APPENDIX

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APPENDIX A

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16-6511

[Filed February 27, 2018]

JASON CLINARD, Petitioner-Appellant,
v.
RANDY LEE, Warden, Respondent-Appellee,

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

BEFORE: GUY, CLAY, and WHITE, Circuit Judges.

HELENE N. WHITE, Circuit Judge. Petitioner-Appellant Jason Clinard was fourteen years old when he shot and killed Joyce Gregory, his school bus driver. The state of Tennessee sought to prosecute Clinard as an adult. During his transfer hearing, acting on the advice of his retained counsel, Clinard unexpectedly withdrew his objection to the transfer. He

was subsequently charged as an adult, convicted of first-degree premeditated murder, and sentenced to life with the possibility of parole.[1] Clinard's conviction and sentence were upheld on direct appeal, and his numerous arguments for state postconviction relief were rejected. Clinard brought a federal habeas petition, also raising numerous claims, which were all denied. The district court did, however, grant a certificate of appealability as to Clinard's claim that he received ineffective assistance of counsel during his transfer hearing. Because the state court's determination that Clinard's counsel was not ineffective in waving the transfer hearing was an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984), we **REVERSE**, and **REMAND** to the district court for further proceedings consistent with this opinion.

I. FACTS

The facts of the case, as stated by the Tennessee Court of Criminal Appeals, are as follows:

> On March 2, 2005, the 14-year-old defendant shot and killed his school bus driver, Joyce Gregory, as she sat aboard the bus in front of his house. On the day before the shooting, the victim had reported to the vice-principal of Stewart County High School, where the defendant was a freshman, that the defendant had been dipping snuff on the bus. As a result of the victim's

[1] Under Tennessee law, this effectively means Clinard must serve at least 51 years in prison. *See Vaughn v. State*, 202 S.W.3d 106, 118–19 (Tenn. 2006).

report, the defendant received in-school suspension. The evidence established that the March 1, 2005 incident was not the first time the defendant had violated the school bus rules. He had previously been suspended from riding the bus for fighting and had only returned to riding the bus on February 25, 2005. According to the defendant's 16–year–old nephews, Joseph and Bobby Lee Fulks, the defendant believed that the victim was picking on him and he didn't like [the victim] too much.

On the morning of the shooting, the defendant rose as usual, readied himself for school, and ate breakfast. As the three boys walked to the bus, the defendant insisted that the Fulks brothers board the bus ahead of him. As the brothers walked to the back of the bus, the defendant aimed a .45 caliber semi-automatic handgun and fired six jacketed hollow point bullets at the victim. Three shots struck the victim in the torso . . . .

After being shot, the victim attempted to radio for help but succumbed to her injuries before she was able to do so. Meanwhile, the defendant ran around the back of his house and into the woods as Joseph Fulks went inside to telephone 9-1-1. After the victim's foot slipped from the brake, Bobby Fulks steered the bus toward a telephone pole to keep it from going over a steep hill. Bobby Fulks and other high school students helped the remainder of the children out of the emergency exit and into a nearby residence.

> By the time the first police officer arrived on the scene, the victim had died. After the officer confirmed that the victim was dead, he saw the defendant's father, Charlie Clinard, walking toward the bus. Mr. Clinard told the officer that the defendant had shot the victim and retreated to the woods behind the family residence. Officers later reached the defendant on his cellular telephone, and he agreed to surrender. Shortly thereafter, the defendant emerged from the woods carrying the .45 caliber handgun in one hand and the magazine in the other. He laid both on the ground and surrendered to the authorities.

Clinard v. State, No. M2011-01927-CCA-R3PC, 2012 WL 6570893, at *1–2 (Tenn. Crim. App. Dec. 17, 2012) ["*Clinard III*"] (internal quotation marks removed and citation omitted) (alteration in original).

II. TENNESSEE JUVENILE TRANSFER LAW

Respondent-Appellee Warden Randy Lee does not dispute that Clinard's counsel's performance was deficient, but argues that the state court reasonably concluded that Clinard was not prejudiced by his counsel's agreement to transfer the case from juvenile court.

