

IN THE TENNESSEE SUPREME COURT  
AT NASHVILLE

STATE OF TENNESSEE, )  
                          )  
Movant,               )     CAPITAL CASE  
                          )  
v.                      )     Case No. M2016-01869-SC-R11-PD  
                          )  
OSCAR SMITH,          )     EXECUTION DATE:  
                          )     April 21, 2022  
Respondent.            )

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**Motion to Vacate Execution Date**

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On March 30, 2022, Serological Research Institute (SERI) reported the presence of unknown DNA—DNA *that does not match Mr. Smith*—on the handle of the murder weapon in this case. After 32 years of adamantly asserting his innocence, Oscar Smith finally has proof that someone else murdered his family. This new DNA evidence can and should be matched to the actual killer—who also left their fingerprints on the weapon—so that Oscar Frank Smith may finally be exonerated. Oscar Smith—who is scheduled for execution on April 21, 2022—has two collateral actions involving new scientific proof of his actual innocence currently pending before Tennessee courts. In light of these pending actions, Mr. Smith requests that this Court vacate his execution date, currently scheduled for April 21, 2022.

Three business days after receiving the SERI report, Mr. Smith filed for relief in the criminal court under Tennessee Code Annotated § 40-30-117 and § 40-30-301, *et seq.*. Ex. 1, Mot. to Reopen & Pet. under

DNA Act. Even though the state had not responded to Mr. Smith's filing, on Monday, April 11, 2022, the criminal court denied Mr. Smith's motion. Mr. Smith filed for reconsideration because the post-conviction court misapprehended the facts and applied the wrong legal standards.

Upon the post-conviction court's denial of the motion to reconsider on Tuesday April 12, 2022, Mr. Smith immediately filed a notice of appeal and requested expedited briefing. *See Ex. 2 Smith v. State*, M2022-00455-CCA-R3-PD, Mot. to Req. Expedited Briefing (filed April 12, 2022). On April 13, 2022, Mr. Smith filed a Rule 28 application for permission to appeal from the post-conviction court's denial of his Motion to Reopen in the Court of Criminal Appeals. *Smith v. State*, M2022-00460-CCA-R28-PD. Mr. Smith requested expedited briefing and oral argument pursuant to Tennessee Supreme Court Rule 28 § 10(B) in that matter.

This Court should vacate Mr. Smith's execution date to allow the Court of Criminal Appeals to adjudicate the post-conviction court's errors without the pressing constraints inherent in a looming execution date. Mr. Smith is entitled to reopen post-conviction proceedings and/or to relief pursuant to the Post-Conviction DNA Act of 2001 because the SERI Report is new and favorable scientific proof of Mr. Smith's actual innocence. The report establishes that someone else murdered Mr. Smith's family—just as Mr. Smith has maintained for 32 years.

This Motion is made under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Article 1, §§ 2, 8, 16, and 32 of the Tennessee Constitution; this Court's inherent authority under Section 16-3-503 of the Tennessee Code; and Tennessee Supreme Court

Rule 12.4(A), (E). Rule 12 specifically grants this Court authority to stay or delay “an execution date pending resolution of collateral litigation in state court [where] the prisoner can prove a likelihood of success on the merits in that litigation.” Tenn. S. Ct. R. 12(4)(E); *accord State v. Irick*, [556 S.W.3d 686, 689 \(Tenn. 2018\)](#) (defining likelihood of success on the merits as a showing of “more than a mere possibility” of success) (quoting *Six Clinics Holding Corp. II v. Cafcomp Sys.*, [119 F.3d 393, 402 \(6th Cir. 1997\)](#)). In establishing likelihood of success on the merits, “it is ordinarily sufficient if the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation.” *Six Clinics*, 119 F.3d at 402.

