IN THE CRIMINAL COURT FOR SHELBY COUNTY, TENNESSEE AT MEMPHIS, DIVISION I

PERVIS TYRONE PAYNE,	)	
	)	
Petitioner,	)	NOS. P-09594
	)	87-04408
	)	87-04409
vs.	)	87-04410
	)	
STATE OF TENNESSEE,	)	DIVISION I
	)	
Respondent.	)	

PETITION FOR POST-CONVICTION DNA ANALYSIS

COMES NOW the Petitioner, Pervis Payne, by and through undersigned counsel, and pursuant to the Post-Conviction DNA Analysis Act of 2001, T.C.A. § 40-30-301, *et seq.*, (the "DNA Act") and respectfully requests an Order for DNA Testing of any and all remaining evidence that exists at the time of filing. A Motion to Preserve Evidence and proposed Order Preserving Evidence are filed with this Petition.

I. INTRODUCTION

For more than thirty years, Mr. Payne—an intellectually-disabled man with no prior criminal history—has been imprisoned on death row for crimes that he has consistently maintained he did not commit. Mr. Payne, who is black, was convicted in 1988 and sentenced to death for the stabbing murder of a white woman and her two-year-old daughter, and the non-fatal stabbing of her four-year-old son. Throughout, Mr. Payne's account has remained the same: Mr. Payne went to visit his girlfriend who lived in the same apartment building and on the same floor as the victim; as he entered the building an unknown man with blood on his shirt rushed past Mr. Payne; Mr. Payne unknowingly came upon the gruesome scene of the double-murder, entering the victims'

apartment after they were stabbed; and he attempted to help the victims. But as police arrived, and realizing he was the only person at the scene, with the victim's blood transferred onto his clothing, he panicked and fled. His fears quickly came to fruition. A police officer spotted Payne as he ran from the building, and he was the sole focus of the investigation from that point on. He was arrested within hours, and despite asserting his innocence, police failed to meaningfully investigate any of the other suspects. The real murderer has never been caught.

DNA testing, which was unavailable at the time of Mr. Payne's trial and has not been performed any time since, could provide scientific proof of the assailant's identity and exonerate him. Mr. Payne now faces a December 3, 2020 execution date having never had a chance to access DNA testing capable of proving his innocence. Mr. Payne previously sought testing under the DNA Act and was denied based on the Tennessee Supreme Court's decision in *Alley v. State*, 2006 WL 1703820 (Tenn. Crim. App. 2006), which had held that the DNA Act could not be used for testing to demonstrate a convicted person's innocence by linking crime scene evidence to a known third-party in the state and federal convicted offender DNA databases. The *Alley* decision was subsequently abrogated by the Tennessee Supreme Court in *Powers v. State*, 343 S.W.3d 36, 44, 59 (Tenn. 2011), which recognized that Tennessee's DNA Act has twin purposes of aiding the exoneration of the wrongfully convicted and identifying the actual perpetrators of serious crimes. Importantly, in *Powers*, the Tennessee Supreme Court also held that courts ***must presume that the results of DNA testing will favor petitioners like Mr. Payne*** in determining whether post-conviction test results would be material to innocence in a given case. "'[T]he trial court should postulate whatever realistically possible test results would be most favorable to [the petitioner] in determining whether he has established' the reasonable probability requirement." 343 S.W.3d at 51 (quoting *State v. Peterson*, 836 A.2d 821, 827 (N.J. Super. Ct. App. Div. 2003)). "Realistically

possible" DNA test results include a range of results, including the possibility that testing will not only fail to identify the petitioner's DNA on the item tested but will also simultaneously identify the DNA profile of a known individual convicted of a similar crime in the CODIS database. *Id.* at 57–58; *State v. Nelson*, W2012-00741-CCA-R3CD, 2014 WL 295833, at *7 (Tenn. Crim. App. Jan. 27, 2014). Mr. Payne was convicted of a brutal crime in which the assailant engaged in a prolonged, close-range violent confrontation with the victims who he collectively stabbed over fifty times. The circumstances of the murder, condition of the crime scene, and presence of over forty defensive wounds support that a post-conviction re-examination of the evidence could identify DNA belonging to the assailant.

Recent exonerations underscore the ability of DNA testing to demonstrate innocence in cases like Mr. Payne's, where the wrongly convicted person innocently came upon the crime scene and fled out of fear. For example, a man named Clemente Aguirre was exonerated twelve years after being convicted of the stabbing murder of his neighbors and sentenced to death in Florida. Aguirre, like Mr. Payne, discovered the crime scene and was convicted in part because blood from the victims had transferred onto his clothing. Aguirre's DNA was also located on evidence he handled at the crime scene. In spite of this significant circumstantial evidence, Aguirre was exonerated in 2018 when he was excluded from drops of blood left at the crime scene, and the DNA identified the real perpetrator.[1] Mr. Aguirre's exoneration, and those of several other individuals who were wrongfully convicted in cases similar to Mr. Payne's are discussed in further detail in Section IV.C.1, *infra*.

[1] Mr. Aguirre became the 164th wrongfully convicted death-row prisoner to be exonerated in the United States since 1973.

Ordering testing here will satisfy both purposes of the DNA Act. As Mr. C. Alan Keel explains in his accompanying expert affidavit, more than a dozen pieces of evidence from the crime scene—including a bloody comforter, bedsheets, and pillow only ***first provided to the defense in December 2019***—is capable of scientifically resolving Mr. Payne's innocence claim. Post-conviction testing has the potential to yield DNA belonging to the assailant that could exclude Mr. Payne and identify the actual assailant by linking evidence to a third party through a search in the CODIS database and/or comparison to a known individual. This is particularly important in this case. There are multiple alternative suspects, including (i) a man Mr. Payne saw fleeing the area with blood on his shirt just before he discovered the victims, and (ii) the adult victim's abusive ex-husband. If a DNA profile extracted from the crime scene evidence matched those alternative suspects—or another as-of-yet unknown individual—it would be powerful evidence that the account Mr. Payne has told for the last thirty years is true.

In addition to DNA testing, Mr. Payne seeks to search the latent fingerprints recovered during processing of Ms. Christopher's home, and any other fingerprints that can be reasonably recovered from items in evidence, against the Federal Bureau of Investigations' ("FBI") Next Generation Identification ("NGI") fingerprint database and the Tennessee Bureau of Investigation's ("TBI") Automated Fingerprint Information System. NGI, which came into use in 2014, utilizes Advanced Fingerprint Identification Technology ("AFIT"), which include a new fingerprint-matching algorithm that has improved matching accuracy from 92 percent to more than 99.6 percent, and enables latent images to be compared against the criminal, civil, and Unsolved Latent File (ULF) repositories in a matter of minutes.[2] Because of these advancements, the FBI's

[2] FBI, Next Generation Identification (NGI), https://www.fbi.gov/services/cjis/fingerprints-and-other-biometrics/ngi (last visited July 20, 2020); FBI Biometrics Specifications, What We Do, https://www.fbibiospecs.cjis.gov/Home/Background (last visited July 20, 2020).

Criminal Justice Information Services Division recommends latent fingerprint images submitted prior to 2013 be resubmitted for a search in the NGI system.[3] Just last year, in Louisiana, a man in his thirty-seventh year of a life sentence for a 1982 home invasion rape was exonerated after a search in the fingerprint database—which took less than eight hours—identified prints left at the crime scene as belonging to a serial offender, who had committed at least five other similar crimes in the area.[4]

Mr. Payne first sought access to forensic testing to demonstrate his factual innocence fourteen years ago. Since that time, new physical evidence from the crime scene has become available for testing, screening and testing technology has significantly advanced, and the Tennessee Supreme Court has clearly stated that petitioners like Mr. Payne are entitled to post-conviction testing and a search of the CODIS database to obtain evidence of third-party guilt. The forensic testing that Mr. Payne seeks can be performed in less than 60 days and is capable of demonstrating, what he has consistently maintained for three decades: that he is innocent. The Court should immediately order the requested testing.

II. FACTUAL BACKGROUND

In 1988, Mr. Payne was convicted of the murder of Charisse and Lacie Christopher, and the stabbing of Nicholas Christopher. The three victims were found on the kitchen floor of their apartment. Charisse Christopher, 28, sustained 42 direct knife wounds to her chest, abdomen, neck, head and right thigh and 42 defensive wounds to her hands and arms. *See* Ex. 1, Trial Tr. Vol. IV, Testimony of Richard Harruff at 485; Ex. 2, Trial Tr. Vol. IV, Testimony of Joseph

[3] FBI, Next Generation Identification (NGI), https://www.fbi.gov/services/cjis/fingerprints-and-other-biometrics/ngi (last visited July 20, 2020).

4 The Innocence Project, Match in National Fingerprint Database Establishes Innocence of Baton Rouge Man After 36 Years in Prison https://www.innocenceproject.org/fingerprint-database-match-establishes-archie-williams-innocence/ (last visited July 20, 2020).

Zvolanek at 474. Charisse's two-year-old daughter Lacie, sustained nine stab wounds to her chest, abdomen, back and head. *See* Ex. 1, Trial Tr. Vol. IV, Testimony of Richard Harruff at 490; Ex. Trial Tr. Vol. IV, Testimony of Joseph Zvolanek at 475. Charisse's three-year-old son, Nicholas, who survived, sustained multiple abdominal stab wounds and lacerations on his neck, leg, hands and arms. *See* Ex. 2, Trial Tr. Vol. IV, Testimony of Joseph Zvolanek at 475; Ex. 3, Trial Tr. Vol. VI, Testimony of Sherman Douglas Hixson at 822-824.

Despite the indications that this could have been a crime of rage committed by someone close to the victim, police focused exclusively on Mr. Payne, who was the boyfriend of the victims' neighbor and who found the victims' bodies. But, nothing in Mr. Payne's history suggests he would commit such a crime, and he had no motive to do so. At trial, prosecutors advanced a theory that the day of the crime, Mr. Payne had taken drugs, was looking for sex, entered the Christophers' apartment to make sexual advances toward Charisse Christopher, and attacked and killed her when she rebuffed him. *See* Ex. 4, Trial Tr. Vol. IX, State's Closing at 1350-51. As detailed below, this theory was entirely speculative, and other individuals, who were not thoroughly investigated, possessed motives and opportunity to harm the victims.

A. Mr. Payne Has Maintained His Innocence For More Than Thirty Years

1. Mr. Payne Has Given A Consistent Account Since 1987

Mr. Payne has always maintained that he is an innocent man who discovered a gruesome crime scene and, after attempting to help the victims, was found leaving the scene of the crime. During the afternoon on Saturday, June 27th, 1987, Payne, then 20 years old, was waiting for his girlfriend, Bobbie Thomas, to return from a trip. *See* Ex. 5, Trial Tr. Vol. VIII, Testimony of Pervis Payne at 1195. They had planned on spending the weekend together in Millington, Tennessee and Payne, who had no other way of contacting her, had been checking in at Bobbie's apartment building all day. Between his check-ins, Mr. Payne spent most of his day with friends

and family that lived in the area and attended a church picnic. *Id.* at 1185-1215. He even made plans for Bobbie and himself to see some friends later that night. *Id.* at 1202. But when he returned to the apartment complex around 3 p.m., a man ran past him and down the building's staircase. *Id.* at 1215-1216. The man, who had blood on his shirt, did not even stop to pick up the change and papers that fell from his pockets. *Id.* at 1215-1217. Feeling uneasy, Mr. Payne picked up some of the scattered items and walked to the building's second floor where he noticed the door to the apartment across the hall from Bobbie's unit was slightly ajar. After hearing sounds of distress inside and a cry for help, Payne announced that he was coming in. *Id.* at 1218, 1220. When he pushed open the door, Payne discovered a horrific crime scene.

At trial, Mr. Payne explained what he saw: "I saw the worst thing I ever saw in my life and like my breath just had--had tooken--just took out of me." *Id.* at 1220 (sic). On the kitchen floor of their apartment, Charisse and her two children were bleeding profusely.[5] Mr. Payne immediately entered the Christophers' apartment and tried to help Charisse. "[S]he was looking at me," he testified, "[s]he had the knife in her throat with her hand on the knife like she had been trying to get it out and her mouth was just moving but words had faded away. And I didn't know what to do." *See* Ex. 5, Trial Tr. Vol. VIII, Testimony of Pervis Payne at 1220-1221. Overwhelmed by the gruesome scene, Mr. Payne ran to the kitchen sink thinking he would be sick. *Id.* at 1221. He then saw the telephone hanging up on the wall by the sink and picked it up to call the police. He told Charisse not to worry and that he was going to get help. *Id.* at 1221. But Mr. Payne was

[5] Contemporaneous police records, including photographs, indicate that the kitchen walls and floor were blood-spattered. Ex. 6, Trial Exhibits 21, 22. A bloody knife was found at Lacie Christopher's feet. *See* Ex. 7, Trial Tr. Vol. VI, Testimony of Sammy Wilson at 947. A tampon was purportedly found on the floor next to the adult victim's body, but was not discovered until two days after the murder and does not appear in any of the crime scene photographs or video taken the day of the homicide. *See* Ex. 8, Trial Tr. Vol. V, Testimony of Carroll Owen at 679-680. The kitchen curtains and rug were soaked in blood. *See* Exs. 9, 10, Property Logs 23-24. A bloodstained stuffed animal, a heart-shaped earring, and several bloodstained pairs of shoes were also found on the kitchen floor. *See* Ex. 7, Trial Tr. Vol. VI, Testimony of Sammy Wilson at 938-40; Ex. 8, Trial Tr. Vol. V, Testimony of Carroll Owen at 680; Ex. 11, Property Log 25.

so panicked, he could not think of a number to call. *Id.* at 1221. "I couldn't leave her," Mr. Payne would later testify, "I couldn't leave her because she needed--she needed help. I was raised up to help and I had to help her." *Id.* at 1221. So, Mr. Payne knelt next to Charisse, whose hands were gripping the knife, laid his hands over hers, and tried to pull the knife out of her neck. *Id.* at 1221-1222. The knife, however, was securely lodged in Charisse's throat. In order to remove the knife from her neck, Mr. Payne grabbed beneath the handle, cutting himself on the blade. *Id.* at 1221-1222, 1237. Charisse held onto Mr. Payne as he did so—"like she was wanting me to help her, you know," Mr. Payne would later testify, "you know, hold me for help." *Id.* at 1222.