In its opinion affirming the denial of postconviction relief, the Tennessee Court of Criminal Appeals explained the relevant law as it existed at the time of Clinard's transfer hearing:

> Juvenile courts have original jurisdiction over children who are alleged to be delinquent. Tenn. Code Ann. § 37-1-134; s*ee also Howell v. State*,

185 S.W.3d 319, 326 (Tenn. 2006). Tennessee Code Annotated section 37-1-134(a) provides the circumstances under which a juvenile court shall transfer a juvenile accused of conduct that constitutes a criminal offense to adult court. For a child less than sixteen years old and charged with a certain offense, such as first degree murder, the child must be provided with notice and a hearing. Tenn. Code Ann. § 37-1-134(a)(1)–(3). The child is to be treated as an adult if the juvenile court finds that there are reasonable grounds to believe that (1) the "child committed the delinquent act as alleged"; (2) the "child is not committable to an institution [] for the developmentally disabled or mentally ill"; and (3) the "interests of the community require that the child be put under legal restraint or discipline." Tenn. Code Ann. § 37-1-134(a)(4)(A)–(C). Moreover, Tennessee Code Annotated section 37-1-134(b) lists the following factors that the judge must consider in deciding whether to treat a juvenile as an adult.

> (1) The extent and nature of the child's prior delinquency records;
>
> (2) The nature of past treatment efforts and the nature of the child's response thereto;
>
> (3) Whether the offense was against person or property, with greater weight in favor of transfer given to offenses against the person;

> (4) Whether the offense was committed in an aggressive and premeditated manner;
>
> (5) The possible rehabilitation of the child by use of procedures, services and facilities currently available to the court in this state; and
>
> (6) whether the child's offense would be considered a criminal gang offense . . . if committed by an adult.

Clinard III, 2012 WL 6570893, at *6. Transfer is mandatory if the three elements set out in § 37–1–134(a)(4) are satisfied. *Howell v. Hodge*, 710 F.3d 381, 384 (6th Cir. 2013). Additionally, an individual ceases to be a "child" for any purpose when he or she turns nineteen. Tenn. Code Ann. § 37-1-102(b)(5)(B). Thus, regardless of the seriousness of a child's offense, any term of commitment ends when the child turns nineteen. *Id.* at § 37-1-102(b)(5)(B)(ii); *see Howell*, 710 F.3d at 392 (Stranch, J., concurring).

III. PROCEDURAL HISTORY

A. Proceedings in the Juvenile Court

Clinard was charged with first-degree murder in the Juvenile Court of Stewart County, Judge Andrew Brigham presiding, and was placed in the Middle Tennessee Mental Health Institute ("MTMHI"). Public Defender Jake Lockert, an attorney with substantial experience as both a prosecutor and a criminal defense attorney, including with murder trials and juvenile cases, was appointed to represent Clinard. Anticipating the state would seek to prosecute Clinard as an adult, Lockert and his staff began to prepare for a transfer

hearing. The juvenile court appointed attorney Roselle Shackelford to act as guardian ad litem for Clinard.

Lockert retained Dr. William Bernet,[2] the Director of Forensic Psychiatry at Vanderbilt University, to conduct a forensic psychiatric evaluation of Clinard. Lockert also contacted two of the doctors—Drs. Craddock and Farooque—who were treating Clinard at MTMHI, as well as administrators from that facility, all of whom Lockert came to believe would testify that Clinard could be successfully treated as a juvenile. Lockert also identified witnesses who would testify that Clinard had "no prior criminal behavior," "was a model student involved in extracurricular activities," and "had shown signs of extreme honesty." (Postconviction Hr'g Tr., R. 33-3, PID 396.) Lockert and his staff spent approximately 300 hours working on Clinard's case. Lockert's case file totaled "somewhere between six hundred and a thousand pages." (*Id.* at 400.)

