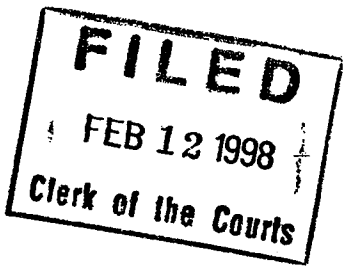
IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE



CECIL C. JOHNSON, JR.,
Petitioner-Appellant,

v.

STATE OF TENNESSEE,
Respondent-Appellee.

On Application For Permission To Appeal
From The Judgment Of The Court Of Criminal Appeals,
Case No. 01C01-9610-CR-00442

APPLICATION FOR PERMISSION TO APPEAL PURSUANT TO TENN. R. APP. P. 11 ON BEHALF OF CECIL C. JOHNSON, JR.

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February 13, 1998

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EXPLANATION OF ABBREVIATIONS

The following abbreviations have been used in citing portions of the record of Petitioner's trial, direct appeal and first post-conviction proceeding,[1] as well as the record of the instant second post-conviction proceeding. See Tenn. R. App. P. 27(g).

The Technical Record on Petitioner's direct appeal is cited as "T.R."; the Technical Record of the first post-conviction proceeding is cited as "P.T.R."; and the Technical Record of the instant second post-conviction proceeding is cited as "S.P.T.R."

The Transcript of the hearing on Petitioner's pre-trial motions (two volumes) is cited as "P.T."

The trial transcript of Petitioner's trial (eight volumes) is cited as "T.T."

The transcript of Petitioner's sentencing hearing (two volumes) is cited as "S.T."

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1 The records of Petitioner's direct appeal and appeal from the initial post-conviction proceeding have been filed with the Clerk of this Court, along with the record from the instant post-conviction proceeding. In its November 25, 1997, Opinion, the Court of Criminal Appeals incorrectly stated that the "trial record containing the transcripts of witness testimony was not made a part of the record on this appeal." Cecil C. Johnson, Jr. v. State, No. 01C01-9610-CR-00442, slip op. at 7, n. 9 (Tenn. Crim. App. Nov. 25, 1997) (copy attached as Exhibit A). The lower court, however, went on to state that "due to the procedural history and magnitude of this capital case, we will take judicial notice of the trial record." Id. Though it is permissible for appellate courts to take judicial notice of the records from earlier proceedings in the same case, State v. Newell, 391 S.W.2d 667, 669 (Tenn. 1965), in this case it was unnecessary to do so, since the trial record was in the record on appeal.

The lower court's misstatement prompted Petitioner to file a Petition for Rehearing on December 5, 1997, for the sole purpose of clarifying that the trial transcript was in the record. In its December 17, 1997, Order denying the request for a rehearing, the lower court "fully acknowledge[d] the diligence of appellant's counsel in assuring that the trial transcript was transmitted to the trial court for the second post-conviction hearing," but maintained its incorrect belief that "for some unexplained reason, the eight volumes of trial transcript were not included in the record on appeal. . . ." See 12/17/97 Order. For purposes of this application, Petitioner's counsel emphasize that they not only took those steps necessary to make sure that the trial record was included within the record on appeal, but also personally inspected the record at the Clerk's Office on December 4, 1997, and confirmed that such was the case. See 12/5/97 Petition for Rehearing at p. 1, n. 1.

The transcript of the hearing on Petitioner's motion for a new trial (one volume) is cited as "N.T." The transcript of the evidentiary hearing in the first post-conviction proceeding (twelve volumes) is cited as "P.H.T."

Exhibits to the evidentiary hearing in the first post-conviction proceeding are cited as "P.H.Ex."

The transcript of the evidentiary hearing in the second post-conviction proceeding (one volume) is cited as "S.P.H.T."

Exhibits to the evidentiary hearing in the second post-conviction proceeding are referred to either as "S.P.H. Exhibit" or "S.P.H. Ex."

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE COURT OF CRIMINAL APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF RELIEF ON PETITIONER'S BRADY CLAIM, GIVEN THE EXISTENCE OF A "REASONABLE PROBABILITY" THAT THE RESULT OF PETITIONER'S TRIAL WOULD HAVE BEEN DIFFERENT IF THE EXCULPATORY EVIDENCE AT ISSUE HAD BEEN DISCLOSED IN A TIMELY FASHION.

II. WHETHER THE COURT OF CRIMINAL APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S REFUSAL TO SET ASIDE PETITIONER'S CONVICTIONS BECAUSE THE JURY INSTRUCTIONS AT PETITIONER'S TRIAL FAILED TO PROPERLY DEFINE THE "REASONABLE DOUBT" STANDARD.

III. WHETHER THE COURT OF CRIMINAL APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S DENIAL OF RELIEF ON PETITIONER'S CLAIM THAT THE JURY INSTRUCTIONS AT PETITIONER'S TRIAL IMPROPERLY MERGED THE "PREMEDITATION" AND "DELIBERATION" ELEMENTS OF FIRST DEGREE MURDER.

IV. WHETHER THE COURT OF CRIMINAL APPEALS ERRED IN DECLINING TO HOLD THAT THE CUMULATIVE EFFECT OF THE CLAIMS IN THE SECOND PETITION, VIEWED IN COMBINATION WITH EACH OTHER AND WITH THE CLAIMS PREVIOUSLY ASSERTED IN THE ORIGINAL POST-CONVICTION PETITION, CALLS FOR A NEW TRIAL.

STATEMENT OF THE CASE

On August 6, 1980, the Davidson County Grand Jury returned a seven-count indictment against Petitioner. T.R. 2-10. The first two counts charged Petitioner with Armed Robbery; counts three, four and five charged Petitioner with Murder in the First Degree; and counts six and seven charged Petitioner with Assault with Intent to Commit First Degree Murder.

Petitioner's trial began in Division III of the Davidson County Criminal Court on January 13, 1981, the Honorable A.A. Birch, Jr., presiding. On January 19, 1981, the jury convicted Petitioner on all seven counts of the indictment. T.R. 78-79. Pursuant to this State's bifurcated trial proceeding in capital cases, the penalty phase of Petitioner's trial commenced and ended on the following day, January 20, 1981. The jury sentenced Petitioner to death on each of the first degree murder counts, and the Trial Court entered judgment on the verdicts. T.R. 87-89.

Petitioner's motion for a new trial was overruled by an Order entered on March 9, 1981. T.R. 162-68. Petitioner perfected his direct appeal to this Court, which affirmed his convictions and sentences on all counts on May 3, 1982. State v. Johnson, 632 S.W.2d 542 (Tenn. 1982). A Petition for Rehearing was denied by Order entered May 21, 1992, Justice Brock dissenting. The Supreme Court of the United States denied a Petition for the Writ of Certiorari on October 4, 1982. Johnson v. Tennessee, 459 U.S. 882 (1982).

Thereafter, Petitioner filed a Petition for Post-Conviction Relief in the Davidson County Criminal Court on March 15, 1983. P.T.R. 47-120. The Petition contained thirty-two separate grounds for relief. After this Court denied Petitioner's motion to designate a judge other than the judge who presided at Petitioner's trial to hear his Petition, P.T.R. 46, and after the Trial Judge denied Petitioner's motion for him to recuse himself, P.T.R. 165, the Trial Court, Judge Birch presiding, conducted an evidentiary hearing that transpired over several days throughout the spring of 1983. The last day of the evidentiary hearing was May 31, 1983. P.T.R. 271.

On September 14, 1983, the Trial Court entered an order denying relief. P.T.R. 278-81. Petitioner filed his Notice of Appeal from that final order on October 6, 1983. P.T.R. 282. On

January 20, 1988, the Court of Criminal Appeals entered judgment on Petitioner's appeal, remanding the case to the Trial Court for a new sentencing hearing based on error under Caldwell v. Mississippi, 472 U.S. 320 (1985), but affirming the Trial Court's denial of relief in all other respects. Cecil C. Johnson, Jr. v. State, No. 83-241-III (Tenn. Crim. App. Jan. 20, 1988).

On March 21, 1988, Petitioner filed a timely Application for Permission to Appeal to this Court, which the Court granted by Order and Supplemental Order of August 29 and 30, 1988. (The Supplemental Order granted the State's application for permission to appeal from that portion of the Court of Criminal Appeals' judgment that ordered a new sentencing hearing.) On September 4, 1990, this Court reversed the lower court's decision to remand for a new sentencing hearing, reinstated the sentences of death, and affirmed the denial of relief on all of Petitioner's other claims. Johnson v. State, 797 S.W.2d 598 (Tenn. 1990). On September 12, 1990, Petitioner filed a Petition for Rehearing on the ground that the terms of office of three of the Justices who decided the appeal had expired, and therefore those Justices were functus officio when the Court's Opinion was filed. The Court denied the Petition for Rehearing on October 22, 1990, and on January 14, 1991, also denied Petitioner's Motion for Leave to File Second Petition for Rehearing.

On February 14, 1991, Petitioner filed a Petition for the Writ of Habeas Corpus in the United States District Court for the Middle District of Tennessee. That petition remains pending at this time. Johnson v. Bell, No. 3:91-0119 (M.D. Tenn.).

Undersigned counsel first obtained access to the Brady material that is the focus of this proceeding pursuant to a request under the Tennessee Open Records Act in the spring of 1992. S.P.T.R. 129, 131. Petitioner promptly amended his federal habeas petition to add a claim based on the discovery of this Brady material.

Petitioner filed the instant Second Petition for Post-Conviction Relief in the Davidson County Criminal Court on February 28, 1995. S.P.T.R. 1-67. The filing of the Petition was prompted by the discovery of certain facts and on developments in federal and Tennessee case law that followed the original post-conviction proceeding, particularly the exculpatory evidence discussed below. See S.P.T.R. 13-16.

The Trial Court, Honorable J. Randall Wyatt presiding, conducted an evidentiary hearing on October 23, 1995. On May 6, 1996, the Trial Court entered an order denying relief. S.P.T.R. 227-238. Petitioner filed a timely Notice of Appeal to the Court of Criminal Appeals on June 3, 1996. S.P.T.R. 239. On November 25, 1997, the Court of Criminal Appeals entered judgment on Petitioner's appeal, affirming the trial court's denial of relief in all respects. Cecil C. Johnson, Jr. v. State, No. 01C01-9610-CR-00442 (Tenn. Crim. App. Nov. 25, 1997) (copy attached as Exhibit A and hereinafter referred to as "Exhibit A").

On December 5, 1997, Petitioner filed a Petition for Rehearing for the sole purpose of clarifying a misstatement in the Court of Criminal Appeals' decision that the trial transcript was not included in the record on appeal. While acknowledging "the diligence of appellant's counsel in assuring that the trial transcript was transmitted to the trial court for the second post-conviction hearing," the Court of Criminal Appeals denied the request for a rehearing by Order of December 17, 1997. See 12/17/97 Order.

Petitioner was originally incarcerated on death row at the Tennessee State Penitentiary on or about January 20, 1981, but has since been transferred to Riverbend Maximum Security Institution, where he is presently incarcerated. Petitioner's execution has previously been stayed by the United States District Court for the Middle District of Tennessee pending the final disposition of the Petition for a Writ of Habeas Corpus. Johnson v. Bell, No. 3:91-0119 (M.D. Tenn.) (Order dated Feb. 15, 1991). That stay remains in effect.

STATEMENT OF THE FACTS

The primary issue presented on this application is whether the Court of Criminal Appeals erred in affirming the trial court's denial of relief on Petitioner's Brady claim. Exhibit A at 5-13. Before addressing the facts relating to the Brady claim (see Facts Relating to Argument I, at p. 13, infra), Petitioner will first provide a factual overview based on the record that existed before the exculpatory material in question was discovered.

Overview

On the evening of July 5, 1980, a lone gunman entered Bob Bell's Market on 12th Avenue South in Nashville. Inside were the proprietor, Bob Bell, Jr.; his son, Bob Bell, III; and Louis Smith, a mechanic who was working on Mr. Bell's boat motor in the store. The gunman ordered all three to get behind the store counter, where he joined them, while at least three and possibly four customers came and went (according to the trial testimony of Messrs. Bell and Smith). T.T. 49-52, 97-99. The last customer to enter the store was, apparently, Mr. Charles House; as he entered, the gunman ordered him to leave, which he did. T.T. 52, 69.

At that point, the gunman ordered the younger Bell to take the money from the cash register and put it in a sack. After he had done this, the gunman shot the child in the head, killing him. T.T. 52-54, 100-02.

After shooting the child, the gunman turned his weapon on Mr. Bell and Mr. Smith, wounding them both. T.T. 54, 103-05. The proof showed that, as he fled the store, the gunman shot and killed two men sitting in a cab that was backed into the entrance of the store. T.T. 55, 102-07. The passenger in the cab was Mr. House. Although Mr. Bell chased the assailant for some short distance with a shotgun, the gunman got away, and neither the gun nor the proceeds of the robbery were ever recovered.

After the robbery/murders, the police and ambulances arrived, and a large crowd gathered outside the neighborhood market. Before the ambulance took him away, Mr. Bell told a policeman, Wesley Carter, that he recognized the gunman as someone who had been in the store before and who was from Louisville. T.T. 176-78. In the presence of Officer Carter, Mr. Bell also pointed out a young black man in the crowd, whom Mr. Bell believed to be an acquaintance of the gunman. Officer Carter questioned this man, who stated that he knew nothing about the person to whom Bell was referring; but Officer Carter wrote down on a separate piece of paper the last name of this man, Leroy Johnson, and the word "Louisville," and showed this paper to other officers at the scene. T.T. 177-78, 182-85. In addition, Mr. Bell gave the officers a general description of the gunman, i.e., a young black man with dark clothing. T.T. 176. (It should be noted that the gunman had made no attempt to conceal his identity by wearing a mask or the like.)

In the immediate aftermath of the crimes, therefore, the police had a general description of the gunman and the two words Officer Carter wrote down: "Louisville," where the gunman was from, according to Mr. Bell; and "Johnson," the name of a man in the crowd who Mr. Bell believed knew the gunman. At least insofar as the record discloses, Mr. Leroy Johnson was never heard from again.

The next day, July 6, Mr. Bell selected Cecil Johnson's mug shot from a photo montage, which was shown to him in his hospital room. T.T. 113-14. Shortly thereafter, Petitioner was arrested for the Bob Bell's Market crimes at his father's house, where Petitioner waited for the police to arrive after he had been informed that they were looking for him. T.T. 447-48.

During his arrest processing, Petitioner told the police and members of the press that he was innocent and that he had been with another person in Franklin, Tennessee. See S.P.H. Ex. 8 (7/6/80

WTVF videotape). An unfortunate by-product of this exposure was that Petitioner's picture was prominently displayed on television and in the newspapers. T.T. 557-59, 574-76.

Shortly thereafter, Public Defender investigators debriefed Petitioner and were able to corroborate his statement that he had been in Franklin with another young man and had not left Franklin until approximately 9:30 p.m. They were able to locate this young man, Victor Davis, and they were also able to locate some young women who recognized Petitioner as having been with them in Franklin that night. See T.T. 508-09. In addition, the investigators located an employee of a Kentucky Fried Chicken Store in Franklin, who identified Petitioner as a man whom she had turned away from the store after closing time, at approximately 9:25 p.m. See T.T. 563-65.

Victor Davis was interviewed extensively, both by the defense and the police, within two weeks of the crimes, T.T. 346-47, and confirmed that he was with Petitioner in Franklin, en route to Nashville, and at Petitioner's father's house at all relevant times. Accordingly, he would testify that Petitioner had no opportunity to commit the crimes at Bob Bell's Market on the evening of July 5, 1980. See P.H.T. 96-97, 307-09; T.R. 132.

The case against Petitioner weakened even further when Louis Smith was unable to pick Petitioner out of a corporeal lineup and so marked his card, although he stated as he left the lineup room that he thought it was Petitioner. P.H.T. 293. It should also be noted that at the time, Louis Smith was facing an aggravated rape charge in Davidson County. P.H.T. 134-36.

On the other hand, within two weeks of the crimes, the police had located a young woman, Ms. Debra Smith, who claimed that she had been in the store during the robbery and that she could identify Petitioner because she was acquainted with him. See T.T. 284-85. The police had also located a witness named Michael Lawrence, whom Bell had questioned outside the store before going to the hospital. Bell had said that Lawrence knew the gunman, and Lawrence later recalled

that Petitioner had loaned him some beer money while in Bob Bell's Market a few days before the robbery. T.T. 264-67.

Debra Smith was of dubious value because of the sketchiness of her recollections and her almost incredible story that although she knew the market was being robbed, she nonetheless bought a soft drink, left, and never called the police. T.T. 284-89. Presumably because of her deficiencies, and in an extraordinary and callous piece of gamesmanship, the State deliberately concealed this witness until eleven days before trial, despite its affirmative misrepresentations to defense counsel that all its witnesses were listed on the indictment. See N.T. 87-90 (testimony of Assistant District Attorney Sterling Gray at hearing on Petitioner's motion for a new trial); T.R. 135; P.H. Ex. 6.

Michael Lawrence's statement was of inestimable probative value on its face, however, because it lent great strength to Mr. Bell's identification of Petitioner, given the fact that Mr. Bell's identification hinged on his ability to recognize the gunman as someone he already knew. This was undercut, of course, by Mr. Bell's apparent mistake in also recognizing Leroy Johnson as someone who knew the gunman; indeed, defense counsel had information that Mr. Bell had also pointed out at least two other persons in the crowd as knowing the gunman. See P.H.T. 176-81. At least one of these individuals, a Wesley Martin, stated that he definitely did not know Petitioner. P.H.T. 178. Unfortunately, the defense overlooked the fact that Mr. Bell had erroneously pointed out other people in the crowd as knowing the gunman, and these other identifications that Mr. Bell made on July 5 never found their way into the trial testimony.

In addition to Victor Davis and the Franklin witnesses, the prosecution was faced with still another obstacle to Cecil Johnson's conviction. Having proceeded on the assumption that the gunman entered the store at 10:00 p.m. or shortly thereafter, and having stated in a Motion for

Notice of Alibi, T.R. 15, that the offense occurred between 10:00 and 10:10 p.m., the State was confronted with Petitioner's disclosure, in his Notice of Alibi, T.R. 36-37, that his father would testify that he was at home by then.

Accordingly, two weeks before trial the prosecution was faced with a double-barreled alibi; one barrel being Petitioner's lack of opportunity (based on Petitioner's testimony and that of Victor Davis), and the other barrel being the "time" testimony of Cecil Johnson, Sr. Given the softness of the State's identification testimony (Louis Smith's actual uncertainty and Mr. Bell's extreme emotional distress) and an absolute dearth of physical evidence (i.e., fingerprints, robbery proceeds, a weapon) this alibi no doubt looked imposing, if not insurmountable.

In the final ten or eleven days before trial, however, the following events took place. First, presumably in light of its unavoidable obligation under Rule 12.1 of the Tennessee Rules of Criminal Procedure to disclose all witnesses serving to rebut Petitioner's alibi defense, the State "unveiled" Debra Smith, advising defense counsel, in general terms, that she was a woman who had been in the store during the robbery. See N.T. 87-90; T.R. 120-24; P.H.T. 92-95. Second, on January 6, 1981, the State served a list of fifteen additional witnesses on defense counsel, despite its previous representations that all witnesses were listed on the indictment. See P.H.T. 82; P.H. Ex. 5. Third, and although this would not become apparent until the trial itself, the State's theory about the time of the offense changed. Instead of the 10:00 to 10:10 p.m. time frame set forth in its Motion for Notice of Alibi, the State's proof reflected a time comfortably before 10:00 p.m., thereby accommodating the testimony of Cecil Johnson, Sr.

