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Court of Criminal Appeals of Tennessee  
AT JACKSON

Vern BRASWELL

STATE of Tennessee

No. W2016-00912-CCA-R3-PC  
October 3, 2017 Session  
FILED 04/09/2018

Appeal from the Criminal Court for Shelby County, No. 05-03038, Paula L. Skahan,  
Judge

Attorneys and Law Firms

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General; Jonathan H. Wardle, Assistant Attorney General; Amy P. Weirich, District Attorney  
General; and Marques Young and Pam Stark, Assistant District Attorneys General, for the  
appellee, State of Tennessee

Opinion

John Everett Williams, J., delivered the opinion of the court, in which Thomas T. Woodall,  
P. J., and Norma McGee Ogle, J., joined

OPINION

John Everett Williams, J.

The Petitioner, Vern Braswell, appeals the post-conviction court's denial of his petition for post-conviction relief in which he challenged his conviction for second degree murder and his twenty-four-year sentence. On appeal, the Petitioner contends that he received ineffective assistance of counsel at trial and that the State violated *Brady v. Maryland*, 373 U.S. 83, 83 (S.Ct. 1194, 10 L. Ed 2d 215 1963), by failing to provide the defense with statements of witnesses, items recovered from the Petitioner's home, and the contents of a sealed envelope that was discovered during the pendency of post-conviction proceedings. Upon reviewing the record and the applicable law, we affirm the judgment of the post-conviction court.

FACTUAL AND PROCEDURAL BACKGROUND

\*1 The Petitioner was charged with first degree premeditated murder for killing his wife, Sheila Braswell, by manual strangulation. The Petitioner argued at trial that the victim's death was accidental and occurred after he and the victim engaged in erotic asphyxiation. The jury convicted the Petitioner of second degree murder, and the trial court sentenced him to twenty-four years as a Range 1, standard offender. This court affirmed the Petitioner's conviction and sentence on direct appeal. See *State v. Vern Braswell*, No. W2006-01081-CCA-R3-CD, 2008 WL 238014, at \*1 (Tenn. Crim. App. Jan. 28, 2008), *perm. app. denied* (Tenn. Aug. 25, 2008).

Trial Proceedings

The evidence presented at trial was summarized by this court in its opinion on direct appeal as follows:

Pauline Washburn testified that her daughter Sheila Braswell, the victim, had been married to Defendant for ten years, and the couple had two young sons. Defendant and the victim resided together with their children in Cordova, Tennessee. Ms. Washburn said

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Dr. Schwartz said that Defendant's explanation of the use of hand signals to control the application and release of pressure around the neck supported his credibility because someone who had not engaged in erotic asphyxiation would not grasp the significance of anticipating a signal for release. Dr. Schwartz explained that the problem with the system described by Defendant was that the partner waits longer and longer before signaling release, and it was a "lethal kind of system that they used."

Dr. Schwartz stated that as a result of his interview with Defendant and review of the material which had been introduced into evidence, it was his opinion that the victim's death was an accident due to erotic asphyxiation.

On cross-examination, Dr. Schwartz verified that he was not a medical doctor.

*Vern Braswell*, 2008 WL 2380141 at \*1-11

#### Post-Conviction Proceedings

The Petitioner filed a pro se petition for post-conviction relief in which he claimed that trial counsel was ineffective at trial and that the prosecution engaged in multiple acts of prosecutorial misconduct, including the failure to disclose favorable evidence to the defense. The post-conviction court appointed attorney Ms. Taylor Eskridge to represent the Petitioner, and Ms. Eskridge filed an amended petition in August 2009. In March 2011, Assistant Attorney General Doug Carriker filed a response to the petition, and an evidentiary hearing was scheduled for July 2011.

During an April 20, 2011 report date, Ms. Eskridge requested that the evidentiary hearing be continued. During a bench conference, the following exchange occurred:

GENERAL CARRIKER: I need to sit down with [Assistant Attorney General Glen] Baity and review with him, regarding what he wants her to get from me. There is some of this stuff that I am not comfortable just handing over in Court, so I'll need someone else to review it, too. And that is partly because [District Attorney General Amy] Weirich had things marked as, "not exculpatory," in bold letters in an envelope and it is sealed.

And I want to make sure that before I hand something over that I am not going to-

THE COURT: Oh, my gosh.

MS. ESKRIDGE: Now of course, that wets my appetite. I'm like, "what's in the envelope?"

THE COURT: For all I know you can file a freedom of information act request for all of that.

GENERAL CARRIKER: And [General] Baity has called me this morning, called me in to make an open file discovery, but I want to meet with him and sit down and show him what he's requesting that we-but we did find a couple of things that he had questioned the day we met and I want to show him what - to make sure I'm doing the right thing and not getting myself in trouble with the State, whatsoever.

General Carriker also stated that he needed time to review the file and locate additional items requested by the Petitioner. The post-conviction court agreed to continue the evidentiary hearing.

During a report date on July 1, 2011, General Carriker informed the post-conviction court that he still needed to meet with General Weirich, explaining, "I've got to meet with her and let her review it. She was the trial lawyer and I want to get with her before I turn over things that she says I shouldn't be turning over." On July 28, 2011, The post-conviction court entered an order allowing Ms. Eskridge to withdraw as counsel for the Petitioner and for current post-conviction counsel to be substituted as attorney of record.

•11 During a February 13, 2013 report date, post-conviction counsel reported to the post-conviction court that counsel and Assistant Attorney General Marques Young, the prosecutor who had since been assigned the case, met and determined that General Young needed to speak with General Carriker, the prosecutor on the case "two prosecutors ago" to obtain "the full story on who has dealt with this and what's going on in the case". The Petitioner filed an amended petition on August 2013. The Petitioner raised additional claims of ineffective assistance of counsel and that "[t]he State failed to produce exculpatory evidence in this matter. Since such failure to produce, the evidence has not been able to be located."

