No. 07-1114

IN THE

Supreme Court of the United States

GARY BRADFORD CONE,

Petitioner,

v.

RICKY BELL, Warden,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONER

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Petitioner's sole defense to the capital murder charges against him was that he was in the throes of an amphetamine psychosis, brought on by post-traumatic stress disorder from his honorable service in Vietnam and by his massive addiction to drugs. Petitioner maintained on that basis that he was insane or, at the least, deserving of the mercy of a life sentence rather than the death penalty. The prosecution not only suppressed significant evidence that validated petitioner's defense, but it also misled the jury by arguing that petitioner's claim of drug addiction was a fabrication; presenting its own witnesses to disprove that defense; and suppressing further evidence that would have impeached its witnesses. The State subsequently thwarted any adjudication of petitioner's claim that the prosecution's conduct violated *Brady v. Maryland*, 373 U.S. 83 (1963), by repeatedly misrepresenting the case's procedural history to the state and federal courts. Petitioner's opening brief demonstrated that he is finally entitled to a single adjudication of his *Brady* claim, and moreover that the claim is meritorious. Respondent's arguments to the contrary are not persuasive.

I. Petitioner Has Not Procedurally Defaulted His *Brady* Claim.

Respondent does not defend the Sixth Circuit's ruling that petitioner's *Brady* claim was "procedurally defaulted" in light of the state courts' holding that the claim had been "previously determined." Respondent instead advances two new

theories for deeming the claim defaulted. Those arguments, however, have been waived and are in any event meritless for multiple reasons.

A. Respondent Does Not Defend The Sixth Circuit's Obviously Erroneous Holding That The "Previous Determination" Of A Claim Establishes A "Procedural Default."

After petitioner was convicted and sentenced to death, he timely sought state post-conviction relief. His first application did not include his *Brady* claim because state law as it then stood did not grant him access to the prosecution files that contained the exculpatory evidence the State had suppressed. When an intervening state court ruling forced the prosecution to finally reveal that evidence (*see Capital Case Res. Ctr. v. Woodall*, No. 01-A-01-9104-CH-00150, 1992 WL 12217 (Tenn. Ct. App. Jan. 29, 1992)), petitioner promptly set forth the *Brady* claim in his second amended post-conviction application. Respondent notably does not dispute that this application was authorized under state law. *See* Pet. Br. 5-7 & n.1, 36-37 n.7 (collecting Tennessee decisions authorizing successive applications in these circumstances); J.A. 13-14 (¶ 35), 19-21 (¶ 41); *Swanson v. State*, 749 S.W.2d 731, 733-34 (Tenn. 1988) (applying Tenn. Code § 40-30-112 (repealed 1995)).

In the state post-conviction proceedings, however, the State falsely represented to the trial court that petitioner's suppression claim had been previously determined on direct review, with the consequence that the claim was not justiciable as a

matter of state law. Pet. Br. 5-7; J.A. 16-17; Resp. Br. 15. When petitioner subsequently presented his *Brady* claim on federal habeas, respondent reversed course, falsely representing to the Sixth Circuit that the claim was "simply never raised in the state court" (J.A. 41) – precisely the opposite of the State's previous misrepresentation that petitioner had presented the claim twice in state court.

The Sixth Circuit held that petitioner's *Brady* claim was procedurally defaulted based on the state trial court's determination that the claim had been "previously determined":

> Under Tennessee law, grounds for relief which have been "waived or previously determined" are not cognizable in a state post-conviction application. The Tennessee courts held that Cone's *Brady* claims were previously determined under this rule and we found that Cone's claims were therefore procedurally defaulted.

Pet. App. 22a (citations omitted).

Respondent does not defend that holding. He nonetheless asserts that petitioner's arguments for reversal of the Sixth Circuit's judgment are not merely "sophistry" (Br. 28) but affirmatively "mystifying" (*id*. at 32 n.9) because "Cone himself admits[] that he did not 'twice present' his *Brady* claim to the state courts" and instead "presented [the claim] for the first time in a second or subsequent petition for post-conviction relief" (*id*. at 28 (emphasis and citations omitted)). Admits? By misrepresenting the record, the State persuaded the state courts in 1993 that the claim *was* previously determined. Petitioner has spent the ensuing fifteen years

attempting to establish that the state courts' error should not preclude him from ever receiving a single adjudication of his *Brady* claim.

Petitioner's opening brief demonstrated that the Sixth Circuit erred because (a) his *Brady* claim was not previously determined but rather was presented only once – in his second post-conviction application (Br. Part I.B), and in any event (b) such a finding by the state courts would not establish that the claim was "procedurally defaulted" as a matter of federal law because it would merely mean that petitioner had twice exhausted his claim in state court (*id.* Part I.A). Before this Court, respondent disputes neither point and finally acknowledges after more than a decade of litigation that petitioner's *Brady* claim was not "previously determined." Br. 25. Because a patently erroneous and undefended state court finding that a federal constitutional claim has been defaulted will not preclude that claim's consideration on federal habeas corpus (*see* Pet. Br. Part I.B), the Sixth Circuit's judgment should be reversed.

B. Respondent's Newfound Theories That Petitioner Improperly Briefed His *Brady* Claim In State Court Are Both Wrong And Irrelevant.

Nothing if not consistent in his inconsistency, respondent now advances two entirely new theories – at least his sixth and seventh – for depriving petitioner of even a single adjudication of his claim under *Brady*. *See generally* Pet. Br. 15-16 (detailing the first five). Having acknowledged that petitioner complied with the substance of Tennessee law on the permissibility of successive post-conviction

applications, respondent now turns his attention to the process by which petitioner's state post-conviction counsel briefed his *Brady* claim in state court. Citing a "presumption of waiver," respondent asserts that petitioner should have done a better job of explaining to the trial court that petitioner could not have included his *Brady* claim in his first post-conviction application because the facts underlying the claim became available only later. Br. 39. Respondent also asserts that petitioner should have presented a more detailed argument to the state court of criminal appeals that his *Brady* claim was not waived. *Id*.

Both of respondent's newfound theories lack merit for four independent reasons: (i) respondent has waived these arguments by not raising them earlier in the case; (ii) neither of his theories can be the basis for a finding of procedural default because neither was the basis for the state courts' dismissal of the *Brady* claim; (iii) petitioner in fact properly presented the claim to the state courts; and (iv) in any event, petitioner has shown "cause and prejudice" for any supposed failure to timely present the claim in the state system.

