

No. W2010-01800-CCA- R3-CO

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

ERSKINE LEROY JOHNSON

Appellant

v.

STATE OF TENNESSEE

Appellee

BRIEF OF *AMICUS CURIAE*
THE INNOCENCE NETWORK

William D. Massey (B.P.R. 9568)
Lorna S. McClusky (B.P.R. 16803)
MASSEY MCCLUSKY & SWANSON
3074 East Road
Memphis, TN 38128
(901) 201-6747

Keith A. Findley
President
INNOCENCE NETWORK
Wisconsin Innocence Project
Frank J. Remington Center
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706
(608) 262-4763

Thomas H. Golden
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, NY 10019
(212) 728-8000

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INTEREST OF *AMICUS CURIAE*

The Innocence Network is an association of organizations dedicated to providing pro bono legal and investigative services to prisoners for whom newly-discovered post-conviction evidence can provide conclusive proof of innocence. The Network currently has sixty-three members representing hundreds of prisoners with claims of innocence in all fifty of the United States, the District of Columbia, as well as Australia, Canada, the United Kingdom and New Zealand.¹ The Innocence Network and its members are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system has convicted innocent persons, the Network advocates study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that future wrongful convictions are prevented.

¹ The member organizations include the Alaska Innocence Project, Association in Defence of the Wrongly Convicted (Canada), California Innocence Project, Center on Wrongful Convictions, Connecticut Innocence Project, Downstate Illinois Innocence Project, Duke Center for Criminal Justice and Professional Responsibility, The Exoneration Initiative, Georgia Innocence Project, Hawaii Innocence Project, Idaho Innocence Project, Innocence Network UK, Innocence Project, Innocence Project Arkansas, Innocence Project at UVA School of Law, Innocence Project New Orleans, Innocence Project New Zealand, Innocence Project Northwest Clinic, Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of South Dakota, Justice Project, Inc., Kentucky Innocence Project, Maryland Innocence Project, Medill Innocence Project, Michigan Innocence Clinic, Mid-Atlantic Innocence Project, Midwestern Innocence Project, Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project, Northern Arizona Justice Project, Northern California Innocence Project, Office of the Public Defender (State of Delaware), Office of the Ohio Public Defender, Wrongful Conviction Project, Ohio Innocence Project, Osgoode Hall Innocence Project (Canada), Pace Post-Conviction Project, Palmetto Innocence Project, Pennsylvania Innocence Project, Reinvestigation Project (Office of the Appellate Defender), Rocky Mountain Innocence Center, Sellenger Centre Criminal Justice Review Project (Australia), Texas Innocence Network, Thomas M. Cooley Law School Innocence Project, Thurgood Marshall School of Law Innocence Project, University of British Columbia Law Innocence Project (Canada), Wake Forest University Law School Innocence and Justice Clinic, Wesleyan Innocence Project, Wisconsin Innocence Project, and Wrongful Conviction Clinic.

Given the Innocence Network's mission and work in correcting and preventing wrongful convictions, it has an interest in this case because of the numerous procedural deficiencies that have come to light over the years -- including wrongly suppressed exculpatory evidence, police and prosecutorial misconduct, and racial discrimination in jury selection, as well as powerful newly-discovered evidence -- all of which call into question the reliability of the Appellant's conviction. The Innocence Network's experience with these procedural deficiencies and how they negatively impact the search for truth in our criminal justice system have shown a holistic review of newly-discovered evidence in conjunction with other post-conviction evidence is necessary to determine whether one has been wrongfully convicted. This forms the basis for the Network's *amicus* brief filed in support of Appellant Erskine Leroy Johnson.

STATEMENT OF THE CASE

On the morning of October 2, 1983, during an armed robbery of a Food Rite grocery store in Memphis, Tennessee, Joe Belenchia, the owner of the store, was fatally shot. Erskine Leroy Johnson, an African-American man, was charged with the robbery and murder of Belenchia, a white man, and stood trial by an all-white jury.

At trial, the State heavily relied on several pieces of testimony: Tommy Lee Perkins made a pre-trial identification from a photo display and in-court identification of Johnson; Elizabeth Starks testified that on the morning before the robbery and murder, Johnson left her Memphis home with another man and Starks's boyfriend, Dennis Williams, to go to the Food Rite; Dennis Williams corroborated Starks's story; and Beverly Batts, Johnson's former girlfriend, testified that Johnson admitted to the murder and robbery months later. In addition, a palm print lifted from the top of the getaway vehicle, a burgundy station-wagon stolen from a Hertz car rental at the St. Louis airport and driven to Memphis, supposedly matched Johnson's. Despite testimony from several alibi witnesses

placing Johnson in St. Louis at the time of the crime, Johnson was convicted of felony murder and sentenced to death by electrocution on December 7, 1985.