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During a bench conference at a report date on October 11, 2013, post-conviction counsel discussed "an envelope that had a sticky writing on the front of it that said, something along the lines of what [Ms. Eskridge] remembered it saying was, 'Do not turn over to defense counsel.'" Post-conviction counsel reported that she and General Young reviewed the State's file and were unable to locate the envelope. Post-conviction counsel stated that General Young and General Carriker then searched the file and found something that might be the item for which they were searching but that the item appeared different from what both General Carriker and Ms. Eskridge recalled. While the post-conviction court stated that it recalled the discussion of the item, the court could not recall whether an order was ever entered requiring the State to turn the item over to the Petitioner and suggested that the parties review the filings.

Evidentiary hearings were held throughout 2014, 2015, and 2016. During this time period, the Petitioner filed multiple amended petitions raising additional claims of ineffective assistance of counsel and prosecutorial misconduct due to the State's failure to provide as exculpatory evidence the items from the sealed envelope, statements from witnesses, and other documents.

**The Petitioner's Proof**

General Carriker testified that he was a prosecutor in the post-conviction court's courtroom in 2011 and was assigned to the Petitioner's post-conviction case by the division leader, Assistant District Attorney General Glen Baily, in February 2011. Upon receiving the case, he spoke to Ms. Eskridge and learned that none of the prosecutors who had previously been assigned the case had filed a response to the post-conviction petition or allowed her to see the State's file. General Carriker subsequently filed a response to the Petitioner's petition.

General Carriker met with Ms. Eskridge on two occasions as his office. He and Ms. Eskridge spent the first meeting determining the progress of the case and the tasks that needed to be completed. During the second meeting on April 4, 2011, they reviewed the State's files, which consisted of two large accordion files. General Carriker said he allowed Ms. Eskridge to engage in "open file discovery" and to make notes and copies of anything in the State's file that she wanted. During the meeting, General Carriker located a sealed manila envelope in the file. He estimated that the envelope was approximately one-half of an inch thick and appeared to have contained somewhere between one and one hundred pages. He recalled that on the outside of the manila envelope was a four-inch by four-inch "yellow sticky pad note" with language similar to "not turned over or do not turn over to defense." The note was dated "2005 or so" and had the initials of District Attorney General Amy Weirich, the prosecutor at the Petitioner's trial. Ms. Eskridge asked to look inside the envelope, and General Carriker told her that he would prefer to obtain permission from his superiors first.

•12 General Carriker testified that he learned shortly after Thanksgiving of 2011 that he was being transferred to the domestic violence unit effective January 2012, and he was instructed that all of his cases would be reassigned to other prosecutors. The Petitioner's post-conviction case was reassigned to Assistant District Attorney General Melanie Headley Cox, and General Carriker gave General Cox the State's file sometime during the first or second week of December 2011.

General Carriker testified that he never unsealed the envelope and never looked inside it. He explained that he did not want to open the seal until he had a chance to speak to someone about it. He did not recall ever giving the envelope to Ms. Eskridge for her review. He said that he kept the State's file in his office while he was assigned the case and did not recall removing the envelope from the file. He did not know whether the envelope was still in the State's file upon his transfer. Ms. Eskridge later withdrew as counsel for the Petitioner.

General Carriker recalled that Assistant District Attorney General Betsy Carnesale Wiseman, who was one of the prosecutors at trial, was his division leader prior to General Baily. General Carriker said that while he recalled speaking to General Wiseman about the case, he did not recall whether he had the envelope with him or whether they had a chance to look at the envelope. He also did not recall reviewing the State's file with her.

Following his transfer, General Carriker did not hear anything else about the envelope until he was approached by either post-conviction counsel or Assistant District Attorney Marques Young and informed that the envelope could not be located. General Carriker went to General Young's office and searched the State's file but was unable to locate the envelope. Instead, he found an open-faced file folder, which he described as a lighter "beige" color than the manila envelope. He stated that the sealed manila envelope was standard-sized for

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letter-sized paper, while the folder was a legal-sized file. He also stated that the sealed manila envelope was

a fold top, and it was the type that has a metal prong that starts like this and when you close it, and wrap the thing over it, you pull the prong down and it closes and you can also, usually it has some kind of adhesive on the back that you can lick or use a wet sponge and close it and it will seal

Inside the file folder was about thirty or forty pages attached with a binder clip and a four-inch by four-inch yellow note. General Carriker testified that he "couldn't say it's not the same note, but it's very similar as far as what it says on it." The note stated in black ink:

I am NOT giving these items in discovery

8-22-05

APW

In smaller lettering in blue ink, the note stated:

12-6-05

Jencks STMTS of witnesses who testified were turned over at the appropriate time

We note that the trial occurred on December 5-9, 2005.

The note, the file folder, and the contents were entered an Exhibit 6 to the post-conviction hearing ("Exhibit 6"). The contents of Exhibit 6 included: (1) the statement of Mr. Billy M. Massey of the City of Memphis Fire Department on December 14, 2001; (2) Ms. Renee Welch's statement on November 16, 2001; (3) documents labeled "Braswell's Burglar Alarm Information"; (4) the victim's employment and medical information from the victim's employer; (5) an authorization for release of the victim's medical, employment, and financial records signed by the Petitioner; (6) a handwritten journal entry dated November 29, 2002, on stationery from Comfort Suites in Grand Prairie, Texas; (7) a typewritten letter from the victim to the Petitioner dated March 21, 2004; and (8) a typewritten letter from the Petitioner to the victim. Handwritten in the bottom right-hand corner of items (6), (7), and (8) was "11:19:04 PW 10:47 AM," and the evidence presented at the evidentiary hearing established that the initials were those of the victim's mother, Pauline Washburn.

