No. _____

In The

Supreme Court of the United States

MICHAEL D. RIMMER,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the courts below erred by upholding the trial court's determination that the only witness to petitioner's purported jailhouse confession was "unavailable," allowing the prosecution, at petitioner's retrial, to read to the jury testimony of such witness.

2. Whether due process tolerates a trial containing serious violations of fundamental fairness regarding material physical evidence, when viewed in combination with the remaining evidence (or lack thereof).

3. Whether the purposeful prosecutorial misconduct at petitioner's first trial and resentencing was of such a magnitude to implicate the Double Jeopardy Clause.

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. The petitioner is not a corporation.

RELATED PROCEEDINGS

Tennessee Criminal Court, 30th Judicial District, 8th Judicial Division, No. 98-01034, *State v. Rimmer*, May 7, 2016.

Tennessee Criminal Court, 30th Judicial District, 8th Judicial Division, No. 98-01033, *State v. Rimmer*, January 27, 2017.

Tennessee Court of Criminal Appeals, No. W2017-00504-CCA-R3-DD, *State v. Rimmer*, May 21, 2019.

Tennessee Supreme Court, No. No. W2017-00504-SC-DDT-DD, *State v. Rimmer*, April 16, 2021, *reh'g denied* May 21, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Rimmer respectfully seeks a writ of certiorari to review the judgment of the Supreme Court of Tennessee.

OPINIONS BELOW

The reported opinion of the Supreme Court of Tennessee is available at 623 S.W.3d 235 (Tenn. 2021). Rehearing was denied on May 21, 2021. *See* App. 101a. The unreported opinion of the Court of Criminal Appeals of Tennessee is available at No. W2017-00504-CCA-R3-DD, 2019 WL 2208471 (Tenn. Crim. App. May 21, 2019). Both opinions are attached, respectively, as Appendix A and B. *See* App. 1a, 44a.

STATEMENT OF JURISDICTION

The Supreme Court of Tennessee entered judgment on April 16, 2021. *See* App. 1a. That same court denied petitioner's motion for Reargument on May 21, 2021. *See* App. 101a. Pursuant to this Court's July 19, 2021 Order, denial of Reargument occurred prior to July 19, 2021, and therefore, 150 days from the state court's denial of rehearing is October 18, 2021. This Court has jurisdiction under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness

> against himself, nor be deprived of life, liberty, or property, without due process of law . . .
>
> .

The Sixth Amendment to the United States Constitution provides:

> 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 of the crime 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 defense.

Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of 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.

STATEMENT OF THE CASE

In no area of the law must due process and constitutional protections be more carefully considered than in capital cases. If a defendant loses, his or her life will be extinguished—snuffed out—with governmental sanction. *See Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982), quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (Burger, C.J.) (plurality opinion) ("'[T]he imposition of death by public authority is . . . profoundly different from all other penalties.'"). Assuming society demands such a result, the constitution requires that the mechanisms of the machinery of death must be at their fairest and most reliable. *See Woodson v. North Carolina*, 428 U.S. 280, 304-305 (1976). Otherwise, our society will, over time, gradually stir to a ghastly revelation: we are the architects of an unjust machine, and, as hard as we might try, we may never wipe away the bloodstains from our hands.

Petitioner Michael Rimmer comes before this Court knowing all too well of the machinery of death in Tennessee. As relevant here, petitioner was previously convicted of first-degree murder and sentenced to death, in a case where no body of the alleged victim has ever been found to conclusively establish that person's death. On direct appeal, that sentence was vacated, and the case was remanded for a resentencing; thereafter, a sentence of death was again imposed.[1] In 2012, petitioner obtained relief in state post-conviction—based upon ineffective assistance of counsel but intertwined with a finding that the State had engaged in "blatantly false, inappropriate and ethically questionable" tactics—and received a new trial. Pertinent

[1] Petitioner's second death sentence was upheld on direct review. *See State v. Rimmer*, 250 S.W.3d 12 (Tenn. 2008), *cert. denied sub nom. Rimmer v. Tennessee*, 555 U.S. 852 (2008).

here, following a retrial still suffering from the State's misconduct in the first proceeding, petitioner was again convicted of first-degree murder and sentenced to death. Because this capital retrial continues to be afflicted by significant errors, the judgments below require reversal.

The Tennessee courts did not safeguard reliability and fairness in petitioner's capital retrial in three respects. First, petitioner's Confrontation Clause right was violated because the State did not establish a good faith effort in securing a pivotal witness; thus, a purported jailhouse confession, from petitioner's first trial, was read to the jury. Second, petitioner's due process rights were violated because he was prevented from inspecting and testing the most material piece of physical evidence in this case. In light of that reality, along with the erroneously admitted confession, the remaining evidence casts doubt on the convictions below. Last, because the State purposefully committed prosecutorial misconduct throughout petitioner's first trial and resentencing—which deprived petitioner of his valued right to complete that trial with constitutional protections before his first jury—petitioner was placed in double jeopardy.

This Court has expounded upon the rights a defendant is afforded by the Confrontation Clause balanced with the need for a way to introduce testimonial hearsay when a witness is unavailable. Over time, the Court settled on two requirements for admission of such hearsay. First, a defendant must have had a previous opportunity to cross-examine the witness against them, and second, the State must have conducted a good-faith effort in locating the unavailable witness. *See*

Crawford v. Washington, 541 U.S. 36, 57 (2004), citing *Barber v. Page*, 390 U.S. 719, 722-725 (1968) and *Pointer v. Texas*, 380 U.S. 400, 406-408 (1965).

With regard to the second requirement, the Confrontation Clause does not tolerate the rubber stamping of offerings of "good faith" from prosecutors because it would essentially relieve "the government [from] establish[ing the] unavailability of the witness." *Crawford*, 541 U.S. at 57. However, what happened at petitioner's retrial did just that. The trial court erroneously determined that the State had conducted a good-faith effort in locating the sole witness to petitioner's purported jailhouse confession. Consequently, the State was allowed to read into the record such testimony from the previous trial, which, in effect, presented to the retrial jury a cross-examination by prior defense counsel who were found to be constitutionally ineffective—which begs the question of whether the witness' previous testimony had been truly put through "the crucible of cross-examination." *Id.* at 61. On petitioner's appeal, the courts below determined that petitioner was not entitled to relief. While what constitutes a good-faith effort remains undefined, fundamental fairness demands that there must be some minimum objective showing by the State that it indeed acted in good-faith in attempting to secure a witness's presence. Without such a showing, the good faith effort requirement is rendered meaningless.

In addition to the State's abject failure to conduct a constitutional good-faith effort, recursive procedures at retrial reintroduced errors from the first trial. For instance, as outlined in petitioner's motion to suppress DNA evidence, at neither the first nor second trial was petitioner able to examine the most material piece of

physical evidence in this case—the vehicle in which the body was allegedly transported—before it was effectively destroyed by the State. While at petitioner's first trial DNA testing indicated certain correlations between the alleged victim and samples taken from the vehicle, retesting for retrial offered inconclusive results. Further, expert testimony indicated that a more thorough investigation of the vehicle should have been conducted, especially regarding the processing of the trunk. Therefore, even with a new trial, these enduring problems abraded the very fibers of a fair trial, unraveling any confidence in the judgments of conviction rendered and sentence of death imposed. On appeal, the reviewing courts decided that petitioner was not entitled to relief on these issues.