Lockert did not, however, represent Clinard at the transfer hearing. In May 2005, Clinard's family retained attorney Worth Lovett to represent Clinard. Lovett had substantially less experience than Lockert, and, apparently, this was Lovett's first murder case. His practice to that point had consisted primarily of guardian ad litem and juvenile work. Lockert spoke to Lovett on the phone and advised Lovett regarding the witnesses he had secured to testify at the transfer hearing. Lockert emphasized the importance of having the neutral MTMHI doctors testify that Clinard could complete a treatment program by age nineteen. However, Lovett never met with Lockert in person, and

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[2] Dr. Bernet's name also appears in the record as "Burnett."

never requested Lockert's case file or any further assistance.

Clinard's transfer hearing was held on August 2, 2005. As relevant here, the parties stipulated to the admission of the court-ordered MTMHI evaluation of Clinard, prepared by licensed psychologist M. Duncan Currey, Ph.D. Dr. Currey diagnosed Clinard as suffering from "Major Depressive Disorder, Recurrent, Severe, With Psychotic Features," i.e., auditory and visual hallucinations. (R. 41-17, PID 2428–29, 2433.) Dr. Currey opined that:

> Jason's depression most likely compromised his judgment and reasoning skills, and put him at increased risk for inappropriate behavior, such as acting on his angry impulses. His reports of suicidal thoughts and plans reflect the thinking of a boy who may have developed self-defeating cognitive patterns in a dysfunctional attempt to cope with his negative emotions. Suicidal thoughts in children sometimes reflect feelings of guilt and shame that can manifest in self-destructive behaviors, or in aggression toward others.
>
> Jason responded well to a structured, supportive environment during the evaluation, and his potential for learning to manage his behavior appropriately will probably increase with ongoing supervision and guidance. Adolescents with similar histories typically respond best to therapeutic, supportive, structured, organized living environments where the goals, consequences, and rewards are clear.

(*Id*. at 2434.) Dr. Currey recommended that Clinard "be placed in an adolescent residential treatment center and receive individual and group therapy, family counseling, anger management training, and psychiatric monitoring of his medication." (*Id.* at 2425.)

Although the state had brought the transfer motion, the juvenile court permitted Dr. Bernet to testify first, as a witness for Clinard, due to a scheduling issue. *Clinard III*, 2012 WL 6570893 at *3. As relevant here, Dr. Bernet testified that, based on reviewing relevant records and evaluating Clinard first-hand, Clinard suffered from "major depressive disorder," "intermittent depressive disorder," and "intermittent explosive disorder." (Transfer Hr'g Tr., R. 41-21, PID 3095.) Dr. Bernet opined that Clinard could be successfully treated in a structured residential setting, using a combination of "individual and group therapy and medication." (*Id.* at 104–05.) Dr. Bernet explained that when individuals suffering from major depressive disorder "are treated with both medication and appropriate psychotherapy . . . around 80 percent, maybe 85 percent recover." (R. 41-21, PID 3097.) Dr. Bernet also testified that "[m]ost people" with intermittent explosive disorder "can learn how to manage their anger and deal with it through either therapy or medication." (*Id.* at 3096–97.) Dr. Bernet further opined, based on his experience as a former consultant to the juvenile-justice system, that Clinard could be appropriately treated within that system, and that treatment up to the age of nineteen "should be long enough certainly to address his psychiatric issue." (*Id.* at 3097, 3102–03.) Dr. Bernet acknowledged, however, that there could be no guaranty that treatment would be successful or that Clinard would

not reoffend. In particular, Dr. Bernet opined that, due to a genetic variation that affects how his brain processes serotonin, Clinard was predisposed to depression, and that predisposition would stay with him throughout his life.

After Dr. Bernet's testimony, the state called psychiatrist Kimberly Stalford. Dr. Stalford reviewed Clinard's MTMHI records, but did not interview Clinard. Based on her review of the records, Dr. Stalford concluded that Clinard did not suffer from a major depressive disorder. She also opined that Clinard was not experiencing hallucinations or suffering from "true psychosis," but instead was engaged in "delusional thinking." (Transfer Hr'g Tr., R. 41-21, PID 3114.) Thus, Dr. Stalford concluded that, if Clinard was depressed, it was "significantly less than what Dr. Bernet" had diagnosed. (*Id.* at 3118; 3126–27.) When asked about treatment, Dr. Stalford acknowledged that depression is "a treatable medical problem," but that Clinard's genetic predisposition to depression "c[ould] not be treated." (*Id.* at 3118, 3122.) Asked separately about rehabilitation, Dr. Stalford opined that "the best predictor for violence is a previous history of violence, and the severity of the violence is an important issue." (*Id.* at 3123.) She did not, however, actually offer an opinion as to the likelihood that Clinard would reoffend.