1. Respondent has waived both of the procedural default arguments he makes in this Court. Over the course of the fifteen years of post-conviction proceedings in this case, the parties have addressed petitioner's *Brady* claim in the state post-conviction court, the Tennessee court of criminal appeals, the federal district court, the Sixth Circuit (twice), and at the certiorari stage in this Court. But prior to the submission of his brief on the merits, respondent had never before made either argument as a basis for deeming petitioner's *Brady* claim procedurally

defaulted. This Court "do[es] not consider claims that were neither raised nor addressed below" absent "only the most exceptional circumstances." *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 170 (2004).

Nothing would be gained – and this Court's limited resources would be wasted – by deciding this case on the basis of respondent's new fact-bound, state law theories. This Court granted certiorari to resolve conflicts in the circuits over the effect under federal law of a state court ruling that a defendant's federal constitutional claim had been "previously determined." *See* Pet. for Cert. 13-17. But respondent now asks this Court to leave those important questions unresolved in order to instead decide in the first instance whether isolated sentences in a trial court affidavit and appellate brief filed in the state courts more than a decade ago fail to satisfy Tennessee's pleading standards. Such a ruling would establish only one principle of federal law that would guide later cases: that a party is free to repeatedly misrepresent the record through multiple rounds of litigation in state and federal court, only to attempt to rescue a concededly erroneous ruling in its favor through entirely new arguments at the last possible minute.

2. In any event, neither of respondent's new theories can give rise to a finding of procedural default because neither was the basis of the state courts' rulings. Only a state law ground clearly invoked by the state courts establishes a default precluding a federal habeas court from considering a federal constitutional claim. *See, e.g.*, *Harris v. Reed*, 489 U.S. 255, 261-62 (1989) (for procedural bar to

apply, the "state court must actually have relied on the procedural bar as an independent basis for its disposition of the case" (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985))).

Respondent's arguments cannot survive a straightforward reading of the state courts' rulings. Respondent himself recognizes the unambiguous treatment of the *Brady* claim in the state post-conviction courts: the trial court "dismissed Cone's *Brady* claim on the erroneous ground that it had been 'considered and denied' on direct appeal or in the first post-conviction proceeding" (Resp. Br. 25) and, in turn, "the state appellate court's opinion [affirming the trial court] did not address the *Brady* claim" (*id.* 21). *See* J.A. 22 (dismissal of ¶ 41); Reply App., *infra*, 1a (dismissal of ¶ 35)); Reply App., *infra*, 4a-11a (appellate opinion). The state supreme court then denied review without comment. *Cone v. State*, CCA No. 02C01-9403-CR-00052 (Tenn. Mar. 4, 1996).

The state trial court's specific and unambiguous dismissal of the *Brady* claim on the ground that it had been previously decided (J.A. 22) is controlling for purposes of assessing the state courts' finding of procedural default. The trial court's opinion is determinative as the last reasoned decision on the question, given that neither the court of criminal appeals nor the state supreme court spoke to the issue. *Ylst v. Nunnemaker*, 501 U.S. 797, 804 (1991) (holding that opinions which are silent on an issue are construed to affirm the lower court's holding and thus "a presumption which gives them no effect – [and] simply 'looks through' them to the last reasoned decision – most nearly reflects the role they are . . . intended to play").

Respondent's contention that the state court of criminal appeals held that petitioner failed to overcome a state law "presumption of waiver" applicable to the *Brady* claim in his second post-conviction application (Br. 21) misstates that court's ruling. To the extent that court said anything relevant, it "affirmed" the trial court's ruling, including its holding that "most of [petitioner's] stated grounds for relief . . . were previously determined." Reply App., *infra*, 5a, 11a. Respondent's reliance on the appellate court's statement that petitioner waived "'all claims raised in [his] second petition for post-conviction relief which *had not* been previously determined'" (Resp. Br. 25 (quoting Reply App., *infra*, 11a) (emphasis added)) thus misses the mark because the trial court held that the *Brady* claim *was* previously determined, and the court of criminal appeals did disturb that ruling. *Accord* Br. of *Amici* Former Prosecutors 9 n.3. At the very least, the state court of criminal appeals' ruling does not contain the "clearly expressed" finding of waiver (*Harris v. Reed*, 489 U.S. at 263) that would be required to establish that petitioner procedurally defaulted his *Brady* claim.

3. Respondent's newfound theories of procedural default fail for the further independent reason that petitioner properly presented and preserved his *Brady* claim at every turn in the state system.

a. Respondent does not dispute that petitioner presented the claim at the first possible opportunity, and that the claim was timely filed under state law. *See supra* at 2. Petitioner also properly advised the trial court of the justification for his second post-

conviction application. Petitioner submitted a sworn affidavit explaining: "I did not know of the existence of this claim in earlier proceedings, including post-conviction proceedings. . . . Such facts have been revealed through disclosure of the State's files, which occurred after the first post-conviction proceeding." (J.A. 17-18 (¶ 41). The affidavit carefully tracked the parallel paragraph of the second amended post-conviction application. *Compare* J.A. 17-18 *with* J.A. 20-21. Petitioner also requested an evidentiary hearing to prove that he had not waived his claims. Reply App., *infra*, 2a-3a.

Petitioner's submissions fully satisfied the mandates of Tennessee law, and the state courts notably did not hold to the contrary. State law merely required petitioner to "briefly and clearly state . . . whether [the claim] ha[d] been previously presented to any court and, if not, why not." Tenn. Code § 40-30-104(a)(10) (repealed 1995). Because the facts underlying petitioner's *Brady* claim were not available at the time his first post-conviction application was decided, the claim was not subject to a presumption of waiver. *Swanson v. State*, 749 S.W.2d 731, 734 (Tenn. 1988) ("A rebuttable presumption of waiver arises if the asserted grounds for relief could have been but were not presented in any prior proceedings at the first reasonable opportunity."). The State was entitled to dismissal of the *Brady* claim without petitioner receiving the benefit of the evidentiary hearing he requested on the question of waiver only if it had negated petitioner's representation that he could not have previously asserted the claim. *Allen v. State*, 854 S.W.2d 873, 874-75 (Tenn. 1993) (when a petition "present[s]

reasons why the claims were not presented [earlier] . . . 'the State's conclusory contention in the trial court that Petitioner has filed a prior petition cannot be the sole grounds to justify a dismissal when the claim presented is that the ground did not exist at the time of the prior petition, unless this claim is conclusively incorrect'" (quoting *Swanson*, 749 S.W.2d at 736)). Because the State did not even *attempt* to dispute petitioner's justification for presenting the claim in his second application, there could be no finding of waiver.