Finally, petitioner's conviction and death sentence degrade double jeopardy principles. After the State's first full and fair opportunity to try petitioner, including a resentencing, for murder in the first degree, the state post-conviction court found that the prosecution had engaged in purposeful prosecutorial misconduct. This Court has recognized that the State may not reprosecute a person for the same offense if it goaded such person into seeking a mistrial. The rationale underpinning that determination extends to the present case, where the State was given the luxury to reprosecute petitioner after engaging in unjustifiable and purposeful prosecutorial misconduct by, among other things, withholding evidence indicating someone else committed the offense. Although not argued at trial, the Supreme Court of Tennessee reviewed the claim for plain error and determined petitioner was not entitled to relief.

Simply put, petitioner Michael Rimmer's second capital trial was marred by the State's failure to conduct a good-faith effort in locating a jailhouse snitch, the State's choice to effectively destroy material physical evidence, and the State's demonstrated history of prosecutorial misconduct in petitioner's first trial—which should have barred any retrial. This Court's intervention is necessary not only to correct the errors below but to clarify the law.

FACTUAL STATEMENT

A. Petitioner's First Trial, Direct Appeal, and State Post-Conviction Proceedings.

In 1997 and 1998, a grand jury in Shelby County, Tennessee, indicted petitioner Michael Rimmer on two counts of theft, one count of aggravated robbery, one count of first-degree premediated murder, and one count of first-degree felony murder. *See State v. Rimmer*, No. W1999-00637-CCA-R3-DD, 2001 WL 567960, at *1-*2 (Tenn. Crim. App. May 25, 2001). Petitioner was convicted, upon a jury verdict, of one count of theft, aggravated robbery, and first-degree premeditated murder. *See id.* at *1. At the sentencing hearing, the jury found petitioner had prior convictions involving violence to a person and that this aggravating factor outweighed any mitigating factors; thus, the court imposed a sentence of death. *See id.* at *3.

Upon direct review, the Tennessee Court of Criminal Appeals affirmed the conviction; however, it "conclude[d] that the verdict [was] enigmatic and uncertain, requiring reversal of the sentence of death." *Id.* at *1.[2] Accordingly, that court vacated the sentence of death and remanded for resentencing. *See id.* at *23. After a second sentencing hearing in 2004, a new jury again found petitioner "was previously

[2] Specifically, the Court of Criminal Appeals, in a divided opinion, determined that the jury had "considered twice as much evidence as it should have relative to the prior violent felony aggravator by considering eight felonies, rather than only the four that were eligible for consideration." *State v. Rimmer*, No. W1999-00637-CCA-R3-DD, 2001 WL 567960, at *20 (Tenn. Crim. App. May 25, 2001). This included the jury considering the offenses on trial as aggravating factors, as opposed to prior offenses only, as required by Tennessee law. *See id.* at *21; T.C.A. § 39-13-204 (i) (2). The court opined that "simply because the defendant was convicted in this case of first[-]degree murder, without narrowing the class of more culpable defendants who are deserving of a death sentence, violates state and federal provisions against cruel and unusual punishment." *Id.* In addition, that court determined that the trial court had erred by accepting an imperfect or incomplete verdict from the jury, coupled with "the trial court's *sua sponte* revision of the verdict without informing counsel that a revision was being made." *Id.* at *22.

convicted of one or more felonies whose statutory elements involved the use of violence to the person" and "that the aggravating circumstance outweighed the mitigating circumstances beyond a reasonable doubt." *State v. Rimmer*, No. W2004-02240-CCA-R3-DD, 2006 WL 3731206, at *1 (Tenn. Crim. App. Dec. 15, 2006). The court again imposed a sentence of death. *See id.* On direct appeal, the Court of Criminal Appeals and the Tennessee Supreme Court affirmed the judgment and sentence. *See id.* at *28; *see also State v. Rimmer*, 250 S.W.3d 12, 36 (Tenn. 2008), *cert. denied sub nom. Rimmer v. Tennessee*, 555 U.S. 852 (2008).

In 2008, petitioner filed for post-conviction relief, asserting, among other things, claims of State misconduct and ineffective assistance of counsel relating to the State's failure to disclose, and defense counsel's failure to uncover, exculpatory evidence. *See* App. 102a-314a; *see also State v. Rimmer*, No. W2017-00504-CCA-R3-DD, 2019 WL 2208471, at *1 (Tenn. Crim. App. May 21, 2019). In particular, petitioner asserted that the State withheld evidence that an eyewitness identified "Billy Wayne Voyles as one of the two men he saw with blood on their hands at the [crime scene at the alleged time of the crime]" and did not identify petitioner as one of the men he saw in a lineup containing petitioner's photograph. App. 191a-192a. Following an evidentiary hearing, the post-conviction court discerned that "the [S]tate admittedly failed to meet [its] responsibilities under *Brady*;" on the other hand, it concluded that since there was alternative evidence, or avenues of investigation, available to trial counsel that could have led to roughly the same substance contained in the evidence withheld by the State, petitioner was not entitled

to relief on a prosecutorial misconduct theory. App. 196a-197a; *see generally* App. 190a-208a (discussing each piece of evidence). Rather, the post-conviction court determined that petitioner was entitled to relief on his ineffective assistance of counsel claims. *See* App. 230a-251a. The court determined that, even though the State had hindered petitioner's case by its failure to timely provide defense counsel with exculpatory evidence, defense counsel was ineffective by their failure to investigate or seek out evidence that could have led to more or less the same type of evidence withheld by the State. *See* App. 251a.[3] The post-conviction court opined that "the collective failure of both defense counsel and the prosecution in this case . . . renders the verdict in this matter unreliable." App. 245a. Thus, that court granted petitioner's petition and ordered a new trial. App. 313a. The State did not appeal that decision and order. *See State v. Rimmer*, 2019 WL 2208471, at *1.

B. Evidence Produced at the Retrial[4]

According to testimony presented at petitioner's second trial, at around 3:10 a.m. on February 8, 1997, a witness discovered that the night clerk's office was abandoned in the Memphis Inn in Shelby County, Tennessee. *See State v. Rimmer*,

[3] In addition to this failure, the post-conviction court found that trial counsel was "overburdened" by a "case load [that] caused both counsel and the auxiliary members of the defense team to conduct a seriously deficient investigation of petitioner's case." App. 239a. Relatedly, the court found that "counsel provided ineffective assistance by conducting an inadequate investigation of petitioner's case," in both the guilt phase and the resentencing phase. App. 244a, 289a-295a. Moreover, the court found that, in relation to the failure to investigate, defense counsel "were ineffective in failing to cross examine [two witnesses]." App. 279a.

[4] Prior to retrial, the trial court dismissed one of the counts of theft in indictment 97-02817 because of double jeopardy concerns and severed the other theft charge. *See State v. Rimmer*, No. W2017-00504-CCA-R3-DD, 2019 WL 2208471, at *1 (Tenn. Crim. App. May 21, 2019).

