IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE,	)	
	)	
Movant,	)	
v.	)	No. E1997-00196-SC-DDT-DD
	)	
GARY WAYNE SUTTON,	)	
	)	
Defendant.	)	

RESPONSE IN OPPOSITION TO
MOTION TO SET EXECUTION DATE

Gary Wayne Sutton opposes the State's motion to set an execution date because that motion is premature. Alternatively, Mr. Sutton requests this Court issue a Certificate of Commutation because extenuating circumstances exist. Setting an execution date is premature because, as explained herein, the federal court is still reviewing the constitutionality of the guilt phase of the trial that resulted in Mr. Sutton's conviction. *See* Order, *Dellinger v. Mays,* No. 3:09-cv-404 (E.D. Tenn. Sept. 17, 2009), ECF No. 3 (finding Mr. Dellinger's convictions arise out of the same operative facts as Mr. Sutton's). Extenuating circumstances exist because the State of Tennessee failed to turn over exculpatory evidence to Mr. Sutton's defense team about its key scientific witness and the appellate courts of this state later decided Mr. Sutton's case based on inaccurate information about that witness. Also, the reliability of Mr. Sutton's death sentence is called into question by trial

counsel's spending a mere five attorney billable hours in preparation for sentencing which resulted in the jury and reviewing courts having inaccurate, misleading information when assessing Mr. Sutton's moral culpability. These factors establish extenuating circumstances that warrant a certificate of commutation. Finally, should this Court find the motion is not premature, Mr. Sutton requests the execution date be set on a date that permits his counsel enough time to adequately and competently represent him in clemency.

I. Setting an execution date in Mr. Sutton's case is premature.

Setting an execution date in Mr. Sutton's case is premature because legal proceedings relevant to his case are ongoing. The State of Tennessee jointly charged Mr. Sutton and his uncle James Dellinger with the Blount County murder of Tommy Griffin and the later occurring Sevier County murder of Mr. Griffin's sister, Connie Branam.[1] The State of Tennessee has always maintained two key facts about these charges: first, that the Blount County and Sevier County crimes are so intertwined that neither a jury nor a judge could evaluate one murder without considering the other murder; and second, that Mr. Sutton and Mr. Dellinger acted jointly with equal culpability at all times. Both trials involved the same proof with evidence of the Blount County Griffin murder being used to prove the Sevier County Branam murder and vice versa. *See* facts from *State v. Dellinger and Sutton,* 79 S.W.3d 458, 462-66 (Tenn. 2002) (Griffin Blount County case), with *State v. Sutton and Dellinger,* No. 03C01-9403-

[1] Victim Connie Branam is also referred to as Connie Branum in court opinions.

CR-0090, 1995 WL 406953, at *1-3 (Tenn. Ct. Crim. App. Jul. 11, 1995) (Branam Sevier County case). At each trial the State argued Mr. Sutton and Mr. Dellinger acted jointly and with equal culpability. Even though the federal district court currently is reviewing recently discovered evidence that undercuts the prosecution's theory of Mr. Sutton and Mr. Dellinger's guilt, (Order, *Dellinger v. Mays*, No. 3:09-cv-404 (E.D. Tenn. Mar. 7, 2019), ECF No. 146) (referring discovery motion to magistrate and denying without prejudice State's motion for summary judgment), the State of Tennessee has moved to execute Mr. Sutton. This Court should deny that motion as premature.

Given the trial and reviewing courts' conclusions that the Sevier and Blount County murders are interrelated, and given those same courts' conclusions that Mr. Dellinger and Mr. Sutton acted unison at all times, federal review of this recently discovered evidence suggesting innocence should be completed before an execution date is set for Mr. Sutton. It is premature to execute Mr. Sutton until federal review of the trials which resulted in his convictions is complete.

The prosecution has never been able to establish a motive for Mr. Griffin's death. This Court has noted Mr. Sutton and Mr. Dellinger were close friends with Mr. Griffin, that the Griffin murder was motiveless, and that the case against Mr. Sutton and Mr. Dellinger was circumstantial. *State v. Dellinger and Sutton*, 79 S.W.3d at 476 ("The defendants were friends of the victim, and no clear motive was established at trial."). Unable to obtain a death sentence for Mr. Griffin's death in Blount County, which the prosecution believed occurred first, the prosecution tried the second murder (the Sevier County charge) first.

The Blount County prosecutor explained, "Unfortunately, we don't have any of the enhancing factors that apply [the Blount County prosecutor] said. [The Sevier County prosecutor] and I are just going to have to work together and try to get the same results in Sevier County." (Attachment A, Leslie Wilson, *Blount can't seek execution for brother's death*, The Mountain Press). The Blount County prosecutor did just that and assisted in the prosecution of the Sevier County case. The prosecution theory at the Sevier County trial was that Ms. Branam was attempting to locate her missing brother, Mr. Griffin; once she suspected Mr. Dellinger and Mr. Sutton of being connected to her brother's disappearance, they killed her. *See, e.g., State v. Sutton and Dellinger*, No. 03C01-9403-CR-0090, 1995 WL 406953, at *4 (Tenn. Ct. Crim. App. Jul. 11, 1995) ("[Sutton] shared Dellinger's motive to prevent Branum from discovering and revealing that [they] killed her brother.").

Once convictions were procured in Sevier County, though not a death sentences, the Blount County prosecutor presented the same case to a Blount County jury and argued the Sevier County convictions established the aggravating circumstance of prior violent felonies. The Blount County prosecutor acknowledged he presented to the Blount County jury the same evidence that had been presented to the Sevier County jury. (Motions Hearing at 15, *State v. Sutton and Dellinger*, Nos. C-6670, C-6671 (Blount Co. Circuit Court Apr. 20, 1994) ("This is an unusual case, as Your Honor is aware, because basically it has been tried once previously in another jurisdiction."). The Blount County jury convicted both men and, relying upon the Sevier County convictions, sentenced each to death. *State v. Dellinger and Sutton*, 79 S.W.3d at 458

(Tenn. 2002). The Sevier County case and the Blount County case are inextricably bound together.