After the trial court nonetheless erroneously dismissed petitioner's application without holding an evidentiary hearing, he continued to press the claim in the court of criminal appeals. Petitioner argued that, contrary to the trial court's ruling, "a close examination of the issues resolved in the direct appeal and the decision in his first post-conviction appeal, clearly shows that the issues were neither presented on direct appeal nor addressed in the initial post-conviction petition." Br. for Appellant, *Cone v. State*, No. 02C01-9403-CR-00052, at 16 (citations omitted). That discussion referenced his *Brady* claim. *Id.* at 15-16 (referencing ¶ 35 of second amended post-conviction application). Petitioner also specifically argued that "a hearing is essential in order to enable Mr. Cone to present evidence and prove the factual allegations, including those relating to his claims . . . of the *withholding of exculpatory evidence*." Reply Br. for Appellant, *id.*, at 5 (emphasis added) (citing J.A. 17-18 (¶ 41)). *See also* Br. for Appellant, *id.*, at 6 (explaining that in the trial court petitioner "moved for the disclosure of exculpatory evidence for the post-conviction

proceeding"); *id.* at 16-17 (relying on trial court affidavit identifying State's failure to disclose exculpatory evidence).

b. Respondent nonetheless argues that, because this case is now in federal court, it is "too late" for petitioner to respond to allegations that his counsel presented the *Brady* claim in state courts in an improper manner. Br. 26. Respondent specifically asserts that petitioner was required to argue in the state court of criminal appeals that he did not waive the claim by raising it in his second post-conviction application. *Id.* at 34 n.10. But respondent ignores that petitioner argued to the court of criminal appeals that his affidavit established that he had not waived any of his claims. Br. for Appellant, *Cone v. State*, No. 02C01-9403-CR-00052, at 12-13, 18.

Petitioner had no reason – much less any obligation – to present a more developed argument to the state court of criminal appeals that he had not waived his *Brady* claim in particular. Petitioner was appealing the trial court's ruling, which rested on the theory of "previous determination," not "waiver." *See supra* at 7. Nor did the State argue that the dismissal of the *Brady* claim should be upheld on the theory of "waiver." Indeed, there was no serious argument that petitioner had waived the claim under state law, given that he presented the *Brady* claim as soon as the prosecutors were compelled by state law to turn over the files they had suppressed at trial. *See supra* at 2. Petitioner was not required to anticipate that respondent would argue fifteen years later in this Court that the state court of criminal appeals could have erroneously deemed the claim to have been waived.

In any event, even assuming that the court of criminal appeals did *sua sponte* deem petitioner's *Brady* claim to have been "waived," petitioner nonetheless properly preserved his objection to that ruling at the first possible opportunity. As respondent acknowledges, after the state court of criminal appeals ruled, petitioner addressed any alleged "waiver of his *Brady* claim in his Application for Permission to Appeal to the Tennessee Supreme Court." Resp. Br. 34 n.11. There is accordingly no sound basis for respondent's assertion that petitioner abandoned the *Brady* claim by failing to argue it with sufficient detail in the Tennessee appellate system.

4. Finally, given that respondent seemingly acknowledges that any finding of waiver by the state courts would have been erroneous, petitioner is at the very least entitled to show that he has not waived his claim as a matter of federal law under the "cause and prejudice" standard. *See Williams v. Taylor*, 529 U.S. 420 (2000); *Strickler v. Greene*, 527 U.S. 263 (1999); *Murray v. Carrier*, 477 U.S. 478 (1986); *Engle v. Isaac*, 456 U.S. 107 (1982); *Wainwright v. Sykes*, 433 U.S. 72 (1977). Indeed, respondent recognizes that his position is premised on establishing that petitioner "cannot meet the cause-and-prejudice showing necessary to avoid the [alleged] default." Br. 28.

Respondent does not doubt that petitioner had "cause" for not presenting his *Brady* claim in his first post-conviction application because at that time the evidence substantiating his claim of suppression was still being suppressed. *See* Pet. Br. 5; *Strickler*, 527 U.S. at 283. As respondent recognizes, the remaining question whether petitioner has established prejudice

"coincides with the materiality element of *Brady*" (Resp. Br. 41; *see Banks v. Dretke*, 540 U.S. 668, 691 (2004)) – *i.e.*, if petitioner's *Brady* claim is meritorious, petitioner has been "prejudiced" by the failure of the state courts to decide it. Thus, even on respondent's alternative theory for affirming the Sixth Circuit's judgment, the determination whether petitioner procedurally defaulted his *Brady* claim requires an evaluation of the materiality of the State's suppression: if the claim is found to have merit, then petitioner has established "prejudice" and is entitled, as a matter of federal law, to review of his meritorious *Brady* claim. *See also* Pet. Br. 8, 44-46 (petitioner established cause and prejudice with respect to withheld FBI documents).

II. Petitioner's *Brady* Claim Is Meritorious.

Petitioner's opening brief demonstrated that the prosecution in this case engaged in gross misconduct in responding to petitioner's only defense and argument in mitigation of the death penalty: that he committed the crimes in the course of an amphetamine psychosis brought on by post-traumatic stress disorder and massive drug use. The prosecution not only withheld a wealth of material evidence but also misled the jury into rejecting petitioner's defense and sentencing him to die. The prosecution undercut petitioner's experts on the ground that there was no independent evidence of petitioner's drug use; offered rebuttal witnesses to prove that petitioner was not a drug addict while suppressing the evidence that impeached those witnesses; presented an expert who relied on that flawed rebuttal testimony; and finally argued to the jury that the very premise of petitioner's only defense

was a sham when in fact the State knew that it was supported by the substantial evidence the prosecutors had withheld. That conduct – like respondent's subsequent misrepresentations that have thus far succeeded in precluding any adjudication of petitioner's *Brady* claim – was outrageous. *See generally* Br. of *Amici* Former Prosecutors 3, 12 (describing prosecution's duty of candor). Respondent's argument that the State's misconduct was immaterial to the verdict or sentence is unpersuasive.

1. As respondent acknowledges, the only disputed question under *Brady* is whether the suppressed evidence was "material" to the outcome of petitioner's case. Br. 43. It was. "[A] trial resulting in a verdict worthy of confidence" cannot occur when the prosecution suppresses evidence that goes to the heart of a substantial defense both at the guilt and capital sentencing stages and that directly impeaches key governmental witnesses. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *cf. South Carolina v. Holmes*, 547 U.S. 319, 324 (2006) ("[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense."). The "jury must be allowed not only to consider such evidence, or to *have such evidence before it*, but to respond to it in a reasoned, moral manner *and to weigh such evidence* in its calculus of deciding whether a defendant is truly deserving of death." *Brewer v. Quarterman*, 127 S. Ct. 1706, 1714 (2007) (emphases added).