2019 WL 2208471, at *2. Deciding to investigate, this witness, hearing running water, was able to access the employee restroom and observed blood in the sink basin and on the toilet, along with bloody towels on the floor. *See id.* Seeking help, the witness eventually came across two county sheriff deputies, who were able to secure the scene and notify the Memphis Police Department. *See id.* In addition to the blood in the restroom, investigators later identified a blood trail from the restroom, through the office and to the curb outside the motel's night entrance. *See id.* Also, it was noted that roughly $600 from the office was gone. *See id.* The missing night clerk was identified as Ricci Ellsworth; investigators located her purse in the office, her car in the parking lot, and her wedding ring on the bathroom floor. *See id.* at *2, *7.[5]

It was testified to that petitioner drove a maroon Honda to his brother's house between 8:30 a.m. and 9:00 a.m. on February 8, 1997. *See* 2019 WL 2208471, at *2. Petitioner and his car were muddy, which he explained by having driven into a ditch. *See id.* Petitioner then asked his brother to dispose of a shovel. *See id.* After allowing petitioner to clean his shoes, his brother declined petitioner's request to stay. *See id.* Petitioner left, and his brother disposed of the shovel. *See id.*

Two days after Ricci Ellsworth went missing, petitioner did not appear for his job at an auto repair shop. *See id.* at *3. On March 5, 1997, petitioner was stopped for speeding in Johnson County, Indiana. *See id.* Receipts found in the car indicated that petitioner had been traveling through at least nine states before being pulled over. *See id.* Upon investigation, authorities discovered that the vehicle petitioner was

[5] To date, Ricci Ellsworth has not been located. *See State v. Rimmer*, 2019 WL 2208471, at *1.

driving had been reported missing and that petitioner was wanted in Shelby County, Tennessee, for questioning in connection with Ms. Ellsworth's disappearance. 2019 WL 2208471, at *3.[6] Investigators noted that there were blood stains in the back seat of petitioner's vehicle. *See id.*

According to the testimony of James Allard Jr., petitioner's cellmate in Indiana, at some point petitioner told Allard that he had killed someone who petitioner allegedly identified as his "wife," shooting them with a firearm twice. *See id*. Additionally, Allard testified that petitioner had discussed escape plans with him. *See State v. Rimmer*, 623 S.W.3d 235, 249 (Tenn. 2021). The State failed to locate Allard for petitioner's second trial. Nevertheless, the State presented evidence that it contended demonstrated that it had conducted a good-faith effort in locating Allard and that he was constitutionally unavailable. *See id.* at 281-283. Specifically, the State put on a Tennessee Bureau of Investigation agent, who testified that his attempts to locate Allard consisted only of running a Google search as well as searching other databases. *See id.* at 281-282. This yielded one potential phone number, but the agent determined that it was a dead end. 2019 WL 2208471, at *18. On cross-examination, the agent admitted that he had not checked into Allard's criminal background and was not aware that "Allard had been previously incarcerated in Indiana and said that he did not search for him through the Indiana Department of Correction," even though the purported confession was elicited in an

[6] As relevant here, Ms. Ellsworth and petitioner had an on-again, off-again relationship in the late 1970s and early 1980s; following an incident in 1989, petitioner pleaded guilty to burglary in the first degree, aggravated assault, and rape. *See* 2019 WL 2208471, at *1.

Indiana correctional facility. 623 S.W.3d at 282. Moreover, the agent stated that he did not investigate Allard's family for a lead because he didn't know who they were. *See* 2019 WL 2208471, at *18. The agent avoided answering whether he had attempted to go to Allard's last known address. *See* App. 80a. Petitioner's counsel argued that this basic computer search was insufficient to demonstrate a good-faith effort by the State; the trial court disagreed, finding that the State had met its burden. *See* 623 S.W.3d at 282. Consequently, Allard's previous testimony from the initial trial—a trial that the post-conviction court reversed based upon ineffective assistance of counsel while simultaneously finding that the prosecutor had committed purposeful prosecutorial misconduct—was read into the record at the second trial. *See id.* at 281-283. This was the only testimony presented at petitioner's second trial suggesting that petitioner admitted a possible role in the offense. *See id.*

Several witnesses were present at the Memphis Inn in the early morning hours of February 8, 1997. *See* 2019 WL 2208471, at *1-*2. Based on testimony, the last sighting of Ricci Ellsworth was at approximately 1:45 a.m. that morning. *See id.* at *1. At different points that morning, witnesses observed either one or two men in the motel's office and in front of the office entrance. *See id.* at *2. One witness testified that he noticed a man, who was next to a maroon vehicle in front of the office entrance, "had something rolled up in his arms," which he placed in the trunk, causing the vehicle to sink. *Id.* This witness also testified that he saw two men, with blood on their hands, in the motel office. *See id.* Presented with a photo array containing petitioner's photograph, the witness was unable to identify petitioner as

one of the men he had seen. *See* 623 S.W.3d at 244. However, this witness was able to identify the second man as Billy Wayne Voyles. *See* 2019 WL 2208471, at *2.[7]

The blood in the motel and the bloodstains in the backseat of the vehicle were tested for DNA; the mother of Ricci Ellsworth provided a DNA sample for comparison. *See id.* at *3. The DNA testing indicated that the blood from the backseat of petitioner's vehicle was consistent with a female offspring of Ms. Ellsworth's mother and that the blood samples in the motel and vehicle were consistent with Ricci Ellsworth's DNA. *See id.* According to both the State's and petitioner's blood stain/splatter experts, the crime scene photos indicated that a person could have sustained four or five blows with, respectively, sharp or blunt force. *See* 623 S.W.3d at 250. Neither of these experts observed evidence that supported a scenario where someone was shot with a firearm—the story that jailhouse informant Allard claimed to have heard from petitioner. *See id.*

Although there were photographs and some fabric samples taken from the vehicle petitioner was driving, little investigation was conducted on the contents or interior of vehicle's trunk. *See id.* at 247, 250-251. Once the State believed its processing of the vehicle was complete, it released the vehicle "because the [Memphis] police department did not have the storage capacity to keep it longer." *Id.* at 248. When the owner later inspected the vehicle, he noticed that the liner inside the trunk was missing. *See id.* Other evidence that was introduced at trial included testimony

[7] This witness, James Darnell, did not testify at the initial trial of petitioner or at the resentencing hearing and was not disclosed to defense counsel until post-conviction proceedings. *See* App. 191a-201a.

and physical evidence of several escape attempts by petitioner. *See* 2019 WL 2208471, at *3.