In 1996, Johnson filed an amended petition for post-conviction relief based on the State's failure to disclose exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and based on the State's use of peremptory strikes in a racially-biased manner, removing African-American jurors otherwise eligible to serve on the panel, in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). After obtaining access to the prosecution's case files, Johnson discovered that the State wrongfully withheld police reports that implicated Michael Brown, Charles Keller and Eric Brown -- members of the so-called "Brown Gang" -- to the Belenchia robbery and murder. The evidence tied the Brown Gang to the getaway car and revealed that two witnesses independently identified Michael Brown as the shooter from a stack of photos that included a picture of Johnson. There is no evidence that Johnson was affiliated with the Brown Gang or that he knew its members. In addition, the suppressed evidence revealed that Starks was unable to positively identify him as one of the men who came to her home in her initial statement to the police, and none of his fingerprints matched any of those lifted from the getaway car.

On August 12, 1999, the post-conviction court determined that it would not consider Johnson's *Batson* claim because it was not challenged at trial.² With regard to his *Brady* claim, the

² During voir dire, the prosecution used six peremptory strikes to excuse eligible African-American jurors from the jury; none was used to excuse any prospective white jurors. Race was the only basis for this exclusion. By using its peremptory strikes in a racially-charged manner, the prosecution successfully obtained an all-white jury to try Johnson. Johnson objected to the racial composition of his jury at trial, but the trial court refused to put the racial composition of the prospective jurors and alternates on the record. And because Johnson's case was tried before *Batson v. Kentucky*, 476 U.S.79 (1986), the prosecution was not required to show, nor is there any evidence on the record of, a race-neutral basis for using the peremptory strikes to remove prospective African-American jurors from serving on the panel.

court found that, even though the wrongfully withheld evidence was exculpatory, a new trial was not warranted, because it was not sufficiently material to undermine confidence in the verdict in light of the circumstantial evidence -- testimony from Tommy Perkins, Elizabeth Starks and Beverly Batts, as well as the palm print -- against Johnson. *Johnson v. State*, No. 02C01-9707-CR-00292, 1999 WL 608861, at *5 (Tenn. Crim. App. Aug. 12, 1999). However, the post-conviction court did remand for a new sentencing hearing, and on remand, the State did not seek the death penalty. Johnson was re-sentenced to life in prison on November 15, 2004.

On April 22, 2005, Johnson filed a petition for writ of error coram nobis based on newly-discovered evidence. In June of 2004, while preparing for his re-sentencing hearing, Johnson learned that Elizabeth Starks had a close connection to the Brown Gang, which provided a motive for her to divert attention away from the Brown Gang and to incriminate Johnson, and established another connection between the Brown Gang and the crime. Later, Dennis Williams recanted his testimony at trial and averred he never met Johnson and only identified him to protect his then girlfriend Elizabeth Starks and in response to police pressure. Tommy Perkins revealed that the police showed him several pictures of the man they said shot Belenchia, all of which were of Johnson, and that the prosecution approached him just before he testified and encouraged him to identify Johnson at trial, even if he “looked different” from the person Perkins saw commit the crime.

A hearing on the petition took place on March 22, 2007. Subsequently, the coram nobis court denied relief, refusing to consider the evidence of the connection between Elizabeth Starks and the Brown Gang because the court believed Johnson should have discovered this evidence earlier, and finding that Johnson failed to show that the other newly-discovered evidence “would have” resulted in a different verdict. *Johnson v. State*, No. P-29609, slip op. (Tenn. Crim. Ct. May 31, 2007). Johnson appealed, and on September 30, 2009, this Court ruled that the connection

between Starks and the Brown Gang must be considered, and also instructed that the correct standard is whether the newly-discovered evidence “may have,” not “would have,” resulted in a different verdict and, accordingly, remanded back to the coram nobis court. *Johnson v. State*, No. W2007-01546-CCA-R3-CO, slip op. at 10 (Tenn. Crim. App. Sept. 30, 2009). On remand, the coram nobis court considered each piece of newly-discovered evidence in isolation and found that Johnson failed to establish that the evidence “may have” led to a different result at trial. *Johnson v. State*, No. P-29609, slip op. at 11 (Tenn. Crim. Ct. Aug. 11, 2010). This appeal followed.