\*13 On cross-examination, General Carriker testified that the pages in Exhibit 6 were "close to the thickness" to the manila envelope but that it "[c]ould have been more, could have been a little less, I really don't know." He stated that the wording on the note in Exhibit 6 was "very similar" to the wording on the note from the manila envelope. He explained that "the main part of the wording is that I am not giving these items in discovery and then at the bottom [are] initials and the date. I remember that, it's very similar, I can't say more than that, though."

On redirect examination, General Carriker acknowledged that he was not certain that the note on the manila envelope was the same note in Exhibit 6. He stated that as far as he knew, the manila envelope was in the file the last time that he possessed it. He did not know what happened to the manila envelope after he was transferred out of the division. He testified that he "[d]idn't see [the manila envelope] today, didn't see it last fall when I was made aware of it not being there."

Ms. Taylor Eskridge was appointed in 2009 to represent the Petitioner in the post-conviction proceedings. She filed a motion for discovery and inspection of the State's evidence in March 2009 and attempted to review the State's file for more than one year without success. She stated that she was told that no one knew where the file was and was provided different reasons why she could not have access to the file. At one point, Assistant Attorney General Brian Davis, who was previously assigned the post-conviction case, informed Ms. Eskridge that the State's file was in California.

After General Carriker was assigned the case, Ms. Eskridge met with him and reviewed the State's file. Ms. Eskridge testified that while reviewing the file, they discovered a letter-sized envelope with a fold over the top that was sealed. She believed the envelope also had a prong for closing the envelope but said "it wasn't prong closed, it was closed with a seal that I recall." She recalled a note on the envelope that said "do not show defense or something like that. But it was something that caught both of our attentions." She stated that the note had "just a few words. It was written in big bold like a marker or something but it was on a

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post it note stuck to the front of it. But it was something that made us realize that it wasn't something that defense counsel was supposed to see. Ms Eskridge believed the note included someone's initials or signature but could not remember. She could not recall the words on the note and said "it was something that was not usual. It wasn't like, it's not discoverable or not... it was something that we hadn't seen before and so it made us both pause." She did not recall whether the writing was in blue or black ink or any other pen markings or other writing on the note.

Ms Eskridge testified that General Carriker informed her that he should obtain authorization before showing the information in the envelope to her. She never received the information that was inside the envelope and never saw the envelope again. She said she and the Petitioner discussed the envelope on several occasions. Ms Eskridge later withdrew as counsel, and post-conviction counsel was substituted as attorney of record.

Ms Eskridge testified that Exhibit 6 did not include the envelope or the note that she saw while she and General Carriker were reviewing the State's file. She explained that unlike the note in Exhibit 6, the note that she saw did not include the language, "I am not giving these items in discovery." She said that although she could not recall the exact words on the note, "it was something shocking." She also said that the note in Exhibit 6 implied that the folder included Jencks material, which would not have been discoverable prior to trial but would have been provided to the defense when the witness testified at trial and to post-conviction counsel during post-conviction proceedings.

On cross-examination, Ms Eskridge testified that although she could not recall the exact words on the note that she saw during her meeting with General Carriker, the note in Exhibit 6 was not the same note. She said the language on the note that she saw during the meeting was unusual and that it alarmed both her and General Carriker. Ms Eskridge stated that the note she saw during the meeting implied that the defense should never see it and made General Carriker understand that he should not open the manila envelope in front of her and should obtain approval before showing her the contents of the envelope. Ms Eskridge stated that the note in Exhibit 6, however, did not say that the defense could never see the contents of the folder but that the material was not being provided in discovery. She believed that had she and General Carriker seen the note in Exhibit 6, General Carriker would have provided her with the material in the manila envelope because the note stated that the material had already been provided to the defense at the appropriate time.

Ms Eskridge testified that she and General Carriker informed the post-conviction court that General Carriker planned to seek approval and then allow her to view the contents of the envelope. Ms Eskridge stated that she would have filed a motion regarding the material had General Carriker indicated that he did not intend to comply with her request. She said she "was willing to, as a colleague, give him the amount of time that he requested to get it done."

On redirect examination, Ms Eskridge testified that General Carriker appeared to be "uncomfortable" and "in shock" upon seeing the note. She informed post-conviction counsel about the envelope once post-conviction counsel began representing the Petitioner. While Ms Eskridge acknowledged that she was unsure of the exact words on the note that she saw during the meeting, she was "sure" that the note in Exhibit 6 was not the same note and that Exhibit 6 did not include the manila envelope.

Assistant District Attorney General Melanie Cox testified that she represented the State in the Petitioner's post-conviction case while assigned to the post-conviction court's courtroom from January 2012 until August 2012. General Cox did not review the State's file to a great extent while the case was assigned to her and never came across a sealed manila envelope with a note stating "Do not show defense."

On cross-examination, General Cox testified that prosecutors, generally, did not take any action on a post-conviction case until the case was set for a hearing. When she was assigned the Petitioner's case, it was reset on multiple occasions, and as a result, she never really looked at the file. She said neither General Carriker nor a defense attorney told her there was any problem with the case. General Cox did not recall speaking to Ms. Eskridge about the case and stated that post-conviction counsel was representing the Petitioner when General Cox was assigned the case.