The state then presented testimony from Tom Texture, the first police officer to respond to the shooting. Texture described his arrival on the scene, his discovery that Gregory had been killed, and Clinard's arrest by other officers. Jason Gillespie, another officer, provided similar testimony, and also

identified the handgun recovered from Clinard. Finally, Clinard's 16-year-old twin nephews, Joseph and Bobby Fulks, testified about the shooting.

At that point, the court recessed. According to Judge Brigham, "[t]here was an in-chambers discussion and . . . Mr. Lovett with the presence of the [guardian ad litem] had recommended to Mr. Clinard that the transfer hearing stop and that he agree[] to the transfer." (Postconviction Hr'g, R. 33-3, PID 438–39.) This surprised Judge Brigham, because the state had not rested, and "[t]he defense hadn't started yet other than that out-of-order witness [Dr. Bernet]." (*Id.* at 439.) The only explanation Judge Brigham could recall for the decision was that "the defense was concerned that the record was developing against their client," and that the record of the transfer hearing might be used against Clinard at trial or by the corrections department. (*Id*. at 439, 459.)

The parties prepared an Agreed Order stating that the elements of the transfer statute were satisfied, and the judge signed the order, transferring Clinard to the jurisdiction of the Circuit Court of Stewart County. Clinard was fifteen years old at the time of the transfer.

B. Subsequent State Court Proceedings

After his transfer, Clinard was tried and convicted of first-degree premediated murder. *State v. Clinard*, No. M2007-00406-CCA-R3CD, 2008 WL 4170272, at *1 (Tenn. Crim. App. Sept. 9, 2008) ["*Clinard I*"]. Because the state did not seek a sentence of life imprisonment without the possibility of parole, Clinard "received the statutorily mandated sentence of life imprisonment."

Id. at *2. The Court of Criminal Appeals of Tennessee upheld his conviction and sentence on direct appeal, rejecting arguments not raised here. *Id.* at *2–7. Clinard did not seek further review of that decision.

Clinard petitioned for postconviction relief in the state trial court on January 29, 2009. *Clinard v. State*, No. M2012-00839-CCA-R3HC, 2012 WL 4459717, at *2 (Tenn. Crim. App. Sept. 27, 2012) ["*Clinard II*"]. Among other contentions, Clinard raised the claim now before this court—that he received ineffective assistance of counsel at the transfer hearing. *Clinard III*, 2012 WL 6570893 at *2.

The state postconviction trial court held an evidentiary hearing on August 3, 2011. Lockert testified about the work he and his staff performed on Clinard's behalf, particularly his efforts to identify mental-health professionals and administrators from MTMHI who would testify that Clinard could successfully be treated as a juvenile, as well as Lovett's failure to retrieve Lockert's voluminous case file. (*See* discussion *supra* Section III.A.)

Judge Brigham also testified. Addressing Clinard's decision to accede to the transfer, Judge Brigham stated: "Quite frankly the decision was surprising and I was caught off guard." *Clinard III*, 2012 WL 6570893, at *3 (quotation marks omitted). Judge Brigham "was surprised because defense counsel had not presented any witnesses other than Dr. Bernet." *Id.* The state postconviction appellate court summarized the remainder of Judge Brigham's relevant testimony:

> He stated that at the time of defense counsel's recommendation, he had not yet made a decision

as to how he would rule on the transfer. In particular, he was going to consider possible rehabilitation programs available to the Petitioner in juvenile court, the Petitioner's amenability to rehabilitation, and evidence showing the existence of premeditation. He stated, "There was a lot still I was going to weigh."

