

Tennessee Judicial Nominating Commission

*Application for Nomination to Judicial Office*

James Edward Thomas

**Tennessee Judicial Nominating Commission**  
***Application for Nomination to Judicial Office***

*Rev. 14 September 2011*

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**INTRODUCTION**

Tennessee Code Annotated section 17-4-101 charges the Judicial Nominating Commission with assisting the Governor and the People of Tennessee in finding and appointing the best qualified candidates for judicial offices in this State. Please consider the Commission's responsibility in answering the questions in this application questionnaire. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Commission needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in word processing format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website <http://www.tncourts.gov>). The Commission requests that applicants obtain the word processing form and respond directly on the form. Please respond in the box provided below each question. (The box will expand as you type in the word processing document.) Please read the separate instruction sheet prior to completing this document. Please submit the completed form to the Administrative Office of the Courts in paper format (with ink signature) *and* electronic format (either as an image or a word processing file and with electronic or scanned signature). Please submit seventeen (17) paper copies to the Administrative Office of the Courts. Please e-mail a digital copy to [debra.hayes@tncourts.gov](mailto:debra.hayes@tncourts.gov)

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

**PROFESSIONAL BACKGROUND AND WORK EXPERIENCE**

1. State your present employment.

Criminal Defense Attorney,  
Law Office of James E Thomas, 40 S. Main Street, Suite 1540, Memphis, TN 38103

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

2001 B.P.R. # 021721

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Tennessee, B.P.R. # 021721

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any State? If so, explain. (This applies even if the denial was temporary).

No.

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

Law Office of James Thomas, 2003-present  
Massey, McClusky and Robbins, 2002-2003  
Law Office of Robert Little, 2001-2002  
Law Clerk- Chancellor Walter L. Evans-2000-2001

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

N/A

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

99% Criminal defense  
1% General civil matters

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Commission needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Commission. Please provide detailed information that will allow the Commission to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

Over the past 10 years I have amassed considerable experience as both a trial and appellate attorney. I have handled criminal and civil cases in both state and federal court. I have been defense counsel in hundreds of criminal cases ranging from disorderly conduct to first degree murder. I have been counsel in 37 homicide cases, at the trial or appellate level, eight of these were capital cases. None of my clients are on death row.

Additionally, I have been counsel of record, or have written briefs, in over 100 appeals before the Tennessee appellate courts and 23 appeals before the Sixth and Eighth Circuit Courts of Appeal. I also drafted a petition for writ of certiorari to the United States Supreme Court in *State of Tennessee v. Christopher Hatcher*.

I served as Staff Judge Advocate General, 1<sup>st</sup> Regiment, Tennessee State Guard, from 2004-2008. Prior to being licensed as an attorney I served as a judicial law clerk for Chancellor Walter L. Evans from 2000-2001. I have also handled cases before various professional boards such and the Board of Dentistry, as well as other administrative bodies.

9. Separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

I have the following published opinions, *State of Tennessee v. Jeremy Garrett*, 331 S.W.3d 392 (Tenn. 2011); and *United States of America v. Marvin Goodman*, 519 F.3d 310 (6<sup>th</sup> Cir. 2008).

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

N/A

11. Describe generally any experience you have of serving in a fiduciary capacity such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

I have served as Guardian Ad Litem in approximately 5 cases. I have also served as Receiver for the Absentee Estate of Jacob Christian Sletvold. All of these cases were in Shelby County, Chancery Court.

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Commission.

Reserve Deputy Sheriff, Fayette County, Tennessee 2010-2011

13. List all prior occasions on which you have submitted an application for judgeship to the Judicial Nominating Commission or any predecessor commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

N/A

### EDUCATION

14. List each college, law school, and other graduate school which you have attended,

including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

**University of Memphis, Cecil C. Humphreys School of Law**

Memphis, TN

Juris Doctor, May 2001

Class Rank: 54<sup>th</sup> of a starting class of 180

\* Associate Editor, *Tennessee Journal of Practice and Procedure*

\* Published Case Summary Spring 2001 edition of *Tennessee Journal of Practice and Procedure*

**Troy State University**

Troy, AL

33 Graduate hours towards Master of Science, Criminal Justice 2001-2005

GPA: 3.7/4.0

**University of California, San Diego**

San Diego, CA

Bachelor of Arts, Political Science, June 1997

GPA: 3.44/4.0

Honors: Provost's List Winter and Spring Quarters 1997

**Southwestern College**

Chula Vista, CA

Associates of Arts, Political Science, with Honors December 1994

GPA: 3.85/4.0

**PERSONAL INFORMATION**

15. State your age and date of birth.

South Carolina, 09/27/1965

16. How long have you lived continuously in the State of Tennessee?

13 years

17. How long have you lived continuously in the county where you are now living?

13 years

18. State the county in which you are registered to vote.

Shelby County, Tennessee

19. Describe your military Service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

**Federal Military Service**

1984 –1996 U.S. Navy, Naval Reserve and U.S. Army-Honorably Discharged

1983- 1988 USN- USS RANGER CV-61

1988-1990 USNR-Inactive Ready Reserve

1990-1991 USNR-USS Copeland FFG 25

1992-1993 USNR-Special Boat Unit 13

1993-1993 US Army

1993-1996 USNR Inactive Ready Reserve

**Honors and Awards**-Good Conduct Medal, Armed Forces Expeditionary Medal, National Defense Medal, Meritorious Unit Citation, Letter of Citation, Sea Service Ribbon, Battle "E" Award.

**State Military Service**

2004-present Tennessee State Guard- NSA Memphis

2008-present Lieutenant Colonel-Executive Officer, 1<sup>st</sup> Regiment, TNSG

2004-2008 Staff Judge Advocate, 1<sup>st</sup> Regiment, TNSG

**Honors and Awards**- Meritorious Service Ribbon (two awards), Tennessee Defense Service Ribbon, Aid to Civil Authority Ribbon (two awards), Operation Task Force Volunteer Ribbon, Military Readiness Ribbon, Unit Citation (two awards), Community Service Ribbon.

20. Have you ever pled guilty or been convicted or are you now on diversion for violation of any law, regulation or ordinance? Give date, court, charge and disposition.

No.

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No.

22. If you have been disciplined or cited for breach of ethics or unprofessional conduct by any court, administrative agency, bar association, disciplinary committee, or other professional group, give details.

N/A

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

Yes. Suntrust Bank- 165.00 in August 2011. Paid. Collection was for payroll services. Bank failed to simply draft outstanding fees and sent matter to collection without any communication.

Mayor Funeral Home-\$750.00. Dispute over final amount of my brothers funeral bill. \$6,000.00 already paid.

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

Yes, filed Chapter 7 in San Diego, California, 1991, discharged 1991.

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

No.



26. List all organizations other than professional associations to which you have belonged within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices which you have held in such organizations.

National Rifle Association  
National Association of Criminal Defense Attorneys  
State Guard Association of The United States  
USS Ranger (CV-61) Reunion Association

27. Have you ever belonged to any organization, association, club or society which limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.
- If so, list such organizations and describe the basis of the membership limitation.
  - If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

No.

**ACHIEVEMENTS**

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices which you have held in such groups. List memberships and responsibilities on any committee of professional associations which you consider significant.

American Bar Association 2001-2005

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school which are directly related to professional accomplishments.

N/A

30. List the citations of any legal articles or books you have published.

Published Case Summary Spring 2001 edition of *Tennessee Journal of Practice and Procedure*

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

Trial support-voir dire in death penalty cases- Tunica Mississippi, December 2009.

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

N/A

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No.

34. Attach to this questionnaire at least two examples of legal articles, books, briefs, or other legal writings which reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

Both samples are 100% of my work.

### ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? (150 words or less)

Simply put, I believe that I would be a very good appellate court judge. I have had the opportunity to handle cases from their inception through the appellate process, as well as collateral attacks after direct appeal rights have been exhausted. I believe my trial experience, combined with my appellate experience, gives me a unique insight into how cases are prosecuted and defended leading to a better understanding of the review process at the appellate level. I relish the opportunity to be in a position to apply the law correctly rather than advocating one particular side. Additionally, I believe it is another instance in which I can effectively serve my state and country.

36. State any achievements or activities in which you have been involved which demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. (150 words or less)

The vast majority of my clients have been court appointed. I have accepted representation of these indigent individuals without hesitation and regardless of the crime charged. This has not been easy for many reasons, be it the rate of compensation or the serious nature of the charges. Nevertheless, I have represented my clients with the vigorous advocacy the system requires and justice demands.

I have also represented numerous individuals *pro bono*. In one specific case I undertook representation of an individual in Federal Court and successfully litigated a motion to suppress an illegal search and seizure. The government filed a notice to appeal the Court's ruling and on the day the government's brief was due they instead filed a motion to dismiss the indictment. This matter required over a hundred hours of work, I was not compensated, and it was one of my proudest achievements as an attorney.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. *(150 words or less)*)

The judgeship I seek is one of four judges of the Western Section of the Tennessee Court of Criminal Appeals, Jackson, Tennessee. The Court reviews appeals of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure originating in the trial courts within the western section. These matters include cases on direct appeal from initial convictions, as well as post-conviction proceedings.

I would bring to the Court experience not only as a trial and appellate attorney, but also my life experiences as a sailor, a soldier, and a deputy sheriff. I am respected by the judges before whom I have appeared and my colleagues in the defense bar and prosecution. I submit my life experiences give me a unique insight and the appropriate temperament to serve as an appellate judge.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? *(250 words or less)*

I have volunteered my time to several organizations. The Tennessee State Guard is an all volunteer branch of the Tennessee Military Department. I have dedicated many hours to the service of the State of Tennessee in this capacity. Additionally, I have assisted many veterans and their families with legal assistance during extended deployments.

I have also participated annually in training young men and women associated with the Naval Sea Cadet program during the annual training each year at the National Guard Training facility in Milan Tennessee. I intend to continue this if I am selected to serve on the Court.

I have also volunteered my time over the last nine months as a Reserve Deputy Sheriff in

Fayette County, Tennessee. This is something that I would not be able to continue if I were appointed to the Court. This position has allowed me to view the criminal justice system from another prospective..

If appointed I will attempt to find additional ways to be involved in various community activities in an effort to motivate young people towards seeking higher education and self betterment.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Commission in evaluating and understanding your candidacy for this judicial position. *(250 words or less)*

My road to becoming an attorney is a bit different than that of most I suspect. During my teenage years I did not like school. I was in juvenile court for truancy and placed on probation until I was 16 years old. If not for the guiding hand of my high school baseball coach, who is to say where I might have landed. Even with his help I still only managed to graduate from high school ranked 171 out of 173.

My path was also impacted greatly by my military service. The military help me gain the confidence required to achieve my education and my success in the courtroom. In the military environment I was exposed to different cultures and ideas that were not present in my hometown of Georgetown, South Carolina. I was able to travel the world and see never before imagined people and places.

I consider the privilege to serve my country a gift that I can never repay. I believe my experiences growing up and the values learned in the military have given me a sense of compassion towards others. My life experiences will remind me that when a judge rules on a case, writes an opinion, or issues an order, there are real people affected by such decisions. Lawsuits involve people, not just words on a page. It is also important to remember that the lawyers who appear before you are people as well and they should be treated with the respect deserved.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. *(250 words or less)*

The answer is, of course, yes. It is not the role of a judge to legislate or manipulate the law to affect the outcome of a particular case. This is so even if one has a personal belief that a particular statute, or case holding, is not well thought out or completely contrary to what one might personally believe is just. Everyday lawyers around the country are faced with instances where application of the law is in some way unfair, either to your client or your opponent.

Years ago I had a case in which an illegal sentence was proposed in a plea agreement. The proposal was beneficial to my client. The agreement called for the trial court to sentence my client to concurrent sentences when consecutive sentences were required by law. In this instance I had a duty to point out to the prosecution, the sentencing court and my client that such a sentence was contrary to the law and would not be honored by the Department of Corrections. It was not an easy task for obvious reasons. My client did not believe I had his best interest at heart, but the duty to the rule of law often takes precedent over a particular individual. That is not to say that if one has a legitimate interpretation of a specific point it should not be advocated. But nevertheless, while I disagreed with the law I was duty bound to point it out to the court.

**REFERENCES**

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Commission or someone on its behalf may contact these persons regarding your application.

A. David Kustoff, 22 N. Front Street, Suite 660, Memphis, TN 38103, (901) 527-0255
B. Jim Strickland, 22 N. Front Street, Suite 660, Memphis, TN 38103, (901) 527-0255
C. Michael McCusker, 201 Poplar Ave. Suite 301, Memphis TN 38103 (901) 378-9424
D. Ray Garcia, Inspector, Fayette County Sheriff's Office, 705 Justice Dr., P.O. Box 219, Somerville, TN, 38068 (901) 466-3933
E. Thomas F. Whitaker, Chief Deputy, Fayette County Sheriff's Office, 705 Justice Dr., P.O. Box 219, Somerville, TN, 38068 (901) 466-3916

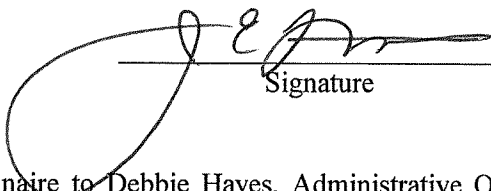
**AFFIRMATION CONCERNING APPLICATION**

Read, and if you agree to the provisions, sign the following:

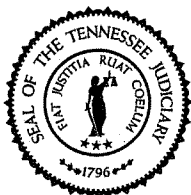
I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the **Court of Criminal Appeals** of Tennessee, and if appointed by the Governor, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended questionnaire with the Administrative Office of the Courts for distribution to the Commission members.

I understand that the information provided in this questionnaire shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Commission may publicize the names of persons who apply for nomination and the names of those persons the Commission nominates to the Governor for the judicial vacancy in question.

Dated: 10/3 \_\_\_\_\_, 20 11 .

  
\_\_\_\_\_  
Signature

When completed, return this questionnaire to Debbie Hayes, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.



**TENNESSEE JUDICIAL NOMINATING COMMISSION**  
511 UNION STREET, SUITE 600  
NASHVILLE CITY CENTER  
NASHVILLE, TN 37219

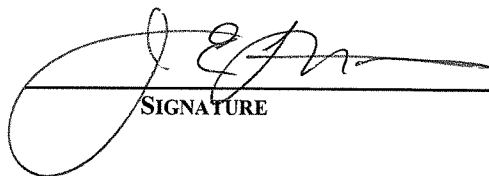
**TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY**

**WAIVER OF CONFIDENTIALITY**

I HEREBY WAIVE THE PRIVILEGE OF CONFIDENTIALITY WITH RESPECT TO ANY INFORMATION WHICH CONCERNS ME, INCLUDING ANY COMPLAINTS ERASED BY LAW, AND IS KNOWN TO, RECORDED WITH, ON FILE WITH THE BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESSEE, AND I HEREBY AUTHORIZE A REPRESENTATIVE OF THE TENNESSEE JUDICIAL NOMINATING COMMISSION TO REQUEST AND RECEIVE ANY SUCH INFORMATION.

