No._____

IN THE

SUPREME COURT OF THE UNITED STATES

SOLOMON V. HESTER - PETITIONER

VS.

KEVIN SPRAYBERRY - RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO

ELEVENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

SOLOMON V. HESTER

GDC # 924529 ; BLDG. Y - 2-A

HAYS STATE PRISON; P.O. BOX 668

TRION, GA 30753 - 0668

QUESTIONS PRESENTED

1) THE HALL COUNTY DISTRICT ATTORNEY'S OFFICE CONTACTED THE GEORGIA BUREAU OF INVESTIGATION (HEREIN AFTER G.B.I.) AND TOLD THEM NOT TO RELEASE MITIGATION EVIDENCE TO THE DEFENSE.

WAS PETITIONER DENIED DUE PROCESS AND HAVE A VALID BRADY CLAIM WHEN THE STATE WITHHELD EXCULPATORY EVIDENCE THAT COULD HAVE AND PROBABLY WOULD HAVE CHANGED THE OUTCOME OF THE TRIAL, DIRECT APPEAL AND THE PETITIONER'S HABEAS CORPUS UNDER 28 USC § 2254 IF THE STATE HAD RELEASED THE INFORMATION TO PETITIONER'S COUNSEL?

2) THE HALL COUNTY DISTRICT ATTORNEY'S OFFICE CONTACTED A DEFENSE WITNESS AND THREATENED THE WITNESS WITH IMPRISONMENT FOR PERJURY IF THE WITNESS TESTIFIED FOR THE DEFENSE. THIS WITNESS WOULD HAVE TESTIFIED THAT SHE WAS ON THE PHONE WITH PETITIONER WHEN THE CRIME OCCURRED AND THAT PETITIONER DID NOT FIRE THE WEAPON THAT KILLED THE VICTIM.

WAS PETITIONER'S RIGHT TO DUE PROCESS VIOLATED WHEN THE STATE THREATENED HIS ONLY WITNESS WITH IMPRISONMENT IF THE WITNESS TESTIFIED TO ANYTHING OTHER THAN WHAT THE STATES IDEA OF WHAT THEIR IDEA OF THE EVIDENCE WAS?

4) PETITIONER WAS REPRESENTED AT TRIAL AND ON DIRECT APPEAL BY THE SAME ATTORNEY. COUNSEL COULD NOT RAISE INEFFECTIVE ASSISTANCE OF COUNSEL AGAINST HIMSELF. THERE WERE ISSUES OF INEFFECTIVE ASSISTANCE

OF COUNSEL THAT SHOULD HAVE BEEN BROUGHT FORTH IF PETITIONER HAD BEEN APPOINTED NEW COUNSEL FOR HIS DIRECT APPEAL. THERE WERE MATTERS WITH MUCH MORE CHANCE OF REVERSAL ON DIRECT APPEAL IF COUNSEL COULD HAVE RAISED THEM. COUNSEL BROUGHT FORTH ISSUES JUST TO MAKE A SHOWING OF REPRESENTATION INSTEAD OF RAISING MATTERS THAT COULD HAVE AND PROBABLY WOULD HAVE CHANGED THE OUTCOME OF THE PROCEEDINGS.

DID PETITIONER RECEIVE CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL ?

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[~~/~~] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[~~/~~] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[~~/~~] is unpublished. Please see Appendix C

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix D to the petition and is

[~~/~~] reported at 292 Ga. 356; 736 S.E.2d 404; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

THE DATE ON WHICH THE UNITED STATES COURT OF APPEALS DECIDED MY CASE WAS NOVEMBER 20, 2017.

A TIMELY PETITION FOR REHEARING WAS DENIED BY THE UNITED STATES COURT OF APPEALS ON THE FOLLOWING DATE: MARCH 12, 2018, AND A COPY OF THE ORDER DENYING REHEARING APPEARS AT APPENDIX A - 1

THE JURISDICTION OF THIS COURT IS INVOKED UNDER 28 U.S.C. § 1254 (1)

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

THE FOLLOWING STATUTORY AND CONSTITUTIONAL PROVISIONS ARE INVOLVED IN THIS CASE.

U.S. CONST., AMEND. VI

IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT TO A SPEEDY AND PUBLIC TRIAL, BY AN IMPARTIAL JURY OF THE STATE AND DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED, WHICH DISTRICT SHALL HAVE BEEN PREVIOUSLY ASCERTAINED BY LAW, AND TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION; TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM; TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR, AND TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENCE.

U.S. CONST., AMEND. XIV

SECTION 1. ALL PERSONS BORN OR NATURALIZED IN THE UNITED STATES, AND SUBJECT TO THE JURISDICTION THEREOF, ARE CITIZENS OF THE UNITED STATES AND THE STATE WHEREIN THEY RESIDE. NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES; NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS.

28 U.S.C. § 2254

(a) THE SUPREME COURT, A JUSTICE THEREOF, A CIRCUIT JUDGE, OR A DISTRICT COURT SHALL ENTERTAIN AN APPLICATION FOR A WRIT OF HABEAS CORPUS IN BEHALF OF A PERSON IN CUSTODY PURSUANT TO THE JUDGMENT OF A STATE COURT ONLY ON THE GROUND THAT HE IS IN CUSTODY IN VIOLATION OF THE CONSTITUTION OR LAWS OR TREATIES OF THE UNITED STATES.

(b)(1) AN APPLICATION FOR A WRIT OF HABEAS CORPUS ON BEHALF OF A PERSON IN CUSTODY PURSUANT TO THE JUDGMENT OF A STATE COURT SHALL NOT BE GRANTED UNLESS IT APPEARS THAT ---

(A) THE APPLICANT HAS EXHAUSTED THE REMEDIES AVAILABLE IN THE COURTS OF THE STATE; OR

(B)(i) THERE IS AN ABSENCE OF AVAILABLE STATE CORRECTIVE PROCESS; OR

(ii) CIRCUMSTANCES EXIST THAT RENDER SUCH PROCESS INEFFECTIVE TO PROTECT THE RIGHTS OF THE APPLICANT.

(2) AN APPLICATION FOR A WRIT OF HABEAS CORPUS MAY BE DENIED ON THE MERITS, NOTWITHSTANDING THE FAILURE OF THE APPLICANT TO EXHAUST THE REMEDIES AVAILABLE IN THE COURTS OF THE STATE.

(3) A STATE SHALL NOT BE DEEMED TO HAVE WAIVED THE EXHAUSTION REQUIREMENT OR BE ESTOPPED FROM RELIANCE UPON THE REQUIREMENT UNLESS THE STATE, THROUGH COUNSEL, EXPRESSLY WAIVES THE REQUIREMENT.

(c) AN APPLICANT SHALL NOT BE DEEMED TO HAVE EXHAUSTED THE REMEDIES AVAILABLE IN THE COURTS OF THE STATE, WITHIN THE MEANING OF THIS SECTION, IF HE HAS THE RIGHT UNDER THE LAW OF THE STATE TO RAISE, BY ANY AVAILABLE PROCEDURE, THE QUESTION PRESENTED.

(d) AN APPLICATION FOR A WRIT OF HABEAS CORPUS ON BEHALF OF A PERSON IN CUSTODY PURSUANT TO THE JUDGMENT OF A STATE COURT SHALL NOT BE GRANTED WITH RESPECT TO ANY CLAIM THAT WAS ADJUDICATED ON THE MERITS IN STATE COURT PROCEEDINGS UNLESS THE ADJUDICATION OF THE CLAIM ---

(1) RESULTED IN A DECISION THAT WAS CONTRARY TO, OR INVOLVED AN UNREASONABLE APPLICATION OF, CLEARLY ESTABLISHED FEDERAL LAW, AS DETERMINED BY THE SUPREME COURT OF THE UNITED STATES; OR

(2) RESULTED IN A DECISION THAT WAS BASED ON AN UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED IN THE STATE COURT PROCEEDING.

(e)(1) IN A PROCEEDING INSTITUTED BY AN APPLICATION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN CUSTODY PURSUANT TO THE JUDGMENT OF A STATE COURT, A DETERMINATION OF A FACTUAL ISSUE MADE BY A STATE COURT SHALL BE PRESUMED TO BE CORRECT. THE APPLICANT SHALL HAVE THE BURDEN OF REBUTTING THE PRESUMPTION OF CORRECTNESS BY CLEAR AND CONVINCING EVIDENCE.

(2) IF THE APPLICANT HAS FAILED TO DEVELOP THE FACTUAL BASIS OF A CLAIM IN STATE COURT PROCEEDINGS, THE COURT SHALL NOT HOLD AN EVIDENTIARY HEARING ON THE CLAIM UNLESS THE APPLICANT SHOWS THAT ---

(A) THE CLAIM RELIES ON ---

(i) A NEW RULE OF CONSTITUTIONAL LAW, MADE RETROACTIVE TO CASES ON COLLATERAL REVIEW BY THE SUPREME COURT, THAT WAS PREVIOUSLY UNAVAILABLE; OR

(ii) A FACTUAL PREDICATE THAT COULD NOT HAVE BEEN PREVIOUSLY DISCOVERED THROUGH THE EXERCISE OF DUE DILIGENCE, AND

(B) THE FACTS UNDERLYING THE CLAIM WOULD BE SUFFICIENT TO ESTABLISH BY CLEAR AND CONVINCING EVIDENCE THAT BUT FOR CONSTITUTIONAL ERROR, NO REASONABLE FACTFINDER WOULD HAVE FOUND THE APPLICANT GUILTY OF THE UNDERLYING OFFENSE.

(f) IF THE APPLICANT CHALLENGES THE SUFFICIENCY OF THE EVIDENCE ADDUCED IN SUCH STATE COURT PROCEEDING TO SUPPORT THE STATE COURT'S DETERMINATION OF A FACTUAL ISSUE MADE THEREIN, THE APPLICANT, IF ABLE, SHALL PRODUCE THAT PART OF THE RECORD PERTINENT TO A DETERMINATION OF THE SUFFICIENCY OF THE EVIDENCE TO SUPPORT SUCH DETERMINATION. IF THE APPLICANT, BECAUSE OF INDIGENCY OR OTHER REASON IS UNABLE TO PRODUCE SUCH PART OF THE RECORD, THEN THE STATE SHALL PRODUCE SUCH PART OF THE RECORD AND THE FEDERAL COURT SHALL DIRECT THE STATE

TO DO SO BY ORDER DIRECTED TO AN APPROPRIATE STATE OFFICIAL. IF THE STATE CANNOT PROVIDE SUCH PERTINENT PART OF THE RECORD, THEN THE COURT SHALL DETERMINE UNDER THE EXISTING FACTS AND CIRCUMSTANCES WHAT WEIGHT SHALL BE GIVEN TO THE STATE COURT'S FACTUAL DETERMINATION.

(g) A COPY OF THE OFFICIAL RECORDS OF THE STATE COURT, DULY CERTIFIED BY THE CLERK OF SUCH COURT TO BE A TRUE AND CORRECT COPY OF A FINDING, JUDICIAL OPINION, OR OTHER RELIABLE WRITTEN INDICIA SHOWING SUCH A FACTUAL DETERMINATION BY THE STATE COURT SHALL BE ADMISSIBLE IN THE FEDERAL COURT PROCEEDING.

(h) EXCEPT AS PROVIDED IN SECTION 408 OF THE CONTROLLED SUBSTANCES ACT, IN ALL PROCEEDINGS BROUGHT UNDER THIS SECTION, AND ANY SUBSEQUENT PROCEEDINGS ON REVIEW, THE COURT MAY APPOINT COUNSEL FOR AN APPLICANT WHO IS OR BECOMES FINANCIALLY UNABLE TO AFFORD COUNSEL, EXCEPT AS PROVIDED BY A RULE PROMULGATED BY THE SUPREME COURT PURSUANT TO STATUTORY AUTHORITY. APPOINTMENT OF COUNSEL UNDER THIS SECTION SHALL BE GOVERNED BY SECTION 3006A OF TITLE 18.

(i) THE INEFFECTIVE OR INCOMPETENCE OF COUNSEL DURING FEDERAL OR STATE COLLATERAL POST - CONVICTION PROCEEDINGS SHALL NOT BE A GROUND FOR RELIEF IN A PROCEEDING ARISING UNDER SECTION 2254.

STATEMENT OF THE CASE

ALISON BROWNELL DIED AS A RESULT OF A HARD PRESS GUNSHOT WOUND TO HER HEAD. AT TRIAL, THE STATE THEORIZED THAT THE PETITIONER INTENTIONALLY SHOT BROWNELL AND PLANTED THE GUN IN HER HAND. PETITIONER MAINTAINS, HOWEVER, THAT BROWNELL SHOT HERSELF IN FRONT OF HIM. PETITIONER TOLD POLICE THAT BROWNELL WAS HIGHLY INTOXICATED (THE AUTOPSY REVEALED A 0.27 BAC), BECAME ERRATIC AND HIGHLY EMOTIONAL, AND SHOT HERSELF.