**I. Mr. Smith is likely to succeed on appeal and on a subsequent remand of his action seeking to “Reopen Post-Conviction Proceedings and/or for Review under the Post-Conviction DNA Act.”**

On April 4, 2022, Mr. Smith filed a Motion to Reopen Post-Conviction Proceedings, Tennessee Code Annotated § 40-30-117, and/or for Review under the Post-Conviction DNA Analysis Act of 2001, Tennessee Code Annotated §§ 40-30-301, *et seq.* (“DNA Act”), in the Criminal Court for Davidson County, Tennessee. Ex. 1. Based on an agreement between the parties and a subsequent court order, Mr. Smith was able to obtain new scientific proof of his actual innocence—a report with new and previously unavailable DNA analysis confirming the presence of an identifiable DNA profile on the murder weapon that *definitively does not match* Mr. Smith. *Id.*; *see also* Ex. 3, Jan. 19, 2022

Agreed Order; Ex. 4, 2d Agreed Order. Mr. Smith argued that, when considered in conjunction with evidence of an identifiable print on that same murder weapon which *also* definitively did *not* match Mr. Smith, the new DNA analysis proves his innocence.

At the beginning of 2022, Mr. Smith learned that new DNA technology is available that could allow for a DNA profile to be developed from the “touch DNA” left in an identifiable, yet still unidentified, fingerprint on the murder weapon in this case. In litigation pursuant to the new Fingerprint Act of 2021, Mr. Smith’s expert noted multiple errors made in the processing of fingerprint evidence in this case including that the police fingerprint examiner, Sergeant Johnny Hunter, had failed to realize that he had obtained from the murder weapon an identifiable fingerprint from the perpetrator. *See* Ex. 1 at p. 14, Bright-Birnbaum Report; Although Hunter collected the awl from the crime scene (kitchen) and lifted the perpetrator’s print from the awl, he marked it as “N/V,”—or “no value”— in his report, indicating that it could not be used for identification. Ex. 1 at p. 289, Hunter Report (dismissing 30 prints, including that on the awl, as having “no identifiable value”). Hunter’s determination that the print on the murder weapon, Item 001-01B, had no value was error. *See id;* Ex. 1 at p. 14, Bright-Birnbaum Report at 1-2. In addition to determining that Mr. Smith *did not* leave that print on the awl, Bright-Birnbaum found that Item 001-01B *was* identifiable—that is, enough of the print from the awl was lifted and preserved to provide sufficient information such that a comparison could be made. *Id.* at 2. However, the courts dismissed Mr. Smith’s claims under the

Fingerprint Act for procedural reasons. See *Smith v. State, No. M2021-01339-CCA-R3-PD, 2022 WL 854438 (Tenn. Crim. App. Mar. 23, 2022)*.

Upon realizing that Bright-Birnbaum's analysis showed that the unknown perpetrator's print was on the murder weapon and that new scientific procedures were available to obtain profiles in such circumstances, Mr. Smith sought DNA analysis of the awl. Though it has been theoretically possible to develop "touch DNA" for several years, the Applied Biosystems™ GlobalFiler™ PCR Amplification Kit was not developed until 2012 and did not become available in most labs until after 2017. Ex. 1 at p. 151, SERI Report. Moreover, the fully continuous probabilistic genotyping software program that makes it possible to isolate individual strands of DNA from sources that involve mixtures of the DNA of two or more people, BulletProof Sentry, was not available until 2022. *Id.* Because the awl in this case was coated with Chad Burnette's blood, BulletProof Sentry was necessary to isolate the unknown murderer's DNA profile.

Mr. Smith sought to develop this critical DNA evidence, even while the Fingerprint Action was still proceeding. On January 19, 2022, the criminal court, seeing the agreement of the parties, ordered the release of the awl to Mr. Smith's DNA analyst. Ex. 3, Jan. 19, 2022 Agreed Order. On February 28, 2022, the criminal court ordered release of the known samples back to SERI. Ex. 4, 2d Agreed Order. Reanalysis of the known DNA samples was required because the 2016 analysis results were not sufficient for comparison with the new technology used to analyze the biological material left behind on the awl.

On March 30, 2022, SERI issued a report confirming the presence of the unknown perpetrator’s DNA on the murder weapon. Ex. 1 at p. 147, SERI Report. The three victims were excluded as sources of this DNA profile. *Id.* Most notably, Mr. Smith was *definitively excluded* as the contributor of this DNA. *Id.*

The significance of his new scientific evidence cannot be overstated: Oscar Smith has, using new touch DNA technology, demonstrated that he is not the person who used the awl to kill his family. He now has both an identifiable fingerprint *and* a DNA profile from the true assailant for comparison to any alternate suspect(s).

