

IN THE TENNESSEE COURT OF CRIMINAL APPEALS

ROBERT GLEN COE,)	No. _____
)	Shelby County Post Conviction
Petitioner/Applicant,)	No. P-3577, 6594, 14345
)	
v.)	<u>Capital Case</u>
)	
STATE OF TENNESSEE,)	ORAL
REQUESTED)	
)	
Respondent.)	

FILED
ARGUMENT
January 04, 2000

**APPLICATION FOR PERMISSION TO APPEAL
AFINDINGS OF FACT AND CONCLUSIONS OF LAW ON
MOTION TO REOPEN POST CONVICTION PETITION@**

**FROM THE CRIMINAL COURT OF SHELBY COUNTY, TENNESSEE,
DIVISION III, THE HONORABLE JOHN COLTON, PRESIDING**

Robert L. Hutton
GLANKLER BROWN, PLLC
1700 One Commerce Square
Memphis, TN 38103
(901) 525-1322

Attorney for Applicant,
Robert Glen Coe

TABLE OF CONTENTS

STATEMENT OF JURISDICTION..... 1

QUESTIONS PRESENTED 1, 2

STATEMENT OF THE CASE 2

 A. Trial And Post Conviction Proceedings 2

 B. Proceedings On the Motion to Reopen 4

STATEMENT OF FACTS 6

 A. Robert Coe Provided Sworn Testimony To the Trial Court Which Made A Threshold Showing of a Claim Under *State v. Ferguson* Due To The State-s Destruction Of Evidence 6

 B. Argument Was Presented To The Trial Court That Coe Made A Threshold Showing Of A Violation Of *State v. Ferguson*, And Was Entitled To Reopen His Post Conviction Petition 8

 C. The Trial Court Correctly Concluded That *State v. Ferguson* Established A New Rule Of Constitutional Criminal Law Which Must Be Retroactively Applied 13

ARGUMENT 16

 I. The Trial Court Erred In Denying Petitioner-s Motion To Reopen When The Trial Court Implicitly Found Petitioner Had Met The Requirements To Reopen His Post Conviction Petition and The Trial Court Made Findings Of Fact Without The Benefit Of An Evidentiary Hearing..... 16

 II. The Trial Court Erred In Finding That Coe Received A Fundamentally Fair Trial Notwithstanding The State-s Loss Or Destruction Of Potentially Exculpatory Evidence 20

 III. The Trial Court Erred In Denying Relief As To The Other Claims Raised In The Motion To Reopen..... 22

CONCLUSION 23

COMES NOW the applicant, Robert Glen Coe, by and through his undersigned counsel of record, and moves this court pursuant to TCA ' 40-30-217(c) for application to appeal the Findings of Fact and Conclusions of Law on Motion to Reopen Post-Conviction Petition entered December 20, 1999 by the Honorable John Colton, Judge of Division III of the Criminal Court of Shelby County, Tennessee.

STATEMENT OF JURISDICTION

The Tennessee Court of Criminal Appeals has jurisdiction to consider applications for permission to appeal denial of a motion to reopen a post conviction petition, pursuant to TCA ' 40-30-217(c).

QUESTIONS PRESENTED

I. Whether the trial court erred in denying petitioner's motion to reopen when the court implicitly found petitioner had met the threshold requirements to reopen his post conviction petition; and the trial court made findings of fact without the benefit of an evidentiary hearing?

II. Whether the trial court erred in finding that Coe received a fundamentally fair trial notwithstanding the state's destruction of potentially exculpatory evidence?

III. Whether the trial court erred in denying relief as to other claims raised in the motion to reopen, including:

a. Whether the death sentence was tainted by an unconstitutional and improper finding of a heinousness aggravating

circumstance, in violation of the intervening case of *State v. Harris*, 989 S.W.2d 307 (Tenn. 1999)?

b. Whether discrimination in the selection of the grand jury foreperson in violation of the intervening case of *Campbell v. Louisiana*, 423 U.S. 392 (1998) warrants post conviction relief?

c. Whether subjecting Robert Coe to numerous execution dates over a 16 year time period from the date he was first sentenced constitutes cruel and unusual punishment in violation of Article I, ' ' 16 and 32 of the Tennessee Constitution; the Eighth Amendment to the United States Constitution; Article 7 of the International Covenant on Political and Civil Rights (AICCPR@); The Convention Against Torture and Other Cruel, Inhuman, or Degrading Punishment or Treatment, Article 16(1); and Customary International Law, in accordance with Article 5 of the Universal Declaration of Human Rights and Article XXV of the American Declaration of the Rights and Duties of Man?

d. Whether in violation of the evolving standards of decency in Tennessee, Article I, ' 16 of the Tennessee Constitution, and the Eighth Amendment to the United States Constitution, the jury was not allowed to consider life without parole as an alternative punishment?