Again, Mr. Payne rushed to the sink believing he was about to be sick. *Id.* at 1222. He grabbed a cup and filled it with water, but gagged and spit the water out. *Id.* at 1222. Mr. Payne then immediately ran to the male child, who was still alive. *Id.* at 1222. At trial, Mr. Payne explained that "I just--it's a feeling all over me that I know that the [other] baby's already dead. And it was automatically a scared feeling." *Id.* at 1222. Scared, but unable to leave the crying little boy, he put his hand on the child's back trying to comfort him. *Id.* at 1222-23. He told the boy "don't cry, don't cry, it's going to be all right, I'm going to get help," *Id.* at 1222.

Mr. Payne walked out of the apartment into the hallway to alert neighbors to call for help, and through a window saw a police car pull up to the building. *Id.* at 1223-24. Police were about to find Mr. Payne, a young black man and the only person at an apartment where a young white mother and her two children had been brutally attacked. "[A]s soon as I left out the door I saw a police car, and some other feeling just went all over me and just panicked, just like, oh, look at this," Mr. Payne later testified at trial, "I'm coming out of here with blood on me and everything. It going to look like I done this crime …. I saw a police getting out and …a white man at that. And that scared me even--even more, you know, like I didn't have a chance, like I know he's going to

think I did this …. I had blood and everything on me …. I didn't have no witness or nobody witnessed to what I had helped out or nothing. It was just me alone." *Id.* at 1223-1224.[6] Mr. Payne panicked, ran, and was arrested later that day.[7] *Id*. at 1220-27, 1233-34.

2. Mr. Payne is Intellectually Disabled

Mr. Payne's actions are further contextualized by the fact he was only twenty years old and intellectually-disabled.

Although not recognized at the time of trial, recent testing makes clear that Mr. Payne is and was intellectually disabled. In 2018, at age 51, Mr. Payne received his ***first*** thorough neuropsychological examination, which was performed by Daniel Martell, Ph.D., A.B.P.P., an expert in psychology and neuropsychology. Mr. Payne's IQ on the Wechsler Adult Intelligence Scale, Fourth Edition is 72, and his functional IQ, taking into account the aging norms of the WAIS-IV, is 68.4.[8] An IQ score of 70 to 75 "indicates a significant limitation in intellectual functioning." *See* Ex. 12, American Psychiatric Association, What is Intellectual Disability?. An IQ score of 70 is at least two standard deviations below average and is considered an intellectual disability according to the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition ("DSM-5"). *See* Ex. 13, American Psychiatric Association, Intellectual Disability – DSM05.

Dr. Martell is unequivocal in his opinion that Mr. Payne exhibits clinically significant and subaverage function in the following areas:

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[6] Mr. Payne told his sister that while being interrogated after his arrest officers told him "you think you black now, wait until we fry you."

[7] Mr. Payne changed his shirt and shoes as he was leaving the scene, and put his clothing in his overnight bag. He hid at his ex-girlfriend's house until the police arrested him later that day. *See* Ex. Ex. 5, Trial Tr. Vol. VIII, Testimony of Pervis Payne at 1224-34.

[8] The norm obsolescence problem, known as the "Flynn effect," is genuinely accepted in the psychological community. The Flynn effect occurs when an IQ test compares an individual's performance with outdated IQ norms from a historical reference group of the past, instead of the individual's contemporary peers, resulting in an inaccurate IQ score. Kevin S. McGrew, *Norm Obsolescence: The Flynn Effect*, in The Death Penalty and Intellectual Disability at 155 (Edward A. Polloway ed., 2015). The outdated IQ norms reflect a lower overall performance than is typical in contemporary society, which causes the current test-subject's IQ to be artificially inflated. *Id.* at 156. The Flynn effect "recognizes that the normal curve distribution of intelligence shifts upward over time." *Id.*

- Mr. Payne's reading skills are in the bottom 5th percentile for his age;
- Mr. Payne's mathematics skills are below the bottom 0.1 percentile for his age;
- Mr. Payne's language functioning is significantly impaired, with evidence of expressive aphasia including dysnomia (an inability to find words for things), paraphasia (an inability to pronounce words correctly), and neurodevelopmental stuttering;
- Both his immediate and delayed memory are functioning in the bottom 1st percentile, as is his auditory memory; and
- Testing for his frontal lobe executive functioning revealed deficits involving, among other things, his capacity for: multitasking, behavioral perseveration (i.e. a pathological repetition of behavior without self-awareness or control), and maintaining a cognitive "set" (*i.e.*, he has great difficulty keeping track of what he is supposed to be doing).

The results of Dr. Martell's testing, as well as corroborating testimony from numerous individuals who know, taught, or worked with Mr. Payne were discussed extensively in Section II of Mr. Payne's Response in Opposition to Motion to Set Execution Date, which, for reference, is attached hereto as Exhibit 14.

B. Crime Scene Evidence, Including Newly-Disclosed Evidence That Was First Given To Mr. Payne's Defense Team In December 2019, Has Never Been Subject To DNA Testing

DNA testing has never been performed in this case, and several pieces of evidence that could produce DNA profiles that could exonerate Mr. Payne were not made available to Mr. Payne's counsel until six months ago, in December 2019.

1. A Bloodstained Comforter, Sheets, And Pillow From The Crime Scene Were First Turned Over To The Defense Team In December 2019

For more than thirty years—throughout Mr. Payne's trial, appeals, and post-conviction proceedings—the State has maintained that the crime scene was limited to kitchen area of the apartment. Indeed, the contemporaneous crime scene report states that the rest of the apartment was neat and showed no signs of a struggle. *See* Ex. 15, Millington Police Report at 4. All of the

testimony at the trial focused on the kitchen, and the prosecution's closing argument referred to only the kitchen as the crime scene. *See* Ex. 4, Trial Tr. Vol. IX, State's Closing at 1369, 1382; Ex. 7, Trial Tr. Vol. VI, Testimony of Sammy Wilson at 927.

Yet on December 20, 2019, after obtaining a court order to view all of the evidence in possession of the Shelby County Criminal Court Clerk (including residue), Mr. Payne's counsel, for the first time, was provided with new, material, and potentially exculpatory evidence that had been in the State's possession the whole time, including: (1) a bloody comforter, (2) a bloody fitted sheet, (3) a bloody top sheet, and (4) a bloody pillow. *See* Declaration of Ben Leonard, dated July 20, 2020, ¶ 6 attached hereto as Exhibit 16 (the "Leonard Decl."). These items were kept in an evidence bag labelled "Bedroom" and are not referenced in contemporaneous police reports from the time of the crime. *Id.* ¶ 7.

2. There Are Numerous Other Pieces Of Evidence From The Crime Scene, Including A Tampon, Bloodstained Clothing, A Weapon, Fingernail Clippings, And Potentially A Rape Kit, That Have Never Been DNA Tested

Mr. Payne's motion is not limited to the newly-disclosed evidence. In addition, there is also an abundant amount of crime-scene evidence that has yet to be subject to DNA analysis that could exonerate Mr. Payne. Such evidence includes: (1) the murder weapon, (2) bloodstained clothing taken from the victims, (3) a tampon (discovered at the scene of the crime but not documented until two days after the initial police reports), (4) bloodstained curtains taken from the kitchen, (5) a bloodstained tablecloth taken from the kitchen, (6) bloodstained women's glasses taken from the kitchen, (7) a bloodstained stuffed animal taken from the kitchen, (8) a bloodstained rug taken from the kitchen, (9) a bloodstained paper sack taken from the kitchen, (10) a bloodstained washcloth taken from the Christophers' living room, (11) bloodstained clothing belonging to Mr. Payne, (12) vaginal swabs from Charisse Christopher, and (13) fingernail

scrapings from the victims. As discussed below, *infra* § IV.C.2, each of these items has the potential to yield genetic material that could be subject to DNA analysis and potentially the perpetrator.

C. There Are Substantial Reasons To Believe That Mr. Payne Was Wrongfully Convicted

1. Mr. Payne Lacked a Motive For The Crime

Mr. Payne was convicted based on a speculative theory comprised solely of circumstantial evidence. Specifically, when prosecutors could not determine a motive for the crime, on the eve of trial they concocted a theory that Mr. Payne was high from drug use and looking for sex when he entered the Christophers' apartment. *See* Ex. 17, PC Tr. Vol. I, Testimony of Jim Garts at 70-71, 80; Ex. 18, PC Tr. Vol. II, Testimony of Thomas Henderson at 173 (testifying that purported evidence of drug use did not come up until a week or two before trial and "came as a surprise to [the prosecution] in trial preparations since that made it a whole easier [sic] to explain why someone would do such a crime").

The State's theory is not supported by any hard evidence, and there is nothing in Mr. Payne's background before, or since, that suggests that he would have committed such a crime. He had no prior criminal history at the time of his arrest, either as a juvenile or adult. Nor did Mr. Payne have any history of violence or serious drug use. A minister's son, he came from a stable household where he presented no problems as a child or teenager. *See* Ex. 19, Trial Tr. Vol. XI, Testimony of Carl Payne at 1566-70. Mr. Payne was close with his family and active in his church. *Id*. He was a respected young man in his neighborhood, and although he struggled academically in school on account of his intellectual disability (discussed below), he never had any disciplinary issues. Indeed, in an article published just days after Mr. Payne was arrested, several people who knew him explained that the accusations against Mr. Payne were completely inconsistent with the

person they knew. *See* Ex. 20, Anthony Cooke, *Father doubts his son killed mother and her child*, June 30, 1987. Doris Harris, a member of Mr. Payne's church, described Mr. Payne as a "moral young fellow, nice sense of humor, kind. His personality is just such that you couldn't help but love him if you knew him." *Id.*

a. Mr. Payne Did Not Use Drugs

There is no evidence that Mr. Payne used drugs. There is no written police report that mentions any observation that Mr. Payne appeared to be on, or in possession of, drugs the day of his arrest. Indeed, the six-page report detailing Mr. Payne's arrest did not contain a single mention of drug paraphernalia or suspected drug use. *See* Ex. 21, Trial Tr. Vol. VI, Testimony of Richard Beck at 914.

At trial, the State hinged its assertion of Mr. Payne's purported drug use on a piece of paper that the State claimed tested positive for traces of cocaine. *See* Ex. 22 Trial Tr. Vol. VI, Remarks by Defense Counsel at 834. Mr. Payne has consistently denied that the paper was his, and maintained that it was among the litter he picked up on the stairs of the apartment building. *See* Ex. 23, Trial Tr. Vol. IX, Cross-examination Testimony of Pervis Payne at 1257. Indeed, there is no record evidence that establishes that Mr. Payne ever used cocaine or any other drugs. In fact, when he was arrested, Mr. Payne's mother implored the police to test Mr. Payne for drug use, knowing the result would be negative. *See* Ex. 24, Trial Tr. Vol. XI, Testimony of Bernice Payne at 1564. Having no reason to suspect he was on drugs, the police refused.

b. Physical Evidence Does Not Support The State's Case

The lack of physical evidence on Mr. Payne also undercuts the State's theory and suggests that Mr. Payne is not the person who committed the crime. Charisse Christopher suffered an extraordinary number of stab wounds to her body—42—and she also fought her assailant, as the medical examiner testified she sustained 42 additional defensive wounds to her hands and arms as

she attempted to fight her attacker off. See Ex. 1, Trial. Tr. Vol. IV, Testimony of Richard Harruff at 485. The brutal nature of the crime suggests that the perpetrator would have sustained injuries from the victim's repeated attempts to defend herself. But contrary to testimony given by police at trial, there was no evidence of wounds on Mr. Payne consistent with such an intense, prolonged, close-range struggle. *See* Ex. 25, booking photo. Mr. Payne only had potentially two minor cuts/abrasions to his hand which he maintained resulted from when he attempted to aid Ms. Christopher and dislodged the knife from her neck. *See* Ex. 23, Trial Tr. Vol. IX, Cross-examination Testimony of Pervis Payne at 1237.

While police maintained in their trial testimony that Mr. Payne also had scratches (insinuating that they were on his right shoulder and relied on photographs of Mr. Payne's body when he was stripped down to his underwear after his arrest), none of the numerous contemporaneous police report describes Mr. Payne having scratches on his body. Mr. Payne has always maintained the marks in the booking photo on his shoulder are actually stretch marks. *See* Ex. 23, Trial Tr. Vol. IX, Cross-examination Testimony of Pervis Payne at 1235-38.

Moreover, the perpetrator and Charisse Christopher engaged in a close-range violent struggle. The kitchen[9] where the victims were found was covered in blood, including on the walls and doors. The minor amount of blood present on Mr. Payne's clothing is inconsistent with him being the perpetrator. It is, however, consistent with Mr. Payne's testimony.

c. The State Constructed a Sexual Motive

To make sense of a crime that otherwise was completely lacking in motive for Mr. Payne to have committed, the State argued that Ms. Christopher was sexually assaulted. Moreover, in

[9] As discussed above, *supra* § II.B.1, the existence of a bloodstained comforter, bed sheets, and pillowcase recently provided to Mr. Payne's counsel undermines the State's theory that the entirety of the crime happened in the kitchen.

making that argument, as Mr. Payne sat at the defense table, the State tapped into racial tropes,[10] and reminded the jury of Ms. Christopher's "white skin." *See* Ex. 23, Trial Tr. Vol. IX, Cross-examination Testimony of Pervis Payne at 1299:13-19; Ex. 4, Trial Tr. Vol. IX, State's Closing at 1370:10.

However, the State's evidence that the crime involved a sexual assault was dubious at best. Ms. Christopher was fully clothed, and there was no evidence that her clothing had been disturbed. The State's theory that the crime was part of a sexual assault relied on a tampon that was purportedly in the kitchen, found next to her body; the State argued the assailant removed the tampon during the sexual assault. *See* Ex. 4, Trial Tr. Vol. IX, State's Closing at 1369; Ex. 18, PC Tr. Vol. II, Testimony of Thomas at 187-88 ("I thought [the tampon] was the most easily understandable and most powerful evidence that he'd had sex with her."). But, the tampon was not collected until two days after the murder and does not appear in any of the crime scene photographs or video taken the day of the homicide undermining the claim that it was next to her body in the kitchen when her body was discovered.