Petitioner's retrial commenced on April 28, 2016, and after the guilt phase, the jury found petitioner guilty of first-degree premediated murder, first-degree felony murder, and aggravated robbery. 623 S.W.3d at 242; 2019 WL 2208471, at *2-*3.[8] The trial court merged the felony murder conviction into the premeditated murder conviction. 2019 WL 2208471, at *3. During the sentencing phase, the previous victim impact statement of Ms. Ellsworth's mother was read to the jury. *See id.* The State also introduced certified copies of petitioner's prior felony convictions involving the use of violence against a person. *See id.*; *see also* T.C.A. § 39-13-204 (i) (2). Petitioner did not present any mitigation evidence. *See id.* The jury found that the State had proven an aggravating factor and determined that petitioner would receive a sentence of death, which the court imposed. *See id.* After a separate sentencing hearing on the aggravated robbery conviction, "the trial court imposed an additional eighteen years of confinement running consecutively to the death sentence." 623 S.W.3d at 253. On May 21, 2019, the Tennessee Court of Criminal Appeals affirmed the judgments and sentences, *see* 2019 WL 2208471, and on April 16, 2021, the Tennessee Supreme Court affirmed as well. *See* 623 S.W.3d 235. Petitioner's motion for rehearing was denied on May 21, 2021. *See* App. 101a.[9]

[8] Prior to retrial, petitioner filed a motion to dismiss the felony murder count, a motion to suppress DNA evidence, and a motion to suppress Tennessee Rule 404 (b) evidence. 623 S.W.3d at 242. The trial court denied the motion to dismiss and partially denied the other motions. *See id.*

[9] In its first unpublished opinion below, the Tennessee Supreme Court included multiple substantive errors that were not supported by the record. For example, the court stated that witness

Petitioner Michael Rimmer now prays that this Court exercise its discretionary review and grant this petition.

James Darnell "indicated that Defendant 'looks like' the man he let go ahead of him through the night entrance door." Nowhere in the record is there any support that Darnell had ever identified petitioner. If anything, a fair reading of the record demonstrates that Darnell gave identifiers that did not correlate to petitioner's appearance. A similar error was included later in the opinion when the court stated that "[a] witness described seeing someone who fit the Defendant's description at the Memphis Inn with blood on his hands the night the victim disappeared." Again, nothing in the record supports that assertion. These errors were, in part, the basis for petitioner's motion for rehearing. After denying that motion, the Tennessee Supreme Court stated:

> [W]e agree with Appellant Michael Rimmer that the opinion at pages 6, 25, and 37 does not align with the record. Accordingly, the opinion is corrected by withdrawing pages 6, 25, and 37, and substituting in their stead revised pages 6, 25, and 37, attached hereto. The revisions do not change the substantive analysis or the result of the opinion filed on April 16, 2021. Accordingly, the time for filing a petition to rehear does not begin anew.

App. 101a.

REASONS FOR GRANTING THE PETITION

This Case Presents an Opportunity for the Court to Further Elucidate the Contours of the Confrontation Clause When a State Witness is Purportedly Unavailable.

In affirming the convictions below, the Tennessee Supreme Court addressed the State's unavailable witness, James Allard Jr., and his testimony in the most cursory of manners, stating that "[t]he Defendant later confessed to the murder in conversations with a fellow inmate, complete with accurate descriptions of the crime scene." 623 S.W.3d at 260. This observation—which petitioner maintains is not supported by the record—later underpinned that court's determinations that other issues were not meritorious because "the other evidence used at the trial was overwhelming," including the court's death sentence proportionality analysis. *Id.* at 259-260, 269, 287. This purported confession was the only evidence presented to the jury suggesting that petitioner ever made an admission regarding any involvement in the disappearance of Ricci Ellsworth. Plainly, the Tennessee Supreme Court did not properly contend with whether Allard's testimony was properly admitted into evidence because the trial court's finding that the prosecution had "made a reasonable attempt to produce" Allard was clearly erroneous and is not supported by the record on appeal. App. 85a. Because the State did not meet its burden to demonstrate a good-faith effort for the Confrontation Clause's unavailable witness exception, this Court should grant leave and give further guidance on the minimum showing for a good-faith effort in attempting to locate a witness.

As this Court has explained, "[w]here testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. . . . Whatever else the term [testimonial] covers, it applies at a minimum to prior testimony at a . . . former trial[.]" *Crawford*, 541 U.S. at 68; *see* U.S. Const. amend. VI. "[A] witness is not 'unavailable' for purposes of the . . . exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." *Barber* 390 U.S. at 724-725. In *Barber*, this Court determined that the state had not made a good-faith effort to secure the attendance of an incarcerated out-of-state witness because "increased cooperation between the States themselves and between the States and the Federal Government" allowed for securing attendance of such witnesses by legal processes, which the prosecution failed to do. *Id.* at 723-24; *see also Brumley v. Wingard*, 269 F.3d 629, 641 (6th Cir. 2001) (determining that a witness in custody in Arizona was not "'unavailable' in a constitutional sense" for trial in Ohio because both states had "enacted the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, and thus a means existed for obtaining [the] presence [of the witness]"). The burden of establishing a good-faith effort in locating a witness is on the party seeking to admit the hearsay declarant's statement. *See Ohio v. Roberts*, 448 U.S. 56, 74-75 (1980), *abrogated on other grounds by Crawford*, 541 U.S. at 60-62.

In 2016, at a jury-out hearing, the prosecution, in order to demonstrate that Allard was unavailable to testify at the retrial, presented evidence through Tennessee

Bureau of Investigation Special Agent Charles Baker. *See* App. 73a-88a. S.A. Baker testified that he had attempted to locate Allard by conducting searches using computer databases available to him. *See* App. 76a. However, he did not adequately discuss what information, content, or substance these databases utilized in their search algorithms. For instance, in describing a database called CLEAR, S.A. Baker stated, "[i]t will search untold amounts of different databases, whether it be real estate, criminal information, criminal records, [or] civil law records." App. 76a. Strikingly, nothing was offered to the court on whether those "untold amounts of different databases" were limited to the State of Tennessee; encompassed information outside Tennessee; how extensive the records in the databases were; or even whether the databases were updated regularly. On cross-examination, S.A. Baker conceded that he had not attempted to contact any of Allard's family members, he "wasn't looking at [Allard's] criminal background," App. 79a, and he had not checked with the Indiana Department of Correction or any county facilities. *See* App. 79a-80a. Astonishingly, S.A. Baker even admitted that "he was not aware Mr. Allard had been previously incarcerated in Indiana." 623 S.W.3d at 282.

Based on this evidence, defense counsel argued the State had not established that Allard was unavailable because the efforts to locate Allard were insufficient. *See* App. 82a-83a. The trial court disagreed, finding that "the State made a reasonable attempt to produce [Allard]," App. 85a, and it allowed Allard's prior trial testimony to be read to the jury. After this ruling, defense counsel stated, "Mr. Allard has an extensive criminal history. . . . I've got hits on three different counties in Indiana."

App 86a. The State responded that it "ha[d] no objections" to the entry of those prior convictions at petitioner's retrial. App. 87a.

To begin with, the testimony of S.A. Baker is the only evidence in the record for a reviewing court to consider in determining whether the State made a good-faith effort in locating Allard. Although there apparently was an exhibit, designated as "exhibit B," entered at trial that allegedly contained the research S.A. Baker undertook in his attempts to locate Allard, App. 78a-79a, that exhibit was not included in the Shelby County Court's authenticated exhibits for appeal. *See* App. 89a-100a.[10] Thus—based upon the record on appeal—the prosecution, unquestionably, failed to establish that a good-faith effort had been made to secure Allard's appearance for petitioner's retrial because S.A. Baker did not adequately testify as to the content and parameters of the databases and his searches. Nor did the trial court sufficiently discuss its basis for determining that the State had met its burden in its opinion from the bench. In other words, the record does not demonstrate on what basis the trial court made its good-faith effort determination. Therefore, the Tennessee reviewing courts erred in their Confrontation Clause analysis because of the lack of such a basis. The only conclusion from the record is that the trial court's admission of Allard's prior testimony into evidence violated petitioner's Confrontation Clause rights. *See* U.S. Const. amend. VI. This is of particular concern in this capital trial because this testimony was a purported jailhouse confession and, perhaps, the most material piece of evidence.