Based on the new scientific evidence revealing an identifiable DNA profile on the murder weapon that *does not belong to Mr. Smith*, he filed his Motion in the criminal court seeking review and relief. He requested that his post-conviction proceedings be reopened because new scientific evidence established that he is actually innocent of the offenses for which he was convicted, and that the facts, if true, establish by clear and convincing evidence that his conviction should be set aside or that his sentence should be reduced. Tenn. Code Ann. § 40-30-117(a)(2), (4). Mr. Smith also argued that the DNA analysis—which was performed by a qualified lab, pursuant to the parties’ agreement and the post-conviction court’s order—is “favorable,” thus warranting an evidentiary hearing under the DNA Act. Tenn. Code Ann. § 40-30-312.

On Monday, April 11, 2022—without a responsive pleading by the state and without a hearing or argument—the post-conviction court denied Mr. Smith’s motion. Within hours of the court’s order, Mr. Smith filed a motion for reconsideration, setting out the post-conviction court’s

factual and legal errors. The post-conviction court summarily denied the motion for reconsideration on April 12, 2022, and Mr. Smith initiated appellate proceedings in the Court of Criminal Appeals that same day.

Mr. Smith has requested expedited briefing and hoped to provide this Court with the Court of Criminal Appeals' schedule contemporaneous to this filing. However, in the two days since Mr. Smith's request for expedited briefing was filed—a request about which the state authorized Mr. Smith to indicate that the state took no position—the Court of Criminal Appeals has not issued any schedule. That more than two days have passed without even a schedule being established demonstrates that the lower courts require more time than the current execution date allows to fully adjudicate Mr. Smith's claims.

Mr. Smith is likely to prevail in the appellate courts because the post-conviction court applied the wrong legal standards as to each procedural vehicle and misapprehended the record, resulting in a ruling that is not likely to stand. If this Court vacates the execution date such that Mr. Smith has time not only to win reversal in the appellate court and to present the merits of his claims in the post-conviction court, he has a likelihood of success on the merits.

**A. Mr. Smith is likely to prevail on his Rule 3 appeal as of right from the denial of his petition under the DNA Act.**

If the courts are given time to fully adjudicate and contemplate Mr. Smith's arguments, Mr. Smith is likely to prevail on his Rule 3 appeal from the denial of his motion under the DNA Act, Tennessee Code Annotated § 40-30-301, *et seq.*. First, in denying Mr. Smith's motion, the court failed to properly apply this Court's binding precedent from *Powers*

*v. State*, 343 S.W.3d 46 (Tenn. 2011). Second, the post-conviction court speculated—erroneously—as to the significance of the DNA evidence presented by Mr. Smith. The appellate court must have time to review the trial court errors and to adjudicate Mr. Smith’s entitlement to a remand. The errors must, then, be rectified by the post-conviction court—which will require a hearing on the merits of Mr. Smith’s claims.

The post-conviction court failed to properly apply *Powers* to Mr. Smith’s proof. *Powers* instructs courts to consider the way the “particular evidence of innocence interacts with the evidence of guilt.” *Powers*, 343 S.W.3d at 55. Here, however, the post-conviction court quoted a portion of the CCA’s recent fingerprint opinion in Mr. Smith’s case, holding that, if the court stacked the most favorable fingerprint evidence against the trial evidence, the fingerprint evidence would not tip the scales in Mr. Smith’s favor. Ex. 5, Order at p. 11. The post-conviction court’s new order simply substituted the words “touch DNA” where the CCA’s opinion had the word “fingerprint.” *Id.* (quoting *Smith*, 2022 WL 854438, at \*17). But the CCA was not presented with the legal question that was presented in the DNA Act Petition.

Mr. Smith has now presented favorable DNA evidence *in addition to* the favorable fingerprint evidence he recently offered, and his motion argued that the combination of those compelling pieces of evidence must be considered. Thus, these *two* pieces of evidence interact differently with the evidence of guilt than did the fingerprint analysis alone. The post-conviction court failed to engage with Mr. Smith’s argument about the interplay of the two pieces of exonerative evidence at all. Further, the

court’s mere substitution of the words “touch DNA” for “fingerprint” in the CCA’s fingerprint opinion demonstrates that the court did not engage with the differences in the previously presented favorable fingerprint evidence and the newly presented exonerating DNA evidence.