The element of time played an unusually critical role in this case, and could have played an even greater role had defense counsel recognized the State's shift in its theory. The State did not contest the testimony of Jennette Edging, the Kentucky Fried Chicken employee from Franklin,

that placed Petitioner in Franklin at approximately 9:25 p.m. T.T. 563; T.T. 667 (closing argument of General Shriver). Moreover, the State did not dispute Cecil Johnson, Sr.'s, testimony that his son arrived home right at 10:00 p.m.; indeed, the State vouched for his credibility. T.T. 669. In addition to this, there was no dispute that the events in Bob Bell's Market transpired over some significant amount of time. Indeed, Mr. Bell and Mr. Smith both estimated that the robbery lasted for about fifteen minutes. T.T. 62, 127. While this might seem a long time for a robbery to transpire, the proof reflected the bizarre circumstance of multiple customers entering the store, making purchases, and then leaving while the robbery was still in progress; as stated above, the trial testimony conveyed the existence of at least three and possibly even four such customers. Even under the State's theory, as articulated in its closing arguments, the robbery lasted at least four minutes. T.T. 667. Finally, the State offered proof through the witness James Sledge, a criminal investigator for the District Attorney's Office, that he covered the 17.1 miles between the Kentucky Fried Chicken in Franklin and Bob Bell's Market in twenty-nine minutes, never exceeding forty-five miles per hour. T.T. 582. (Sledge followed the route described by Victor Davis, and he presumably never exceeded forty-five miles per hour in accordance with Davis's testimony that he was driving slowly because of a defective wheel. See T.T. 581, 371-72, 403-04.)

Given these temporal confines, it quickly becomes doubtful that Petitioner could have left Franklin at 9:25 p.m., taken the route down Franklin Road described by Victor Davis at the speed described by Davis, committed the crimes in the time that was necessarily required (with customers entering and leaving), run home, and entered his father's house at 10:00 p.m. Nonetheless, the State's witnesses convincingly testified that the crimes did occur at least a few minutes before 10:00 p.m. See T.T. 173, 180, 186-87 (Officer Carter); 261 (Amanda Perry); 49 (Louis Smith); 127-28

(Bob Bell); 280 (Debra Smith). Accordingly, it is not surprising that the State declined to reveal this change in its "time of the offense" theory prior to trial, given its susceptibility to attack.

But the most significant event, by far, that occurred just before trial was the transformation of Victor Davis. Already on probation for burglary and with a petition for probation pending in the Davidson County Criminal Court in another case, T.T. 339-40, Davis was seized on the Friday night before trial (which started the following Tuesday), escorted through booking, and taken to the office of the District Attorney for a midnight interview with the three attorneys assigned to the trial, a Metropolitan Police Department detective, and an investigator for the District Attorney's Office. After three or more hours of "discussion," which included discussion of the fact that Davis could be indicted on the same charges facing Petitioner, N.T. 81-84, Davis told a story that incriminated Petitioner, and thus he was successfully neutralized as an alibi witness. Subsequently, on the following Monday, he was "immunized" in some fashion that has never been fully disclosed, although it is clear that he received a promise of absolutely no prosecution for his presumed part as the "wheel man" in the Bob Bell's Market crimes. See T.R. 146-47. At trial, Davis was called as a fact witness against Petitioner, and he was the only witness to support directly the State's primary "aggravation" theory for the death penalty, i.e., that Petitioner had killed the victims to avoid arrest. Davis supplied testimony that Petitioner, while leaving Davis's car right before the robbery, announced not only that he was going to rob the market, but that he would also try not to leave any witnesses. T.T. 353.

Despite these last minute developments, and in the face of their belief that they really had no defense at the time the trial began, trial counsel made no effort to continue the case. Instead, trial started on January 13, 1981, barely six months after Petitioner's arrest. With the main defense witness "turned" in the eleventh hour, a new identification witness (Debra Smith), and a convenient

change in the State's theory about the time of the offense, trial counsel rode into the "valley of the shadow of death," not only failing to move for a continuance, but also without any effort to deal with the fact that the three attorneys representing the State had now made themselves potentially critical fact witnesses, given their role in the Davis conversion. During trial, defense counsel missed opportunity after opportunity to impeach the State's witnesses; allowed the prosecutors, for all practical purposes, to testify about the Davis conversion; and made no effort to oppose the State's extremely objectionable closing arguments. The ultimate result was entirely predictable; Petitioner was convicted on each and every charge.

On January 20, 1981, the day after the jury's guilty verdicts, the sentencing phase of Petitioner's trial began. Trial counsel, who had never been involved in a capital case, had done almost no preparation for this trial on the question of whether Petitioner would live or die. The late-breaking developments in the case had stymied counsels' plan to spend the last two weeks before trial doing that preparation. See P.H.T. 363-65. Trial counsel attempted to put on "expert" testimony that was clearly inadmissible under governing state law, and sat by without objection while the district attorneys made numerous statements suggesting to the jury that they were legally required to impose death sentences. Trial counsel declined to make a closing argument, and made no other effort to plead for Petitioner's life. The Trial Court instructed the jury in a fashion that virtually directed death sentences, and the jury obeyed. S.T. 119-28.

The jury found three different aggravating circumstances in Petitioner's case, i.e., that the killing of Bob Bell, III, occurred during the commission of a felony, that all three homicides were committed for the purpose of avoiding, interfering with or preventing a lawful arrest, and that the defendant knowingly created a risk of death to two or more persons, other than Bob Bell, III, during

his act of murdering that victim. Because the second aggravating circumstance was found in all three homicides, there was a total of five aggravating circumstances. See S.T. 126-28.

Facts Relating to Argument I

A. The Brady Material At Issue.

The specific items of exculpatory evidence that are the subject of Argument Section I are:

1. A July 6, 1980, report prepared by Detective Jerry Moore of the Nashville Metropolitan Police Department concerning his interview of Bob Bell (S.P.H. Ex. 1).

2. A July 11, 1980, report of Officer J. Dobson concerning his interview of Louis Smith (S.P.H. Ex. 2).

3. A July 5, 1980, report of Detective William Flowers concerning his interview of Louis Smith (S.P.H. Ex.3).

4. A July 5, 1980, report of Officer John Patton concerning his interview of Louis Smith (S.P.H. Ex. 4).

5. A pleading that the defense filed in the case of State v. Louis Edgar Smith, No. C6175-A, which was received by the Davidson County District Attorney General's Office no later than November 11, 1980 (S.P.H. Ex. 5).

6. A July 6, 1980, report prepared by Detective William Robeck concerning his interview of Louis Smith (S.P.H. Ex. 6).

7. A "History and Physical Examination" report prepared by Robert Stein, M.D., concerning his examination of Bob Bell at Baptist Hospital on July 5, 1980 (S.P.H. Ex. 10).

In the next section, we address the evidentiary significance of these materials in detail. Before turning to a discussion of the specific items of suppressed evidence, Petitioner deems it appropriate to point out that his trial counsel made specific Brady requests that clearly and

unmistakably called for all of the items now in question. In fact, as discussed in the next section, several of the items were responsive to more than one request.

B. The Significance Of The Specific Items Of Suppressed Evidence In Light Of The Trial Record.

On September 3, 1980, Petitioner's trial counsel filed and served a "Request for Discovery Inspection, and Notice of Intent to Use Evidence." S.P.H. Ex. 11. The pertinent requests were as follows:

> 11. To be advised of any and all information or evidence which could be exculpatory in nature, tend to lessen the degree of guilt of the defendant, to show his innocence, to show the guilt of another party, to mitigate the offense, to reduce the penalty to be suffered by the defendant upon conviction, or which may lead to such exculpatory material, including the names and addresses of suspects other than the defendant.
>
> 12. To be provided with any evidence or information which tends to impeach any witness for the State, including the record of all impeachable convictions of the witness and any information regarding the mental condition of the witness which could reflect upon credibility.
>
> 13. To receive copies of any statement inculpating the defendant, which statement was later retracted in whole or part where such retraction could conflict with the State's evidence, and to further receive any interview memoranda, documentary evidence, or reports containing any information which could contradict or be inconsistent with the State's evidence.
>
> 14. To obtain the identity and statement of any individual whose description of the perpetrator of the charged offense, which perpetrator the State alleges to be the defendant, might fairly be said not to match the defendant in essential physical characteristics.

16. To be informed of the names and addresses of any and all persons who either have, are believed by the State to be able, or have been unable to identify the defendant, or any co-defendants, as the perpetrator(s) of the alleged crime, and, if such identification procedure occurred pretrial or extrajudicially, the defendant also requests disclosure of the date when the identification was made, to whom this information was communicated and the date when it was first communicated. * * *

Assistant District Attorney Sterling Gray served and filed the "State's Answer to Defendant's Request for Discovery and Inspection" on September 23, 1980. S.P.H. Ex. 12. General Gray denied, without qualification, the existence of any exculpatory material responsive to Petitioner's requests.

With that preface, we will now turn to a discussion of the specific pieces of evidence that the State suppressed in this case.

1. Detective Moore's Report Concerning His Interview Of Bob Bell (S.P.H. Ex. 1).

In his trial testimony, Mr. Bell ostensibly made a positive identification of Petitioner as the gunman who killed his son and wounded him. T.T. 93-94, 117-18. He testified that the robber was in the store for approximately fifteen minutes, T.T. 127-128, and that he (Mr. Bell) looked the gunman straight in the eye the "whole time." T.T. 117, 130. Of course, Mr. Bell's identification testimony seemingly drew strength from his statements that the gunman had been a frequent customer, and that the robber had been in the store with another individual (which turned out to be one Michael Lawrence) only two or three days before the events of July 5, 1980. T.T. 108-11.

In short, Bell emphasized in his trial testimony that he had an ample opportunity to observe the gunman over a period of time, and that he recognized him as someone who had been in the store on multiple occasions in the recent past. On this point, the Court should be apprised that there

is no dispute about the fact that Cecil Johnson had been a customer at the store in the recent past, and that he was, indeed, the young man who had been with Michael Lawrence a few days before July 5. Petitioner freely acknowledged these points in his own testimony. See T.T. 443-46. The defense contention was that Mr. Bell had confused Petitioner -- someone with whom he was acquainted -- with the killer.

It is in this connection that Mr. Bell's statements (including his testimony) about the gunman's facial hair become extremely significant, especially in view of Mr. Bell's insistence that he had looked at the gunman's face over a significant period of time. At trial, Mr. Bell testified as follows on the subject of facial hair:

> Q: Did you mention anything to the police officers about whether or not [the robber] had any facial hair?
>
> A. Yes, I think so.
>
> Q. All right, do you recall what statement you made to them concerning that?
>
> A. No I do not.
>
> Q. All right, then, turning back to your independent memory of that evening, do you recall whether or not he had any facial hair?
>
> [A. No response indicated in transcript.]
>
> Q. All right, can you recall, of your own recollection, I'm not asking you just what you told the officers, but anything that you can remember, about his facial hair that evening?
>
> A. Not to my recollection.
>
> Q. All right, you say you think he had some?
>
> A. Yes.

Q. But apparently there wasn't anything distinctive about it that came to your attention is that correct?

A. Would you repeat that again.

Q. Apparently there wasn't anything particularly distinctive about any facial hair that he had?

A. Well, there could have been but I was looking him in his eyes.

T.T. 153-54 (cross-examination).[2]

In truth and in fact, Cecil Johnson had facial hair (in the form of a goatee and a light mustache) at the time of the offenses, as established beyond any doubt by S.P.H. Exhibits 8 and 9 (i.e., the July 6, 1980, WTVF videotape and Petitioner's July 6, 1980, mug shot). Accordingly, Mr. Bell's trial testimony was totally consistent with the historical facts.

Such is the context for S.P.H. Exhibit 1, which is a copy of the report that Detective Jerry Moore generated from his interview of Mr. Bell only hours after the shootings. In pertinent part, the report recites the description of Mr. Bell's assailant that he gave to Detective Moore. Mr. Bell described the gunman as a "male black" with a "very dark complexion" and "no facial hair" (emphasis added). It does not take much imagination to see what a reasonably competent defense attorney could have done with this description -- the very first recorded description that Mr. Bell made -- at trial. As Justice Scalia wrote for the dissenters in Kyles v. Whitley, 514 U.S. 419, 131 L.Ed.2d 490, 115 S. Ct. 1555 (1995),[3] "[f]acial features are the primary means by which human beings recognize one another." 131 L.Ed.2d at 526 (emphasis in original). It would have given

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2 General Gray had asked no questions about facial hair on direct examination.

3 The Supreme Court's decision in Kyles is discussed at length in Argument Section I, beginning at p. 28, infra.

great weight to the defense contention that Mr. Bell had confused Petitioner with the actual robber, especially in view of Mr. Bell's insistence about his ample opportunity to observe the man's face.

Finally, it bears mention that the State placed great emphasis on Mr. Bell's apparently unshaken eyewitness identification in closing argument. See T.T. 591-94, 672-73. Indeed, in the final closing argument, General Shriver characterized Mr. Bell's identification as "the key to this whole lawsuit," further contending that "Bob Bell is the one that makes this case a clear case of guilt without any of the other witnesses." T.T. 672. We submit that the significance of Mr. Bell's original "no facial hair" description increases with the weight that the State placed on this seemingly positive eyewitness. Cf. Kyles, supra, 131 L.Ed.2d at 512 (contrasting the prosecution's closing argument about the eyewitness identifications of two witnesses with the inconsistencies reflected in their previously suppressed statements).

2. Baptist Hospital History and Physical Examination Report Concerning Mr. Bell (S.P.H. Ex. 10).

Dr. Robert Stein was the emergency room physician at Baptist Hospital who treated Mr. Bell when he was brought there on the night of July 5. In the "History and Physical Examination" report that Dr. Stein subsequently prepared, he noted that Mr. Bell's past medical history "indicates some mental instability," without further elaboration. S.P.H. Ex. 10.

This document is indisputably less significant than Detective Moore's report but, handled properly, it would have had considerable value to competent defense counsel. Obviously, the horror of the experience that Mr. Bell had undergone and his resulting emotional state had some inherent probative value in terms of undermining his identification of Petitioner. Standing alone, however, that point is less than overwhelming in terms of undermining the identification testimony; but when coupled with a medical history indicating "some mental instability," the impeachment effect becomes much weightier.

Concerning this medical report, the State has produced the Affidavit of Dr. Stein himself. S.P.H. Ex. 18. This Affidavit, we submit, fairly supports Petitioner's position concerning the report. Dr. Stein -- who says that he has "a basic recall" of the events due to their "tragic nature" -- states that the term "some mental instability" was intended as a "red flag" to indicate that Mr. Bell "had some situational emotional problems," based upon his own (Mr. Bell's) recounting of emotional problems he was encountering as a result of the breakup of his marriage. Dr. Stein further notes that Mr. Bell was "visibly upset, as any normal person would be who had just witnessed the murder of his son." Dr. Stein goes on to disclaim any suggestion that Mr. Bell was psychotic (nor was Petitioner suggesting that in any way). Finally, Dr. Stein conveys that if he had believed that Mr. Bell's "mental status" warranted it, he would have recommended Mr. Bell for a psychological consult, which he did not do. He concludes with the observation that there was "never any evidence to indicate that Mr. Bell was mentally incompetent" (and again, Petitioner was not suggesting that the "mental instability" noted in the medical report suggested a disorder of that degree).

In short, if competent defense counsel had received the medical report contemporaneously, it would have led to evidence communicating to the jury that Mr. Bell had some medically significant (though obviously not incapacitating) emotional problems. This would have been important in terms of supporting the defense contention that the reliability of Mr. Bell's eyewitness identification was diminished by the stress of the horrible events that he had undergone.

3. The Louis Smith Impeachment Evidence (S.P.H. Exs. 2, 3, 4, 5 and 6).

From before the night of July 5, 1980, through Petitioner's trial, the victim/eyewitness Louis Smith was under indictment for the aggravated rape of a minor female in Davidson County, with his case being prosecuted by the Davidson County District Attorney's Office. In one of trial

counsels' most significant lapses into ineffective assistance, they actually stipulated to the inadmissibility of the fact that that charge was pending against Mr. Smith. T.R. 66; P.H.T. 135. It was quite clear at the time, however, that the pendency of that indictment would have been admissible as extrinsic proof of Mr. Smith's potential bias, a proposition that the State has never even disputed in Petitioner's post-conviction proceedings. See, e.g., Davis v. Alaska, 415 U.S. 308, 39 L.Ed.2d 347, 94 S.Ct. 1105 (1974).

This is an appropriate preface to the following discussion of the Brady material relating to Mr. Smith, in light of the remarkable transformation that took place between his very initial statements to the police (three of them) and his testimony at trial. At trial, Mr. Smith purported to be a positive eyewitness who got a "good look" and a "real good" look at the robber's face. T.T. 50, 80. In his freshest -- indeed, contemporaneous --statements, however, Mr. Smith had disavowed any ability to make an identification, even to the point of saying that he had not had a chance to observe the assailant's face. See S.P.H. Exs. 2, 3, and 4 (particularly Ex. 2, page 2).

The jury knew nothing of these initial statements. Indeed, as with all of the Brady material discussed in this Application, it has been stipulated that the State did not produce these statements to defense counsel.

Of greatest importance is S.P.H. Exhibit 2, a three-page handwritten report prepared by Officer "J. Dobson" and dated July 11, 1980. Although the photocopied handwriting is somewhat difficult to read, it is clear that Office Dobson interviewed Mr. Smith at Vanderbilt Hospital on the night of July 5. After some discussion of the status of the homicide victim, Bob Bell, III, the following statement appears on page 2: "I then talked to a M-W Louis Smith who related he was inside market working on a motor when assailant entered market and shot and robbed him for no reason and he saw him to be a M-B young but did not see assailant face" (emphasis added).

S.P.H. Exhibit 3 is a photocopy of a report prepared by Detective William Flowers on or about July 5. The report notes that he likewise interviewed Mr. Smith at Vanderbilt Hospital. The following statement appears at the end of the report: "Victim advised he could not describe susp. at this time but is willing to be reinterviewed at later date." This is consistent with a statement that appears higher up in the report, on a line that calls for any identifying information that the witness could provide. On that line, Detective Flowers made the notation "unable to describe."

S.P.H. Exhibit 4 is a one-page handwritten report prepared by Officer John Patton (now Sergeant John Patton) and dated July 5, 1980. Referring to Mr. Smith as a "M-W" (standing for "male white"), the final line of the report reflects Mr. Smith's statement that "he did not get good look at suspect."

When juxtaposed against Mr. Smith's trial testimony, the devastating impeachment effect of these statements is self-evident, and it would serve no purpose to belabor it further.

These reports have additional legal significance, however. In combination, they convey that General Gray and the other members of the prosecution team knew or should have known that Mr. Smith was perjuring himself when he claimed at trial to have gotten a "good look" at the gunman. This point is addressed under Heading D, infra.

S.P.H. Exhibit 6 is a single-page typewritten report prepared by Detective William Robeck and dated July 6, 1980. The final sentence in this report reflects that Detective Robeck showed Mr. Smith a photo array, and that Mr. Smith picked out mug shots 5 and 6.

