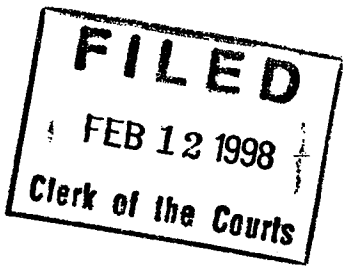
IN THE SUPREME COURT OF TENNESSEE

AT NASHVILLE



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

v.

STATE OF TENNESSEE,
Respondent-Appellee.

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

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

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February 13, 1998

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EXPLANATION OF ABBREVIATIONS

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

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

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

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

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

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

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

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

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

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

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

QUESTIONS PRESENTED FOR REVIEW

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

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

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

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

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

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

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

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

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

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

STATEMENT OF THE FACTS

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

Overview

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Facts Relating to Argument I

A. The Brady Material At Issue.

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

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

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

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

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

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

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

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

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