At sentencing, petitioner's defense was central to the jury's determination whether to impose the death penalty. State law required the jury to consider, as

mitigating factors, whether "[t]he murder was committed while the defendant was under the influence of extreme mental or emotional disturbance" and whether "[t]he capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment." Tenn. Code § 39-2404(j)(2), (8) (repealed 1982). The jury was moreover entitled to give independent mitigating weight to, and vote for a life sentence based upon, any evidence of petitioner's mental illness, drug use, or intoxication, even apart from the statutory mitigating factors. *See, e.g.*, *Penry v. Lynaugh*, 532 U.S. 782 (2001). In addition, proof that petitioner committed the crimes in the course of an amphetamine psychosis and therefore was not aware of the consequences of his actions would have directly undercut the prosecution's reliance on two aggravating factors that were dependent on petitioner's mental state: that petitioner acted with "depravity of mind" and that he acted with the "purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution." Trial Tr. 2151-54. That was particularly critical because, on direct review, the Tennessee Supreme Court invalidated the jury's reliance on a third aggravator – that petitioner knowingly created a further great risk of death to two or more other persons. *State v. Cone*, 665 S.W.2d 87, 95 (Tenn. 1984). Had the jury in fact heard the evidence suppressed by the prosecutors, there is a substantial prospect that it would not have imposed

the death penalty based on the only remaining aggravating circumstance argued by the State: that petitioner had been previously convicted of a violent felony. Trial Tr. 2151-54.[1]

Critically, if petitioner had proved the factual premise of his sole defense – *i.e.*, that he was in fact a severe drug addict – there was a substantial prospect that at least one juror would have been persuaded not to sentence him to death. That is so because, as respondent acknowledges (Br. 44), "[t]wo expert witnesses testified in support of Cone's mental health defense" that, as a result of petitioner's post-traumatic stress disorder and severe drug addiction, he committed the crimes in an "amphetamine psychosis" – a recognized mental illness – that prevented him from recognizing the wrongfulness of his acts and conforming his conduct to the standards of society. *See generally* Pet. Br. 46 (describing the testimony). *Contra* Resp. Br. 43 (mischaracterizing petitioner's defense as merely "that he was a drug user and was acting under the influence of drugs at the time of the murders").

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[1] As to guilt, petitioner was not criminally responsible for his acts "if at the time of [his] conduct as a result of mental disease or defect he lack[ed] substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." *Graham v. State*, 547 S.W.2d 531, 540 (Tenn. 1977) (adopting American Law Institute, Model Penal Code § 4.01 (1962)). Once the jury concluded that petitioner's proof established "reasonable doubt as to the defendant's sanity, the burden of proof on the issue shift[ed] to the State" to prove sanity "beyond a reasonable doubt." *Id.* at 544.

The prosecution notably did not contest the testimony of petitioner's experts that – given petitioner's post-traumatic stress disorder – an amphetamine psychosis would have been brought on by massive drug use, *if* petitioner was in fact a severe drug addict. Nor could it: as *amicus curiae* Veterans for America explains, petitioner's condition is well recognized. *Amicus* Br. 3 ("[V]eterans suffering from PTSD often turn to substance abuse to deaden their symptoms, bringing on a vicious cycle of self-destructive behavior."); *id.* at 10 ("The impulse to self-medicate through substance abuse is especially high among those suffering from PTSD as a result of combat trauma."). Rather, the State's strategy was to defeat the very factual premise of the experts' opinions by establishing that petitioner was not a drug addict.

The prosecution effectuated that strategy through reinforcing layers of misconduct and misrepresentations. Its investigation of the case had produced an array of evidence strongly supporting the conclusion that petitioner was severely addicted to drugs, all of which the State suppressed. *See generally* Pet. Br. 42-45. But the prosecution's misconduct was far more outrageous even than withholding the very evidence that was central to petitioner's case and the jury's determination whether to send petitioner to his death. The prosecutors compounded their unlawful suppression of that evidence by *emphasizing* to the jury that petitioner's defense was weak because it rested entirely on petitioner's supposedly self-serving assertions of his own drug use. *See* Pet. Br. 41-42 (collecting trial excerpts in which prosecution

established that petitioner's witnesses relied on petitioner's own assertions regarding drug use); *see, e.g.*, *Trammel v. McKune*, 485 F.3d 546, 551-52 (10th Cir. 2007) (McConnell, J.) (finding a *Brady* violation because prosecution withheld evidence supporting defendant's theory and yet argued on rebuttal there was "virtually no evidence" to support defendant's theory); *Bailey v. Rae*, 339 F.3d 1107, 1117 (9th Cir. 2003) (suppression of evidence is "all the more alarming given that the State . . . showcased to the jury the defense's paucity of evidence").

The State then put on its own rebuttal witnesses – Officer Ralph Roby, FBI Agent Flynn, and Ilene Blankman – for the sole purpose of persuading the jury not to find a fact that was strongly supported by evidence the prosecution had suppressed: that petitioner was a severe drug addict. The State compounded this misleading testimony by offering a further rebuttal expert – John Hutson – who rested his opinion that petitioner knew the consequences of his actions on the testimony of the State's rebuttal witnesses that petitioner was not a drug addict. *See* Pet. Br. 43 (citing Tr. 1982).

Finally, the prosecutors argued to the jury that petitioner's defense was a fabrication invented from whole cloth, when in fact they knew it was supported by substantial evidence. The prosecutor thus did not dispute that amphetamine psychosis was a proper defense, but instead repeatedly stressed to the jury that the proof at trial was that petitioner "wasn't drug crazy. He [was] a robber and a killer. Simple as that. Nothing complicated about this." J.A. 108. *See also* J.A. 113 ("You're dealing, I submit to you, with a

premeditated, cool, deliberate – and even cowardly, really – murder[er].").

As the Tennessee Supreme Court later concluded, given the record and arguments at trial, it was essentially inevitable that on this record the jury would convict petitioner and sentence him to death. The jury perceived petitioner to present "a tenuous defense, at best": his experts' "testimony that he lacked mental capacity was based purely upon his personal recitation to them of his history of military service and drug abuse," and "[l]ay witnesses who saw him at or about the time of the homicides contradicted his statements to his expert witnesses as to the degree and extent of his drug abuse." *State v. Cone*, 665 S.W.2d 87, 90 (Tenn. 1984). The cumulative effect of the prosecution's sweeping misconduct was that the jury rendered its verdict and sentence of death based on a grossly distorted picture of the facts, such that it is not now fairly possible to accept the jury's judgment with confidence.