In fact, as reflected in the transcript of the pre-trial suppression hearing on January 6, 1981 -- in which Detective Robeck testified that Mr. Smith said Nos. 4 and 6 "looked like the man" -- photograph No. 4 was Cecil Johnson's photograph, not No. 5 (in contrast to the statement in Detective Robeck's contemporaneous report). See P.T. 113-14. In other words, had defense

counsel been supplied with Detective Robeck's report, they could have conveyed to the jury that Mr. Smith had actually picked out mug shots of two individuals, neither of whom was Petitioner. In any event, there is no dispute that the individual in photograph No. 6 was not Cecil Johnson. See P.T. 114.

Not surprisingly, the State did not have Detective Robeck testify to Mr. Smith's photo identification at trial. (By contrast, Detective Larry Flair affirmatively testified to Mr. Bell's photographic identification of Petitioner on July 6. See T.T. 271-76.) In terms of Mr. Smith's photo identification, the only evidence adduced was Mr. Smith's own testimony that he picked out two photographs "that was pretty close to him." T.T. 65.

Nonetheless, even though the State steered away from the Louis Smith photo identification procedure at trial, Detective Robeck's report should have stood out as a piece of exculpatory evidence, given the statement (when juxtaposed with the photo array itself) that Mr. Smith picked out two individuals, neither of whom was Cecil Johnson.

The significance of Louis Smith's eyewitness identification to the State's case was reflected in the prosecution's closing arguments. Generals Gray and Shriver, in turn, repeatedly drew upon the apparent strength of Mr. Smith's identification of Petitioner. T.T. 593-95, 672-73.[4]

Finally, S.P.H. Exhibit 5 has nothing to do with Mr. Smith's identification. Instead, it concerns the aggravated rape prosecution that was pending against Mr. Smith at all relevant times. As stipulated, Exhibit 5 is a photocopy of a pleading that the District Attorney General's Office received from Mr. Smith's counsel no later than November 11, 1980. It is a "Motion for

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4 Curiously enough, and even though there was no evidence in the trial testimony to support his argument, General Gray actually asserted, without objection, that Mr. Smith had picked out the photographs numbered 4 and 6. T.T. 593. (Through Detective Flair's testimony about Mr. Bell's photo identification, the jury would have known that Petitioner was the No. 4 photograph in the array.) In short, this is another example of General Gray's unrestrained approach to the case.

Continuance and Notice of Insanity Defense" filed on behalf of Mr. Smith, whose text recites counsel's opinion that there was a "reasonable probability that the most appropriate defense to this case is an insanity defense or a defense of diminished capacity," and which sought a psychiatric evaluation of Mr. Smith.

While it is true that the psychiatric examiners ultimately concluded that Mr. Smith was not insane, see S.P.H. Ex. 21, the impeachment value of this pleading -- filed in Mr. Smith's behalf -- would have been enormous.

The State has asserted that defense counsel could and should have discovered this public document themselves. There are two responses. First, there is persuasive authority rejecting precisely this type of response to a Brady claim. See United States v. Payne, 63 F.3d 1200, 1209 (2d Cir. 1995) (defense counsel had no duty to discover an affidavit in a government witness's public court file in the absence of any reason to believe that such an affidavit existed, and the prosecution should have produced it as Brady material). Second -- and perhaps more significantly -- this response only serves to underscore trial counsels' initial ineffectiveness in concluding that any proof about the pending rape case against Mr. Smith would have been inadmissible. While it is probably true that, as a matter of effective representation, defense counsel could and should have reviewed the file in Mr. Smith's case, their fundamental threshold mistake lay in concluding that the pending prosecution was inadmissible for any purpose.

In short, the State cannot have it both ways; defending the Brady claim relating to the Notice of Insanity Defense on the basis that it was a public filing can be done only at the cost of reinforcing Petitioner's ineffective assistance claim concerning trial counsels' disavowal of any effort to use the pending rape case against Mr. Smith as impeachment material.

4. Additional Impeachment of Louis Smith and Debra Smith As to Debra Smith's Presence in the Store (S.P.H. Ex. 6).

Debra Smith was the young woman who testified that she entered Bob Bell's Market by herself while Petitioner was there, recognized him based on a previous acquaintanceship, knew that he was in the midst of robbing the store, nonetheless bought a soft drink (consistent with her additional testimony that she was "not afraid"), and then returned home. T.T. 287-88, 318. Aside from making contemporaneous comments to her boyfriend and her sister after returning home, Ms. Smith did nothing about the robbery that she believed was in progress, an omission for which she had no explanation. T.T. 320.

At trial, Louis Smith corroborated Ms. Smith's account of her presence during the robbery by testifying to his recollection that "a woman" and a child came in the store while it was happening. T.T. 52.

In connection with Ms. Smith's testimony and Louis Smith's partial corroboration of it, S.P.H. Exhibit 6 (the July 6, 1980, single-page report of Detective Robeck) is significant in two inter-related respects. First, it impeaches Mr. Smith, because in describing the two customers who entered the store during the robbery, Mr. Smith referred to both of them as "him," i.e., as males. Second, by identifying these customers as males in this contemporaneous statement, the Robeck report had the capacity to undermine Debra Smith's very claim that she had even been there.

Moreover, Mr. Smith's fresh recollection would not have stood alone; in his July 10, 1980, tape-recorded statement to the State investigators, Mr. Bell had likewise referred to two customers, and identified them as male black children. See S.P.H. Ex. 17, at 5-6. (Mr. Bell also described an older black man who came in the store, which turned out to be the subsequent murder victim,

Charles House. Id. at 6-7.) In fact, Mr. Bell was specifically asked if anyone else had come in the store after the two children and the older man, and he answered "[n]o." Id. at 8.[5]

To complete the relevant background, it should also be noted that the State did supply defense counsel with a seventeen page transcript of a July 11, 1980, tape-recorded statement of Mr. Smith (which was also included in S.P.H. Exhibit 17). (This statement was supplied immediately after Mr. Smith's direct examination pursuant to the precursor to Rule 26.2, Tenn. R. Crim. P. See T.T. 71.) In that statement, however, Mr. Smith referred to two customers, but didn't characterize them by gender or even age. See S.P.H. Ex. 17 (the Louis Smith statement), at 6-7, 13. In other words, the Louis Smith statement that the prosecutors gave defense counsel as Jencks material did not flatly contradict Ms. Smith's account, unlike Mr. Smith's statement to Detective Robeck, which had clearly referred to the customers as males.

While it may seem remarkable in the abstract, the contention that the core of Ms. Smith's testimony was perjured -- the contention that Mr. Smith's statement to Detective Robeck would have supported, especially in conjunction with Mr. Bell's recorded statement of July 10 -- is not much of a stretch at all. Indeed, the objective reader of Ms. Smith's trial testimony, even on the face of it, cannot help but have serious doubts about its truthfulness. See T.T. 279-331.

Even by her own admission, Ms. Smith did not come forward until after she had seen Cecil Johnson on television on July 6. T.T. 322. (Her initial police interview was on July 15, 1980. T.T. 321.) Among other points that can be made about her testimony, the transcript conveys that she was hopelessly confused as to whether Louis Smith was white or black, and she may even have

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5 Insisting on strict compliance with the Tennessee version of the Jencks Act, the State supplied Petitioner's trial counsel with this twenty-one page Bob Bell statement (S.P.H. Ex. 17) only after his direct testimony. T.T. 119. Unfortunately, defense counsel failed to pick up on the fact that, in conflict with the very premise of Ms. Smith's account (i.e., that she had even been in the store at all), Mr. Bell had referred to only two male customers who came into the store during the robbery. This omission has been a part of

thought that he was the gunman's partner. See T.T. 289, 299-302, 314, 326-27. (Her ultimate position, however, was that there were no white people in the store that night, or any other customers for that matter. T.T. 327.) The transcript further reflects that the first time she referred to the robber, she called him Cecil "Jones." T.T. 284. She did subsequently correct this to "Johnson," however. Somewhat similarly, in her initial statement to the police, she had said that the name of Cecil Johnson's brother with whom she had supposedly attended Overton High School was "James." T.T. 328. (In fact, it was David.) Astoundingly enough, her actual in-court identification of Petitioner was made with General Shriver pointing at him. See T.T. 291. A comparison of her testimony at the pre-trial suppression hearing on January 7 and her ultimate trial testimony a few days later reveals that although she had no idea what time she was in the store when she testified on January 7 (at the suppression hearing), P.T. 143, by the time she testified at trial on January 16, she described a rather precise time frame (totally in keeping with the State's theory) of between 9:30 and 9:50 p.m. T.T. 280. On cross-examination, however, she went back to admitting that she didn't know what time she had gone to the market that evening. T.T. 292.

Even the cold transcript demands the conclusion that Ms. Smith was a terrible witness for the State. Armed with the Robeck report (in conjunction with Bob Bell's statement), reasonably competent defense counsel could have completed her annihilation.

In case there is any doubt about it, even General Gray acknowledged after the guilt phase that Ms. Smith had made a poor witness. He admitted as much to Public Defender Investigator Thomas Stevens by conveying to Stevens that the only reason the State ultimately called Victor Davis as a prosecution witness (the State's last) was because Ms. Smith had "proved such a poor

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Petitioner's ineffective assistance claim from the outset.

witness for the State." T.R. 131, 135 (Affidavit of Thomas Stevens filed in support of Petitioner's Motion for a New Trial pursuant to Rule 33(c), Tenn. R. Crim. P.).

REASONS SUPPORTING REVIEW BY THE SUPREME COURT

Petitioner submits that the decision of the Court of Criminal Appeals in the instant case, affirming in all respects the Trial Court's denial of post-conviction relief, is in conflict with established principles of Tennessee and federal law. The concerns of settling important questions of law and of public interest, the need to secure uniformity of decision, and the exercise of this Court's supervisory authority justify the granting of the Application for Permission to Appeal. Tenn. R. App. P. 11(a). Specifically, Petitioner submits that the following reasons, set forth in detail below, favor permitting an appeal in the instant case:

ARGUMENT

I. PARTICULARLY IN LIGHT OF THE SUPREME COURT'S RECENT DECISION IN KYLES v. WHITLEY, THE COURT OF CRIMINAL APPEALS ERRED IN FAILING TO GRANT RELIEF ON PETITIONER'S BRADY CLAIM BECAUSE THERE IS A "REASONABLE PROBABILITY" THAT THE RESULT OF PETITIONER'S TRIAL WOULD HAVE BEEN DIFFERENT IF THE EXCULPATORY EVIDENCE AT ISSUE HAD BEEN DISCLOSED IN A TIMELY FASHION.

The Court of Criminal Appeals recognized (indeed, the State has conceded) that the evidence that is the subject of Petitioner's Brady claim was exculpatory, favorable to Petitioner, and improperly withheld by the prosecution at Petitioner's trial. Exhibit A at 5-7. However, notwithstanding the obvious impeachment value of the suppressed evidence, and contrary to the Supreme Court's recent decision in Kyles v. Whitley, 514 U.S. 419, 131 L.Ed.2d 490, 115 S.Ct. 1555 (1995), the Court of Criminal Appeals concluded that Petitioner had failed to satisfy the standard of materiality required for relief. Exhibit A at 7-13.

The United States Supreme Court's recent decision in Kyles did not announce any "newly minted rule[s] of law," as Justice Stevens's concurring opinion observes. See 131 L.Ed.2d at 519. Petitioner respectfully submits, however, that the Kyles decision applies the Brady principles to a

set of facts in a manner that demands the conclusion that Petitioner is entitled to a new trial in this case. Indeed, undersigned counsel submit that, as compared to the facts of Kyles, this is an even stronger case for the defense.

As this Court observed on direct appeal, the prosecution's case turned on the testimony of three eyewitnesses, particularly the two who "looked into the barrel of the pistol held by appellant and were shot by him." State v. Johnson, 632 S.W.2d 542, 547 (Tenn. 1982).[6] The Brady material at issue goes directly to the eyewitness identifications of these two witnesses who "looked into the barrel of the pistol." The evidence thoroughly demolishes the credibility of Louis Smith's purported identification of Petitioner. As to the second of these witnesses, Robert Bell, Jr., the Brady material substantially undermines the strength of his eyewitness identification, which was based on his belief that the gunman was a young man who visited his market frequently, and who had been in the store only a few nights before the crimes with one Michael Lawrence, another State witness at trial. Finally, the Brady material even undercuts the credibility of the third eyewitness, one Debra Smith, who claimed that she had entered the store while the robbery was in progress, recognized it as such, made a purchase anyway, and then did nothing more than casually mention it to her sister and boyfriend.

There was no probative physical evidence in this case. There was likewise no confession; indeed, Petitioner has consistently maintained his innocence, even to the point of testifying in his own defense at trial. As we will demonstrate below, this is a case in which there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would

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6 The quotation appears in the context of the Court's discussion of certain issues relating to the purported accomplice witness, Victor Davis, about which more will be said below. In that context, Justice Cooper wrote as follows: "Furthermore, appellant's insurmountable problem in this case was not Davis's testimony, but the testimony of the three eyewitnesses, two of whom looked into the barrel of the pistol held by appellant and were shot by him." Id.

have been different," which is the standard of materiality that Petitioner must meet in order to obtain relief. Kyles, supra, 131 L.Ed.2d at 505 (quoting United States v. Bagley, 473 U.S. 667, 682, 87 L.Ed.2d 481, 105 S.Ct. 3375 (1985)). A "reasonable probability" of a different result is shown when the prosecution's suppression of evidence "undermines confidence in the outcome of the trial." Kyles, supra, 131 L.Ed.2d at 506 (quoting Bagley, supra, 473 U.S. at 678).

The Kyles majority observed that "the effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others . . . ." 131 L.Ed.2d at 513. In this case, the Brady material would have permitted the "effective impeachment" of two out of the three eyewitnesses, and also "extend[ed] directly" to the third eyewitness, as explained below. Moreover, unlike the factual situation in Kyles, there was no physical evidence to serve as a counterweight against the suppressed exculpatory material.

As noted above, the specific items of exculpatory evidence are:

1. The July 6, 1980, report prepared by Detective Jerry Moore of the Nashville Metropolitan Police Department concerning his interview of Bob Bell (S.P.H. Ex. 1);

2. The July 11, 1980, report of Officer J. Dobson concerning his interview of Louis Smith (S.P.H. Ex. 2);

3. The July 5, 1980, report of Detective William Flowers concerning his interview of Louis Smith (S.P.H. Ex. 3);

4. The July 5, 1980, report of Officer John Patton concerning his interview of Louis Smith (S.P.H. Ex. 4);

5. The pleading that the defense filed in the case of State v. Louis Edgar Smith, No. C6175-A, which was received by the Davidson County District Attorney General's Office no later than November 11, 1980 (S.P.H. Ex. 5);

6. The July 6, 1980, report prepared by Detective William Robeck concerning his interview of Louis Smith (S.P.H. Ex. 6); and

7. The "History and Physical Examination" report prepared by Robert Stein, M.D., concerning his examination of Bob Bell at Baptist Hospital on July 5, 1980 (S.P.H. Ex. 10).

As discussed above, on September 3, 1980, Petitioner's trial counsel filed and served a "Request for Discovery Inspection, and Notice of Intent to Use Evidence," which included specific Brady requests that clearly and unmistakably called for the items now in question. S.P.H. Ex. 11. Assistant District Attorney Sterling Gray served and filed the "State's Answer to Defendant's Request for Discovery and Inspection" on September 23, 1980. S.P.H. Ex. 12. General Gray denied, without qualification, the existence of any exculpatory material responsive to Petitioner's requests.

Given General Gray's intervening death, we can only speculate about his knowledge and intent concerning these misrepresentations. Given his conduct throughout the case, however, there is every reason to believe that it was intentional and deliberate to the highest degree; General Gray had determined to win convictions and death sentences at any cost.[7]

In the final analysis, however, the flagrancy of General Gray's misconduct is irrelevant because of two principles that the United States Supreme Court reiterated in Kyles. First, "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

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7 The Statement of the Facts, supra, touches upon the topic of prosecutorial misconduct. Petitioner's brief in this Court in the first post-conviction proceeding (filed Nov. 28, 1988), which is part of the record now lodged with the Clerk of this Court, addresses the topic in much greater detail. 11/28/88 Brief on Behalf of Petitioner-Appellant at 8-41, 99-149. This Court declined to reach the merits of the prosecutorial misconduct issues that Petitioner raised in his initial post-conviction proceeding, however. See Johnson v. State, 797 S.W.2d 578, 582 (Tenn. 1990).

faith or bad faith of the prosecution." 131 L.Ed.2d at 505 (quoting Brady v. Maryland, 373 U.S. 83, 87 (1963) (emphasis added). Second, assuming arguendo that this would have been General Gray's defense, it is no response for a prosecutor to claim that he was not personally aware of favorable evidence possessed by his office or by "others acting on the government's behalf in the case, including the police." Kyles, supra, 131 S.Ed.2d at 508. A prosecutor has a duty to learn of any favorable evidence, and the prosecutor cannot be excused "from disclosing what he does not happen to know . . . "; as the Court further observed, "the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result." Id. at 509.

A. The Court Should Grant This Application And Order A New Trial Because The Suppressed Evidence Was Material Within The Meaning Of Brady v. Maryland And Its Progeny.

As the Supreme Court forcefully reiterated in Kyles, "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." 131 L.Ed.2d at 505 (quoting Brady v. Maryland, supra, 373 U.S. at 87). As reflected by the Stipulation filed at the October 23 hearing, S.P.T.R. 129-32, there is no controversy concerning the issue of whether the evidence in question was suppressed within the meaning of Brady; it was.[8] Moreover, as set out in the preceding discussion, the undisclosed evidentiary material was favorable. Consequently, the only legal issue is whether the evidence satisfies the requirement of materiality. If it does, that ends the inquiry, and Petitioner is entitled to a new trial. As the Supreme Court

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8 Moreover, it was suppressed in the face of specific requests that called for all of the items now in question. It should be noted, however, that the presence or absence of specific requests has no bearing on the materiality inquiry. See Kyles, supra, 131 L.Ed.2d at 505.

explains in Kyles, the nature of the materiality requirement precludes the necessity of an additional layer of "harmless error" review. 131 L.Ed.2d at 506-07.

Concerning the materiality requirement, the Kyles opinion reiterates that favorable evidence is "material" within the meaning of Brady "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. at 505 (quoting United States v. Bagley, supra, 473 U.S. at 682). A "reasonable probability" is a probability sufficient to "undermine[] confidence in the outcome of the trial." 131 L.Ed.2d at 506 (quoting Bagley, supra, 473 U.S. at 678).

The Kyles Court took pains to make the following additional points about materiality.

First, the materiality requirement does not require a defendant to demonstrate that timely disclosure of the suppressed evidence would have resulted ultimately in acquittal; as just stated, the "touchstone of materiality" is a "reasonable probability" of a different result. "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." 131 L.Ed.2d at 506.

Second, materiality in this context is not a "sufficiency of the evidence test." A defendant is not expected to demonstrate that there would not have been enough evidence left to convict after discounting the inculpatory evidence in light of the undisclosed evidence. Id. The possibility of acquittal on a criminal charge "does not imply an insufficient evidentiary basis to convict." A petitioner establishes a Brady violation 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.

Third, it bears emphasis that the probable impact of the suppressed evidence is to be considered "collectively, not item-by-item." Id. at 507. In other words, a reviewing court is to consider the cumulative effect of the suppressed material. Id. at 507 n.10 & 508.

Fourth, Kyles sends a serious message that prosecutors will be held accountable, and that they are responsible not only for disclosing exculpatory evidence of which they have actual knowledge, but also for identifying favorable evidence "known to others acting on the government's behalf in the case, including the police." See 131 L.Ed.2d at 508-09. Although Kyles itself did not establish any new constitutional rules, the Court's treatment of the case -- particularly in terms of holding the State accountable for undisclosed evidence bearing on the defendant's most fundamental right to a fair trial -- may "convey[] a message more significant than even the most penetrating legal analysis," as Justice Stevens expressed it in his concurrence. Id. at 519.