The State also introduced testimony that acid phosphatase—an enzyme present in semen—was found in the victim's vagina, and used that information to argue to the jury that Ms. Christopher was vaginally raped. *See* Ex. 1, Trial. Tr. Vol. IV, Testimony of Richard Harruff at 489, 498-500; Ex. 4, Trial Tr. Vol. IX, State's Closing at 1369. There are two reasons that the presence of acid phosphatase in Ms. Christopher's rape kit did not establish that a sexual assault occurred during her murder, one of which the jury heard, the other was not disclosed at trial. First,

[10] "The brute caricature portrays black men as innately savage, animalistic, destructive, and criminal -- deserving punishment, maybe death. This brute is a fiend, a sociopath, an anti-social menace. Black brutes are depicted as hideous, terrifying predators who target helpless victims, especially white women." *See* Prof. David Pilgrim, *The Brute Caricatrue*, Ferris State University Jim Crow Museum of Racist Memorabilia, *available at* https://www.ferris.edu/jimcrow/brute/ (last visited July 20, 2020).

as the State's own expert testified the presence of acid phosphatase, alone, does not necessarily mean semen was present; this is because acid phosphatase is present in other body fluids and therefore the mere finding of acid phosphatase is not corroborative of sexual activity.[11] *See* Ex. 1, Trial. Tr. Vol. IV, Testimony of Richard Harruff at 498-500. Second, assuming the acid phosphatase was from semen, what the defense was never told, and what the jury never heard, was that the State knew of a potential non-crime explanation for the presence of semen: the victim had sex with her then-boyfriend, Daryl Shanks, the night before the murder. *See* Ex. 17, PC Tr. Vol. I, Testimony of Jim Garts at 73; Ex. 26, PC Tr. Vol. I, Testimony of Darryl Shanks at 49-50. In a 1992 affidavit, Shanks said he last saw Ms. Christopher in the early morning on the day she was murdered, that he had sex with her, and that he told this to the prosecuting attorney. *Id*. While Mr. Shanks subsequently recanted his affidavit, his testimony that he had consensual sex with Ms. Christopher the night before the crime would have provided an explanation for the finding of semen (if it was in fact present) undermining the State's key evidence the crime was sexually motived. Indeed, the State's own expert witness conceded that the seminal fluid present in Ms. Christopher could have been there for days before her death, a timeline that aligns with Mr. Shanks' admission that he had sex with the victim the night before her murder. *See* Ex. 1, Trial. Tr. Vol. IV, Testimony of Richard Harruff at 513-14.

2. There Are Viable Alternative Suspects To Mr. Payne

Because police attention focused so quickly on Mr. Payne, police overlooked all other possible suspects including alternative suspects who, unlike Mr. Payne, had both motive and opportunity to commit the crime.

[11] Indeed, testing for acid phosphate is merely presumptive, and without a finding of sperm—which was not located here—it may not indicate the presence of semen at all, let alone Mr. Payne's. *See* Ex. 1, Trial. Tr. Vol. IV, Testimony of Richard Harruff at 489.

a. Mr. Payne Saw A Man Fleeing From The Apartment

Mr. Payne has consistently maintained there was another man in the victim's apartment before him. At trial he testified that when he entered the apartment building on the day of the murders, "a black guy with a long, white - like a tropical shirt, kind of beige, . . . jumped from the second landing down to the steps and ran down past me real quick." *See* Ex. 5, Trial Tr. Vol. VIII, Testimony of Pervis Payne at 1215. This man, who Mr. Payne testified had blood on him, was tall and had on short pants. *Id*. at 1216-17. Mr. Payne stated that as the man rushed past him, the man dropped some trash and loose change on the steps as he was running down the stairs. *Id*. at 1216. Mr. Payne stated that he picked up the trash and change the man dropped because he did not want there to be litter and continued up the stairs to his girlfriend Bobbie Thomas's apartment and never saw the man again. *Id*. at 1216-17. This testimony is consistent with the account Mr. Payne gave to police officers after his arrest. *Id*. at 1234-35.

John Ed Williams, a neighbor who lived in the same apartment complex where the murders took place and knew Mr. Payne for decades, corroborated Mr. Payne's version of the events. *See* Ex. 27, Affidavit of John Edward Williams, dated Feb. 3, 1992. Mr. Williams stated that he saw Mr. Payne enter the apartment building, and shortly after, he saw a different black male leave the building, get into a car, and drive away. *Id.* Soon after, Mr. Williams saw Mr. Payne running from the apartment building. *Id*. Mr. Williams stated that he had seen the black man who came out of the building with Ms. Christopher on several prior occasions, and sometimes they were arguing. *Id*.

b. Witnesses Have Linked The Murder To A Local Drug Dealer

In a separate affidavit given the same day, Mr. Williams stated that he knew Ms. Christopher to use drugs because he had been in her apartment on several occasions when she both sold and used cocaine. *See* Ex. 28, Affidavit of John Edward Williams. Leroy Jones, the half-

brother of cocaine-dealer Charles Douglas Jones, also knew Ms. Christopher to both use and deal drugs, as he was involved in drug trafficking himself. *See* Ex. 29, Affidavit of Leroy Jones, dated Oct. 14, 1989. Leroy Jones stated that his brother, Charles Douglas Jones, had employed Ms. Christopher to sell drugs. *Id.* Ms. Christopher owed Charles Douglas Jones money, and Leroy Jones was present for a meeting in which Charles Douglas Jones's partner said that Ms. Christopher had to be killed, and Charles Douglas Jones should "take care of the Christopher woman." *Id*. Leroy Jones submitted a sworn affidavit that he then heard Charles Douglas Jones tell one of the drug dealers he employed, William Hall, that "the Christopher woman had to be 'taken care of.'" *Id.* Following Ms. Christopher's murder, Charles Douglas Jones told Leroy Jones that "Pervis Payne was in the wrong place at the wrong time." *Id*.

In addition, the victim's ex-husband, Kenneth Christopher, admitted that he knew the victim used drugs—specifically, amphetamines. *See* Ex. 30, Transcript of Kenneth Christopher Interview at 23. Methamphetamine and amphetamine were found in the victim's blood at the time of her death. *See* Ex. 31, Toxicology Report.

c. Ms. Christopher's Violent Ex-Husband

The victim had a violent ex-husband, Kenneth Christopher, with a motive to commit the crime. It is undisputed that the victim's marriage to Mr. Christopher was toxic and filled with years of physical, mental, and emotional abuse. *See* Ex. 32, Christopher Complaint for Divorce. Indeed, in 1985, after years of abuse, neglect, and abandonment, Ms. Christopher fled from Mr. Christopher, filing for divorce shortly thereafter. *Id*. The grounds for which she sought divorce were cruel and inhuman treatment, abandonment, and neglect. *Id*. Indeed, Ms. Christopher claimed that Mr. Christopher had "offered such indignities to her person as to render her condition intolerable." *Id.*

Kenneth Christopher had a lengthy criminal history both before and after he was married to Ms. Christopher, which included violence on multiple occasions. *See* Ex. 33, Criminal Record of Kenneth Christopher.[12] At the time of Mr. Payne's arrest, Kenneth Christopher was serving a sentence for aggravated assault at Fort Pillow State Penitentiary. On that basis, investigators excluded Kenneth Christopher as a suspect. *See* Ex. 30, Transcript of Kenneth Christopher Interview at 4.

But an employee of the prison at the time Kenneth Christopher was incarcerated has said in a sworn declaration that it was common for minimum security inmates to leave the prison during the day without repercussion, making it possible for him to visit the victim and potentially perpetrate the crime. *See* Ex. 34, Declaration of Caress Ushry, dated Dec. 28, 2019.

III. RELEVANT PROCEDURAL HISTORY

In 1988, Mr. Payne, was convicted of two counts of first-degree murder and one count of assault with intent to commit first degree murder. The jury imposed sentences of death on the murder convictions, and a sentence of thirty years imprisonment on the assault conviction. No DNA evidence was presented at trial. On direct appeal, the Tennessee Supreme Court affirmed Mr. Payne's conviction and sentence. *State v. Payne*, 791 S.W.2d 10 (Tenn. 1990). Payne appealed the affirmation to the United States Supreme Court, arguing that introduction of victim impact statements violated his rights under the Eighth Amendment and under *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989). The Supreme Court overruled these cases and affirmed the sentence. *Payne v. Tennessee*, 501 U.S. 808 (1991).

[12] Kenneth Christopher's criminal record includes numerous charges for aggravated assault, breaking and entering, and criminal trespass, and several other charges related to intoxication. *See* Ex. 33, Criminal Record of Kenneth Christopher. Kenneth Christopher's drunkenness was another ground on which Ms. Christopher sought divorce. *See* Ex. 32, Christopher Complaint for Divorce.

In 1992, Mr. Payne filed petitions for post-conviction relief and for a writ of error *coram nobis*. *Payne v. State*, 1998 WL 12670, *petition to appeal denied* (Tenn. Crim. App. Jan. 15, 1998). Both were denied. *Id*. Mr. Payne brought a federal habeas corpus petition in 1998, which was also denied. *Payne v. Bell*, 418 F.3d 644 (6th Cir. 2005).[13]

In September 2006, Mr. Payne filed a petition requesting DNA testing of specified evidence from his case under the DNA Act (the "2006 DNA Petition"). The 2006 DNA Petition was denied in March 2007, and the denial judgment was affirmed by the Tennessee Court of Criminal Appeals. *Payne v. State*, ("*Payne DNA I*"), No. W2007-01096-CCA-R3-PD, 2007 WL 4258178 (Tenn. Crim. App. Dec. 5, 2007). As discussed below, *infra* § 4.E, the Court of Criminal Appeals' decision was based on a narrow reading of the DNA Act, which was rejected by the Supreme Court of Tennessee in a later case because it "arbitrarily abrogate[d] a petitioner's state-created liberty interest in developing scientific evidence of his or her actual innocence." *Powers*, 343 S.W.3d 36, 44, 59 (Tenn. 2011).

On February 24, 2020, the Tennessee Supreme Court granted state prosecutors' application for an execution date for Mr. Payne. Mr. Payne is now scheduled to be executed on December 3, 2020. *State v. Payne*, No. MI988-00096-SC-DPE-DD (Tenn. Feb. 24, 2020).

[13] Attempts to reopen his petition for post-conviction relief and bring a successive federal habeas petition—both grounded in arguments that his intellectual disability made his execution unconstitutional— were also denied. *See Payne v. Carpenter*, No. M2014-00688-COA-R3-CV, 2016 WL 4142485 (Tenn. Ct. App. Aug. 2, 2016); *In re Payne* 722 F. App'x. 534, 536 (6th Cir. 2018).

IV. MR. PAYNE MEETS THE STANDARD FOR GRANTING DNA TESTING

The availability of STR technology and DNA testing databases have produced scores of pre-[14] and post-conviction DNA exonerations in recent years that have been nothing less than astonishing – both because of the minute traces of evidence involved, and because of the grave errors revealed in a host of criminal cases where the defendants' guilt had appeared to be beyond dispute.[15] There have been 367 post-conviction DNA exoneration cases nationwide to date. In 162 of these cases, DNA not only exculpated the innocent, but also lead to the identification of the actual assailant.[16] The Tennessee legislature, through the DNA Act, recognized the importance of granting access to DNA testing to individuals convicted of serious crimes.[17] The Act's legislative history shows it has two purposes, first, "to aid in the exoneration of those who are wrongfully convicted" and second, "to aid in identifying the true perpetrators of the crimes." *Powers*, 343 S.W.3d at 51.

One of the earlier exoneration cases, from 2002 in Shelby County, is demonstrative of the power of post-conviction DNA testing to achieve these duals purposes. Clark McMillan was

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[14] William S. Sessions, director of the FBI who oversaw the creation of the bureau's first DNA laboratory, noted that the laboratory's initial results "were stunning: in approximately 30 percent of the cases, the DNA found during an investigation did not match that of the suspect. In the last 20 years, that percentage has dropped to 25 percent, but remains a rate far too high." Sessions, *DNA Testing*, NY TIMES, May 27, 2009.

[15] In 1997, for example, Stephan Cowans of Massachusetts was convicted of shooting a Boston police officer. The evidence against him included, among other things, an eyewitness identification by the surviving victim, and testimony by not one but *two* police department fingerprint analysts that prints taken from the crime scene matched Cowans. But in 2004, STR DNA testing conducted on saliva from a glass of water the assailant drank at the scene, skin cells from the band of a hat that fell off his head while fleeing as well as a sweatshirt left behind at the scene by the assailant, yielded the same STR DNA profile – which conclusively excluded Cowans as the source. The fingerprint was then re-analyzed, and, after police concluded that the prior match had been "a mistake" by both analysts, Cowans was exonerated. *Man Freed in 1997 Shooting of Officer*, BOSTON GLOBE, Jan. 24, 2004.

[16] "Those actual perpetrators went on to be convicted of 152 additional violent crimes, including 82 sexual assaults, 35 murders, and 35 other violent crimes while the innocent sat behind bars for their earlier offenses." *See* The Innocence Project, Exoneration Statistics and Databases, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited July 20, 2020); The National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/browse.aspx (last visited July 20, 2020); *see also Powers*, 343 S.W.3d at 46-47.

[17] Since the DNA Act was enacted, 2 convictions in Tennessee have been overturned on the basis of DNA evidence *See* The Innocence Project, All Cases, https://www.innocenceproject.org/all-cases/#tennessee,exonerated-by-dna (last visited July 20, 2020).

convicted in 1980 of a rape and robbery of a couple in Overton Park. Prior to his trial, while he was being held in pre-trial detention at the jail, Mr. McMillan encountered a man David Boyd who admitted that he was the person who committed the crime. Mr. McMillan proclaimed his innocence and attempted to tell officials about Boyd's confession to no avail; Boyd was arrested for, and went on to commit additional attacks in the park. When Mr. McMillan was in his twenty-second year of wrongful imprisonment, and DNA evidence had become forensically available, he secured testing that excluded him from the crime scene evidence, and through a search and match in the CODIS database, showed that the crime had in fact been committed by David Boyd (who was in the database as a result of committing a 1983 rape in Houston, Texas). Tom Bailey. *Wrong Man – Imprisoned 22 of his last 37 years – Dies*. Memphis Commercial Appeal. July 15, 2017. Post-conviction DNA testing here is equally able to vindicate Mr. Payne's longstanding assertions of innocence and to identify the actual assailant of the crime.

A. **The Applicable Standard**

The DNA Act provides a procedural mechanism whereby convicted persons in this State can seek exoneration through DNA testing. A Petitioner, may, "at any time, file a petition requesting the forensic DNA analysis of any evidence that is in the possession or control of the prosecution, law enforcement, laboratory, or court, and that is related to the investigation or prosecution that resulted in the judgment of conviction and that may contain biological evidence." Tenn. Code Ann. § 40-30-303. Under the Act, after notice to the prosecution and an opportunity to respond, testing is required, and the Court "*shall*" order DNA analysis where an applicant shows:

> (1) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA analysis;
>
> (2) The evidence is still in existence and in such a condition that DNA analysis may be conducted;

(3) The evidence was never previously subjected to DNA analysis or was not subjected to the analysis that is now requested which could resolve an issue not resolved by previous analysis; and

(4) The application for analysis is made for the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice.