Trial counsel served as lead counsel at the Petitioner's trial, and his father served as co-counsel. Trial counsel had previously represented the Petitioner and knew him outside of the legal system. Mr. Glen Wright represented the Petitioner during the initial appearance and the arraignment in general sessions court, and Mr. Leslie Ballin and trial counsel

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being recorded He did not want his clients to divulge any confidential information over the telephone

On cross-examination, Mr. Wright testified that he did not recall the Petitioner stating that the victim died while they were engaging in rough sex. Mr. Wright could not recall the specifics of the conversation other than the Petitioner stating they were engaging in rough sex, which led to the victim's death.

Mr. Leslie Ballin, a criminal defense attorney, was retained in 2004 to represent the Petitioner around the time of the victim's death and during the preliminary stages of the case. Mr. Ballin testified that shortly after the victim's death, he and the Petitioner discussed how the victim's death was unintentional and that it occurred during sex. Mr. Ballin did not recall whether any other attorney worked with him on the Petitioner's case during the preliminary hearing.

Mr. Ballin testified that during his thirty-seven years of practicing law, he had never heard of a secure telephone line at the jail where his clients could contact him. He stated that whenever a client called him from the jail, they would only discuss procedural matters and that he would instruct his client to refrain from discussing factual matters because the telephone line was not secure and the discussion could be used against his client.

•29 District Attorney General Amy Weirich testified that she and General Wiseman were the prosecutors during the Petitioner's trial in December 2005. General Weirich prepared the discovery once trial counsel filed a motion and trial counsel was contacted to retrieve the discovery from the District Attorney General's Office on August 23, 2005. General Weirich noted that trial counsel was given a summary of the recordings of the Petitioner's telephone calls from the jail and, therefore, was aware of their existence.

+ General Weirich testified that she recognized Exhibit 6 and that the note on Exhibit 6 was in her handwriting. She did not recall sealing any discovery in a manila envelope and writing a note that no one should give the information to the defense. She stated that her general practice was to place those items that were not turned over to defense counsel in a folder and to label the folder as "[i]tems not turned over," similar to the folder in Exhibit 6. She recalled that General Carnker asked her about an envelope while he was preparing for the Petitioner's post-conviction hearing. She told him that she had no knowledge of an envelope and that she had not touched the file on the Petitioner's case since the December 2005 trial.

General Weirich acknowledged that she did not provide trial counsel with a handwritten statement on Comfort Suites letterhead dated November 29, 2009, a typewritten letter to the Petitioner from the victim, and a typewritten letter to the victim from the Petitioner that were included in Exhibit 6. The bottom corner of each letter included information indicating that Ms. Pauline Washburn, the victim's mother, turned the documents over on November 19, 2004. General Weirich stated that while the documents were not given directly to her, they "made it into our file." She did not know where Ms. Washburn found the documents. General Weirich acknowledged that if the items were retrieved from the Petitioner's home or his belongings, she possibly would have been required to provide them to trial counsel in discovery in accordance with Tennessee Rule of Criminal Procedure 16. When post-conviction counsel asked whether the Petitioner's typewritten letter could constitute a statement of the Petitioner, General Weirich replied, "I guess, but not under Rule 16." She explained, "It's not a statement that fell under Rule 16, and I didn't provide it. There was nothing exculpatory in it." When asked whether a defendant's statement had to include exculpatory information to be discoverable, General Weirich replied, "I don't know that it is his statement." She acknowledged that "I guess you could say" that a defendant's statement need not include exculpatory information to be discoverable.

General Weirich did not recall whether trial counsel requested Jencks material after every witness who testified at trial but said she might have provided the statements regardless of whether trial counsel requested it. She did not know whether she provided Jencks material after every witness who had given a statement testified. She noted that while the defense attorney will generally ask for a break to review Jencks material, the fact that a break was not indicated in the record did not necessarily mean that she did not provide Jencks material.

General Weirich noted that an evidence receipt that was provided to trial counsel in discovery indicated that the State had possession of a recorded statement by Ms. Smith. General Weirich stated that she likely would not have given trial counsel both the recorded statement and the formal written statement as Jencks material because it would be easier

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of either listening to the recordings at the prosecutor's office or providing a compact disc on which the prosecutor may copy the recordings.

General Weirich testified that the victim's handwritten journal, her typewritten letter to the Petitioner, and the Petitioner's typewritten letter did not relate to the facts of the case or the incident that led to the victim's death but constituted a discussion of their marital environment at the time that the letters were written. General Weirich did not believe that the documents constituted relevant statements of a defendant under Rule 16. She also did not believe that there were any means by which to establish where the letters were found or that the letters were admissible at trial. She agreed that the letters clearly established that the Petitioner and the victim were not engaged in a sexual relationship during the time period in which the letters were written and that she would have liked to have admitted them at trial.

General Weirich agreed that until a motion regarding prior bad acts is filed under Tennessee Rule of Evidence 404(b), much of the information pertaining to the prior bad acts is not discoverable because the information does not relate to the actual charged offense. She agreed that information relating to the Petitioner's prior bad acts would have been provided to trial counsel during the hearing and that trial counsel would have demanded the information had General Weirich not provided it to him. General Weirich maintained that her opening statements regarding the Petitioner's prior behavior did not relate to propensity but related to the State's claim of lack of mistake or accident. She said the trial court allowed her to discuss the Petitioner's prior bad acts during voir dire, her opening statements, and the State's case-in-chief.

•3.7 On redirect examination, General Weirich testified that she could not say that she gave every supplemental police report to trial counsel in discovery. She acknowledged that the victim wrote the letter to the Petitioner discussing their marriage during the same year in which she died and that part of the proof that the State presented at trial was that the marriage between the Petitioner and the victim had "its ups and downs." With regard to the Petitioner's calls from the jail, General Weirich stated that many of the calls were between the Petitioner and trial counsel and that the Petitioner was aware of the content of the calls since he made them.