STATEMENT OF THE CASE

A. Trial And Post Conviction Proceedings

Following a plea of not guilty, Robert Glen Coe was convicted of first degree murder, aggravated kidnaping and aggravated rape in the Criminal Court

of Shelby County, Tennessee. *State v. Robert Coe*, Nos. B-73812, 73813, 73814. Coe was convicted on February 23, 1981, and his motion for a new trial was denied April 10, 1981. Coe was sentenced to death on the murder charge, and to life imprisonment on the rape and kidnaping convictions. The Tennessee Supreme Court affirmed the conviction and sentence on direct appeal, *State v. Coe*, 655 S. W. 2d 903 (Tenn. 1983).

Coe first applied for post conviction relief in 1984 (Shelby Dk. # P. 3577). The trial court denied relief after an evidentiary hearing in 1986, and the Court of Criminal Appeals affirmed the denial. The Tennessee Supreme Court denied Coe's request for permission to appeal because he did not timely file for it.

In 1987, Coe filed his first petition for habeas corpus relief in federal court. The District Court dismissed the petition in 1989 without prejudice because Coe had not exhausted his state court remedies.

Coe filed his second petition for state post conviction relief in 1989 (Shelby Dk. # P. 6594). The trial court denied relief, and the ruling was affirmed by the Court of Criminal Appeals. Permission to appeal was denied by the Tennessee Supreme Court.

Mr. Coe then refiled his petition for habeas corpus relief in the United States District Court in 1992, and during the pendency of the petition, filed a third post conviction petition in state court (Shelby Dk. # P. 14345). The third post conviction was denied and the denial was affirmed by the Court of Criminal Appeals.

Subsequently, the United States District Court for the Middle District of Tennessee granted Coe relief on five of his claims in his habeas corpus petition and ordered Mr. Coe to receive a new trial. The United States Court of Appeals for the Sixth Circuit reversed the District Court in granting Coe habeas relief, and reinstated the sentence of death. *Coe v. Bell*, 161 F.3d 320 (6th Cir. 1998). The Sixth Circuit denied rehearing and the United States Supreme Court denied certiorari on October 4, 1999.

B. Proceedings On The Motion To Reopen

Mr. Coe filed his *A*Motion to Reopen Post Conviction Petition[®] on December 9, 1999 (attached hereto as Exhibit 1). In his motion to reopen, Mr. Coe asserted that the recently decided case of *State v. Ferguson*, 2 S. W. 3d 912 (Tenn. September 20, 1999), gave rise to a new state constitutional claim which entitled reopening of the post conviction petition pursuant to TCA ' 40-30-217. Filed contemporaneously with the motion was a memorandum of law in support of the motion to reopen containing transcripts of sworn testimony taken in the federal habeas corpus proceedings which provided the factual basis for the motion to reopen (attached hereto as Exhibit 2). On December 13, 1999, the State filed its *A*Response to Motion to Reopen Post Conviction Petition[®] (attached hereto as Exhibit 3). In its response, the State argued that (1) the *Ferguson* case did not establish a new constitutional rule of law; (2) if it did establish a new rule of law, the rule was not required to be retroactively applied; and (3) the petitioner did not file an affidavit in support of his motion to reopen.

On December 15, 1999, Mr. Coe filed his ANotice of Filing@ containing copies of the transcripts attached to the memorandum originally filed, along with (1) the Affidavit of Beverly Cole, Registered Professional Court Reporter; (2) Affidavit of John Tunnel, Registered Professional Court Reporter; and (3) Affidavit of Frances Matlock, Deputy Clerk of the United States District Court for the Middle District of Tennessee (attached hereto as Exhibit 4). The aforesated affidavits verified that the portions of the transcript from the federal habeas proceedings attached to the supporting memorandum were true and accurate accounts of sworn testimony which was taken in the United States District Court for the Middle District of Tennessee.

The Honorable John Colton set the matter for oral argument on December 17, 1999 at 9:30 a.m. (See Affidavit of Robert Hutton, Exhibit 7). The purpose of the oral argument was to determine whether a threshold showing had been made according to TCA ' 40-30-217(a) to reopen Mr. Coe-s post conviction petition. *Id.* The court further instructed that no testimony would be heard on December 17 since counsel would only be arguing whether Mr. Coe had presented a threshold showing for post conviction relief on a motion to reopen; namely (1) Did *State v. Ferguson* establish a new rule of constitutional criminal procedure which is required to be retroactively applied? (Affidavit of Robert Hutton, Exhibit 7).