Just as the State has maintained the Blount and Sevier County cases are inextricably linked, so too has the State maintained Mr. Sutton and Mr. Dellinger acted jointly with equal culpability. In each trial, both defendants moved for and were denied severances. *See State v. Sutton and Dellinger,* 1995 WL 406953, at *6 (affirming Sevier County trial court's denial of severances). *See also State v. Dellinger and Sutton,* 79 S.W.3d at 468 (Affirming the Blount County trial court's denial of severance and observing "thorough review of the record reveals no admitted evidence that was improper as to one of the defendants."). Mr. Sutton and Mr. Dellinger each argued the evidence did not establish his individual participation and the courts consistently rejected these arguments finding Mr. Sutton and Mr. Dellinger acted jointly and were equally culpable. *See, e.g., State v. Sutton and Dellinger,* 1995 WL 406953, at *6 (Tenn. Crim. App. 1995) ("[T]he evidence indicates that the appellants killed Connie Branum to prevent her from discovering that they were responsible for the murder of her brother …."); *State v. Dellinger and Sutton,* 79 S.W.3d at 491 ("It is clear that the above evidence, when viewed in the light most favorable to the State, is sufficient for a rational jury to find beyond a reasonable doubt that Appellants were the individuals who killed Griffin.").

The prosecution relied upon ballistics recovered from Mr. Dellinger's residence. Spent shells near Mr. Griffin's body matched firearms owned by Mr. Dellinger. Mr. Sutton was not permitted to challenge the lawfulness of the search; he lacked standing because the

search that recovered this evidence occurred at Mr. Dellinger's home, not Mr. Sutton's. In post-conviction, the intermediate court noted there was substantial evidence "connecting the petitioner and Dellinger with each other." *Sutton v. State*, No. E2004-02305-CCA-R3-PD, 2006 WL 1472542, at *18 (Tenn. Ct. Crim. App. May 30, 2006). In post-conviction, the intermediate court noted, "In view of the fact that the ballistics evidence indirectly implicated only Dellinger, giving him a strong motive to establish its lack of relevance," Mr. Sutton's counsel did not have a duty to challenge the ballistics. *Sutton*, 2006 WL 1472542, at *21. Mr. Sutton was not permitted to challenge the ballistic evidence used against him at trial but Mr. Dellinger was, and his federal petitions are still pending.

When Mr. Sutton argued the evidence was insufficient to establish Mr. Sutton's guilt of first degree murder, this Court approved the intermediate court's holding that even if Mr. Dellinger inflicted the fatal wound, Mr. Sutton was "criminally responsible for the murder of Griffin by Dellinger because Sutton had aided Dellinger with the intent of promoting or assisting the murder of Griffin." *Id.* at 493.

Because Mr. Dellinger's case, including the conviction for which Mr. Sutton was held criminally responsible, and upon which Mr. Sutton's case hinges, is still under federal review at the district court level, setting an execution date for Mr. Sutton is improper. Federal petitions challenging the constitutionality of the Sevier and Blount County trials are still pending in the district court. *See Dellinger v. Mays,* No 3:09-cv-404 (challenge to constitutionality of Sevier County jury trial); *Dellinger v. Mays*, No. 3:09-cv-104 (challenge to the constitutionality of Blount County trial). The interests of justice require that an execution not be set

for Mr. Sutton until his co-defendant uncle's challenges to his convictions are resolved.

Of significance, in case number 3:09-cv-404, the district court is considering the impact of newly discovered evidence that undermines the prosecution's theory of guilt in these intertwined cases. As this Court is aware, the killing of Mr. Griffin was without motive. No explanation has ever surfaced for why Mr. Sutton would want to kill his friend. For these reasons, the possibility of a viable alternative suspect has always lingered.

The federal court is reviewing recently uncovered evidence suggesting Lester "Festus" Johnson had the opportunity and motive for the Sevier and Blount County murders. The possibility of Mr. Johnson's involvement in the cases was considered in post-conviction. Days before the post-conviction hearing in Blount County began, the State of Tennessee turned over to defense counsel memo contained in the Blount County Sheriff's Department files concerning an investigation of Mr. Johnson. (PC Exh. 1, *Sutton v. State*, No. C-14433 (Blount Co. Circuit Court Jan. 27, 2005); PC Exh. 4, *Dellinger and Sutton v. State*, No. 96-1185-III (Sevier Co. Crim. Ct. Feb. 25, 2004)). The memo was prepared by Blount County Detective Gourley and detailed information received from Agent Gregory with the North Carolina State Bureau of Investigation. The gist of the Gourley memo was that Lester Johnson faced trial for attempting to sexually assault Tina Hartman. Mr. Griffin and Ms. Branam were to appear at the Johnson trial but failed to do so. Mr. Johnson was acquitted on Friday, February 21, 1992, the same day the State alleged Mr. Griffin was shot. Agent Gregory speculated Mr.

Johnson had a motive to kill Ms. Branam and Mr. Griffin. *See generally Dellinger and Sutton v. State*, No. E2004-01068-CCA-R3-PC, 2006 WL 1679595, at *5 (Tenn. Crim. App. Jun. 19, 2006).

The appeals court did not "find the information in Detective Gourley's memorandum to be exculpatory." *Dellinger and Sutton v. State*, 2006 WL 1679595, at *25. The court reasoned that while "it is possible for Mr. Johnson to have traveled from the courthouse in Sylva, North Carolina to [Blount County], Tennessee before midnight there is nothing in the record to indicate that he did so, nor is there any indication that he was in Sevier County when Ms. Branum was killed." *Id*. The appeals court reached a similar conclusion in the Blount County case, remarking it was unlikely that upon release from custody, Mr. Johnson would have immediately travelled from North Carolina to Blount County and killed Mr. Griffin. *Sutton*, 2006 WL 1472542, at *28.

Suffice it to say the appellate courts were not persuaded by the Gourley memo, standing alone, because there was no evidence Mr. Johnson was actually in Blount County, or, later, Sevier County, nor was there evidence suggesting a motive. But recently discovered evidence has come to light that demonstrates that Lester Johnson was in Kodak, Tennessee (an area that is in Sevier County) and did in fact, have a reasonable opportunity to commit the crimes. The newly discovered evidence also provides a powerful motive.