General Weirich testified that if she located a sealed envelope in the State's file, she would have opened it and likely filed and labeled the information in the envelope. She did not know anyone else with the initials "APW" who had access to the State's file prior to, during, or after the trial. She stated that evidence is not supposed to be removed from the State's file at the post-conviction stage and that post-conviction counsel is allowed to review all of the evidence in the State's file.

General Weirich did not recall General Carriker sending her an email on March 25, 2011, asking to meet with her about the Petitioner's post-conviction case. She said she and General Carriker met on a prior occasion and discussed the envelope. She told General Carriker that she had no knowledge of the envelope. She could not recall whether her meeting with General Carriker occurred before a hearing was set or before General Carriker testified at the post-conviction hearing. General Weirich did not recall attaching a note stating, "Do not show Defense" to a file in any case. She said her typical practice was to use language such as "Items not turned over," "Not being turned over to Defense at this time," or "To be turned over to Defense at a later date."

Sergeant William Merritt testified that in 2004, he was employed with the Memphis Police Department and was the case coordinator for the investigation into the victim's death. At the time of the post-conviction hearing, he was a criminal investigator for the Shelby County District Attorney General's Office. Sergeant Merritt ordered that the recordings of the Petitioner's calls from the jail be turned over to him as part of the investigation. He acknowledged that some calls were between the Petitioner and his attorney and that some calls were three-way calls where the Petitioner called someone else who then called trial counsel. Sergeant Merritt listened to some of the recordings and prepared a summary of them. He said that calls directly from an inmate to counsel or from counsel to an inmate were generally deleted but that he listened to the three-way calls between the Petitioner, a third person, and trial counsel.

Sergeant Merritt testified that he interviewed Ms. Smith, recorded her formal statement, and prepared a summary of Ms. Smith's statement as part of his supplemental report. He asked Ms. Smith whether the victim mentioned that the Petitioner strangled her or pretended to strangle her during any of their sexual encounters, and Ms. Smith replied that the victim never mentioned it to her. Sergeant Merritt explained that he asked the question because

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conversations with trial counsel that were entered into evidence involved whether trial counsel had completed tasks for him. The Petitioner believed that the recordings of three or four telephone calls were played to the jury. He acknowledged that during one of the calls to another person, he included "code" language about Ms. Woods.

On redirect examination, the Petitioner testified that he and his family provided trial counsel with funds to retain an expert but that they were unaware of what happened to the expert or where the money went. According to the Petitioner, trial counsel went to his brother and mother on the eve of trial and told them that if they did not pay for another expert, no expert would testify at trial and that the Petitioner would likely be convicted of the charges. The Petitioner stated that trial counsel retained Dr. Schwartz on the Sunday night before trial began and did not prepare Dr. Schwarzl to testify, which showed when he was cross-examined by the State.

The Petitioner stated that while he was provided with summaries of his telephone calls from the jail in discovery, the summaries did not prepare him for the recordings that were entered into evidence and played for the jury at trial. He recalled that after giving his initial statement to the police, he decided that he wanted to give another statement. He informed the officer that he wished to give another statement but that he wanted his attorney present. He explained that he did not give a second statement because his attorneys instructed him against it.

The Petitioner explained that he did not mention erotic asphyxiation to the police due to "[s]hame" and said he did not believe that it had anything to do with the victim's death at that time. He affirmed that during opening statements, co-counsel stated that he intended to establish a pattern of choking as part of the Petitioner's sexual lifestyle. The Petitioner complained that trial counsel and co-counsel failed to establish such a pattern at trial. The Petitioner said that during closing arguments, his counsel stated that a pattern was established and that one of the jurors looked "extremely skeptical" and shook his head. The Petitioner disagreed that co-counsel was alluding to the Petitioner's testimony at trial to establish a pattern of choking.

#### The State's Proof

\*43 Assistant District Attorney General Glen Baily testified that he was assigned as division leader in the post-conviction court's courtroom for one year in 2011. At that time, General Carriker was an assistant in the division. General Baily did not recall General Carriker informing him of locating a folder or an envelope marked "not turned over to defense." General Baily stated that he would have remembered the conversation had it occurred. He also did not recall a defense attorney approaching him about an envelope or a discussion in open court about a problem with discovery in a post-conviction case. On cross-examination, General Baily testified that he did not recall any conversations with General Carriker about the Petitioner's case.

Assistant District Attorney General Betsy Wiseman testified that she served as co-counsel for the State during the Petitioner's trial and that she was the division leader in the post-conviction court's courtroom from January 2008 through December 2010. General Carriker was assigned to the division while General Wiseman was division leader. She did not recall any conversations with General Carriker about the Petitioner's post-conviction case and did not recall him approaching her with any problems with the case. She said that while she received an email from General Carriker about the case on March 25, 2011, nothing in the email indicated that there were any problems with the case, and General Carriker did not include questions regarding how to proceed with any issues that had arisen.

General Wiseman testified that she had never known General Weirich to seal items inside an envelope and did not recall her doing so in the Petitioner's case. General Wiseman stated that items that could have been received in manila envelopes included autopsy reports, documents received while the case was in general sessions court, and additional information received by law enforcement after the officers submitted their official State report. General Wiseman understood the folder labeled "items not turned over" in Exhibit 6 was an effort to maintain a record of those items that were not discoverable and, therefore, not provided to the defense. She denied hiding or destroying information in the file and said that if she wanted to hide something from the defense, she would not have placed it in an envelope in the file with a note that said, "do not give to defense."

General Wiseman recalled that up until the beginning of trial, she and General Weirich believed that the defense theory would be that the victim drowned while bathing. She said

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that the first indication that the defense theory would not be drowning was when trial counsel informed them of the defense expert on the morning of trial.