DNA evidence is qualitatively different from fingerprint evidence and Mr. Smith has presented the court with evidence that a murder weapon used in the crime has DNA that conclusively *does not* belong to him. *See House v. Bell, 547 U.S. 518, 540–41 (2006)* (finding that “[p]articularly in a case like this where the proof was . . . circumstantial,” the jury would have given “great weight” to DNA evidence excluding petitioner as the source of DNA found on the victim); *United States v. Herrera, 704 F.3d 480, 486 (7th Cir. 2013)* (noting that other forms of “matching” evidence, including fingerprint evidence and eyewitness identification are “less rigorous than the kind of scientific matching involved in DNA evidence”).

This new DNA evidence proves that someone besides Mr. Smith wielded the murder weapon. Under *Powers*, the post-conviction court must engage with *both* the DNA evidence *and* the fingerprint evidence (both the debunked palm print analysis *and* the evidence of an unidentified fingerprint that does not belong to Mr. Smith on the same awl). It must consider the weight of the evidence that an unknown perpetrator’s DNA is on the awl, not simply repeat the CCA’s words from an earlier opinion that did not wrestle with these factors. Otherwise, the court has abandoned its obligation under *Powers* to independently assess the weight of the evidence of innocence.

Further, the post-conviction court erroneously ascribed counterfactual significance to the fact Mr. Smith’s DNA was found on Judy Smith’s shirt sleeve. In its denial, the post-conviction court cited the SERI report’s finding that Mr. Smith’s DNA was on the “left sleeve of an ‘off-white long sleeve shirt with large red/brown stains’” as a basis for its denial. Ex. 5, Order at p. 11 (quoting SERI report). After noting the shirt sleeve evidence, the post-conviction court “conclude[d] there is not a reasonable probability that the recently discovered DNA evidence would have prevented Mr. Smith’s prosecution or conviction.” *Id.* The post-conviction court’s reliance on Mr. Smith’s DNA on Mrs. Smith’s shirt as proof of Mr. Smith’s guilt (and resulting non-entitlement to a hearing) was contrary to the evidence presented at trial, evidences the post-conviction court’s failure to review the proof in conjunction with the facts in the record, and demonstrates that the post-conviction court failed to properly apply the *Powers* standard.

The uncontested proof presented by the prosecution at trial established that Mr. Smith spent the day prior to the murders with Mrs. Smith. They drank coffee together at Waffle House before driving to the Gold Rush on Elliston, where they continued to be together for several hours. *See* Ex. 6, TT. p. 2061–67 (testimony of Bruce Hornal that the Smiths were sitting together on the same side of the booth at Waffle House); *id.*, p. 2636 (testimony of Mary Jane Fitzpatrick that Smiths were sitting “side by side” for “a couple hours” while eating supper at the Gold Rush); *see also* Ex. 7, Supp. Police Report by Det. McElroy (documenting Waffle House employee statement that Judy Smith was wearing a “white long-sleeve shirt and blue jeans”). Because the proof

presented by the prosecution at trial provides a completely innocent explanation for Mr. Smith's DNA on the victim's shirt, the post-conviction court's reliance on speculation about the portion of the SERI report regarding Mr. Smith's DNA on the victim's shirt was contrary to the record. Further, the post-conviction court's finding that there is not a reasonable probability that the newly produced DNA evidence would have made a difference is vitiated by the court's counter-factual speculation.

The post-conviction court further observed that "it is unclear whether the awl was preserved in such a manner that would have assured the DNA profiles were left at the crime scene and did not result from contamination." Ex. 5, Order at p. 11 n.6. Though the court stated that it would have granted Mr. Smith a hearing despite its concerns about contamination, the mere fact that the post-conviction court *speculated* that contamination may have been the source of the unknown DNA further demonstrates that the court failed to analyze Mr. Smith's entitlement to relief under sections 304 and 305 under the *Powers'* presumption. *Powers*, 343 S.W.3d at 46.

*Powers* requires that the post-conviction court presume that the results of testing will be favorable—and then determine whether, with the favorable testing, a different result is probable. *Id.* Here, the post-conviction court's speculations reflect that the court failed to presume favorability. Instead, the court speculated that the favorable results obtained by SERI could be the results of misconduct or mishandling of evidence. Such supposition is expressly contrary to *Powers'* instruction that postconviction courts not "engag[e] in

conjecture[.]” *Id.* at 56 n.29. The appropriate forum to engage with such open questions is an evidentiary hearing; until then, under *Powers*, all inferences *must* be drawn in favor of Mr. Smith. Had the post-conviction court correctly applied these standards, it would have had no choice but to grant Mr. Smith an evidentiary hearing.