[10] Nonetheless, current counsel scoured the record for exhibit B, but to no avail.

To be sure, S.A. Baker testified that he checked computer databases available to him, but, again, he did not discuss the content of those databases or the parameters he used in his search for Allard.[11] Moreover, S.A. Baker failed to give any indicia of what data those databases *specifically* contained or searched. S.A. Baker testified that he "wasn't looking at [Allard's] criminal background," App. 79a, and had not checked with the Indiana Department of Correction or any county facilities for Allard. *See* App. 79a-80a. To this last point, commonsense dictates that at a minimum the State should have checked with the Indiana Department of Correction for Allard—where he had been incarcerated during petitioner's first trial—which would have almost certainly provided the most up-to-date location information for Allard (whether in custody or a last known address from parole or probation).

This is not mere conjecture. As previously noted, the parties stipulated to Allard's prior convictions, as recent as October 2010, from Brown County, Indiana. *See* App. 86a-87a. However, in its analysis, the trial court misapprehended this point, stating "[j]ust because [Allard] might have been in [Indiana] 19 years ago does not mean he's still there or still being supervised." App. 86a. Yet, *when* Allard was in custody while in Indiana was not at issue. The appropriate inquiry before the trial court was whether the prosecution conducted a good-faith effort to locate Allard when it did not even try to inquire into likely the best lead on the last known whereabouts

[11] In addition to CLEAR, S.A. Baker identified that he had searched the State Tennessee Justice Portal, another database called NCIC, and Google. *See* App. 76a-77a. Although the Tennessee Supreme Court stated in its opinion that S.A. Baker searched death records, in context, the record demonstrates S.A. Baker utilized Google for such a death records search. *Compare State v. Rimmer*, 623 S.W.3d 235, 282 (2021) *with* App. 77a.

of Allard, the Indiana Department of Correction, a fact known to the State because that was where Allard was incarcerated when called to testify at petitioner's first trial. Petitioner submits that this failure to conduct the most basic of searches cannot be countenanced as a good-faith effort. Furthermore, considering that the alleged confession was the only evidence connecting petitioner to the primary crime scene or to being involved whatsoever, the "lengths" the State went to here, in a capital trial, cannot be said to have been reasonable. *See Roberts*, 448 U.S. at 74, quoting *California v. Green*, 399 U.S. 149, 189 n.22 (1970) (Harlan, J., concurring); *accord Hardy v. Cross*, 565 U.S. 65, 70 (2011) (per curiam) (discussing same in context of AEDPA review). Without more from S.A. Baker, or knowing what substance exhibit B contained, there is not an adequate basis in the record for the trial court's conclusion that the State had, in fact, conducted a good-faith effort.

In addition, it is worth considering the problematic approach the Tennessee Supreme Court and the Court of Criminal Appeals took in addressing the issue of a good-faith effort. Relying on Tennessee case law for guidance, the courts below compared this case to, and distinguished it from, *State v. Armes*, 607 S.W.2d 234 (Tenn. 1980). However, in *Armes*, regarding the issue of the State's good-faith effort, the Tennessee Supreme Court clarified that a "prosecuting attorney's statement to the Court concerning the efforts of the State's investigator to locate the witness"—which was the only offer from the State—"cannot be considered as evidence of proof on the issue of the State's good faith effort." *Id.* at 237. Therefore, because "[t]he State failed to provide *any* independent evidence of an attempt to locate the witness to

prove the witness's unavailability other than a statement by the prosecutor," 623 S.W.3d at 283 (emphasis added), the *Armes* Court determined that the State had failed to establish a good-faith effort in locating a witness. *See* 607 S.W.2d at 237. As should be apparent, *Armes* stands for the proposition that when the State offers *no* independent evidence of an attempt to locate a witness, the State fails to establish a good-faith effort. Because *Armes* offers no guidance on what *minimal* showing is required of independent evidence to establish a good-faith effort, it is inapposite for comparison. Indeed, by juxtaposing this case with *Armes*, the decisions below read as though if the State were to offer *any* independent evidence of investigation, then that would sufficiently establish a good-faith effort. Such a lax analytical framework cannot be reconciled with *Crawford*.

In short, the trial court erred in its determination that the State carried its burden to establish Allard was constitutionally unavailable for petitioner Michael Rimmer's retrial. The result: Allard's prior testimony—again, the only evidence suggesting a confession by petitioner—was read into the record. This is particularly damning because this "confession" was relied upon by the Tennessee Supreme Court in its later determinations regarding other claims that the evidence against petitioner was "overwhelming," including upholding his sentence of death. *See* 623 S.W.3d at 259-260, 269, 287. More so when one considers that this alleged confession described a cause of death unanimously rejected by experts for *both* petitioner and the State, as well as the State's crime scene officer from the Memphis Police. Thus, the Tennessee Supreme Court's statement that petitioner gave, as part of his confession,

"complete [and] accurate descriptions of the crime scene," 623 S.W.3d at 260, is belied by the record.

Because petitioner's rights under the Confrontation Clause were violated by the trial court allowing in Allard's prior testimony, this Court should grant leave and explain that the State's efforts here fell well below the minimum required for a good-faith effort.[12]

Fundamental Fairness Issues Petrified Due Process in this Capital Trial, Rendering It Deadened Beyond Constitutional Promise.

In too many aspects, petitioner's second trial was lacking in fundamental fairness, violating the most basic notions of due process. To start with, perhaps the most material piece of physical evidence—the vehicle petitioner was driving when apprehended—was subject to problematic police procedures and testing before being effectively destroyed. Next, in relation to the *Crawford* issue above, because petitioner's first trial counsel were found ineffective, it strains credulity that the content of Allard's testimony would have remained unaltered at petitioner's second trial, creating due process concerns. Finally, considering the gravity of a capital case, the quality and quantity of evidence admitted at trial—a capital trial where the State failed to locate or produce evidence of the alleged victim's body—in tandem with the issues relating to the vehicle and Allard's testimony, cannot sustain a verdict of guilty

[12] In no way is petitioner asking for a rule requiring a state to send an investigator to *every other* U.S. state and territory to locate a witness. All petitioner prays for is that a state be required to conduct a *basic* inquiry into a witness's last known whereabouts, whether in- or out-of-state. For this reason, the policy rationale offered by the trial court in support of its determination rings hollow. *See* App. 85a-86a; *see also* 623 S.W.3d at 282.

or, at the very least, cannot sustain a punishment of death without depriving petitioner Michael Rimmer of due process.