Mr. Johnson's girlfriend at that time, Mary Ann Huskey, has recently stated under penalty of perjury that she attended Mr. Johnson's North Carolina trial and drove him home after he was acquitted. She recalls they arrived in Kodak Tennessee before dark on the day in

question. (Attachment B, Declaration of Mary Ann Huskey, *Dellinger v. Mays*, No. 3:09-cv-104; 404 (E.D. Tenn. Sept. 21, 2018), ECF No. 130-4, PageID# 2565-66). She also states that on the way home, Mr. Johnson told her he attacked Ms. Hartman but chose not to kill her after she told him what had really happened to his cousin, Mike Vaughn. Mr. Johnson believed Ms. Hartman knew information about, or was involved in, an attack that rendered his cousin Vaughn a paraplegic. (Attachment B, Declaration of Mary Ann Huskey). Johnson was close to his cousin Vaughn and it disturbed him that he had been made a paraplegic. (Attachment B, Declaration of Mary Ann Huskey). Finally, she states, again under penalty of perjury, that she had heard Tommy Griffith was involved in the attack on Mike Vaughn. (Attachment B, Declaration of Mary Ann Huskey).

This information has been submitted to the federal court on behalf of Mr. Dellinger, whose cases are still pending in district court. The federal court has taken this new evidence seriously, as it should. However, the discovery motion on this matter is pending. Should the federal court grant discovery, more information about the attack on Vaughn and Lester Johnson' s perception of that attack will become available. Although the federal court has not yet ruled upon the discovery motion, the federal court has directed that if discovery is granted, Mr. Dellinger will be permitted to amend his petition to raise claims related to this factual issue that may very well establish his innocence. (Order, *Dellinger v. Mays*, No. 3:09-cv-404 (E.D. Tenn. Mar. 7, 2019), ECF No. 146). Specifically, the district court ruled that in light of the pending motions (including the discovery motion to learn more information about

events surrounding Johnson's role in various crimes and who subpoenaed Connie Branam and Tommie Griffin to appear at Johnson's trial and why that party did so), it would deny without prejudice the State's motion for summary judgment. (Order, *Dellinger v. Mays*, No. 3:09-cv-404 (E.D. Tenn. Mar. 7, 2019), ECF No. 146). The federal district court has referred these complicated factual matters to the magistrate.

The district court found Mr. Sutton's Sevier County convictions "arise out of the same transaction or occurrence" as his Blount County conviction. (Order, *Sutton v. Bell*, No. 3:07-cv-30 (E.D. Tenn. Feb. 3, 2007), ECF No. 4) (noncapital Sevier County case). The federal court has also found that Mr. Dellinger and Mr. Sutton's Sevier and Blount County convictions "arise out of the same transaction or occurrence." (Order, *Dellinger v. Mays,* No. 3:09-cv-404 (E.D. Tenn. Sept. 17, 2009), ECF No. 3). The Blount County and Sevier County trials are inextricably bound and rest upon interrelated facts. Every court that has reviewed these trials has determined Mr. Dellinger and Mr. Sutton's convictions arose out of the same facts and that Mr. Sutton and Mr. Dellinger acted jointly and are equally culpable for the deaths.

The interest of justice demands that Mr. Sutton's execution date not be set until the federal court has completed its review of this factually complex case. This Court has long recognized principals of judicial estoppel. *McLemore v. Memphis & C.R. Co.,* 69 S.W. 338, 344 (Tenn. 1902). The purpose of the doctrine of judicial estoppel is to "ensure the integrity of the judicial process." *Kershaw v. Levy*, 583 S.W.3d 544, 548 (Tenn. 2019) (quoting John S. Nichols, *Safeguarding the Truth in Court: The Doctrine of Judicial Estoppel,* 13 S.C. Law. 32, 34 (2002)). Judicial

estoppel focuses on the "relationship between a litigant and the judicial system." *Kershaw v. Levy,* 583 S.W.3d at 548 (quoting 31 C.J.S. Estoppel and Waiver § 189 (June 2019 Update)). Accordingly, where the appellate courts of this state have held the cases are factually intertwined and the defendants acted jointly and with equal culpability, the integrity of the judicial system requires that this Court deny the motion to set an execution date for Mr. Sutton as premature.

II. Extenuating Circumstances exist that warrant the issuance of a Certificate of Commutation.

This Court, with its unique expertise and familiarity with Tennessee jurisprudence on death penalty cases, plays an important role in overseeing and ensuring the integrity of this state's judicial process which may result in a death sentence. This Court may certify to the Governor that clemency is appropriate when extenuating circumstances are present and the facts supporting the extenuating circumstances are uncontroverted. Tenn. Code Ann. § 40-27-106; *Workman v. State,* 22 S.W.3d 807, 808 (Tenn. 2000). Given this Court's unique position in the judicial review process, this Court has a duty to recommend whether the Governor ought to commute a condemned inmate's punishment from death to life imprisonment. A certificate of commutation is a "vehicle through which the Court may ethically and on the record communicate with the Governor in aid of his exclusive exercise of the power to commute sentences." *Workman,* 22 S.W.3d at 817 (Birch, J., dissenting).

A certificate of commutation may be issued pursuant to Tenn. Code Ann. § 40-27-106, only when the extenuating circumstances are based upon facts in the record or a combination of record facts and new evidence

that are uncontroverted. *Workman,* 22 S.W.3d at 808. Mr. Sutton's request meets these standards. His request is based upon facts in the state court record as well as evidence developed in federal court.

A. The convicting jury and reviewing state courts did not know that a key scientific witness for the prosecution was under investigation for gross misconduct and gross incompetence.

Gary Wayne Sutton sits on Tennessee's death row convicted of the motiveless killing of his close friend Tommy Griffin. The State of Tennessee relied upon the testimony of the now-discredited medical examiner, Dr. Charles Harlan, to establish Mr. Sutton's guilt. Even as Dr. Harlan offered key testimony against Mr. Sutton, he was under investigation for dishonesty, professional misconduct, and gross incompetence. Defense counsel, the jury, and, importantly, this Court, did not know that Dr. Harlan's testimony was unreliable and unworthy of supporting a capital conviction. Due to technicalities in the law on when a post-conviction motion to reopen may be granted and technicalities in the scope of application of *Brady v. Maryland*, 373 U.S. 83 (1963), this defect in Mr. Sutton's capital case is without judicial remedy.