Aside from articulating general principles about the meaning of materiality, Kyles also demonstrates the application of the materiality standard to a specific set of facts. Petitioner submits that even though his case should and could be resolved in his favor on the basis of the general principles standing alone, it is the application of the materiality standard reflected in the Kyles opinion that unmistakably demands relief in this case. As stated at the outset, undersigned counsel respectfully submit that this case is worse than Kyles; it is a stronger case for the defendant.

Somewhat ironically, Justice Scalia's dissent in Kyles may be the best reflection of what materiality means, as applied to a set of facts. Kyles arose from a robbery/murder in a grocery store parking lot in New Orleans committed by a single gunman in broad daylight. Justice Scalia made a strong case that there was a "mountain of direct evidence" against the defendant, which he similarly characterized as a "massive core of evidence" in the State's favor. This mountain included (but was not limited to) four eyewitnesses, the murder weapon found in the defendant's apartment, and some

of the victim's personal effects located in the defendant's trash. See 131 L.Ed.2d at 525-29. Nonetheless, the majority still held that the suppressed evidence was material.

What was that suppressed evidence? Justice Souter listed the following items of exculpatory (but suppressed) items early in his opinion:

> 1. Six contemporaneous eyewitness statements that the police took following the murder.
>
> 2. Records of the initial call that the critical informant, one "Beanie," made to the police.
>
> 3. The tape-recording of a conversation between Beanie and certain police officers.
>
> 4. A typed and signed statement that Beanie gave.
>
> 5. A computer print-out of license numbers of cars parked in the grocery store lot several hours after the murder, which did not include the defendant's car.
>
> 6. An internal police memorandum calling for the seizure of the defendant's trash after Beanie had suggested that the victim's purse might be there.
>
> 7. Evidence linking Beanie to other crimes at the grocery store and to the unrelated murder of another individual.

See 131 L.Ed.2d at 502.

As the Court can see, several of these items (five of the seven) concern the informant, Beanie. Significantly, Beanie did not even appear as a witness at trial for either side, id. at 503, a point that Justice Scalia belabored in dissent. Id. at 524-25. However, the "Beanie evidence" (to coin a phrase) was important in Kyles because the defense theory that Beanie might have committed the murder provided a response to the "massive core" (to use Justice Scalia's term) of

physical evidence arrayed against Kyles, including the murder weapon and the victim's purse, most notably. The defense theory (which Justice Scalia viewed as wildly implausible) was that Beanie planted these items in Kyles's apartment as part of an effort to "frame" Kyles. See id. at 513-15, 518.

In this case, by contrast, there is no physical evidence to explain. Accordingly, the "Beanie" aspects of Kyles are essentially irrelevant. While the State may try to argue that there was a greater quantity of suppressed, exculpatory evidence in Kyles (i.e., the Beanie material) the Court must keep in mind that, in the materiality balance, it was offset by an impressive showing of extremely incriminating physical evidence, the likes of which is completely missing here.

As in this case, the critical exculpatory evidence in Kyles consisted of the inconsistent prior statements of eyewitnesses who testified for the prosecution at trial. According to the Court, "the heart of the State's case" consisted of the testimony of these four eyewitnesses, all of whom "positively identified Kyles in front of the jury." Id. at 503. Significantly, the testimony of two of these witnesses was completely untainted by the Brady violations, another point that Justice Scalia emphasized in dissent. Id. at 526 n.3 & 527. In this case, by contrast, the Brady material impeaches all three eyewitnesses.

Turning to the particulars of the impeachment material concerning the Kyles eyewitnesses, the majority observed that the Kyles prosecutors had characterized one Henry Williams as their best witness. He testified at trial that he had seen Kyles struggle with the victim and shoot her. Id. at 510. Moreover (as Justice Scalia noted in dissent), Williams had picked Kyles out of a photo lineup four days after the murder. Id. at 525.

In comparison to the Brady material in this case, the Williams statement that the prosecution failed to disclose was quite tame. (Again, Justice Scalia is a good source on this point.

See id. at 525-27.) In his contemporaneous statement to the police, Williams described the gunman as "a black male, about 19 or 20 years old, about 5'4" or 5'5", 140 to 150 pounds, medium build." Id. at 510. Kyles was actually six feet tall and thin; in fact, Williams's physical description was more consistent with Beanie's physical attributes. Id. at 510-11. Nonetheless, Williams testified without contradiction that he had seen the killer not only commit the crime, but drive away less than ten feet away from him, and that he (Williams) had had a good opportunity to look at the man. In addition, he "unhesitatingly" picked Kyles out of a photo lineup. Id. at 527. As Justice Scalia observes, "[t]he jury might well choose to give greater credence to the simple fact of identification than to the difficult estimation of height and weight." Id.

The second eyewitness whose testimony could have been impeached with the suppressed Brady material was Isaac Smallwood. He testified that he actually saw Kyles shoot the victim during their struggle. In his contemporaneous statement to the police, however, Smallwood had said that he had not seen the actual murder, and that he had only seen Kyles driving by in the victim's car. Id. at 511. But on the other hand, like Williams, Smallwood had picked Kyles out of a photo lineup only four days after the murder. Id. at 525.

As stated above, two other prosecution eyewitnesses were totally untouched in any way by the Brady material. See id. at 510, 512; id. at 526 n.3, 527 (Scalia, J., dissenting). The majority dealt with that fact by observing that the prosecution had referred to Smallwood and Williams as its two best witnesses in closing argument. Id. at 512. In addition -- and most importantly for present purposes -- Justice Souter wrote that "the effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others, as we have said before." Id. at 513 (citing United States v. Agurs, 427 U.S. 97, 112-13 n.21, 49 L.Ed.2d 342, 96 S.Ct. 2392 (1976)).

In the final analysis, the Kyles decision turned on the suppressed statements of Smallwood and Williams, which undermined their identifications. The "Beanie" evidence served only to cancel out the mass of incriminating physical evidence.[9] Consequently, it stands to reason that the critical inquiry here comes down to comparing the probable impact of the missing Brady material on the eyewitness testimony in Kyles with the potential impact of the missing Brady material on the eyewitness testimony in this case. This comparison is no contest.

As stated above, the Brady material materially impeaches the identifications of all three eyewitnesses, and thoroughly demolishes one of them (Mr. Smith). There should be nothing more to say, because it was the these "three eyewitnesses" that this Court characterized as Petitioner's "insurmountable problem" on direct appeal. State v. Johnson, supra, 632 S.W.2d at 547. The Court did not know about the problems with their identifications buried in the District Attorney's file. Nonetheless, the Court's characterization of the importance of the eyewitness testimony should end the inquiry as to whether the suppressed evidence was material within the meaning of Brady. Of course it was.

For the sake of completeness, however, we will briefly address the testimony of Victor Davis, the purported accomplice. The basic facts concerning his "conversion" from a defense witness to a prosecution witness are outlined at pages 10-11, supra. Suffice it to state at this juncture that the circumstances of the Davis conversion must give the objective observer some pause. As the Supreme Court observed in Washington v. Texas, 388 U.S. 14, 22, 18 L.Ed.2d 1019,

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9 The majority and the dissenters agreed that the list of cars in the parking lot -- the only other item in Justice Souter's opening inventory, 131 L.Ed.2d at 502 -- was inconclusive. Id. at 516, 531.

The majority also noted that various undisclosed witness statements were inconsistent with one another in terms of describing the killer's height, build, age, facial hair and hair length, see id. at 499, 518, but there is no indication that these matters had any impact whatsoever on the testimony of the two "untainted" eyewitnesses.

87 S.Ct. 1920 (1967), common sense suggests that if an accused accomplice is going to lie, he generally has a greater interest in lying for the prosecution, not for the defendant on trial.

Davis's direct examination is relatively brief. See T.T. 335-67. As the Court can see, most of it consists of Davis's monosyllabic responses to General Gray's extremely leading questions, which drew but one objection.[10]

At the end of the trial, of course, the jury received the standard Tennessee instruction on accomplice testimony. The trial court instructed the jury that if they found that Davis was an accomplice (which was the State's vociferous contention, as reflected in its closing arguments, see T.T. 598, 663), then Petitioner could not be convicted upon Davis's uncorroborated testimony. T.T. 680.

Finally, and most importantly, this Court minimized the relative importance of Davis's immunized testimony. In the context of addressing Petitioner's claims concerning the Victor Davis episode, the Court observed that the proof concerning Davis's immunity "could serve only to diminish Davis's credibility in the eyes of the jury to the advantage of appellant." 632 S.W.2d at 547. The Court then made its critical finding that "the testimony of the three eyewitnesses" was Petitioner's "insurmountable problem in this case . . . not Davis's testimony . . . ." Id. As stated above, this finding alone demands the conclusion that the Davis testimony is insufficient to overcome the materiality of the Brady violations concerning the three eyewitnesses.

Although Kyles does not explicitly convey that the presence or absence of a defense case contributes to the materiality determination,[11] it is a fact that Petitioner put on a case. Indeed,

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10 Trial counsels' failure to react to General Gray's handling of the Davis examination is and always has been an important component of Petitioner's ineffective assistance claim.

11 It is a fact, however, that there was defense proof in Kyles, including Kyles's own testimony. See 131 L.Ed.2d at 503-04.

Petitioner testified in his own defense; most importantly, he related that he and Victor Davis had gone directly to his father's house from Franklin on the night of July 5, not to Bob Bell's Market. T.T. 466-71. The defense was further supported by Jennette Edging, the Kentucky Fried Chicken employee in Franklin who placed Petitioner at her store around 9:25 p.m. T.T. 560-66. In addition, Petitioner's father placed Petitioner at his home right around 10:00 p.m. T.T. 513-16.

As set forth earlier, even the prosecution's own time limitations made this an extremely close case. The State contended that the crimes occurred shortly before 10:00 p.m. However, if the crimes occurred too soon before 10:00 p.m., Petitioner could not have returned from Franklin, having departed from there at around 9:25 p.m. (The State did not challenge Ms. Edging's testimony to that effect.) Moreover, there was no dispute that Petitioner was at his father's house right at 10:00 p.m.; the State actually vouched for Mr. Johnson's credibility on this point. T.T. 668-69. The chronology gets squeezed even tighter in light of the fact that the incident played out over some period of time, with customers actually entering and leaving the store; according to both Messrs. Smith and Bell, the events transpired over some fifteen minutes. T.T. 62, 127.

In short, the closeness of the case supports the conclusion that the withheld evidence was material.

In conclusion, Petitioner's case presents a stronger case for materiality than Kyles itself. While this is not Petitioner's burden to sustain, the Court may fairly conclude that the undisclosed Brady material would have transformed this case into one of probable acquittal.

B. Alternatively, The Court Should Grant This Application And Order A New Trial Because The Prosecutors Knew Or Should Have Known That Louis Smith's Testimony Was Perjured, And There Is A Reasonable Likelihood That His False Testimony Could Have Affected The Jury's Judgment.

Starkly put, Louis Smith's three contemporaneous statements (S.P.H. Exs. 2, 3 and 4) leave no room for doubting that his trial testimony hinged upon a lie. He did not get a "good look" at the robber, as he testified (twice) at trial. See T.T. 50, 80. Even at best (from the State's perspective), he did not get a "good look" at the killer, see S.P.H. Ex. 4; at worst, he did not see the gunman's face at all. S.P.H. Ex. 2. Mr. Smith perjured himself by claiming that he recognized Cecil Johnson as the killer.

All three statements were located in the District Attorney's file. See S.P.T.R. 129 ("Stipulations Concerning Petitioner's Exhibits" ¶¶ 2-4). Accordingly, there is no question but that the trial prosecutors either knew or should have known that Mr. Smith was lying.

This is important, because Kyles reiterates that the materiality standard is lower when the prosecution has failed to disclose evidence revealing that the State introduced trial testimony "that it knew or should have known was perjured." 131 L.Ed.2d at 490 (citing Agurs, supra, 427 U.S. at 103-04). In that situation, convictions must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Kyles, supra, 131 L.Ed.2d at 505 n.7 (quoting Agurs, supra, 427 U.S. at 103).

In terms of illustrating the extent to which this is a lower threshold of materiality, it may be useful to point out that in United States v. Bagley, supra, 473 U.S. at 679 n.9, the Supreme Court took pains to note that it is equivalent to the "harmless beyond a reasonable doubt" standard for constitutional errors first articulated in Chapman v. California, 386 U.S. 18, 24, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967). Needless to say, this is a significantly more "defense-friendly" standard than the "reasonable probability of a different outcome" standard that Bagley announced for Brady

violations not involving perjury. See United States v. Alzate, 47 F.3d 1103, 1110 (11th Cir. 1995). In fact, it may be fairly characterized as a "light" burden. United States v. Boyd, 833 F.Supp. 1277, 1346 (N.D. Ill. 1993) (so characterizing it).

On the facts of this case, it is self-evident that Mr. Smith's seemingly positive identification "could have affected the judgment of the jury." The Court cannot fairly conclude that such important testimony was "harmless beyond a reasonable doubt." This is particularly true since, as a victim of the crimes, Mr. Smith was also a sympathetic figure, not just a third-party observer. Indeed, the sympathy factor was presumably enormous in Mr. Smith's case, given his testimony that he was shot while trying to protect Bobby Bell, the twelve-year-old murder victim. See T.T. 54.[12]

Accordingly, even if the Court should see fit to reject Petitioner's primary Brady claim, the Louis Smith perjury calls for a new trial under the lower materiality standard that applies to this set of circumstances.

C. At The Very Least, The Court Should Grant This Application And Order A New Sentencing Hearing Because There Is A Reasonable Probability That The Impact Of The Suppressed Brady Material Would Have Created A "Residual Doubt" In The Mind Of At Least One Juror, Thereby Precluding Imposition Of The Death Penalty.

While sometimes overlooked, Brady itself held that the suppression of evidence violates due process if the evidence is material either to guilt or to punishment. Brady, supra, 373 U.S. at 87

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12 While a defendant cannot reasonably be required to prove why a witness lied, in this particular case, Mr. Smith's likely motivations are transparent. As stated above, the same District Attorney's Office that prosecuted Petitioner was handling Mr. Smith's pending aggravated rape indictment (the pendency of which was never disclosed to the jury due to trial counsels' ineffectiveness). See p. 19, supra.

The Court may take judicial notice of the fact that Mr. Smith was subsequently convicted of the rape of his minor female victim (a friend of his daughter). State v. Louis Smith, No. C6175-A (Davidson Criminal). For a criminal of his magnitude, perjury would have been a minor matter, especially if he believed he might benefit from it.

(quoted in Kyles, supra, 131 L.Ed.2d at 505). That principle forms the predicate for the following alternative argument.

As it does today, the Tennessee death penalty statute required jury unanimity for Petitioner's death sentences; absent unanimity, the trial court would have automatically imposed life sentences. See Tenn. Code Ann. § 39-13-204(h) (1991) (formerly codified as section 39-2-203(h)). Consequently, given the unanimity requirement, a single juror could have made the difference between life and death.

There is a reasonable probability in this case that, even if the jury had still convicted despite the timely disclosure of the Brady material now in question, its impact would have caused at least one or more jurors to have a "residual doubt" about Petitioner's guilt to a degree that would have precluded that juror or those jurors from voting for the death penalty. Particularly in conjunction with Brady's own holding (as discussed above), the plausibility of this scenario (requiring nothing more than the residual doubt of one juror) provides an alternative basis for concluding that Petitioner has satisfied the materiality requirement, at least to the extent of calling for a new sentencing hearing.

Kirkpatrick v. Whitley, 992 F.2d 491 (5th Cir. 1993), a federal habeas corpus case arising from Louisiana, reflects an application of the "single juror" rationale. In Kirkpatrick, the petitioner claimed that the prosecution had either suborned perjury or, at least, withheld exculpatory material at his trial in violation of Brady. Id. at 493-94. (In a striking parallel to this case, the evidence -- in the form of police reports -- came to light as a result of an amendment to Louisiana's version of an "open records" statute. See id. at 496 & n.20.)

The Fifth Circuit panel remanded the case for an evidentiary hearing. In holding that the case had sufficient merit to warrant such a hearing, the Fifth Circuit panel relied, in part, on the type

of "residual doubt" analysis that Petitioner outlines above. See id. at 496-97 & n.33. As in Tennessee, the Louisiana death penalty statute required unanimity for a death sentence, thereby providing a foundation for the "residual doubt" approach. Significantly, in the context of discussing the applicable standards of materiality, the court observed that the exculpatory evidence had the potential to create such a doubt in the mind of at least one juror, which might have avoided a death sentence. See also Lindsey v. King, 769 F.2d 1034, 1042-43 (5th Cir. 1985) (granting habeas corpus relief on the basis of a Brady claim in light of court's determination that the impeachment evidence concerning one eyewitness could have affected the outcome as to either guilt or punishment).

Closer to home, the United States Court of Appeals for the Sixth Circuit has held in a case arising from Kentucky (which likewise requires juror unanimity for a death sentence) that, in applying a harmless error test to sentencing issues, the court must find beyond a reasonable doubt that no juror would have been influenced by the constitutional error at issue to vote for the death penalty. Kordenbrock v. Scroggy, 919 F.2d 1091, 1097-98 (6th Cir. 1990) (en banc). Under this "effect-on-one-juror approach," "[t]he Court must entertain with an open mind the possibility that at least one member of the jury . . . relied on [the error] to tip the balance in favor of the death penalty." Id. at 1097.

In short, although Kordenbrock was not addressing a Brady materiality issue, it reflects the same type of approach that Petitioner is suggesting here. In a jurisdiction, like Tennessee, where death requires jury unanimity, a court may not deny relief on a constitutional claim unless it can determine that the violation would have had no impact on the death sentence, keeping in mind that the opposition of even one juror is all it takes to tip the balance in favor of a life sentence.

Accordingly, even if the Court should determine to deny Petitioner a new trial, it should order a new sentencing hearing. At the very least, there is a reasonable probability that the suppressed evidence would have created a residual doubt in the mind of at least one juror, which would have made the difference between life and death.

II. THE COURT OF CRIMINAL APPEALS ERRED IN FAILING TO SET ASIDE PETITIONER'S CONVICTIONS BECAUSE THE JURY INSTRUCTIONS AT PETITIONER'S TRIAL FAILED TO PROPERLY DEFINE THE "REASONABLE DOUBT" STANDARD.

At trial, the jury instruction defining reasonable doubt was as follows:

> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of guilt. Reasonable doubt does not mean a captious, possible, or imaginary doubt. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required as to every proposition of proof requisite to constitute the offense.

T.T. 677.

By focusing on the subjective issue of whether a particular juror's mind could "rest easily as to the certainty of guilt," and on "moral certainty" instead of certainty based on the evidence, this instruction allowed a finding of guilt based on a degree of proof below that required by the Due Process Clause of the Fourteenth Amendment (incorporating components of the Fifth and Sixth Amendments), and by the requirement of reliable fact-finding procedures in death penalty cases that the Eighth Amendment imposes. The instruction also violated Petitioner's rights under Article I, sections Eight, Nine and Sixteen of the Tennessee Constitution.