On cross-examination, General Wiseman testified that she did not believe that she placed the documents in Exhibit 6 in the folder because General Weirich's handwriting was on the note that was on the folder. General Wiseman believed General Weirich selected which documents to place inside the folder. General Wiseman stated that if anything was sealed inside a manila envelope, she would not have been the person who did so and that she would have recalled if any items were sealed in a manila envelope because such a practice was "highly unusual." General Wiseman stated that if she had come across a sealed envelope in preparing for trial, she would have spoken to General Weirich about it and opened the envelope. General Wiseman did not recall this occurring. She acknowledged that something could have been placed in the State's file after the case was closed.

General Wiseman testified that she prepared a written summary of the Petitioner's telephone calls from jail and believed she provided trial counsel with both the summary and a compact disc that included the recordings. However, following her testimony, the State agreed that trial counsel did not have a copy of the recordings. General Wiseman then testified that trial counsel was made aware of the recordings and never requested a copy of them.

44 Assistant Attorney General Marques Young testified that he represented the State during the Petitioner's post-conviction proceedings until he left the Shelby County District Attorney General's Office to be a federal prosecutor. He was assigned the case during the summer of 2012, replacing General Cox. He stated that at that time, he did not take any action in the case because he was waiting on the Petitioner to file an amended petition. As a result, the file remained in General Cox's office until 2013.

General Young first reviewed the State's file in 2013 after General Carriker came into his office and informed him about a discussion with post-conviction counsel about an envelope that General Carriker and Ms. Eskridge found while reviewing the State's file. General Carriker advised General Young that the envelope had a note on it that mentioned items that were not provided to the defense. General Young maintained that this was the first time that he had heard of the issue. He did not have the file in his office at that time. Upon retrieving the file, General Carriker searched it but was unable to locate the envelope.

General Carriker returned to General Young's office approximately one week later during which time they both searched the State's file, which had remained in General Young's office. While searching the file, General Carriker used an email exchange between him and Ms. Eskridge to refresh his memory. On April 4, 2011, General Carriker sent an email to Ms. Eskridge stating that he enjoyed meeting with her that day and asking her to forward a copy of the final amended petition because he did not have a copy. Ms. Eskridge responded in an email,

Please find attached a list of requested items from [the Petitioner]. The list was drafted by [the Petitioner] and a copy sent to [the post-conviction court]. However, he neglected to send you a copy. I will also send a copy of the petition. I was unable to come back to see you last week. Let me know how your conversation went with Camas Dale [sic] regarding items not provided to the defense in discovery. Also, let me know what items you are able to secure. Thanks, I'll touch base again with you soon.

Attached to Ms. Eskridge's email was a four-page list of items. General Young stated that a number of the items would not have been in the State's file and that none of the items would have been difficult to secure.

General Young testified that while reviewing the file, General Carriker located a manila folder with a note on it that appeared to be the folder entered as Exhibit 6 during the post-conviction hearing. General Young said that once General Carriker located the folder, General Carriker appeared relieved and said he was "pretty sure this was it."

On cross-examination, General Young testified that while he believed that he did not speak to post-conviction counsel about the envelope until General Carriker brought the issue to his attention, he could have been mistaken. He acknowledged that General Carriker testified during the post-conviction hearing that he was unsure whether Exhibit 6 was the envelope that he saw during his meeting with Ms. Eskridge.

Assistant District Attorney General Byron Winsett, the chief prosecutor of the public corruption and economic crime unit, testified that he began an investigation that involved trial

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information regarding the victim's prior episodes of paralysis in supplemental police reports summarizing officers' conversations with the victim's prior employer, a friend of the victim, and Ms. Taylor and Ms. Welch a few days before their formal statements. Trial counsel also obtained the victim's medical records, which included the information, and investigated the prior episodes in preparing for trial. He was also aware of the discovery of the victim's hair in the Jacuzzi following her death and decided against pursuing the issue at trial. The State provided trial counsel with a transcript of the preliminary hearing during which Sergeant Merritt testified regarding the Petitioner's emotional state following the victim's death and supplemental police reports summarizing conversations with the victim's brother and the Petitioner's neighbor during which they discussed the Petitioner's emotional state.

\*57 Moreover, Ms. Smith, Ms. Hardin, and Lieutenant Jackson testified at trial, and the post-conviction court credited trial counsel's testimony that he received the statements of each witness who testified at trial following their testimony on direct examination. "[D]elayed disclosure requires an inquiry into whether the delay prevented the defense from using the disclosed material effectively in preparing and presenting the defendant's case." *State v. Caughron*, 855 S.W.2d 526, 548 (Tenn. 1993) (citing *United States v. Ingradi*, 793 F.2d 408 (1st Cir. 1986)), see *State v. Joan Elizabeth Hall*, No. 01C01-9710-CC-00503, 1999 WL 34782, at \*9 (Tenn. Crim. App. Jan. 28, 1999), *perm app. denied* (Tenn. July 12, 1999) ("[I]f there is only a delayed disclosure of information, in contrast to a complete failure to disclose exculpatory information, *Brady* normally does not apply, unless the delay itself causes prejudice.") The Petitioner has failed to establish that the State's delay in providing the statements of Ms. Smith, Ms. Hardin, and Lieutenant Jackson to trial counsel prevented him from using the evidence in presenting and preparing the Petitioner's case for trial. The Petitioner is not entitled to relief regarding this issue.