Tenn. Code Ann. § 40-30-304. Where these conditions are met, the Court is required to order testing. *Nelson*, 2014 WL 295833, at *4 ("The provisions of this section are mandatory, meaning that if the post-conviction court finds that they are satisfied, it is without discretion to deny DNA analysis.")

Mr. Payne's case satisfies the four criteria set out in Tenn. Code Ann. § 40-30-304, and thus the Court must order testing.

B. The Evidence Mr. Payne Seeks To Have Tested Is Still In Existence, Has Never Been Subjected to DNA Testing, And Is In Such A Condition That DNA Analysis May Be Conducted

At the time of trial, "DNA-based evidence testing was just gaining a foothold in the forensic arena" and was generally unavailable in criminal investigations. When the TBI Crime lab at Nashville (TBIN) examined and tested some of the biological evidence in 1988, it did so with basic conventional serology (ABO blood group and some enzyme isozyme phenotyping) testing which was only capable of excluding or including a suspect with a relatively large segment of the population who could be the source of evidence: it was not capable of establishing that biological evidence came from a specific individual. That testing, which was in use at the time at TBI and almost all other crime laboratories throughout the country, is now outdated. *See* Ex. [], Declaration of Alan Keel, dated July 20, 2020, ¶ 15, attached hereto as Exhibit 35 (the "Keel Decl.").

"Today's STR DNA technology is exponentially more sensitive and discriminating than the conventional serology and early-generation DNA analysis methods available to the forensic

community at the time of this trial."[18] *Id*. ¶ 8. STR analysis "is the foundation for the Combined DNA Index System (CODIS), our national DNA-based identification system," and enables analysts to successfully generate DNA profiles from "minute amounts of biological material that are generally invisible to the naked eye, degraded evidence," including, significantly, "evidence samples collected in decades-old [] cases" that have been stored with courts, police departments, and laboratories. *Id*. ¶¶ 7, 14; *see generally Cotton v. State*, 144 So. 3d 162, 163 (Miss. Ct. App. 2013), aff'd, 144 So. 3d 137 (Miss. 2014) (after being stored in the sheriff's property room for thirteen years, fingernail evidence from an unsolved murder in Mississippi was successfully DNA typed in 2008 and through a match in CODIS identified a suspect who was convicted of the crime based exclusively on the DNA).

1. The Evidence Has Never Been DNA Tested

Under § 40-30-304 (3) of the DNA Act, post-conviction testing is appropriate where the biological evidence was "never previously subjected to DNA analysis . . . ." This requirement is satisfied as no DNA testing has been performed in this case.

2. The Evidence is in a Condition for Testing

Mr. Payne also meets the requirement of § 40-30-304(2) in that the evidence is currently in a condition that would enable the requested DNA testing. This petition is supported by the declaration of DNA expert C. Alan Keel, who reviewed records of available evidence to determine its suitability for DNA analysis. Mr. Keel is the Forensic Biology/DNA Analysis Unit Supervisor and DNA Technical Lead Analyst for Forensic Analytical Crime Lab, Inc. (FACL). Keel Decl. ¶ 2. The laboratory has significant experience in the post-conviction re-examination of biological

[18] The DNA quantification methods are more sensitive, the DNA amplification polymerase is more efficient and less susceptible to inhibition, more PCR cycles are employed during STR amplification, and the DNA typing instruments are more sensitive. Keel Decl. ¶ 8.

evidence, and 40% of the laboratory's current casework is performed on behalf of law enforcement in the pre-trial investigation of criminal cases. *Id*. Prior to joining FACL, Mr. Keel worked for fifteen years on behalf of law enforcement at a number of government crime laboratories, from Louisiana to California. *Id*. ¶¶ 2-3. Mr. Keel has "conducted DNA testing in hundreds of cases on thousands of samples from across the country on behalf of prosecutors and defendants in both pre-trial and post-conviction investigations from over 36 states including Tennessee, several military bases, and Canada." *Id*. ¶ 4.

Mr. Keel explains that since the time of the trial in this case "advances in DNA testing technology. . . have led to more detailed physical evidence examination procedures. These examination and technological advances allow the detection and collection of biological material and the development of highly discriminating DNA profiles from even minute quantities of biological evidence 1) that went overlooked or unconsidered by previous examiners, 2) was previously deemed insufficient using earlier methods, and 3) that previously generated "inconclusive" results using the state of the art serological methods available in 1988 and DNA analysis methods that were just in their infancy." *Id*. ¶ 6.

Unlike the forensic testing in use at the time of trial, current DNA testing technology enables the identification of "highly discriminating to unique DNA profiles from challenging forensic evidence such as vaginal samples from cases where no ejaculation occurred and a very limited amount of male DNA was recovered, from body surface swabs and fingernail clippings/scrapings where a small amount of the male biology was present and from the roots of single hairs recovered from crime scenes." *Id*. ¶ 8. Using today's technology "highly discriminating to unique DNA profiles" can also be obtained "from so-called 'touch DNA' (low

levels of biological material containing DNA that can be transferred from a person via brief handling or physical contact) recovered from clothing items or objects found at crime scenes." *Id*.

In addition, Y-STR testing, a form of the STR test now available, "is particularly suited to casework in which the evidentiary items contain a mixture of female and male DNA." *Id*. ¶ 9 (emphasis in original). "Y-STR testing is especially valuable where the evidence contains a small amount of male DNA commingled with female DNA. By targeting only male DNA and 'avoiding' the often otherwise overwhelming amount of female DNA, Y-STR testing is highly useful for discriminating male DNA present in a mixed sample, such as a victim's fingernail evidence specimens, vaginal swabs with little or no semen, commingled female and male bloodstains, and victim clothing that was handled by a male perpetrator." *Id*.

After reviewing the TBI Laboratory reports related to this case, the trial testimony of medical examiner Dr. Richard Haruff and toxicologist Paulette Sutton, evidence inventories, crime scene photographs, and photographs of evidence as it is being stored by the Clerk of Court, Mr. Keel has identified over a dozen items that, using modern technology, are suitable for DNA testing in satisfaction of Tenn. Code Ann. § 40-30-304(2), and which have the potential to generate DNA from the assailant. Keel Decl. ¶¶ 5, 15-33. To the best of Mr. Payne's knowledge, these items have remained in the possession of the State since being collected from the crime scene and at autopsy; the items so indicated *infra* have already been confirmed to be stored in the Property and Evidence Room of the Shelby County Criminal Court Clerk. Leonard Decl. ¶ 6.

a. Items Shown To Mr. Payne's Counsel During An Inspection Of Evidence At The Shelby County Criminal Court Clerk In December 2019

(i) Bloodstained 8" blade with wood handle

There can be no question that the assailant extensively handled the knife: the assailant used the knife to stab and cut Charisse Christopher over eighty times (she was stabbed 42 times in her

chest, abdomen, neck, head and right thigh and incurred 42 separate defensive wounds); Lacie Christopher was stabbed nine times in her chest, abdomen, back and head; and Nicholas Christopher multiple times in his abdomen. *See* Ex. 1, Trial. Tr. Vol. IV, Testimony of Richard Harruff at 485, 490; Ex. 2, Trial Tr. Vol. IV, Testimony of Joseph Zvolanek at 475. The bloody knife was found at Lacie's feet. *See* Ex. 7, Trial Tr. Vol. VI, Testimony of Sammy Wilson at 947. It has been preserved since trial and can now be tested.

Law enforcement and private DNA laboratories routinely test weapons and other items that are believed to have been touched or handled by a perpetrator: in current cases, old unsolved cases, and in cases of people seeking to prove innocence. *Using DNA to Solve Cold Cases*, NAT'L INSTIT. JUST., OFF. JUST. PROGRAMS, U.S. Dept. Just., Pub. No. NCJ 194197 (June 2002) at 1-2, 21 (listing weapons among common evidence to test for assailant DNA). Weapons are considered common items of evidence to test because individuals leave sweat and skin cells behind on items that they handle or touch and current DNA technology, specifically the availability and sensitivity of the STR test, make it possible to develop DNA profiles from this biological evidence. *Id.* Mr. Keel explained that "[w]ith today's DNA technology, it has become usual and customary to attempt to recover DNA from the biology referred to as 'touch DNA' deposited on virtually any object during handling – but particularly if that object is a tool with a handle normally gripped tenaciously during use." Keel Decl. ¶ 22. In cases involving repeated stabbing, such as the instant case, the DNA profile(s) of the person(s) who used the knife can be identified through DNA analysis of skin cells left behind on the handle.

Aside from the handle of the knife which can be tested for skin cells left behind by the assailant, testing of the blood from the knife's blade is capable of identifying both victim and assailant DNA. Blood from the victims would be expected, but importantly, *some of the blood*

present on the blade also may originate from the assailant. This is because in stabbing cases, especially where there are multiple injuries, the knife can slip during the repeated stabbings and injure the assailant. The additional fact the Charisse Christopher had 42 defensive wounds to her hands and arms indicates she fought the attacker and attempted to defend herself, which also could cause the knife to cut the perpetrator during the attack. *See* Jim Varnon et al., *Self-Wounding of Assailants during Stabbing and Cutting Attacks*, SWAFS J., 17-1, 19, 1995, *at* https://www.cacnews.org/news/winter95.pdf (paper authored by investigators of homicides involving stabbings discussing numerous opportunities for self-wounding sustained by assailants during violent stabbings given the difficulty – even impossibility – for the knife wielder to control each thrust or slash).

Mr. Keel's view is "[i]t is also not unreasonable the assailant, even if gloved, may have been injured during the melee and bled on the knife. Based on this, the knife recovered from the kitchen floor handle and blade areas should be subjected to DNA testing." Keel Decl. ¶ 21.

While it might be expected to find Mr. Payne's DNA on knife as he attempted to aid the victim and thereby came into contact with the handle and may have incurred an injury dislodging the knife, DNA testing is capable of establishing the presence of male DNA from skins cells and/or blood on the handle and blade of the murder weapon that does not belong to Mr. Payne nor the victim(s). Any DNA – especially blood – that does not come from the victims or Mr. Payne would be highly probative and can be compared to the alternate suspects in this case, and if eligible uploaded into the CODIS database.

(ii) Newly-disclosed bloodstained bedding; bloodstained clothing worn by the juvenile victims, curtains from kitchen, tablecloth, white washcloth, rug, and stuffed animal

While the State's theory at trial was that the entirety of the attack occurred in the kitchen, new, untested evidence indicates otherwise: *in 2019, bedding police recovered from Ms. Christopher's bedroom was made available to Mr. Payne's counsel* ***for the first time****, which led to a startling discovery: the bedding appears to be bloodstained* suggesting a portion of the attack actually occurred in Ms. Christopher's bedroom. These bloodstains can now be tested for assailant DNA. Keel Decl. ¶ 23. As discussed *supra*, in close-range confrontations, especially where a victim attempts to defend herself from repeated stabbings, assailants are often injured in the attack and are the source of bloodstains found at the crime scene.

In fact, it has always been the State's position that Ms. Christopher "struggled for her life and the life of her babies," that she scratched the assailant, and that the assailant was bleeding at the scene. *See* Ex. 4, Trial Tr. Vol. IX, State's Closing at 1374-78. The State used the finding of A type blood, which was consistent with Mr. Payne's blood type (as well as one of the child victims) to argue that Mr. Payne left his blood at the scene. *Id*. ("So where did she get A Type blood underneath her right fingernails? She got it from his shoulder . . . . That's where she got the A Type blood underneath her fingernails on her right hand"). Thus, under the State's theory at trial at least some of the crime scene blood comes from the assailant. Testing of the bloodstains that establishes the presence of male DNA not belonging to the victims or Mr. Payne would, especially under the State's trial theory, undermine confidence in the verdict.

The finding of foreign blood at the scene of a stabbing murder has helped identify perpetrators of violent crime, leading to criminal convictions and exonerations of the wrongly convicted. Keel Decl. ¶ 27 (discussing testing Mr. Keel's laboratory performed in connection with

a quadruple homicide involving a woman, her sister and her two children; all victims had been stabbed and a shirt recovered from a bathroom was found to have several discreet blood drop stains, five were sampled and matched to a suspect who was then convicted of all four killings); *State v. Underwood*, M200601826CCAR3CD, 2008 WL 5169573, at *8 (Tenn. Crim. App. Dec. 10, 2008) (where one victim was stabbed 41 times, a second victim was stabbed 59 times and crime scene officer reported seeing "what appeared to be blood 'just everywhere[,]'" a DNA analyst at TBI observed a single blood drop located on one victim's thigh, which was matched to the defendant along with blood on the doorknob mixed with DNA from one victim, and blood on an aerosol can collected from the scene); National Registry of Exonerations, Kenneth Waters at https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3722 (Wrongfully convicted of a 1980 murder in Massachusetts in which the victim was stabbed more than 30 times, Waters was exonerated two decades later when he was excluded through DNA testing of bloodstains foreign to the victim that were found at the crime scene.).

Because of the possibility that the assailant injured himself during this crime, based on the circumstances of the crime and nature of Ms. Christopher's injuries, Mr. Keel advises that in addition to the bedding, several other bloodstained items collected from the crime scene – the clothing of the children, tablecloth, curtains, white washcloth, rug, and stuffed animal – should also be examined for "particularly isolated stains, and/or biology foreign to the Christopher family." Keel Decl. ¶ 25 (emphasis in original). The white washcloth and the rug recovered from the floor of the living room which were tested by the TBI prior to trial and found to be stained with blood can be tested to determine the source of the blood present, whether any blood belongs to the assailant as a result of an injury during the assault. *Id*. In addition, even if the blood on the washcloth is wholly attributable to the victim(s), the washcloth can be tested for male DNA left

behind by the assailant if he used the towel to wipe the victim's blood off of his hands, or otherwise used the towel to wipe himself down after the attack, leaving behind skin cells, or semen. *Id*.