This claim arises out of developments in federal case law concerning the definition of reasonable doubt in criminal cases, beginning with Cage v. Louisiana, 498 U.S. 39, 112 L.Ed.2d

339, 111 S.Ct. 328 (1990). There, a unanimous Supreme Court held that the following definition of reasonable doubt was defective under the Due Process Clause of the Fourteenth Amendment:

> If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. It must be such doubt as would give rise to a grave uncertainty, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty.

498 U.S. at 40 (emphasis in original) (citation omitted).

The Court in Cage appeared to be primarily concerned with the phrases "grave uncertainty" and "actual substantial doubt," stating that the terms "grave" and "substantial" suggested a higher degree of doubt than is required for acquittal under the reasonable doubt standard. Id. at 41. However, the Court also noted that the "reference to 'moral certainty,' rather than evidentiary certainty," allowed a reasonable juror to interpret the instruction so as to permit a finding of guilt based on a degree of proof below that required by the Due Process Clause. Id.

Cage was followed by the Supreme Court's decision in Victor v. Nebraska, 511 U.S. 1, 127 L.Ed.2d 583, 114 S.Ct. 1239 (1994), which focused on the "moral certainty" language specifically. In Victor, the Supreme Court held that the phrase "moral certainty" does not, of itself, render a reasonable doubt instruction unconstitutional. See Victor, supra, 127 L.Ed.2d at 599-600. However, Victor criticized the use of the phrase "moral certainty" as being "ambiguous in the

abstract," and indicated that, to be constitutionally valid, a court's reasonable doubt instruction must provide sufficient context to lend meaning to the phrase. Id. at 596, 600.

The Supreme Court in Victor upheld reasonable doubt instructions in two companion cases. One of the instructions stated in part as follows:

> It is the state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

Id. at 591 (emphasis in original). Similarly, the other instruction defined reasonable doubt as follows:

> It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused.

Id. at 598 (emphasis in original).

In upholding the instructions, the Supreme Court relied primarily on the fact that the phrase "moral certainty" was used in both instructions in conjunction with the "abiding conviction" language, which thereby "'impress[ed] upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused.'" Id. at 596 (citation omitted); see also id. at 600 ("[i]nstructing the jurors that they must have an abiding conviction of the defendant's guilt does much to alleviate any concerns that the phrase moral certainty might be misunderstood in the abstract").

Unlike the situation in Victor, the instruction in Petitioner's case did not use the phrase "moral certainty" in conjunction with the "abiding conviction" language approved in Victor, or in conjunction with any other language that would accurately define the reasonable doubt standard. To the contrary, Petitioner's instruction contains additional language that has been held equally

"ambiguous in the abstract," Victor, supra, 127 L.Ed.2d at 598, in that it also defines reasonable doubt as an inability "to let the mind rest easily as to the certainty of guilt" (T.T. 677). Rickman v. Dutton, 864 F. Supp. 686 (M.D. Tenn. 1994), aff'd on other grounds, No. 94-6232 (6th Cir. Dec. 2, 1997); but see Austin v. Bell, 126 F.3d 843, 846-47 (6th Cir. 1997).

In Rickman, Chief Judge John Nixon of the United States District Court for the Middle District of Tennessee held that an instruction that was identical in all material respects to the one at issue in Petitioner's case violated due process under Cage and Victor. The instruction at issue in Rickman stated in part:

> Reasonable doubt is that doubt engendered by investigation of all the proof in the case and an inability after such investigation to let the mind rest easily upon the certainty of guilt. Reasonable doubt does not mean a doubt that may arise from possibility. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required and this certainty is required as to every proposition of proof requisite to constitute the offense.

Id. at 708-09.

Rickman distinguished Victor, observing that in Victor the Court approved reference to "moral certainty" because it was used in conjunction with "abiding conviction" and, thus, did not suggest a standard below the prosecution's proper burden of proof. Id. at 709. Judge Nixon held that, unlike the instruction in Victor, the reasonable doubt instruction given in Rickman did not lend content to the phrase "moral certainty." Id. Rickman further observed that combining the phrase "moral certainty" with the phrase "mind rest easily" would suggest to a reasonable juror a lower burden of proof than is constitutionally required. Id.

The Court of Criminal Appeals declined to grant relief to Petitioner in regard to the "reasonable doubt" instruction, holding, first, that Petitioner's claim was barred by the statute of

limitations set forth in Tenn. Code Ann. § 40-30-102 (repealed 1995). Exhibit A at 14-15. Petitioner's counsel acknowledge that the instant claim arises out of developments in federal case law that begin with the Supreme Court's decision in Cage. On the other hand, insofar as counsel are aware, the Rickman decision was the first case to address the "moral certainty" phrase used in conjunction with the "mind rest easily" phrase, and thus Petitioner contends that the Rickman analysis, in combination with the Supreme Court's earlier decisions in Cage and Victor, sufficiently created a new rule of law as applied to circumstances of this case to avoid the limitations bar. See Burford v. State, 845 S.W.2d 204, 208-10 (Tenn. 1992); Jones v. State, 891 S.W.2d 228, 230-31 (Tenn. Crim. App. 1994). Further, there is no legitimate state interest in applying the statute of limitations sufficient to outweigh Petitioner's interest in having this Court review potentially unconstitutional jury instructions that resulted in his convictions and death sentences. See Jones, 891 S.W.2d at 231. It is worth noting in this regard that notwithstanding the liberality with which it has raised procedural issues throughout the history of Petitioner's case, not even the State considered the statute of limitations of sufficient merit to raise on appeal to the Court of Criminal Appeals. See 1/17/97 Brief of the State of Tennessee at pp. 16-19 (no mention of limitations defense).

The lower court also went on to reject the instant claim on the merits, following this Court's decision in State v. Nichols, 877 S.W.2d 722 (Tenn. 1994), as well as the lower court's decision in Pettyjohn v. State, 885 S.W.2d 364 (Tenn. Crim. App. 1994). See Exhibit A at 15, n.28. We recognize that this Court in Nichols and the Court of Criminal Appeals in Pettyjohn upheld instructions similar to the one used in Petitioner's case. However, neither court has directly addressed the ambiguity in the "mind rest easily" language.[13]

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13 In rejecting the "reasonable doubt" claim, the Court of Criminal Appeals also cited its unreported

In Nichols, this Court on direct appeal upheld a reasonable doubt instruction at the sentencing phase, which, like the instant case, used the phrase "moral certainty" in conjunction with an instruction that "'[r]easonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily upon the certainty of your verdict.'" Nichols, supra, 877 S.W.2d at 734. The primary rationale offered for the Court's ruling was that the "context in which the instruction was given clearly conveyed the jury's responsibility to decide the verdict based on the facts and the law." Id. We respectfully suggest that, in so reasoning, this Court did not come to grips with the real issue in that case (and in this one), which concerns the standard to be applied in so deciding the verdict. In other words, the Court focused only on the first part of the above-quoted instruction (reasonable doubt is "that doubt engendered by an investigation of all the proof in the case"), and ignored the ambiguity in the second part ("an inability, after such investigation, to let the mind rest easily upon the certainty of your verdict"), the very portion of the instruction that purported to define the degree of doubt required to acquit.

Similarly, in Pettyjohn, the Court of Criminal Appeals denied relief to a post-conviction petitioner in regard to a reasonable doubt instruction that was, in part, the same as the one used in Petitioner's case. Pettyjohn, supra, 885 S.W.2d at 365. In upholding the instruction, the Court relied on the same language that had been approved by this Court in Nichols, indicating that the instruction provided sufficient content to the phrase "moral certainty" without considering the ambiguity in the "mind rest easily" language, Id. at 366; see also State v. Sexton, 917 S.W.2d 263, 266 (Tenn. Crim. App. 1995) (following Nichols). Otherwise, the Court relied upon language in

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case of Maurice Booker v. State, No. 01C01-9606-CC-00271 (Tenn. Crim. App. June 30, 1997) (Exhibit B hereto). While the lower court in Booker purportedly addressed the "mind rest easily" language, the court did nothing more than give conclusory treatment to the issue, relying primarily on the earlier Nichols and Pettyjohn decisions. See Exhibit B.

the instruction (also present in Petitioner's instruction) conveying that reasonable doubt did not include a "'captious, possible, or imaginary doubt,'" and that a conviction did not require "'absolute certainty'" -- language which, although purportedly stating what reasonable doubt is not, did little to explain what moral certainty, and hence the reasonable doubt standard, are. Id.

Consistent with the reasoning of Rickman, Petitioner contends that the reasonable doubt instruction at his trial failed to lend content to the phrase "moral certainty," and instead compounded the ambiguity with the use of the "mind rest easily" language. Accordingly, Petitioner's convictions are invalid under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, sections Eight, Nine and Sixteen of the Tennessee Constitution. Moreover, this error requires that Petitioner's convictions be set aside without conducting harmless error analysis. Sullivan v. Louisiana, 508 U.S. 275, 124 L.Ed.2d 182, 189-90, 113 S.Ct. 2078 (1993) (misdescription of reasonable doubt standard invalidates all of the jury's findings, which thereby necessarily precludes harmless error analysis).

III. THE JURY INSTRUCTIONS AT PETITIONER'S TRIAL IMPROPERLY MERGED THE "PREMEDITATION" AND "DELIBERATION" ELEMENTS OF FIRST DEGREE MURDER, THEREBY REQUIRING THAT PETITIONER'S MURDER CONVICTIONS BE SET ASIDE.

The trial court gave the following instruction on the elements of first degree murder:

> For you to find the defendant guilty of murder in the first degree, as charged in count three of this indictment, the Sate must have proven beyond a reasonable doubt: (1) that the defendant unlawfully killed Robert Bell, III; (2) that the killing was malicious; that is, that the defendant was of the state of mind to do the alleged wrongful act without legal justification or excuse; (3) that the killing was willful. This means that the defendant must have intended to take the life of Robert Bell, III; (4) that the killing was deliberate; that is, with cool purpose; and (5) that the killing was premeditated. This means that the intent to kill must have been formed previous to the

> act itself. Such intent to design to kill may be conceived and deliberately formed in an instant. It is not necessary that the purpose of kill[ing] pre-exist in the mind of the accused for any definite period of time. It is sufficient that it preceded the act, however short the interval. The mental state of the accused at the time he allegedly instigated the act which resulted in the alleged death of the deceased must be carefully considered in order to determine whether or not the accused was sufficiently free from excitement and passion as to be capable of premeditation. Passion does not always reduce the crime below murder in the first degree, since a person may deliberate, may premeditate, and may intend to kill after premeditation and deliberation, although prompted and to a large extent controlled by passion at the time. If the design to kill was formed with deliberation and premeditation, it is immaterial that the accused may have been in a passion or excited when the design was carried into effect.

T.T. 709-10. The charge was identical as to the other two counts of first degree murder. T.T. 719-20, 730-31.

In light of recent holdings of the this Court, it is apparent that this instruction misstated the "premeditation" and "deliberation" elements of first degree murder. State v. Brown, 836 S.W.2d 530 (Tenn. 1992); State v. West, 844 S.W.2d 144 (Tenn. 1992) (Daughtrey, J., in both cases). Brown held that years of Tennessee jurisprudence effectively merging the "premeditation" and "deliberation" elements of first degree murder had been in error. See 836 S.W.2d at 538-43. They are two separate elements. Deliberation requires "a cool mind that is capable of reflection," while premeditation requires that the individual with the cool mind "did in fact reflect, as least for a short period of time before his act of killing." Id. at 541 (quoting 2 W. LaFave & A. Scott, Substantive Criminal Law §7.7 (1986)). Unlike premeditation, deliberation "cannot be formed in an instant." 836 S.W.2d at 543. However, the standard jury instruction in Tennessee (as given in this case) was

erroneous, because it merged the two elements of premeditation and deliberation, and then conveyed that this merged mens rea could be "formed in an instant." See id.

Because these are the distinguishing elements of murder in the first degree, the instruction in Petitioner's case effectively became an instruction for a directed verdict on the entire offense once the jury concluded that there was an intent to kill, even if "formed in an instant." The instruction thereby violated Petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections Eight, Nine and Sixteen of the Tennessee Constitution. Accordingly, Petitioner's first degree murder convictions should be set aside. See Brown, supra, 836 S.W.2d at 543 (reversing murder conviction); West, supra, 844 S.W.2d at 147-48 (to same effect); State v. Brooks, 880 S.W.2d 390, 391-92 (Tenn. Crim. App. 1993) (instruction required reversal, since five-minute struggle, later followed by fatal gunshot wound, provided insufficient evidence of deliberation for error to be considered harmless); but see Exhibit A at 17 (following three unreported decisions from the Court of Criminal Appeals holding that Brown did not create a new constitutional right and should not be applied retrospectively).

IV. THE CUMULATIVE EFFECT OF THE CLAIMS IN THE SECOND PETITION, VIEWED IN COMBINATION WITH EACH OTHER AND WITH THE CLAIMS PREVIOUSLY ASSERTED IN THE ORIGINAL POST-CONVICTION PETITION, CALLS FOR A NEW TRIAL.

The overarching inquiry in evaluating a Brady violation is whether the defendant received a fair trial without the missing evidence, "understood as a trial resulting in a verdict worthy of confidence." Kyles, supra, 131 L.Ed.2d at 506; see also id. at 518. This suggests that a Brady violation should not be viewed in isolation from the rest of the case; if there were other factors that undermined the fairness of the proceeding, the cumulative effect of all of those elements (Brady and non-Brady) should be considered. Cf. Martin v. Parker, 11 F.3d 613, 615 (6th Cir. 1993) (reflecting principle that all errors striking at the fundamental fairness of the trial should be viewed in the aggregate in determining whether the trial comported with due process).

Accordingly, if the Court should grant this application but determine to affirm the denial of relief on all three preceding claims, we must then ask the Court to consider these claims in conjunction with the claims Petitioner raised in his initial Petition, even though the state courts have previously denied relief on the earlier Petition. See Johnson v. State, supra, 797 S.W.2d 578 (Tennessee Supreme Court opinion).[14] Obviously, the earlier courts were not considering the original Petition's claims in light of Petitioner's new grounds for relief, particularly the Brady claim. (As reflected by Paragraph 18 of the Stipulation filed with the Trial Court on October 23, 1995, undersigned counsel did not obtain access to the District Attorney's file until May 1992. S.P.T.R. 131.)

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14 It should be noted that the Court of Criminal Appeals ordered a new sentencing hearing based on prosecution arguments that improperly minimized the jury's sentencing responsibilities, in violation of Caldwell v. Mississippi, 472 U.S. 320, 86 L.Ed.2d 231, 105 S.Ct. 2633 (1985). See Johnson v. State, No. 83-241-III, slip op. at 23-28 (Tenn. Crim. App. Jan. 20, 1988). The Court of Criminal Appeals rejected all of Petitioner's other claims, however. This Court, in turn, reversed the Court of Criminal Appeals on the

In a conclusory fashion, the Court of Criminal Appeals found "no cumulative effect or error sufficient to warrant a new trial." In doing so, the lower court did not even purport to conduct the type of cumulative effect analysis that Petitioner requested, but instead summarily rejected the cumulative effect claim solely on the basis that the "trial court, as affirmed by our supreme court, denied relief on all grounds" raised in the first post-conviction petition, and that the lower court had decided to affirm "the judgment of the trial court" determining that "the issues raised in [the instant] petition were without merit." Exhibit A at 17. We submit, however, that surely the new claims -- but especially the Brady claim -- when weighed together with the earlier claims, are sufficient to tip the balance in favor of concluding that Cecil Johnson did not get a fair trial.

Petitioner's Brief in this Court (filed Nov. 28, 1988) – which is part of the record now before this Court – addresses the earlier claims in detail, and undersigned counsel can do no better than to direct the Court to that existing Brief. For present purposes, the pertinent pages of that Brief are pages 15-74 and 99-196.

While not detracting from any of the other arguments set forth in that Brief, undersigned counsel believe it is appropriate to devote some attention in this Brief to Petitioner's contention that his trial counsel rendered ineffective assistance. This is so because trial counsels' ineffectiveness was primarily the direct result of an orchestrated effort by the trial prosecutors (particularly General Gray)[15] to bushwhack the defense in the ten days or so immediately preceding the trial date. To put it mildly, this effort was a huge success. To borrow a phrase from Kyles, the prosecution "descend[ed] to a gladiatorial level." See 131 L.Ed.2d at 509.[16]

Caldwell issue, but affirmed the lower court's opinion in all other respects. See 797 S.W.2d 578.

15 General Gray acted as the lead prosecutor at trial. District Attorney General Thomas Shriver himself and then-Assistant District Attorney Torry Johnson assisted him.

16 This is evidently an allusion to the following quotation that appears in United States v. Cronic, 466

The suppression of exculpatory evidence was inextricably intertwined, we submit, with the State's ambush approach to the trial, which effectively rendered Petitioner's trial counsel ineffective. However, in hindsight, it is now obvious that the suppression of Brady material compounded that ineffectiveness geometrically; by failing to disclose the exculpatory evidence, the State exacerbated the trial's fundamental unfairness. In this connection, it is critical to note that the ultimate inquiry both claims present (Brady and ineffective assistance) is the fundamental fairness of the trial. See Strickland v. Washington, 466 U.S. 668, 695-96, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984) (addressing prejudice requirement in context of actual ineffectiveness claims). In fact, Strickland articulates the same "reasonable probability of a different outcome" test for ineffective assistance claims that the Supreme Court later applied to Brady claims in United States v. Bagley, supra, 473 U.S. at 682. That is all the more reason why the ineffective assistance and Brady claims in this case go together.

With that preface, we will now turn to an abbreviated discussion of some of the factual points underlying Petitioner's ineffective assistance claim.

Situation Before January 2, 1981.

As the case developed during the fall of 1980, it appeared that the defense was faced with the eyewitness identifications of Robert Bell, Jr., and possibly Louis Smith. There were known problems with Mr. Smith's identification. P.H.T. 130. There was no physical evidence connecting Petitioner with the crime. From almost the beginning of the case, it had been clear that the defense would be an alibi defense, and thus it seemed that the trial would amount, essentially, to a

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U.S. 648, 80 L.Ed.2d 657, 104 S.Ct. 2039 (1984), dealing with ineffective assistance of counsel: "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." 466 U.S. at 657 (quoting U.S. ex rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir. 1975)).

confrontation between the testimony of Mr. Bell and possibly Mr. Smith, as opposed to Petitioner's alibi. P.H.T. 88-89.

Central to Petitioner's alibi defense was his primary alibi witness, Victor Davis, who was expected to testify that Petitioner was in his exclusive company at all relevant times. P.H.T. 97. Davis had been interviewed by public defender and police investigators early in the case, see T.R. 128-29, T.T. 346-47, P.H.T. 307-09, 361-62, and he related that he had been with Petitioner before, during, and after the time of the crimes, such that it would have been impossible for Petitioner to have committed them. T.R. 132, P.H.T. 97. Davis's story was substantially corroborated by the defense investigation, which yielded witnesses from Franklin, Tennessee, who placed Petitioner in Franklin with Davis shortly before the time of the crimes. See T.T. 507-10, 561-66. Davis's story was also corroborated by Petitioner's father, who recalled Davis and Petitioner coming into his home at approximately 10:00 p.m. See T.T. 513.

The impression that the State's case consisted solely of Mr. Bell and Mr. Smith was substantially reinforced by the State's response to Petitioner's initial discovery requests. That response, Exhibit 16 to the October 23, 1995, hearing, affirmatively represented that the only witnesses present at the time of the offense were Louis Smith and Bob Bell, and that the names and addresses of all witnesses the State intended to call were listed on the indictment. The State further represented that the only statement by Petitioner of which it was aware was that he had been in Franklin with a friend and that he did not get back into town until late (which was totally consistent with the defense). As for the crucial element of time, the State represented both in its discovery response and in a Motion for Notice of Alibi, T.R. 15, that the crimes occurred between 10:00 and 10:10 p.m. Mike Engle, Petitioner's lead trial counsel, relied on this discovery response,

particularly its representation that the State had listed all its witnesses on the indictment. P.H.T. 85-86.