"The right to a fair trial, guaranteed to state criminal defendants by the Due Process Clause of the Fourteenth Amendment, imposes on States certain duties consistent with their sovereign obligation to ensure 'that justice shall be done' in all criminal prosecutions." *Cone v. Bell*, 556 U.S. 449, 451 (2009), quoting *United States v. Agurs*, 427 U.S. 97, 111 (1976); *see* U.S. Const. amend. XIV. While this Court has recognized that due process is automatically implicated in certain discrete areas of criminal law,[13] it has also observed, without controversy, that "criminal prosecutions must comport with prevailing notions of fundamental fairness" and has "interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). Indeed, this has been deemed an "elementary principle." *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985). As a corollary, this Court has explained that "the Government's 'interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *Turner v. United States*, 137 S. Ct. 1885, 1893, 198 L. Ed. 2d 443 (2017) (discussing due process in the context of *Brady v. Maryland*, 373 U.S. 83 [1963]), quoting *Kyles v. Whitley*, 514 U.S. 419, 439 (1995). That said, ever-present is the "recogni[tion] that the aim of due process 'is not punishment of society

[13] For example, the Court has remarked that "mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process;" that is to say, "a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).

for the misdeeds of the [State] but avoidance of an unfair trial to the accused.'" *Smith v. Phillips*, 455 U.S. 209, 219 (1982), quoting *Brady*, 373 U.S. at 87.

At bottom, the very notion of fairness requires that the most material piece of physical evidence in a capital case be competently tested and preserved until a judgment of conviction is entered or, at the very least, a defendant has an opportunity to confront and examine the evidence. Here, the vehicle was processed by the State, allowing it to collect what it deemed worthy, and then it released the vehicle. Because the vehicle was not preserved to allow petitioner, who would be on trial for his life, to confront and examine the evidence in its original state, there were, unsurprisingly, serious issues with the processing and analysis of the vehicle. For example, at petitioner's retrial, Marilyn Miller, Ph.D. (an expert on crime scene investigation and reconstruction, forensic science and serology, and blood spatter pattern analysis), testified regarding how the investigation procedures here faltered. She noted that she was "never given the opportunity to see an unobstructed photograph of the back seat of the vehicle taken while the bloodstains were fresh." 623 S.W.3d at 250. This would have aided in the analysis regarding interpreting any bloodstain evidence from the backseat. *See id.* at 250-251. In addition, Dr. Miller opined that authorities did not adequately test the trunk of the vehicle because only select items from the trunk were processed for blood and not its entire contents. *See id.* at 251. And because the liner inside the lid of the trunk had been removed, it could not be examined at all. *See id.* Petitioner's other expert, William Joseph Watson, Ph.D. (an expert on DNA analysis and serology), noted that of the items collected and tested for blood by the State, they

had resulted in a positive finding for blood when tested in anticipation of petitioner's first trial; the results were negative when tested again approaching petitioner's second trial. *See id.* at 251-252. Dr. Watson opined that "the forensic examiner should have looked into the reason for the differing results." *Id.* at 252.

While this Court has repeatedly acknowledged that "when the State suppresses or fails to disclose material exculpatory evidence, the good or bad faith of the prosecution is irrelevant: a due process violation occurs whenever such evidence is withheld," *Illinois v. Fisher*, 540 U.S. 544, 547 (2004) (per curiam), citing *Brady*, 373 U.S. at 83, a majority of this Court has also held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988). However, distinguished legal minds have also offered the viewpoint that "'there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair.'" *Fisher*, 540 U.S. at 549 (Stevens, J., concurring in judgment), quoting *Youngblood*, 488 U.S. at 61.

Though acknowledging the holding in *Youngblood*, petitioner respectfully urges the Court to adopt the view of Justice Stevens' concurrence and recognize that the evidence in question here was critical to petitioner's defense. In other words, petitioner's trial was rendered fundamentally unfair because the State failed to preserve the most material piece of physical evidence until petitioner had a chance to

examine it in its totality. Additionally, petitioner respectfully advances that with *Youngblood*'s holding, states are potentially incentivized to, or at the very least not dissuaded from, gathering and preserving only evidence it sees fit in securing convictions before destroying it completely. It can hardly be seen as justice when, as a blanket rule, destruction of material (and exculpatory) evidence is countenanced. *See Turner*, 137 S. Ct. at 1893 ("The Government's interest in a criminal prosecution is not that it shall win a case, but that justice shall be done.") (internal quotation omitted). Yet, petitioner agrees that not every case should result in a mistrial; rather, due process demands that a more holistic method should be employed, considering the totality of circumstances in each case.

Regarding the State's view, accepted by the Tennessee Supreme Court, that it is an impossible burden to require police departments to retain vehicles pending a capital trial (or at least until a defendant has the opportunity to confront and examine it), this assessment is conclusory. For instance, of the approximately 18 capital trials currently active in Tennessee, only four are in Shelby County. Thus, even if all four cases involved a vehicle that is objectively material evidence, it strains the imagination that the Memphis Police Department would not be able to securely store those four vehicles. In any event, even if such a view were true, due process demands more than mere argument by the State or speculation by a court in order for a court to accept such a premise—namely, the State should be required to make a showing of the impossibility or impracticability of storing such evidence. No such showing was offered here.

This lack of due process regarding the vehicle is compounded with the almost certainty that had the State located Allard to testify at petitioner's second trial, both the direct and cross-examination would have been different. That is to say, if the State had located Allard, petitioner's second trial counsel would have had the opportunity to effectively object during direct and effectively cross-examine Allard. This is so because the state post-conviction court found petitioner's initial trial counsel to be ineffective. Consequently, it is questionable, at best, whether Allard was tested by constitutionally adequate cross-examination. *See Crawford*, 541 U.S. at 61. Because this was the *only* evidence demonstrating a purported confession, the State's failure to make a good-faith effort in locating Allard (and the trial court's admission of the testimony) implicate not only the Confrontation Clause but also fundamental due process concerns.

Given the doubtful nature of the vehicle and the "jailhouse confession" from Allard, the remaining evidence offered against petitioner cannot support a judgment of first-degree murder nor a punishment of death. In considering a legal sufficiency argument, "a reviewing court makes a limited inquiry tailored to ensure that a defendant receives the minimum that due process requires: a 'meaningful opportunity to defend' against the charge against him and a jury finding of guilt 'beyond a reasonable doubt.'" *Musacchio v. United States*, 577 U.S. 237, 243 (2016), quoting *Jackson v. Virginia*, 443 U.S. 307, 314-315 (1979). Courts consider only "the 'legal' question 'whether, after viewing the evidence in the light most favorable to the

prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id.*, quoting *Jackson*, 443 U.S. at 319.

Here, because the admission into evidence of the vehicle and purported confession did not meet basic due process notions of fairness, these errors tainted evidence that the jury considered—leading to a breakdown of a fair trial. These glaring issues, in a case where the alleged victim was never located, prevented petitioner from having any meaningful opportunity to defend himself because the deck was stacked.

In sum, these due process issues, considered in totality, undermine confidence in petitioner's judgments of conviction and sentence of death. This Court should grant leave not only to correct the errors below, but it should also further refine due process requirements, particularly in the realm of capital cases.

Finally, Double Jeopardy Principles Should Bar the Retrial of a Defendant Where the State Intentionally Engaged in Prosecutorial Misconduct that Precluded the Defendant from Mounting a Meaningful Defense.