With regard to Ms. Christopher's bedding, in addition to testing for bloodstains from the perpetrator, there is also another important potential source of assailant DNA that may be present on the bedding. It is unclear if *the bedding has ever been examined for semen*. The presence of blood on Ms. Christopher's bedding suggests that at least some portion of the attack occurred in her bedroom and the State prosecuted Mr. Payne under a theory that there was a sexual motive for the crime, and that Ms. Christopher was vaginally raped. As Mr. Keel explained, "Finding semen on the bedding from a non-consensual source could confirm the sexual assault component of this crime and potentially identify the killer, especially if any semen and blood on the bedding originate from the same male." *Id*. ¶ 23.

Mr. Keel's discussion of the testing his laboratory performed in the Nashville, Tennessee homicide involving defendant Melvin Crump underscores the ability of testing the bedding today to identify semen related to the crime and to thereby establish the identity of who committed the crime.[19] Crump was convicted in 2006 of a 1988 rape and murder based on DNA testing of biological evidence on bedding that was not identified when the evidence was first examined shortly after the crime, but which was found during Mr. Keel's post-conviction re-examination of the evidence. *State v. Crump*, M200602244CCAR3CD, 2009 WL 723524, at *6 (Tenn. Crim.

[19] While there is no indication here that the bedding was ever examined for semen, even if it had been, it is not uncommon for labs to identify critical evidence in the post-conviction re-examination of evidence that was missed during the original testing of the evidence and several DNA exonerations have resulted from analysts' ability to locate semen/sperm overlooked in a laboratory's initial examination of the evidence in the pre-DNA era. *See*, *e.g*., Robert D. McFadden, DNA Clears Rape Convict After 12 Years, N. Y. TIMES, May 20, 2003; Wrong Man is Set Free by DNA, N.Y. POST, May 20, 2003; *see* also Man Cleared in 1994 Rape Says Faith, Perseverance Got Him Through Prison, Now Free Thanks to DNA Evidence, Dean Cage Looks to Start His Life Over, CHICAGO TRIBUNE, May 29, 2008 (rape kit and clothing collected from a sexual assault victim in 1994 failed to reveal sperm, post-conviction Y-STR testing revealed DNA from the same unknown male on both the victim's clothing and rape kit swab, and excluded Dean Cage who had been wrongfully convicted and served 12 years of a 40 year sentence for the crime).

App. Mar. 18, 2009). Crump had been an initial suspect and arrested, but the charges were dismissed. When the evidence was re-examined in 2005, Mr. Keel's laboratory identified semen on the victim's bed sheet and a towel found under the victim's body, which had been overlooked in the initial examination of the evidence at the TBIN Crime lab in the late 1980s and which was key evidence in his prosecution. Keel Decl. ¶ 24. A re-examination of the bedding in this case is similarly capable of identifying biological evidence left behind by the assailant on the bedding.

(iii) *Tampon*

To support its theory that Ms. Christopher was raped, at trial the State introduced a tampon police recovered from the scene, purportedly nearby to where her body was found on the kitchen floor. Because the tampon was not discovered until two days after the murder and does not appear in any of the crime scene photographs or video taken on the day of the homicide, there remains serious question as to whether the tampon was in fact found where police claimed it was, and whether it was removed by the assailant at the time of Ms. Christopher's attack. Nevertheless, given the State's theory at Mr. Payne's trial that this was a sexually motivated crime, and its reliance on the tampon as "the most easily understandable and most powerful evidence that he'd had sex with her[,]" (*see* Ex. 18, PC Tr. Vol. II, Testimony of Thomas Henderson at 187-88; Ex. 4, Trial Tr. Vol. IX, State's Closing at 1369), presuming the State's theory to correct, the tampon could contain DNA from being handled by the assailant during the assault, or through fluids transferred onto the tampon if it was in use at the start of any sexual assault. Current DNA technology is capable of identifying any male DNA present.

Mr. Keel explained, "As with the victim's bedding, finding semen on the tampon from a non-consensual source could confirm the sexual assault component of this crime and potentially identify the killer, especially if this finding is redundant to other physical evidence from the scene." Keel Decl. ¶ 30. In cases where a victim was using a tampon either immediately before or during

a sexual assault, male DNA has been recovered both on the string of the tampon as well as absorbent cotton portion, leading to both exonerative and inculpatory evidence. *See* The Cases: Angel Gonzalez at https://www.innocenceproject.org/cases/angel-gonzalez/ (Gonzalez was exonerated of a 1994 sexual assault in 2015 based on exclusionary results from "touch DNA" from the victim's shorts, male DNA found on the victim's tampon which was removed during the attack, and sperm from the rape kit); Keel Decl. ¶ 31 (discussing 2012 DNA testing performed at FACL laboratory on behalf of the Innocence Project that identified sperm on a tampon recovered from a sexual assault victim in 1987 in New Orleans, and yielded the DNA profile of the sperm source which matched the defendant).

Here, it has always been the State's position that the assailant removed the tampon from Ms. Christopher's body and this was evidence of sexual assault. The State argued to the jury:

> What other evidence do we have there was a sexual assault? We have the used tampon. It was not found in the body at the morgue. It was found in the floor at the death scene. How did it get out of her body at the death scene? When was it removed? And by whom was it removed in the kitchen? And for what reason other than some sort of sexual assault?

Ex. 4, Trial Tr. Vol. IX, State's Closing at 1369. Thus, DNA results that identify male DNA on the tampon and exclude Mr. Payne as the source would be powerful evidence that he is not the person who attacked and murdered Ms. Christopher.

(iv) Bloodstained clothing belonging to Payne

"[B]ased on the number of knife stab wounds each victim received, the number of defensive knife wounds Charisse Christopher received, and the extensive bloodstain distribution at the scene, it is reasonable to expect a <u>significant amount and likely characteristic deposits of blood</u> from the victims to be on the assailant's clothing. The clothing believed to have been worn by Mr. Payne <u>while he was at the crime scene</u> should be examined." Keel Decl. ¶ 28 (emphasis in original). Such an examination could be informative as to "whether the bloodstain evidence is compatible

with Mr. Payne perpetrating such a violent and prolonged attack or with Mr. Payne's version of his involvement at this crime scene." *Id*.

b. Additional Probative Evidence in the State's Possession

(i) Fingernail clippings

In violent crimes, DNA from the perpetrator can accumulate under the fingernails of the victim in a number of ways including through scratching the perpetrator during a defensive action. Keel Decl. ¶ 17. The crime scene evidence here depicts an intense physical struggle. Ms. Christopher was stabbed 42 times and incurred a remarkable 42 defensive wounds – increasing the probability that she captured her assailant's DNA under her nails – as he repeatedly stabbed her and she attempted to fight off the repeated stabbing – to a near certainty.

It was the State's theory that Ms. Christopher scratched Mr. Payne. The State introduced the results of blood typing that showed that blood foreign to Ms. Christopher, which was Blood type A, was detected in the material recovered from under Ms. Christopher's fingernails. The State argued that this Blood type A came from Mr. Payne, who shared this same blood type (so too did Nicholas), and argued that Mr. Payne was scratched as Ms. Christopher attempted to fight him off. *See* Ex. 4, Trial Tr. Vol. IX, State's Closing at 1374.

Mr. Keel concluded: "Of the physical evidence collected in this case the adult victim's fingernail clippings may hold the most promise to identify this perpetrator. This is because of: 1) the intimate and violent contact that necessarily occurred between Charisse and her assailant as the result of, at least, a prolonged knife attack; 2) the historically well-documented, in both the scientific literature and our criminal justice system, utility of fingernail evidence in providing relevant, if not dispositive, biological evidence in violent crimes; 3) the fact that foreign ABO blood group type A antigen was found associated with two separate fingernail clippings analyses by TBI at the time of trial." Keel Decl. ¶ 16 (footnote omitted).

Current STR DNA testing is capable of identifying assailant DNA in the fingernail clippings. Keel explained: "Based on my own work[20] with scores of fingernail specimens and the scientific literature, fingernail evidence from suspects and victims in violent crimes often bears biological material capable of producing highly discriminating DNA profiles." *Id.* ¶ 18 (with today's "DNA technology it is not unusual to recover male DNA sufficient to produce a meaningful profile from one or several different fingernail specimens, even if that DNA is commingled with an abundance of female DNA.")

Y-STR DNA testing which is a form of the STR test that targets only male DNA, also may be "especially valuable" here, as the fingernail evidence likely contains "a large amount of female DNA from the victim and a small amount of male DNA." *Id.* ¶ 9. In such circumstances, the female DNA can mask the male DNA present in the sample when traditional STR testing is performed, leaving the assailant DNA undetected.[21] "By targeting only male DNA and 'avoiding' the often otherwise overwhelming amount of female DNA, Y-STR testing is highly useful for discriminating male DNA present in a mixed sample, such as a victim's fingernail evidence. . .". Keel Decl. ¶ 9. "Using today's Y-STR DNA technology it is not unusual to recover male DNA sufficient to produce a meaningful profile from one or several different fingernail specimens, even if that DNA is commingled with an abundance of female DNA." *Id.* ¶ 18.

If a sufficient male STR DNA profile is obtained from the victim's fingernails it could be searched in CODIS and possibly matched to a convicted offender on file. If the male DNA profile

[20] "FACL analysts have examined fingernail evidence in over 64 cases" and Mr. Keel "personally ha[s] examined fingernail clippings, scrapings, and swabs in over 50 cases." Keel Decl. ¶ 18.

[21] Y-STR technology has enabled the detection of male DNA profiles in forensic casework samples that had previously shown only a female contributor when conventional STR testing was employed. *Shabazz v. State*, 592 S.E.2d 876 (Ga. 2004) (Y-STR identified male and was used to link defendant to that male DNA, after conventional STR analysis of the same evidence failed to generate the male donor's profile).

is not eligible to be searched (because its partial or a Y-STR profile which is incompatible with the database), it can be compared to DNA obtained from other crime scene evidence.

(ii) Rape kit

While no semen was conclusively identified in TBI's pre-trial testing, the State introduced the testimony that acid phosphatase—an enzyme present in semen—was found in the victim's vagina, (*see* Ex. 1, Trial. Tr. Vol. IV, Testimony of Richard Harruff at 498-500), arguing it was corroborative of a sexual assault. If Ms. Christopher was sexually assaulted, as the State theorized, DNA from the assailant could potentially be obtained through testing of the rape kit, which could show if male DNA is present. Keel Decl. ¶ 32. As previously discussed, testing could also identify sperm overlooked in the original examination. In addition, the availability of Y-STR testing—by isolating only male DNA in mixed (male and female) DNA samples—has made it possible to yield the genetic profile of a male perpetrator, even where a victim's rape kit does not contain sperm by obtaining a DNA profile from other biological material (skin cells, fluid, pre-ejaculate) passed during intercourse.[22] Any male DNA profile from Ms. Christopher's rape kit could be compared to other evidence from the crime scene and potentially searched in the DNA databases if CODIS-eligible results are obtained.

(iii) Paper sack

The brown paper sack recovered from the kitchen, which contains bloodstains and was referenced in police reports at the time of the crime could be tested in this same fashion to identify blood and/or skin cells from the assailant.

[22] Cassie L. Johnson, Robert C. Giles, Joseph H. Warren, Judith I. Floyd, and Rick W. Staub, *Analysis of Non-Suspect Samples Lacking Visually Identifiable Sperm Using a Y-STR 10-Plex*, 50 J. FORENSIC SCI. (September 2005).

3. The Evidence From this Case is Available for Testing

Petitioner has confirmed that the Shelby County Clerk of Court is currently storing the following items of evidence he seeks to subject to post-conviction DNA testing:[23] the bloodstained knife, bloodstained bedding, tampon, bloodstained clothing worn by the juvenile victims, clothing worn by Mr. Payne, curtains from kitchen, tablecloth, and a stuffed animal.

In addition, the following items collected during the investigation of the crime are believed to remain in the possession of the State: Ms. Christopher's fingernails, rape kit, and the bloodstained white washcloth, rug and paper sack. Petitioner requests that the Court direct the State to conduct a physical search of its evidence storage facilities for these evidentiary items, and to provide chain of custody documents and proof of destruction for any evidence it asserts no longer exists.[24] The DNA Act provides the Court with the authority to enter such an order in connection with an application for testing. *See* Tenn. Code § 40-30-311 ("The court may, in its discretion, make such other orders as may be appropriate."); *Powers*, 343 S.W.3d 36, 49 (Tenn. 2011) (referring to the "General Assembly's broad grant of discretionary authority to 'make such other orders as may be appropriate.'").

In the post-conviction context, it is routine for evidence that is still in existence to be erroneously deemed "lost" or destroyed, but subsequently located and made available for testing after a court issues an evidence search order and/or officials voluntarily undertake additional physical searches of laboratory, medical examiner's office, police department, and storage within

[23] The DNA Act requires the court to order the preservation of "all evidence in the possession of the prosecution, law enforcement, laboratory, or the court that could be subjected to DNA analysis . . ." Tenn. Code § 40-30-309. Simultaneous with the filing of this petition, Petitioner has moved the court to order the preservation of all evidence from this case.

[24] In response to a previous request to test vaginal swabs taken from Ms. Christopher, the State claimed that the swabs "*likely* do [] not still exist due to a malfunction of a storage facility at the . . . lab" in which it was stored. *Payne DNA I*, 2007 WL 4258178, at *8 (emphasis added). Mr. Payne requests that the Court order the State to undertake a search for the swabs and determine if they were actually destroyed.

district attorney's offices. Only after a thorough physical search for evidence and examination of chain of custody documents can a determination be made regarding the availability of the evidence. For a recent illustration, undersigned counsel at The Innocence Project is currently involved in litigation in Alexander County, Cairo, Illinois where in 2018 the Assistant Laboratory Directory of the Illinois State Police informed the court in writing that it no longer possessed *any* evidence from an old homicide, and that the laboratory had returned all evidence to the submitting agencies; on that basis the State initially represented the court that no evidence was available for post-conviction DNA testing. Based on the request of undersigned counsel and the frequent occurrence of locating evidence presumed to be lost, the court issued an order directing all state agencies that once possessed the evidence, including the lab, to perform a physical search for any evidence from the case. In response to the court's order, the laboratory informed the court it had located four items of evidence in the laboratory's state-wide evidence vault.