PRIOR TO TRIAL THE DEFENSE SOUGHT AN ORDER FROM THE TRIAL COURT COMPELLING THE STATE CRIME LAB TO CONDUCT ADDITIONAL DRUG TESTING ON BROWNELL'S BLOOD. UNBEKNOWNST TO THE DEFENSE, BUT KNOWN TO THE PROSECUTION, TWO TESTS WERE COMPLETED PRIOR TO THE END OF THE TRIAL AND THE RESULTS INDICATED THE PRESENCE OF MARIJUANA METABOLITES IN BROWNELL'S BLOOD. AFTER TRIAL THE DEFENSE LEARNED OF THE COMPLETED MARIJUANA TESTS AND SOUGHT A NEW TRIAL ON THE GROUNDS OF A BRADY V MARYLAND VIOLATION. THE TRIAL COURT DENIED RELIEF.

PRIOR TO TRIAL, THE DEFENSE LEARNED FROM THE STATE CRIME LAB (HEREINAFTER GBI) TOXICOLOGIST, LARRY LEWELLEN, THAT BROWNELL'S BLOOD HAD BEEN SUBJECT TO AN IMMUNOASSAY TEST (HEREINAFTER, IA TEST) FOR A LIMITED NUMBER OF DRUGS. (PRETRIAL MOTIONS, HEREINAFTER PTM, 03-03-2009, 3-5; MOTION FOR NEW TRIAL, HEREINAFTER MNT 226; R-596-602). DEFENSE COUNSEL WAS INFORMED THAT ADDITIONAL IA TESTS COULD BE DONE ON BROWNELL'S BLOOD, BUT HAD NOT BEEN REQUESTED BY THE PROSECUTION OR LAW ENFORCEMENT. THE GBI REFUSED DEFENSE COUNSEL'S REQUEST TO CONDUCT THE ADDITIONAL TEST WITHOUT THE REQUEST OF THE PROSECUTION OR A COURT ORDER. DEFENSE COUNSEL IMMEDIATELY FILED A MOTION TO COMPEL THE TESTING. AT THE PRETRIAL HEARING ON PETITIONER'S MOTION TO COMPEL, THE TRIAL COURT ORDERED THE TESTING BE PERFORMED, OVER THE OBJECTIONS OF THE PROSECUTION. (PTM 03-03-2009, 3 -5)

ON THE SECOND DAY OF JURY SELECTION, MARCH 06, 2009, THE PROSECUTOR ANNOUNCED TO THE TRIAL COURT AND DEFENSE COUNSEL THAT THE TESTING HAD BEEN REQUESTED, BUT WOULD NOT BE READY IN TIME FOR THE START OF THE TRIAL. " AT THE LUNCH

BREAK I SPOKE WITH LARRY LEWELLEN .... HE CALLED TODAY AND
WOULD NOT BE READY BY MONDAY, MARCH 9th, AND PROBABLY NO
NEXT WEEK ... THERE HAS TO BE PEER REVIEW AND ALL THOSE TH
WILL RELEASE THE RESULTS. " (T, IV - 374 - 375).

IN POINT OF FACT, THE IA TEST HAD ALREADY BEEN COMPLETED.
(MNT 245 - 246). INDEED, THE PROSECUTOR WAS TOLD BY LEWELLEN
MARCH 06, 2009, " THAT [THE IMMUNOASSAY SCREEN TEST RESULT]
FOR THE MARIJUANA METABOLITE " (MNT 49-50) AND " IT WAS PRES
(MNT 94). ACCORDING TO LEWELLEN " I THINK I EXPLAINED THAT TO
THAT BEING AT THE CUTOFF WE BELIEVED THERE WAS A GOOD PRO
NOT BE ABLE TO CONFIRM THE PRESENCE OF IT OR RULE IT OUT VE

ON MARCH 11, 2009, PRIOR TO THE TRIAL'S CONCLUSION, GBI COMPL
ON BROWNELL'S BLOOD, A GAS CHROMATOGRAPHY, MASS SPECTROM
GC/MS) TEST THAT HAD AN "INDICATION OF 7.5 " NANOGRAMS PER M
MARIJUANA METABOLITE. (MNT 54; 247). WHILE IT WAS BELOW THE
REPORTING A TEST RESULT AS POSITIVE (10 NANOGRAMS PER MILLIL
RESULT WAS NOT NEGATIVE." (MNT 53, -70)

AFTER TRIAL, DEFENSE COUNSEL LEARNED ABOUT THE EXISTENCE
THE GC/MS TEST. (MNT230; 234). AT THE MOTION FOR NEW TRIAL, TH
TESTIFIED REGARDING THE TEST RESULTS. DR. DULANEY CONCLUDED
WERE PROPERLY INTERPRETED AS POSITIVE FOR THE MARIJUANA ME
AND, Dr. DULANEY CONCLUDED THAT THE RESULTS THEREFORE SUPP
CONCLUSION THAT BROWNELL WAS SUFFERING FROM MARIJUANA IN
TIME OF THE SHOOTING. THE GBI TOXICOLOGISTS (LARRY LEWELLEN
CHILDERS) CONCLUDED THAT THE PRESENCE OF THE MARIJUANA ME
DECEDENT'S BLOOD MERELY COULD NOT BE CONFIRMED. (MNT 54- 55;

BOTH GBI TOXICOLOGISTS AGREED THAT BOTH THE IA TEST AND TH
LOCATED, DETECTED AND QUANTIFIED THE PRESENCE OF THE MARIJU

BROWNELL'S BLOOD. (MNT 25; 52-53; 147; 163); (MNT 245-246). AND, LEWELLEN CONCEDED THAT THE IA TEST IS " NOT UNRELIABLE. " MNT 79). HOWEVER, LEWELLEN CONCLUDED THAT, BECAUSE THE UNDISCLOSED "CONFIRMATORY" GC/MS TEST RESULT WAS BELOW THE AGENCY'S CUTOFF, THE TWO TESTS COULD " NEITHER RULE IN NOR RULE OUT THE PRESENCE OF MARIJUANA." (MNT 60).

IMPORTANTLY, ALL THREE EXPERTS AGREED THAT THE QUANTITY OF THE METABOLITE HAD LIKELY DISSIPATED DUE TO THE SUBSTANTIAL (OVER SEVENTEEN MONTHS) TIME LAG BETWEEN SAMPLE COLLECTION AND TESTING. ACCORDING TO Dr. DULANEY, THE AMOUNT OF THE METABOLITE WOULD HAVE NECESSARILY DROPPED SIGNIFICANTLY - MEANING THE AMOUNT OF THE METABOLITE " LIKELY PRESENT IN THIS SAMPLE UPON COLLECTION ... WAS HIGHER. IT WAS A GOOD DEAL HIGHER. " (MNT 105). INDEED, " TO SEE SOMETHING AT EIGHTEEN MONTHS WAS VERY SURPRISING. " (MNT 104). BOTH GBI TOXICOLOGISTS AGREED THAT, DUE TO DISSIPATION OF THE METABOLITE IN BLOOD OVER TIME, HAD THE BLOOD BEEN TESTED CLOSER IN TIME TO COLLECTION THE RESULTS OF THE TWO TESTS MAY WELL HAVE BEEN HIGHER - AND COULD HAVE BEEN REPORTED AS A POSITIVE BY GBI. (MNT 20-21; 55-57; 154 - 156)

ALL THREE TOXICOLOGY EXPERTS FURTHER AGREED THAT THE PRESENCE OF THE MARIJUANA METABOLITE IN THE BLOOD SUPPORTS THE CONCLUSION THAT A PERSON IS UNDER THE INFLUENCE OF MARIJUANA. (MNT 31; 130; 158). AND, ALL THREE EXPERTS LIKEWISE AGREED THAT THE PRESENCE OF MARIJUANA METABOLITE IN THE BLOOD SUGGESTS THE PERSON HAS INGESTED MARIJUANA WITHIN THE LAST FOUR TO SIX HOURS.

THE PROSECUTOR, FOR HER PART, CANDIDLY TESTIFIED, " I NEVER PROVIDED THE TESTS " EXCEPT PERHAPS " AT SOME POINT AFTER THE TRIAL OF THE CASE. " (MNT 242). LEWELLEN STATED THAT TOXICOLOGY TESTS RESULTS WOULD NOT BE, AND IN FACT WERE NOT, AVAILABLE TO THE DEFENSE IN THIS CASE. (MNT 28-29). DEFENSE COUNSEL CONFIRMED THAT THE DEFENDANT NEVER RECEIVED ANY RESULTS FROM ANY OF THE TESTS UNTIL LONG AFTER THE CONCLUSION OF THE TRIAL. (MNT 230; 234).

MARIJUANA HAS UNIQUE EFFECTS ON THE BODY AND MIND. SPECIFICALLY, IT CAUSES SHORT TERM MEMORY LOSS AND " DIVIDED ATTENTION " PROBLEMS IN USERS CREATING

SITUATIONS WHERE THE USER PERFORMS A TASK IN ONE HAND AND FORGETS WHAT THE OTHER HAND IS DOING. (MNT 81- 82 ; 160-161). Dr. DULANEY EXPLAINED, " ONE OF THE MOST COMMON THINGS I HAVE ACTUALLY SEEN IS THAT PEOPLE THAT ARE SMOKING MARIJUANA FOR ANY PERIOD OF TIME FUNCTIONALLY FORGET THAT THEY HAVE A LIGHTER IN THEIR HAND, THEN THEY WILL FLICK IT, AS THIS IS A NERVOUS HABIT, AND BURN THEMSELVES, IT'S CALLED BIC SYNDROM. "(1) (MNT 122).

MARIJUANA IS A HALLUCINOGEN, LEADING TO " DISTORTION OF THE PERSON'S PERCEPTION OF TIME AND SPACE. " IT CAUSES USERS TO EXPERIENCE, " TRANSIENT PSYCHOTIC EPISODES " (MNT 32; 159) AND FEELINGS OF PANIC, DISTRUST, SADNESS OR DEPRESSED MOOD. (MNT 31; 158 - 159).

WHEN COMBINED WITH ALCOHOL, ESPECIALLY AT BROWNELL'S BAC LEVEL OF 0.27, THE EFFECTS ARE MORE THAN ADDITIVE, THEY ARE EXPONENTIAL (MNT 124; 160 - 161). GBI TOXICOLOGIST CHILDERS STATED, IT " COULD REALLY CRANK UP THE PSYCHOLOGICAL DISTRESS THAT THE PERSON IS FEELING. " (MNT 161). IMPORTANTLY, A PERSON WITH A 0.27 BAC AND UNDER THE INFLUENCE OF MARIJUANA, " MIGHT MISTAKE FACTS THAT THEY 'RE PERCEIVING " (MNT 130).

ON THE NIGHT IN QUESTION, PETITIONER CALLED 911 REPORTING BROWNELL HAD, WHILE HIGHLY INTOXICATED AND BEHAVING STRANGELY, SHOT HERSELF. (T V 626). POLICE ARRIVED TO FIND BROWNELL CLUTCHING THE FIREARM IN HER LEFT HAND AND A CIGARETTE LIGHTER IN HER RIGHT HAND. (TV 616 - 621). UPON MOVING THE BODY, A PARTIALLY BURNED CIGARETTE FELL FROM BROWNELL'S LEFT LEG AREA. (T IX 1296). THE STATE'S EVIDENCE AT TRIAL CONSISTED LARGELY OF CIRCUMSTANTIAL FORENSIC EVIDENCE WITH THE EXCEPTION OF PETITIONER'S CUSTODIAL STATEMENTS TO POLICE AND BROWNELL'S DAUGHTER'S TESTIMONY. (2).

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(1) A significant point because Brownell was found by police still clutching a lighter in her right hand, see infra.

(2) The prosecution candidly conceded in closing argument, " this case is mostly a circumstantial case. " (T XVI 2219

PETITIONER'S STATEMENTS TO POLICE, ADMITTED AT TRIAL, TOLD THE FOLLOWING STORY OF THE NIGHT OF THE SHOOTING: PETITIONER LEFT WORK AT 5: 30 p.m. AND ARRIVED HOME WHERE BROWNELL AND HER TWO DAUGHTERS HAD BEEN MOST OF THE DAY. PETITIONER THEN LEFT THE HOUSE TO BUY HAMBURGER BUNS FOR DINNER AND UPON RETURNING HOME, "I GUESS IT WAS AROUND THE SECOND BEER BROWNELL STARTED ACTING WEIRD, THAT'S THE BEST WAY I CAN PUT IT." (T XVIII 2492- 93). BROWNELL REHASHED AN OLD ARGUMENT ABOUT PETITIONER'S INFIDELITY AND IMPLORED PETITIONER TO " DO SOMETHING SPECIAL " IN THEIR RELATIONSHIP. (T XVIII 2493).

