

Excerpts from Braswell v State (2018 WL 1719443) Relating to state prosecutors choosing to destroy suppressed evidence instead of revealing the evidence to the defendant or the court.

(*10) 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.

•// 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"**

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 Baity, 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 Baity. 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 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, 2004; (2) Ms. Renee Welch's statement on

November 16, 2004; (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 24, 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 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.

¹⁴ 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 notes he 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.

•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 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 Carriker 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 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 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 the victim died from strangulation and that he had heard of people being strangled during sex.** He was anticipating that the issue could arise later, and he wanted to know whether the Petitioner and the victim engaged in the practice.

*43 Assistant District Attorney General Glen Baity 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 Baity did not recall** General Carriker informing him of locating a folder or an envelope marked "not turned over to defense." General Baity 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 Baity 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."**

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.

•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.

The Missing Envelope

The Petitioner maintains that the State violated *Brady* and *Slate 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 [Judge Paula Skahan'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." 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 WL1650233, 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.

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.**