On December 20, 1999, the trial court entered its AFindings of Fact and Conclusions of Law on Motion to Reopen Post Conviction Petition@ (attached

hereto as Exhibit 5). In the Findings of Fact, the court incorrectly stated it conducted an evidentiary hearing on December 17, 1999. See Findings, p. 2 (Exhibit 5)(Affidavit of Robert Hutton, Exhibit 7). The trial court's findings implicitly found that *State v. Ferguson* established a new rule of constitutional criminal procedure which had to be retroactively applied, but the court in applying *Ferguson* held that relief was not warranted under *Ferguson* on the merits. However, the trial court analyzed the merits without ever affording Mr. Coe an evidentiary hearing to develop the facts of this claim. (See Affidavit of Robert Hutton, Exhibit 7).

STATEMENT OF FACTS

A. Robert Coe Provided Sworn Testimony To the Trial Court Which Made A Threshold Showing of a Claim Under *State v. Ferguson* Due To The State's Destruction Of Evidence.

The information before the post conviction court showed that it was Donald Gant -- not Robert Coe -- who was identified as the perpetrator by each of the three eyewitnesses to the abduction of Cary Medlin. Michael Stout, who was with the victim at the time of the abduction, gave an eyewitness description which matched Gant, and Michael Stout then picked Gant out of a line-up as the person who he saw commit the offense. See e.g., Tr. 1115. Maggie Stout also picked Gant out of a line-up. See e.g., Tr. 1088. Herbert Clements -- who had known Gant for years -- also identified Gant as the person he saw in the car with the girl. Exhibit 2, Attachment C, 2 E.H.Tr. 126-128 (Donald Gant: Clements knew Gant all his life and Clements said he saw Gant in the car with the girl);

Exhibit 2, Attachment C, 2 E.H.Tr. 158 (Ted McAlister).

Gant had a history of making inappropriate advances to young girls. Exhibit 2, Attachment C, 2 E.H.Tr. 92 (Yoakum -- Gant had history of complaints concerning sexual abuse of children); Exhibit 2, Attachment A, Pet'r E.H.Ex. 56 at 120-121 (Statement of Ted McAlister in T.B.I. file: Gant fondled McAlister's daughter). After the abduction, he had fresh scratches on his neck. Exhibit 2, Attachment C, E.H.Tr. 73 (T.B.I. Agent Robert Yoakum). Gant's clothing and bedding were bloody -- what one might expect following the rape and stabbing of a young girl. Gant's bloody clothing and bedding were taken by the authorities. Exhibit 2, Attachment C, 2 E.H.Tr. 72, 83 (T.B.I. Agent Robert Yoakum); Exhibit 2, Attachment A, Pet'r E. H. Ex. 56 at 333 (Gant's clothing taken by T.B.I. for testing); Exhibit 2, Attachment C, 2 E.H.Tr. 144, 147 (Patsy Morris: Gant's clothing and bedding taken and never returned). However, that evidence -- critical to proving Gant's guilt --- was either lost or destroyed by state agents.

Though the evidence was purportedly sent to the T.B.I. Laboratory for analysis, the T.B. I. has no record of that evidence. Exhibit 2, Attachment D, 3 E.H.Tr. 6-8 (William Darby: no T.B.I. laboratory record of testing of items taken from Gant). This seems to indicate that the evidence may have been maliciously destroyed. The loss of this evidence thwarted establishing a defense in this case at both the guilt and sentencing phases, because Gant had blood on his clothing, scratch marks on his neck and face, and no alibi; and coupled with the lost evidence would have raised a reasonable doubt as to Robert Coe's guilt.

Exhibit 2, Attachment C, 2 E.H.Tr. 83 (T.B.I. Agent Robert Yoakum). Gant was questioned about the abduction and kept changing his stories about what he did the night of September 1, and ultimately admitted being in Greenfield that night. Exhibit 2, Attachment A, Pet'r E.H.Ex. 56 at 333, 416, 417, 421 (T.B.I. notes of interrogation of Donald Gant).¹

The physical evidence itself points to someone else, including Gant. A hair on the victim's body is not Robert Coe's. Tr. 1646 (Malcolm David). Tire tracks at the muddy scene where the body was found are not from Robert Coe's car. Exhibit 2, Attachment B, 1 E.H.Tr. 196-201, 207-220; Exhibit 2, Attachment C, 2 E.H.Tr. 3-8 (Peter McDonald). Instead, they are consistent with Gant's tires. Exhibit 2, Attachment B, 1 E.H.Tr. 199, Exhibit 2, Attachment C, 2 E.H.Tr. 5-6 (Peter McDonald). Though the statement secured by authorities asserts that Robert Coe assaulted the victim in his car, investigation revealed no evidence of any such assault. Tr. 1571-1573 (Alvin Daniel); Tr. 1647 (Malcolm Davis).