2. Respondent's assertion that the evidence suppressed by the prosecution was not material is belied by the trial record. Respondent submits that the evidence was superfluous because "[t]he jury heard substantial evidence of Cone's drug use, including the testimony of two expert witnesses and his mother." Br. 44. But respondent took precisely the opposite position before the jury – *viz.*, that all of this evidence was unreliable because it was based not on personal knowledge but on petitioner's own statements. Thus, while respondent goes to pains to describe the testimony of defense expert Matthew Jaremko that petitioner suffered from "a substance-abuse disorder" (Br. 6) and of expert Jonathan

Lipman detailing petitioner's extensive "history of drug abuse" (*id.* at 7), he omits any mention of the prosecution's devastating response to that testimony at trial: that the experts "[j]ust took [petitioner's] word" regarding his drug abuse. J.A. 111. And the State told the jurors that Hutson won the battle of the experts "hands down," because he did not merely base his conclusions on "just what that man told him." J.A. 111-12.[2]

Indeed, the supposedly "unrebutted testimony" at trial of petitioner's drug use on which respondent bases his position (Br. 44) rested on, as respondent now acknowledges, "information Cone had reported," "Cone's admission[s]," and "Cone's assertion[s]" (*id.*). The prosecutor's argument that such testimony was unreliable second-hand *post hoc* invention surely resonated with the jury, which knew petitioner only as a confessed murderer and which was presented with the contrary rebuttal testimony of a police officer and an FBI agent. "The likely damage [caused by the suppression of evidence] is best understood by taking the word of the prosecutor" at trial (*Kyles*, 514 U.S. at 444), not the later rationalizations of the State's post-conviction appellate counsel.

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[2] Thus, while the jury received some evidence of petitioner's "drug dependency . . . and its effects," petitioner's counsel was forced to argue that "the testimony of the experts established the existence of mitigating circumstances." *Bell v. Cone*, 535 U.S. 685, 699 (2002). As discussed in the text, the prosecutors suppressed the evidence that would have established the factual foundation for the experts' conclusions.

Respondent places particular emphasis on the fact that "[t]he proof at trial showed that, at the time of the offense, Cone was in possession of a significant variety and quantity of narcotics and other controlled substances." Br. 44. That is factually accurate, but respondent's argument ignores that the prosecutors advised the jury that "Cone's possession of this quantity and variety of drug items – four bags of marijuana, 24 vials of four different narcotic drugs, and 5,163 tablets consisting of 18 different narcotics in 61 separate containers – demonstrated that he was a drug dealer, arguing in closing that Cone 'had a drug store in [his] car.'" *Id.* at 5 (citation omitted). With the State having suppressed the evidence supporting the conclusion that petitioner was *using* those drugs, the jury had no reason to disbelieve the prosecution's closing argument: "I'm not trying to be absurd, but he says he's a drug addict. I say balon[e]y. He's a drug seller." J.A. 107.

Had it not been suppressed, "[t]he testimony of more disinterested witnesses . . . would quite naturally be given much greater weight by the jury." *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986). Respondent misstates the record in asserting that the suppressed evidence of those witnesses' statements "says nothing about Cone's mental state at the time of the crime and does not impeach the testimony of any of the numerous witnesses who observed Cone in the period surrounding the murders." Resp. Br. 43-44. In fact, as detailed in petitioner's opening brief (at 42), the evidence included persuasive first-hand observations of petitioner shortly before, during, and soon after the crimes that strongly supported petitioner's defense. J.A. 49 (suppressed witness

statement regarding robbery on the day before the murders confirming that petitioner "appear[ed] to be drunk or high" because "he acted real weird"); *id.* at 50 (suppressed witness statement that just after jewelry store robbery petitioner "looked wild eyed"); *id.* at 53 (suppressed witness statement that after petitioner fled to Florida soon after the murders petitioner was "agitated" and "looking about in a frenzied manner").

By contrast, notwithstanding respondent's unsupported contrary assertion (Br. 44-45), the prosecution did not introduce any evidence of petitioner's mental state at the time of the crimes. To the extent that the jury heard anything relevant from the witnesses to the crimes, that testimony hardly constitutes the kind of overwhelming proof that petitioner was acting rationally at the time he committed the crimes that would give confidence in the jury's judgment on such a prosecutorially distorted record. Tr. 1188 (Herschel Dalton) ("I could see a look of desperation in his eyes."); *id.* at 1189 ("[Witness] started hearing a clicking sound . . . and [he] looked back and there he was, aiming the gun at the sky and just clicking away.").

Nor can respondent succeed in his assertion that the evidence withheld by the prosecution would not have impeached the State's rebuttal witnesses. According to respondent, "[n]either Roby, Flynn, nor Blankman testified that Cone was not a drug user; rather, each of the witnesses confined their testimony to their observations of Cone in the days after the murders, during which time they did not observe him use drugs, and he did not appear to be under the influence." Br. 47. But this is no more than a back-

handed acknowledgment that the rebuttal testimony from these limited observations was relatively weak, a fact that makes the prejudice resulting from the State's suppression of the impeachment evidence stronger. The prosecution's emphatic argument to the jury that petitioner did not commit the crimes in the course of an amphetamine psychosis because he was not a drug addict rested not on actual proof of petitioner's mental state at the time of the crimes, but instead on these inferences drawn from this thin testimony that respondent now backhands. But the jury had no realistic choice other than to accept that testimony because it constituted the *only* remotely direct evidence actually introduced at the trial on the question of petitioner's drug addiction.

Respondent's specific assertion that "the evidence in no way impeaches the testimony of [rebuttal witness] Sergeant Ralph Roby that he observed no needle marks on Cone's body when he saw him" (Resp. Br. 46) is inexplicable. The prosecution did not call Roby as a *dermatologist*. The very point of his rebuttal testimony was to answer the defense's claim that petitioner was a drug addict. It blinks reality to say that the jury would not have found material the evidence suppressed by the prosecutors that Roby himself had distributed the teletypes describing petitioner as an addict (J.A. 55-57); interviewed petitioner's sister, who described petitioner's severe drug problems (*id.* at 59-60); and interviewed another witness who agreed that petitioner appeared to be on drugs before the crimes (*id.* at 49). *See generally* Pet. Br. 43.