This Court has correctly observed the State of Tennessee never established a motive for Mr. Sutton to kill Mr. Griffin. *State v. Dellinger and Sutton*, 79 S.W.3d 458, 476 (Tenn. 2002) ("The defendants were friends of the victim, and no clear motive was established at trial."). This Court has also noted the prosecution was based upon circumstantial evidence. *State v. Dellinger and Sutton*, 79 S.W.3d at 490. There are no witnesses to the shooting and there is no confession. Instead, the

prosecution relied upon the time of death being Friday evening, February 22, 1992, soon after Griffin was seen with Mr. Sutton and his codefendant-uncle Dellinger. Forensic testimony on this question was crucial to this issue and the State's key witness on this matter was Dr. Charles Harlan, a witness who was dishonest and incompetent. Even as he testified at trial, he was under investigation by multiple state agencies for inappropriate conduct ranging from misrepresenting himself as the State's Chief Medical Examiner to fabricating death certificates to botching autopsies.

The prosecution case for guilt required Mr. Griffin to have been shot late Friday evening, February 22, 1992—almost three days, or 64 hours before his body was found on Monday afternoon, February 24, 1992. Blount County Medical Examiner, Dr. Eric Ellington, the pathologist who performed the autopsy, stated in his autopsy report that Griffin died on the same day the body was found, Monday, February 24. (Attachment C, Trial Exh. 50, Autopsy). Prior to trial, Dr. Ellington told the prosecution that while he viewed himself as unqualified to determine time of death, he believed the body was fresher than the prosecution's Friday night shooting theory required. (Attachment D, Deposition of Edward Bailey, Exh. 24, *Sutton v. Colson*, No. 3:06-cv-388 (E.D. Tenn. Sept. 15, 2008), ECF No. 81-3, PageID# 759). At trial, Dr. Ellington did, in fact, testify that he and the other members of his practice viewed themselves as not capable of offering an opinion on time of death. (TT VII, 904).

In his defense, Mr. Sutton offered witnesses who testified to his strong friendship with Griffin. (TT XI, 1505; 1588-89; TT XII, 1660).[2] He also offered lay testimony that he did not use or handle firearms at Mr. Dellinger's home. (TT VII, 988-98; Trial Exh. 65, 4478-84).

The defense also called Dr. Wolfe, a family practitioner who had served as a county medical examiner for three years. (TT XIII, 1851). Dr. Wolfe believed Griffin was shot 24 to 36 hours before his body was found (TT XIII, 1853) because the body was in full rigor, and because lividity was still transitional (TT XIII, 1858-65). Dr. Wolfe also believed that if the body had been dead 64 hours, there would have been a noticeable odor of decomposition; because first responders did not detect an odor, the body had not been dead that long. (TT XIII, 1884).

In rebuttal, the prosecution called Dr. Harlan, who testified the time of death was any time from 11:30 p.m. on the evening of the 21st until 8:00 a.m. on the 22nd. (TT XIV, 2016). The prosecution elicited testimony that he was board-certified by the American Board of Pathology in anatomical, clinical and forensic pathology (TT XIV, 2009-10) that he was a consulting forensic pathologist for approximately 63 counties in Middle Tennessee, that his *curriculum vitae* was correct

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[2] Abbreviations for citations to the Transcript of Proceedings are as follows: "TT" (Trial Transcript); "PCT" (Post-Conviction Transcript), followed by the volume number and the page number as assigned by the court reporter.

The abbreviations for the designated papers filed in the trial court and submitted to the appellate court are as follows: "T TR" (Trial Technical Record); and "PC TR" (Post-Conviction Technical Record), followed by the volume number and Bates number assigned by the clerk of the trial court.

except it did not "list [his] tenure as Chief Medical Examiner [for the State of Tennessee]" (TT XIV, 2011) and that he had performed 15,000 autopsies. (TT XIV, 2014). The prosecution also elicited testimony that in his role as the State's Chief Medical Examiner, he supervised Dr. Wolfe in his role as the county medical examiner. (TT XIV, 2025-26). The prosecution also elicited testimony that Dr. Wolfe was not a pathologist, and was not qualified to perform forensic autopsies. (TT XIV, 2026). Finally, the prosecution elicited testimony from Dr. Harlan that Dr. Ellington (who claimed from the stand to lack qualifications regarding a time of death opinion) was "by far[ ] more qualified" than Dr. Wolfe. (TT XIV, 2028).

In closing argument, the State urged the jury to accept Dr. Harlan's opinion over Dr. Wolfe's based on Dr. Harlan's credentials:

> Now, they've attacked the experts, so-called. The people that have told you about the time of death. I want you to think about who you've heard that's testified about time of death. We have the observations of Jason and his mother, who heard those gunshots.
>
> You heard Dr. Ellington. Dr. Ellington is the first to tell you, I am not qualified to make that determination. I did not make it, I will not make it. And this is a board certified pathologist.
>
> . . .
>
> They brought in for you a man who is a family practitioner. He's not even board certified as a family practitioner. . . . He has no real training in pathology. He's watched autopsies being done and he served as the medical examiner in Union County, because . . . he was the only medical doctor in Union County. So, he wore that hat, as well.

> The only person you heard testify who is a board certified forensic pathologist who has done 15,000 autopsies is Dr. Charles Harlan.
>
> . . .
>
> [I]t's Dr. Harlan's conclusion this man who they've told you was well-qualified and well-respected, a renowned expert . . . it's his considered opinion that Mr. Griffin died around midnight . . . .
>
> . . .
>
> Dr. Wolfe . . . seems to be a very nice doctor some of you might want to go to as your family practitioner . . . . I[f] you're going to take opinions and expert testimony on forensic pathology, that [opinion] should come from trained, board certified forensic pathologist, such as Dr. Harlan[.]

(TT Closing Arguments, 43-44). The jury accepted the prosecution's argument, accredited Dr. Harlan, and convicted Mr. Sutton and Mr. Dellinger.

On direct appeal, this Court observed that Mr. Sutton was a "friend[] of the victim, and no clear motive was established at trial." *State v. Dellinger and Sutton,* 79 S.W.3d at 477. This Court also noted "Forensic pathologist Dr. Charles Harlan opined that Griffin had died between 6:00 p.m. on Friday 21 and 8:00 a.m. on February 22." *State v. Dellinger and Sutton*, 79 S.W.3d at 465.