Under these circumstances, Mr. Engle believed that he had a substantial defense. He believed it was a "good alibi," and that the case was in a posture where the State would have to establish the crime within a matter "almost of seconds." Consequently, he felt like Petitioner had a significant prospect of succeeding at the guilt phase of the trial. P.H.T. 105.

Developments Between January 2 and January 13, 1981.

However, as a result of circumstances beyond their control and even beyond their capacity to predict, defense counsel experienced a dramatic deterioration in their position in the eleven days prior to trial (beginning January 13). There were three major "events"; the unveiling of Debra Smith, the disclosure of fifteen additional witnesses, and the loss and ultimate "conversion" of Victor Davis. These will be addressed in order.

As stated above, in its September 1980 discovery response, the State had affirmatively represented that all its witnesses were listed on the indictment, and that the only witnesses present at the crimes were Bob Bell and Louis Smith. But on January 2, 1981, Mr. Engle received a letter from the District Attorney's Office advising him "that an additional witness, Ms. Debra Ann Smith . . . will be called by the State to testify in its case-in-chief . . . ." T.R. 121. Nothing was said about the substance of her testimony. Initial efforts to contact Ms. Smith or to determine the nature of her testimony in some other way were unsuccessful. On either January 5 or January 6, Mr. Engle spoke with Assistant District Attorney Gray, and asked him what the nature of Ms. Smith's testimony would be. T.R. 122, P.H.T. 92-93. Gray told Engle that she was a customer who was in the store and that she could identify Petitioner as the perpetrator, since she had known him previously. Id. When asked why this information had not been disclosed earlier, Gray said that her

existence had "simply slipped his mind." T.R. 123. In post-trial testimony, however, Gray took the position that it had not slipped his mind, thereby acknowledging that her concealment had been intentional. See N.T. 87-90. This was also the position taken by the State (at least implicitly) in its Answer to Petitioner's Motion for a New Trial. See T.R. 142.

The defense team expended considerable time and energy trying to investigate Ms. Smith, both as to the substance of her testimony and avenues of impeachment. These efforts were essentially unsuccessful. T.R. 123, P.H.T. 92-93. The defense then filed a motion to suppress her identification testimony, which was heard on January 7, 1981. See P.T. 142. Not until then did defense counsel learn precisely what her testimony would be. P.H.T. 94, 517.

Given the State's previous representations, the belated disclosure of this witness had the effect of throwing the defense "very much off balance." P.H.T. 335.

On January 6, 1981, by way of a letter from General Gray, the State disclosed a list of fifteen additional witnesses to defense counsel. See Ex. 5; P.H.T. 82. This came as something of a surprise, given the State's previous representation that all of its witnesses were named on the indictment, a representation upon which Mr. Engle had relied. P.H.T. 82, 85. Up to this time, Mr. Engle also had no other reason to believe that the State intended to call any significant witnesses other than those listed on the indictment. P.H.T. 86.

After receiving this letter, the defense team experienced a period of "extreme agitation" in which they were "trying to race around and discover what in the world these additional people were going to say." P.H.T. 108, 519-20. Although none of these witnesses turned out to be as significant as Debra Smith, the necessity of investigating this number of witnesses further strained the already stretched resources of the defense. P.H.T. 90-91.

The last blow came on Saturday, January 10, 1981. On that day, defense counsel learned of Davis's midnight meeting at the District Attorney's Office, and they attempted to interview him. P.H.T. 86, 523-24. They could not find out exactly what he had told the State, but they left knowing that he would no longer be testifying as a defense witness. P.H.T. 527-28.

After trial, it became clear that Victor Davis had initially changed his account during a private session with General Gray; the other attendees at the January 10 meeting were excluded from this most critical event. T.R. 133-34; N.T. 59-61, 76-80.

On January 6, 1981, at the hearing on certain pre-trial motions, Mr. Engle told the Court that the number of the State's witnesses had increased by sixteen since January 2, 1981. He stated that defense counsel were trying "desperately and urgently" to work through these witnesses and determine what their anticipated testimony would be. P.T. 32, P.H.T. 104. This representation, made before the trial itself, fully corroborates the veracity of defense counsels' testimony at the evidentiary hearing in 1983 about the effect of these events.

Situation As Of January 13, 1981.

From defense counsels' perspective, the situation confronting them on January 13, 1981, the first day of trial, was bleak, if not hopeless. The testimony at the evidentiary hearing on the original Petition disclosed that at that time, and particularly in light of Davis's removal, they believed there was no defense. P.H.T. 98. As Robert Smith (Mr. Engle's court-appointed co-counsel) expressed it, the Victor Davis development was a "devastating blow," and had the effect of throwing out a great portion of the preparation, or at least the "direction of the preparation" that had been undertaken to that point. P.H.T. 529. Of course, the blow was compounded by the fact that, prior to the events of the last few days, counsel had a defense that they believed had "excellent

prospects." P.H.T. 98. Mr. Engle actually felt "relatively confident" before these developments, and certainly prepared. P.H.T. 106.

In short, the defense was not prepared to go forward on January 13. P.H.T. 110. Mr. Engle provided a good example of his unpreparedness; when he stood up to voir dire the first juror, he suddenly recalled that he had not even prepared any voir dire questions. Id. More fundamentally, Mr. Engle testified that the defense lacked a "theme" on the first day of trial, even though he had always been taught and always attempted to go into a case with one or two "dominant themes to the case." P.H.T. 111. Mr. Smith likewise testified that the defense was not prepared to go forward on January 13. P.H.T. 536-37. He explained that the events of the past few days had simply put them in a position where they were not prepared. P.H.T. 537-40.

Mr. Engle and Mr. Smith both testified that in their professional judgments (and in retrospect), they had good cause for a continuance on January 13. P.H.T. 112, 546. Nonetheless, they failed to make the motion. P.H.T. 114. In fact, there was not even a discussion of moving for a continuance, or at least any substantial discussion of that possibility. P.H.T. 113, 545-46. This was not a strategic choice. P.H.T. 112-13, 546-47.

Judge Walter Kurtz, an expert witness called by Petitioner, testified unambiguously that under the circumstances, it was not competent for defense counsel not to ask for a continuance. P.H.T. 689-93. Attorney Lionel Barrett, called as a witness by the State, likewise testified on cross-examination that it was not competent for defense counsel to go forward without making the motion for a continuance if they were unprepared. P.H.T. 819, 822, 825. According to Mr. Barrett, a defense attorney should always have a "game plan" or a "goal" in mind, and if, at any stage in a trial, he is unable to articulate what his goal is, that is a "serious factor." P.H.T. 822.

The Trial.

In reality, however, defense counsel still had an eminently defensible case, even though it was obviously not as strong as the case they thought they had a few days earlier. Had they sought the opportunity to regroup, perhaps they would have realized it. In any event, having gone forward in a completely demoralized condition, they committed a number of major errors, all of which flowed from the fundamental pre-trial error of attempting to go forward when they were utterly unprepared to do so.

This Brief will not revisit all of the errors described in Petitioner's earlier Supreme Court Brief. Instead, we will briefly discuss a few of the primary mistakes vis-a-vis the four main witnesses against Petitioner, i.e., Bob Bell, Louis Smith, Debra Smith and Victor Davis. As the Court will see, these witnesses were impeachable to an almost astounding degree, just with the materials that Petitioner's trial counsel had. Supplemented with the evidence that the State suppressed, the potential effect in the hands of competent counsel would have been devastating.

Concerning Bob Bell, it was the defense theory that, especially in view of his agitated emotional state, he had confused Petitioner with the gunman. Petitioner freely acknowledged frequent visits to Mr. Bell's store.

With that context, a significant breakdown occurred when trial counsel failed to catch a glaring discrepancy between Mr. Bell's description of his friendly relationship with the assailant as a customer, which he gave at trial, and his description of his relationship with the robber that he gave to the police on July 10, which defense counsel received by way of Mr. Bell's transcribed statement that the State produced as Jencks material following his direct testimony. S.P.H. Ex. 17.

At trial, Mr. Bell testified that the robber had been in his store on many previous occasions, that they had a friendly relationship, and that Mr. Bell had even offered to help the young man find

a job. T.T. 109, 148-49. In his July 10 statement, however, Mr. Bell had described the robber in dramatically different terms. Mr. Bell told the police that he had always told "everybody who worked for me" to "beware of this guy." P.H.T. 264. Mr. Bell also described for the police an incident in which the future killer had used "a lot of profanity" in the store, which had led to a confrontation between Mr. Bell and this individual. P.H.T. 265. In addition to this, Mr. Bell had described the assailant as someone who "would stand across the street from my place," and whom Mr. Bell suspected of breaking into houses. P.H.T. 266. Finally, Bell told the police that he had "never got personal" with this individual, because he didn't have time to talk to people while operating a cash register. Id.

The difference could have hardly been more startling. On July 10, five days after the crime, Mr. Bell was describing the assailant as someone he told people to "beware of," but at trial, he described a quite different relationship with the assailant, in which he had even offered to help this person find a job.

Mr. Engle acknowledged that he simply failed to pick up on this inconsistency, and that if he had noticed it, he would have used it. P.H.T. 268. In other words, there was no tactical or strategic reason for this omission. See also P.H.T. 558 (Robert Smith).

At the trial, the State had one extremely important piece of evidence that seemingly corroborated Mr. Bell's identification of Petitioner as someone whom he knew from coming into the store previously. Bell testified on direct that he pointed to a young man in the crowd that had gathered after the police arrived, told this individual that he had been with the assailant a few days before when buying some beer, and asked this individual the name of that person. T.T. 110-11. The State then produced Michael Lawrence, who testified that, indeed, he and Cecil Johnson had been at Bob Bell's Market on the previous Thursday, and that Petitioner had lent him (Lawrence)

some money to buy beer. T.T. 264-67. There was no dispute on this point; Cecil Johnson agreed with Lawrence in his (Petitioner's) own testimony. Not surprisingly, the State gave great emphasis to the combined effect of the Bob Bell-Michael Lawrence testimony in closing argument. T.T. 592-93.

This testimony came in almost undiluted, with the jury getting the impression that Mr. Bell had pointed out one person in the crowd, and correctly identified him as someone who knew Petitioner. Defense counsel had substantial information in their files, however, that could have been used to show that Mr. Bell had pointed out a number of people in the crowd as persons who knew the assailant, but he was apparently mistaken.[17]

For example, in his preliminary hearing testimony, Bell had testified that he "hollered in the crowd and asked some guys to step up so that they could give me the name of the guy because I knew, you know, I knew his face but I didn't know his name." P.H.T. 180. This testimony clearly suggests that even Bell recalled that he had pointed out more people than Michael Lawrence. Indeed, barely over a week before his trial testimony, Bell had testified in the suppression hearing that there were "two guys." P.T. 50; P.H.T. 171. The defense failed to bring out either of these two prior statements of Mr. Bell, however.

The defense also had even more specific information concerning individuals whom Mr. Bell had erroneously recognized as acquaintances of the robber. One in particular was an individual named Wesley Martin. A Public Defender interview of Officer Wesley Carter in counsels' possession disclosed information that Bell had similarly identified Wesley Martin as an acquaintance of the gunman, but that Wesley Martin definitely did not know Cecil Johnson. P.H.T.

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17 There was one bit of trial testimony suggesting this point, i.e., Mr. Bell's erroneous identification of Leroy Johnson as someone who knew the robber. See T.T. 177, 182-83 (testimony of Officer Carter).

177-78. The same interview report further disclosed that Mr. Bell had also identified a person named "Speck Jordan" as someone who knew the assailant. P.H.T. 172, 176. This person was likewise never heard from again, which suggests that he could not provide the same kind of corroborating testimony that Michael Lawrence provided.

Defense counsel acknowledged that the failure to explore these avenues of impeachment was not the result of any trial strategy. P.H.T. 180-81. If counsel had recognized them, he would have brought them out. He failed to do so, and the jury presumably got the impression that Mr. Bell identified only Michael Lawrence in the crowd that night as someone who knew the robber (unless the jurors happened to recall Officer Carter's very brief testimony about Leroy Johnson).

On another point, Mr. Bell testified at trial that he had not seen any newspaper photographs of Petitioner before his corporeal lineup identification on July 17, 1980. T.T. 159. In his July 10 statement to the police, however, Mr. Bell plainly acknowledged that he had seen photographs of Petitioner in the newspapers. P.H.T. 258. At the evidentiary hearing, Mr. Engle acknowledged the importance of this point, but stated that it "didn't strike my attention." P.H.T. 260. He acknowledged that there was no tactical reason for not asking about this, and that he certainly would have used it if he had caught it. P.H.T. 260, 307.

Concerning Louis Smith, this Brief has already made the point about trial counsels' grievous error in concluding that the aggravated rape prosecution pending against Smith could not be used for any purpose. Cf. Davis v. Alaska, 415 U.S. 308, 39 L.Ed.2d 347, 94 S.Ct. 1105 (1974). Mr. Engle acknowledged that he simply failed to consider the issue of whether the pendency of that prosecution could be admissible as extrinsic proof of bias. P.H.T. 135. Judge Walter Kurtz testified as an expert witness for Petitioner that this error fell below the range of competence

demanded of criminal defense attorneys. P.H.T. 697-700. (In fact, Judge Kurtz so testified about all of the errors summarized in this discussion, among others.)

On what could have been a critical point, Mr. Smith said in his July 11 statement to the investigators (which defense counsel received as Jencks material following Mr. Smith's direct examination) that the gunman had no facial hair. P.H.T. 158-59. (That statement is included as part of Exhibit 17 to the October 23 hearing.) At trial, however, Mr. Smith conveyed that the robber did have facial hair. T.T. 74.

Defense counsel failed to impeach Mr. Smith with his prior statement. They acknowledged that there was no strategic reason for this failure. Moreover, by failing to pursue this point, defense counsel missed the opportunity to prove and to make a substantial point that Cecil Johnson had worn a goatee as of July 5, 1980, in contrast to Mr. Smith's relatively fresh "no facial hair" description.

Mr. Smith was likewise inconsistent in his statements about the gunman's weight. In the July 11 statement (Exhibit 17), Smith stated in response to a request that he estimate the assailant's weight that he "didn't really get that good a look at his body." P.H.T. 146-47. At trial, however, Smith rather precisely estimated that the robber weighed 160 pounds. T.T. 64. Defense counsel failed to point out this inconsistency, and again, there was no strategic reason for failing to do so. P.H.T. 148, 561.

As noted above, there was an air of inherent implausibility about Debra Smith's testimony, but the State, with good effect, emphasized in closing argument that the key to her testimony was her previous acquaintanceship with Cecil Johnson. T.T. 595-96. Accordingly, it should have been incumbent upon defense counsel to impeach this claim.

Ms. Smith testified that she had known Petitioner's brother, David, and that she had been to Petitioner's house with Petitioner and his brother. T.T. 286, 308. While there, she had also met Cecil Johnson, Sr. T.T. 310-13. Both David Johnson and his father were present at the trial, and Mr. Engle asked each of them if they knew the name Debra Smith, and if they recalled the specific incident when Debra Smith supposedly visited them in their home. Neither did. P.H.T. 317-21. Nonetheless, neither was called as a rebuttal witness on this point. There was no tactical reason for this omission.

In addition, David Johnson told defense counsel that it was he, and not Cecil, who had frequented a certain neighborhood market to play pinball, P.H.T. 320, although Debra Smith had testified that it was Cecil who often played pinball at this establishment (which is where she claimed to have met him). T.T. 285, 303-05. Again, there was no reason why defense counsel did not call David Johnson to testify to this. See also P.H.T. 564-65.

Defense counsel also had a prior inconsistent statement of Debra Smith concerning her alleged visit to the Johnson household on some previous occasion in the Jencks material that they received after her direct examination. In an interview with an investigator from the District Attorney's Office on July 15, 1980, Ms. Smith related that she had been out walking with a girlfriend and then stopped at the Johnson home to watch television. Petitioner and his father were there. P.H.T. 284-87. At trial, by contrast, Ms. Smith testified that Petitioner had picked her up in a car and driven her to his home (no mention of a girlfriend). T.T. 312. Again, there was no tactical reason for failing to bring this out before the jury. P.H.T. 290-91.

Finally, defense counsel could have used Ms. Smith's testimony from the suppression hearing on January 7 to impeach a critical part of her trial testimony. At trial, Ms. Smith testified that she was in the store between 9:30 and 9:50 p.m. T.T. 280. At the suppression hearing,

however, she had absolutely no idea when she was in the store; she could not even recall if it was after 8:00 p.m. or after 10:00 p.m. P.T. 143. Defense counsel simply failed to recall this testimony (and had also failed to obtain a transcript of the suppression hearing), and there was, therefore, absolutely no strategic reason for not impeaching her with this discrepancy. P.H.T. 280-83.

Concerning Victor Davis, Mr. Engle knew prior to trial that at least General Gray, and possibly General Shriver, had been present on the night of Davis's interrogation and "conversion." P.H.T. 118-19. Of course, he knew that the circumstances surrounding Davis's conversion might become extremely relevant during the trial. P.H.T. 119. Mr. Engle did not consider, however, that the individuals who were present might become material witnesses. P.H.T. 120. It also did not occur to Mr. Engle that he should have considered the possibility of moving for the prosecutors to recuse themselves in this situation. P.H.T. 126.

The trial transcript clearly reflects that General Gray's direct examination of Victor Davis as to the facts surrounding his conversion consists almost exclusively of Davis's one-syllable affirmations of General Gray's narration. T.T. 351-52, 366-67, 430-33. In addition, both General Gray and General Shriver gave a considerable amount of "testimony" during their closing arguments in connection with the Victor Davis episode. See T.T. 597-98, 662-63. The problem was exacerbated by the fact that, as later revealed, General Gray was the only person present when Davis made the initial change in his story. N.T. 60, 77.

As stated, General Gray's direct examination of Davis was leading to an extraordinary degree. Indeed, Petitioner contends that the examination was so testimonial on the part of General Gray that it deprived him (Petitioner) of his right to confront and cross-examine the witnesses against him, since he was unable to cross-examine General Gray. At the evidentiary hearing, Mr. Engle was asked why he didn't try to prevent this questioning, aside from the one or two objections

that he did make. P.H.T. 345-46. Mr. Engle testified that he did not realize how leading the questions really were at the time, and that there was no tactical reason for not attempting to ask the Court to intercede. Mr. Engle's co-counsel, Mr. Smith, actually testified that he failed to object to General Gray's examination because he was "wrapped up in the revelations"; this was the "first occasion to discern the events surrounding Victor Davis' conversion," and consequently, Mr. Smith was not "particularly noting leading questions being propounded to the . . . witness." P.H.T. 572.

Although much of Davis's trial testimony touched upon the fact that he had given previous statements both to the police and to the defense that were, in critical part, different from the incriminating testimony he gave at trial, defense counsel failed to show the jury what precisely Davis had said before. At the trial, for example, Mr. Engle cross-examined Davis as to whether he had told Public Defender investigators that when he and Petitioner returned from Franklin on the way to Cecil Johnson's home, they saw police cars in front of Bob Bell's Market. Davis testified that he could not remember saying that. T.T. 408-09. Although defense counsel could have easily called the investigator who took the statement to testify that Davis had in fact made it, he failed to do so. There was no reason why this was not done. P.H.T. 309.