ARGUMENT

I. This Matter Involves Procedural Deficiencies that are Hallmarks of Wrongfully Convicted Defendants

Procedural deficiencies prior to and at trial are an all-too-common occurrence in the modern American court system. As an organization committed to reforming our criminal justice system to prevent wrongful convictions, the Innocence Network seeks to find and correct the particular deficiencies that most often lead to such convictions. As such, the Innocence Network is familiar with the many permutations such deficiencies may take. In some instances, new evidence is discovered subsequent to trial and, because the jury was unable to consider such evidence, a new trial is required. There may also be cases in which a prosecutor wrongfully withholds exculpatory evidence from the defense, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). At other times, the government may violate a defendant’s due process rights by using racial considerations to strike potential jurors, in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). Still other instances involve misconduct by the police or the prosecutors, outside of *Brady* or *Batson*, in the handling of witnesses or presentation of evidence that warrants a reversal of a conviction.

The present case has the distinction of involving not one, but all four of these categories of serious procedural issues. Here, the jury was drawn from a potentially tainted jury pool

and, because of improper conduct by both the police and the prosecutor, that jury did not have the opportunity to hear vital information that pointed away from Johnson and toward other persons as being guilty of the crime. More importantly, new evidence now shows crucial trial witnesses recanting their testimony and demonstrates that the prosecution improperly pressured and coached witnesses to testify against Johnson. The combination of this newly-discovered evidence and the procedural deficiencies (stemming from the failure to turn over *Brady* evidence and the exclusion of African-Americans from the jury) prevented Johnson from having an untainted jury hear all of the evidence, particularly that evidence consistent with his innocence, and thus seriously undermined confidence in the verdict.

It is a claim of newly-discovered evidence that is the subject of Johnson's coram nobis petition. As detailed in his own appellate brief, Johnson presented three major points of newly-discovered evidence in that petition. First, through affidavits and testimony during his coram nobis hearing, Johnson showed that the person who was the most significant trial witness for the prosecution – Elizabeth Starks – had a previously-undisclosed relationship with a member of the Brown Gang. That fact is highly relevant because it corroborates other evidence implicating members of the Brown Gang in the murder and robbery for which Johnson was convicted. Second, an affidavit by another key prosecution witness, Dennis Williams, provided a complete recantation of his prior testimony in which he had corroborated the testimony of Starks and provided an independent identification of Johnson. Williams's affidavit – which he has no motive to fabricate -- explicitly admitted that he lied in making his prior statements, which falsely implicated Johnson, in order to protect Starks. Third, an affidavit by Tommy Perkins, the sole trial witness who identified Johnson as the shooter, disclosed that prosecutors had told him to identify Johnson even if he looked different from the man Perkins had seen at the crime scene.

Closely related to, and critical for understanding the full impact of, this newly-discovered evidence is evidence that tended to exculpate Johnson, which this Court has already held was wrongfully withheld by the prosecution under *Brady v. Maryland*. See *Johnson v. State*, No. 02C01-9707-CR-00292, 1999 WL 608861, at *5 (Tenn. Crim. App. Aug. 12, 1999). Specifically, suppressed police reports showed that two separate witnesses identified members of the Brown Gang as connected to the murder and robbery, rather than Johnson. One witness to the shooting picked Michael Brown out of a line-up, while a second witness, who had seen individuals switching license plates on the vehicle later identified as the getaway car, identified Michael Brown and his cousin Charles Keller as two of the participants involved.

Suppressed police reports also linked the Brown Gang to the getaway car, which had been stolen from a car rental at the St. Louis airport. Michael Brown, Charles Keller and Michael's brother, Eric Brown, were three out of four names on a list identified as persons suspected of stealing cars from the St. Louis airport. Another car stolen from the same car rental was found outside the home of Eric Brown, and a witness reported that Brown had stolen it, and he stole other cars too. Another witness reported that he had seen the getaway car outside of Eric Brown's house and another stated that both Eric and Michael Brown stole cars from St. Louis. The prosecution compounded the *Brady* violation by withholding physical evidence, including a fingerprint inventory that did not report any print being lifted from the top of the getaway car and a report that Johnson's prints did not match the prints lifted from the getaway car.