#### A. Items Taken from the Petitioner's Home

The Petitioner asserts that the State violated *Brady* by failing to provide in discovery various items taken from his home. While the Petitioner did not identify the items in his brief, post-conviction counsel clarified during oral argument that the items included a document that appeared to be the victim's handwritten journal and two typewritten letters between the Petitioner and the victim. During oral argument, the State argued that the Petitioner raised the issue in his post-conviction petition as a violation of Tennessee Rule of Criminal Procedure 16 and not as a *Brady* violation and that as a result, the Petitioner waived the issue for purposes of appeal. However, upon reviewing the Petitioner's fourth amended petition, we conclude that while not a model of clarity, the petition fairly raised the issue as a violation of *Brady* and, therefore, we will address the merits of the Petitioner's claim.

In rejecting the Petitioner's claim, the post-conviction court found that the documents were not exculpatory. The victim's handwritten journal was dated approximately two years before the victim's death, and her letter to the Petitioner was dated approximately eight months prior to her death. The journal and both letters discuss the marital discord between the Braswells and do not include any information that was favorable to the defense. See *Brady*, 373 US at 87, 83 S.Ct. 1194; *Jackson*, 444 S.W.3d at 593. Accordingly, the State's nondisclosure of the documents does not violate *Brady*.

#### B. The Missing Envelope

The Petitioner maintains that the State violated *Brady* and *State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999), by failing to disclose to the defense items that were included in a sealed envelope that has since gone missing. The State responds that "it is clear the post-conviction court credited the testimony of the district attorneys and considered the contents of the manila folder marked as Exhibit 6 to be the same as the contents of the supposedly missing envelope, if there ever was a missing envelope". We disagree with the State's characterization of the post-conviction court's findings. In its findings of fact, the post-conviction court stated:

Petitioner alleges that the [S]tate should have disclosed the contents of a folder located by [General Carriker] in October 2013. At the hearing for post-conviction relief, General Carriker testified that on top of the folder, he saw a sticky note dated August 22, 2005, and initialed by General Weirich. The folder [General] Carriker located had a tab inscribed "items not turned over." There was a sticky note on the front of the folder dated August 22, 2005, with General Weirich's initials stating "I am NOT giving these items in discovery." The sticky note also contains an inscription which appears to be in different handwriting dated December 6, 2005, indicating that Jencks statements of witnesses were turned over to the defense at the appropriate time. General Weirich testified that she wrote the December 6 inscription.

•58 General Carriker believed that the contents of the folder have previously been in a sealed manila envelope, and that the original envelope had been lost. General Weirich testified at the hearing for post-conviction relief that she did not know anything about the envelope or folder prior to a conversation with General Carriker in 2011 during the pendency of these proceedings. She testified that it was possible that the manila envelope contained items provided by the victim's family which were added to the case file while the case was still in General Sessions Court.

(Internal citations omitted.) The post-conviction court summarized General Weirich's testimony that although she did not provide the statements of witnesses in discovery, she provided supplemental police reports to defense counsel that provided a summary of the witnesses' testimony. The post-conviction court further found:

[General] Weirich testified that it was her routine practice to keep a separate copy of items she had not yet turned over to the defense, particular [ly] Jencks statements, so she would remember to turn the materials over at the appropriate time. General [Wiseman], who was the division leader in charge of this case in 2011, confirmed that it was standard procedure to keep copies of Jencks statements in a separate folder with a sticker indicating that the statements should not be turned over to the defense during discovery. [General Wiseman] testified that the purpose of this organizational system is to ensure that Jencks statements are disclosed after the direct testimony of each respective witness.

(Internal citations omitted.)

However, the post-conviction court's factual findings do not accurately reflect General Carriker's testimony at the post-conviction hearing. General Carriker did not testify that he believed that the contents of the folder had been in a sealed manila envelope and that the original envelope had been lost. Rather, he testified that he located a sealed manila envelope that was approximately one-half of an inch thick and appeared to contain between one and one hundred pages. He stated that the outside of the manila envelope had a four-inch by four-inch "yellow sticky pad note" with language similar to "not turned over or do not turn over to defense" and General Weirich's initials at the bottom with a date of "2005 or so".

General Carriker testified that after he learned that the envelope could not be located during the pendency of the post-conviction proceedings, he went to General Young's office to search the State's file and located a folder that was later entered into evidence as Exhibit 6. He stated that the manila envelope was a darker color than the file folder and that the manila envelope was standard-sized for letter-sized paper, while the folder was a legal-sized file. General Carriker also described the seal on the envelope. He stated that the pages in the folder were "close to the thickness" of the envelope and that the language on the note that was on the folder was similar to the language on the note that was on the envelope. He acknowledged that he was uncertain whether the note on the folder was the same note that was on the envelope.

The Petitioner argued in the post-conviction court that the State's failure to provide the defense with the contents of the missing envelope violated *Brady*. However, the post-conviction court analyzed whether the State violated *Brady* by failing to provide the defense with the documents in Exhibit 6 without expressly finding that the missing envelope was actually the file folder that was entered as Exhibit 6. The post-conviction court found that the

•59 Petitioner has failed to show by clear and convincing evidence that the information contained in Exhibit 6 was improperly withheld, that it was favorable to Petitioner, or that it was relevant and material to the preparation of Petitioner's defense. This Court finds that Petitioner's theory of intentional non-disclosure is less plausible than the [S]tate's reasonable explanation that the documents contained in Exhibit 6 were either witness statements turned over to the defense at trial under Jencks or products of the [S]tate's investigation not subject to discovery.

The post-conviction court also found that "[a]lthough the folder that is now Exhibit 6 may have been misplaced during the lengthy course of these post-conviction proceedings, the unavailability of these documents did not likely prejudice [the] Petitioner's ability to present a defense because he either received the documents at the appropriate time or was never entitled to disclosure of the documents."