BROWNELL THEN BEGAN TO TALK ABOUT HER MOTHER'S DEATH. BROWNELL STARTED CRYING AND THEN SHIFTED TO ACCUSING PETITIONER, " YOU DON'T EVEN KNOW WHERE MY MOM'S BURIED." (T XVIII 2494). BROWNELL PLEADED WITH PETITIONER, " TAKE ME THERE [TO HER MOTHER'S GRAVE], TAKE ME THERE IN THE MORNING. " PETITIONER AGREED AND BROWNELL AND PETITIONER " SHOOK ON IT " WITH PETITIONER REQUESTING " I JUST WANT YOU TO LEAVE THAT [THE TOPIC OF BROWNELL'S MOTHER'S DEATH] ALONE." (T XVIII 2494).

HOWEVER, " EVEN THOUGH PETITIONER AND BROWNELL HAD AGREED TO DROP THE ISSUE, SHE STILL KEPT GOING BACK TO ... YOU DON'T EVEN - YOU DON'T CARE ABOUT - YOU DON'T EVEN KNOW WHERE MY MOTHER IS BURIED." (T XVIII 2294). PETITIONER, BECOMING EXHAUSTED WITH BROWNELL'S ERRATIC BEHAVIOR, CALLED A FRIEND IN FRONT OF BROWNELL, TELLING THE FRIEND " MAN I MIGHT NEED TO COME TO YOUR HOUSE TONIGHT, I'LL CALL AND LET YOU KNOW," (T XVIII 2494). IN RESPONSE, BROWNELL GOT THE PISTOL OUT FROM UNDER A COUCH CUSHION, HOLDING IT TO HER LEFT TEMPLE, TELLING PETITIONER " IS THIS WHAT YOU REALLY WANNA DO, IS THIS WHAT YOU REALLY WANNA DO ? (T XVIII 2294).

PETITIONER STATED, " I DON'T KNOW IF SHE THOUGHT IT WASN'T ... LOADED OR WHAT ... I SEEN THE HAMMER COCKED BACK AND AT THIS TIME I STAND UP AND ... AS I GO TO REACH MY HAND OUT ... WHEN I LIKE REACHED TO GRAB IT, IT WENT OFF." (T XVIII 2494).

POLICE CHALLENGED PETITIONER'S VERSION OF EVENTS, CONTENDING THE TRAJECTORY OF

THE BULLET AND BLOOD SPATTER EVIDENCE SUGGESTED BROWNELL WAS NOT SITTING UP ON THE COUCH WHEN THE SHOT WAS DELIVERED. POLICE SHOWED PETITIONER A PHOTOGRAPH OF BROWNELL'S HEAD WITH A DOWEL ROD SHOVED THROUGH HER SKULL AND SUGGESTED THAT THE DOWEL ROD DEPICTED THE TRAJECTORY OF THE SHOT. (T XVIII 2547; *FOR PHOTOGRAPH OF INITIALLY PROPOSED TRAJECTORY, SEE* STATE'S Ex. P at T XVII 2344). POLICE LATER ADMITTED AT TRIAL THAT THIS WAS INCORRECT, AND THAT IN FACT THE TRAJECTORY SUGGESTED A PATH CONSISTENT WITH PETITIONER'S VERSION OF EVENTS (T XI 1501); (*FOR PHOTOGRAPH OF ACTUAL TRAJECTORY, SEE* STATE'S EXHIBIT 43 AT T XVII 2361)

ACCORDING TO WHAT PETITIONER HAD WITNESSED, BROWNELL HAD SHOT HERSELF WITH HER LEFT HAND EVEN THOUGH BROWNELL WAS RIGHT HANDED. PETITIONER TOLD POLICE " SHE NEVER HELD A GUN AND SHE'S RIGHT HANDED ... I DON'T KNOW IF IT WAS THE ALCOHOL, IT WAS A BIDI [CIGARETTE], IT WAS THE LIGHTER THAT CAUSED BROWNELL TO DO THIS]." (T XVIII 2511).(3) PETITIONER EXPLAINED, " SHE WAS JUST OFF HER ROCKER" (T XVIII 2510). " THIS IS NOT HER." (T XVIII 2519). " SHE'S NOT THAT TYPE OF PERSON. " (T XVIII 2524).

THE PROSECUTION'S SOLE FACT WITNESS WAS BROWNELL'S NINE YEAR OLD DAUGHTER, DESTINY BROWNELL. (T V 729). DESTINY RECOUNTED THAT PETITIONER HAD ALEAYS BEEN NICE TO BROWNELL AND HER DAUGHTERS AND RARELY ARGUED WITH HER MOTHER. (T VI 831).

ONE THE NIGHT OF THE SHOOTING DESTINY TESTIFIED THAT BROWNELL TOOK DESTINY AND LORI (BROWNELL'S YOUNGEST DAUGHTER) OUT INTO THE FRONT YARD AND " SEEMED KIND OF SAD." (T VI 837). THEY ALL LAID UNDER THE STARS IN THE DARK WHILE BROWNELL CRIED. (T VI 837 - 838). BROWNELL TOLD HER CHILDREN THAT " HER HEART HURT. " THIS CAUSED DESTINY AND LORI TO CRY ALSO. (T VI 839).

AFTER GOING BACK TO HER ROOM, DESTINY OVERHEARD MUFFLED ARGUING BETWEEN PETITIONER AND BROWNELL. DESTINY CLEARLY OVERHEARD BROWNELL REPEAT

(3) According to Destiny, her mother was ambidextrous. (T V 843)

PETITIONER "DIDN'T KNOW WHERE BROWNELL'S DEAD MOTHER WAS BURIED." (T VI 842) THEN, SHORTLY BEFORE THE SHOOTING, DESTINY HEARD BROWNELL STATE: "IF YOU PUT YOUR HANDS ON ME I"LL CALL THE COPS" (T V 731).

AFTER HEARING THE SHOT, DESTINY ENTERED THE LIVING ROOM. DURING HER INITIAL TESTIMONY, DESTINY COULD NOT REMEMBER WHETHER BROWNELL HAD BEEN HOLDING ANYTHING IN HER HANDS. (T V 732). DESTINY WAS THEN RECALLED, AND AGAIN COULD NOT RECALL (T VI 821) BUT LATER STATED "I DIDN'T SEE A GUN IN MY MOM'S HANDS. (T VI 822).

THE REMAINDER OF THE STATE'S CASE WAS CIRCUMSTANTIAL, PRESENTED THROUGH VARIOUS FORENSIC WITNESSES. A GUNSHOT RESIDUE EXPERT CONCLUDED THAT A GUNSHOT RESIDUE PARTICLE WAS FOUND ON PETITIONER'S SHIRT (A FACT FULLY CONSISTENT WITH PETITIONER'S VERSION OF STANDING DIRECTLY IN FRONT OF BROWNELL AND REACHING FOR THE GUN WHEN SHE SHOT HERSELF). (IX 1279). A BLOOD SPATTER EXPERT TESTIFIED THAT BROWNELL'S POSITION AT THE TIME OF THE SHOT INDICATED THAT BROWNELL'S POSITION AT THE TIME OF THE SHOT INDICATED THAT BROWNELL'S HEAD WAS IN CONTACT WITH THE COUCH SEAT CUSHION (CONTRADICTING PETITIONER'S STATEMENT) (T XIV 1790), BUT THIS EVIDENCE WAS REBUTTED BY THE DEFENSE'S BLOOD SPATTER EXPERT WHO TESTIFIED THAT BROWNELL'S HEAD WAS AS HIGH AS 11 INCHES OFF THE COUCH SEAT CUSHION AT THE TIME OF THE SHOT. (T XIV 1881). A GBI CRIME LAB TOXICOLOGIST CONFIRMED BROWNELL'S BLOOD ALCOHOL CONCENTRATION WAS EXTREMELY HIGH AT 0.27, AND THAT THIS WOULD HAVE LED BROWNELL TO EXPERIENCE EXAGGERATED EMOTIONS, STAGGERING GAIT, MENTAL CONFUSION, INCREASED IMPULSIVITY. (T IX 1241 - 43). THE DEFENSE'S PATHOLOGIST OPINED THAT BROWNELL'S ALCOHOL INTOXICATION WOULD IMPEDE "THE IMPULSES TO STOP HERSELF FROM PUTTING A GUN TO HER HEAD AND PULLING THE TRIGGER." (T XV 1973).

ALTHOUGH THE EVIDENCE WAS IN CONFLICT AS TO WHETHER BROWNELL WAS PREDOMINANTLY RIGHT HANDED OR AMBIDEXTROUS, BOTH THE STATE AND PETITIONER'S PATHOLOGISTS AGREED THAT IT IS "NOT UNUSUAL" FOR PERSONS TO SHOOT THEMSELVES

WITH THEIR NON-DOMINANT HAND. T XII 1534, 1583; T XV 1951).

LASTLY, THE STATE'S PATHOLOGIST, Dr. STEVEN DUNTON, CONCEDED THAT A HARD PRESS CONTACT WOUND TO THE TEMPLE IS THE MOST TYPICAL METHOD IN WHICH PERSONS SHOOT THEMSELVES AND THAT IT IS RARE TO SEE A HARD PRESS WOUND THAT IS NOT A SUICIDE. (T XII 1587). HOWEVER, DUNTON CONCLUDED THAT THE WEAPON'S ORIENTATION (AS EVIDENCED BY " MUZZLE STAMP " ON BROWNELL'S LEFT TEMPLE) SUGGESTED THE WEAPON WOULD HAVE TO HAVE BEEN GRIPPED BY BROWNELL IN AN AWKWARD MANNER. " I THINK IT IS VERY UNLIKELY FOR SOMEONE TO HAVE SHOT THEMSELVES HAVING TO POSITION THE WEAPON IN SUCH AN UNCOMFORTABLE AND AWKWARD MANNER WHEN THERE ARE SO MANY EASIER WAY'S TO DO IT. " (T XII 1533). " IT IS A VERY AWKWARD POSITIONING AND NOT ONE I WOULD EXPECT IN SOMEONE WHO HAD SHOT THEMSELVES HOLDING THE WEAPON IN THIS FASHION. " (T XXI 1537). SIMILAR CONCLUSIONS (THAT THE WEAPON ORIENTATION WAS AWKWARD BUT NOT IMPOSSIBLE) WERE OFFERED BY SEVERAL EXPERT WITNESSES, TESTIFYING FOR BOTH THE DEFENSE AND PROSECUTION. (T VII 1080-81) (T XIV 1918; 1920)

DEFENSE PATHOLOGIST, Dr. EMILY WARD, TESTIFIED THAT BROWNELL'S CLUTCHING OF THE GUN IN HER LEFT HAND AND THE LIGHTER IN HER RIGHT WAS CONSISTENT WITH THE MEDICAL CONDITION KNOWN AS " CADAVERIC SPASM " OR INSTANTANEOUS RIGOR - A CONDITION WHEREBY THE BODY'S HANDS TIGHTLY GRIP WHATEVER ITEMS THEY ARE HOLDING AT THE INSTANT OF DEATH. (T XV 1945; 1947) Dr. DUNTON, THE STATE'S PATHOLOGIST, WAS SKEPTICAL ABOUT CADAVERIC SPASM, BUT ACKNOWLEDGED THAT LEARNED TREATISES BELIEVED IN THE CONDITION AND THAT, IF IT EXISTS, IT USUALLY OCCURS IN DEATHS PRECEDED BY GREAT PSYCHOLOGICAL EXCITEMENT OR TENSION. (T XII 1663).

ARGUMENT AND CITATION OF AUTHORITY

ONE OF THE MOST CHERISHED PRINCIPLES OF OUR CRIMINAL JUSTICE SYSTEM IS THAT " THE STATE'S INTEREST ... IN A CRIMINAL PROSECUTION IS NOT THAT IT SHALL WIN A CASE,

BUT THAT JUSTICE SHALL BE DONE." BERGER V UNITED STATES, 295 U.S. 78, 88 (1935). CONSISTENT WITH THE STATE'S SPECIAL ROLE ... IN THE SEARCH FOR TRUTH IN CRIMINAL TRIALS," STRICKLER V GREENE, 527 U.S.263, 281 (1999), "IT IS AS MUCH AS THE STATES'S DUTY TO REFRAIN FROM IMPROPER METHODS CALCULATED TO PRODUCE A WRONGFUL CONVICTION AS IT IS TO USE EVERY LEGITIMATE MEANS TO BRING ABOUT A JUST ONE." BERGER, 295 U.S. AT 88. THE RULE OF BRADY V MARYLAND, 373 U.S. 83 (1963) AND ITS PROGENY ARE BASED ON THIS OVER REACHING PRINCIPLE.