On cross-examination, Judge Brigham testified that probable cause as to whether the Petitioner had committed the act was "still somewhat in the air" when the Petitioner waived the remainder of the transfer hearing. Dr. Bernet was in favor of the Petitioner's case remaining in juvenile court. However, experts from MTMHI had concluded that the Petitioner was not committable. Judge Brigham had been expecting the defense to present testimony about programs that could rehabilitate the Petitioner and whether he could be rehabilitated by the time he turned nineteen years old. Judge Brigham said he was concerned about the Petitioner's being released from custody at nineteen because "we were dealing with a relatively short period of time." He acknowledged that the defense would have had to present overwhelming proof that the Petitioner could be rehabilitated before he would have decided not to transfer the case to circuit court. He acknowledged signing a transfer order, stating that all of the requirements of the juvenile transfer statute had been satisfied. He said that he probably would not have signed the order if he had not believed enough evidence

> existed to transfer the Petitioner's case to adult court.
>
> On redirect examination, Judge Brigham testified that although he signed the transfer order, he did not have to make a decision to transfer the Petitioner's case to adult court because the Petitioner agreed to the transfer.

Id. at *3-4. Aptly summarizing, the state court concluded that for Judge Brigham, "the issue of transfer was very much in doubt when counsel agreed to waive the hearing." *Id.* at *9.

Finally, Agent Joe Craig of the Tennessee Bureau of Investigation, the lead investigator in Clinard's case, testified that he was present at the transfer hearing and, if the hearing had continued, he would have provided additional details about the crime, the investigation, and the evidence collected at the scene and thereafter.

Applying *Strickland v. Washington*, 466 U.S. 668 (1984), and relevant state precedents, "the post-conviction court found that trial counsel's performance was deficient because counsel should have 'at least [attempted] to prevent the transfer using mental health testimony' and because counsel agreed to the transfer without receiving a 'significant concession' from the State." *Clinard III*, 2012 WL 6570893 at *4 (alteration in original) (quoting R. 41-15, PID 2291). However, the postconviction trial court found that Clinard was not prejudiced by Lovett's deficient performance. In reaching that conclusion, the court recognized that the only truly disputed issue was whether the "interests of the community require[d]

that [Clinard] be put under legal restraint or discipline"—a necessary predicate for transfer. Tenn. Code Ann. § 37-1- 134(a)(4)(C). As to the rehabilitation question, the court stated that:

> the proof on this issue is in equipoise. The defense expert was of the opinion that Petitioner could be successfully treated within the four years available to the juvenile court system and the State's expert was doubtful that Petitioner could be successfully treated at all. The MTMHI evaluation found that Petitioner was not committable to a mental health institution on an involuntary basis.
>
> This Court considers this factor as being in equipoise, favoring neither retention in juvenile court nor transfer to adult court.

(R. 41-15, PID 2299.) The court then concluded: "[c]onsidering all of the [§ 37-1-134-(b)] factors and the facts of the case, this Court is of the opinion that there is no reasonable probability that Petitioner would not have been transferred to adult court had all of the evidence been presented to the juvenile court." (*Id.* at 2300.) The trial court did not, however, discuss Judge Brigham's testimony or acknowledge that Judge Brigham was focused on the rehabilitation question and that he remained undecided when the hearing was cut short.

The state appellate court agreed with the trial court as to both deficient performance and lack of prejudice, and affirmed the denial of postconviction relief. *Clinard III*, 2012 WL 6570893 at *8–9. The appellate court acknowledged Judge Brigham's testimony, and

specifically found that in Judge Brigham's mind, "the issue of transfer was very much in doubt when counsel agreed to waive the hearing." *Id.* at *9. Nevertheless, the appellate court accepted the trial court's conclusion:

> The Petitioner argues that the testimony of Jake Lockert, who testified about the proof he developed for the transfer hearing, and Judge Brigham, who testified that the issue of transfer was very much in doubt when counsel agreed to waive the hearing, established that he was prejudiced by counsel's deficient performance. However, the post-conviction court considered all of the evidence presented at the transfer hearing, considered all of the evidence presented at the evidentiary hearing, and addressed all of the factors set out in the juvenile transfer statute. The Petitioner did not present any additional evidence at the evidentiary hearing to address those factors. Therefore, we conclude that the Petitioner has failed to establish that but for counsel's deficient performance, his case would not have been transferred from juvenile court to adult court.