JAMES E. THOMAS

TYPE OR PRINTED NAME

  
SIGNATURE

10/3/2011

DATE

021721





No. 04-10707

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**IN THE  
SUPREME COURT OF THE UNITED STATES**

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**CHRISTOPHER HATCHER**  
*Petitioner-Appellant,*

v.

**STATE OF TENNESSEE**  
*Respondent-Appellee*

---

**ON PETITION FOR WRIT OF CERTIORARI  
FROM THE COURT OF CRIMINAL APPEALS  
OF TENNESSEE**

---

**PETITION FOR WRIT OF CERTIORARI**

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ROBERT LITTLE  
515 VALLEY STREET  
SUITE 170  
MAPLEWOOD, NJ 07040

JAMES E. THOMAS  
ONE COMMERCE SQUARE, SUITE 1550  
MEMPHIS, TN 38103  
901 544-7007

Counsel for Petitioner  
Pursuant to Indigent Appointment

## QUESTION PRESENTED

Is a sufficiency of the evidence standard determinative of the materiality prong of a *Brady* violation in Tennessee where the trial court erred in not granting the Defendant a new trial when the state failed to disclose exculpatory evidence that was in its possession in violation of *Brady v. Maryland*?

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## **OPINIONS BELOW**

The opinion of the Court of Criminal Appeals of Tennessee is not reported. A copy of the Opinion is included in Appendix A. The judgment and commitment of the Criminal Court of Tennessee for the 30th Judicial District is unreported and included in Appendix B.

## **JURISDICTION**

Appellant was indicted and convicted under Tennessee law. Appellant raises a question relating to his federal Constitutional right to due process, providing for Supreme Court jurisdiction.

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

This petition is founded primarily on *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

The Court has held that “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.” *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Thus, a defendant has a constitutionally protected right to request and obtain from the prosecution evidence that is either material to guilt or relevant to punishment.

## STATEMENT OF THE CASE

References below are to the record before the Supreme Court of Tennessee.

On August 14, 2001, the Shelby County Grand Jury returned three true bills of indictment against the defendant charging him in No. 01-09095 in two counts, respectively, with murder in the perpetration of attempted murder in the first degree and premeditated murder in the first degree of Marcel Mackey on or about April 3, 2001; in No. 01-09094, in a single count, attempted murder in the first degree of Randall White on or about April 3, 2001; and in No. 01-09093, in a single count, attempted murder in the first degree of Anitra Flowers. **1:1-7.**

On June 7, 2003, a jury returned a verdict of guilty as charged in No. 01-09095 of murder in the perpetration of attempted murder in the first degree, as alleged in count one, and of murder in the second degree, as included in count two. The jury also returned verdicts of guilty as charged of attempted murder in the first degree in No. 01-09094 and guilty of reckless endangerment as included in No. 01-09093. **1:104.** The defendant was immediately sentenced, in No. 01-09095, to life in prison with the possibility of parole for murder in the perpetration of attempted murder in the first degree. **1:104.**

On July 15, 2003, the defendant was sentenced by the court to twenty years, in No. 01-09094, for attempted murder in the first degree of Randall White and to a term of 11 months and 29 days, in No. 01-09093, for reckless endangerment of Anitra Flowers. The trial court ordered that all of these sentences would run concurrently. **13:4.**

On June 23, 2003, defendant timely filed a motion for new trial. **1:119.** The motion was overruled on July 2, 2003. **1:174.** On July 16, 2003, defendant timely filed a notice of appeal. **1:76.**

On September 15, 2004, the Court of Criminal Appeals issued an opinion affirming defendant's convictions. (see opinion). On January 24, 2005, the Tennessee Supreme Court denied defendant's application for permission to appeal pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure. This petition follows.

## STATEMENT OF THE FACTS

**Randall White** testified that on April 2, 2001, he resided in a downstairs apartment at the Raintree Apartments. 7:237-38. Mr. White testified that sometime after 10 p.m. on the evening of April 2, 2001, someone who he had never before seen knocked on the kitchen door of his apartment. 7:242. Mr. White further explained that his friend, Marcel Mackey, approached the door in the kitchen, and that he (White) was right behind him. 7:301. Mr. White was about to “stick his head out of the door” when a second person came from the side and started shooting into the apartment. Mr. Mackey was shot. 7:243. Mr. White testified that this person wore a hood so that he was only able to see the features of the person’s face for a split second. 7:303-04. Mr. White identified the person he saw for a “split second” as Christopher Hatcher. 7:243. Mr. White testified that “everything happened so fast, I struck out running.” 8:335. Mr. White testified that he recognized the defendant because the defendant had previously robbed him, 7:256.

**Ashanti Pinkens** testified that on April 3, 2001, she saw Christopher Hatcher near the Raintree apartments with a gun. 8:338. On direct examination, the prosecutor inquired of Ms. Pinkens, the “individual you have identified as Chris, do you see him in the courtroom today?” 8:337.



Ms Pinkens stood, looked around the courtroom and stated “I don’t see him.” **8:338**. The prosecution then showed Ms. Pinkens a photographic lineup she viewed the night of the incident. During this pretrial photographic lineup, she identified the defendant and circled his picture. Further, she had written on the photo lineup sheet “[t]his is the person I seen at Red’s door shooting.”<sup>1</sup> **8:351, Exhibit 15**. Ms. Pinkens acknowledged during her trial testimony that her previous statement and identification were not true as she did not see anyone “shooting” and, further, she did not see anyone leaving “Red’s” house. **8:51**. She explained that the police would not “take her home” until she had identified the defendant and made a statement saying that she saw the defendant shooting. **8: 354-56**.

**Timothy Jackson** testified that he was with Ashanti Pinkens at the time when she said that she saw the defendant. **8:361-62**. Mr. Jackson testified that the defendant put a gun to his side whereupon he “took out running” and “hid behind a car.” While under the car, Mr. Jackson said that he heard shots, but that he did not see who was shooting. **8:373**.

**George Norman** testified that on April 3, 2001, he was closing an apartment and saw “some fellows walking I ain’t never—I ain’t recognize

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<sup>1</sup> “Red” is Randall White.

them.” Mr. Norman could not determine if any of these “fellows” were armed. **8:383-84**. Mr. Norman simultaneously identified the defendant as the “shooter” and acknowledged that he did not see anyone shooting. **8:386-87**.

Mr. Norman testified that he cannot read or write, but he can print his name. **8:389**. The prosecution showed Mr. Norman a photographic lineup which he had viewed on April 4, 2001, and had identified the defendant’s photograph. **8:391, Exhibit 23**. Mr. Norman could not remember giving a statement the night of the incident, and the prosecution sought to refresh his memory with a statement he allegedly made on April 4, 2001. The trial court, over defendant’s objection, allowed Mr. Norman to have his memory refreshed, outside the presence of the jury, by allowing the prosecution to read the statement to Mr. Norman. **8:394-401**. In this statement, Mr. Norman allegedly said that one of the individuals he had seen earlier that night “hollered out, the door’s open...” **8:414**. Further, in this statement, Mr. Norman, who cannot read or write, allegedly described the person who did the hollering as “a male black about fifteen years old, five foot four, medium build, dark complexion. He was wearing a white T-Shirt, blue jeans, a black hat and black tennis shoes.” **8:416-17**. During cross-examination, Mr. Norman was asked by defense counsel:

Q. Okay. Mr. Norman, I want you to describe me in your own words.

A. I can't. I don't know.

Q. Sir.

A. I don't know.

Q. Okay. Are you able to see me?

A. Yeah.

Q. Okay. You're not able to describe me at all?

A. Far. Far.

Q. Sir.

A. Some.

Q. Some?

A. (no audible response.)

Q. Your description of me is the word some?

A. (no audible response.)

**8:429-21.**

**Athena Cartwright** testified that when she arrived at the apartment located at 756 Raines the night of the shooting "it was already late" and dark outside. **8:430.** Ms. Cartwright stated that she could not see who did the shooting. **8:431.**

**Anitra Flowers** testified that she was in the apartment located at 756 Raines, sitting on the couch, when the shooting started. **8:456-57**. Ms Flowers testified that she did not see who was shooting. **9:492**.