THE PRINCIPLES OF BRADY ARE WELL SETTLED. THE FIFTH AND FOURTEENTH AMENDMENTS BAR PROSECUTORS FROM SUPPRESSING FAVORABLE EVIDENCE "MATERIAL EITHER TO GUILT OR TO PUNISHMENT, IRRESPECTIVE OF THE GOOD FAITH OR BAD FAITH OF THE PROSECUTION." Id. AT 87. TO ESTABLISH A BRADY VIOLATION THAT UNDERMINES A CONVICTION, A CONVICTED DEFENDANT MUST MAKE EACH OF FOUR SHOWINGS: "(1) THE STATE POSSESSED EVIDENCE FAVORABLE TO THE DEFENDANT; (2) THE DEFENDANT DID NOT POSSESS THE FAVORABLE EVIDENCE AND COULD NOT OBTAIN IT HIMSELF WITH ANY REASONABLE DILIGENCE; (3) THE STATE SUPPRESSED THE FAVORABLE EVIDENCE; AND (4) HAD THE EVIDENCE BEEN DISCLOSED TO THE DEFENSE, A REASONABLE PROBABILITY EXISTS THAT THE OUTCOME OF THE TRIAL WOULD HAVE BEEN DIFFERENT." SCHOFIELD V PALMER, 279 GA 848, 852 (2005).

HERE, ALL FOUR REQUIREMENTS HAVE BEEN SATISIFED. UNKNOWN TO THE DEFENSE, THE STATE POSSESSED TWO TOXICOLOGY TEST RESULTS THAT LOCATED AND QUANTIFIED MARIJUANA METABOLITES IN BROWNELL'S BLOOD - A FACT SUPPORTING THE CONCLUSION THAT BROWNELL WAS UNDER THE INFLUENCE OF MARIJUANA AT THE TIME OF THE SHOOTING. BROWNELL'S MARIJUANA INTOXICATION IS HIGHLY FAVORABLE TO PETITIONER BECAUSE IT EXPONENTIALLY BOLSTERS PETITIONER'S CENTRAL DEFENSE (*THAT BROWNELL'S INTOXICATION WAS THE IMPETUS FOR BROWNELL SHOOTING HERSELF*) AND SIGNIFICANTLY UNDERMINES KEY ELEMENTS OF THE STATE'S PROSECUTION (*BROWNELL'S HEARSAY STATEMENT, THE LIGHTER, THE PARTIALLY BURNED CIGARETTE, THE AWKWARD GUN POSITIONING AND SHOT TRAJECTORY*). UNDER A FAITHFUL APPLICATION OF THE ABOVE

PRINCIPLES, THIS IS NOT A CLOSE CASE. IF THE FAVORABLE MATERIAL HAD BEEN DISCLOSED BEFORE TRIAL RATHER THAN WITHHELD, THERE IS A REASONABLE PROBABILITY THAT THE OUTCOME OF PETITIONER'S TRIAL WOULD HAVE BEEN DIFFERENT. THIS COURT SHOULD GRANT PETITIONER A NEW TRIAL TO REMEDY THE FUNDAMENTAL MISCARRIAGE OF JUSTICE PETITIONER HAS SUFFERED THROUGH NO FAULT OF HIS ON.

(1) THE SUPPRESSED TOXICOLOGY TESTS ARE FAVORABLE TO PETITIONER BECAUSE THEY SUPPORT THE CONCLUSION THAT BROWNELL WAS SUFFERING FROM MARIJUANA INTOXICATION - A FACT THAT IS BOTH EXCULPATORY AND IMPEACHING.

UNDER THIS FIRST PRONG OF BRADY, " THE EVIDENCE AT ISSUE MUST BE FAVORABLE TO THE ACCUSED, EITHER BECAUSE IT IS EXCULPATORY, OR BECAUSE IT IS IMPEACHING. " STRICKLER V GREENE, 527 U.S. 263' 281 - 82 (1999). BECAUSE BOTH THE IA TEST AND THE GC / MS TEST LOCATED AND QUANTIFIED THE MARIJUANA METABOLITE IN BROWNELL'S BLOOD, A JURY COULD REASONABLY CONCLUDE THAT BROWNELL WAS UNDER THE INFLUENCE OF MARIJUANA AT THE TIME OF THE SHOOTING. BROWNELL'S MARIJUANA INTOXICATION WOULD BE FAVORABLE TO PETITIONER BECAUSE IT EXPONENTIALLY BOLSTERS THE CONCLUSION THAT BROWNELL SHOT HERSELF WHILE UNDERMINING THE CONCLUSION THAT PETITIONER SHOT BROWNELL.

THE PROPER VIEW OF THE SUPPRESSED TESTS IS THAT EITHER TEST COULD REASONABLY SUPPORT THE CONCLUSION BY THE JURY THAT BROWNELL WAS IMPAIRED BY MARIJUANA AT THE TIME OF THE SHOOTING. HERE, THE JURY COULD REASONABLY DRAW THE CONCLUSION THAT BROWNELL WAS INTOXICATED BY MARIJUANA AT THE TIME OF THE SHOOTING BECAUSE TOXICOLOGIST Dr. DULANEY CONCLUDED: (1) BOTH THE 1A TEST AND THE GC / MS TEST SUPPORT THE CONCLUSION THAT BROWNELL WAS UNDER THE INFLUENCE OF MARIJUANA METABOLITE BETWEEN COLLECTION AND TESTING, THE AMOUNT OF THE MARIJUANA METABOLITE IN THE BLOOD WAS SIGNIFICANTLY HIGHER UPON COLLECTION OF

THE SAMPLE.

FURTHER, THE GBI TOXICOLOGIST; (1) CONCEDED THAT THE GBI MAY WELL HAVE REPORTED THE TESTS AS A "POSITIVE" HAD THE SAMPLE BEEN TESTED CLOSER IN TIME TO COLLECTION; (2) ADMITTED THAT BOTH THE IA TEST AND THE GC/MS TEST LOCATED AND QUANTIFIED THE MARIJUANA METABOLITE IN BROWNELL'S BLOOD; (3) TESTIFIED THAT THE IA TEST RESULT WAS OVER THE GBI CUTOFF AND IS A RELIABLE TEST; AND (4) DID NOT RULE OUT THAT BROWNELL WAS SUFFERING FROM MARIJUANA INTOXICATION, INSTEAD MERELY CONCLUDING THE MARIJUANA INTOXICATION COULD NOT BE CONFIRMED.

HERE, THE TRIAL COURT IMPROPERLY FOCUSED ON THE FACT THAT GBI CONSIDERED THE IA TEST A SCREENING TEST, FAILED TO TAKE INTO ACCOUNT THE FACT THAT BOTH THE IA TEST AND THE GC/MS TEST LOCATED AND QUANTIFIED THE MARIJUANA METABOLITE, AND IGNORED THE LIKELY DISSIPATION OF THE SAMPLE. THE CASE IN In re BROWN, 952 P2D 715 (CAL 198), IS INSTRUCTIVE BECAUSE THERE THE CALIFORNIA SUPREME COURT DEALT WITH A BRADY CLAIM FOR AN UNDISCLOSED SCREENING IA TEST (AND NEGATIVE CONFIRMATORY GC/MS TEST). THE COURT FOUND THE IA TEST RESULT EXCULPATORY EVEN THOUGH "THE CRIME LAB UTILIZED THE IA TEST AS A SCREENING MECHANISM" AND THE "CONFIRMATORY" GC/MS TEST HAD NOT FOUND THE DRUG. In re BROWN, 952 P2D AT 722. THE COURT NOTED, "NOTHING IN THE RECORD ESTABLISHES THE IA TEST IS INHERENTLY UNRELIABLE." In re BROWN, 952 P2D AT 722. "THE DIFFERING RESULTS CAN BE RECONCILED ON SEVERAL BASES THAT DO NOT EXCLUDE THE POSSIBILITY EACH TEST WAS ACCURATE." *ID AT 723.* "GRANTED, THE PROSECUTION COULD, AND UNDOUBTEDLY WOULD, HAVE PRESENTED REBUTTAL EVIDENCE, INCLUDING THE FACT THE IA TEST WAS USED BY THE CRIME LAB AS A SCREENING MECHANISM THAT REQUIRED CONFIRMATION OF ANY POSITIVE RESULTS. BUT BY DEFINITION REBUTTAL EVIDENCE COUNTERS - IT DOES NOT PRECLUDE THE DEFENSE CASE - IN - CHIEF." *ID AT 725.* "WHEN THE VERDICT DEPENDS UPON THE RESOLUTION OF CONFLICTING EVIDENCE, THAT TASK IS NOT FOR A REVIEWING COURT." *ID AT 726*

SIMILARLY, HERE, REGARDLESS OF WHETHER THE IA TEST WAS CLASSIFIED BY GBI AS A SCREENING TEST, NO CLAIM WAS MADE THAT THE IA TEST WAS UNRELIABLE. FURTHER, EVEN THE GBI TOXICOLOGISTS CONCEDED THAT BOTH THE IA AND THE GC/MS TESTS

LOCATED AND QUANTIFIED THE MARIJUANA METABOLITE. AND, AS WAS TRUE IN In re BROWN, THE MERE FACT THE GC / MS GOT A RESULT BELOW THEIR CUTOFF IS IRRELEVANT FOR PURPOSES OF A BRADY CLAIM, ESPECIALLY WHERE THE TIME LAG BETWEEN COLLECTION AND TESTING LIKELY ACCOUNTED FOR THE DISSIPATION OF THE MARIJUANA METABOLITE IN THE SAMPLE.

WHILE, " THE STATE MAY ADVANCE VARIOUS VARIOUS REASONS WHY THE JURY MIGHT HAVE DISCOUNTED THE UNDISCLOSED BRADY EVIDENCE ... THAT MERELY LEAVES US TO SPECULATE ABOUT WHICH OF THE TWO SIDES THE JURY WOULD HAVE BELIEVED. " SMITH V CAIN, 132 S CT 627, 630 (2012) (EMPHASIS IN ORIGINAL). THEREFORE, BROWNELL'S MARIJUANA INTOXICATION IS A REASONABLE CONCLUSION FOR THE JURY TO MAKE BASED ON THE SUPPRESSED TOXICOLOGY REPORTS.

1.1 BROWNELL'S MARIJUANA INTOXICATION AT THE TIME OF THE OF THE SHOOTING IS EXCULPATORY BECAUSE IT EXPONENTIALLY BOLSTERS PETITIONER'S DEFENSE THAT BROWNELL SHOT HERSELF DUE TO EXAGGERATED EMOTIONS, IMPULSIVENESS, AND SEVERE INTOXICATION.

BROWNELL'S MARIJUANA INTOXICATION IS EXCULPATORY TO PETITIONER BECAUSE IT EXPONENTIALLY (NOT MERELY ADDITIVELY). ADVANCES PETITIONERS PRIMARY ARGUMENTS: (1) THAT BROWNELL'S INTOXICATION CAUSED HER TO EXPERIENCE EXAGGERATED EMOTIONS AND BEHAVE IMPULSIVELY; (2) THAT BROWNELL WAS EXPERIENCING DEPRESSION; AND (3) THAT BROWNELL'S BODY EXHIBITED THE MEDICAL CONDITION CADAVERIC SPASM AT THE TIME OF DEATH.

BROWNELL'S MARIJUANA INTOXICATION IS EXCULPATORY TO PETITIONER BECAUSE, WHEN COMBINED WITH BROWNELL'S 0.27 BAC, IT WOULD HAVE EXPONENTIALLY MAGNIFIED BROWNELL'S EXAGGERATED EMOTIONAL STATE, PSYCHOLOGICAL DISTRESS, AND IMPULSIVITY. THE JURY WAS TOLD THAT BROWNELL'S 0.27 BAC COULD CAUSE BOTH

EXAGGERATED EMOTIONS AND IMPULSIVENESS - AND THE DEFENSE PATHOLOGIST CONCLUDED THIS LED TO BROWNELL TAKING HER OWN LIFE. HOWEVER, THE JURY WAS NOT TOLD THAT MARIJUANA ALSO CAUSES THESE SAME EMOTIONS IN USERS AND IN FACT WOULD HAVE EXPONENTIALLY ADDED TO THESE PSYCHOLOGICAL EFFECTS. THEREFORE, BROWNELL'S MARIJUANA INTOXICATION WOULD HAVE EXPONENTIALLY BOLSTERED PETOTIONER'S PRIMARY CONTENTION THAT BROWNELL SHOT HERSELF DUE TO EXAGGERATED EMOTIONS AND INTOXICATION.