Id. at *9. The Tennessee Supreme Court denied Clinard's application for permission to appeal.

C. Proceedings in the District Court

Clinard filed a pro se petition for habeas corpus relief in the district court. Counsel was appointed, and the operative amended petition was filed on May 2, 2016, asserting that Lovett was ineffective at the transfer hearing by (1) agreeing to the transfer, and (2) failing to call Drs. Craddock and Farooque of

MTMHI.[3] The district court agreed with the state courts that Lovett's performance at the transfer hearing was deficient, but that Clinard had not established prejudice. The district court granted a certificate of appealability and this timely appeal followed.

IV. DISCUSSION

A. Standard of Review and Applicable Law

We review de novo the district court's legal conclusions and its answers to mixed questions of fact and law. *Lucas v. O'Dea*, 179 F.3d 412, 416 (6th Cir. 1999) (citation omitted). The district court's independent findings of fact are reviewed for clear error, *id.*, but findings based only on the district court's reading of the state court record are reviewed de novo, *Slagle v. Bagley*, 457 F.3d 501, 513 (6th Cir. 2006).

Clinard filed this habeas petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (AEDPA), so AEDPA standards govern this appeal. *See Lindh v. Murphy*, 521 U.S. 320, 326–27 (1997). Under AEDPA,

> a federal court may not grant a writ of habeas corpus with respect to any claim adjudicated on the merits in state court unless the state adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as

[3] Clinard has abandoned his other claims by not seeking to expand the certificate of appealability.

> determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

Cauthern v. Colson, 736 F.3d 465, 473 (6th Cir. 2013) (quoting 28 U.S.C. § 2254(d)). The petitioner carries the burden of proving that this standard has been met. *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

> In analyzing whether a state court decision is contrary to or an unreasonable application of clearly established Supreme Court precedent, a federal court may look only to the holdings of the Supreme Court's decisions, not the dicta. A state court decision on the merits is contrary to clearly established Supreme Court precedent only if the reasoning or the result of the decision contradicts that precedent.

LaMar v. Houk, 798 F.3d 405, 415 (6th Cir. 2015) (citations omitted). Further,

> [t]o violate the unreasonable-application clause, after identifying the correct governing legal principle from the Supreme Court's decisions, the state court decision must (a) unreasonably apply it to the facts, or (b) either unreasonably extend or unreasonably refuse to extend a legal principle from Supreme Court precedent to a new context. The state-court application of Supreme Court precedent must have been "objectively unreasonable," not simply erroneous or incorrect.

Id. (citations omitted). "State-court factual findings are presumed correct unless the applicant rebuts them by clear and convincing evidence." *Id.* (citing 28 U.S.C. § 2254(e)(1)). Finally, we review "the last reasoned state court decision." *Cauthern*, 736 F.3d at 473 (citing *Pinholster*, 563 U.S. at 187–88). Here, that is the Court of Criminal Appeals of Tennessee's opinion affirming the denial of Clinard's petition for postconviction relief. *See Clinard III*, 2012 WL

Juveniles are entitled to the effective assistance of counsel at transfer hearings. *Kent v. United States*, 383 U.S. 541, 554 (1966). To establish the deprivation of that right, Clinard must show that 1) counsel's performance was deficient—objectively unreasonable under prevailing professional norms—and 2) it prejudiced the defense. *Strickland*, 466 U.S. at 687. Here, the state courts found that Lovett's performance was deficient, *Clinard III*, 2012 WL 6570893 at *8, and the Warden does not challenge that determination.