**Christina Flowers** testified that she is the 13 year-old daughter of Anitra Flowers. **9:493**. She further testified as follows when questioned by the prosecution:

Q. Do you now (sic) who shot your mother?

A. I am pretty sure it was Christopher.

Q. How do you know it was Christopher?

A. I don't know. I just, I just think it was him.

**9:497**. Later she was asked if she knew the individuals shooting and she replied “[n]o ma’am.” **9:497**. She was then shown, over the defendant’s objection, a photographic lineup which she had viewed on the night of the incident and had identified the defendant. **9:508, Exhibit 29**. She later testified, over defense objection, that she knew the defendant because she had seen him previously “[a]t the robbery.” **9:517**. During cross-examination, she acknowledged that she did not see the face of anyone shooting. **9:523**. Specifically, she stated that she did not see the defendant, and she acknowledged that the statement and identification she had made on

the night of the incident were not true. **9:526**. She explained, "I don't know why I told them that." **9:526**.

**Latoya Brown** testified that on April 3, 2001 she was living at No. 738, Apt. 2 at the Raintree Apartments. **9:530**. Further, she said that she had seen four individuals running with weapons. **9:532**. She admitted that she was not able to identify any of these four individuals. **9:533, 536, 538**. She further testified, over the objection of the defense, that she was to identify the defendant from a photographic lineup. **9:535**.

**Ricky Davison**, a crime response technician with the Memphis Police Department, made multiple photographs and collected various shell casings at the crime scene. These items, over defense objection, were admitted into evidence as Exhibits 32-109. **9:553- 10:685**. Davison did not collect any fingerprint evidence or other physical evidence that connected the defendant with the shooting in any way. **10:676, 681**.

During the testimony of **Kevin Shaver**, also a crime response technician with the Memphis Police Department, defense counsel noticed that a juror had fallen asleep. **10:698**. The trial court instructed the jury to stand and move around a bit, but permitted Officer Shaver to continue his testimony. **10:698**. Officer Shaver testified that he collected various shell casings and sketched specific areas of the crime scene where shell casings

were located. **10:682-709.** These sketches were admitted into evidence as Exhibits 110-120.

According to Officer Shaver no fingerprint evidence was recovered from any of the of the shell casings which allegedly connected the defendant to the crime. Specifically, when asked “[no]w from your handling of the evidence you don’t know if Christopher Hatcher is at all guilty of this offense”, Officer Shaver replied “I have no idea who Christopher Hatcher is, sir.” **10:709.**

At the conclusion of Officer Shaver’s testimony, defense counsel moved the court to dismiss Juror Eunice Bradford because she was sleeping during critical portions of the proof. **10:711.** Upon being questioned by the trial court concerning the contention that she had been sleeping, Juror Bradford stated “I knew what happened. I knew why he asked to come to the bench. I knew it was me he was talking about.” (Juror Bradford was speaking of defense counsel’s approach to the bench to inform the trial judge of this matter). **10:714.** The trial court, based on the statements of Juror Bradford, that “she was not asleep”; she knew what was going on; and that her “eyes was closed” allowed her to remain on the jury notwithstanding her statements indicating her knowledge that defense counsel was seeking to remove her. **10:714-15.**

**Rachael Bowen**, a fingerprint technician employed by Shelby County, was allowed to testify over defense counsel's objection. The prosecution showed Ms. Bowen exhibits 15, 17, 23 and 29. Specifically, she was asked:

Q. Are they the same set of pictures, although different---or the sheets?

A. Yes Sir.

Q. Now, is the same picture circled on each of those sheets?

A. Yes Sir.

**10:744-46.** Defense counsel objected and the objection was overruled.

Q. --the same picture was circled on each of them.

A. Yes Sir.

Q. And it's the same picture of the same person?

A. Yes Sir.

**10:745-46.**

Ms Bowen then testified that she had (that morning) taken the fingerprints of the defendant and compared them to the prints associated with the person's picture circled in exhibits 15, 17, 23 and 29. Ms. Bowen concluded that the prints of the defendant and the person in the picture circled in the exhibits were identical. **10:746.**

**Cornelius Jefferson** testified that he was smoking weed and drinking liquor on April 3, 2001, at Shawn Hatcher's house. **11:796-97**. He further testified that the defendant forced him to participate in the shooting. **11:798-99**. Additionally, Mr. Jefferson admitted that he lied in his pretrial statement to police. **11:806**. He further testified that the defendant forced him to knock on the apartment door at 756 Raines and then shoved him aside. **11:808**. Mr. Jefferson further testified that he did not know who was firing shots. **11:811**.

Mr. Jefferson acknowledged that although he was charged with first degree murder, he was released on a thirty thousand dollar bond with the consent of the State. Prior to this, Jefferson had been confined in the jail about one month. **11:793, 822**. Mr. Jefferson further testified that he did not want to go back to jail, and that he would do anything to stay out on the streets. **11:794**. Additionally, Mr. Jefferson confirmed that he had made a deal with the prosecution. In return for his testimony against the defendant, he would receive an eight (8) year sentence. He further testified it was his understanding that the State would not oppose his request for probation. **11:794, 816**. Specifically he testified as follows:

Q. And you would do whatever you had to, to try to get an eight year sentence, wouldn't you?



A. Yes, sir.

Q. You would, wouldn't you?

A. Unless it was something better than that.

Q. Okay. So if a better deal comes along, you would try to do whatever you had to, to try to get that better deal, right?

A. Yes, sir.

**11:795.**

**Nathan Berryman**, a Sergeant with the Memphis Police Department, testified that he was not on the scene the night of the incident, but he assisted in witness interviews. Berryman also interviewed the defendant. **11:826.** Sergeant Berryman also interviewed Ashanti Pinkens, took her statement, and showed her a photographic lineup. **11:829.** He further testified, over defense objection, that she said "that's Chris and "this is the person I seen shoot Red's—seen at Red's door shooting," and that he instructed her to write that down. **11:830.**

Sergeant Berryman also stated that he interviewed Christopher Hatcher who declined to sign any statement. **11:833.** Further, according to Sergeant Berryman, he had discarded his original notes of the interview with the defendant. **11:839.** He was then allowed, over defense objection, to read his reconstruction of these discarded notes into the record. **11:840-847.**

Sergeant Berryman testified that it is common practice for Memphis Police Department officers to shred notes after an interview. **11:858.** Additionally, Sergeant Berryman admitted that the notes do not contain everything stated by the defendant. **11:964.**

During its closing argument, the prosecution characterized the defendant as the “devil.” Specifically, the prosecution argued “...if you’re after the devil, I’m just saying, if you’re after the devil you can’t go to heaven and get angels to testify. You have to go to hell and get his friends, his other, the other devils to testify.” **12:1001.** The defense objection was overruled, and the prosecution continued to use this characterization of the defendant. **12:1002**

On June 9, 2003, two days after the jury returned a verdict, defense counsel was contacted by Assistant District Attorney General, P. Thomas Hoover. **Exhibit 1, Sentencing Hearing.** Mr. Hoover informed defense counsel that the State had in its possession a statement of an eyewitness, Chanitra Flowers. **Exhibit B, Motion for New Trial Hearing.** This statement had not been provided to the defense before June 9, 2003.