Mr. Sutton argued on appeal it was unfair for the prosecution to call Dr. Harlan as a rebuttal witness. (Sutton Direct Appeal Brief at 26-29). The State of Tennessee countered as follows:

> Dr. Harlan's testimony plainly rebutted the defense expert regarding the time of Griffin's death. The jury determined the weight and credibility of that expert

> testimony. Moreover, the defendants do not challenge the qualifications and the relevance of Harlan's testimony.

(State Direct Appeal Brief at 47)

The appellate court found no error in admission of Dr. Harlan's testimony. *State v. Dellinger and Sutton*, 79 S.W.3d at 488-89.

Mr. Sutton timely sought post-conviction relief. While the appeal from the denial of post-conviction relief was pending before the Tennessee Court of Criminal Appeals, the Department of Health published an order detailing its findings in support of its decision to permanently revoke Dr. Harlan's medical license. (Attachment E, *In the matter of: Charles Harlan, M.D.*, Final Order). The order found Dr. Harlan has engaged in unprofessional conduct, including dishonorable conduct, making false statements and representations, commission of fraud or deceit, committing malpractice, being incompetent, and falsifying information on a death certificate. (Attachment E, Order at 17-19). The specific inappropriate actions detailed in the order occurred between 1995 to 2001. (Attachment E, Order at 2-15). Mr. Sutton filed a motion in the Court of Criminal Appeals to remand his case so that he could have a hearing on whether the jury's consideration of Dr. Harlan's testimony rendered his conviction unreliable. (Motion to Remand, *Sutton v. State*, No. E2004-02305-CCA-R3-PD, (Tenn. Ct. Crim. App. May 18, 2005). The Court of Criminal Appeals directed the State to respond. The state did so as follows:

> Dr. Harlan had neither been charged nor found civilly or criminally liable for any wrong doing in connection with his duties as medical examiner. In short there was nothing for prosecutors to withhold in 1996.

(Attachment F, Response to Motion to Remand at 4-5, *Sutton v. State*, No. E2004-02305-CCA-R3-PD (Tenn. Ct. Crim. App. Jun. 1, 2005)).

The Court of Criminal Appeals denied the remand (Order, *State v. Sutton*, No. E2004-02305-CCA-R3-PD (Tenn. Ct. Crim. App. Jun. 9, 2005)), and later affirmed the denial of post-conviction relief. *Sutton v. State*, 2006 WL 1472542, at *1.

Mr. Sutton next sought relief in federal court. Pursuant to court-ordered discovery, he uncovered evidence showing the TBI had investigated Dr. Harlan and was aware of his gross incompetence and gross misconduct, as follows:

1. TBI's 1993 Investigation Into Dr. Harlan's Misconduct.

In 1993, the TBI launched an investigation into various allegations of misconduct by Dr. Harlan. This investigation was overseen and directed by the Director and Assistant Director of the TBI. During the investigation, the TBI learned that Dr. Julia Goodin fired Dr. Harlan from the Davidson County Medical Examiner's office for falsifying a death certificate and improperly using government facilities to conduct private autopsies. (Attachment G, Petitioner's Hrg. Exh. 20 at 22, *Sutton v. Colson*, No. 3:06-cv-388 (E.D. Tenn. Feb. 2, 2010).[3] Dr. Goodin further stated on the record that she did not believe Dr. Harlan should be

[3] Counsel has appended excerpts of the records contained in Petitioner Sutton's Hearing Exhibits 19 and 20, as well as in Petitioner Sutton's Motion to Expand (TBI Case No. 82B-49-CI), filed in *Sutton v. Colson*, No. 3:06-cv-388 (E.D. Tenn.). Counsel will provide complete records at the Court's request.

permitted to conduct any autopsies whatsoever. (Attachment G, Petitioner's Hrg. Exh. 20 at 63-64).

2. TBI Director Wallace's 1995 Order Barring Dr. Harlan From Entering the TBI

Following this investigation, on July 3, 1995, TBI Director Larry Wallace barred Dr. Harlan from entering the TBI Crime Laboratory because he was "unprofessional" and engaged in behavior "unbecoming for the State's Chief Medical Examiner." (Attachment G, Petitioner's Hrg. Exh. 20 at 232). Director Wallace had also stated Dr. Harlan's conduct had an "adverse impact on the employees of the Bureau's Forensics Division" and that he did not want the TBI "to be subjected to the irresponsible and unprofessional conduct exhibited by Dr. Harlan." (Attachment G, Petitioner's Hrg. Exh. 20 at 232). The Assistant TBI Director also documented specific instances of Dr. Harlan's unprofessional behavior, including: (1) that he was uncertain how to handle a rape kit, asking "what am I suppose[d] to do with it"; (2) that he engaged in highly offensive remarks of a graphically sexual nature; (3) that he stated he fired an employee for leaking evidence to the wrong source; (4) that Dr. Harlan was acting strangely; and (5) that he mishandled ballistics evidence in another capital case. (Attachment G, Petitioner's Hrg. Exh. 20 at 234-37).

Soon thereafter, TBI Director Wallace notified the Tennessee Department of Health that the TBI had barred Dr. Harlan from its property. The Department of Health answered back, informing the TBI that Dr. Harlan had been fired from his position as Chief Medical

Examiner as of June 30, 1995. (Attachment G, Petitioner's Hrg. Exh. 20 at 238).

3. TBI's 1995 Investigations of Multiple Botched Infant Autopsies By Dr. Harlan

In June of 1995, the TBI contacted Dr. Harlan to perform an autopsy on infant Phelps. After claiming to have performed an autopsy, Dr. Harlan concluded the child died an accidental death. (Attachment G, Petitioner's Hrg. Exh. 20 at 270-71). The TBI secured a second autopsy by George R. Nichols II, M.D., Chief Medical Examiner, Commonwealth of Kentucky. The second autopsy found multiple broken bones and obvious child abuse. (Attachment G, Petitioner's Hrg. Exh. 20 at 271). Dr. Nichols informed the TBI that it was, "improbable that any competent medical examiner would have missed the various rib fractures, corner fractures of the humorous, and second skull fracture[.]" (Attachment G, Petitioner's Hrg. Exh. 20 at 271). Dr. Nichols further stated, "If this line of irrational thinking has been applied to other cases in the State of Tennessee, then God help you and the rest of the citizens of the State of Tennessee." (Attachment G, Petitioner's Hrg. Exh. 20 at 255).