The fully continuous probabilistic genotyping software program used to obtain the perpetrator’s DNA profile was not available until *this year*. After the technology became available, the parties agreed to the DNA analysis, and the criminal court ordered release of the evidence for the purpose of performing the analysis using this new technology. Ex. 3 and Ex. 4. SERI meets the standards adopted pursuant to the DNA Identification Act of 1994, as required by Tennessee Code Annotated § 40-30-310. Ex. 1 at p. 291. Mr. Smith has thus satisfied the technical prerequisites to obtaining a hearing under the DNA Act.

Once the post-conviction court weighs his evidence under the standard this Court set out in *Powers*, Mr. Smith is likely to obtain a hearing under the DNA Act, where he is likely to succeed in establishing the that he is entitled to relief from his convictions and/or sentence of death. There can be no serious doubt that the identification of a DNA profile on a murder weapon that *excludes* the Mr. Smith and the victims—and that identifies the actual killer—is “favorable” evidence. See Tenn. Code Ann. § 40-30-312. Thus, SERI’s identification of the unknown assailant’s DNA on the murder weapon entitles Mr. Smith to a hearing under the mandatory language of the DNA Act.

**B. Mr. Smith is likely to prevail on his Rule 28 application for permission to appeal from the post-conviction court’s denial of his motion to reopen.**

If the courts are given time to adjudicate his claims, Mr. Smith is likely to prevail on appeal, because the post-conviction court abused its discretion in denying his motion to reopen post-conviction. The post-conviction court misapprehended Mr. Smith’s burden of proof under the motion to reopen statute, holding Mr. Smith to a pleading standard that this Court has found violates due process. The post-conviction court denied Mr. Smith’s motion under Tennessee Code Annotated § 40-30-117 because “given the extensive evidence of Mr. Smith’s guilt produced at his trial, even when considering the DNA evidence resulting from SERI’s recent testing in a light most favorable to the Petitioner, the Court concludes Mr. Smith would be unable to prove *by clear and convincing evidence* that the DNA evidence establishes he is actually innocent of the offenses for which he was convicted.” Ex. 5 Order at p. 12 (emphasis added).

The post-conviction court’s use of the “clear and convincing evidence” standard to summarily dismiss Mr. Smith’s claim violates due process and was clear error under this Court’s rules and the binding precedent of [Howell v. State, 151 S.W.3d 450 \(Tenn. 2004\)](#), and [Van Tran v. State, 66 S.W.3d 790 \(Tenn. 2001\)](#). Supreme Court Rule 28 § 6 governs the procedure post-conviction courts are to use to adjudicate motions to reopen. The procedure followed by the post-conviction court below failed to follow those dictates. In particular, the post-conviction court failed to follow Section 6(2) which required the court to determine “whether the

petition states a colorable claim.” Tenn. Sup. Ct. R. 28 § 6(B)(2). The post-conviction court further failed, upon making the determination of a colorable claim, to follow Rule 28 § 6(B)(3)(d) which required the court to order the state to respond. The court also failed to follow Rule 28 § 6(B)(4)(c) that required the court to set out conclusions of law in support of the determination that the petition did not state a colorable claim. Finally, the court failed to re-review the petition and answer following the state’s response, as is required by Rule 28 § 6.

In *Howell*, the Tennessee Supreme Court held that Supreme Court Rule 28’s “colorable claim” standard applies to motions to reopen. 151 S.W.3d at 460–63. Mr. Howell moved to reopen post-conviction and, upon dismissal, argued on appeal—just as Mr. Smith does here—that the trial court erred in dismissing his claim under the clear and convincing evidence standard. This Court agreed, finding that, when a petitioner has not had a prior opportunity to present the claim raised in the motion to reopen, the heightened “clear and convincing evidence” standard violated due process.