Prejudice is established by showing there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694. Although the reasonable-probability standard is lower than the more-probable-than-not standard, *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *Strickland*, 466 U.S. at 693–94, the difference between the two "is slight and matters 'only in the rarest case.' The likelihood of a different result must be substantial, not just

conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (quoting *Strickland*, 466 U.S. at 697).[4]

B. Analysis

The question before us "is whether there is any reasonable argument that [Clinard's] counsel satisfied *Strickland*'s deferential standard" when he waived the transfer hearing. *Richter*, 562 U.S. at 105. The answer is "no."

1. The State Postconviction Appellate Court Applied the Correct Legal Standard

As a preliminary matter, Clinard asserts that we should review his claim de novo because the state postconviction appellate court "applied the wrong standard" when assessing prejudice. (Appellant's Br. at 45). In support of that argument, Clinard focuses on the final sentence of the court's analysis: "Therefore, we conclude that the Petitioner has failed to establish that but for counsel's deficient performance, his case would not have been transferred from juvenile court to adult court." *Clinard III*, 2012 WL 6570893 at *9. Clinard contends that this language[5] indicates the state appellate court improperly applied a preponderance-of-the-evidence standard to the prejudice question. However, the court correctly stated

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[4] We reject Clinard's assertion that "reasonable probability" equals 20% because that view is incompatible with *Richter*, and the Supreme Court has rejected "mechanical rules" for ineffective assistance cases. *Strickland*, 466 U.S. at 69.

[5] Clinard also identifies an earlier incorrect recitation of the *Strickland* standard in the state appellate court's opinion.

the applicable standard earlier in its opinion: "To establish prejudice, the petitioner must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Clinard III*, 2012 WL 6570893 at *5 (quoting *Strickland*, 466 U.S. at 694). The court also noted that "[c]onsidering all the factors, the post-conviction [trial] court concluded that 'there is no reasonable probability that Petitioner would not have been transferred to adult court had all of the evidence been presented to the juvenile court.'" *Id.* at *8 (quoting R. 33-4, PID 512). Habeas review includes a "presumption that state courts know and follow the law." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam) (citations omitted). Omitting the words "reasonable probability" when reciting the *Strickland* standard does not justify de novo review when the state court correctly stated and applied the standard in the "central" portion of its opinion. *Id.* at 23. That is the case here.

Vasquez v. Bradshaw, 345 F. App'x 104 (6th Cir. 2009), on which Clinard relies, is both unpublished and distinguishable. In *Vasquez*, the state postconviction trial court "relied directly" on an incorrect formulation of the *Strickland* standard for prejudice. 345 F. App'x at 110–11. The state appellate court stated the correct standard once, but then "expressly adopted the erroneous legal reasoning of the court below." *Id.* at 112. Distinguishing *Woodford* on that basis, our court found an unreasonable application of federal law and proceeded to review the petitioner's claim de novo. *Id.* This case is different. The state postconviction trial court applied the correct standard, (R. 33-4, PID 512),

and the appellate court "expressly adopted" the "legal reasoning of the court below," *Vasquez*, 345 F. App'x at 112, despite an incomplete recitation of the *Strickland* prejudice standard, *see Clinard III*, 2012 WL 6570893 at *5, *8–9. The state postconviction appellate court did not apply the wrong standard.[6]

2. The State Postconviction Courts Unreasonably Applied *Strickland*

Clinard's petition asserts that Lovett provided constitutionally inadequate assistance at the transfer hearing on two theories: (a) Lovett failed to call Drs. Craddock and Farooque and unnamed state juvenile facility administrators at the transfer hearing; and (b) Lovett agreed to the transfer. On appeal, Clinard has not briefed the first theory and we therefore deem it abandoned. We conclude he is entitled to relief on the second theory.

As Clinard acknowledges, the evidence presented at the transfer hearing clearly established reasonable grounds to believe that Clinard murdered Gregory and was not committable. Thus, the juvenile court was required to transfer Clinard if the "interests of the community require[d] that [Clinard] be put under legal restraint or discipline." *See* Tenn. Code Ann.