B. Argument Was Presented To The Trial Court That Coe Made A Threshold Showing Of A Violation Of *State v. Ferguson*, And

¹Authorities secured an oral statement from Robert Coe, but after the authorities secured that statement, the police continued to investigate Gant, even interrogating Judy Radford, his girlfriend. Exhibit 2, Attachment A, Pet'r E.H.Ex. 56 at 336 (T.B.I. File: Judy Radford's September 5 waiver of rights). The District Attorney, however, held a press conference the next morning and announced that Robert Coe was to be charged with murder.

Was Entitled To Reopen His Post Conviction Petition.

In the post conviction court, Robert Coe noted that the Tennessee Supreme Court has recently held that under Article I ' 8 of the Tennessee Constitution, due process requires a new trial or sentencing hearing when the prosecution destroys evidence which deprives the defendant of a fair trial or sentencing hearing. *State v. Ferguson*, 2 S.W.3d 912 (Tenn. September 20, 1999) (Exhibit 6).

Marvin Ferguson was arrested by a Johnson City police officer on November 18, 1992, being found unconscious parked in his car with his engine running. Field sobriety tests were performed and videotaped and Mr. Ferguson was charged with DUI. *Ferguson*, p. 4 (Exhibit 6). The videotape of the sobriety test was inadvertently taped over by the police before anyone could view the tape. *Ferguson*, p. 5 (Exhibit 6). The issue which had never been decided in Tennessee was what consequences flow from the State's loss or destruction of evidence alleged to have been exculpatory. *Ferguson*, p. 6 (Exhibit 6). The State urged the Tennessee Supreme Court to adopt the federal rule which requires a defendant to show bad faith by State officials in the loss of evidence before a defendant has a due process claim. *Ferguson*, p. 6 (Exhibit 6). In *Ferguson*, the Court noted that the preservation of the defendant's fundamental right to a fair trial [is] a paramount consideration when evidence has been destroyed. Consequently, *Ferguson* rejected any requirement that a defendant

must prove bad faith when evidence is destroyed by the prosecution or state agents. See *Ferguson*, p. 10 (Exhibit 6) (rejecting federal bad faith analysis of *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L. Ed. 2d 281 (1988)).

Instead, the Tennessee Supreme Court held that a balancing test is to be used, in which the court must analyze the degree of negligence involved in the destruction of the evidence, the significance of the destroyed evidence in light of other evidence available to prove the facts shown by the destroyed evidence and

the sufficiency of other evidence to support the conviction. See *Ferguson*, pp. 11-12, (Exhibit 6).

It is clear that the evidence taken from Donald Gant was highly significant and exculpatory. Gant was identified by three eyewitnesses as the person who abducted the victim who was sexually assaulted. Gant had scratches on his neck. Gant's clothing and bedding were bloodied, which one might expect to find at the location at which a young girl was sexually assaulted and stabbed and upon the clothing of the person who committed such a sexual assault. Tire tracks at the crime scene were consistent with Gant's tires. In contrast to this evidence implicating Gant, there was no evidence in Robert Coe's car of any sexual assault.

Applying the test set forth in *Ferguson* to Mr. Coe's case demonstrates the denial of due process and Coe's fundamental right to a fair trial and sentencing hearing from the loss or destruction of this critical exculpatory evidence. The three part analysis shows:

(1) The degree of negligence involved. In the instant case, there is a presumption of negligence by law enforcement for losing evidence and there is strong indication that the evidence could have been destroyed in bad faith. The evidence clearly was taken from Gant - it was sent to the T.B.I., but there is no record of the evidence. Common sense dictates that the evidence may have been deliberately destroyed before it ever reached the T.B.I. laboratory. The only other possibility is that the

evidence made it to the T.B.I. laboratory, but the T.B.I. failed to follow any of its procedures to log the evidence in and preserve it, unless it was the T.B.I. which lost or destroyed it and the records of its existence. In any event, the State officials were at least negligent in losing the evidence and an evidentiary hearing would develop the extent of the culpability of the State officials, including whether they acted in bad faith. For purposes of establishing a threshold showing, *Ferguson* says that there is at least a presumption of negligence when the State loses evidence. *Ferguson*, p. 11, n. 10 (Exhibit 6). Importantly, the State has not disputed that the bloody clothing and bedding was lost, neither at oral argument or in the State's response to the motion to reopen (see Response, Exhibit 3).