Here Mr. Payne seeks a court ordered search to determine the location for the items of evidence from this case that are currently unaccounted for, especially given the ability of testing of this additional evidence to produce highly exculpatory evidence, even determinative of innocence. In his declaration, Ben Leonard, an investigator with more than 20 years of experience—including 13 in Tennessee—explains that in his experience, physical evidence from criminal cases like Mr. Payne's is often kept in three places in addition to the clerk's office: (1) the property room of the investigating police department, (2) the West Tennessee Regional Forensic Center, and (3) the TBI. Leonard Decl. ¶ 10. Mr. Leonard has been in contact with Jeanne Broadwell, the TBI's General Counsel, who has informed him that the TBI is in possession of the forensic case folder for Mr. Payne's case, and that it would provide the information from the folder if subpoenaed. *Id.* ¶ 11.

C. A Reasonable Probability Exists That Mr. Payne Would Not Have Been Prosecuted Or Convicted If Exculpatory Results Had Been Obtained Through DNA Analysis Of The Evidence This Petition Seeks To Have Tested

Testing should be ordered because there is a reasonable probability that DNA evidence from the items Mr. Payne has identified will "undermine confidence" in the decisions to prosecute or convict him. *See* Tenn. Code Ann. § 40-30-304(1). The Supreme Court has directed that in determining whether there is a reasonable probability that an applicant for post-conviction DNA testing would not have been prosecuted or convicted if exculpatory DNA test results had been available a post-conviction court must presume that testing results would yield the most favorable test results that are possible in light of the evidence sought to be tested:

> Inevitably, determining whether a petitioner should be afforded DNA testing involves some conjecture, as "it is difficult to anticipate what results DNA testing may produce in advance of actual testing." Under section 40–30–304(1) of the Act, however, we begin with the proposition that DNA analysis will prove to be exculpatory. As one jurisdiction has ruled, "the trial court should postulate whatever realistically possible test results would be most favorable to [the] defendant in determining whether he has established" the reasonable probability requirement under that jurisdiction's DNA testing statute. We hold the same to be true under Tennessee's Act.

Powers, 343 S.W.3d 36, 55 (Tenn. 2011) (citations omitted). In *Powers* the Court also made clear that favorable results includes a search of the CODIS database that matches crime scene evidence to a known offender, stating:

> . . . the Post–Conviction DNA Analysis Act permits access to a DNA database if a positive match between the crime scene DNA and a profile contained within the database would create a reasonable probability that a petitioner would not have been prosecuted or convicted if exculpatory results had been obtained or would have rendered a more favorable verdict or sentence if the results had been previously available.

Id. at 39. The *Powers* Court also made clear that the "reasonable probability" requirement is based on a *Brady* materiality standard and therefore "*prior to a mandatory order of testing*, a petitioner's argument must merely establish 'a probability sufficient to undermine confidence' in the decision

to prosecute or in the conviction had the State or the jury known of exculpatory DNA testing results." *Id*. at 54–55 (emphasis added).

In other words, in determining whether testing must be granted, the Court is to consider the evidentiary significance of the best case scenario test results for the Petitioner: would favorable results—including a match of the crime scene evidence to a known offender who committed a similar crime—undermine confidence in the decision to prosecute or the jury's verdict in the case. It is irrelevant whether the Court thinks that it is *unlikely* that testing will *in fact* show the most favorable results that are possible. It is only logical that the capacity of testing would control whether testing is warranted since in the post-conviction context there will invariably be significant evidence of guilt—there had to be at least sufficient evidence for a conviction and by the time a request for post-conviction testing is made that conviction will have been upheld through the appellate process. The whole purpose of post-conviction DNA testing is to—despite even significant evidence of guilt—determine whether a wrongful conviction has occurred:

> While courts must also consider the evidence that was presented against the petitioner at trial, the evidence must be viewed in light of the effect that exculpatory DNA evidence would have had on the fact-finder or the State. The Act was created because of the possibility that a person has been wrongfully convicted or sentenced, and as a result, the [mere] fact that the victim identified the petitioner as the perpetrator should not provide a basis for denying testing.

Id. at 55 (citations and internal quotation marks omitted); *Peterson*, 836 A.2d 821 at 827 (clarifying the "reasonable probability" requirement relates to whether a new trial would be granted "if the results of the DNA testing [are] favorable" and "even if a trial court concludes, in light of the overwhelming evidence of a defendant's guilt presented at trial, that it is unlikely DNA testing will produce favorable results, the court may not deny a motion for DNA testing on that basis."). For example, *Peterson*, involved a case where there was "strong evidence of defendant's guilt[,]" including, among other things, testimony by three people that Peterson confessed to having

committed the crime on a car ride to work, and described the crime to them "in lurid detail" only a few hours after the crime was committed and before the victim's body had even been discovered; the fact that Peterson had fresh scratch marks on his arms that looked like fingernail marks in the days after the crime; several hairs at the scene were microscopically consistent with his hair, and testimony that Peterson confessed to an inmate while awaiting trial. *Peterson*, A.2d 821 at 826. After determining that there were a range of favorable test results in that case which met the materiality prong there, the court ordered testing. The results showed that the hairs attributed to Peterson did not belong to him, and semen in the victim's mouth (overlooked in the original pre-trial examination of the evidence) matched DNA under the victim's fingernails and excluded Peterson. Peterson, who also had been prosecuted for capital murder, was exonerated in 2006.[25]

1. DNA Testing Has Repeatedly Exonerated Individuals Who Were at the Scene of the Crime

It is common for individuals who were present at a crime scene to be mistaken for the assailant and wrongfully convicted. Indeed, even in cases where a defendant was found *covered in the victim's blood,* DNA testing has led to exoneration.

The case of Clemente Aguirre is particularly relevant and informative. As mentioned *supra*, Aguirre was wrongly convicted and sentenced to death in Florida for a 2004 murder after he, like Mr. Payne, came across a crime scene, and tried to aid the stabbed victims—a woman and her mother murdered in their home. When Aguirre was questioned by police, he initially reported that he knew nothing, but later disclosed that he had discovered the victims' bodies the night before (he had stopped by the house to ask for beer). Aguirre maintained that he checked to see if they were still breathing, which resulted in blood from the victims getting on his clothing. Realizing

[25] *New Jersey Death Penalty Study Commission Report*, Jan. 2007, at 52, available at http://www.njleg.state.nj.us/committees/dpsc_final.pdf; Laura Mansnerus, *Citing DNA, Court Annuls Murder Conviction from 1989*, N.Y. Times, July 30, 2005.

the victims were dead and fearful that the perpetrator was still present, Aguirre said he picked up a knife that was near one of the victim's body, but panicked, threw the knife into the yard and ran home. Once home, he took off his bloodstained clothes and put them into a plastic bag. Police arrested Aguirre, and he was convicted based in large on the presence of the victims' blood on his clothing and footwear impressions, showing his shoe prints in blood at the scene. In 2011, Aguirre sought DNA testing of over 80 pieces of crime scene evidence. DNA testing of bloodstains identified the DNA of the victims' daughter/granddaughter, which the defense contended was consistent with other evidence (admissions she made) and indicated she was the killer. *See Aguirre-Jarquin v. State*, 202 So. 3d 785, 789, 795 (Fla. 2016). Thus, the fact that Mr. Payne was present at the crime scene and discovered the victim's body (and his DNA may be present) does not undermine the capacity of DNA testing to produce materially relevant evidence of his innocence.

Likewise, David Ayers served eleven years in prison for murder after finding a woman in the apartment building where he worked beaten to death and nude from the waist down. Ayers, who was crying and visibly shaken when police arrived at the crime scene, told police that he had been to the victim's apartment earlier that day to help her after she had taken a fall. See The National Registry of Exonerations, David Ayers, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3868 (last visited July 20, 2020). Police believed that surveillance footage did not back up Ayers' account of his visit to the apartment, so they accused him of lying. At Ayers trial, the prosecution presented telephone records and a written statement from a friend of Ayers, who had made a statement to police that Ayers called him prior to the discovery of the body to report that victim had been murdered. On the witness stand, however, the witness recanted portions of the written statement,

saying detectives pressured him to say the call came before the body had been discovered. In 2011, the evidence from the crime scene was submitted for DNA testing—including the rape kit, a bloody towel, and hair evidence. *Id.* The testing excluded Ayers as the perpetrator of the crime. *Id*

Like Aguirre and Ayers, Chad Heins became the prime suspect in a homicide after he discovered the victim's body and was at the scene. *See* The Cases: Chad Heins, https://www.innocenceproject.org/cases/chad-heins/ (last visited July 20, 2020). In 1994, Tina Heins was stabbed to death in the Florida apartment that she shared with her husband and his brother, Chad. *Id*. The victim's husband, who served in the Navy, was on duty that night. Chad, who had recently moved to Jacksonville was sleeping on the victim's couch during the crime. *Id*. When he woke up, he discovered his sister-in-law's dead body in her bedroom—she had been stabbed 27 times while he was asleep. Heins was charged with and later convicted of murder based on the prosecution's theory that he had killed her in a jealous rage. *Id*. Post-conviction DNA testing showed that male DNA under the victim's fingernails did not belong to Chad Heins or the victim's husband. *Id.* A comparison of the unknown male DNA profile found underneath the victim's fingernails with three hairs found on the victim's body and semen found on the victim's bedding showed the profile from the evidence was consistent. *Id*. Prosecutors conceded that the unidentified male whose DNA profile was on multiple pieces of crime scene evidence was the true perpetrator and Chad was officially exonerated. *Id*. As with Heins's case, despite his known presence at the scene, testing in Mr. Payne's case is capable of establishing the assailant's identity through the presence of the same DNA profile on multiple pieces of evidence (DNA on the knife, bedding, fingernail cuttings) and of demonstrating that person is not Pervis Payne.

2. Favorable Test Rest Results Would Undermine Confidence in the Verdict

In this case, there are a range of exculpatory test results, that when viewed in the light "most favorable to the petitioner[,]" would "undermine confidence" in the decision to prosecute or in the conviction had the jury known of the exculpatory results, including: 1) DNA test results that exclude Mr. Payne from crime scene evidence attributable to the assailant, for example male DNA on the tampon, blood/skin cell on the murder weapon or other bloodstains at the scene that does not come from Mr. Payne or the victims; 2) redundant DNA results which establish the same DNA profile on multiple items of evidence and exclude Mr. Payne and 3) DNA testing that matches DNA at the crime scene to an alternate suspect or another known third party through CODIS. With any of these scenarios, which the Court is required to consider under the *Powers* decision, a "reasonable probability" would exist that Mr. Payne would not have been prosecuted or convicted, and accordingly, the Court must order testing DNA testing here.

a. DNA Exclusion of Mr. Payne from Crime Scene Evidence Attributable to the Assailant

Mr. Payne seeks to compare DNA recovered from the crime scene and autopsy evidence to a sample of his own DNA. The exclusion of Mr. Payne from male DNA present on the specified evidence, individually or collectively, would completely undermine the state's theory and provide powerful scientific proof that Mr. Payne is not the person who murdered the victims.

(i) Exclusion from Murder Weapon

There has been no question that the bloody knife found on the floor nearby the victims' bodies is the weapon the assailant used to stab the victims, collectively, over four dozen times. The extensive use of the knife increases the likelihood that the assailant's DNA is on the knife handle or that blood on the knife may belong to the assailant from the prolonged struggle with Ms. Christopher.

The murder weapon can be tested for both touch DNA from the handle (when the assailant gripped it). The blood on the blade can be tested for the presence of the victims' blood (to confirm its use as the murder weapon) as well as to detect the presence of male blood foreign to the victims from self-wounding during the crime. *Nelson*, 2014 WL 295833, at *1 (reversed denial, and remanded for testing of knife brandished during crime to compare to defendant's DNA and for purpose of a database search). As stated, while it may be expected to find DNA from Mr. Payne given his consistent account of aiding the victims and removing the knife from Ms. Christopher's neck, the presence of third-party male DNA on the handle of the knife and/or blade as well as blood foreign to the victims and Mr. Payne would constitute powerful proof of Mr. Payne's innocence.

(ii) Bloodstain Evidence:

The recent disclosure of bloodstains on Ms. Cristopher's bedding is extremely significant. It undermines the State's theory that the entirety of the crime happened in the kitchen, and indicates Ms. Christopher's attack may have begun in her bedroom. Testing that identified male blood drops at the scene—on the bedding or any of the other evidence—and that excludes Mr. Payne would undermine confidence in the jury's verdict and constitute powerful evidence of his innocence.

(iii) Exclusion from Male DNA on Tampon, Semen from Rape Kit or on Bedding

The State's theory included a sexual motive and the State used Ms. Christopher's rape kit—specifically the finding of acid phosphatase on her vaginal swabs—to argue at trial that Mr. Payne had sex with her. Ex. 1, Trial. Tr. Vol. IV, Testimony of Richard Harruff at 498-500. The State also argued that the assailant removed Ms. Christopher's tampon during the course of the sexual assault and that the presence of acid phosphate, while not conclusive of "a sex act because there is

no sperm present[,]" was in the view of the State's expert "likely to have been seminal, that is, male in source." *See* Ex. 4, Trial Tr. Vol. IX, State's Closing at 1369.

DNA testing that excludes Mr. Payne from male DNA on Ms. Christopher's tampon or any male DNA/semen in her rape kit, especially given that the State attributed to the semen to him at trial and argued he handled the tampon, would certainly require vacatur of his conviction. *Com. v. Reese*, 663 A.2d 206, 210 (1995) (where "the jury was advised that seminal fluid was found on the victim's clothing following the attack, but because scientific developments had not yet made it possible to perform accurate and precise DNA testing, the jury was not advised that the appellee could not have been the depositor of the seminal fluid" hold it "appropriate for the court to award a new trial. Only under these circumstances can we be assured that the "interests of justice" have prevailed."); *State v. Behn*, 868 A.2d 329, 346 (App. Div. 2005) ("Having offered these proofs and argued their significance, the State should not be permitted to now 'walk away' from its evidence and demean its importance.").