Respondent similarly ignores the role of the State's rebuttal witnesses in his assertion (Br. 46)

that FBI Agent Flynn's testimony that petitioner "was mentally alert, provided details of his recent travels, and exhibited no signs of a mental disease or defect [in an interview] is in no way inconsistent with any of the FBI alerts Cone now insist were 'exculpatory.'" That argument rests on the dubious premise that the jury would have found Flynn's testimony about his limited observations during this single interview while petitioner was in custody – at a time when petitioner had no access to drugs and thus could not have been suffering from an amphetamine psychosis – to be *more* persuasive than the teletypes, which reflected the FBI's working understanding on the basis of its investigation that petitioner was a severe drug addict. *See* Pet. Br. 44.

3. Ultimately, while the parties agree that this Court should resolve the merits of petitioner's *Brady* claim (*see* Resp. Br. 26-27), the Court may instead elect to leave that task to the lower courts on remand in the first instance. Respondent does not dispute the showing in petitioner's opening brief (at 48-52) that the Sixth Circuit's passing assessment of petitioner's *Brady* claim rested on a serious legal error. The court of appeals compartmentalized the different categories of evidence suppressed by the prosecution into "four separate *Brady* claims" (Pet. App. 18a) and considered "each category of [withheld] documents separately" (*id.* at 57a). But a court must assess the materiality of evidence under *Brady* as the jury would: "collectively, not item by item." *Kyles*, 514 U.S. at 436. The court of appeals thus failed to properly assess the cumulative effect of the suppressed evidence on the reliability of petitioner's trial. *See* Pet. Br. 49.

The Sixth Circuit also failed to account for the context of the trial, including the facts that the prosecutors misled the jury in numerous respects; that petitioner could be sentenced to death only if every juror voted for that punishment (Tenn. Code § 39-2404 (1979)); and that the reliability of the death sentence is separately undermined by the fact that it rested on an aggravating circumstance that the Tennessee Supreme Court held on direct review to be unsupported by the trial evidence (*see* 665 S.W.2d at 95). Respondent's brief notably does not defend the Sixth Circuit's legal framework for evaluating petitioner's *Brady* claim, and the judgment can accordingly be reversed and the case remanded for further proceedings on that basis.

At the very least, the Sixth Circuit's judgment should be reversed because the court of appeals deprived petitioner of any opportunity to develop facts supporting his *Brady* claim through an evidentiary hearing in the district court. Even if, contrary to petitioner's principal submission, the record as it stands is not sufficiently developed to establish the materiality of the evidence suppressed by the prosecution, there is a substantial prospect that additional fact-finding could produce a different result. For example, petitioner could develop proof of additional evidence and lines of effective cross-examination of the State's lay and expert witnesses that his counsel would have pursued if he had been provided with the significant withheld evidence that petitioner was not merely a drug addict, but was in the throes of an amphetamine psychosis when he committed the crimes. The district court would also be in a position to assess whether the prosecution

would have presented its rebuttal case at all if the State had disclosed the available impeachment evidence. Accordingly, if this Court concludes that the existing record does not establish the materiality of the evidence suppressed by the prosecution, the case should be remanded to the district court for further proceedings. *See* Pet. Br. 51-52.[3]

* * * *

This Court's prior rulings sustaining the death sentence in this case are grounded on a basic faith in the judgments that arise from criminal trials under our system of justice. In *Bell v. Cone*, 535 U.S. 685, 699-702 (2002), the Court held that, given the limited available evidence supporting petitioner's defense, petitioner's trial counsel (having initially focused on petitioner's mental health as the mitigating circumstance justifying a life sentence) made a reasonable strategic judgment to waive his closing argument to the jury. Subsequently, in *Bell v. Cone*, 543 U.S. 447, 455-59 (2005) (per curiam), the Court held that the penalty phase instructions appropriately guided the sentencing determination

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[3] No point would be served by remanding the case to the state courts. *Cf.* Tr. of Oral Arg., No. 07-1223, *Bell v. Kelly*, 12-17 (Nov. 12, 2008). The three-year statute of limitations for petitioner to seek post-conviction relief (Tenn. Code § 40-30-102 (repealed 1995)) has expired. No exception exists for subsequently discovered *Brady* claims. *Harris v. State*, 102 S.W.3d 587 (Tenn. 2003). When the federal courts do adjudicate the *Brady* claim, they will owe no deference to any fact-finding by the state courts, which made no "determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

by the jury, which was able to consider all the relevant evidence in imposing the death penalty.

When a trial comports with basic principles of due process, that faith is fully warranted. But when prosecutorial misconduct so thoroughly pervades the jury's evaluation of the defense in a capital case, the verdict and sentence are not worthy of confidence, and allowing them to stand threatens the integrity of, and public confidence in, the fair administration of the death penalty. Petitioner caused two deaths, for which he was properly subject to trial and the prospect of execution, dependent on the jury's assessment of his mental capacity to understand the wrongfulness of his acts and to conform his conduct to the requirements of society. But in violation of the basic due process obligations embodied in *Brady*, the prosecution stacked the deck in guilt and sentencing proceedings that were, unbeknownst to the court and to petitioner's counsel, a farce. The State's misrepresentations first to the jury and later to the state and federal courts have precluded any fair adjudication of the case against petitioner. The judgment accordingly should be reversed.

CONCLUSION

For the foregoing reasons, as well as those in the petitioner's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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December 1, 2008

APPENDIX A: MEMORANDUM FINDINGS OF FACT AND CONCLUSIONS OF LAW (EXCERPTS)

THURSDAY, DECEMBER 16, 19

IN THE CRIMINAL COURT OF TENNESSEE
THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

DIVISION X

GARY BRADFORD CONE,
PETITIONER

VS. P-06874

STATE OF TENNESSEE,
RESPONDENT

MEMORANDUM FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is Petitioner, Gary Bradford Cone's Second Petition for Post Conviction Relief.

***

Likewise, grounds 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36 involves a potpourri of various errors by the court at the trial all of which grounds have been considered and denied in direct appeal or the First Post Conviction Petition.

***

APPENDIX B: PETITIONER'S REPLY TO STATE'S RESPONSE TO PETITION FOR POST-CONVICTION RELIEF & MOTION TO DISMISS AND STATEMENT & AMENDMENT REGARDING ISSUE OF WAIVER (EXCERPTS)

OCTOBER 5, 1993

IN THE CRIMINAL COURT FOR SHELBY COUNTY, TENNESSEE

GARY BRADFORD CONE,
PETITIONER

VS. P-06874

STATE OF TENNESSEE,
RESPONDENT

PETITIONER'S REPLY TO STATE'S RESPONSE TO PETITION FOR POST-CONVICTION RELIEF & MOTION TO DISMISS AND STATEMENT & AMENDMENT REGARDING ISSUE OF WAIVER

Comes now Petitioner Gary Bradford Cone, and pursuant to T.C.A. §40-30-101 et. seq., Article I §§ 7, 8, 9, 10, 16 of the Tennessee Constitution, the Fourth Fifth Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and respectfully replies that contrary to Respondent's assertions, petitioner must be afforded an evidentiary hearing encompassing the issue of waiver and the merits of his claim.