(2) How significant was the missing or destroyed evidence? Since the missing evidence was evidence that would have directly and unequivocally pointed toward Gant and away from Coe, there simply was no substitute for this evidence. A young girl was assaulted and murdered. Gant was identified by the eyewitnesses as the perpetrator. The physical proof of his guilt lies on his bloody clothing and bloody bedding. There is no comparable physical evidence to prove Gant's guilt -- any evidence of the girl's blood on Gant's clothing or bedding has been destroyed. Without the destroyed evidence, Robert Coe simply lacked the opportunity to present [] his defense in . . . a complete manner.®

Ferguson, pp. 11-12 (Exhibit 6).

(3) The sufficiency of the other evidence used at trial to support

the conviction. There was conflicting evidence about Robert Coe's guilt.

The prosecution has a statement from Coe and other circumstantial evidence, but Robert Coe has a long history of mental illness and everything in his statement was known to the authorities before the statement was obtained. More importantly, there was significant evidence that Gant was the guilty party. Without question, a determination whether Robert Coe was guilty beyond a reasonable doubt hinges on the missing evidence. The missing evidence is critical to any determination whether a reasonable juror could have found a reasonable doubt had it known the truth about Gant. Had the evidence not been destroyed, a reasonable juror could have acquitted Robert Coe based upon the identifications by witnesses of Gant, the physical evidence which was consistent with Gant's guilt, and proof from the destroyed evidence. The evidence was especially significant, given that Maggie and Michael Stout also gave pre-trial descriptions of the abductor or his vehicle which were wholly inconsistent with Robert Coe's guilt. See *e.g.*, Exhibit 2, Attachment A, p. 406 (Maggie Stout described car as having a top lighter than the bottom which is different from Robert Coe's car); p. 127 (Michael Stout described car as light-brown four door car and abductor as having light blond shoulder length hair, though in claiming Robert Coe was abductor, he

later testified at trial that car was Agrayish-green@ (Tr. 1102, 1110) and that the abductor had Ashort@ hair. (Tr. 1113)

The destroyed or missing evidence is as important in the sentencing phase as it is to the guilt determination. In Tennessee, residual doubt about a defendant-s guilt is recognized as a mitigating factor to be considered by the sentencing jury. *State v. Teague*, 897 S.W.2d 248 (Tenn. 1995). Such doubt -- confirmed by the withheld evidence in this case -- often leads to a vote for life. See e.g., Stephen Garvey, *Aggravation And Mitigation In Capital Cases: What Do Jurors Think?* 98 Colum.L.Rev. 1538 (60.4% of capital jurors Amuch less likely@ to vote for death if they doubted defendant-s guilt). Especially where only one juror need vote for life to avoid the death sentence, the State-s loss of evidence violated due process at sentencing. Because the evidence was lost or destroyed, there is indeed a reasonable doubt whether the death sentence was appropriate.

The sworn testimony provided in support of his motion to reopen clearly established that under *State v. Ferguson*, Mr. Coe was entitled to relief. At oral argument, the State did not dispute any of the facts as to the State-s loss of the evidence, or the other evidence pointing towards Donald Gant as the perpetrator. Rather, the State focused its argument on whether *Ferguson* stated a new rule of law that had to be retroactively applied.

C. The Trial Court Correctly Concluded That *State v. Ferguson* Established A New Rule of Constitutional Criminal Law Which Must Be Retroactively Applied.

The Tennessee Legislature enacted TCA ' 40-30-222 to guide the courts in determining whether a new case creates a new rule of law that must be retroactively applied:

Interpretation - For purposes of this part, a new rule of constitutional criminal law is announced if the result is not dictated by precedent existing at the time the petitioner-s conviction became final and application of the rule was susceptible to debate among reasonable minds. A new rule of constitutional criminal law shall not be applied retroactively in a post conviction proceeding unless the new rule places primary, private individual conduct beyond the power of the criminal law making authority to proscribe or requires the observance of fairness safeguards that are implicit in the concept of ordered liberty.

TCA ' 40-30-222.

There is no question that *State v. Ferguson* decided September 20, 1999, announced a new rule of law. In *Ferguson*, the court discusses Awhat consequences should flow from the State-s loss or destruction of evidence alleged to have been exculpatory.@ *Ferguson*, p. 6 (Exhibit 6). The court discusses how in *Arizona v. Youngblood*, 488 U.S. 51 (1988) the United States Supreme Court held the United States Constitution requires proving bad faith by law enforcement in the loss of evidence before a due process violation is raised. *Ferguson*, p. 6 (Exhibit 6). However, the Tennessee Supreme Court, based upon State constitutional grounds, rejected the *Arizona v. Youngblood* requirement of proving bad faith and held that the loss of evidence by the State must be looked at in the context of the entire record.