FURTHER, BROWNELL'S MARIJUANA INTOXICATION WOULD HAVE OFFERED A SCIENTIFIC EXPLANATION TO SUPPORT PETITIONER'S CLAIM OF BROWNELL'S DEPRESSED MOOD. HAD THE SUPPRESSED MARIJUANA TESTS BEEN DISCLOSED, THE JURY WOULD HAVE LEARNED THAT MARIJUANA, UNLIKE ALCOHOL, CAUSES TRANSIENT PSYCHOTIC EPISODES, FEELINGS OF DISTRUST, SADNESS, AND DEPRESSION. THUS, MARIJUANA IS QUALITATIVELY DIFFERENT FROM ALCOHOL IN THAT IT ACTUALLY CAN BE THE GENESIS OF SADNESS, DEPRESSION, AND TRANSIENT PSYCHOSIS. ALL ELSE REMAINING CONSTANT, MARIJUANA INTOXICATION SUPPORTS THE CONCLUSION THAT BROWNELL SHOT HERSELF.

LASTLY, BROWNELL'S MARIJUANA INTOXICATION WOULD FURTHER SUPPORT Dr. WARD'S CONCLUSION OF CADAVERIC SPASM. Dr. WARD TESTIFIED BROWNELL'S GRIPPING OF THE FIREARM IN HER LEFT HAND AND LIGHTER IN HER RIGHT HAND INDICATED THE MEDICAL CONDITION CALLED CADAVERIC SPASM. IMPORTANTLY, THIS LED WARD TO CONCLUDE THAT BROWNELL'S DEATH WAS SELF INFLICTED. THE PROSECUTION'S PATHOLOGIST COUNTERED THAT CADAVERIC SPASM USUALLY OCCURS ONLY IN DEATHS PRECEDED BY "GREAT EXCITEMENT OR TENSION." THE JURY LEARNED THAT BROWNELL'S 0.27 BAC WOULD LIKELY CAUSE EXAGGERATED EMOTIONS, BUT HAD THE MARIJUANA TESTS BEEN DISCLOSED THEY WOULD HAVE LEARNED THAT THOSE EXAGGERATED EMOTIONS WOULD HAVE BEEN EXPONENTIALLY MAGNIFIED WHEN COMBINED WITH MARIJUANA. AND, THE JURY WOULD HAVE LEARNED MARIJUANA'S HALLUCINOGENIC EFFECTS CAUSES PSYCHOTIC EPISODES AND PANIC, ALL MAKING THE "GREAT EXCITEMENT OR TENSION" PREREQUISITE OF THE STATE'S FORENSIC PATHOLOGIST MORE LIKELY TO HAVE BEEN PRESENT.

THIS COURT HAS PREVIOUSLY HELD THAT WHERE "PROPER EVIDENCE OF A CAUSAL

CONNECTION BETWEEN THE PRESENCE OF DRUGS IN THE VICTIM'S BODY AND THE THE VICTIM'S POTENTIAL BEHAVIOR " IS MADE, THE EVIDENCE IS RELEVANT AND SHOULD BE ADMITTED. McWILLIAMS V STATE, 280 GA 724, 726 - 27 (2006) (PROPERLY OFFERED TO SHOW ELEMENT OF PROVOCATION FOR VOLUNTARY MANSLAUGHTER); SEE ALSO BELL V STATE, 280 GA 562, 567 - 68 (J. HINES, CONCURRING) (EVIDENCE SHOULD BE ADMITTED WHERE THERE IS A POSSIBLE LINK BETWEEN THE VICTIM'S DRUG USE AND HIS BEHAVIOR AT THE TIME OF THE SHOOTING, THEREBY RENDERING THE EVIDENCE OF COCAINE METABOLITES IN THE VICTIM'S BLOOD RELEVANT. "). SUCH A CONNECTION IS EASILY ESTABLISHED IN THIS CASE.

THE SOLE ISSUE FOR THE JURY IN THIS CASE WAS WHETHER BROWNELL WAS SHOT BY PETITIONER OR HERSELF. THUS, THE INSTANT CASE IS ANALOGOUS TO A VEHICULAR HOMICIDE CASE IN THAT THE QUESTION IS LIKEWISE WHICH OF THE TWO PARTIES INVOLVED IS AT FAULT. IN CROWE V STATE, 277 GA 513 (2004), THE COURT REVERSED A DEFENDANT'S CONVICTION FOR MISDEMEANOR VEHICULAR HOMICIDE BECAUSE THE TRIAL COURT HAD PRECLUDED THE DEFENDANT FROM INTRODUCING THE TOXICOLOGY RESULTS OF THE VICTIM DRIVER, " WHETHER OR NOT THE VICTIM DRIVER WAS IMPAIRED, AND WHETHER OR NOT HER IMPAIRMENT CONTRIBUTED TO THE ACCIDENT, WAS FOR THE JURY TO DETERMINE, THE URINALYSIS EVIDENCE INDISPUTABLY GOES TO THE QUESTION OF WHETHER THE VICTIM DRIVER WAS IMPAIRED AND WHETHER THAT IMPAIRMENT CONTRIBUTED TO THE ACCIDENT." ID AT 514.

SIMILARLY, IN HARRIDGE V STATE, 243 GA APP 658 (2000), THE COURT OF APPEALS REVERSED A CONVICTION FOR SECOND DEGREE VEHICULAR HOMICIDE AND FAILURE TO MAINTAIN LANE DUE TO A BRADY VIOLATION. THERE, THE STATE SUPPRESSED TOXICOLOGY TESTS INDICATING THE PRESENCE OF MARIJUANA AND COCAINE IN THE DRIVER'S BLOOD. IN THAT CASE, THE STATE ARGUED THE VICTIM DRIVER'S POSSIBLE IMPAIRMENT WAS NOT FAVORABLE TO THE DEFENSE BECAUSE THE EVIDENCE AT TRIAL ESTABLISHED THE COLLISION WAS CAUSED ONLY BY HARRIDGE'S CROSSING THE ROAD'S CENTERLINE. WHILE THERE IS EVIDENCE TO SUPPORT SUCH A CONCLUSION, THAT IS A MATTER FOR THE JURY TO DECIDE AFTER HEARING ALL THE MATERIAL EVIDENCE, INCLUDING THE CONDUCT AND

CONDITION OF THE VICTIM DRIVER AT THE TIME OF THE ACCIDENT. IN A VEHICULAR HOMICIDE CASE, THE CONDUCT OF THE DECEDENT, WHETHER NEGLIGENT OR NOT, IS MATERIAL TO THE EXTENT THAT IT BEARS UPON THE QUESTION OF WHETHER UNDER ALL THE CIRCUMSTANCES OF THE CASE THE DEFENDANT WAS NEGLIGENT, OR, IF NEGLIGENT, WHETHER THE DECEDENT'S NEGLIGENCE WAS THE SOLE PROXIMATE CAUSE OF THE INJURY, OR WHETHER THE INJURY OR DEATH RESULTED FROM AN UNAVOIDABLE ACCIDENT. THE LEVEL OF COCAINE AND MARIJUANA IN THE VICTIM DRIVER'S BODY IS A CIRCUMSTANCE ON WHICH HARRIDGE COULD HAVE RELIED TO SUPPORT HIS DEFENSE THAT HE DID NOT CAUSE THE ACCIDENT. THE JURY MAY OR MAY NOT HAVE BEEN PERSUADED BY SUCH A DEFENSE. BUT THE JURY, NOT THE STATE, IS ENTITLED TO MAKE THAT DECISION BASED ON ALL THE EVIDENCE. HARRIDGE, 243 GA APP AT 661. SIMILARLY, BROWNELL'S MARIJUANA INTOXICATION WAS RELEVANT, ADMISSIBLE, AND CLEARLY FAVORABLE TO PETITIONER. THE JURY HAD THE RIGHT TO HEAR ABOUT IT IN MAKING THEIR DETERMINATION.

1.2 BROWNELL'S MARIJUANA INTOXICATION IS EXCULPATORY BECAUSE IT CASTS DOUBT ON THE CENTRAL FACETS OF THE STATE'S CASE.

BROWNELL'S MARIJUANA INTOXICATION SIGNIFICANTLY UNDERCUTS AND IMPEACHES THE CORNERSTONES OF THE STATE'S CASE, BECAUSE: (1) IT IMPEACHES BROWNELL'S STATEMENT "IF YOU PUT YOUR HANDS ON ME I"LL CALL THE COPS;" AND (2) IT EXPLAINES THE LIGHTER IN BROWNELL'S RIGHT HAND, THE PARTIALLY BURNED CIGARETTE LOCATED UNDER BROWNELL'S LEFT LEG, AND BROWNELL'S AWKWARD GRIP ON THE GUN AND SHOT TRAJECTORY.

1.2.1 MARIJUANA INTOXICATION IMPEACHES BROWNELL'S STATEMENT "IF YOU PUT YOUR HANDS ON ME I'LL CALL THE COPS."

BROWNELL'S STATEMENT, "IF YOU PUT YOUR HANDS ON ME I'LL CALL THE COPS" WAS ARGUABLY THE LYNCHPIN OF THE PROSECUTION'S CASE. THE PROSECUTION REPEATED THIS

REFRAIN AS THE OPENING LINE OF BOTH THEIR OPENING STATEMENT AND THEIR CLOSING ARGUMENT, ARGUING " MAYBE HE LOOKED LIKE HE WAS GOING TO LAY HIS HAND ON HER AND HE HAD LAID HIS HANDS ON HER SOMETIME IN THE PAST." THIS STATEMENT OF BROWNELL WAS ADMITTED AT TRIAL OVER OBJECTION, UNDER THE RES GESTAE EXCEPTION. GEORGIA LAW AFFORDS THE RIGHT TO IMPEACH A NON - TESTIFYING HERESAY DECLARANT. SEE BRANTLEY V STATE, 177 GA APP 13, 16 (1985) (" WE HOLD THAT A PARTY MUST BE PROVIDED WITH THE OPPORTUNITY TO IMPEACH THE CREDIBILITY OF A HERESAY DECLARANT. ").

THUS, PETITIONER HAD THE RIGHT TO IMPEACH BROWNELL'S ABILITY TO PERCEIVE THE FACTS ASSERTED IN THE STATEMENT. SEE WHITUS V STATE, 222 GA APP 103, 110 (1966) ("THE STATE OF MIND OF THE WITNESS AT THE TIME OF THE OCCURRENCE TESTIFIED ABOUT WOULD GO TO HIS CREDIT, WHICH IS ALWAYS A QUESTION FOR THE JURY."), REVERSED ON OTHER GROUNDS BY WHITUS V GEORGIA, 385 U.S. 545 (1967) SEE ALSO GREENE V WAINWRIGHT, 634 F2D 272, 276 (1981). FURTHER, IMPEACHMENT OF A VICTIM DECLARANT THROUGH TOXICOLOGY RESULTS, BECAUSE OF THE POSSIBLE EFFECT ON THE ABILITY TO PROPERLY PERCEIVE EVENTS, HAS BEEN RECOGNIZED AS PROPER IN THE BRADY CONTEXT. SEE CHEUNG V MADDOCK, 32 F SUPP 2D 1150, 1158 (N.D. CAL. 1998) (HOLDING SUPPRESSED EVIDENCE OF A SHOOTING VICTIM'S BLOOD ALCOHOL LEVEL WAS BOTH MATERAL AND FAVORABLE TO THE DEFENSE, REQUIRING A NEW TRIAL BECAUSE THIS "SCIENTIFIC MEDICAL EVIDENCE ... WOULD HAVE CAST DOUBT ON THE VICTIM'S ABILITY TO IDENTIFY PETITIONER.").

HAD THE STATE DISCLOSED THE MARIJUANA TOXICOLOGY REPORTS, THE JURY WOULD HAVE LEARNED THAT A PERSON WITH BROWNELL'S COMBINED ALCOHOL AND MARIJUANA INTOXICATION HAS A SIGNIFICANTLY IMPAIRED ABILITY TO PROPERLY PERCEIVE AND RELATE EVENTS. FURTHER, THE JURY WOULD HAVE BEEN TOLD THAT, BECAUSE MARIJUANA IS A HALLUCINOGEN, A PERSON SUFFERING FROM MARIJUANA INTOXICATION MAY PERCEIVE SITUATIONS OR SEE THINGS THAT ARE NOT REAL. THUS, THE DECEDENT'S STATEMENT ARGUABLY THE LYNCHPIN OF THE STATE'S CASE WOULD HAVE CALLED INTO SERIOUS DOUBT THE FACTS ASSERTED IN THE STATEMENT THAT (PETITIONER WAS ASSAULTING OR

ATTACKING, OR WAS ABOUT TO ASSAULT OR ATTACK BROWNELL) (4)

1.2.2 MARIJUANA INTOXICATION EXPLAINS THE LIGHTER FOUND IN BROWNELL'S RIGHT HAND, THE AWKWARD WEAPON ORIENTATION AND SHOT TRAJECTORY, AND THE PARTIALLY BURNED CIGARETTE UNDER BROWNELL'S LEFT LEG.