As stated above, these are just some of the instances of ineffectiveness at trial. The entire discussion is set forth at pages 41-74 and 182-96 of Petitioner's Tennessee Supreme Court Brief.

One final point on the ineffective assistance issue deserves comment. Although Petitioner has limited the preceding discussion to the guilt phase of his trial, the Court should be apprised that, as reflected by the undisputed proof at the evidentiary hearing, there was essentially no preparation for the sentencing phase. P.H.T. 365, 519-20, 529, 534-35, 578. Moreover, defense counsel did not even make a closing argument on Petitioner's behalf; there was no final effort to persuade the jury to spare his life. As the State's own witness, Lionel Barrett, testified, there is no such thing as a

valid tactical reason for waiving closing argument at the conclusion of the penalty phase in a death penalty case. P.H.T. 798-99, 801, 826-27.

We respectfully submit that no objective observer could consider the record establishing the ineffective assistance that Petitioner received at trial in conjunction with the subsequently-discovered Brady material and conclude that Petitioner had anything approximating a fair trial. Having chose the "gladiatorial" approach to the trial, cf. Kyles, supra, 113 L.Ed.2d at 509, the State should now accept the consequences.

CONCLUSION

For all of these reasons, Petitioner submits that this Court should grant permission to appeal from the November 25, 1997, Judgment of the Court of Criminal Appeals.

Respectfully submitted,

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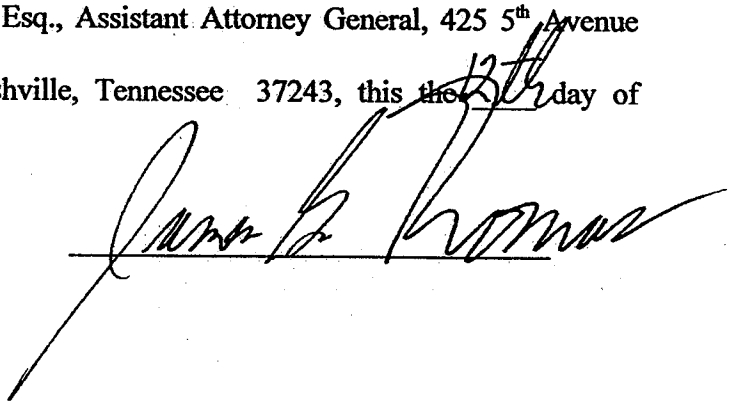
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by first-class mail, postage prepaid, on Victor S. Johnson, III, Esq., District Attorney General, 222 Second Avenue North, Nashville, TN 37201, and Glenn R. Pruden, Esq., Assistant Attorney General, 425 5th Avenue North, Cordell Hull Building, 2nd Floor, Nashville, Tennessee 37243, this the 12th day of February, 1998.



IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JULY SESSION 1997

STATE OF TENNESSEE

Appellee,

v.

CECIL C. JOHNSON, JR.

Appellant.

C.C.A. 01C01-9610-CR-00442

DAVIDSON COUNTY

Hon. J. Randall Wyatt, Jr., Judge

(Post-Conviction Relief)

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OPINION FILED: NOV 25 1997

AFFIRMED

WILLIAM M. BARKER, JUDGE

EXHIBIT A

OPINION

The appellant, Cecil C. Johnson, Jr., appeals the Davidson County Criminal Court's dismissal of his second post-conviction petition. On appeal, he contends that: (1) The trial court erred in finding that the evidence withheld by the prosecution at trial was not material under Brady v. Maryland; (2) The trial court erred in failing to set aside the appellant's convictions because the jury instructions at trial did not properly define the "reasonable doubt" standard; (3) The trial court erred in failing to set aside the appellant's two first-degree murder convictions because the jury instructions at trial improperly merged the "premeditation" and "deliberation" elements of first degree murder; and (4) The cumulative effect of the claims in the second post-conviction petition, when viewed together with the claims previously asserted in the first petition, calls for a new trial.

After a careful review of the record, we find no error and affirm the judgment of the trial court.

FACTUAL BACKGROUND

In 1981, the appellant was convicted by a jury of three counts of first degree murder, two counts of assault with intent to commit murder, and two counts of armed robbery. He was sentenced to death by the jury on each count of first degree murder and he received consecutive life sentences on the three remaining counts. Our supreme court affirmed his convictions and sentences in his direct appeal in 1982.[1] The facts surrounding his offenses were described in the direct appeal as follows:

> The crimes for which appellant stands convicted were committed on July 5, 1980. There is evidence that on that day, at about 9:45 p.m., appellant went to the convenience market on Twelfth Avenue South in Nashville, Tennessee, which was owned and operated by Bob Bell, Jr. Appellant pointed a gun at Mr. Bell and ordered him and Lewis Smith, who was in the store working on a boat motor at the request of Mr. Bell, to go behind the store counter. Mr Bell's twelve year old son, Bobbie Bell, was already behind the counter.

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[1]Following our supreme court's decision, the United States Supreme Court denied the appellant's petition for writ of certiorari. Johnson v. Tennessee, 459 U.S. 882 (1982).

While appellant and his captives were behind the counter, a woman and two children entered the market. Appellant concealed his gun and told his captives to act naturally and to wait on the customers. As soon as the customers left, appellant ordered Bobbie Bell to fill a bag with money from the cash register; Bobbie obeyed. Appellant then searched Smith and Bell, taking Smith's billfold.

At that moment, Charles House stepped into the market, and was ordered out by appellant; House obeyed. Almost immediately thereafter, appellant began shooting his captives. Bobbie Bell was shot first [and killed]. Smith threw himself on top of Bobbie to protect him from further harm, and was himself shot in the throat and hand. Appellant then walked toward Bob Bell, who was on the floor behind the counter, pointed the gun at Bell's head and pulled the trigger. Fortunately, Bell threw up his hands and the bullet hit him in the wrist, breaking it. Appellant ran from the market.

Bell got a shotgun from under the store counter, preparatory to chasing appellant. He heard two gunshots outside the market. He looked toward the front of the store and saw appellant standing beside an automobile parked at the entrance. Bell chased after appellant. As he passed the automobile, he saw that a cab driver and his passenger had been shot. The passenger was later identified as Charles House, the customer who had entered the market only moments before appellant began shooting his captives and who was acquainted with appellant. Both the cab driver, James E. Moore, and Mr. House died from a gunshot wound.

Appellant was arrested on July 6, 1980, as the result of information given police officers by Bell immediately after the robberies and murders. Subsequently, both Bell and Lewis Smith identified appellant as the perpetrator of the crimes and testified to that effect at the trial. Debra Ann Smith, the customer who came into the market with the children, also [testified and] identified appellant and placed him behind the store counter with Bell, Bell's son, and Lewis Smith.

In addition to this eyewitness testimony, appellant was tied into the crimes by the testimony of Victor Davis, who had spent most of July 5, 1980, in the company with the appellant. During the police investigation, Davis gave statements to the prosecution and to the defense that tended to provide an alibi for appellant. In essence, Davis said that he and appellant were together continuously from about 3:30 p.m. on July 5, 1980, until about midnight and that at no time did they go to Bell's market. However, four days before the trial, and after his arrest for carrying a deadly weapon and for public drunkenness, Davis gave a statement to the prosecution, which incriminated appellant. In the trial, Davis, who was promised immunity from prosecution in the Bell affair, testified in accord with his last statement.

According to Davis, he and appellant left Franklin, Tennessee about 9:25 p.m. and arrived in Nashville in the vicinity of Bell's Market shortly before 10:00 p.m. Appellant then left Davis' automobile, after stating that he was going to rob Bell and was going to try not to leave any witnesses.

Davis testified that he next saw appellant some five minutes later,

> near appellant's father's house which was only a block or a block and a half from Bell's Market. At that time, appellant was carrying a sack and a pistol. Appellant discarded the pistol as he got into Davis's automobile and said, "I didn't mean to shoot that boy." Davis retrieved the gun and sold it the next day for $40.00.
>
> Davis further testified that after he picked up appellant, they went directly to appellant's father's house, arriving a little after 10:00 p.m. There, in the presence of Mr. Johnson, Sr., appellant took money from the sack, counted approximately $200.00, and gave $40.00 of it to Davis.
>
> Appellant took the stand in his own behalf and denied being in the Bell Market on July 5, 1980. His testimony as to events of the day generally was in accord with Davis' testimony except for the crucial minutes before 10:00 p.m. when witnesses placed appellant in Bell's Market. Appellant testified that he never left the Davis automobile on the trip from Franklin to his father's house in Nashville, and that he arrived at his father's house shortly before 10:00 p.m. Mr. Johnson, Sr., fixed the time of arrival of appellant at a few minutes before 10:00 p.m. by testifying that appellant arrived as a television program ended and the 10:00 p.m. news came on. Appellant's girl friend, who talked with appellant on the telephone while appellant was at his father's home, [testified and] fixed the time as being ten to fifteen minutes before 10:00 p.m. Appellant further testified that the money counted in the presence of his father was money he had won gambling in a street game in Franklin, Tennessee.

See State v. Johnson, 632 S.W.2d 542, 544-45 (Tenn. 1982).

The appellant filed his first post-conviction petition in 1983 raising thirty two grounds for relief. The trial court denied his petition and he subsequently appealed to this Court. We affirmed the trial court's judgment in part, but reversed and remanded the case for resentencing on the first degree murder convictions.[2] In 1990, the supreme court reversed this Court's decision to remand for a new sentencing hearing, reinstated the death sentences, and affirmed the denial of relief on the appellant's other alleged grounds.[3]

The appellant filed his second post-conviction petition in February 1995 after

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[2] See Cecil C. Johnson v. State, No. 83-241-III (Tenn. Crim. App., at Nashville, Jan. 20, 1988), *per. app. granted* (Tenn. 1988).

[3] See Johnson v. State, 797 S.W.2d 578, 579-582 (Tenn. 1990). After our supreme court denied the appellant's petition for a rehearing on January 14, 1991, the appellant filed a petition for Writ of Habeas Corpus in the United States District Court for the Middle District of Tennessee. That petition is currently pending.

receiving information in 1992 pursuant to a request under the Tennessee Open Records Act.. In his petition, the appellant alleged that: (1) the prosecution suppressed exculpatory and material evidence at trial, warranting a new trial under Brady v. Maryland; (2) the jury instructions did not properly define the "reasonable doubt" standard; (3) the jury instructions improperly merged the "premeditation" and "deliberation" elements of first degree murder; and (4) the cumulative effect of the claims in the second post-conviction petition, when viewed together with the claims previously asserted in the first petition, called for a new trial. The appellant had the burden of proving those allegations by a preponderance of the evidence. See McBee v. State, 655 S.W.2d 191, 195 (Tenn. Crim. App. 1987).[4]

The trial court held an evidentiary hearing and found that: (1) the evidence withheld by the prosecution at trial was not material under Brady v. Maryland; (2) the jury instruction pertaining to "reasonable doubt" properly reflected the evidentiary certainty required by "due process" in the federal and state constitutions; (3) the jury instruction on "premeditation" and "deliberation" did not violate the appellant's constitutional rights; and (4) the past and current claims raised by the appellant did not create a cumulative effect warranting a new trial.

The judgment of the trial court is affirmed.

ANALYSIS

The appellant first contends that the evidence withheld by the prosecution at trial was material and warrants a new trial under Brady v. Maryland. This issue is without merit.

At the evidentiary hearing, the appellant introduced seven documents, marked as exhibits one through seven, to demonstrate a Brady violation. Exhibit one is a July 6, 1980 report by Detective Jerry Moore of the Nashville Metropolitan Police

[4]If the appellant had filed his petition after May 10, 1995, he would have been subject to the 1995 Post Conviction Procedure Act. Tenn. Code Ann. §§ 40-30-201 – 310 (1996 Supp.). Tennessee Code Annotated section 40-30-210 (f) (1996 Supp.) requires petitioners to prove their allegations of fact by clear and convincing evidence.

Department ("NMPD") in which Robert Bell stated that the assailant had no facial hair. Exhibits two through four concern separate police interviews of the eyewitness, Louis Smith, taken between July 5 and July 11, 1980, in which Smith indicated that he did not get a good look at the assailant.[5] Exhibit five is a pleading from the file of the District Attorney's office in the case of State v. Louis Edgar Smith, No. C6175-A. Exhibit six is a July 6, 1980 report by Detective William Robeck of the NMPD in which Louis Smith describes several customers who entered Bell's Market during the robbery. Additionally, that report contains information regarding Smith's ability to identify the assailant from a photographic line up. Lastly, exhibit seven is a medical report prepared by Doctor Robert Stein at the Baptist Hospital in which Doctor Stein stated that Robert Bell had a history of "some mental instability."

The appellant relies on the landmark case of Brady v. Maryland[6] to assert that the State's suppression of the evidence in exhibits one through seven violated due process. In Brady, the United States Supreme Court held that the prosecution has a constitutional duty to furnish the defendant with any exculpatory evidence concerning the defendant's guilt or innocence and possible punishment. See 373 U.S. at 86. To establish a violation under Brady, the defendant must prove by a preponderance of the evidence that the prosecution suppressed evidence at trial, the evidence was favorable to the defendant, and the evidence was material.[7]

In this case, the State concedes that the evidence contained in exhibits one through seven was exculpatory, favorable to the appellant, and improperly suppressed at trial. The issue on appeal is whether the evidence was material.

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[5]Exhibit two is a July 11, 1980 report by Officer J. Dobson of the NMPD in which Smith identifies the assailant as a young black man, but claims that he did not see the assailant's face. Exhibit three is a July 5, 1980 report by Detective William Flowers of the NMPD in which Detective Flowers wrote that the "Victim [Smith] advised that he could not describe suspect at this time but is willing to be reinterviewed at a later date." Exhibit four is a July 5, 1980 report by Officer John Patton of the NMPD indicating that Smith did not get a good look at the suspect.

[6]373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

[7]See United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); State v. Edgin, 902 S.W.2d 387, 389-390 (Tenn. 1995).

The United States Supreme Court established the standard for determining materiality in United States v. Bagley. Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." See 473 U.S. at 682. The existence of "reasonable probability" centers around whether the court has confidence in the verdict of the case despite non-disclosure of the exculpatory evidence. See id. at 678. The court must view the suppressed evidence collectively in the context of the entire record to determine whether the evidence is material under Bagley.[8]

In this case, we find that although the evidence in exhibits one through seven is exculpatory and favorable to the appellant, the evidence when viewed collectively is not material.

The essence of the State's case against the appellant was the testimony of three eyewitnesses and the appellant's friend, Victor Davis.[9] The jury heard the testimony of Robert Bell, who was the owner of the market where the robbery and murders took place. In his testimony, he described in detail how the assailant entered the store and held him, his son, and Louis Smith at gun point before robbing and shooting them. According to Bell, the assailant held them captive behind the check-out counter while a few customers entered and left the store. The assailant told Bell that he had nothing to lose and ordered Bell's son, Bobbie, Jr., to give him the money from the cash register. After filling a paper bag with money, the assailant robbed Bell and Louis Smith before shooting each of them and Bobbie, Jr. with a .38 caliber pistol.[10]

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[8]See Kyles v. Whitley, 514 U.S. ___, ___, 115 S.Ct. 1555, 1566, 131 L.Ed.2d 490, 505-08 (1995); United States v. Agurs, 427 U.S. 97, 112, 96 S.Ct. 2392, 2401, 49 L.Ed.2d 342 (1976). The Tennessee Supreme Court followed Bagley and Kyles in State v. Edgin, 902 S.W.2d 387, 390 (Tenn. 1995).

[9]The trial record containing the transcripts of witness testimony was not made a part of the record in this appeal. However, due to the procedural history and magnitude of this capital case, we will take judicial notice of the trial record.

[10]Bullet fragments recovered from the victims were identified by Patrick Garland, a senior firearms examiner of the Tennessee Bureau of Investigation. Garland testified that the fragments were consistent as having been fired from a .38 caliber revolver.

At trial, Bell identified the appellant as the perpetrator of the crimes. He emphasized that although he did not originally know the appellant's name, he clearly recognized him as a customer who had frequented the market in the months preceding the robbery.[11] Bell specifically remembered that the appellant had been in the market three nights before the robbery and had helped another customer, Michael Lawrence, purchase beer.[12]

After the robbery, Bell identified the appellant, on four separate occasions, as the perpetrator. First, when emergency crews began arriving at the crime scene, Bell pointed Michael Lawrence out of a crowd of bystanders as the man who had been in the store with the appellant three nights before the robbery. Bell testified he knew at that time that the appellant was the same man who had just robbed his store. Additionally, Bell positively identified the appellant as the assailant from a photographic line up, a physical line up, and in his testimony at trial. According to Bell, the appellant fit his description of the perpetrator being roughly 5' 10" and between 160 and 170 pounds. Bell stated that on the night of the robbery, the appellant was wearing a dark shirt, dark pants, and a dark checkered sport coat.

Bell's pre-trial description of the assailant was generally consistent with the description he provided at trial. However, in his July 6, 1980 statement given to Detective Jerry Moore, Bell indicated that the assailant had no facial hair. The appellant's mug shot taken one day after the robbery revealed that the appellant had a faint mustache and a goatee. Although the appellant never received a copy of Bell's statement to Detective Moore prior to trial, his defense counsel questioned Bell on the

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[11]Bell testified that he had seen the appellant in the store on numerous occasions. About four months before the robbery, the appellant stopped by the market and told Bell that he had just returned from Ohio. During a later visit, he told Bell that he had gotten a job with the nearby Vanderbilt Hospital. Bell testified that the appellant shopped in the store about three to four times a week and often wore his hospital work clothes.

[12]Bell testified that on July 2, 1980, the appellant had been shopping in the store and was about to leave when he let another man borrow some change to purchase beer. After the robbery, Bell recognized the other man, Michael Lawrence, standing amongst a crowd of onlookers in the market parking lot. Lawrence testified at trial that he had been in the store on July 2 when the appellant gave him some change for a beer.

issue of facial hair. Bell explained that he focused on the assailant's eyes during the robbery and did not notice anything distinctive about facial hair.

Another eyewitness, Louis Smith, testified for the State that he was in the store when the robbery and murders occurred.[13] His testimony corroborated the testimony of Robert Bell and he provided details concerning the time sequence of the robbery. According to Smith, the assailant spent almost fifteen minutes in the market during which time he held Bell, Bobbie, Jr., and Smith at gun point behind the counter. Smith remembered a few customers entering and leaving the store during the robbery; however, he stated that he did not notice them closely because he was focused on the assailant.[14] Smith further remembered Bobbie, Jr. crying as the assailant ordered him to take money from the cash register and place it into a paper bag. According to Smith, the assailant took the money and then began firing his gun. Smith testified that he dove on top of Bobbie, Jr. after he saw the assailant shoot him with the gun.

At trial, Smith identified the appellant as the perpetrator of the robbery and murders. He testified that the assailant was a black male about 5' 8" and 160 pounds. However, before trial, it is apparent that Smith could not positively identify the assailant. In interviews conducted by Officer Patton and Officer Dobson, Smith indicated that he did not get a good look at the suspect. Moreover, in a report by Detective Flowers, Smith advised that "he could not describe the suspect at this time but is willing to be reinterviewed at a later date." Smith testified at trial that he gave statements to police officers after the robbery; however, the prosecution never

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[13]During the appellant's trial, Louis Smith was under indictment on an unrelated charge of aggravated rape. See State v. Louis Edgar Smith, No. C6175-A. The appellant claims that a defense pleading in the Smith case was Brady evidence that the State should have disclosed in his case. We find that any pleading in the Smith case was public record and not in the exclusive control of the State. Thus, the State's failure to disclose the pleading to the appellant was not a Brady violation.