In *Howell*, this Court held that the due process concerns regarding the opportunity to raise a constitutional claim implicated fundamental rights: “If an excessively lengthy sentence implicates a fundamental right, . . . then certainly a death sentence would as well.” *Id.* at 462–63. The Court continued, “[W]e find the case before us today does involve a fundamental right. We reject the State’s attempt to frame the question as one of a right to attack a conviction rather than a right to be free from unconstitutional punishment.” *Id.* This Court explicitly held that fundamental fairness is encompassed in due process. *Id.* The Court

noted, that “while there is merit to the argument that procedural due process and substantive due process are conceptually different, we find that both encompass the central idea of fundamental fairness. If the petitioner in the present case is found to be [intellectually disabled], then he has a fundamental right not to be executed.” For that reason, this Court held that “[d]ue process requires he be given a fair opportunity to litigate this claim in order to protect this right.” *Id.*

Here, Mr. Smith has the same fundamental right not to be executed as Mr. Howell had. And just like Mr. Howell, he had no prior opportunity to raise the claim he now raises, as the technology that allowed SERI to isolate the unknown perpetrator’s DNA did not exist until this year. Ex. 1, at p. 143, SERI report (reflecting new technology not available until 2022); *see also* Ex. 5. Order at 9–10 (finding “no reason to believe the timing results from an attempt to ‘unreasonably delay the execution of sentence or administration of justice’”). Accordingly, under this Court’s binding precedent in *Howell*, the standard the post-conviction court should have used to evaluate Mr. Smith’s entitlement to a hearing on his motion to reopen was the colorable claim standard set forth in Rule 28 § 6(B)(2). The trial court abused its discretion in failing to apply this Court’s binding precedent and its denial of a hearing based on the higher clear and convincing standard violated due process. *Howell*, at 462–63.

In *Van Tran*, this Court followed *Howell* and held that that fundamental fairness requires that “the petitioner have a meaningful opportunity to raise his substantive constitutional claim.” 66 S.W.3d at 823–24. (“In previous cases where this Court has granted a post-conviction hearing based upon due process grounds, the defendant

was confronted with circumstances beyond his control that prevented him from asserting a claim.”). Mr. Smith has never had an opportunity to present this proof of his actual innocence—due to “circumstances beyond his control that prevented him from asserting a claim.” *Id.* (citing *Williams v. State*, 44 S.W.3d 464 (Tenn. 2001); *State v. Nix*, 40 S.W.3d 459 (Tenn. 2001); *Seals v. State*, 23 S.W.3d 272 (Tenn. 2000); *Watkins v. State*, 903 S.W.2d 302 (Tenn. 1995); *Burford v. State*, 845 S.W.2d 204 (Tenn. 1992)).

*Howell* and *Van Tran* dictate that, whereas here, a petitioner has never had a chance to present a claim, the pleading standard is dictated by Tenn. Sup. Ct. R. 28 § 6(B)(2): the claim must “colorable” to merit a hearing. Once a colorable claim has been established, a petitioner is entitled to a hearing where entitlement to relief must be established by clear and convincing evidence. *Howell*, 151 S.W.3d at 463; *Van Tran*, 66 S.W.3d at 823–24. Here, because the post-conviction court determined that Mr. Smith could not have produced this evidence sooner, the court abused its discretion in failing to apply the colorable claim standard set out in *Howell* and *Van Tran*. Under the constitutionally required colorable claim standard, Mr. Smith was—and still is—entitled to meaningful, substantive review, including a hearing on the merits.

**C. Mr. Smith has a likelihood of success on the merits and this Court should allow thorough litigation of these critical issues.**

In enacting the DNA Act in 2001, the Tennessee legislature recognized the importance of granting not only access to DNA testing to individuals convicted of serious crimes, but also review of the integrity of

those convictions in light of the results of such testing. Indeed, the Act's legislative history confirms its dual aims: "to aid in the exoneration of those who are wrongfully convicted," and "to aid in identifying the true perpetrators of the crimes." *Powers*, 343 S.W.3d at 44, 59. Mr. Smith's collateral action is thus precisely the type of case that the legislature intended to correct in passing the DNA Act. Similarly, the Post-Conviction Procedures Act allows petitioners to reopen post-conviction proceedings upon proof of new scientific evidence of actual innocence. Tenn. Code Ann. 40-30-117(c). The Legislature passed these laws to ensure that in circumstances like those presented here, a citizen unjustly convicted of a crime has a vehicle to present proof of his innocence to the courts.