During the taking of Ms. Flowers’ pretrial statement, she was shown a photographic lineup that included the defendant’s photograph. **Exhibit A, Motion for New Trial Hearing.** The defendant’s photograph was in

position A4. Ms. Flowers then identified, however, the photograph in position A6 of Exhibit A. Specifically, Ms Flowers was questioned as follows:

Q: Did you see who did the shooting of (sic) just heard it?

A: I saw it.

Q: Who did the shooting?

A: It was two men at the door, they had on black mask.

Q: How many men did you see?

A: I just saw two.

**Exhibit B, Motion for New Trial Hearing.** Later in the statement, Ms Flowers was asked the following:

Q: Where you advised that you would be viewing a photo lineup?

A: Yes.

Q: Where you able to identify anyone in the photo's and if so, which photo did you identify?

A: Yes I was, A6.

Q: How do you know the person pictured in A6?

A: Because he always used to be with Squirt.

Q: And the person you picked in the photo lineup was at your house tonight?

A: Yes.

Q: What was he doing at your house tonight?

A: He was shooting.

**Exhibit B, Motion for New Trial Hearing.**

Additionally, Ms Flowers' statement is contrary to the testimony of

Randall White. In part Ms. Flowers states that “[i]t was two men at the door, they had on black mask.” **Exhibit B, Motion for New Trial Hearing.** Mr. White testified that the person doing the shooting had on a hood, but he could see his face. **7:304.** The defense was not provided with Ms Flowers’ statement until two days after the trial had concluded.

## ARGUMENT FOR GRANTING WRIT

### **THE TRIAL COURT ERRED IN NOT GRANTING THE DEFENDANT A NEW TRIAL BECAUSE THE STATE FAILED TO DISCLOSE EXCULPATORY EVIDENCE THAT WAS IN ITS POSSESSION IN VIOLATION OF *BRADY V. MARYLAND*.**

The trial court committed prejudicial error when it denied the defendant's motion for a new trial based on the withholding by the State of plainly exculpatory evidence. On June 9, 2003, two days after the jury returned its verdicts, counsel for the defendant was contacted by Assistant District Attorney General, P. Thomas Hoover. **Exhibit 1, Sentencing Hearing.** Mr. Hoover informed defense counsel that the State had in its possession a statement of an eyewitness, Chanitra Flowers. **Exhibit B, Motion for New Trial Hearing.** This statement was not provided to the defense before June 9, 2003.

During the taking of Ms. Flowers' statement, she was shown a photographic lineup that included the defendant's photograph. **Exhibit A, Motion for New Trial Hearing.** The defendant's photograph was in position A4. Contrary to this, however, Ms Flowers actually identified the photograph in position A6. Specifically, Ms. Flowers stated as follows:

Q: Did you see who did the shooting of (sic) just heard it?

A: I saw it.

Q: Who did the shooting?

A: It was two men at the door, they had on black mask.

Q: How many men did you see?

A: I just saw two.

**Exhibit B, Motion for New Trial Hearing.** Later in the statement, Ms Flowers was asked the following:

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A: Yes.

Q: Where you able to identify anyone in the photo's and if so, which photo did you identify?

A: Yes I was, A6.

Q: How do you know the person pictured in A6?

A: Because he always used to be with Squirt.

Q: And the person you picked in the photo lineup was at your house tonight?

A: Yes.

Q: What was he doing at your house tonight?

A: He was shooting.

**Exhibit B, Motion for New Trial Hearing .**

The Flowers statement and participation in the pretrial photographic lineup are not just favorable evidence, but rather strongly and materially exculpatory. Additionally, Ms. Flowers' statement is contrary to the testimony of Randall White. In part Ms. Flowers states that "[i]t was two men at the door, they had on black mask." **Exhibit A, Motion for New**

**Trial hearing.** Mr. White testified at the trial that the person doing the shooting had on a hood, but he could see his face. **7:304.**

A “criminal defendant is guaranteed the right to a fair trial under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the ‘Law of the Land’ Clause of Article I, section 8 of the Tennessee Constitution. *Johnson v. State*, 38 S.W.3d 52, 55 (Tenn. 2001)(citing *State ex rel. Anglin v. Mitchell*, 596 S.W.2d 779, 786 (Tenn.1980). 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.” *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Thus, “a defendant has a constitutionally protected right to request and obtain from the prosecution evidence that is either material to guilt or relevant to punishment.” *Johnson v. State*, 38 S.W.3d 52, 55 (Tenn. 2001)(quoting *State v. Ferguson*, 2 S.W.3d 912, 915 (Tenn. 1999). If such evidence or information is not turned over to the defense, a constitutional violation has occurred.

“In order to establish a *Brady* violation, four elements must be shown by the defendant: 1) that the defendant requested the information (unless the evidence is obviously exculpatory, in which case the State is bound to

release the information whether requested or not); 2) that the State suppressed the information; 3) that the information was favorable to the accused; and 4) that the information was material.” *Johnson v. State*, 38 S.W.3d 52, 56 (Tenn. 2001)(citing *State v. Edgin*, 902 S.W.2d 387, 390 (Tenn.1995)).

In applying the above elements to the case at bar it is clear that a *Brady* violation has occurred, and a new trial is required. The defendant requested the information in question. On January 21, 2003, defendant filed discovery motions specifically requesting Rule 16 and *Brady* material. 1:44 On March 3, 2003, the State of Tennessee, in a response to defendant’s motion for pretrial discovery and exculpatory material stated “[t]he State of Tennessee is now unaware of any evidence which tends to exculpate the defendant of the crime charged against him.” 1:47. It is clear from the record that the defendant requested Rule 16 and *Brady* material, and the State withheld or concealed it.

Additionally, at defendant’s motion for new trial hearing the prosecution admitted they should have disclosed the statement and photographic lineup prior to trial. Specifically, the prosecution stated on the record that “in an abundance of caution, we should have given the statement,



or made them aware of the statement prior to trial. But having not done that now, I think the best analysis is that it was at best harmless.” 14:24.

The prosecution also argued that defense counsel should have been aware that there was a statement given by Chanitra Flowers because there was a reference to the existence of a statement in a police narrative. 14:24. This argument is without merit.

As this Court has recently held “[o]ur decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed.” *Banks v. Dretke*, 124 S.Ct. 1256, 1275 (2004).

Given the State’s response that “[t]he State of Tennessee is now unaware of any evidence which tends to exculpate the defendant of the crime charged against him” as well as its argument at the motion for new trial, it is clear that valuable exculpatory evidence which was actively sought by the defendant was suppressed by the State of Tennessee.

The information concealed was extremely favorable to the accused. Specifically, Ms. Flowers identifies another person as the assailant. The Tennessee Supreme Court has held that information which is favorable to the accused consists of, but is not limited to, evidence that could exonerate the accused, corroborate the defendant’s position in asserting his innocence,

or possess favorable information that would have enabled defense counsel to conduct further and possibly fruitful investigation regarding the fact that someone else was the assailant. *Johnson v. State*, 38 S.W.3d 52, 56, (Tenn. 2001) (quoting *State v. Marshall*, 845 S.W.2d 228, 233 (Tenn. Crim. App. 1992)). Under any reasonable definition or analysis, the Flowers statement in connection with the photographic lineup conducted prior to the trial in this cause was favorable to the defendant.