In addition to the newly-discovered evidence and the *Brady* claim, Johnson's case also involved an allegation in his post-conviction petition that the prosecution had violated *Batson v. Kentucky*, 476 U.S. 79 (1986). In his 1985 trial, the prosecutor used six of its peremptory strikes against African-Americans on the petit jury, while striking no white jurors, in a successful effort to

seat an all-white jury in a case in which an African-American man was tried for the murder of a white man. Johnson's attorney objected to the racial composition of the jury. The trial court denied the objection, refusing even to put the racial composition of potential jurors on the record. This Court concluded that it could not consider the *Batson* claim on the merits, holding that Johnson's trial counsel -- who lodged his objection to the racial composition of the jury prior to the seminal holding in *Batson* -- failed to expressly challenge the prosecution's use of its peremptory challenges at trial. *Johnson v. State*, No. 02C01-9707-CR-00292, 1999 WL 608861, at *13-14 (Tenn. Crim. App. Aug. 12, 1999).

Finally, there is evidence of various instances of misconduct by the police and prosecutors beyond withholding exculpatory evidence and the use of race-based considerations in jury selection. During closing arguments at trial, in an effort to convince the jury to convict Johnson and sentence him to death, the prosecutor improperly vouched for Beverly Batts's credibility -- "I was impressed with the testimony of Beverly Batts... I don't believe [she would testify falsely]. I don't believe that for a moment. . . I think she's telling the truth" -- and stated his personal opinion that "if I thought it would honestly do Erskine Johnson any good to sentence him to life in our penitentiary, if that would habilitate him, I would tell you to do that...[b]ut I don't think that's the case here." T. 10 at 1428:16 – 1429:21; Amended Petition for Post-Conviction Relief at 7, *Johnson v. State*, (No. P-9404). Further, the affidavit of Dennis Williams indicates that in giving his statement to the police, Williams felt pressured by the police to wrongly identify Johnson because they wanted his statement to match up with Starks, and the police threatened to take away the immunity that his counsel had negotiated. The affidavit of Tommy Lee Perkins details a highly questionable tactic used by the police interrogating him, where, rather than showing him an array of photos of different individuals, the police showed him several photos of Johnson and suggested that

Johnson was responsible for the murder. The Perkins affidavit also details a questionable statement made to him by the prosecutor in which he was encouraged to identify Johnson at trial even if Johnson looked different from the man that Perkins remembered seeing commit the crime.

The negative implications of procedural deficiencies prior to and at trial, and their tendency to lead to wrongful convictions, are well-documented. On a nationwide level, prosecutorial misconduct, including *Brady* and *Batson* violations, commonly leads courts to dismiss charges, reverse convictions and/or reduce sentences.³ Further, the recent introduction of DNA evidence, which has been used to prove actual innocence in certain types of cases, has shown that in many instances in which procedural deficiencies are alleged, defendants are later determined to be innocent of the crimes for which they were charged.⁴

The collective impact of the procedural deficiencies in this case should not be ignored by this Court when considering whether the lower court properly evaluated whether the newly-discovered evidence introduced by Johnson in his coram nobis petition may have resulted in a different judgment had it been presented at trial.

³ Steve Weinberg, Center for Public Integrity, *Breaking the Rules: Who Suffers When a Prosecutor is Cited for Misconduct?* (2003). In a study of 11,452 criminal appeals from 1970 to 2002, CPI found that in at least 2,012 cases, prosecutorial misconduct was a factor when dismissing charges, reversing convictions or reducing sentences; see *United States v. Lyons*, No. 6:01-cr-134-Orl-31DAB, 2010 WL 2871107, at *2 (M.D. Fla. July 20, 2010) (failing to disclose state witness, who claimed he purchased drugs from defendant every two weeks for three years, could not identify defendant at lineup or that jailhouse snitches received reductions in sentences in exchange for testimony against defendant amounted to “serious” errors caused government to concede defendant was actually innocent of drug trafficking charges three years after defendant was convicted of such charges by the jury).

⁴ Innocence Project, *Understand the Causes: Forensic Science Misconduct – Government Misconduct* (2010) (study finding that police misconduct was a factor in 37 of 74 DNA exoneration cases and prosecutorial misconduct was a factor in 33 of the 74 DNA exoneration cases); Emily M. West, Innocence Project, *Court Findings of Prosecutorial Misconduct Claims in Post-Conviction Appeals and Civil Suits Among the First 255 DNA Exoneration Cases* (2010) (study of 65 DNA exoneration, finding that of 65 cases, 31 (48%) resulted in court findings of error with 18% of findings leading to reversals).