[14]The appellant's trial counsel cross-examined Smith on his ability to identify the various customers who entered the store during the robbery. Smith testified in accordance with his pre-trial statement to Detective William Robeck that he remembered a few customers entering and leaving the store during the robbery. However, he admitted that he could not accurately identify the customers except for the last customer, Charles House. Smith's statement to Robeck was never disclosed to the appellant at trial. However, we find that the jury heard the substance of Smith's statement when he was cross-examined by defense counsel.

disclosed those reports to the appellant.[15]

On July 6, 1980, one day after the robbery, Detective William Robeck presented a photographic line up to Smith. Robeck's report indicates that Smith picked photographs five and six as matching the assailant, with photograph number four being a picture of the appellant.[16] At trial, Smith testified that he picked two photographs that closely fit his description of the assailant; however, the prosecution never disclosed Detective Robeck's report to the appellant.

Additionally, before trial, Smith was asked to identify the perpetrator from a physical line up. Smith testified that he believed person number two, the appellant, to be the assailant. However, he stated that he could not make a positive identification because the appellant had his hair "up in curls" at the line up, unlike his hair style at the crime scene.

The State's third eyewitness was Debra Smith, a customer who entered the store during the robbery. Ms. Smith testified that she went to Bell's market on July 5, 1980 between 9:30 p.m. and 9:50 p.m. to pick up a cold beverage. When she arrived at the market, she noticed a man standing in a phone booth and a cab parked out front with the driver waiting in the front seat. Upon entering the store, she observed Robert Bell, Bobbie, Jr., Louis Smith, and the appellant standing behind the counter. She testified that she knew the appellant from having seen him on prior occasions in another convenient store. She further stated that she had visited in the appellant's home in the past and had gone to high school with the appellant's older brother.

According to Ms. Smith's testimony, she knew that a robbery was in progress when she payed for her beverage at the check-out counter. She stated that although

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[15]After Smith's direct examination, the State supplied defense counsel with a seventeen page transcript of a tape-recorded statement given by Smith on July 11, 1980. The recording contains statements by Smith concerning the events of the robbery and descriptions of the assailant. However, the recording contains no information regarding other statements that Smith gave to the police.

[16]At a pre-trial suppression hearing in 1981, Smith testified that he picked photographs four and six as matching the assailant. The appellant did not cross-examine Smith at trial regarding this discrepancy.

she did not see the appellant's gun, she noticed Bobbie, Jr. crying as he handed her the change from her purchase. She further testified that she immediately left the store and returned to her boyfriend's house without calling the police. Besides telling her sister about the robbery, she did not communicate her knowledge of the incident until police contacted her on July 15, 1980. She explained at trial that she kept quiet because she knew the appellant and she did not want to get involved.

During cross-examination, Ms. Smith expressed difficulty in identifying Louis Smith as the fourth man in the market. She admitted that she originally thought that Smith was the appellant's accomplice in the robbery. She stated that she remembered seeing Smith behind the counter with the appellant; however, she identified Smith as a black male. The appellant's counsel reminded her of her earlier testimony during direct examination in which she stated that Smith was Caucasian.

One of the State's key witnesses at trial was Victor Davis, a close friend of the appellant. Davis was originally listed as an alibi witness for the defense. However, at trial, Davis testified for the prosecution concerning his activities with the appellant leading up to the events at Bell's Market. Davis testified that he and the appellant had gone to Franklin, Tennessee during the afternoon on July 5, 1980. While in Franklin, the two men picked up chicken at a local KFC and spent time gambling at a hangout near the Franklin high school. Davis testified that they went back to the KFC around 9:00 p.m. that evening, but the restaurant was already closed. While sitting in the KFC parking lot, the appellant told Davis that he would have robbed the restaurant if it had been open. Davis stated that he noticed the appellant carrying a dark .38 caliber pistol during their time in Franklin. He also remembered that the appellant was wearing a black shirt and denim jeans.

Davis testified that he was having car trouble on July 5, but that he and the appellant returned to Nashville before 10:00 p.m. Davis estimated that the return trip from Franklin took them about forty-five minutes. When the two arrived in Nashville, Davis dropped the appellant off a few blocks from Bell's Market. Davis testified that

as the appellant was exiting the car, he told Davis that "he was going to rob Bob Bell" and "was going to try not to leave no witnesses."

Davis testified that he did not see the appellant again until about five minutes after the appellant left his car. Davis explained that he observed the appellant walking in the direction of his home with a paper bag in one hand and a pistol in the other. Davis stopped his car and picked up the pistol which the appellant had thrown on the ground. The two men then proceeded to the appellant's father's house, arriving shortly after 10:00 p.m.[17] Davis testified that, during their visit, the appellant counted about two hundred ($200) dollars from the paper bag and gave forty dollars ($40) of the money to Davis. While handling the money, the appellant told his father that he had been gambling in Franklin, Tennessee. The appellant then called his girlfriend on the telephone before leaving with Davis to pick up some beer. Davis testified that the appellant made only one comment that evening concerning his involvement in the robbery. As Davis and the appellant were leaving his father's home, the appellant told Davis that "he didn't mean to shoot that boy."

During cross-examination, the appellant's counsel attempted to impeach Davis' testimony by emphasizing that Davis was originally a witness for the defense.[18] Davis admitted that he had never disclosed the incriminating facts against the appellant until after his arrest on the Saturday before trial.[19] He explained that he initially withheld the information because he did not want to get involved in the case against the appellant.[20] He also expressed fear that he would be considered an accomplice to the

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[17]Davis was certain of this time frame because he remembered seeing the ten o'clock news program on T.V. at the appellant's father's house.

[18]In pre-trial statements given to police investigators and the public defender's office, Davis originally explained that he and the appellant had driven from Franklin, Tennessee straight to the appellant's father's house in Nashville. The defense planned to use Davis to establish an alibi for the appellant.

[19]On the Saturday before the appellant's trial, Davis was arrested by police for public drunkenness and as a suspect in an unrelated robbery. Information concerning the outcome of that arrest was not made a part of the record in this appeal.

[20]According to Davis, he and the appellant had agreed before trial to keep their stories consistent regarding the events on July 5, 1980.

crimes at Bell's Market. Thus, he testified that he did not come forward with complete information about the case until the State promised him immunity for his testimony.

The appellant argues that he could have impeached both Robert Bell and Louis Smith if the prosecution had properly disclosed the exculpatory evidence contained in exhibits one through seven.[21] We agree that the suppressed evidence would have strengthened the appellant's ability to cross-examine those two eyewitnesses. However, after considering that evidence collectively with the record, we have complete confidence in the verdict.

The record reflects that three eyewitnesses separately identified the appellant as the perpetrator of the crimes. Specifically, Robert Bell and Debra Smith both recognized the appellant from past experiences and knew without a doubt that he was the assailant in Bell's Market. Although Bell's and Louis Smith's pre-trial descriptions of the assailant were flawed, their testimony at trial was strengthened by Victor Davis, who placed the appellant at Bell's Market during the time of the robbery. We find that the appellant had full opportunity to impeach the testimony of Davis without disclosure of the Brady evidence. However, Davis' testimony concerning the events before and after the robbery was uncontroverted.

In light of Davis' testimony and the testimony of the corroborating eyewitnesses, we have confidence in the verdict even though the prosecution withheld exculpatory evidence. We, therefore, find no reasonable probability that the results of the case would have been different if the State had disclosed that evidence to the appellant.

II.

The appellant next contends that the trial court erred in failing to set aside his

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[21]The appellant also argues that he could have impeached the testimony of Debra Smith if the State had properly disclosed the July 6, 1980 report by Detective Robeck. In that report, Louis Smith provided vague descriptions of the customers who entered Bell's Market during the robbery. The appellant contends that he could have used Smith's statements to challenge Ms. Smith's testimony concerning her presence in the market on that evening. The record, however, reflects that Smith never testified that Ms. Smith was a customer in the market during the robbery. Moreover, Smith admitted at trial that he could not clearly identify any customer except Charles House. Thus, we find that Smith's statements to Detective Robeck would have provided the appellant with little assistance in the cross-examination of Debra Smith.

convictions because the jury instructions at trial did not properly define the "reasonable doubt" standard. He specifically argues that the phrases "moral certainty" and "let the mind rest easily" in the instructions allowed the jury to convict him on a lower standard of proof in violation of the decisions in Cage v. Louisiana[22] and Victor v. Nebraska.[23] This issue is without merit.

In this case, the trial judge instructed the jury on reasonable doubt as follows:

> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of guilt. Reasonable doubt does not mean a captious, possible, or imaginary doubt. Absolute certainty of guilty is not demanded by the law to convict of any criminal charge, but moral certainty is required as to every proposition of proof requisite to constitute the offense.

The appellant concedes that this Court has previously upheld the constitutionality of similar jury instructions.[24] However, he requests this Court to re-examine the "reasonable doubt" issue in light of Rickman v. Dutton.[25]

We initially find that the appellant's claim is time-barred by the three year statute of limitations in Tennessee Code Annotated section 40-30-102 (repealed 1995).[26] The appellant first raised the "reasonable doubt" issue in his second post-conviction petition filed in February 1995, under the pre-1995 Post Conviction Procedure Act. Accordingly, almost five years elapsed between the United States Supreme Court's ruling in Cage and the appellant's second post-conviction petition.

We find that since the Supreme Court's decision in Cage, there has been no

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[22]498 U.S. 39, 41, 111 S.Ct. 328, 329-30, 112 L.Ed. 2d 339 (1990).

[23]511 U.S. 1, __, 114 S.Ct. 1239, 1247-48, 127 L.Ed. 2d 583 (1994).

[24]See e.g. PettyJohn v. State, 885 S.W.2d 384 (Tenn. Crim. App. 1994), *per app. denied* (Tenn. 1994).

[25]864 F.Supp. 686 (M.D. Tenn. 1994), appeal docketed, No. 94-6232 (6th Cir. Oct. 3, 1994).

[26]In its brief, the State argues that the appellant has waived any challenge to the definition of "reasonable doubt" in the jury instructions by failing to raise the issue at trial, on direct appeal, or in his first post-conviction petition. We find, however, that the appellant's first opportunity to raise this particular issue was not until the United States Supreme Court decided Cage on November 13, 1990. Therefore, we find no waiver on this issue. However, although not raised by either party on appeal, we find it appropriate to determine whether the issue is time barred by the three-year statute of limitations in Tennessee Code Annotated section 40-30-102 (repealed 1995).

subsequent constitutional rule on "reasonable doubt" jury instructions to warrant an exception to the three-year statute of limitations. See Burford v. State, 845 S.W.2d 204, 208-210 (Tenn. 1992). The appellant's reliance on Victor v. Nebraska and Rickman v. Dutton does not affect our decision.

In Victor, the United States Supreme Court readdressed the use of the "moral certainty" phrase in jury instructions. The Court reasoned that the phrase "moral certainty" may have lost its historical meaning and that modern juries might interpret "moral certainty" to mean something less than the high level of determination constitutionally required in criminal cases. However, the Court in Victor did not espouse a new constitutional rule concerning the use of "moral certainty" in jury instructions. Instead, the Court merely expressed criticism regarding the continued use of the "moral certainty" phrase.

The appellant also relies on Rickman v. Dutton, a decision from the United States District Court for the Middle District of Tennessee. In Rickman, the district court held that a jury instruction containing the phrases "moral certainty" and "mind rest easily" suggested to a reasonable juror a lower burden of proof than is required by constitution. See 864 F.Supp. at 709. Although we acknowledge that the district court's ruling in Rickman pertained to a jury instruction similar to the one in the appellant's case, we are not bound by decisions of the district court.[27]

Moreover, this Court and the Tennessee Supreme court have specifically addressed and upheld the constitutionality of jury instructions similar to the one in this case.[28] We, therefore, conclude that, even if the appellant's claim were not time barred, his contention is without merit. The reasonable doubt instruction given at the

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[27] See State v. Jones, 598 S.W.2d 209 (Tenn. 1980); Maurice Booker v. State, No. 01C01-9606-CC-00271 (Tenn. Crim. App. at Nashville, June 30, 1997).

[28] See State v. Nichols, 877 S.W.2d 722 (Tenn. 1994); PettyJohn v. State, 885 S.W.2d 364, 365-66 (Tenn. Crim. App. 1994), *per app. denied* (Tenn. 1994); Maurice Booker v. State, No. 01C01-9606-CC-00271 (Tenn. Crim. App. at Nashville, June 30, 1997). Additionally, the United States Sixth Circuit Court of Appeals has recently upheld the constitutionality of reasonable doubt instructions containing the phrases "moral certainty" and "mind rest easily." See Austin v. Bell, No. 86-00293 (6th Cir. October 2, 1997).

appellant's trial properly reflected the standard of proof required by the state and federal constitutions.

III.

The appellant next contends that the trial court erred in failing to set aside his two convictions of first degree murder because the jury instructions at trial improperly merged the "premeditation" and "deliberation" elements of first degree murder. He argues that the merger of those elements in the jury charge violated his constitutional rights as set forth in State v. Brown, 836 S.W.2d 530 (Tenn. 1992).

This issue is without merit.

The jury instruction on the elements of first degree murder included the following in pertinent part:

> (4) that the killing was premeditated. This means that the intent to kill must have been formed previous to the act itself. Such intent to design to kill may be conceived and deliberately formed in an instant. It is not necessary that the purpose of kill[ing] pre-exist in the mind of the accused for any definite period of time. It is sufficient that it preceded the act, however, short the interval.

The appellant contends that the rule in State v. Brown should apply retroactively to the jury instruction given at his trial in 1982.

In Brown, the Tennessee Supreme Court held that courts should abandon the use of jury instructions which dictate that "premeditation can be formed in an instant." See id. at 543. The Court reasoned that such an instruction on premeditation might cause juror confusion since the jury must also be instructed on deliberation. As the Court acknowledged, the element of deliberation cannot be formed in an instant, but requires some interval of time.

We agree with the appellant that if applied retroactively, the rule from Brown would entitle him to relief on his first-degree murder instruction. However, this Court has previously held that Brown did not create a new constitutional ground for relief in

post-conviction proceedings.[29] To the contrary, in previous cases, this Court has ruled that "the mere fact that such an instruction has been abandoned as confusing does not necessarily mean that its previous use equated with a due process violation rendering a first degree murder conviction void."[30] The rule in Brown is to be applied prospectively, not retroactively.

We, therefore, conclude that the appellant is not entitled to relief based upon his first-degree murder instruction.

IV.

The appellant next contends that the cumulative effect of the claims in his second post-conviction petition, when viewed collectively with the claims asserted in his first petition, calls for a new trial. This issue is without merit.

In the appellant's first post-conviction petition, he raised thirty two grounds for relief. The trial court, as affirmed by our supreme court, denied relief on all grounds. In his second petition, the appellant raised four new grounds for post-conviction relief. The trial court determined that the issues raised in that petition were without merit; and on appeal, we are affirming the judgment of the trial court. Therefore, we find no cumulative effect or error sufficient to warrant a new trial.

Based on the foregoing, the judgment of the trial court is affirmed. Unless otherwise stayed by a court of competent jurisdiction, the appellant's sentences of death shall be carried out on March 5, 1998.

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[29] See Phillip Rex Spight v. State, No. 02-C-01-9501-CR-00034 (Tenn. Crim. App., at Jackson, November 15, 1995), *per app. denied* (Tenn. 1996). Relief requested in a post-conviction petition may be granted only when the petitioner's sentence or conviction is void or voidable because it contravenes a state or federal constitutional right. See Tenn. Code Ann. § 40-30-105 (repealed 1995); see also State v. Neal, 810 S.W.2d 131 (Tenn. 1991).

[30] See Phillip Rex Spight v. State, No. 02-C-01-9502-CR-00034, slip op. at 7 (quoting John Wayne Slate v. State, No. 03-C-01-CR-00014 (Tenn. Crim. App., at Knoxville, April 27, 1994), *per. app. denied*, concurring in results only (Tenn. 1994)); State v. Willie Bacon, Jr., No. 1164, (Tenn. Crim. App., at Knoxville, Aug. 4, 1992); *per. app. denied* (Tenn. 1992).

William M. Barker

WILLIAM M. BARKER, JUDGE

CONCUR:

JOHN H. PEAY, JUDGE

(not participating)

JERRY L. SMITH, JUDGE

MAURICE BOOKER, Appellant,
vs.
STATE OF TENNESSEE, Appellee.

C.C.A. No. 01C01-9606-CC-00271
COURT OF CRIMINAL APPEALS OF TENNESSEE, AT NASHVILLE
1997 Tenn. Crim. App. LEXIS 606
June 30, 1997, FILED

Williamson County. Honorable Donald P. Harris, Judge, (Post-Conviction).

COUNSEL

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For APPELLEE: Charles W. Burson, Attorney General & Reporter. Lisa A. Naylor, Assistant Attorney General, Criminal Justice Division, Nashville, TN. Joseph D. Baugh, Jr., District Attorney General. Derek K. Smith, Assistant District Attorney General, Franklin, TN.

JUDGES

PAUL G. SUMMERS, Judge, CONCUR: DAVID G. HAYES, Judge, JERRY L. SMITH, Judge
AUTHOR: SUMMERS

OPINION

The appellant, Maurice Booker, was convicted of the sale of cocaine and conspiracy to sell or deliver cocaine. He received an effective sentence of twenty years. The appellant filed a petition for post-conviction relief alleging that the reasonable doubt instruction used at his trial was unconstitutional. After a hearing, his petition was denied. He appeals challenging the constitutionality of the reasonable doubt jury instruction. Upon review, we affirm.

The appellant contends that the trial court's reasonable doubt jury instruction violated his constitutional rights. The jury instruction at issue reads as follows:

> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of guilt. Reasonable doubt does not mean a captious, possible or imaginary doubt. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required, and this certainty is required as to every proposition of proof requisite to constitute the offense.

The appellant alleges that this instruction unconstitutionally lowers the state's burden of proving every element of the offense beyond a reasonable doubt. Specifically, he avers that the language "let the mind rest easily" and "moral certainty" taken together suggest to a reasonable juror a lower burden of proof than what is constitutionally required. In support of his argument, the appellant cites **Rickman v. Dutton,** 864 F. Supp. 686 (M.D. Tenn. 1994). In **Rickman,** the U.S. District Court for the Middle District of Tennessee found a similar reasonable doubt instruction unconstitutional.

The Court first points out that it is not bound by rulings of the lower federal courts or those of sister states. **State v. Jones,** 598 S.W.2d 209 (Tenn. 1980). Moreover, this Court and the

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Tennessee Supreme Court have specifically addressed and upheld the constitutionality of very similar reasonable doubt instructions. **State v. Nichols,** 877, S.W.2d 722 (Tenn. 1994); **Pettyjohn v. State,** 885 S.W.2d 364, 365 (Tenn. Crim. App. 1994). We find that the reasonable doubt instruction given at the appellant's trial properly reflects the evidentiary certainty required by the state and federal constitutions. The instruction clearly conveyed the jury's responsibility to decide the verdict based on the facts and the law. The appellant's contention is without merit. The judgment dismissing his petition is affirmed.

PAUL G. SUMMERS, Judge

CONCUR:

DAVID G. HAYES, Judge

JERRY L. SMITH, Judge

DISPOSITION

AFFIRMED.