Mr. Smith did not kill his family. For 32 years, he has maintained his innocence and has attempted the nearly impossible task of proving a negative—that he did not murder anyone. Mr. Smith has been doggedly seeking proof of his actual innocence for decades and has obtained and brought this exonerative proof to Tennessee's courts as soon as possible after obtaining the results. As the post-conviction court found, this application is not driven by a desire to unreasonably delay either the execution of his sentence or the administration of justice. Ex. 5, Order at 10. This is not a case where a last-minute claim has been brought based upon long known-facts or where a petitioner has slept on his rights. See *Ramirez v. Collier*, --- S. Ct. ----, 2022 WL 867311, at \*13 (U.S. Mar. 24, 2022) (citing *Gomez v. U.S. Dist. Ct. for N. Dist. of Cal.*, 503 U.S. 653, 654 (1992) (*per curiam*); *Gildersleeve v. New Mexico Mining Co.*, 161 U.S. 573, 578 (1896)). Rather, Mr. Smith has steadfastly maintained his innocence

and has been attempting to prove his innocence in Tennessee state court for the better part of a year.

This is instead a case where the development of new law and new scientific testing and methodology have allowed Mr. Smith—who has been incarcerated for more than three decades—to obtain new and previously unavailable facts that prove his innocence. *Herrera v. Collins*, 506 U.S. 390, 417 (1993) (though the burden for proving such would be high, assuming that “in a capital case a truly persuasive demonstration of ‘actual innocence’ made after trial would render the execution of a defendant unconstitutional”); *see, e.g., Aguirre-Jarquin v. State*, 202 So.3d 785 (Fla. 2016) (ordering new trial and vacating death sentence for capital petitioner where new DNA evidence showed profile of alternate perpetrator, supporting petitioner’s trial theory and persistent protestations of innocence); *House*, 547 U.S. at 540–41 (new DNA evidence excluding capital petitioner as source of semen found in murder victim was “of central importance” where identity was an issue and where the previous DNA evidence pointing to petitioner was the sole forensic evidence presented to the jury).

Mr. Smith has now obtained “new scientific evidence establishing that [he] is actually innocent” of murdering his family, *see* Tennessee Code Annotated § 4030117(a)(2), and at an evidentiary hearing, his proof is sufficient to “establish by clear and convincing evidence that [he] is entitled to have the conviction set aside or the sentence reduced,” Tennessee Code Annotated § 40-30-117(a)(4), (b). Unlike many other cases involving new DNA evidence, there has never been any question that this crime was committed by a single perpetrator. Indeed, in both

opening and closing arguments, the prosecution argued that the crime was committed by one person. Ex. 1, at p. 181, Supp. TT of Opening & and Closing Statements at TT p. 4-8 (arguing that one perpetrator committed the murders alone); *id.* at TT p. 62-64 (arguing that “there is only one man” who committed the crime). If the DNA on the murder weapon did not come from the victims or Mr. Smith, a reasonable person can be left with only one conclusion: that Mr. Smith did not commit these murders.

Because Mr. Smith meets the standards of the motion to reopen statute, and because of the strength of his new evidence, he has shown more than a mere possibility that he will succeed in having his murder convictions set aside. Mr. Smith has “raised questions going to the merits” of his claim of actual innocence. *Six Clinics*, 119 F.3d at 402. His claims are “so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation.” *Id.* Mr. Smith is, accordingly, eligible for a stay of execution pursuant to this Courts rules, Rule 12.4.(E). This Court should stay the execution to allow the lower courts to fully and fairly adjudicate Mr. Smith’s claims of actual innocence.

## **II. Conclusion**

Because Mr. Smith has shown a likelihood of success on the merits, this Court should grant a stay of execution. Tn. S. Ct. R. 12.4(E). As such, the Motion to Vacate Mr. Smith’s April 21, 2022 execution date should be granted and a stay should be imposed until Mr. Smith’s meritorious claims may be fully adjudicated.

Respectfully submitted this 14th day of April, 2022.

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BY: /s/ Amy D. Harwell  
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#### CERTIFICATE OF SERVICE

I, Amy D. Harwell, certify that a true and correct copy of the foregoing Motion to Vacate was served via email and the court's e-filing system to opposing counsel, Samantha Simpson, Assistant Attorney General, P.O. Box 20207, Nashville, Tennessee, 37202.

BY: /s/ Amy D. Harwell  
Counsel for Oscar Smith