II. The Coram Nobis Court Did Not Properly Consider the Newly-Discovered Evidence.

In 2009, this Court held that the trial court considering Johnson's first coram nobis petition had used the wrong standard in considering whether to grant the requested relief. Consequently, it remanded the case to the lower court to determine, as provided for by statute and reaffirmed by the Tennessee Supreme Court in *State v. Vasques*, 221 S.W.3d 514 (Tenn. 2007), whether the newly-discovered evidence "may have resulted in a different judgment." On remand, the trial court purported to consider the newly-discovered evidence under the correct "may have" standard, but erred nonetheless. First, the trial court failed to look at the newly-discovered evidence in light of the *Brady* evidence that was revealed in Johnson's post-conviction proceeding. Second, the trial court failed to consider the newly-discovered evidence holistically, and did not take account of the affirmative impact that the evidence would have had on the trial.

A. The Coram Nobis Court Failed to Consider the *Brady* Material When Looking at the Newly-Discovered Evidence.

Following Johnson's trial, conviction, and direct appeal, he filed a motion for post-conviction relief based, in part, on misconduct on the part of the prosecutors in their failure to provide the defense with exculpatory evidence pursuant to *Brady v. Maryland*. As previously discussed, the exculpatory evidence presented by Johnson in his post-conviction proceeding included police reports disclosing that two separate eyewitnesses had identified members of the Brown Gang as the person or persons involved in the murder and robbery, rather than Johnson, police reports linking the getaway car driven at the time of the crime to the Brown Gang, and reports that called into question the physical evidence in the case. This Court concluded that the evidence introduced in Johnson's petition for post-conviction relief was wrongfully withheld under *Brady*, but was not sufficiently material to warrant reversal of his conviction. *Johnson v. State*, No. 02C01-9707-CR-

00292, 1999 WL 608861, at *5 (Tenn. Crim. App. Aug. 12, 1999).

In considering the impact of newly-discovered evidence introduced in connection with a coram nobis petition, the trial court should consider the newly-discovered evidence cumulatively with all other evidence favorable to the defense and not available at trial. *State v. Vazquez*, 221 S.W.3d 514, 522 (Tenn. 2007) (the court should “carefully consider all of the proof in the context of the new information offered at the coram nobis proceeding.”). This Court held as much in its opinion reversing and remanding Johnson’s case in which it indicated that the trial court should consider all of the evidence presented by Mr. Johnson in evaluating his coram nobis petition. *Johnson v. State*, No. W2007-01546-CCA-R3-CO, slip op. at 6-7 (Tenn. Crim. App. Sept. 30, 2009).

Pursuant to the U.S. Supreme Court’s holding in *Kyles v. Whitley*, 514 U.S. 419 (1995), the contents of the various police reports that were withheld as a result of prosecutorial misconduct and were the subject of Johnson’s post-conviction proceeding must be considered in evaluating the potential damage to the prosecution’s case from the newly-discovered evidence. In *Kyles*, a habeas case that involved the prosecution’s failure to turn over exculpatory evidence to the defense, the Supreme Court held that the State’s obligation to disclose exculpatory evidence “turns on the cumulative effect of all such evidence suppressed by the government.” *Id.* at 421. The Court considered “the net effect of the evidence” in reaching its conclusion that that *Kyles* was entitled to a new trial. *Id.*

In rejecting Johnson’s claims for relief from his conviction in the post-conviction proceedings, this Court concluded:

Having reviewed the proof presented at trial and at the post-conviction hearing, we find that confidence in the guilty verdict has not been undermined by the State’s failure to disclose this exculpatory evidence. The circumstantial proof linking Defendant to this shooting is strong. In addition to Mr. Perkins’s identification of Defendant as the shooter, Defendant’s palm print was found on the getaway car. Moreover, despite Defendant’s claim that he was in St. Louis at the

time of the shooting, his cousin, Elizabeth Starks, identified him as being in Memphis on the day of the shooting and identified him as being in the getaway car. She further testified that she and a friend had been in that car prior to the robbery. Her testimony was corroborated by the presence of their fingerprints in the car. Furthermore, Beverly Batts testified that Defendant confessed to a 'cold-blooded' shooting in Memphis.

Johnson v. State, No. 02C01-9707-CR-00292, 1999 WL 608861, at *5 (Tenn. Crim. App. Aug. 12, 1999).