The Double Jeopardy Clause provides that no person may be tried more than once "for the same offence"—a guarantee that "recognizes the vast power of the sovereign, the ordeal of a criminal trial, and the injustice our criminal justice system would invite if prosecutors could treat trials as dress rehearsals until they secure the convictions they seek." *Currier v. Virginia*, 138 S. Ct. 2144, 2149, 201 L. Ed. 2d 650 (2018); *see* U.S. Const. amend. V. However, this guarantee does not mean that "the State will vindicate its societal interest in the enforcement of the criminal laws in one proceeding." *Oregon v. Kennedy*, 456 U.S. 667, 672 (1982). That said, this Court has

recognized that "serious infractions on the part of the prosecutor may provoke a motion for mistrial on the part of the defendant, and may in the view of the trial court warrant the granting of" relief on double jeopardy grounds. *Id.* at 675. In that regard, a defendant must show "intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause." *Id.* at 676. Underpinning the *Kennedy* Court's determination is a criminal defendant's "valued right to complete his trial before the first jury" empaneled to decide the case. *Id*. at 673.

Here, petitioner's right to have a fair determination by his first jury was impeded by gross State misconduct. To wit, an eyewitness at the crime scene observed two men with bloodstained hands. One of these men was passing money from the inside of the clerk's office, through the slot in a protective window, out to the other man. In a statement provided to law enforcement, the witness immediately identified Billy Wayne Voyles as one of the men he had seen. And when shown a photo lineup that included petitioner, the witness did not identify petitioner as one of the men he had seen at the crime scene. The State knew of this witness's positive identification of another individual as a perpetrator of the crime and his inability to identify petitioner as the other individual involved. Despite this knowledge and well-established precedent under *Brady*, the State intentionally withheld this information, *see* App. 213a, lied about possessing this information to the court, *see*

App. 213a, and secured a conviction against petitioner with the first jury under a theory that petitioner acted alone. *See* App. 213a-215a.[14]

Although this eyewitness testified at petitioner's second trial, the passage of nearly twenty years diminished petitioner's ability to defend the case. As discussed above, a purported confession from a jailhouse informant was read into the record

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[14] Based in part on these findings of the post-conviction court, the prosecutor at petitioner's first trial, Thomas D. Henderson, was, upon a guilty plea, publicly censured by the Tennessee Supreme Court. *See In re: Thomas D. Henderson, BPR #8221*, No. M2013-02791-SC-BAR-BP, BOPR No. 2013-2234-9-WM (Tenn. Dec. 23, 2013), available at https://docs.tbpr.org/henderson-2234-bopr635248788162280441.pdf.

This, of course, is not the first time this Court has been presented with the exact same type of prosecutorial misconduct from Shelby County, Tennessee. *See Cone v. Bell*, 556 U.S. 449 (2009); *see also* Hon. Gilbert Stroud Merritt Jr., *Prosecutorial Error in Death Penalty Cases*, 76 TENN. L. REV. 677, 680-681 (2009). It, therefore, should come as no surprise that prosecutorial misconduct in Shelby County, Tennessee, has plagued several capital cases throughout the past 50 years. *See e.g., Thomas v. Westbrooks*, 849 F.3d 659, 666 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 390, 199 L. Ed. 2d 307 (2017); *State v. Jackson*, 444 S.W.3d 554, 588-589, 592-593 (Tenn. 2014); *Sample v. State*, 82 S.W.3d 267, 272-276 (Tenn. 2002); *Johnson v. State*, 38 S.W.3d 52, 53, 58-59 (Tenn. 2001); *State v. Chalmers*, 28 S.W.3d 913, 918 (Tenn. 2000); *State v. Nesbit*, 978 S.W.2d 872, 893-894 (Tenn. 1998); *State v. Payne*, 791 S.W.2d 10, 20 (Tenn. 1990); *State v. Baxter*, No. W2016-01088-CCA-R3-CD, 2018 WL 3860079, at *14-15 (Tenn. Crim. App. Aug. 10, 2018); *State v. Talley*, No. W2003-02237-CCA-R3-CD, 2006 WL 2947435, at *18 (Tenn. Crim. App. Oct. 16, 2006); *State v. Bond*, No. W2005-01392-CCA-R3-CD, 2006 WL 2689688, at *9 (Tenn. Crim. App. Sept. 20, 2006); *Freshwater v. State*, 160 S.W.3d 548, 550, 556 (Tenn. Crim. App. 2004), *abrogated on other grounds by Nunley v. State*, 552 S.W.3d 800 (Tenn. 2018); *State v. Roe*, No. 02C01-9702-CR-00054, 1998 WL 7107, at *8-*9 (Tenn. Crim. App. Jan. 12, 1998); *see also State v. Hawkins*, 519 S.W.3d 1, 50 (Tenn. 2017); *State v. Cribbs*, 967 S.W.2d 773, 786 (Tenn. 1998); Adam Tamburin, *Judge Approves Deal to Remove Tennessee Inmate from Death Row Months Before Execution Date*, THE TENNESSEAN, (Aug. 30, 2019, 9:33 AM), https://www.tennessean.com/story/news/2019/08/30/tennessee-death-row-inmate-gets-death-sentence-vacated/2136943001/.

Despite findings of prosecutorial misconduct in both state and federal courts, including the Tennessee Supreme Court, the Shelby County District Attorney has not yet taken an overt and proactive role in eliminating such misconduct. *See* Toby Sells, *Public Rebuke*, THE MEMPHIS FLYER, (Jan. 16, 2014, 4:00 AM), https://www.memphisflyer.com/public-rebuke/ (noting the refusal to discipline Attorney Henderson by the Shelby County District Attorney for his misconduct at petitioner's first trial); *see also* Katie Fretland, *Shelby County DA Amy Weirich Ranked Highest in Tennessee for Misconduct*, THE COMMERCIAL APPEAL, (July 13, 2017, 4:31 PM), https://www.commercialappeal.com/story/news/courts/2017/07/13/ethics-harvard-law-school-tennessee-prosecutor-amy-weirich/475649001/. With such documented misconduct over the years in the Shelby County prosecutor's office, one cannot help but begin to wonder whether that office "do[es] the right thing every day for the right reason." Shelby County District Attorney, https://www.scdag.com/ (last visited Oct. 18, 2021).

Petitioner offers these points only to help give this Court context into the prosecutor's behavior at petitioner's first trial—which is relevant to his double jeopardy claim.

because of his purported unavailability at the retrial. And again, the only opportunity for cross-examination of this witness came from an attorney who had been found constitutionally ineffective in their representation of petitioner at his first trial. Additionally, the vehicle containing incriminating DNA evidence had long since been released, precluding the defense from mounting any sort of reasonable independent challenge to the State's scientific evidence. Indeed, the lining of the trunk of the vehicle, where the victim's body was allegedly placed after a confrontation at the bloody crime scene, had been removed and was lost. Hamstrung, petitioner's successor trial counsel could not provide meaningful adversarial testing of the State's most incriminating evidence. In a case where the State has never been able to produce a body, the reliability of this conviction and death sentence is, at best, questionable.