Moreover, the information is clearly material. This Court has held that the materiality standard for a *Brady* violation is met when the favorable evidence could reasonably be taken to put the case in such a different light as to undermine confidence in the verdict. *Kyles v. Whitley*, 514 U.S. 419, 434(1999). “[T]he test of materiality *is not* whether the defendant would more likely than not have received a different verdict had the evidence been disclosed.” *Johnson v. State*, 38 S.W.3d 52, 56, (Tenn. 2001) (citing *Strickler v. Greene*, 527 U.S. 263, 275(1999))(emphasis added). Neither is the test of materiality equivalent to that of evidentiary sufficiency. *Id.* One does not have to show that “after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury’s conclusions.” *Id.* (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995) (“This rule is clear, and none of the *Brady* cases has ever

suggested that sufficiency of evidence (or insufficiency) is the touchstone [of materiality].” The standard is simply one that calls into question the confidence of the verdict since the concealed evidence was not heard by the jury. *Id.*

The trial court, in ruling on defendant’s new trial motion appears to have applied no discernible standard whatever. The trial court simply stated that the

defendant’s position that the statement of Chanitra Flowers somehow violated the Principal (sic) of *Brady v. Maryland*. And After considering all the things connected with that allegation, I find it to be without merit.

**14:24.**

Because the defendant was denied critical favorable, exculpatory information, he did not receive a fair trial. The jury was denied an opportunity to hear testimony that cast doubt as to identity of the assailant. Additionally, the suppressed information contradicted other alleged eyewitness testimony. The denial of access to this information has directly and adversely affected the defendant’s ability to exercise his rights of confrontation and cross examination. The jury’s verdict is not worthy of confidence, and this requires that the defendant be granted a new trial. *Kyles v. Whitley*, 514 U.S. 419, 434(1999).

In evaluating the defendant's position that the prosecution withheld exculpatory evidence in violation of *Brady v. Maryland* the Court of Criminal Appeals found three of the elements required to show a *Brady* violation existed. Specifically, the court found that the defendant requested the information, that the State suppressed the information, and that the information was favorable to the defendant. **Opinion** at A-39. The court stated "it is clear that the Defendant has proven the first element. The record establishes that, on January 21, 2003, prior to the Defendant's trial, he made a general *Brady* request." **Opinion** at A-39. "[W]e conclude that the Defendant has also proven the second element, that the State suppressed this information. While the Defendant was afforded "open file" discovery, the State did not provide the statement at issue in response to the Defendant's specific *Brady* request, which it has a duty to do." **Opinion** at A-39. The Court also found that this information was favorable to the Defendant because it corroborated the defense position that someone other than the defendant fired the shots. **Opinion** at A-39.

In regard to the fourth required element, however, the court found that the statement of an eyewitness and subsequent identification of someone other than the defendant as the shooter was not material. Specifically the court found "[i]n light of the strength of the State's case, the young age of

the witness making the statements, and the fact that the statements do not exonerate the Defendant but simply implicate another, additional shooter, we conclude that confidence in the jury's verdict is not undermined. The failure to establish the "materiality" of the favorable evidence thus defeats the Defendant's due process claim premised on the prosecution's suppression of exculpatory evidence. This issue is without merit." **Opinion** at A-40.

The Court of Criminal Appeals, after acknowledging that the test for materiality is not sufficiency, went on to apply a sufficiency standard in determining the materiality of the suppressed exculpatory information. The court stated:

[W]e cannot conclude that Chanita Flowers' testimony, if presented to the jury, would have put the whole case in such a different light as to undermine confidence in the jury's verdict. The State did not call Chanita Flowers to testify, and we are not convinced that her testimony would have in any way impacted the State's case. There were five witnesses who testified for the State that they saw the Defendant in the area of the shooting or commit the shooting. Randall White said that he saw four men, one of whom was the Defendant, and he saw the Defendant start shooting toward the open door with some kind of rifle. He also said that he saw the Defendant continue to shoot as he took "one step into the kitchen." Ashanti Pinkins testified that the Defendant stopped her and three of her friends and asked if they had seen Randall White, also known as "Red." After a brief conversation, the Defendant held a gun to the waist of one of her friends, Timothy Jackson, and Jackson ran away. Pinkins identified the Defendant in a photo array shortly after the shooting, and then, after having her memory refreshed with this photo array, she identified the Defendant in court. Jackson testified that the Defendant, after asking if Jackson had seen "Red," put a "long" gun to his side. Jackson identified the Defendant in a photo array. George Norman

testified that he saw the Defendant walking towards the victim's home with three or four other men. Cornelius Jefferson testified that the Defendant told him that they were going to Raintree Apartments to "stop threats." He said that the Defendant had a rifle and that the Defendant forced him to knock on "Reds" door. Jefferson said that the Defendant then pushed him aside, and he ran away.

**Opinion** at A 40-41. Notwithstanding that this version of testimony as set out by the Court of Criminal Appeals is partly inaccurate, the court clearly weighed what it deemed as inculpatory evidence against the exculpatory evidence (the eyewitness statement and identification of someone else as the person shooting). This was improper and is contrary to previously determined federal law as determined by this Court.

The materiality standard for a *Brady* violation is met when the favorable evidence could reasonably be taken to put the case in such a different light as to undermine confidence in the verdict. *Kyles v. Whitley*, 514 U.S. 419, 434(1999). One does not have to show that "after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). The standard is simply one that calls into question the confidence of the verdict since the concealed evidence was not heard by the jury. *Id.*

The case at bar is a classic example of a blatant *Brady* violation. Each and every element of a constitutional violation is present. Exculpatory evidence was requested by the defendant, it was suppressed by the State, it was favorable to the defendant, and it does not get any more material than someone else being identified as the shooter. This is especially true since there was only one witness who testified that he actually saw the defendant shooting.

### CONCLUSION

For all the foregoing reasons, the Supreme Court should grant this petition in order to correct the Court of Criminal Appeals of Tennessee's error.

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**IN THE SUPREME COURT OF TENNESSEE**

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**STATE OF TENNESSEE,**

\*

**PLAINTIFF/APPELLEE,**

\*

**V.**

**W2009-01878-CCA-R3-CD**

\*

**JEREMY GARRETT,**

\*

**DEFENDANT/APPELLANT**

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MAY IT PLEASE THE COURT:

This record presents an application for permission to appeal, pursuant to Rule 11, Tennessee Rules of Appellate Procedure, from the final judgment of the Court of Criminal Appeals of Tennessee for the Western Division to the Supreme Court of Tennessee. The opinion of the lower court is appended to this application at A-20. This opinion is referred to herein as Opinion followed by page number. Appellant is described herein as defendant, Mr. Garrett or appellant. The State is described as the prosecution or the State.

The record consists of 9 volumes described as follows: One volume of pleadings and orders in the technical record; one of exhibits; one volume holding the jury charge, four volumes of transcribed evidence from the trial below, cited

herein as 4 through 7 followed by page number; one volume of the sentencing hearing and motion for new trial. In support of his application, appellant shows to the Court as follows:

**I. Opinion of the court below.**

The opinion of the court below was filed on November 19, 2009. No petition rehearing was filed.

**II. Questions presented for review.**

*Did the intermediate court err in finding that although the trial court committed error in failing to conduct a hearing regarding consolidation of indictments as well as failing to make any factual findings regarding consolidation in its order, such error was nonetheless harmless?*

**III. Facts relevant to question presented.**

On August 24, 2004, the Shelby County Grand Jury returned an indictment against the defendant charging him in No. 04-05871. The indictment included one count of aggravated robbery.**1:1-2.** On November 9, 2004, the Shelby County Grand Jury returned an indictment against the defendant charging him in No. 04-07755. Count one charged him with murder in the perpetration of robbery and in count two with especially aggravated robbery.**1:3-5.**

On January 24, 2007, the trial court, without a hearing, granted the State's motion to consolidate the indictments for trial. Trial was had beginning August 6,

2007. On August 10, 2007, a jury found the defendant guilty as charged in both indictments. **7:491-492.**

On September 14, 2007, defendant was sentenced to serve 8 years at 30% for his conviction for aggravated robbery in indictment 04-05871. Defendant was sentenced to serve life in prison for his conviction of murder in the perpetration of robbery in count one and 15 years at 100% for his conviction of especially aggravated robbery in count two. All sentences were ordered to run concurrently. **1:67-69, 8:15.**

Defendant's motion for new trial was denied on November 16, 2007. **1:72; 9:1-3.** On November 20, 2007 defendant timely filed a notice of appeal. **1:74.**

On November 19, 2009, the Court of Criminal Appeals affirmed the appellant's conviction but found that with regard to consolidation of indictments that "it is not disputed that the defendant objected to the consolidation and that the trial court failed to conduct a hearing on the motion." Opinion at p. 4.