In the fall of 1995, the TBI concluded that Dr. Harlan had allowed his unqualified, unlicensed assistant to perform an autopsy on yet another infant. (Attachment H, Motion to Expand, TBI Case No. 82B-49-CI, *Sutton v. Colson*, No. 3:06-cv-388 (E.D. Tenn. Oct. 10, 2008), ECF No. 81-10, PageID# 1075-76).

Finally, the TBI file number 5A-760-NA involves additional investigation into Dr. Harlan's misconduct. (Attachment G, Petitioner's Hrg. Exh. 20 at 242-50). On May 26, 1995, TBI agents met with Cathy

Roush, an assistant to Dr. Harlan. Roush explained she knew about problems in Dr. Harlan's practice that could affect criminal prosecutions. (Attachment G, Petitioner's Hrg. Exh. 20 at 247). Specifically, Dr. Harlan allowed other unqualified individuals to retrieve the body of one Baby Murphy. When Dr. Harlan learned his autopsy was questioned, he stated all evidence would be missing and unavailable. (Attachment G, Petitioner's Hrg. Exh. 20 at 248). Roush also recalled that Dr. Harlan allowed his pet dog, Shadow, who was free to roam through the lab, to eat the spleen, kidneys and other organs from an autopsy. (Attachment G, Petitioner's Hrg. Exh. 20 at 248).

Because the TBI was intimately involved in his case, Mr. Sutton argued the prosecution violated its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). Numerous TBI special agents and forensic scientists investigated the case. TBI special agents/forensic scientists who worked on the prosecution include: S. Poltorak Evans, Donald Carman, Hoyt Phillips, J. Russell Davis and Terry Fields. (Evans: Trial Exh. 46; Trial Exh. 66; Carman: Trial Exh.65; Trial Exh. 67; Phillips: Trial Exh.65; Davis and Fields: Trial Exh. 66). All of the TBI forensic lab reports were issued out of the TBI laboratory in Nashville. (Trial Exh. 46; Trial Exh. 65; Trial Exh. 66; Trial Exh. 67).

Special Agent David Davenport was also instrumental in eliciting statements from Sutton. (Trial Exh. 46 at 4456-57). TBI also conducted extensive interviews and shared its results with the prosecution. (Attachment I, Petitioner's Hrg. Exh. 19, TBI Investigative file on Griffin death at 1-2, 14, 19-21, 23, 29-37), and provided a six-page list of

witnesses to the prosecution. (Attachment I, Petitioner's Hrg. Exh. 19 at 19, 38-43).

The federal district court received and reviewed all of this material. The district court found the evidence was impeachment material but that the evidence was not possessed by the prosecutor. *Sutton v. Bell*, No. 3:06-cv-388, 2011 WL 13309012, at *8 (E.D. Tenn. Sept. 2, 2011). The Sixth Circuit affirmed the denial of relief. The Sixth Circuit found the TBI, who possessed the material, and also investigated the Griffin murder, was a cooperating agency and held it was unfair to hold the prosecution responsible for evidence possessed by a "cooperating agency" but not known to the prosecution. *Sutton v. Carpenter,* 617 Fed. Appx. 434, 440 (6th Cir. 2015).

The Sixth Circuit also found Mr. Sutton was not prejudiced by the *Brady* violation because other evidence established Mr. Sutton's guilt. The Sixth Circuit relied on evidence of the location of the co-defendant uncle's truck and the presence of shells fired from the co-defendant's firearm. *Sutton,* 617 Fed. Appx. at 441. The Sixth Circuit's reliance on these pieces of evidence demonstrates the importance of the State's timeline to its case for guilt against Mr. Sutton. Without the time of death testimony, the Sixth Circuit was forced to rely upon evidence specifically related to Mr. Dellinger. *Sutton,* 617 Fed. Appx. at 441 (citing *Dellinger v. State,* 279 S.W.3d 282, 292 (Tenn. 2009)).

Mr. Sutton's conviction is unreliable. The suppressed material would have fueled a withering cross-examination of Dr. Harlan. Regardless of whether the federal court was correct that it was unfair to hold the prosecutor responsible for knowledge by other agencies, the fact

remains that Mr. Sutton is a citizen of the State of Tennessee who faces execution based upon a conviction that reviewing courts have found is tainted but not subject to correction. The facts also remains that this Court did not have accurate information about Dr. Harlan when reviewing Mr. Sutton's case on direct appeal. These circumstances present the type of extenuating circumstances that warrant a recommendation of clemency. Mr. Sutton's conviction rests upon a significant defect that is not subject to correction but this Court may issue a Certificate of Commutation.

B. Extenuating circumstances exist because Mr. Sutton's death sentence rests upon incomplete, unreliable information.

When the sentencing jury assessed Mr. Sutton's culpability, it relied upon incomplete and misleading information. The sentencing jury did not understand the severity of the abandonment and neglect Mr. Sutton experienced, which opened the door to his uncle, James Dellinger, acting as a father figure. The sentencing jury also did not understand that Mr. Sutton is significantly brain-damaged and his executive functioning is significantly impaired. His ability to solve problems or to manage his behavior in difficult or stressful situations is impaired through no fault of his own. The sentencing jury should have been able to consider this mitigating information. Even with the evidence that was presented, the jury gave genuine consideration to the possibility of imposing a life sentence, as evidenced by its question about the likelihood of Mr. Sutton's being released from prison. These factors all qualify as

extenuating circumstances that merit issuance of a Certificate of Commutation.

Counsel early on made the decision not to "make excuses" for Sutton and only to focus on positive character attributes. *Sutton*, 2006 WL 1472542, at *23. This determination resulted in the jury having a misleading picture of Mr. Sutton's maturity and level of functioning. The trial court described Sutton's mitigation case as "at-a-boy" proof. (TT Sentencing Vol. I at 78). Family members served as character witnesses and described Sutton's good deeds, including taking care of children, sending money and hand-made crafts from prison, saving his niece's life by rescuing her from a house fire, maintaining a close relationship with his daughter, and being a good worker. (TT Sentencing Vol. I at 103-12; TT Sentencing Vol. II at 176-82; 185-90, 191-211).