Because we deem the presentation of the defendant-s

fundamental right to a fair trial to be a paramount consideration here, we join today those jurisdictions which have rejected the *Youngblood* analysis in its pure form.

Ferguson, p. 10 (Exhibit 6).

Thus, it is clear from the opinion itself that *Ferguson* is stating a new rule of law. It is further clear that prior to *Ferguson*, the law was unclear as to whether bad faith must be proven to state a claim for loss of evidence under the Tennessee Constitution as is required to make a federal constitutional claim. In *Ferguson*, the Tennessee Supreme Court specifically surveys what the law is in other jurisdictions with respect to law enforcement's loss of evidence in order to determine what law will be adopted in Tennessee. See *Ferguson*, pp. 7-9 (Exhibit 6).

Furthermore, it is also clear that *Ferguson* must be retroactively applied. TCA ' 40-30-222 requires new rules of constitutional criminal law to be retroactively applied if the rule proscribes or requires observance of fairness safeguards that are implicit in the concept of ordered liberty. TCA ' 40-30-222. *Ferguson* is decided upon state constitutional grounds as necessary for the preservation of the defendant's fundamental right to a fair trial. *Ferguson*, p. 10 (Exhibit 6); *Ferguson*, p. 12 (Exhibit 6); *Ferguson*, p. 9 (Exhibit 6). *Ferguson* itself states that a trial lacks fundamental fairness where there are errors which call into question the reliability of the outcome. *Ferguson*, p. 3, n. 3 (Exhibit 6). Certainly the *Ferguson* rule, which is decided upon due process grounds as necessary to protect the right of a defendant to a fundamentally fair trial, is a rule

that requires observance of fairness safeguards that are implicit in the concept of ordered liberty which must be retroactively applied under TCA ' 40-30-222. Thus, the trial court correctly decided that *Ferguson* announced a new rule of constitutional law which must be retroactively applied.

ARGUMENT

I. The Trial Court Erred In Denying Petitioner's Motion To Reopen When The Trial Court Implicitly Found Petitioner Had Met The Requirements To Reopen His Post Conviction Petition and The Trial Court Made Findings Of Fact Without The Benefit Of An Evidentiary Hearing.

On Monday, December 20, 1999, the Court entered its Findings of Fact and Conclusions of Law on Motion to Reopen Post Conviction Petition (Exhibit 5). In its findings, the court incorrectly stated it held an evidentiary hearing on December 17, 1999. (See Findings of Fact, p. 2) (Exhibit 5) (Affidavit of Robert Hutton, Exhibit 7)². However, the trial court did implicitly find that Mr. Coe made a threshold showing to reopen the post conviction petition. The trial court found that *State v. Ferguson* does hold that due process principles under the Tennessee Constitution are broader than under the United States Constitution, and that fundamental fairness requires that the State's failure to preserve evidence that could be favorable to the defendant be evaluated in the context of the entire record (Findings, pp.4-5) (Exhibit 5). The trial court found that in losing the bloody clothing and bedding, the State breached its duty to preserve potentially exculpatory evidence. (Findings, p. 6) (Exhibit 5). The court went on to analyze Mr. Coe's claim of the lost evidence under the *Ferguson* standard.

²The transcripts from the trial court have been ordered and as soon as they are transcribed, petitioner will file them with the Appellate Court Clerk to demonstrate no evidentiary hearing took place in the trial court.

(See Findings, pp. 5-9) (Exhibit 5); and

ultimately the court concluded that despite the fact that the State breached its duty to Robert Coe by losing valuable evidence, Coe, in light of the entire record still received a fundamentally fair trial:

Therefore, in accordance with the standard set forth in *Ferguson*, although potentially exculpatory evidence was destroyed, this Court concludes that the petitioner received a fundamentally fair trial and that he received no measurable disadvantage because of the unavailability of the clothing and the bedding.

(Findings, p. 8) (Exhibit 5). What is most problematic is that the court made findings of fact without affording Mr. Coe an evidentiary hearing.

TCA ' 40-30-217(a) sets forth the threshold requirements to be met to reopen a post conviction petition. Simply put, Coe must demonstrate:

- (1) a new rule of constitutional law that is to be retroactively applied;
- (2) the motion to reopen must be filed within one year of the new rule of law; and
- (3) it appears that the facts underlying the claim if true would entitle Mr. Coe to have the sentence set aside. (See TCA ' 40-30-217(a)).