THE STATE THEORIZED THAT THE LIGHTER IN BROWNELL'S RIGHT HAND AND PARTIALLY BURNED CIGARETTE UNDER HER LEFT LEG SUGGESTED THAT BROWNELL HAD NOT COMMITTED SUICIDE, BUT HAD INSTEAD " JUST LIT A CIGARETTE " WHEN PETITIONER ATTACKED AND SHOT HER. HOWEVER, THIS STRONG PHYSICAL EVIDENCE FOR THE PROSECUTION WOULD HAVE BEEN SEVERELY AND SERIOUSLY UNDERCUT BY EVIDENCE OF BROWNELL'S MARIJUANA INTOXICATION BECAUSE MARIJUANA INTOXICATION CAUSES SHORT TERM MEMORY LOSS AND " DIVIDED ATTENTION " PROBLEMS. THESE CAUSE " A PERSON TO FORGET TASKS THEY'RE DOING WITH THEIR RIGHT HANT WHILE THEY ARE DOING ONE WITH THEIR LEFT. " SEE CROWE V STATE, 277 GA AT 514 (" MARIJUANA CAN AFFECT A PERSON'S ABILITY TO PERFORME MULTI - TASKING OPERATIONS ... BECAUSE IT CAN CAUSE A PERSON TO FOCUS EXCLUSIVELY ON ONE TASK AT THE EXPENSE OF ANY OTHERS. ").

Dr. MARYLAND DULANEY EXPLAINED DIVIDED ATTENTION PROBLEMS IN MARIJUANA USERS BY THE UNIQUE PHENOMENA IN WHICH A USER FORGETS ABOUT THE PRESENCE OF A LIGHTER IN HIS OR HER HAND AND UNCONSCIOUSLY FLICKS THE LIGHTER, BURNING THE USER - KNOWN AS BIC SYNDROME.

ARMED WITH THIS INFORMATION, THE JURY WOULD BE MUCH MORE LIKELY TO CONCLUDE

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(4) This is particularly compelling because the state presented no other evidence of Petitioner having physiclly assaulted Brownell (e.g., no prior difficulties, no physical evidence on Brownell's body)

(5) Petitioner is curious as to why no one mentioned any burn marks on Brownell if she had just lit a cigarette as the state claimed. The state nor defense counsel never raised this fact.).

THAT BROWNELL'S HOLDING THE LIGHTER AND DROPPING THE CIGARETTE IS SIMPLY DUE

TO HER MARIJUANA INTOXICATION AND NOT TO BEING ATTACKED AND SHOT AFTER LIGHTING A CIGARETTE. OBVIOUSLY, EXPERT TESTIMONY REGARDING BIC SYNDROME AND DIVIDED ATTENTION PROBLEMS IN MARIJUANA USERS WOULD HAVE FAVORED PETITIONER AS TO THESE TWO IMPORTANT PARTS OF THE STATE'S CASE.

HAD THE SUPPRESSED TOXICOLOGY TESTS BEEN AVAILABLE TO PETITIONER, THE JURY WOULD HAVE LEARNED THAT MARIJUANA IMPAIRS MOTOR SKILLS COORDINATION, BODY SWAY, POSTURAL BALANCE, AND HAND STEADINESS. ADDING THAT NEW INFORMATION TO THE 0.27 BAC AND THE EXPONENTIAL EFFECTS OF THE TWO COMBINED SUBSTANCES. THE STATE'S AWKWARD WEAPON POSITIONING AND BODY POSITIONING ARGUMENTS ARE SERIOUSLY DAMAGED.

THE JURY NEVER LEARNED THAT BROWNELL'S MARIJUANA INTOXICATION, WHEN COMBINED WITH HER HIGHLY ELEVATED BAC, WOULD HAVE EXPONENTIALLY AFFECTED BROWNELL'S IMPAIRMENT LIKEWISE BOLSTERING PETITIONER'S ARGUMENTS EXPONENTIALLY. BROWNELL'S UNDISCLOSED TOXICOLOGY TESTS, AND THE CONCLUSION THAT SHE WAS IMPAIRED BY MARIJUANA AT THE TIME OF THE SHOOTING, WERE RELEVANT AND ADMISSIBLE TO THE CENTRAL FACTS IN DISPUTE AT THE TRIAL. AND, BROWNELL'S MARIJUANA INTOXICATION, WHILE BOLSTERING PETITIONERS VERSION OF EVENTS, WOULD HAVE SIMULTANEOUSLY AND SIGNIFICANTLY IMPEACHED AND UNDERCUT THE CORNERSTONES OF THE STATE'S CASE. THEREFORE, THE SUPPRESSED TOXICOLOGY REPORTS ARE HIGHLY FAVORABLE TO PETITIONER.

(2) PETITIONER DID NOT POSSESS EITHER TOXICOLOGY TEST NOR COULD HE OBTAIN THEM HIMSELF.

IT IS UNCONTROVERTED THAT PETITIONER DID NOT POSSESS THE RESULTS OF EITHER TOXICOLOGY TEST (THE IMMUNOASSAY TEST OR THE GC/MS TEST). PROSECUTOR KELLY ROBERTSON TESTIFIED, "I NEVER PROVIDED IT" EXCEPT PERHAPS "AT SOME POINT AFTER THE TRIAL OF THE CASE." FURTHER, THE GBI TOXICOLOGIST STATED THAT TOXICOLOGY TEST RESULTS WOULD NOT BE, AND IN FACT WERE NOT, AVAILABLE TO THE DEFENSE IN

THIS CASE. DEFENSE COUNSEL CONFIRMED THAT THE PETITIONER NEVER RECEIVED ANY RESULTS FROM ANY OF THE TESTS UNTIL LONG AFTER THE CONCLUSION OF THE TRIAL. SEE HARRIDGE, 243 GA APP AT 661 (" GBI FORENSIC TOXICOLOGIST TESTIFIED WITHOUT CONTRADICTION AT THE MOTION FOR NEW TRIAL HEARING THAT THE PRELIMINARY RESULTS WOULD NOT HAVE BEEN AVAILABLE TO THE DEFENSE ... ONLY TO THE OFFICER WHO SUBMITTED THE EVIDENCE AND TO THE PROSECUTOR IN THE CASE, ").

(3) THE PROSECUTION SUPPRESSED THE FAVORABLE EVIDENCE.

THIS TEST IS MET WHENEVER THE FAVORABLE EVIDENCE IS NOT DISCLOSED TO THE DEFENSE. TN OTHER WORDS, " THAT EVIDENCE MUST HAVE BEEN SUPPRESSED BY THE STATE, EITHER WILLFULLY OR INADVERTENTLY. STRICKLER V GREENE, 527 U.S. 263, 281-82 (1999). THERE IS NO REQUIREMENT THAT THE EVIDENCE IN QUESTION BE PURPOSELY SUPPRESSED BY THE PROSECUTION. BRADY CLAIMS ARE " IRRESPECTIVE OF THE GOOD FAITH OR BAD FAITH OF THE PROSECUTION." BRADY V MARYLAND, 373 U.S. 83, 87 (1963). IT IS ENOUGH IF THE EVIDENCE IS IN THE POSSESSION OF THE PROSECUTION TEAM AND IS NOT DISCLOSED.

AS AN INITIAL MATTER HERE, THE GBI CRIME LAB WAS AWARE OF BOTH TOXICOLOGY TESTS. REGARDLESS OF WHAT WAS ACTUALLY KNOWN BY THE PROSECUTION, HERE THE GBI CRIME LAB IS PART OF THE " PROSECUTION TEAM " DUE TO THEIR CLOSE INVOLVEMENT IN THE PROSECUTION OF THE CASE. " FOR THE PURPOSES OF BRADY. WE DECIDE WHETHER SOMEONE IS PART OF THE PROSECUTION TEAM ON A CASE BY CASE BASIS BY REVIEWING THE INTERACTION, COOPERATION AND DEPENDENCE OF THE AGENTS WORKING ON THE CASE." HEAD V STRIPLING, 277 GA 403 (2003). HERE, THE GBI CRIME LAB WAS DECIDEDLY PART OF THE PROSECUTION TEAM BECAUSE, AS IN HARRIDGE, " THE GBI LABORATORY WAS FULLY INVOLVED IN THE INVESTIGATION OF THIS CASE IN THAT IT WAS RESPONSIBLE FOR TESTING ... THE VICTIM'S BLOOD AND URIN. " HARRIDGE, 243 GA APP AT 661. FURTHER, THE GBI TESTED PETITIONER'S AND BROWNELL'S GUNSHOT RESIDUE KITS, RAN DNA TESTS ON PETITIONER'S SHORTS, AND CONDUCTED BALLISTICS TESTS ON THE GUN. THUS, FOR

PURPOSES OF BRADY, " THE GBI LABORATORY WAS PART OF THE PROSECUTION TEAM ... AND THEREFORE, THE STATE HAD POSSESSION OF THE TEST RESULTS SHOWING DRUGS IN THE VICTIM'S BLOOD. " HARRIDGE, 243 GA APP AT 661.

FURTHER, WHILE IT IS UNNECESSARY TO SHOW DIRECT KNOWLEDGE BY THE INDIVDUAL PROSECUTOR HANDLING THE CASE, SUCH DIRECT KNOWLEDGE WAS UNQUESTIONABLY PRESENT. ASSISTANT DISTRICT ATTORNEY KELLY ROBERTSON WAS PERSONALLY INFORMED BY GBI TOXICOLOGIST LARRY LEWELLEN THAT THE IMMUNOASSAY TEST (THE TEST ACTUALLY REQUESTED BY DEFENSE COUNSEL AND ORDERED BY THE COURT) HAD INDICATED THE PRESENCE OF MARIJUANA IN THE DECEASED'S BLOOD. ACCORDING TO LEWELLEN, THE MARCH 5, 2009, IMMUNOASSAY SCREEN TEST RESULT WAS REPORTED TO THE DISTRICT ATTORNEY'S OFFICE BY TELEPHONE ON MARCH 6, 2009 (PRIOR TO THE BEGINNING OF TRIAL), " THAT IT CAME UP INDICATIVE FOR THE MARIJUANA METABOLITE, IT WAS GOING TO TAKE LONGER TO GET IT CONFIRMED. " " I TOLD Mrs. ROBERTSON IT WAS PRESUMPTIVELY POSITIVE AND WAS GOING TO HAVE TO GO TO CONFIRMATION. " THUS, THE PROSECUTION KNEW OF A BLOOD TEST RESULT THAT INDICATED THE DECEDENT HAD MARIJUANA IN HER SYSTEM.

AS TO THE SECOND TOXICOLOGY TEST ON BROWNELL'S BLOOD, THE GC / MS TEST, IT WAS LIKEWISE COMPLETED PRIOR TO THE END OF THE PRESENTATION OF EVIDENCE. AGAIN, THE GBI WAS PART OF THE PROSECUTION TEAM AND HAD DIRECT KNOWLEDGE OF THE THIS TEST ON THE DATE IT WAS COMPLETED. THIS TEST RESULT WAS ALSO NOT TURNED OVER TO THE DEFENSE.

GIVEN PETITIONER'S REQUEST FOR THE BRADY MATERIAL FILED ... BEFORE THE TRIAL, THE FACT THAT THE PROSECUTOR NEVER INFORMED PETITIONER ABOUT THE PRELIMINARY TEST RESULTS AND THAT THE PROSECUTOR FAILED TO INFORM EITHER PETITIONER OR THE COURT ON THE MORNING OF THE TRIAL ABOUT THE DRUGS FOUND IN BROWNELL'S BLOOD, IT MUST BE CONCLUDED THAT THE STATE SUPPRESSED THE MATERIAL EVIDENCE. THE PROSECUTOR HAD AN OBLIGATION TO REVEAL THIS EVIDENCE FAVORABLE TO PETITIONER'S DEFENSE, AND HER FAILURE TO DO SO, HOWEVER INADVERTENT, AMOUNTS TO SUPPRESSION

OF THE EVIDENCE. HARRIDGE, 243 GA APP AT 662.

(4) HAD THE TOXICOLOGY RESULTS BEEN DISCLOSED TO THE DEFENSE, A REASONABLE PROBABILITY EXISTS THAT THE OUTCOME OF THE PROCEEDING WOULD HAVE BEEN DIFFERENT.