Sevier County Constable Earl Sutton (no relationship) testified that he lived near Sutton and that he had not had any legal problems before the events at trial. (TT Sentencing Vol. II at 241). Corrections Officer Angela Stout testified that Sutton had not had significant disciplinary problems during his pretrial incarceration. (TT Sentencing Vol. III at 381).

Dr. Eric Engum testified that Sutton had borderline intellectual functioning, a learning disability, alcohol and marijuana dependence, depression, and was easily led. (TT Sentencing Vol. III at 386-93). Dr. Engum discussed Sutton's alcoholism and believed that in prison, away from alcohol, Sutton could live a productive life. (TT Sentencing Vol. III at 395). Dr. Engum literally made a single passing reference to Sutton's

"deplorable" family background and "physical and mental abuse." (TT Sentencing Vol. III at 387-88).

In closing argument at sentencing, counsel argued for a life sentence based upon lingering doubt (TT Closing Argument by Defense at 29-30); Sutton's alcoholism—which counsel made a point of arguing is classified by the federal government as a "disease" (TT Closing Argument by Defense at 39); and the fact that Sutton "came from a home in which, as is a lot of cases, both parents tried to vie for his attention. That happens quite often." (TT Closing Argument by Defense at 32).

During deliberations, the jury returned with a question about whether a life sentence in Blount County would be served consecutively to the Sevier County life sentence. The trial court declined to answer this question. *State v. Dellinger and Sutton*, 79 S.W.3d at 474. This Court affirmed the death sentence.

In post-conviction, Dr. Pamela Auble assessed Mr. Sutton. She explained that Mr. Dellinger acted as a father figure to Mr. Sutton and asserted a profound influence on Mr. Sutton because of the isolation, abuse and neglect Gary suffered from his parents and psychotic step-mother. Gary's parents divorced when he was three years old and he lived with his mother, Anna Morris, and her new husband. (PC Exh. 5, Dr. Auble Report at 5). When Gary was six years old, his mother became pregnant; she surrendered Gary to his father because Gary "ate too much" and she could not afford to feed him and her new baby. (PC Exh. 5, Dr. Auble Report at 5).

Gary's father had by then married a woman named Shirley Sutton. (PCT I, 131). Shirley was emotionally unstable and was hospitalized

because of depression with psychotic features. (PC Exh. 5, Dr. Auble Report at 5-6). The State of Tennessee terminated her parental rights to her own children because she was so violent and abusive to them. (PC Exh. 5, Dr. Auble Report at 6). Gary quickly became her new target. Shirley beat Gary with belts, canes, and coat hangers. (PCT I, 133). Her anger was unprovoked, unpredictable and uncontrollable. (PC Exh. 5, Dr. Auble Report at 6). When Gary was about eight years old, Shirley bit him on the arm because he ate the last piece of bologna. (PCT II, 134). She also viciously attacked him during his sleep. (PCT I, 134). She scratched Gary's face and neck, hit him with her fist and kick at him, (PCT II, 164-65), and often locked him out of the family home. (PCT II, 216-18).

This abuse was borne out in post-conviction testimony from Gary's aunt, Pat Sutton, who lived close to Gary. Pat recalled an incident while riding in the car with Gary and Shirley. Shirley inexplicably lunged to the back seat and attacked her step-son, pulling him by the hair on his head. (PCT II, 217). Pat heard Shirley scream at Gary and later observed bite marks and scratches on his arms, face and neck. Shirley abused Gary because she did not want him around. (PCT II, 218).

Diane Sutton, Gary's sister-in-law, recalled numerous other examples of the abuse heaped on the defenseless young boy. Shirley frequently locked Gary out of the house, even in cold weather. Unwilling to stand up for his own son, Gary's father also locked him out of the house to keep Gary and his wife separated. (PCT II, 165, 216). Banned from his home, Gary drank water from an outdoor spigot (PCT II, 219), and literally sought shelter from the elements in a doghouse, which was also used by the family's large and aggressive guard dog. (PCT II, 178). When

Gary was nine or ten years old, his father isolated him even further by permanently moving him into a camper in the yard so Shirley and he would have the house to themselves. (PCT II, 216-17).

James Dellinger, Gary's uncle and co-defendant, took a strong interest in Gary when he was about ten years old. Given the vacuum of love and supervision he suffered, Gary welcomed his uncle's attention. Gary was flattered by Dellinger's attention and viewed him as a potential protector from his abusive step-mother. (PCT I, 96). Dellinger gave Gary a shotgun and told him to use it to defend himself from Shirley. (PC Exh. 5, Dr. Auble Report at 14). Dellinger took Gary "riding and drinking" when Gary was as young as eleven or twelve years old. (PCT I, 140; PCT II, 172). Dellinger routinely removed Gary from school. (PCT II, 221). Gary failed sixth grade because of absenteeism. He was frequently absent his second year of sixth grade. The school then placed him in the eighth grade and he missed 133 days. Then he dropped out of school completely. (PCT I, 100).

Dr. Auble testified in post-conviction that Dellinger was the only father figure in Sutton's life. Dellinger showed him attention that his parents did not. (PCT I, 96).

Also, unfortunately, Dr. Auble inexplicably testified that Mr. Sutton did not suffer from any brain dysfunction. (*See* PC TR, 106-07, Findings of Fact and Conclusion of Law). In her report, which was admitted into evidence at the post-conviction hearing, however, Dr. Auble explained Mr. Sutton is brain damaged and deficits in his executive functioning are significant. (PC Exh. 5, Dr. Auble Report at 10, 16-17). The intermediate appellate court found Dr. Auble did not find

brain damage. *Sutton v. State*, 2006 WL 1472542, at *12. Mr. Sutton attempted to clarify this important matter in federal court but the federal courts deferred to the state court's findings.

In post-conviction, trial counsel noted he had never conducted a first degree murder trial, much less a capital case, (PCT II, 250), and had no training in conducting a capital sentencing proceeding. (PCT II,285). His billing records reflect he spent five hours preparing for sentencing. (PCT II, 300; PCT III, 302). Half of that time was spent in the courthouse after the jury returned a guilty verdict. (*Id.*). Such minimal investigation falls below the constitutional floor of what is acceptable.