Thus, in evaluating Johnson's post-conviction claim regarding the State's failure to disclose exculpatory evidence relating to guilt in violation of *Brady*, this Court held that the Perkins's identification, the testimony of Elizabeth Starks, the palm print evidence, and the testimony of Beverly Batts was sufficient to reject Johnson's argument that disclosure of the suppressed exculpatory evidence would have undermined confidence in the guilty verdict. But the newly-discovered evidence showing the connection between Starks and the Brown Gang, the recantation of Williams's testimony, and the pressure Perkins faced in making his identification alters the balance of credible evidence in the case.

The newly-discovered evidence calls into question most of the evidence introduced at trial that this Court relied upon in concluding that the *Brady* evidence was not sufficiently material. The combined effect of the newly-discovered evidence brought to light in the coram nobis proceeding together with the *Brady* material that was the subject of the post-conviction proceeding is unequivocal in substantiating Johnson's claim that such evidence may have resulted in a different judgment, and relief from his conviction is warranted.

With a substantial amount of the prosecution's evidence discounted as a result of the combination of the newly-discovered evidence and the wrongfully-withheld *Brady* material, there is no requirement that Johnson prove that the prosecution's remaining evidence would have been

insufficient to support conviction. *Kyles*, 514 U.S. at 435. Rather, Johnson must only show that the undisclosed evidence “may have resulted in a different judgment, had it been presented at the trial.” Tenn. Code Ann. § 40-26-105. While Johnson was, therefore, under no duty to prove that the newly-discovered evidence would have resulted in acquittal, the overall impact of the newly-discovered evidence may have readily led jurors to distrust the prosecution’s case, particularly if they were aware of the *Brady* material.

The cumulative effect of the newly-discovered evidence and the withheld *Brady* material supports the inferences that the Brown Gang was responsible for the murder and robbery, and that Elizabeth Starks may have fabricated the claim against Johnson with Williams’s (later recanted) assistance. This conclusion is supported by the suppressed evidence of the multiple eyewitness identifications of Michael Brown, the link between the Brown Gang and the getaway car, and the suppressed palm and fingerprint evidence. Consequently, the newly-discovered evidence, when coupled with the *Brady* material, would have undermined the credibility of the State’s case, and the lower court erred in failing to consider the *Brady* material along with the newly-discovered evidence.

B. The Coram Nobis Court Failed to Properly Consider the Effect of the Newly-Discovered Evidence.

Not only did the trial court fail to properly consider the cumulative effect of the newly-discovered evidence in conjunction with the *Brady* material, but the court’s analysis of the newly-discovered evidence is inconsistent with Supreme Court precedent in two important respects. First, contrary to *House v. Bell*, 547 U.S. 518 (2006) and *Kyles*, the trial court evaluated the effect of each piece of newly-discovered evidence in isolation rather than “in combination.” *House*, 547 U.S. at 552. Second, despite purporting to apply the proper standard -- that is, whether the newly-discovered evidence, if presented, may have resulted in a different verdict -- the trial court ignored

the clear mandate of *Kyles*, which held that materiality is not a sufficiency standard. Based on this error, the trial court wrongly concluded that, because there was still a sufficient amount of evidence on which to convict, the verdict may not have been different.

The trial court's failure to engage in a holistic analysis of the newly-discovered evidence is inconsistent with *House* and *Kyles*. In *House*, the Supreme Court overturned the district court's finding regarding the significance of newly-discovered evidence, because the district court failed to engage in "a holistic judgment about all the evidence." 547 U.S. at 539 (quotations omitted). Significantly, the Court found that while specific items of new evidence might not have warranted relief when considered individually, taken "in combination," the new evidence established that "no reasonable juror viewing the record evidence as a whole would lack reasonable doubt." *Id.* at 552, 554. Similarly, in *Kyles*, the Supreme Court evaluated the "cumulative effect" of *Brady* evidence "for purposes of materiality" and granted the defendant a new trial, as the totality of the *Brady* evidence made the prosecution's case "significantly weaker" than the one presented to the jury. *Kyles*, 514 U.S. at 437 n.10, 454. *See also United States v. Agrus*, 427 U.S. 97, 112 (1976) (stating that the materiality of non-disclosed evidence "must be evaluated in the context of the entire record.").