The intermediate court went on to find that "at the motion for new trial hearing, the trial court acknowledged that no evidentiary hearing occurred" and also that "the order granting the motion made no findings other than the general statement that 'from all of which it appears that the offenses charged in the captioned indictments constitute parts of a common scheme a plan and/or the

offense charged are of the same or similar character, and that the motion of the State is well taken.” Opinion at p. 4.

At trial **Mexwayne Williams** testified that on March 28, 2004, he was shopping at the tobacco store at Shelby drive and Riverdale in Memphis, Tennessee. **4:37-38.** Williams went into the store to purchase some cigarettes but he was turned away because he needed his identification. **Id.** Williams testified that as he approached his car he was approached by two men. One of the men “put a gun to my chest and carjacked me.” **Id.** The men got into the vehicle and rode off in his 1997 or 1998 Grand Marquis. **Id.**

Williams testified that he had never seen the individuals before and that the incident took place between 12:30 p.m. and 2 p.m. **4:39.** Williams was asked if he saw any of the individuals in the courtroom that robbed him and he replied “No, sir.” **4:44.** Additionally, Williams testified that he had been shown a photographic line up on March 30, 2004, at 6:30 p.m. and that he picked an individual out of the line but could not say for certain if he was one of the people that robbed him. **4:56; 4:59.** Williams specifically testified that he was not sure if the person he identified in exhibit 1 was one of the men that robbed him. **4:63.**

**Willie Williams** testified that on March 29, 2004, he was cooking something and needed some bread so he went to the store to get some. **4:69-70.** Williams testified that as he was going into the store he let another guy out. According to Williams a guy came up and grabbed the guy he let out of the store and they were “wrestling.” **Id.** As they were wrestling another guy came up from the side of the building and “shot him in the head.” **4:71.** After the shot “all of us in the store just kind of ran to the back of the store..”. **4:72.** A few minutes later the guy that was shot came walking into the store. **Id.** Williams testified that he did not get a good enough look at the individuals to identify either of them, nor did he actually see a gun, but only heard the shot. **4:77; 4:84-85.** Williams admitted that he is just assuming the person that came around the side fired the shot. **Id.**

**Jeff McCall** testified that he is a detective with the Shelby County Sheriff’s Department but in March of 2004 he was working uniformed patrol. **4:104.** McCall testified that he responded to a shooting call at the Dollar General. **4:105.** McCall testified that when he arrived on the scene there were several people standing outside the door. **Id.** The victim was behind the cash register on the floor and a black gentlemen was holding his head in his lap. **4:106.** McCall

testified that he secured the scene. **4:107.** McCall testified that there were no suspects on the scene when he arrived. **4:114.**

**Tommy Turley** testified that he was involved in the robbery on March 28, 2004, at the tobacco store, as well as the robbery that resulted in Dexter Birge's death. **4:117.** Turley testified that he was at the tobacco store along with Jeremy Garrett and Kelly Richardson. **4:118.** Turley testified that Jeremy Garrett was driving the car for the tobacco store robbery. **4:119.** Turley testified that they were driving around when the rims on the victim's car got their attention. **4:120.** Turley told Garrett to pull over. **Id.** Turley testified that they watched the victim go into the store and when he came back out they robbed him. **4:121.** Turley testified that he had the gun and pointed it at the chest of the victim and told him to give him the keys. **Id.** Turley gave the keys to Kelly Richardson who drove away in the victim's car. **4:122.** Turley testified that the car was taken to Jeremy Garrett's uncle's house. **4:124.** Turley testified that the rims were sold for about a thousand dollars. **Id.**

Turley testified the next day he, Cory Richmond and Jeremy Garrett were driving around looking for rims and people to rob. **4:127.** Turley testified that they saw Dexter Birge driving a Yukon with rims and they followed him to a store.

**4:128.** Turley testified that after Birge went into the store they got out of the car and Cory Richmond drove off. **Id.** Turley testified that Birge came out of the store he went up and robbed him. **4:129.** Turley testified that he had a gun and asked Birge for the keys. **Id.** Birge gave him the keys and then swung at him or something, and they started to scuffle. **Id.** Turley testified that he hit Birge with the gun several times. **5:186.** Turley threw the keys to Garret and then heard a shot.**4:132.**

Turley also testified that he did not remember giving a statement to police because he was “high” on cocaine as well as at the time of the incident. **5:165.** Turley testified that he did not even remember telling police he was at the Dollar General. **5:168.** Turley testified that he stays high 24/7 and “[m]y mind bad sometimes, brother.” **5:175.** Turly testified that he could not remember telling police that a “Glen, Whiteboy” was involved in the incident. **5:182.** Mr. Turley testified that any inconsistencies in his testimony are due to the cocaine in his system, specifically he testified “I was high, whatever they was asking me, I was high. Ain’t no telling what I was saying.” **5:201.**

**Jeremy Waller** testified Jeremy Garrett is his nephew. **5:221.** Waller testified that on March 28, 2004, he saw Mr. Garrett with a guy he knew as “twin,”

in a black car. **5:222.** Waller testified that he saw “them” take some rims off of the black car. **5:224.**

Waller testified that he saw his nephew (Garrett) on March 29, 2004, and he was with “Twin” and “Corey.” **5:225.** Mr. Waller testified the three of them pulled up in another car that Waller had never seen and he told them to get it away from there. **Id.** Mr. Waller testified that he told police all he knew about how the vehicles arrived at his house. **5:232.**

**Sergeant Vernon Dollahite Jr.,** testified that he is a detective with the Shelby County Sheriff’s Department. **5:280.** Dollahite testified that in March 2004 he was assigned to the General Investigative Bureau, assigned to homicide. **Id.** Dollahite testified that he was one of the officers that interviewed Jeremy Garrett. **Id.** The interview was tape recorded and played for the jury, but no transcription was done when the tape was played during trial. **5:283, Exhibit 27.**

On the tape, the voice identified as Jeremy Garrett, testified that on the day Dexter Birge was killed he was with his friend “Twin” all day. **Exhibit 27.** The voice on the tape states that “Twin” saw Dexter as they were walking from a girl’s house. **Id.** “Twin” saw Dexter drive by and he went to the Dollar General. “Twin” walked over to Dexter at the Dollar General and started hitting Dexter,



beating him with the pistol and shot him. **Id.** Jeremy went into a “state of shock.” **Id.** They took the keys and drove off. **Id.**

Dollahite testified that he recognized the voice on the tape as that of Jeremy Garrett and identified Mr. Garret in the courtroom. **Id.**

**Cory Richmond** testified that on March 29, 2004 he and Tommy Turley and Jeremy Garrett were riding down Range Road. 6:308. Mr. Richmond testified that Garrett asked him if he could help him with something. **Id.** According to Richmond, Garrett told him “they was fixing to get some money” and “was going to get some rims.” **Id.** Richmond testified that he stopped to get some gas at Riverdale and Range Road when Turley looked at him scared and said “right there” and Turley told him to follow an “SUV with large rims on it.” 6:310.