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Regardless of the shortcomings of the post-conviction court's findings, no proof was presented at the post-conviction hearing that could lead to the conclusion that the documents later found in an open file folder which became Exhibit 6 were the contents of the missing envelope. Only two witnesses, Ms. Eskridge and General Carriker, acknowledged that they saw the sealed manila envelope, and they both testified that they never viewed the contents of the now missing sealed manila envelope. While the State appears to suggest in its brief that the missing sealed envelope never existed, the testimony of Ms. Eskridge and General Carriker, their discussions with the post-conviction court during hearings prior to the evidentiary hearing, and the post-conviction court's findings belie the State's claim.

\*

Some of the most disturbing circumstantial evidence from the post-conviction hearing is Ms. Eskridge's testimony that the State failed for more than one year to schedule an opportunity for her to review the State's file as discovery in the post-conviction case. She was told that no one knew where the file was located; she was given different reasons why she could not have access to the file; and she was even told by General Davis that the file was in California. It was not until General Carriker was assigned the post-conviction case that Ms. Eskridge was granted access to the State's file. The olfactory perception of the missing sealed manila envelope is not pleasant.

Nevertheless, there appears to be no way to determine the contents of the missing sealed manila envelope by even a preponderance of the evidence standard much less by a clear and convincing standard. Because there is no evidence as to the contents of the missing envelope, there also is no evidence that the contents included *Brady* material.

The Petitioner urges this Court to apply *State v. Ferguson*, 2 S W 3d 912-917 (Tenn. 1999), which stands for the proposition that the loss or destruction of potentially exculpatory evidence may violate a defendant's right to a fair trial. "[T]he State's duty to preserve evidence is limited to constitutionally material evidence described as evidence that might be expected to play a significant role in the suspect's defense." *State v. Merriman*, 410 S W 3d 779, 785 (Tenn. 2013) (quoting *Ferguson*, 2 S W 3d at 917). If the State fails in its duty, the trial court must examine (1) the degree of negligence involved; (2) the significance of the destroyed evidence in light of the probative value and reliability of the secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence used at trial to support the conviction in order to determine whether the trial conducted without the missing or destroyed evidence would be fundamentally fair. *Id.*

\*60 As this court has recognized, it is unclear whether *Ferguson*, which discusses remedies for the State's failure to preserve evidence prior to trial, even applies in the post-conviction context. See *Tommy Nunley v. State*, No. W2014-01776-CCAR3-PC, 2015 WL 1650233, at \*3 (Tenn. Crim. App. Apr. 13, 2015); *Tommy Nunley v. State*, No. W2003-02940-CCA-R3-PC, 2006 WL 44380, at \*5 n.3 (Tenn. Crim. App. Jan. 6, 2006); *Edward Thompson v. State*, No. E2003-01089-CCA-R3-PC, 2004 WL 911279, at \*2 (Tenn. Crim. App. Apr. 29, 2004). Both the United States and Tennessee Supreme Courts have held that the full scope of due process protections does not extend to post-conviction proceedings. *Pennsylvania v. Finley*, 481 U.S. 551, 554-55, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987); *Stokes v. State*, 146 S.W.3d 56, 60 (Tenn. 2004). "All that due process requires in the post-conviction setting is that the defendant have 'the opportunity to be heard at a meaningful time and in a meaningful manner.'" *Stokes*, 146 S.W.3d at 61 (quoting *House v. State*, 911 S.W.2d 705, 711 (Tenn. 1995)).

Even if *Ferguson* applied to post-conviction proceedings, the Petitioner's claim under *Ferguson* fails for the same reason that his *Brady* claim fails, that is, the lack of evidence as to the contents of the missing envelope. For example, we cannot determine whether the evidence was destroyed or the significance of any destroyed evidence in light of the probative value and reliability of the secondary or substitute evidence that remains available. The Petitioner, who has the burden of proof in post-conviction cases, failed to meet his burden to present clear and convincing evidence to support his claims.

Ms. Eskridge testified that she trusted General Carriker to obtain permission to unseal the envelope and show her the contents. From the record, there is absolutely nothing to indicate that her trust was misplaced. It is unfortunate to conclude that, in retrospect, Ms. Eskridge should have taken additional steps, such as taking multiple photographs with a cellular phone of the now missing sealed manila envelope and the note and attaching the photographs to a promptly filed motion for a protective order requiring the State to preserve the sealed envelope in its then current condition.

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We are left with evidence that a sealed manila envelope, which was approximately one-half-inch thick and had a yellow note with language that it should not be turned over to the defense, was discovered in the State's file and that the sealed envelope went missing from the State's file while in the State's possession without the State ever revealing the contents of the envelope to the Petitioner or the post-conviction court. However, the Petitioner bears the burden of proof in this post-conviction case. Through absolutely no fault of the Petitioner or his post-conviction counsel, there is no evidence that any Brady material was inside the now missing sealed envelope. Accordingly, we must conclude that the Petitioner is not entitled to relief.

**III Cumulative Error**

The Petitioner argues that the cumulative effect of the errors of trial counsel and the State entitles him to relief. The cumulative error doctrine recognizes that in some cases there may be multiple errors committed during the trial proceedings, which standing alone constitute harmless error; however, considered in the aggregate, these errors undermined the fairness of the trial and require a reversal. *State v Hester*, 324 S.W.3d 1, 76 (Tenn. 2010). We have concluded that trial counsel was deficient in failing to interview Ms. Lane, review the recordings of the Petitioner's telephone conversations from jail prior to trial, and object to the prosecutor's improper remarks during opening statements. However, we cannot conclude that such deficiencies when considered individually or together resulted in prejudice in light of the strong evidence supporting the Petitioner's conviction for second degree murder.

**CONCLUSION**

\*61 Upon reviewing the record and the applicable law, we affirm the judgment of the post-conviction court.

**All Citations**

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