***

Petitioner must be afforded a full and fair opportunity to prove that he has never waived his claims, and he must be afforded a fully and fair opportunity to demonstrate the validity of his claims.

***

APPENDIX C: OPINION OF TENNESSEE COURT OF CRIMINAL APPEALS

Court of Criminal Appeals of Tennessee,

at Jackson.

Gary Bradford CONE, Appellant,

v.

STATE of Tennessee, Appellee.

March 22, 1995.

Permission to Appeal Denied by

Supreme Court March 4, 1996.

Stephen R. Glassroth, Glassroth & Associates, P.C., Montgomery, Alabama, Kemper B. Durand, Thomason, Hendrix, Harvey, Johnson & Mitchell, Memphis, for Appellant.

Charles W. Burson, Attorney General and Reporter, Rebecca L. Gundt, Assistant Attorney General, Criminal Justice Division, Nashville, John W. Pierotti, District Attorney General, Kevin Rardin, Asst. Dist. Attorney General, Memphis, for Appellee.

OPINION

SUMMERS, Judge.

The appellant, Gary Bradford Cone, was convicted of murder and sentenced to death in 1982. After unsuccessfully appealing to the Tennessee Supreme Court, the appellant filed a petition for

post-conviction relief. Appellant's first petition was denied, and this Court affirmed the denial. Appellant then filed a second petition, which was dismissed by the trial court. On appeal, this Court remanded the trial court's denial of the appellant's second post-conviction petition in order to give the appellant an opportunity to rebut the presumption of waiver arising from the previous post-conviction proceedings. Appellant filed a lengthy factual affidavit concerning waiver and, following oral argument on the waiver issue, the trial court found that all of the issues raised by the appellant's amended second petition were either previously determined or waived. Accordingly, the trial court dismissed the appellant's second petition. The appellant now appeals the trial court's denial of his second post-conviction petition, presenting for our review the related issues of whether the trial court's dismissal was either premature or incorrect. Having carefully considered both issues, we find them to be without merit and affirm the judgment of the trial court.

ANALYSIS

Appellant contends that the trial court's dismissal of his second petition was premature, because the state had not adequately responded to the petition as amended and because the trial court declined to hold an evidentiary hearing.[4] The

[4] The appellant argues that in our previous opinion, *Cone v. State*, C.C.A. No. 48, 1991 WL 77535 (Tenn. Crim. App. May 15, 1991), we remanded to the trial court for an evidentiary

appellant's position on this issue is based on the Tennessee Supreme Court cases of *Swanson v. State*, 749 S.W.2d 731 (Tenn. 1988), and *Allen v. State*, 854 S.W.2d 873 (Tenn. 1993). In both *Swanson* and *Allen*, *pro se* post-conviction petitions were summarily dismissed upon the state's motion without appointment of counsel or an evidentiary hearing. The cases cited by the appellant are of limited relevance where, as here, the post-conviction petitioner had the benefit of appointed counsel to review and amend his original *pro se* petition. Furthermore, *Swanson* and *Allen* recognized that dismissal without an evidentiary hearing is proper where the petition fails to state a "colorable claim for relief," *Allen v. State*, 854 S.W.2d 873, 876, or where the claims in the petition are "conclusively incorrect." *Swanson v. State*, 749 S.W.2d 731, 736. Our conclusion as to the timeliness of the trial court's dismissal is therefore dependent on our resolution of the substantive issues of waiver and previous determination.

Grounds for relief which have been previously determined or waived are not cognizable in a post-conviction action. T.C.A. § 40-30-111 (1990). Tennessee Code Annotated Section 40-30-112 (1990) provides as follows:

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hearing. In that opinion, we held only that the appellant was entitled to an opportunity to rebut the presumption of waiver. *Id.* We did not intend to require the trial court to conduct an evidentiary hearing.

> A ground for relief is "previously determined" if a court of competent jurisdiction has ruled on the merits after a full and fair hearing.
>
> A ground for relief is "waived" if the petitioner knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented.
>
> There is a rebuttable presumption that a ground for relief not raised in any such proceeding which was held was waived.

The trial court, in memorandum findings of fact and conclusions of law, addressed the fifty-two separate grounds alleged by the appellant as a basis for post-conviction relief. Had Judge Williams not provided this Court with such an exemplary and meticulous treatment of the appellant's petition, our task in reviewing the relevant issues would have been difficult if not insurmountable.

In post-conviction proceedings, the petitioner has the burden of proving the allegations in his petition by a preponderance of the evidence. *McBee v. State*, 655 S.W.2d 191, 195 (Tenn. Crim. App. 1983). Furthermore, the findings of the trial court in post-conviction hearings are conclusive on appeal unless the evidence preponderates against the judgment. *State v. Buford*, 666 S.W.2d 473, 475 (Tenn. Crim. App. 1983); *Clenny v. State*, 576 S.W.2d 12, 14 (Tenn. Crim. App. 1978).

The trial court found that most of the appellant's stated grounds for relief, in addition to being repetitious and cumulative, were previously determined either on direct appeal or in the

appellant's first petition. The trial court also noted that many of the appellant's "grounds" are merely conclusory allegations which fail to state a constitutional deprivation and are therefore not cognizable in a post-conviction action.[5] Finally, the trial court found that the appellant had failed to rebut the presumption of waiver which would preclude the consideration of any new grounds raised in the appellant's petition.

The appellant's second petition contains the following blanket statement on the issue of waiver:

> The above claims were not raised previously either due to the law regarding the claim not being established at the time, ineffective assistance of counsel, the novelty of the claim or counsel's failure to apprise petitioner of the claim or its relevance to his case. Because of this, the petitioner himself has never had an opportunity before now to either raise these claims or waive them. Neither petitioner nor any person previously appointed to represent petitioner has knowingly and understandingly failed to raise any and all such claims earlier.

The appellant contends that this statement alone is sufficient to rebut the presumption of waiver and that the trial court's dismissal of his second petition was therefore incorrect.

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[5] Post-conviction relief will only be granted where a defendant's conviction or sentence is either void or voidable due to the abridgement of a constitutional right. T.C.A. § 40-30-105 (1990).