Relatedly, the State cannot be permitted to reap the benefit of its misconduct by being permitted to reprosecute petitioner after a full and fair opportunity to do so. While the Tennessee Supreme Court and the Court of Criminal Appeals minimized the prosecutorial misconduct at petitioner's first trial, the post-conviction court did not. That court discussed that the prosecutor repeatedly, through written and oral representations, "purposefully misled" initial and resentencing counsels about a crucial eyewitness and "greatly undermined counsel's investigation." App. 213a. In particular, the court discussed that the prosecutor had made statements that were "blatantly false, inappropriate and ethically questionable" and that the "conduct was purposeful." App. 213a-214a. Even though the post-conviction court ultimately granted relief on an ineffective assistance of counsel claim—reading between the

lines—it is apparent that the prosecutorial misconduct had metastasized to "render[] the verdict . . . unreliable." App. 245a. Therefore, it is demonstrably clear that the prosecutor at petitioner's first trial would have stopped at nothing to obtain a verdict of guilty.

In *Kennedy*, this Court discussed double jeopardy implications where a defendant's request for a mistrial was goaded by the prosecutor's misconduct. *See* 456 U.S. at 676. The same principles underpinning *Kennedy* sensibly extend to petitioner's argument here: that the magnitude of the intentional prosecutorial misconduct in this case was of such a degree to implicate double jeopardy concerns and barred retrial. Applied here, because the prosecutor knowingly engaged in unconstitutional misconduct to secure a verdict of guilty and a sentence of death, it was foreseeable that at some level of review a court would, as the post-conviction court did here, recognize such defect and order a new trial. As a result, the first prosecutor receives a notch in their belt while knowing of the likelihood that at some later point, if the misconduct were caught, a defendant would be again subjected to another trial. Here, because the prosecution had a full and fair opportunity to prosecute petitioner and deliberately manipulated the judicial process, the Double Jeopardy Clause should have protected petitioner from the "embarrassment, expense and ordeal [of retrial] and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187-188 (1957). This is particularly so given that this is a capital case. *See Eddings*, 455 U.S. at 118 (1982)

(O'Connor, J., concurring) ("[T]his Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake.").

As the Tennessee Supreme Court observed, petitioner's double jeopardy argument, as relevant here, is unpreserved. Even so, that court conducted plain error review and denied relief. *See* 623 S.W.3d at 255.[15] Nonetheless, petitioner contends that even under plain error review, reversal is warranted.[16]

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[15] In order to prevail under plain error review in Tennessee, a party must demonstrate that "(1) the record . . . clearly establish[ed] what occurred in the trial court; (2) a clear and unequivocal rule of law must have been breached; (3) a substantial right of the accused must have been violated; (4) the accused must not have waived the issue for tactical reasons; and (5) consideration of the error is necessary to achieve substantial justice." 623 S.W.3d at 255-256; *see also* Tenn. R. App. P. 36 (b).

[16] Regarding reviewability of this issue, while "not entirely straightforward," this Court "[has] treated the so-called 'not pressed or passed upon below' rule as merely a prudential restriction." *Illinois v. Gates*, 462 U.S. 213, 219-220 (1983). For this reason, petitioner offers that this Court may entertain this argument. *See id.*; *Eddings v. Oklahoma*, 455 U.S. 104, 113 n.9 (1982); *Wood v. Georgia*, 450 U.S. 261, 265 n.5 (1981); *Beck v. Alabama*, 447 U.S. 625, 630 n.6 (1980); *Vachon v. New Hampshire*, 414 U.S. 478, 479-480 (1974) (per curiam); *see also Webb v. Webb*, 451 U.S. 493, 502 (1981) (Powell and Brennan, JJ., concurring); *cf.* 28 U.S.C. § 1257.

Relatedly, this Court may consider the substantive double jeopardy claim because, although the Tennessee Supreme Court cited its own case law in its disposal of the substantive claim, that same court has also recognized that "[t]he federal and [Tennessee] state prohibitions against double jeopardy have been construed as providing the same protections." 623 S.W.3d at 253; *see Illinois v. Fisher*, 540 U.S. 544, 547 n (2004) (per curiam). Neither the cited case law in its underlying opinion, *see State v. Harbison*, 539 S.W.3d 149, 164 (Tenn. 2018), nor the precedents upon which that case relies contemplate that a defendant is required to distinguish a double jeopardy claim based on state and federal constitutional grounds. Thus, the substance of the double jeopardy claim here cannot be disposed of on an independent state ground.

Last, as this Court has set out, while conflated at times for convenience, forfeiture and waiver of a right or argument are separate and distinct occurrences. *See United States v. Olano*, 507 U.S. 725, 733 (1993) ("Waiver is different from forfeiture."). Because petitioner did not intentionally relinquish or abandon this double jeopardy claim, *see Johnson v. Zerbst*, 304 U.S. 458, 463 (1938), petitioner did not waive this argument. Rather, the argument was forfeited, *contra* 623 S.W.3d at 255, which allows this Court to conduct a plain error review.

With a nuanced evolution, *see United States v. Dominguez Benitez*, 542 U.S. 74, 86 (2004) (Scalia, J., concurring in judgment), this Court has settled on a four-pronged analysis for plain error review, with the first three prongs being "threshold requirements." *Greer v. United States*, 141 S. Ct. 2090, 2096, 210 L. Ed. 2d 121 (2021). First, there must be an error. *See id*. Second, the error must be plain. *See id*. Third, the error must affect "substantial rights," which this Court has stated "generally means that there must be 'a reasonable probability that, but for the error, the outcome of the proceeding would have been different.'" *Id.*, quoting *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1904-1905, 201 L. Ed. 2d 376 (2018). If those threshold requirements are met, "an appellate court may grant relief if it concludes that the error had a serious effect on 'the fairness, integrity or public reputation of judicial proceedings.'" *Id*. at 2096-2097, quoting *Rosales-Mireles*, 138 S. Ct. at 1904-1905. The defendant seeking relief has "the burden of establishing entitlement to relief for plain error." *Dominguez Benitez*, 542 U.S. at 82. While "difficult," *Puckett v. United States*, 556 U.S. 129, 135 (2009), relief on plain error review is not insurmountable. *See Rosales-Mireles*, 138 S. Ct. at 1903.

Beginning with the third prong, had petitioner's counsel raised this issue, and the trial court ruled in his favor, the proceeding would assuredly have been different—truly, nonexistent—because the State would have been barred from reprosecuting petitioner through an entire second trial. Thus, petitioner's substantial rights are sufficiently affected. Additionally, the failure of counsel to raise the issue was error, and plain error, because, as mentioned above, the logic of *Kennedy*

manifestly extends to petitioner's double jeopardy argument. With these threshold prongs met, this Court need reference only to the findings from the post-conviction court in order to determine that the fourth prong is also met here. Candidly, not much occurred at petitioner's first trial, on either side of the aisle, that comported with fundamental notions of fairness and justice. Allowing the State to have a second bite at the apple, in light of its pervasive and purposeful misconduct, seriously puts into question not only the "fairness, integrity, or public reputation of judicial proceedings," *Rosales-Mireles*, 138 S. Ct. at 1908, but also of the judiciary as an institution.

Therefore, this Court should grant leave and announce that the Double Jeopardy Clause does not tolerate such a misguided prosecution and bars reprosecution under the circumstances of this case.

CONCLUSION

For the foregoing reasons, petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

/s/ Debbie Drew

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