Richmond testified that he followed the vehicle to the Dollar General, parked and Mr. Garrett and Mr. Turley exited the vehicle. **Id.** Richmond testified that about a minute or two later he heard a gunshot and saw several cars exiting the parking lot, and the SUV he followed was one of them and Mr. Garrett and Mr. Turley “occupied” it. **Id.**

Richmond testified that he later drove to Jeremy Garrett’s uncle house and he saw the SUV from the Dollar General. 6:312. Richmond testified that Garrett

and Turley asked him if he would give them a ride home and he told them they could just keep his car, if his other car that was being fixed at Garrett's uncle's house was ready. **Id.** Richmond said that Turley and Garrett took off one of the rims of the SUV and put it in his trunk. **Id.**

Richmond admitted that he had given a different statement to police about what happened. **6:319.** Richmond testified that he hoped to receive "some leniency" for his testimony. **6:334.** Richmond testified that maybe he "sprinkled" the truth when he spoke to police initially. **6:337.**

### **BASIS FOR REVIEW**

Consolidation of multiple indictments against a single defendant into one trial is governed by Rule 8(b) of the Tennessee Rules of Criminal Procedure. Specifically, the Rule provides that "[t]wo or more offenses may be joined in the same indictment, presentment, or information, with each offense stated in a separate count or consolidated pursuant to Rule 13 *if the offenses constitute parts of a common scheme or plan or if they are of the same or similar character.*" Tenn. R.Crim. P. 8(b) (emphasis added).

Additionally, Rule 13 allows the trial court, at its option, to consolidate or sever offenses for trial in those instances where either the prosecution or the defense could have elected to consolidate or sever. Rule 13 provides:

(a) Consolidation. The court may order consolidation of two or more indictments, presentments, or informations for trial if the offenses and all defendants could have been joined in a single indictment, presentment, or information pursuant to Rule 8.(b) Severance. The court may order a severance of offenses or defendants before trial if a severance could be obtained on motion of a defendant or of the state pursuant to Rule 14.

Rule 14 mandates that where “two or more offenses have been joined or consolidated for trial pursuant to Rule 8(b), *the defendant shall have a right to a severance of the offenses unless the offenses are part of a common scheme or plan and the evidence of one would be admissible upon the trial of the others.*” Tenn. R.Crim. P. 14(b)(1) (emphasis added).

Under this provision, the defendant has an absolute right to have offenses separately tried unless the prosecution shows that the offenses are part of a common scheme or plan *and* evidence of each crime would be admissible in the trial of the others. *State v. Toliver*, 117 S.W.3d 216, 228 (Tenn. 2003)(*Citing Spicer v State*, 12 S.W.3d 438 (Tenn. 2002)).

When consolidation of indictments is sought by the State and the defendant objects, the State must then demonstrate that the offenses are parts of a common scheme or plan and that evidence of each offense is admissible in the trial of the others. *Id.* at 228. That is to say, consolidation is only proper if the trial court concludes that (1) the multiple offenses constitute parts of a common scheme or

plan; (2) evidence of each offense is relevant to some material issue in the trial of all the other offenses; and (3) the probative value of the evidence of other offenses is not outweighed by the prejudicial effect that admission of the evidence would have on the defendant. *Id.* at 229.

The prosecution must produce *evidence* that consolidation is proper. *Id.* at 228. Moreover, in determining if the evidence the prosecution offers constitutes a common plan or scheme, three other prongs are required. In *State v. Toliver*, the Tennessee Supreme Court reminds us that “[t]here are three types of common scheme or plan evidence: (1) offenses that reveal a distinctive design or are so similar as to constitute ‘signature’ crimes; (2) offenses that are part of a larger, continuing plan or conspiracy; and (3) offenses that are all part of the same criminal transaction.” 117 S.W3d 216, 228-229; (*quoting State v. Shirley*, 6 S.W.3d 243, 248 (Tenn. 1999)).

In the case at bar, the trial court committed several errors which warrant reversal. First, the trial court never held an evidentiary hearing. Specifically, at Mr. Garrett’s motion for new trial hearing, the trial court conceded that no evidentiary hearing occurred. The trial court stated as follows:

The Court:                   Number three: The Court erred by granting the State’s motion to consolidate.  
I think--we didn’t grant an evidentiary hearing, but I did asked the State—Mr. Wax can you speak

to that.

-- to give me a statement about these matters, the facts, and otherwise as to why you were consolidating this cases. I was satisfied with what you—what the record reflects, relative to the consolidation.

Number four: The Court erred by granting the State's motion to consolidate without providing specific written or oral findings.

I thought the State's intentions and, in addition, the State's statement was adequate for the Court to grant consolidation.

9:5-6. Additionally, the trial court entered an order granting the State's motion to consolidate the indictments in this case. 1:21. The order made no findings other than the general statement that "[F]rom all of which it appears that the offenses charged in the captioned indictments constitute parts of a common scheme or plan and/or the offense charged are of the same or similar character, and that the motion of the State is well taken." *Id.* As is evident from the order, the trial court made no mention as to which type of common scheme or plan existed.

The lower court agreed that a statement by the prosecution reciting the reasons why consolidation is proper does not constitute evidence. Opinion at p. 4, A-24. Additionally, the lower court also agreed that trial court failed to make appropriate factual findings in it consolidation order. *Id.*

The intermediate court, however, went on to make a bizarre finding that the trial court's errors were not harmless at the pretrial level because the trial court had no basis to deny the severance motion, but were harmless at the trial level and this affirmed the conviction. Opinion at p. 6, A-26.

Specifically, with regard to the trial analysis the court held "the evidence presented was more than sufficient to support the convictions, and we conclude that no 'injurious effect' resulted to the defendant." The court went on to conclude that "[t]he evidence presented with regard to all the charges was essentially of the same evidentiary quality"....and "[t]he defendant was implicated by a co-defendant who was present during the commission of all the crimes." Opinion at p. 6, A-26. The lower court opined that based on these circumstances "the error which occurred was harmless, and the defendant is not entitled to relief on this issue." *Id.*

This Court has held that "any time an appellate court conducts harmless error review it necessarily engages in some speculation as to the jury's decision making process; for in the end no judge can know for certain what factors led to the jury's verdict." (citing *State v. Dotson*, 254 S.W3d 378, 388 (Tenn. 2008)(citing *Sullivan v. Louisiana*, 508 U.S. 275, 283 (1993) (Rehnquist, J., concurring)). The question that must be answered is whether "the error likely had

an injurious effect on the jury's decision-making process." *Id.* at 389. Thus, the inquiry has to be fact specific. *Id.* If the reviewing court concludes in the affirmative the error cannot be harmless. *Id.*

In the present case, like in *State v. Dotson*, indictments were consolidated and the testimony of similar acts was described by different witnesses. In this case there were two witnesses to aspects of both alleged incidents. One was Jeremy Waller, the appellant's uncle, and the other was a co-defendant. Appellant submits that under such circumstances common sense dictates that the jury most likely believed Mr. Garrett had a propensity to commit aggravated robberies and as such, the testimony of each witness was made more credible by similar testimony coming from the other witnesses.

Finally, at its most basic level, a jury is surely more likely to convict any defendant of a separate indictment (another aggravated robbery) when there is evidence that someone was killed in the incident alleged in the consolidated indictment.

Under these circumstances, the trial court's erroneous consolidation of the indictments more than likely affected the jury's verdict.

## CONCLUSION

For the foregoing reasons appellant does pray the Court grant his application for permission to appeal.

Respectfully submitted this the 13<sup>th</sup> day of January 2010.

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