In this case, the trial court ignored *House* and *Kyles* by concluding that each of the three pieces of newly-discovered evidence, *individually*, may not have caused a different result. With respect to the Dennis Williams affidavit, the trial court held that, "[t]his court is not reasonably satisfied that the jury may have reach a different verdict had they been aware of *it*." *Johnson v. State*, No. P-29609, slip op. at 9 (Tenn. Crim. Ct. Aug. 11, 2010) (emphasis added). The court reached the same conclusion regarding the Tommy Perkins affidavit and the affidavits that established a

relationship between Elizabeth Starks and Betty Joe Ford. *Johnson v. State*, No. P-29609, slip op. at 10 (Tenn. Crim. Ct. Aug. 11, 2010).

But the proper inquiry is not whether the jury may have reached a different verdict had it been aware of the Williams affidavit alone, or had it been aware of the Perkins affidavit alone, or had it been aware of the affidavits and testimony connecting Starks and Ford alone. Rather, the proper inquiry is whether the jury may have reached a different result if it had been aware of the Williams affidavit, *combined with* the Perkins affidavit, *and* the affidavits connecting Starks and Ford *and* all of the wrongfully suppressed *Brady* material. Yet at no point did the trial court ever follow *Kyles* and *House* and evaluate the totality of this newly-discovered evidence and *Brady* material. Its failure to do so was error. See *Kyles*, 514 U.S. at 453 (engaging in a “recap” of the undisclosed evidence).

The cumulative effect of this unrepresented evidence is overwhelming: Had it been presented, the jury would have heard extensive evidence linking the Brown Gang to the murder. It would have also heard extensive evidence connecting Starks to the Brown Gang, which, as the trial court noted, “would serve to impeach the testimony of Elizabeth Starks because it would supply a motive for her, as perhaps a member of the Brown gang, to point the investigation to another subject.” *Johnson v. State*, No. P-29609, slip op. at 5. (Tenn. Crim. Ct. Aug. 11, 2010). Such evidence “would also provide a further link between the Brown Gang and the Belenchia homicide because if Starks were a member of the Brown Gang, who were being investigated for the crime, and she falsely implicated an unrelated party, then this would tend to implicate the Brown Gang as trying to divert the investigative attention from their group.” *Id.* The jury also would have heard that the prosecution pressured Perkins into making his in-court eyewitness identification of Johnson “even if he looked different” from the individual who shot Mr. Belenchia. And the jury would have heard

Williams’s testimony that Johnson was not at Starks’s house the weekend of the homicide. That testimony would have further impeached Starks’s credibility and would have directly supported Johnson’s *nine* alibi witnesses, all of whom testified that Johnson was in St. Louis at the time of the Belenchia robbery and murder.⁵

Aside from discrediting the State’s key witnesses and strongly suggesting that the Brown Gang, and not Johnson, was responsible for the murder, the cumulative effect of the newly-discovered evidence and *Brady* material provides Johnson an additional, powerful defense: it impeaches the credibility of the police and prosecution. In *Kyles*, the Court extensively analyzed how the defense could have used the undisclosed evidence “to attack . . . the thoroughness and even the good faith of the investigation,” and explicitly noted that evidence that calls into question the reliability of the investigation and the decision to charge the defendant can provide an effective defense. 514 U.S. at 445-46.

In *Kyles*, the police failed to disclose police reports documenting interviews with the prosecution’s star witness in which that witness made several inconsistent and self-incriminating statements. *Id.* The Court noted that the defense could have used this information to impeach not only the witness, but also the police for its “remarkably uncritical attitude.” *Id.* at 445. The Court also noted the value to the defense of the “combined force in attacking the process by which the police gathered evidence and assembled the case . . .” *Id.* at 449. Therefore, the materiality analysis for assessing the weight of newly-discovered evidence is not limited to evaluating how the new evidence rebuts or impeaches other evidence in the record, but also includes considerations of inferences a reasonable jury might draw about the trustworthiness of the police and prosecution.

⁵ Johnson presented six alibi witnesses at trial, and three more alibi witnesses testified at his post-conviction hearing.