As for the appellant's claim that some of the issues raised in his second petition were "novel" or that the law concerning some issues was uncertain, we find, as did the trial court, that the appellant has failed to present any support for this vague and conclusory statement. Furthermore, because the appellant did not address the issue of "new law" in his brief or on oral argument to this court, the issue is waived. *See* Tenn. Rules of Crim. App. Rule 10(b); T.R.A.P. Rule 27(a)(7); *State v. Chance*, 778 S.W.2d 457, 462 (Tenn. Crim. App. 1989).

In his first post-conviction petition, the appellant presented five factual allegations to support his constitutional claim of ineffective assistance of counsel. His second petition, on the other hand, listed thirty-five separate deficiencies in his trial counsel's performance. The trial court found that ineffective assistance of counsel is a single "ground for relief" as contemplated by the statute, *see* T.C.A. § 40-30-111, and that the issue of ineffective assistance of counsel issue was therefore previously determined. We agree with the trial court. A petitioner may not relitigate a previously determined issue by presenting additional factual allegations. We should not encourage post-conviction petitioners to invent new facts to revive an issue which was unfavorably decided, nor should we allow petitioners to "sandbag" by reserving factual claims until their second or third petition.

Finally, the appellant maintains that he did not waive any issues "knowingly and understandingly" as required by the statute. *See* T.C.A. § 40-30-112(b)(1). The trial court found that the appellant's mere statement that he did not understand the issues or appreciate the significance of them was insufficient,

without further explanation, to rebut the presumption of waiver. Parenthetically, the trial court noted that the appellant was neither illiterate nor unsophisticated. In fact, the appellant graduated with honors from the University of Arkansas and had been accepted for admission into law school after scoring in the ninety-sixth percentile on his law school admission test.

We must agree with the trial court that the appellant should not be able to extend the post-conviction process and delay the administration of justice ad infinitum by filing subsequent petitions which disingenuously claim that the grounds asserted were unknown to the appellant when his previous petition was filed. As Justice Kennedy wrote for the United States Supreme Court in *McCleskey v. Zant*, 499 U.S. 467, 111 S. Ct. 1454, 113 L.Ed.2d 517 (1991), "[p]erpetual disrespect for the finality of convictions disparages the entire criminal justice system." *Id.* at 492, 111 S. Ct. at 1469. Our own Tennessee Supreme Court observed in 1972:

> There must be a finality to all litigation, criminal as well as civil. The courts, the executive branch of government, the legal profession, and the public have been seriously inconvenienced by the prosecutions of baseless habeas corpus and post-conviction proceedings. Defendants to criminal prosecutions, like parties to civil suits, should be bound by the judgments therein entered. When they fail to make timely objections to errors of the courts they must not be allowed at later times of their own choosing-often perhaps, after witnesses against them have become

> unavailable-to assert those grounds in post-conviction actions.

Arthur v. State, 483 S.W.2d 95, 97 (Tenn.1972).

CONCLUSION

We conclude that the appellant failed to rebut the presumption of waiver as to all claims raised in his second petition for post-conviction relief which had not been previously determined. The trial court's decision to dismiss the appellant's petition without an evidentiary hearing was neither improper nor premature. The judgment of the trial court is therefore:

AFFIRMED.

The appellant's sentence of death by electrocution is set for July 1, 1995, unless otherwise stayed by appropriate authority.

PEAY and HAYES, JJ., concur.

APPENDIX D: APPLICATION FOR PERMISSION TO APPEAL TO THE TENNESSEE SUPREME COURT (EXCERPTS)

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON, TENNESSEE

No. _____
CCA No. 02C01-94030-CR-00052

GARY BRADFORD CONE,
Applicant-Appellant
v.
STATE OF TENNESSEE,
Respondent-Appellee

GARY BRADFORD CONE'S
APPLICATION FOR PERMISSION TO APPEAL

***

Pursuant to Tenn. R. App. P. 11, Applicant Gary Bradford Cone respectfully requests that this Honorable Court grant him permission to appeal the Court of Criminal Appeals' judgment in State of Tennessee v. Gary Bradford Cone, No. 02C01-9403-CR-00052 (Tenn. Cr. App. Mar. 22, 1995) (Appendix A).

***

C.

Brady Claim

As noted supra, after Cone received access to the file of the Shelby District Attorney General under the Tennessee Public Records Act, he amended his petition to include Brady claims (R. 139-144, ¶ 41). Cone alleged that the documents contained in the District Attorney General's file and withheld at trial entitled him to post-conviction relief:

***

The trial court, however, denied relief on the claim, and the Court of Criminal appeals affirmed. Gary Cone was never afforded a hearing on his Brady claims.

***

C. TO SECURE UNIFORMITY OF DECISION, THIS COURT SHOULD GRANT THE APPLICATION ON THE BRADY ISSUE

As noted supra, Gary Cone raised a Brady claim in 1993 after receiving access to the files of the District Attorney General under the Tennessee Public Records Act, following the 1992 Tennessee Court of Criminal Appeals decision in Capital Case Resource Center v. Woodall, No. 01-A-01-9104-CH-00150 (Tenn. App. Nashville, Jan. 29, 1992). In reviewing the file, Cone uncovered various documents which demonstrated that he did not possess the *mens rea* necessary for conviction of first-degree murder, and which conflicted with the prosecution's theory of the case at trial. See R. 138, 139. The trial court, however, never addressed the

claim on the merits, and the Court of Criminal Appeals affirmed.

In Caldwell v. State, No. 02C01-9405-00099 (Tenn. Cr. App. Dec. 28, 1994) (Appendix G), the Court of Criminal Appeals held that when a post-conviction petitioner first obtains documents through the Tennessee Public Records Act after filing a prior post-conviction petition, the petitioner's claim is not waived: "If a petitioner was not and could not have been aware of a possible constitutional claim until 1992 [when Woodall was decided] it is doubtful that the defense of waiver would apply." Id. slip op. at 11. Gary Cone, however, did not receive a hearing on his claim.

This Court, however, has just recently granted application for permission to appeal in State of Tennessee v. Richard Caldwell, Madison County No. 02S01-9505-CC-00044 (Tenn. May 30, 1995) (granting application for permission to appeal), to consider whether "waiver" and/or the post-conviction statute of limitations applies to claims arising from Public Records disclosed after 1992, and after a prior post-conviction petition has been decided.

The trial court's ruling on Gary Cone's claim was erroneous and it conflicts squarely with Caldwell. Gary Cone's petition should be granted, since this Court has also granted review in Caldwell to review the identical issue. This is necessary to insure uniform application of the law on this vital issue. Tenn. R. App. P. 11(a)(1), (a)(3), (a)(4). Alternatively, this Court should hold the application pending the disposition of Caldwell, and then grant the petition and remand for further proceedings, including an evidentiary hearing.

***