(iv) Fingernail Exclusion:

When DNA is found underneath the victim of a violent crime it can be powerful evidence of an attacker's identity. *People v. Hicks*, 981 N.Y.S.2d 81, 84 (2014) (finding it reasonable under the facts of this case to conclude that when the victim vigorously fought her attacker she collected his DNA under her fingernails, vacating conviction based on exclusionary DNA); *See also In re Sagin*, 39 Cal. App. 5th 570, 572, 581 (Ct. App. 2019) (reversing conviction after three decades where DNA testing excluded defendant as the contributor of DNA found under the fingernails of the victim who was found dead with several stab wounds to her upper body and where the DNA experts testified that it would be "unlikely for the perpetrator of a close contact homicide not to leave DNA behind . . . ."). Numerous studies confirm the probative value of fingernail scrapings demonstrating that foreign DNA is not generally present on the fingernails of random persons;

intimate or vigorous contact is required for biology transfer to fingernails; and the persistence of foreign biology on the fingernails of living persons is short. [26] Keel Decl. ¶ 17. Thus, in cases where a close-range confrontation is involved, DNA found under a victim's fingernails is particularly germane to the identity of the perpetrator. *Cotton v. State*, 144 So. 3d 162, 163 (Miss. Ct. App. 2013), *aff'd*, 144 So. 3d 137 (Miss. 2014) (presence of defendant's DNA under victim's fingernails, established a decade after the crime through a database search, sufficient, alone, to support conviction). There have been at least eighteen cases (involving at least 20 individuals) in which DNA from fingernails played a role in the vacatur of the conviction.[27]

In this case, the crime involved a prolonged close-range, violent struggle: the assailant stabbed Ms. Christopher over forty times, and she incurred over forty defensive wounds trying to fight him off. At trial, the state took the position that Ms. Christopher captured biological material

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[26] Cook et al., The Prevalence of Mixed DNA Profiles in Fingernail Samples Taken from Individuals in the General Population, FORENSIC SCIENCE INT'L GENETICS 1, 67 (2007); Henderson et al., Prevalence of Foreign DNA Under Fingernails, INSTIT. OF ENVTL. SCI. AND RES.; Lai et al., An Evaluation of the Routine DNA Analysis of Fingernail Debris in Forensic Casework, INSTIT. OF ENVTL. SCI. AND RES. (2004); Fernandez-Rodriguez et al., Genetic Analysis of Fingernail Debris; Application to Forensic Casework, INT'L. CONG. SERIES, 1239, 921 (2003).

[27] *Hicks*, 114 A.D.3d at 599; Anthony Johnson, Innocence Project, https://www.innocenceproject.org/cases/anthony-johnson/ (last visited July 20, 2020); Anthony Yarbough, Nat'l Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4371 (last visited July 20, 2020); Calvin Willis, Innocence Project, https://www.innocenceproject.org/cases/calvin-willis/ (lase visited July 20, 2020); Chad Heins, Innocence Project, https://www.innocenceproject.org/cases/chad-heins/; Charles Palmer, Nat'l Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5037 (last visited July 20, 2020); Curtis McCarty, Innocence Project, https://www.innocenceproject.org/cases/906/ (last visited July 20, 2020); Daniel Andersen, Nat'l Registry of Exonerations, http://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=4734 (last visited July 20, 2020); David Camm, Nat'l Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4291 (last visited July 20, 2020); Douglas Warney, Innocence Project, https://www.innocenceproject.org/cases/douglas-warney/ (last visited July 20, 2020); James O'Donnell, Innocence Project, https://www.innocenceproject.org/cases/james-odonnell/ (last visited July 20, 2020); Larry Peterson, Innocence Project, https://www.innocenceproject.org/cases/larry-peterson/ (last visited July 20, 2020); Larry W. Davis, Innocence Project, https://www.innocenceproject.org/cases/larry-w-davis/ (last visited July 20, 2020); Malcolm Bryant, Nat'l Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4883 (last visited July 20, 2020); Michael Blair, Innocence Project, https://www.innocenceproject.org/cases/michael-blair/ (last visited July 20, 2020); Nicholas Yarris, Innocence Project, https://www.innocenceproject.org/cases/nicholas-yarris/ (last visited July 20, 2020); Robert Dewey, Innocence Project, https://www.innocenceproject.org/cases/robert-dewey/ (last visited July 20, 2020); Tyrone Hicks, Nat'l Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4432 (last visited July 20, 2020).

from her assailant under her fingernails. Aside from arguing marks on Mr. Payne's body (which he maintained were stretch mark) were scratches, the State relied on the serological finding of type A blood under her fingernails (a blood type foreign to Ms. Christopher, but consistent with Mr. Payne and Nicholas Christopher). Given the evidentiary import of fingernail evidence generally, as well as the specifics facts of this case, testing that shows that the male DNA underneath her Ms. Christopher's fingernail comes from someone other than Mr. Payne (and the victims) would constitute powerful evidence that he is innocent of this crime.

b. Redundant DNA Test Results

"Current DNA technology also typically enables the identification of a common DNA source across multiple items of crime scene evidence" making it important to test all potentially relevant evidence. Keel Decl. ¶ 6 (emphasis omitted). Finding "a redundant profile—meaning a profile from a single source on multiple items—can be critical in DNA investigations because [it] increases the likelihood that the DNA was deposited by the perpetrator, as opposed to an unrelated source" in a non-crime context. *Id* ¶ 12; Greg Hampikian, Emily West, and Olga Akselrod, *The Genetics of Innocence: Analysis of 194 U.S. DNA Exonerations,* ANNU. REV. GENOMICS HUM. GENET. 2011. 12:97–120; *Com. v. Conway*, 14 A.3d 101, 112 (2011) (granting testing in part on a redundancy theory). To illustrate the significant of redundant results, Mr. Keel provided the case example of Nicholas Yarris, who was convicted in 1983 and sentenced to death for the murder of a Pennsylvania woman. Keel Decl. ¶ 12. In 2003, sperm DNA evidence from the case eliminated Yarris, but the State contended it was unclear if it originated from her killer or an unknown consensual partner. Subsequently, Mr. Keel's laboratory tested the victim's fingernails clippings and a pair of winter gloves recovered at the scene (not belonging to the victim). The DNA from the victim's fingernail clippings and the inside of each glove produced the same male DNA profile from the semen on the victim's vaginal swabs. "This redundancy established the relevance of the

semen and definitively placed this male at the death scene. Yarris was exonerated after spending over 20 years on death row." *Id*. ¶ 12.

Testing here is capable of excluding Mr. Payne from "redundant" results—showing, for example, that DNA from the handle of the knife which the assailant used to stab the victims comes from the same man whose blood is on Ms. Christopher's bedding. Such results would constitute powerful proof of Mr. Payne's innocence, which is greater than the showing necessary to obtain testing under the DNA Act. See *Ohio v. Emerick*, 868 N.E.2d 742, 744, 746 (Ohio Ct. App. 2007) (ordering post-conviction DNA testing of "genetic material on the hammer and screwdriver bits used to murder" the victims, crime scene blood and other evidence under Ohio's post-conviction DNA testing statute, finding that if an "unidentified donor's DNA is located on different evidentiary items" the results would be "outcome determinative" with respect to the question of the defendant's guilt).

c. Identification of Known Third Party as Source of Crime Scene DNA

Mr. Payne also seeks to compare any foreign male DNA recovered to the over fourteen million profiles stored in the FBI's Combined DNA Index System ("CODIS")[28] and also for the purpose of comparing the crime scene DNA to known alternative suspects in this case who would have no innocent reason for their blood, skin cells, or semen to be present at the scene (whether on the knife, tampon, bedding or other bloodstained items).

The Tennessee Supreme Court has made clear, the Post–Conviction DNA Analysis Act of 2001 was designed to permit access to a DNA database search: if a positive match between a profile developed from crime scene DNA and a profile contained within a database would create

[28] *See* https://www.fbi.gov/services/laboratory/biometric-analysis/codis/ndis-statistics

a reasonable probability that a petitioner would not have been prosecuted or convicted if exculpatory results from DNA analysis had been previously obtained or that the results would have rendered the petitioner's verdict or sentence more favorable. *Powers*, 343 S.W.3d 36, 60 (Tenn. 2011); *Nelson*, 2014 WL 295833, at *7 (reversing denial of testing because "that the post-conviction court failed to properly postulate the most realistically possible test results, as required by *Powers"* and noting: "Our supreme court has made clear that 'realistically possible' DNA test results include the possibility that testing will not only fail to identify the petitioner's DNA on the item tested but will also simultaneously identify the DNA profile of another known sex offender from the CODIS database.")

Numerous DNA exonerations have resulted from testing that identifies the source of crime scene evidence, and through further investigation that person is confirmed to be the true assailant. Particularly relevant to this case, given the nature of the crime and evidence that was tested, is the exoneration case of Douglas Warney. Nearly a decade after he was convicted for the 1996 brutal stabbing murder of a Rochester, New York man, DNA testing was performed and identified a foreign male profile from blood at the scene of a stabbing murder. [29] Through a search of CODIS, the blood from the crime scene was identified as belonging to a man named Eldred Johnson, who was serving a life sentence for a series of burglary and stabbing offenses involving a very similar *modus operandi*. *Id*. When he was questioned, Johnson confessed and told police that he acted alone and did not know Warney. *Id*. Warney's conviction was vacated upon a joint motion by the State and his lawyers at the Innocence Project. *Warney* v. *State*, 947 N.E.2d 639, 645-46 (N.Y. 2011); *See also People v. Wise*, 752 N.Y.S.2d 837, 847–48 (Sup. Ct. 2002) (newly discovered

[29] Gary Craig, *Innocent Man Freed After 10 Years in Prison*, ROCHESTER DEMOCRAT & CHRON., May 16, 2006; *DNA Is Good for the Soul*, N.Y. TIMES, May 17, 2006; Gary Craig, *Inquiry Urged in Warney Case*, ROCHESTER DEMOCRAT & CHRON., May 18, 2006; Jim Dwyer, *Inmate to Be Freed as DNA Tests Upend Murder Confession*, N.Y. TIMES, May 16, 2006.

evidence matching DNA evidence connected to the "Central Park Jogger's" rape to an alternate suspect who confessed, "would create the probability that had such evidence been received at trial, the verdict would have been more favorable to the defendants"); *See* California Innocence Project, Uriah Courtney, at https://californiainnocenceproject.org/read-their-stories/uriah-courtney/ (last visited July 20, 2020) (Petitioner exonerated of a 2004 rape after "touch" DNA on the left shoulder area of the victim's shirt (where the assailant grabbed the victim from behind) resulted in an exclusion and a search of that profile into CODIS resulted in a "hit" to a convicted sex offender).

Where CODIS fails to yield a hit, forensic genetic genealogy has emerged as a tool to identify, the source of biological material left at a crime scene to establish the identity of the assailant. Forensic genetic genealogy, which utilizes SNPs DNA technology, "couples genetic [DNA] analysis with investigation of publicly available genealogy information" and has been utilized by law enforcement to help solve more than 50 cases in the United States since 2018. Callaghan, Thomas F.,[30] *Responsible Genetic Genealogy*, SCIENCE, Vol. 366, Issue 6462, pp. 155, October 2019; Zhang, Sarah. *How a Genealogy Website Led to the Alleged Golden State Killer*, THE ATLANTIC, Apr. 27, 2018 (the earliest and most public use of genetic genealogy as an investigative tool to identify the source of crime scene DNA and identify the assailant of previously unsolved crimes involved what was dubbed as "the Golden State Killer" case).[31] This technology

[30] Thomas F. Callaghan is chief biometric scientist at the U.S. Federal Bureau of Investigation (FBI) Laboratory Division in Quantico, VA, USA.

[31] There, police had important crime scene evidence related to a burglary, rape and murder spree spanning over a decade which included DNA that they believed came from the person who committed the crimes, but they did not know who that person was. The CODIS database had failed to generate a "hit" to any profile on file. Using genetic genealogy, the police sent the evidence to a laboratory to re-test the evidence to generate a very detailed SNP's DNA profile and then uploaded those results to the GedMatch database to see whether they could find that person or anyone who might have been related to the unknown assailant. They discovered several likely relatives in the database and a family tree was created from those matches that converged on distant ancestors. Mapping forward descendants of the crime scene sample were identified, and then publicly available information helped determine which of them might have, for example, lived near the crime scene or would have been a reasonable age at the time of the crimes to build a list of possible suspects. The suspects were investigated using traditional law enforcement means and ultimately the

has the potential to identify the source of biological evidence from the crime scene in this case, and could link the evidence to someone who, as in the Warney case, has committed similar crimes and/or acknowledges their culpability.

Additionally, there are a number of alternate suspects in this case, and the presence of their DNA on key items from the crime scene would be highly exculpatory proof that Mr. Payne did not commit the crime. Specifically:

(1) Mr. Payne has consistently maintained that when he entered the victim's apartment building, he saw a man with blood on him jump from the second landing down to the steps. Significantly, a neighbor in the same apartment complex where the murders took place who also knew Mr. Payne for decades, *corroborated Mr. Payne's version of the events*, stating that he also had seen the man who came out of the building, and he had seen this same man with Ms. Christopher on several prior occasions, sometimes they were arguing.

(2) Perhaps relatedly, there is evidence that a man Ms. Christopher sold drugs for (Charles Douglas Jones) was overheard (by his own brother, Leroy Jones) talking with his drug associate who told said Ms. Christopher needed to be killed, that Charles Douglas Jones should "take care of the Christopher woman." Ex. 29, Affidavit of Leroy Jones, dated Oct. 14, 1989. Leroy Jones submitted a sworn affidavit that he then heard his brother tell one of the drug dealers he employed, William Hall, that "the Christopher woman had to be 'taken care of.'" *Id.* Following Ms. Christopher's murder, Charles Douglas Jones told Leroy Jones that "Pervis Payne was in the wrong place at the wrong time."

police collected a new DNA sample from the most likely suspect and compared it to the STR profile of the DNA left at the crime scene. There was a match and an arrest was made.

(3) Charisse Christopher had a violent ex-husband, Kenneth Christopher, who was excluded as a suspect because he was serving a sentence for aggravated assault at Fort Pillow State Penitentiary and it was erroneously believed he would not have had the opportunity; but an employee of the prison at the time Kenneth Christopher was incarcerated has since stated that it was common for minimum security inmates to leave the prison during the day without repercussion, making it possible for him to visit the victim and potentially perpetrate the crime.

In many DNA exoneration cases, the wrongly-convicted person was exonerated when DNA testing matched crime scene evidence to an initial/alternate suspect in the crime. In 1995, for example, Ronald Gene Taylor was convicted of a sexual assault in Texas. Prior to trial, the state crime lab analyst reported that no semen was found on the victim's rape kit, bed sheet and clothing. In 2007, after post-conviction DNA testing was ordered, semen was identified on the victim's bed sheet (on the exact spot on the sheet that the crime lab analyst had said was tested before trial), and DNA testing excluded Taylor. The profile was compared to the state DNA database and matched to a known offender who had been identified as an alternate suspect by the defense at trial.[32] Similarly, Robert Clark was exonerated 23 year after being arrested for a 1981 rape in Georgia when he was spotted driving the victim's stolen car. Clark told police he borrowed the car from his friend, Tony Arnold, but police did not credit the account and he was convicted based on the victim's testimony that she was certain he was the assailant. In 2005, post-conviction DNA testing excluded Clark and yielded a hit in the DNA database–to Tony Arnold. Arnold's DNA also matched two other unsolved rapes in Georgia.[33]

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[32] *Falsely Accused: The Case of Ronald Gene Taylor*, THE FORENSIC EXAMINER, Winter 2008; Innocence Project, The Cases: Ronald Gene Taylor *at* http://www.innocenceproject.org/cases-false-imprisonment/ronald-gene-taylor.