Once a threshold showing is established, the procedures governing post conviction apply (see TCA ' 40-30-417(b)). In post conviction, a petitioner is entitled to an evidentiary hearing on a claim which cannot be decided on the record. *Cf. Hayes v. State*, 969 S.W.2d 943 (Tenn. Cr. App. 1997):

The court below summarily dismissed the petition on the grounds that Ameasured against the court record, the petition for post conviction relief is without merit.® The petitioner now appeals, claiming that he was entitled to a hearing on post conviction

claims.

We agree and reverse and remand this matter for an evidentiary hearing.

Hayes, 969 S.W.3d at 943.

Since the court in its findings of fact analyzed the case under the *Ferguson* standard, the court implicitly found that a threshold showing to reopen was made³. The trial court was correct in its analysis that it must make findings of fact to determine under *Ferguson* (1) the degree of negligence involved; (2) the significance of the destroyed evidence, and (3) the sufficiency of other evidence used at trial to support the conviction (Findings, p. 5, Exhibit 5). However, the trial court cannot make findings as to the first two factors without conducting an evidentiary hearing.

Because a threshold showing was made, Coe was entitled to an evidentiary hearing. See TCA ' 40-30-209(a)(evidentiary hearing required if claim not dismissed procedurally); TCA ' 40-30-217(b). In this context, an evidentiary hearing would have been essential to determine the extent of bad faith, recklessness or negligence by law enforcement in losing the bloody clothing and bedding taken from the initial suspect Donald Gant. Mr. Coe was entitled to a hearing to develop the degree of negligence, recklessness or bad faith by law enforcement in destroying the evidence. In fact, the trial court

³For a complete discussion of why the trial court was correct in finding that *State v. Ferguson* established a new rule of constitutional criminal law which is to be

stated:

retroactively applied, see section C of the Statement of Facts, *supra*.

This court refuses to take the leap necessary to conclude that simply because this is a major case, any loss or destruction of evidence was done in bad faith. The fact that evidence once existed, but has been destroyed does not prove that its destruction or loss was purposeful. Petitioner has presented no evidence whatsoever and has therefore failed to prove that the state acted in bad faith in the destruction of the evidence. Absent any proof to the contrary, the only conclusion this court can reach is that the evidence was negligently destroyed.

(Findings, p. 6) (Exhibit 5).

How can the Court draw any conclusions about the degree of negligence or bad faith by law enforcement in losing evidence without affording Mr. Coe an evidentiary hearing at which to develop testimony as to the facts surrounding the loss of the evidence by law enforcement and why the evidence was lost? Mr. Coe established his threshold showing of a *Ferguson* claim by demonstrating that law enforcement lost Gant's bloody clothing and bedding which is not disputed by the State. See *Ferguson*, p. 11, n. 10 (Exhibit 6) (Presumption of negligence when law enforcement loses evidence). See also State's response (Exhibit 3) (no dispute of fact that law enforcement lost evidence). However, having made a threshold showing, Mr. Coe is entitled to an evidentiary hearing to determine the extent of the negligence or perhaps even bad faith by law enforcement in losing the evidence. See *Hayes v. State, supra*. Since one of the factors which must be considered under *Ferguson* is the *extent* of negligence, this factor cannot be analyzed without the aid of an evidentiary hearing. The trial court was thus clearly in error in making findings of fact without provide an evidentiary hearing to Mr. Coe.

Also, an evidentiary hearing would develop the significance of the lost or destroyed evidence; namely what could have been done for Mr. Coe's defense if the bloody clothing and bedding taken from Gant would not have been lost or destroyed by the State. Two of the three *Ferguson* factors were not developed by an evidentiary hearing and, thus, the trial court's findings must be reversed and remanded for an evidentiary hearing.

II. The Trial Court Erred In Finding That Coe Received A Fundamentally Fair Trial Notwithstanding The State's Loss Or Destruction Of Potentially Exculpatory Evidence

In *Ferguson*, the Tennessee Supreme Court established three factors to be considered in determining whether there was a constitutional deprivation as a result of the State's destruction of potentially exculpatory evidence:

- (1) The degree of negligence involved;
- (2) The significance of the destroyed evidence considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and
- (3) The sufficiency of other evidence used at trial to support the conviction.