THIS FINAL PRONG OF THE BRADY RULE IS OFTEN REFERRED TO AS THE MATERIALITY REQUIREMENT. THE TOUCHSTONE FOR MATERIALITY IS WHETHER " THE FAVORABLE EVIDENCE COULD REASONABLY BE TAKEN TO PUT THE WHOLE CASE IN SUCH A DIFFERENT LIGHT AS TO UNDERMINE CONFIDENCE IN THE VERDICT, " KYLES V WHITELY, 514 U.S. 419' 435 (1995). " EVIDENCE IS " MATERIAL " WITHIN THE MEANING OF BRADY WHEN THERE IS A REASONABLE PROBABILITY THAT, HAD THE EVIDENCE BEEN DISCLOSED, THE RESULT OF THE PROCEEDING WOULD HAVE BEEN DIFFERENT." CONE V BELL, 556 U.S. 449, 469 - 70 (2009); SEE STRICKLER, 527 U.S. AT 280; KYLES, 514 U.S. AT 433 - 434. ACCORDINGLY, MATERIALITY " MUST BE EVALUATED IN THE CONTEXT OF THE ENTIRE RECORD. " UNITED STATES V AGURS, 427 U.S. 97 (1976). UNDER A FAITHFUL APPLICATION OF THOSE PRINCIPLES, THIS IS NOT A CLOSE CASE. IF THE FAVORABLE MATERIAL HAD BEEN DISCLOSED BEFORE TRIAL RATHER THAN WITHHELD, THERE IS A REASONABLE PROBABILITY THAT THE OUTCOME OF PETITIONER'S TRIAL WOULD HAVE BEEN DIFFERENT.

(5) THE DISTRICT ATTORNEY'S OFFICE INTIMIDATED DEFENSE WITNESS KIMMONS TO PREVENT HER FROM TESTIFYING IN PETITIONER'S DEFENSE.

IT'S CLEAR FROM THE RECORD THAT THE STATE INTENTIONALLY INTIMIDATED DEFENSE WITNESS KIMMONS, TO PREVENT HER FROM TESTIFYING IN PETITIONER'S FAVOR.

AS THE DISTRICT COURT CLEARLY NOTED IN ITS ORDER (PAGE 23), THE COURT WROTE, " NEVERTHELESS , CONTRARY TO THE STATE COURT'S CONCLUSION, THAT THERE WAS NO EVIDENCE TO SUPPORT A CLAIM THAT KIMMONS WAS THREATENED, THERE IS SOME EVIDENCE IN THE RECORD TO SHOW THAT A STATE EMPLOYEE DID IMPROPERLY

THREATEN HER.

" DEFENSE COUNSEL WILLIS TESTIFIED AT THE EVIDENTIARY HEARING THAT THE STATE THREATENED KIMMONS BEFORE TRIAL. FURTHER, THE RECORD CLEARLY SHOWS THAT AN EMPLOYEE OF THE PROSECUTOR'S OFFICE HAD AN IMPROPER CONVERSATION WITH KIMMONS AND, ALTHOUGH SHE DENIED EXPLICITLY THREATENING KIMMONS WITH CRIMINAL CHARGES, ASSISTANT DISTRICT ATTORNEY AYERS ADMITTED THAT SHE TOLD KIMMONS THAT SHE COULD HAVE PROBLEMS FOR TESTIFYING IN A WAY THAT WAS CONTRARY TO THE STATE'S PROFFER AND COULD BE JAILED FOR LYING ON THE STAND. ADDITIONALLY, THE TRIAL COURT DETERMINED THAT THIS WAS IMPROPER BEHAVIOR, AND KIMMONS DID NOT TESTIFY, WHICH COULD SUPPORT A DUE PROCESS VIOLATION. THE COURT CITED WEBB V TEXAS, 409 U.S. 95 - 97 (CLAIM NOT WAIVED BECAUSE WITNESS'S FAILURE TO TESTIFY AFTER JUDGE'S LENGTHY LECTURE TO DEFENSE WITNESS ABOUT PERJURY INDICATED JUDGE'S COMMENT'S CAUSED REFUSAL TO TESTIFY.).

FEDERAL LAW. WHENEVER THE MATTER CAN BE DECIDED IN EITHER DIRECTION, THE COURT SHOULD DECIDE THE MATTER AGAINST THE STATE.

A COA WAS WARRANTED BECAUSE PETITIONER, AS WELL AS THE COURT, SHOWED THAT WITNESS KIMMONS WAS THREATENED BY THE PROSECUTION. CLEARLY, THIS SHOULD BE ENOUGH TO CONVINCE THE READER THAT PETITIONER'S CONSTITUTIONAL RIGHT TO DUE PROCESS WAS VIOLATED. CLEARLY, ANYONE THAT IS THREATENED WITH BEING JAILED, HAS ENOUGH SENSE TO READ BETWEEN THE LINES AND WILL REFUSE TO TESTIFY. EVEN A PERSON WHO HAS NOTHING TO HIDE WILL NOT SAY A WORD IF THEY ARE BEING THREATENED WITH ARREST; ESPECIALLY KNOWING THAT A PROSECUTOR HAS IMMUNITY FROM PROSECUTION AND HAS NOTHING TO LOSE BY THREATENING A DEFENSE WITNESS WITH ARREST IF THE WITNESS TESTIFIES WITH TESTIMONY THAT DOES NOT AGREE WITH WHAT THE STATE WISHES THE EVIDENCE TO BE.

CLEARLY, PETITIONER DID NOT RECEIVE A FAIR TRIAL WHEN HIS ONLY WITNESS TO THE EVENTS (WITNESS WAS ON THE TELEPHONE WITH PETITIONER WHEN THE SHOOTING OCCURRED) TOOK PLACE. THE CONSTITUTION DOES NOT GUARANTEE A PERFECT TRIAL.

, HOWEVER, IT DOES GUARANTEE A FAIR TRIAL. AT THIS POINT IN TIME, PETITIONER IS STILL AWAITING HIS OPPORTUNITY FOR HIS FAIR TRIAL UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

REASONS FOR GRANTING THE WRIT

(1) THERE IS A REASONABLE PROBABILITY THAT THE EFFECT OF THE BRADY VIOLATION IN PETITIONER'S CASE WOULD HAVE CHANGED THE OUTCOME OF THE PROCEEDINGS.

(2) THERE IS A REASONABLE PROBABILITY THAT IF THE PROSECUTION HAD NOT COERCED AND THREATENED DEFENSE WITNESS KIMMONS INTO NOT TESTIFYING THE OUTCOME OF THE PROCEEDINGS WOULD HAVE BEEN DIFFERENT.

(3) DEFENSE COUNSEL ALSO REPRESENTED PETITIONER ON DIRECT APPEAL. COUNSEL FAILED TO RAISE MATTERS THAT WOULD PROBABLY HAVE CHANGED THE OUTCOME ON DIRECT APPEAL HAD THEY BEEN RAISED.

IN THE PETITIONER'S CASE THE BRADY VIOLATION COMPLETELY CHANGES THE LENS THROUGH WHICH THE STATE'S CASE AGAINST PETITIONER CAN BE VIEWED. IN LIGHT OF THE BRADY EVIDENCE, ALISON BROWNELL'S HEARSAY STATEMENT " IF YOU PUT YOUR HANDS ON ME I'LL CALL THE COPS, " WHICH PROVIDED THE CRITICAL EVIDENCE LINKING PETITIONER TO THE MURDER, IS UNTRUSTWORTHY AND UNRELIABLE. NOT ONLY DOES BROWNELL'S MARIJUANA INTOXICATION IMPEACH BROWNELL'S HEARSAY STATEMENT (PETITIONER DEMONSTRATED THAT MARIJUANA CAUSES USERS TO MISSTATE PERCEPTIONS)

IT EXPONENTIALLY BOLSTERS PETITIONER'S CENTRAL DEFENSE (THAT BROWNELL'S INTOXICATION WAS THE IMPETUS FOR BROWNELL SHOOTING HERSELF) AND SIGNIFICANTLY UNDERMINES KEY ELEMENTS OF THE STATE'S PROSECUTION (THE LIGHTER IN BROWNELL'S RIGHT HAND, THE PARTIALLY BURNED CIGARETTE, THE AWKWARD GUN POSITIONING AND SHOT TRAJECTORY).

UNDER A FAITHFUL APPLICATION OF THE ABOVE PRINCIPLES, THIS IS NOT A CLOSE CASE. IF THE FAVORABLE MATERIAL HAD BEEN DISCLOSED BEFORE TRIAL RATHER THAN WITHHELD, THERE IS A REASONABLE PROBABILITY THAT THE OUTCOME OF PETITIONER'S TRIAL WOULD HAVE BEEN DIFFERENT. IN WITHHOLDING THIS INFORMATION FROM DEFENSE COUNSEL, THE STATE PREVENTED THE DEFENSE FROM SUBJECTING ITS CASE AGAINST PETITIONER TO ANY MEANINGFUL ADVERSARIAL TREATMENT. BECAUSE THE SUPPRESSED EVIDENCE WAS MATERIAL AND PREVENTED THE JURY FROM FULLY EVALUATING THE THE INTEGRITY OF THE STATE'S CASE.

THE JURY WAS TOLD THAT BROWNELL'S 0.27 BAC COULD CAUSE BOTH EXAGGERATED EMOTIONS AND IMPULSIVENESS AND THE DEFENSE PATHOLOGIST CONCLUDED THIS LED TO BROWNELL TAKING HER OWN LIFE. HOWEVER, THE JURY WAS NOT TOLD THAT MARIJUANA WOULD HAVE EXPONENTIALLY ADDED TO THESE PSYCHOLOGICAL EFFECTS. THEREFORE, BROWNELL'S MARIJUANA INTOXICATION WOULD HAVE EXPONENTIALLY BOLSTERED PETITIONER'S PRIMARY CONTENTION THAT BROWNELL SHOT HERSELF DUE TO EXAGGERATED EMOTIONS AND INTOXICATION.

FURTHER, BROWNELL'S MARIJUANA INTOXICATION WOULD HAVE OFFERED A SCIENTIFIC EXPLANATION TO SUPPORT PETITIONER'S CLAIM OF BROWNELL'S DEPRESSED MOOD. HAD THE SUPPRESSED MARIJUANA TESTS BEEN DISCLOSED, THE JURY WOULD HAVE LEARNED THAT MARIJUANA, UNLIKE ALCOHOL, CAUSES TRANSIENT PSYCHOTIC EPISODES, FEELINGS OF DISTRUST, SADNESS, AND DEPRESSION. THUS, MARIJUANA IS QUALITATIVELY DIFFERENT FROM ALCOHOL IN THAT IT ACTUALLY CAN BE THE GENESIS OF SADNESS, DEPRESSION, AND TRANSIENT PSYCHOSIS. ALL ELSE REMAINING CONSTANT, MARIJUANA INTOXICATION SUPPORTS THE CONCLUSION THAT BROWNELL SHOT HERSELF.

BROWNELL'S MARIJUANA INTOXICATION SIGNIFICANTLY UNDERCUTS AND IMPEACHES THE CORNERSTONES OF THE STATES CASE, BECAUSE: (1) IT IMPEACHES BROWNELL'S STATEMENT " IF YOU PUT YOUR HANDS ON ME I'LL CALL THE COPS, " AND (2) IT EXPLAINS THE LIGHTER IN BROWNELL'S RIGHT HAND, THE PARTIALLY BURNED CIGARETTE LOCATED UNDER BROWNELL'S LEFT LEG, AND BROWNELL'S AWKWARD GRIP OF THE WEAPON AND SHOT TRAJECTORY.

BROWNELL'S STATEMENT, " IF YOU PUT YOUR HANDS ON ME I'LL CALL THE COP'S " WAS ARGUABLY THE LYNCHPIN OF THE PROSECUTION'S CASE. THE PROSECUTION REPEATED THIS REFRAIN AS THE OPENING LINE OF BOTH THEIR OPENING STATEMENT AND THEIR CLOSING ARGUMENT, ARGUING " MAYBE HE LOOKED LIKE HE WAS GOING TO LAY HIS HANDS ON HER AND HE HAD LAID HIS HANDS ON HER SOMETIME IN THE PAST. " THIS STATEMENT OF BROWNELL WAS ADMITTED AS A HEARSAY EXCEPTION. GEORGIA LAW AFFORDS THE RIGHT TO IMPEACH A NON - TESTIFYING HEARSAY DECLARANT. SEE BRANTLEY V STATE, 338 SE2D 694, 698 (1985) (" WE HOLD THAT A PARTY MUST BE PROVIDED WITH THE OPPORTUNITY TO IMPEACH THE CREDIBILITY OF A HEARSAY DECLARANT. ").