In Johnson's case, however, the trial court completely ignored these critical considerations in its analysis. The newly-discovered evidence and *Brady* material in this case is not only exculpatory, but it also severely undermines the credibility of the State. Both the Williams and Perkins affidavits detail highly troubling misconduct on both the part of the police and prosecution that would give any reasonable juror pause: Simply put, the police pressured Williams to lie and the prosecution encouraged Perkins to commit perjury. What is more, the State's decision not to pursue the Brown Gang despite the overwhelming evidence against them is highly suspect. Thus, as in *Kyles*, the "defense could have laid the foundation for a vigorous argument that the police had been guilty of negligence." 514 U.S. at 447. Furthermore, the withholding of a police report from the defense raises serious doubts about the credibility of the palm print that, according to the testifying officer, was lifted "from the top of the vehicle, above the right rear door." T. 7 at 988: 5-6 (Testimony of Sergeant B.R. Davis referring to T Ex. 32). However, the police report, which provided a detailed inventory of the all places on the getaway car from which prints were lifted, does not indicate that a palm print was lifted from "above the right rear door." Thus, this wrongfully withheld report not only undermines the credibility of the palm print itself, but it further impeaches the credibility of the police and prosecution. If the trial court had properly considered the cumulative effect that all of this newly-discovered evidence and *Brady* material would have had on the credibility and trustworthiness of the prosecution, it surely could not have concluded that the verdict may not have been different.

The trial court made a second fundamental error in concluding that the jury might not have reached a different verdict merely because Johnson did not discredit all of the State's evidence. As the Supreme Court stated in *Kyles*, "materiality . . . is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the

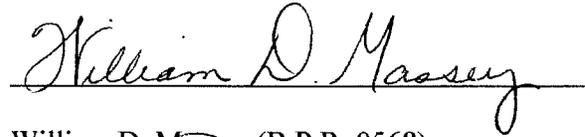
undisclosed evidence, there would not have been enough left to convict.” 514 U.S. at 434-35. Importantly, the Supreme Court granted relief in both *Kyles* and *House*, even though neither case involved conclusive proof of exoneration. *Kyles*, 514 U.S. at 453 (“The inconclusiveness of the physical evidence does not, to be sure, prove *Kyles* innocence, and the jury might have found the eyewitness testimony . . . sufficient to convict . . . But the question is not whether the State would have had a case to go to the jury if it had disclosed the evidence, but whether we can be confident that jury’s verdict would have been the same.”); *House*, 547 U.S. at 553 (“This is not a case of conclusive exoneration.”).

The trial court in this case, however, explicitly denied Johnson relief because he had not met his burden “with regard to *all pieces of evidence heretofore presented.*” *Johnson v. State*, No. P-29609, slip op. at 11 (Tenn. Crim. Ct. Aug. 11, 2010) (emphasis added). In other words, because Johnson did not undermine confidence in each piece of evidence against him (which, arguably, he did), the court concluded that he was not entitled to relief. Therefore, although the trial court paid lip service to the standard this Court instructed it to follow -- *i.e.*, whether the newly-discovered evidence, if presented, may have resulted in a different verdict -- it actually adopted a much more onerous standard completely inconsistent with the coram nobis standard and with Supreme Court precedent. *See Kyles*, 514 U.S. at 451 (“In assessing the significance of the evidence withheld, one must of course bear in mind that not every item of the State’s case would have been directly undercut if the *Brady* evidence had been disclosed.”).

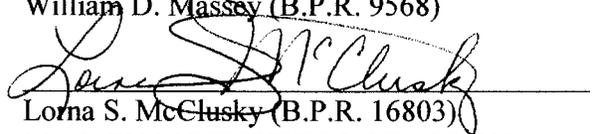
CONCLUSION

For the foregoing reasons, and for the reasons stated in Appellant’s brief, the judgment of the trial court should be reversed.

Respectfully submitted,



William D. Massey (B.P.R. 9568)



Lorna S. McClusky (B.P.R. 16803)

MASSEY MCCLUSKY & SWANSON
3074 East Road
Memphis, TN 38128
(901) 201-6747

Keith A. Findley
President
INNOCENCE NETWORK
Wisconsin Innocence Project
Frank J. Remington Center
University of Wisconsin Law School
975 Bascom Mall
Madison, WI 53706
(608) 262-4763

Thomas H. Golden
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, NY 10019
(212) 728-8000

CERTIFICATE OF SERVICE

I, Lorna S. McClusky, do hereby certify that the foregoing brief has been served on the following persons as indicated below on this the 11th day of January, 2011.



Lorna S.. McClusky

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Ms. Sue Turner

Chief Deputy Clerk

Supreme Court Building

P. O. Box 909

Jackson, TN 38302-0909

FIRST CLASS MAIL

Mr. Robert E. Cooper

Attorney General & Reporter

425 Fifth Ave. N.

Nashville, TN 37243-0493