Ferguson, pp. 11-12 (Exhibit 6)

Analyzing these factors in Mr. Coe's case demonstrates as a matter of law that relief is warranted. First of all, negligence is presumed from the State's loss of evidence. *Ferguson*, p. 11, n. 10 (Exhibit 6). In a murder case, to lose bloody clothes and bloody bedding taken from a prime suspect is *at least* negligent. As

discussed above, without the benefit of an evidentiary hearing, this court is unable to ascertain the degree of negligence or bad faith involved in the loss of the evidence. Importantly, the State does not dispute in its response that the bloody clothing and bedding was lost by law enforcement. See Response (Exhibit 3).

The evidence is highly significant. Donald Gant was the initial suspect identified by *three different eyewitnesses* as the abductor of Carey Medlin. Gant had scratches on his neck, a history of molesting children, no alibi for the night of the abduction and bloody clothing and bedding. The only evidence implicating Coe was his confession which was taken from a mentally ill man who had been in a mental institution for three years previously and from which the police learned no new facts they did not already know. All other evidence pointing to Coe was purely circumstantial and would be consistent with the actions of a disturbed paranoid schizophrenic. It is impossible to say with a straight face that the bloody clothing and bedding taken from the initial suspect who was also identified by three eyewitnesses was not highly significant. Also, there is no other secondary physical evidence that would have been as powerful in exonerating Coe. If a jury would have heard that the person identified by three eyewitnesses had bloody clothing taken from him, weighing such evidence against a confession taken from a mentally ill man would have certainly raised a reasonable doubt in the mind of one juror. Coe is entitled to a new trial and/or a new sentencing hearing where the jury is instructed that law enforcement lost or

destroyed bloody clothing and bedding belonging to

Donald Gant and that the jury may infer such evidence would have been favorable to Coe. *Ferguson*, p. 12 (Exhibit 6).

Thus, as a matter of law, the trial court erred in holding that under a *Ferguson* analysis, that Coe received a fundamentally fair trial

III. The Trial Court Erred In Denying Relief As To The Other Claims Raised In The Motion To Reopen.

Petitioner respectfully reincorporates herein by reference the facts and arguments raised in his Motion to Reopen Post Conviction Petition (Exhibit 1); and Memorandum In Support Of Motion To Reopen Post Conviction Petition pages 6-18 (Exhibit 2); and relies on the arguments stated therein to seek review of the trial court's denial of the claims raised therein. Nevertheless, he briefly notes that he is entitled to relief on his other claims of constitutional error:

A. Robert Coe is entitled to relief Under *State v. Harris*, 989 S.W.2d 307 (Tenn. 1999), because the jury never properly made a finding of a heinousness factor, and the death sentence was therefore unconstitutional.

B. *Campbell v. Louisiana*, 523 U.S. 392 (1998) constitutes a new rule of law in Tennessee, and therefore, Robert Coe is entitled to retroactive application of *Campbell* to his claim that women were systematically excluded as grand jury forepersons, in violation of the Tennessee and United States Constitutions.

C. Subjecting Robert Coe to numerous execution dates over a long period of time is cruel and unusual, especially where he suffers mental illness,

and where contemporary standards of decency demonstrate that treating a human being in such a way is degrading to his humanity, in violation of Article I, ' ' 16 and 32 of the Tennessee Constitution; the Eighth Amendment to the United States Constitution; Article 7 of the International Covenant on Political and Civil Rights (AICCPR®); The Convention Against Torture and Other Cruel, Inhuman, or Degrading Punishment or Treatment, Article 16(1); and Customary International Law, in accordance with Article 5 of the Universal Declaration of Human Rights and Article XXV of the American Declaration of the Rights and Duties of Man;

D. The death sentence in this case does not comport with the evolving standards of decency in Tennessee or under the Eighth Amendment, because the jury was not given the option of returning a sentence of life imprisonment without parole, when the people of the State of Tennessee and the people of almost all states throughout this Nation recognize that no death sentence should be imposed unless the jury has been given the option to choose the severe, but lesser, sentence of life without parole.

CONCLUSION

WHEREFORE, this Court should grant this application for permission to appeal and grant post conviction relief or, in the alternative, remand this case to the trial court to conduct an evidentiary hearing and rule on the issues contained herein on the merits. Petitioner respectfully requests oral argument.

Respectfully Submitted,

GLANKLER BROW, PLLC
1700 One Commerce Square
Memphis, Tennessee 38103
901/525-1322

By: _____
Robert L. Hutton

CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing Application for Permission to Appeal has been served upon John Campbell, Assistant District Attorney, 30th Judicial District, 201 Poplar Avenue, Suite 301, Memphis, TN 38103-1947 and Glen Pruden, Assistant Attorney General, c/o John Campbell, 201 Poplar Avenue, Suite 301, Memphis, TN 38103-1947, via Hand Delivery this 30th day of December, 1999.