The jury that imposed death did not have accurate information about Mr. Sutton's level of functioning. It did not know that due to Mr. Sutton's brain impairments, his ability to solve problems or to make reasonable choices in stressful situations is impaired through no fault of his own. The jury wrongly believed Mr. Sutton's parents vied for his attention when in fact he was abandoned and neglected by his parents and later abused by his step-mother. That the sentencing jury was not able to accurately assess Mr. Sutton's moral culpability is an extenuating circumstance that warrants the issuance of a Certificate of Commutation.

At sentencing, Mr. Sutton's counsel "beseech[ed]" the jury to ... "vote life for Gary Sutton where he is. ... He is in a structured environment ... pos[ing] no threat to any of society...." (TT Sentencing Closing Argument at 41). Almost immediately after this closing defense argument, one of the first instructions given to the jury at sentencing was that if Mr. Sutton were given a life sentence, he would be eligible for parole after "twenty-five (25) full calendar years." (T TR Vol. 2, 243).

During deliberations, the jury submitted a written question: "If James Dellinger and Gary Sutton were given life in prison from Sevier County and they are given life in prison in Blount County-will the prison terms be consecutive and/or concurrent?" *State v. Dellinger and Sutton*, 79 S.W.3d at 474. The trial court refused to answer the jury's question, leaving the erroneous impression that Mr. Sutton would only serve 25 years in prison, in violation of Mr. Sutton's right to due process and a fair trial, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. *Simmons v. South Carolina*, 512 U.S. 154 (1994).

On appeal, this Court did not find reversible error in failing to clarify this matter for the jury. *State v. Dellinger and Sutton*, 79 S.W.3d at 475. Justice Birch dissented from the ruling, noting "it is difficult to ignore the evidence that juror perceptions (or misperceptions) about sentencing may have tainted the decision to impose a death sentence." *State v. Dellinger and Sutton*, 79 S.W.3d at 505.

That the jury seriously considered a life sentence but rejected it because of the inaccurate belief that Mr. Sutton would be paroled also qualifies as an extenuating circumstance that warrants the issuance of a Certificate of Commutation.

III. This Court should permit counsel an adequate amount of time to prepare for clemency.

If this Court decides to schedule Mr. Sutton's execution date, then it is respectfully requested that the Court permit adequate time for counsel to prepare for clemency. The scheduling of any execution date should take into account the realities of the present circumstances. The State has sought execution dates for two clients represented by

undersigned's office, the small Capital Habeas Unit of Federal Defender Services of Eastern Tennessee, Inc. (FDSET CHU). The FDSET CHU currently represents four other clients who have pending execution dates.[4]

Representing clients with overlapping warrant periods presents extreme challenges. Undoubtedly, representing clients with pending execution dates is part and parcel of undersigned counsel's "job." The State, however, was not required nor compelled to request execution dates for two clients represented by counsel's office. The effect of the State's action directly affects counsel's workload in a significant way and directly affects counsel's ability to adequately represent Mr. Sutton in clemency proceedings.

In addition, Counsel Bales also represents federal death row inmate David Runyon in a challenge to his capital conviction and sentence. (*United States v. Runyon*, No. 17-5 (4th Cir.)). Counsel Bales will be required to prepare a Reply Brief to be filed with the Fourth Circuit Appeals Court with a due date of February 3, 2020. It is also anticipated that Counsel Bales will present oral argument to the Fourth Circuit Appeals Court between March 18 – March 20, 2020. (Corrected Tentative Calendar Order, *United States v. Runyon*, No. 17-5 (4th Cir. Dec. 18, 2020), ECF No. 60). Counsel Bales is also co-counsel on a Fifth Circuit Appeals Court capital case. (*Gamboa v. Davis*, No. 16-70023 (5th Cir.), and anticipates assisting in preparing a Reply in that case with a due date of January 24, 2020. The federal death penalty appeal in particular

[4] Nicholas Sutton 2/20/2020, Gregory Lott 3/12/2020, Tim Hoffner 8/11/2021, Keith LaMar 11/16/2023.

involves unusually complex legal and factual issues, as well as a voluminous appellate record, and will require substantial time to adequately complete briefing and then present argument.

Preparing for the clemency process requires a thorough examination of all prior phases of the case and independent investigation to tailor the clemency presentation to the characteristics of the client, case and jurisdiction. Counsel must also ensure that consideration of Mr. Sutton's clemency application is substantively and procedurally just. *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 10.15.2: Duties of Clemency Counsel (Feb. 2003). With respect to Mr. Sutton, adequate preparation of the case for clemency is especially important because he has never faced an execution date not subject to an automatic stay and this will be his first, and likely last, opportunity to request clemency from the Governor. "[T]he clemency power can correct injustices that the ordinary criminal process seems unable or unwilling to consider." *Dretke v. Haley*, 541 U.S. 386, 399 (2004) (Kennedy, J., dissenting). Thus, it is imperative that counsel be afforded sufficient time to prepare and present Mr. Sutton's case for clemency.

Scheduling Mr. Sutton's execution less than four months from any current execution date for a FDSET CHU's client would: (a) unduly strain the resources of counsel's office; (b) require an inordinate amount of counsel's time; and, (c) significantly decrease the quality of representation afforded Mr. Sutton. In addition, scheduling an execution date less than four months from when counsel completes pre-existing responsibilities in two other difficult demanding cases that are on appeal

would limit the amount of time counsel has to devote to preparing Mr. Sutton's case for clemency. Accordingly, counsel prays that any execution date for Mr. Sutton be scheduled no earlier than four-months' time after the execution dates scheduled for other clients which are set for February 20, 2020, March 12, 2020, August 11, 2021, and November 16, 2023, as well as no earlier than four months' time after March 20, 2020. (Argument in *United States v. Runyon*, No. 17-5 (4th Cir.).

IV. CONCLUSION

For these reasons, Mr. Sutton respectfully requests that the Court deny the State's motion as premature.

Further in the alternative, if the Court grants the motion and schedules an execution date, the Court should issue a certificate of commutation to the Governor.

Also, if the Court grants the motion, it is requested that Mr. Sutton's execution date be scheduled no earlier than four-months' time after February 20, 2020, March 12, 2020, March 20, 2020, August 11, 2021, and November 16, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was forwarded by email on the 30th day of December 2019, to the following:

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