[33] Shaila Dewan, *After 24 Years in Prison, Man Has a Reason to Smile*, N.Y. TIMES, Dec. 8, 2005; Innocence Project, News & Events, Press Releases, *Robert Clark Exonerated by DNA Evidence After 24 Years in Prison*, Dec.

In this case, DNA results that show that semen and/or blood evidence at the scene—on the bedding, tampon, or murder weapon—belonging to the above individuals would certainly undermine confidence in the verdict.

D. Mr. Payne's Application Is Made To Establish His Innocence, Not To Delay His Sentence

The DNA Act does not contain a limitations period. A petitioner "*may at any time,* file a petition requesting the forensic DNA analysis of any evidence" "[n]otwithstanding . . . any other provision of law governing post-conviction relief to the contrary." Tenn. Code Ann. § 40-30-303 (emphasis added). However, a petition must be made for "the purpose of demonstrating innocence and not to unreasonably delay the execution of sentence or administration of justice." Tenn. Code Ann. § 40-30-304(4).

This application is not driven by a desire to unreasonably delay the execution of Mr. Payne's sentence or the administration of justice. Rather, Mr. Payne seeks to obtain conclusive proof of what he has said from the very start: he is not the person who committed this crime. And the request is driven in large part by the change in circumstances that occurred when, in December 2019, new evidence from the victim's bedroom—which calls into doubt the State's theory of the case and could completely exculpate Mr. Payne—was for the first time disclosed to Mr. Payne's counsel.

Mr. Payne's execution is not scheduled to occur for close to five months. ***The DNA testing requested in this motion can be performed within sixty (60) days.*** Keel Decl. ¶ 32. And while there is no case law from Tennessee courts interpreting the DNA Act's unreasonable delay

8, 2005, http://www.innocenceproject.org/news-events-exonerations/press-releases/robert-clark-exonerated-by-dna-evidence-after-24-years-in-prison; Innocence Project, The Cases, Robert Clark, *at* http://www.innocenceproject.org/cases-false-imprisonment/robert-clark; *DNA Tests Clear Georgia Inmate of Rape*, ASSOCIATED PRESS, Dec. 8, 2005; Press Summary, *Summary of Robert Clark Case*, Georgia Innocence Project, *at* http://www.ga-innocenceproject.org/images/Clark_PressSummary_WEB1.pdf.

provision with respect to capital cases, at least one court in Texas, interpreting a similar provision of Texas law, granted a testing request submitted the day a petitioner was set to be executed. In that case, *Pruett v. State*, No. AP-77,065, 2017 WL 1245431, at *5 (Tex. Crim. App. Apr. 5, 2017) (recounting history of case), the court granted the last-minute request even though it "ha[d] no doubt the request for the proposed DNA testing was made to delay the execution of sentence" because "although such delay tactics *appear to be unreasonable, it is not clear that they, in fact, are unreasonable*. Although unlikely, it is not impossible to conceive that there could be exculpatory results" (emphasis added). The same logic applies here. There is nothing unreasonable about seeking to save one's own life by proving one's innocence, no matter when that request is made. The Court should order the requested testing.

E. The Denial of Mr. Payne's 2006 DNA Petition Does Not Preclude Testing as that Denial was based on a Now-Abrogated Interpretation of the DNA Act

Since the time of Mr. Payne's initial DNA request nearly fifteen years ago, new evidence has become available for testing that was unknown to Mr. Payne's counsel and not part of the previous request:[34] in December 2019, for the first time, counsel for Mr. Payne learned of the existence of a bloody pillow, bloody comforter, and bloody bedsheets in the Shelby County Criminal Court Clerk's Office in Memphis. In addition, new DNA technology is now available, and the increased sensitivity of modern DNA analysis makes it now possible to perform testing for touch and wearer DNA.

Importantly, Mr. Payne's 2006 DNA Petition was denied by a narrow reading of the DNA Act that has since been rejected by the Tennessee Supreme Court's decision in *Powers*, 343 S.W.3d

[34] Mr. Payne requested testing on four of these items in 2006: (1) the bloodstained clothing the Mr. Payne was wearing at the time of his arrest; (2) the bloodstained shirt found in Mr. Payne's discarded overnight bag; (3) the bloodstained clothing worn by the victims; and (4) the vaginal swabs taken from Charisse Christopher. That request was denied, but for the reasons detailed below, the Court should now permit testing.

at 44, 59 (holding such a limited interpretation of the DNA Act "arbitrarily abrogates a petitioner's state-created liberty interest in developing scientific evidence of his or her actual innocence."). In *Payne DNA I*, the Court of Criminal Appeals denied Mr. Payne's request in part because it weighed the value of potential exculpatory DNA evidence with other evidence of Mr. Payne's alleged guilt, and determined that Mr. Payne still may have been convicted because of this additional evidence. *See Payne DNA I*, 2007 WL 4258178, at *10. *Powers* clarified that the existence of inculpatory evidence alone is insufficient to deny testing as "many DNA exonerations have occurred despite the fact that there was substantial evidence supporting the conviction."[35] *Powers* makes clear that the Court of Criminal Appeals should have looked past this evidence, and focused on the potential exculpatory value of DNA evidence. *Powers*, 343 S.W.3d at 40-43, 56 (granting DNA analysis despite eyewitness identification by four victims and the police finding a knife in Powers's apartment matching the one described by the witnesses).

Significantly *Powers* also made clear that courts should consider the possibility of a CODIS hit to a known offender convicted of committing a similar crime in determining the probative value of the most favorable possible DNA test results in any given case. *See also Nelson*, 2014 WL 295833, at *1 (court of criminal appeals remanded a denial of testing in light of the decision in *Powers* to the post-conviction court for entry of an order granting the request for DNA analysis of knife brandished during crime for the purpose of comparison to the defendant and for purpose of a CODIS search).

[35] *See also id.* at 56 (citing Cynthia E. Jones, *The Right Remedy for the Wrongly Convicted: Judicial Sanctions for Destruction of DNA Evidence*, 77 Fordham L.Rev. 2893, 2926 (2009) ("[A]s is demonstrated with over 200 exonerations, DNA evidence, standing alone, has the persuasive force to prove that an innocent person has been wrongly convicted, notwithstanding all other evidence used at trial to prove guilt beyond a reasonable doubt.")).

V. THE SOURCE OF THE CRIME SCENE FINGERPRINTS CAN BE IDENTIFIED THROUGH A SEARCH OF THE FBI'S PRINT DATABASE

In addition to DNA testing, Mr. Payne seeks to compare any unknown fingerprint evidence recovered from Ms. Christopher's home after the murders and of latent fingerprints reasonably recoverable from other items currently in evidence with databases kept by the FBI and TBI. A database search could produce matches that exonerate Mr. Payne or provide further support for DNA evidence that exculpates Mr. Payne.

Evidence collected at the time of the crime includes fingerprint samples taken from the crime scene.[36] Although some of the fingerprints recovered from the crime scene were matched to Mr. Payne,[37] there are other fingerprints that were lifted but not matched to Mr. Payne or the victims.[38] In addition, there are items recovered from the scene that should be re-examined for any fingerprints that can be reasonably recoverable to use in database searches that were not available at the time of Mr. Payne's trial.

The FBI's fingerprint database became operational in 1999, eleven years after Mr. Payne's trial.[39] That database (IAFIS) was replaced in 2014 by Next Generation Identification (NGI) fingerprint database.[40] The TBI maintains a similar database of fingerprints from all "persons

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[36] *See* Ex. 36, Wilson Investigation File at 12 (referencing fingerprint analysis on the knife, three beer cans, a telephone, a brown plastic drinking cup, a brown paper sack, and latent print cards).

[37] These prints, which were located on the countertop in front of the kitchen sink, the telephone, and beer cans Mr. Payne said he had in his possession when he discovered the crime scene, are consistent with Mr. Payne's account. *See id*.; Ex. 5, Trial Tr. Vol. VIII, Testimony of Pervis Payne at 1220-23; Ex. 23, Trial Tr. Vol. IX, Cross-examination Testimony of Pervis Payne at 1267.

[38] *See* Ex. 36, Wilson Investigation File at 13.

[39] *NGI Officially Replaces IAFIS—Yields More Search Options and Investigative Leads, and Increased Identification Accuracy*, FBI (Oct. 24, 2014), https://www.fbi.gov/services/cjis/cjis-link/ngi-officially-replaces-iafis-yields-more-search-options-and-investigative-leads-and-increased-identification-accuracy; *see Privacy Impact Assessment for Fingerprint Identification Records System (FIRS) Integrated Automated Fingerprint Identification System (IAFIS) Outsourcing for Noncriminal Justice Purposes – Channeling*, FBI (May 5, 2008), https://www.fbi.gov/services/records-management/foipa/privacy-impact-assessments/firs-iafis (last visited July 20, 2020).

[40] *NGI Officially Replaces IAFIS—Yields More Search Options and Investigative Leads, and Increased Identification Accuracy*, FBI (Oct. 24, 2014),

arrested and submitted under existing state law."[41] NGI utilizes the Advanced Fingerprint Identification Technology ("AFIT") enhanced fingerprint and latent processing services, which include a new fingerprint-matching algorithm that has improved matching accuracy from 92 percent to more than 99.6 percent, and enables latent images to be compared against the criminal, civil, and Unsolved Latent File (ULF) repositories in a matter of minutes.[42] *Because of these advancements, the FBI's Criminal Justice Information Services Division recommends latent fingerprint images submitted prior to 2013 be resubmitted for a search in the NGI system if no identification was made during the initial search.*[43]

The development of systems such as IAFIS and NGI has resulted in literally thousands of cases being reopened across the country to search previously unidentified latent fingerprints and has led to the identification of assailants in previously unsolved crimes.[44] As with DNA testing, fingerprint re-examinations and database searches have led to numerous exonerations throughout the country:

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https://www.fbi.gov/services/cjis/cjis-link/ngi-officially-replaces-iafis-yields-more-search-options-and-investigative-leads-and-increased-identification-accuracy (last visited July 20, 2020).

[41] Tenn. Comp. R. & Regs. § 1395-01-01-.07.

[42] *See* U.S. Dep't Justice, 2019 CJIS Year in Review 10, https://www.fbi.gov/file-repository/2019-cjis-year-in-review.pdf/view (last visited July 20, 2020).

[43] FBI, Next Generation Identification (NGI), https://www.fbi.gov/services/cjis/fingerprints-and-other-biometrics/ngi (last visited July 20, 2020).

[44] NGI Officially Replaces IAFIS—Yields More Search Options and Investigative Leads, and Increased Identification Accuracy, FBI (Oct. 24, 2014), https://www.fbi.gov/services/cjis/cjis-link/ngi-officially-replaces-iafis-yields-more-search-options-and-investigative-leads-and-increased-identification-accuracy (last visited July 20, 2020) (Quoting the Connecticut Department of Emergency Services and Public Protection) ("Our first search with NGI resulted in arrest warrants for two individuals out of New York for an unsolved home invasion in Connecticut. If not for NGI, this case would still be unsolved."); James Miller, Even the FBI is Pleasantly Surprised by the Success of its Fingerprinting System, Federal News Network (Dec. 22, 2015), https://federalnewsnetwork.com/technology-main/2015/12/even-fbi-pleasantly-surprised-success-fingerprint-system/ ("NGI has led to faster and more accurate processing of fingerprints, including a rise in the reopening of cold cases.") (last visited July 20, 2020).

Royal Clark, Jr. was convicted in Jefferson Parish, Louisiana in 2003 of armed robbery of a Burger King based on mistaken eyewitness identification.[45] In 2018, attorneys for Mr. Clark requested that the Jefferson Parish Sheriff's office re-examine four latent prints collected from a cup the assailant used. *Id*. Although these prints were deemed "unusable for identification purposes" when initially collected, when submitted to Louisiana's State Automatic Fingerprint Identification System (AFIS) in 2018, three of the prints matched to a man who was in prison for robberies committed two months after the one for which Mr. Clark was convicted. *Id*. Mr. Clark was fully exonerated on June 27, 2019. *Id*.

Archie Williams was exonerated through a match of crime scene prints to a serial offender in the NGI.[46] Mr. Williams was convicted of a 1982 home-invasion rape in Baton Rouge, Louisiana. *Id*. Mr. Williams was excluded from latent prints recovered from the scene, but because repair work was being done on the home police believed there were other possible sources. The prints were searched at the time of trial, and again in 2009 with no matches. *Id*. In 2019, a search was conducted using NGI. *Id*. The new search, conducted in just a day, matched latent prints from the crime scene to a serial assailant, who was implicated in several home invasion rapes in the area with a similar modus operandi. *Id*.

A match of probative prints to a person other than Mr. Payne or the victims (with no innocent explanation for the presence of his prints at the scene) could not only be confirmatory of any exculpatory DNA evidence but would also be indicative of Mr. Payne's actual innocence entitling him to relief under Tenn. Code § 40-30-102(b)(2).

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[45] *Royal Clark, Jr.*, Nat'l Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5588 (last visited July 20, 2020).

[46] Thomas Fuller, *He Spent 36 Years Behind Bars. A Fingerprint Match Cleared Him in Hours*, NY Times (March 21, 2019), https://www.nytimes.com/2019/03/21/us/fingerprint-database-archie-williams.html; *Archie Williams*, Nat'l Registry of Exonerations, https://www.law.umich.edu/special/exoneration/pages/casedetail.aspx?caseid=5529 (last visited July 20, 2020).

CONCLUSION

For the foregoing reasons, Mr. Payne requests that the Court order DNA testing on the items listed in Section IV.C.2 pursuant to the Post-Conviction DNA Analysis Act of 2001, as well as the submission of fingerprint evidence for comparison with the NGI and AFIS databases.

Respectfully submitted this 22nd day of July, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of this petition was served via hand delivery to the Shelby County District Attorney General's Office, 201 Poplar Avenue, Suite 301, Memphis, TN 38103-1945 on the 22nd day of July, 2020.

Kelley J. Henry