THUS, PETITIONER HAD THE RIGHT TO IMPEACH BROWNELL'S ABILITY TO PERCEIVE THE FACTS ASSERTED IN THE STATEMENT. SEE GREEN V WAINWRIGHT, 634 F2D 272, 276 (1981). FURTHER, IMPEACHMENT OF A VICTIM DECLARANT THROUGH TOXICOLOGY RESULTS, BECAUSE OF THE POSSIBLE EFFECT ON THE ABILITY TO PROPERLY PERCEIVE EVENTS, HAS BEEN RECOGNIZED AS PROPER IN THE BRADY CONTEXT. SEE CHEUNG V MADDOX, 32 F SUPP 2D 1150, 1158 (ND CAL 1998) (HOLDING SUPPRESSED EVIDENCE OF A SHOOTING VICTIM'S BLOOD LEVEL WAS BOTH MATERIAL AND FAVORABLE TO THE DEFENSE, REQUIRING A NEW TRIAL BECAUSE THIS " SCIENTIFIC MEDICAL EVIDENCE ... WOULD HAVE CAST DOUBT ON THE VICTIM'S ABILITY TO IDENTIFY PETITIONER. ").

HAD THE STATE DISCLOSED THE MARIJUANA TOXICOLOGY REPORTS, THE JURY WOULD HAVE LEARNED THAT A PERSON WITH BROWNELL'S COMBINED ALCOHOL AND MARIJUANA INTOXICATION HAS A SIGNIFICANTLY IMPAIRED ABILITY TO PROPERLY PERCEIVE AND RELATE EVENTS. THE DECEDENT'S STATEMENT WOULD HAVE CALLED INTO SERIOUS DOUBT THE FACTS ASSERTED IN THE STATEMENT (THAT PETITIONER WAS ASSAULTING OR

ATTACKING, OR WAS ABOUT TO ASSAULT OR ATTACK BROWNELL).

HAD THE SUPPRESSED TOXICOLOGY TESTS BEEN AVAILABLE TO PETITIONER, THE JURY WOULD HAVE LEARNED THAT A PERSON HIGH 0N MARIJUANA IS MORE LIKELY TO ACT IN AN AWKWARD MANNER WHEN PERFORMING TASKS. THE JURY WOULD HAVE ALSO LEARNED THAT MARIJUANA IMPAIRS MOTOR SKILLS COORDINATION, BODY SWAY, POSTURAL BALANCE, AND HAND STEADINESS. ADDING THAT NEW INFORMATION TO THE 0.27 BAC AND THE EXPONENTIAL EFFECTS OF THE TWO COMBINED SUBSTANCES THE STATE'S AWKWARD WEAPON POSITIONING AND BODY POSITIONING ARGUMENTS ARE SERIOUSLY DAMAGED.

THE JURY NEVER LEARNED THAT BROWNELL'S MARIJUANA INTOXICATION, WHEN COMBINED WITH HER HIGHLY ELEVATED BAC, WOULD HAVE EXPONENTIALLY AFFECTED BROWNELL'S IMPAIRMENT, LIKEWISE EXPONENTIALLY BOLSTERING PETITIONER'S ARGUMENTS. BROWNELL'S UNDISCLOSED TOXICOLOGY TESTS, AND THE CONCLUSION THAT SHE WAS IMPAIRED BY MARIJUANA AT THE TIME OF THE SHOOTING, WERE RELEVANT AND ADMISSIBLE TO THE CENTRAL FACTS IN DISPUTE AT THE TRIAL. AND BROWNELL'S MARIJUANA INTOXICATION, WHILE BOLSTERING PETITIONER'S VERSION OF EVENTS, WOULD HAVE SIMULTANEOUSLY AND SIGNIFICANTLY IMPEACHED AND UNDERCUT THE CORNERSTONES OF THE STATE'S CASE

AS THIS COURT HAS REPEATEDLY MADE CLEAR, THE TOUCHSTONE FOR MATERIALITY IS WHETHER " THE FAVORABLE EVIDENCE COULD REASONABLY BE TAKEN TO PUT THE WHOLE CASE IN SUCH A DIFFERENT LIGHT AS TO UNDERMINE CONFIDENCE IN THE VERDICT. " KYLES V WHITLEY, 514 U.S. 419, 435 (1995). " EVIDENCE IS ' MATERIAL ' WITHIN THE MEANING OF BRADY WHEN THERE IS A REASONABLE PROBABILITY THAT, HAD THE EVIDENCE BEEN DISCLOSED, THE RESULT OF THE PROCEEDING WOULD HAVE BEEN DIFFERENT. " CONE V BELL, 556 U.S. 449, 469 - 70 (2009); SEE STRICKLER V GREENE, 527 U.S. 263, 380 (1999); KYLES, 514 U.S. AT 433 - 434. ACCORDINGLY, MATERIALITY " MUST BE EVALUATED IN THE CONTEXT OF THE ENTIRE RECORD. " UNITED STATES V AGURS, 427 U.S. 97, 112 (1976).

IN THIS COURT'S LAST PRONOUNCEMENT ON MATERIALITY, CONE V BELL, 556 U.S. 449, 470

(2009), MATERIALITY WAS SATISFIED WHERE "THE DOCUMENTS SUPPRESSED BY THE STATE ... SHARE A COMMON FEATURE: EACH STRENGTHENS THE INFERENCE THAT CONE WAS IMPAIRED BY HIS USE OF DRUGS AROUND THE TIME HIS CRIMES WERE COMMITTED." THIS, EVEN THOUGH, AS THE DISSENT NOTED, "IT WOULD NOT HAVE BEEN NEWS TO THE JURORS, THAT CONE WAS A DRUG USER." CONE V BELL, 556 U.S. 449, 493 (2009). (J. THOMAS, DISSENTING). HERE, IT WOULD HAVE BEEN NEWS TO THE JURY THAT BROWNELL WAS UNDER THE INFLUENCE OF MARIJUANA.

UNDER A FAITHFUL APPLICATION OF THOSE PRINCIPLES, THIS IS NOT A CLOSE CASE. IF THE FAVORABLE MATERIAL HAD BEEN DISCLOSED BEFORE TRIAL RATHER THAN WITHHELD, THERE IS A REASONABLE PROBABILITY THAT THE OUTCOME OF PETITIONER'S TRIAL WOULD HAVE BEEN DIFFERENT.

(1)(A) IN THE BRADY CONTEXT, LOWER COURTS HAVE REACHED DIFFERENT RESULTS ON THE NON-DISCLOSURE OF LABORATORY TESTS.

AS RECENT AMERICAN LAW REPORT CONCLUDED "A NUMBER OF COURTS HAVE REACHED OPPOSITE CONCLUSIONS, DEPENDING ON THE CIRCUMSTANCES, AS TO WHETHER THERE WAS REVERSAL ERROR DUE TO THE PROSECUTION'S FAILURE TO PRODUCE THE RESULTS OF TESTS OF AND FOR SEMEN, BLOOD, URINE, SALIVA, AND GENERAL OR UNSPECIFIED TOXICOLOGICAL TESTS." 101 A.L.R. 5th 187 (2002) (INTERNAL CITATIONS OMITTED). IN CASES LIKE PETITIONER'S, INVOLVING UNDISCLOSED TOXICOLOGY TESTS ON THE VICTIM, COURTS HAVE OVERWHELMINGLY FOUND MATERIALITY SATISFIED. SEE CHEUNG V MADDOCK, 32 F SUPP 2D 1150 (N.D. CAL 1998) (FINDING MATERIALITY SATISFIED WHERE THE PROSECUTION FAILED TO DISCLOSE THE VICTIM'S BLOOD-ALCOHOL TEST); STATE V WYCHE, 518 A2D 907 (R.I. 1986) (SAME); PEOPLE V DRAKE, 236 N.W.2D 537 (MICH. CT APP 1975) (SAME); HARRIDGE V STATE, 534 SE2D 113 (GA CT APP 2000) (SAME); COM. V MARTIN, 696 NE2D 904 (MASS. 1998) (SAME); COMPARE STATE V BEMBER, 439 A2D 387 (CONN. 1981) (FINDING

MATERIALITY NOT SATISFIED IN SELF - DEFENSE CASE DESPITE THE NON- DISCLOSURE OF VICTIM'S TOXICOLOGY TESTS SHOWING PRESENCE OF LIDOCAINE OR COCAINE).

(2) IT IS CLEAR FROM THE RECORD THAT THE STATE INTENTIONALLY INTIMIDATE DEFENSE WITNESS KIMMONS, TO PREVENT HER FROM TESTIFYING IN PETITIONER'S FAVOR.

AS THE COURT OF APPEALS CLEARLY NOTED IN ITS ORDER (PAGE 23); THE COURT WROTE, " NEVERTHELESS, CONTRARY TO THE STATE COURT'S CONCLUSION, THAT THERE WAS NO EVIDENCE TO SUPPORT A CLAIM THAT KIMMONS WAS THREATENED, THERE IS SOME EVIDENCE IN THE RECORD TO SHOW THAT A STATE EMPLOYEE DID IMPROPERLY THREATEN HER. "

" FIRST, WILLIS [DEFENSE COUNSEL] TESTIFIED AT THE STATE HABEAS CORPUS EVIDENTIARY HEARING, THAT THE STATE THREATENED KIMMONS BEFORE TRIAL. FURTHER, THE RECORD CLEARLY SHOWS THAT AN EMPLOYEE OF THE PROSECUTOR'S OFFICE HAD AN IMPROPER CONVERSATION WITH KIMMONS, AND, ALTHOUGH SHE DENIED EXPLICITLY THREATENING KIMMONS WITH CRIMINAL CHARGES, ASSISTANT DISTRICT ATTORNEY AYERS ADMITTED THAT SHE TOLD KIMMONS THAT SHE [KIMMONS] COULD HAVE PROBLEMS FOR TESTIFYING IN A WAY THAT WAS CONTRARY TO THE STATE'S PROFFER AND COULD BE JAILED FOR LYING ON THE STAND." ADDITIONALLY, THE TRIAL COURT DETERMINED THAT THIS WAS IMPROPER BEHAVIOR, AND KIMMONS DID NOT TESTIFY, WHICH COULD SUPPORT A DUE PROCESS VIOLATION. THE COURT CITED WEBB V TEXAS, 409 U.S. 95, 96- 97 (CLAIM NOT WAIVED BECAUSE WITNESS'S FAILURE TO TESTIFY AFTER JUDGE'S LENGTHY LECTURE TO DEFENSE WITNESS ABOUT PERJURY INDICATED JUDGE'S COMMENTS CAUSED REFUSAL TO TESTIFY).

UNDER FEDERAL LAW, WHENEVER THE MATTER CAN BE DECIDED IN EITHER DIRECTION, THE COURT SHOULD DECIDE THE MATTER AGAINST THE STATE.

(3) DEFENSE COUNSEL ALSO REPRESENTED PETITIONER ON DIRECT

APPEAL. COUNSEL FAILED TO RAISE MATTERS THAT WOULD PROBABLY HAVE CHANGED THE OUTCOME OF THE DIRECT APPEAL HAD THEY BEEN RAISED.

COUNSEL COMMITTED STRICKLAND ERROR WHEN HE FAILED TO ENUMERATE ON DIRECT APPEAL, THE MATTER OF THE DISTRICT ATTORNEY'S OFFICE THREATENING DEFENSE WITNESS KIMMONS CAUSING A DUE PROCESS VIOLATION UNDER THE FOURTEENTH AMENDMENT.

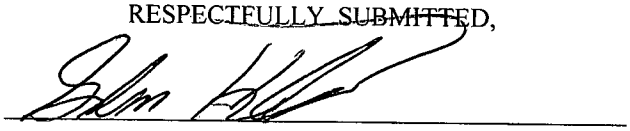
COUNSEL CLEARLY WAS AWARE OF THIS MATTER AS HE RAISED IT AT THE MOTION FOR NEW TRIAL HEARING, BUT FAILED TO RAISE THE CONSTITUTIONAL VIOLATION ON DIRECT APPEAL. THERE IS A REASONABLE PROBABILITY THAT HAD THE ISSUE BEEN RAISED ON DIRECT APPEAL, THE OUTCOME OF THE PROCEEDINGS WOULD HAVE BEEN DIFFERENT.

JUST AS A PASSING MATTER, COUNSEL ALSO FAILED TO RAISE A MATTER OF UNCONSTITUTIONAL ARREST WARRANTS AS WELL AS OTHER CONSTITUTIONAL MATTERS.

CONCLUSION

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

RESPECTFULLY SUBMITTED,



DATE May 22, 2018