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[6] Whether de novo review should apply because, as Clinard contends, the state postconviction courts unreasonably failed to discuss Dr. Currey's opinion that Clinard could likely be rehabilitated and mischaracterized Dr. Stalford's testimony—and thus their decisions are "based on an unreasonable determination of the facts," *see* 28 U.S.C. § 2254(d)(2)—is a closer question. We need not decide that issue, however, because Clinard is entitled to relief even under the more deferential AEDPA standard of review.

§ 37-1-134(a)(4)(A)–(C); *Howell*, 710 F.3d at 384. Looking to the six specified factors relevant to that question, Clinard had no past history of delinquency or treatment (factors 1 and 2), his offense was not gang-related (factor 6), and he had committed an aggressive and premediated offense against a person (factors 3 and 4);[7] the only issue in dispute was whether Clinard could be rehabilitated (factor 5). *See* Tenn. Code Ann. § 37-1-134(b). For Judge Brigham, the focus of *that* question was whether Clinard could be rehabilitated before age nineteen such that he would not reoffend. And because Judge Brigham was uncertain about Clinard's potential for rehabilitation, he "hadn't made up [his] mind" whether to approve the transfer. (Postconviction Hr'g Tr., R. 33-3, PID 463.)

There was ample evidence at the transfer hearing that could have led Judge Brigham to decide the rehabilitation issue in Clinard's favor. Dr. Currey's report spoke favorably about Clinard's ability to learn to manage his behavior. And based on his experience as a consultant to the juvenile-justice system, Dr. Bernet opined that treatment up to the age of nineteen "should be long enough certainly to address [Clinard's] psychiatric issue." (R. 41-21, PID 3097, 3102–03.) Even Dr. Stalford, the state's expert, acknowledged that Clinard's depression was treatable, even if his genetic susceptibility to stress was not. The only contrary

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[7] Judge Brigham testified that he had not decided whether the murder was premeditated, but the postconviction trial court held that the evidence "established without question" that it was. (R. 41-15, PID 2298.) Clinard does not challenge this factual conclusion, nor would such a challenge succeed in light of AEDPA deference.

evidence was Dr. Stalford's testimony that "the best predictor for violence is a previous history of violence, and the severity of the violence is an important issue." (*Id.* at 3123.)

Crucially, although Judge Brigham "testified that the issue of transfer was very much in doubt when counsel agreed to waive the hearing," the state postconviction appellate court concluded that there was not a reasonable probability that competent representation would have produced a different result. *Clinard III*, 2012 WL 6570893 at *9. In doing so, the appellate court accepted the trial court's conclusion that, "[c]onsidering all of the [§ 37-1-134-(b)] factors and the facts of this case . . . there is no reasonable probability that Petitioner would not have been transferred to adult court." (R. 41-15, PID 2291); *see Clinard III*, 2012 WL 6570893 at *9.

These determinations unreasonably applied *Strickland* to the facts of this case. *See LaMar*, 798 F.3d at 415. Specifically, the state postconviction appellate court ignored its own factual finding that in Judge Brigham's mind, "the issue of transfer was very much in doubt when counsel agreed to waive the hearing." *Clinard III*, 2012 WL 6570893, at *9. Under *Strickland*, the prejudice determination "proceed[s] on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." 466 U.S. at 695. And "evidence about the actual process of decision" must be considered when it is "part of the record of the proceeding under review." *Id.* The record in this case demonstrates the wisdom of that rule. Judge Brigham approached a difficult case with an open mind. In the

best judicial tradition, he conscientiously waited to make any decision until after all the evidence was presented. When a "reasonabl[e], conscientious[], and impartial[]" judge says that he had not made up his mind, and the evidence is in "equipoise," as observed by the postconviction trial court and apparently accepted by the appellate court, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694–95. It is the rare case that benefits from judicial testimony such as that offered by Judge Brigham. In a case that challenges counsel's decision to abandon an issue that would have been subject to a discretionary ruling, such as a transfer to adult court, the decisionmaker's testimony that he had not made a decision at the time the issue was abandoned must be considered.

Here, the district court described its reasoning as follows:

> The Juvenile Court Judge testified that he was not disposed one way or the other when the Petitioner chose to waive any further opposition to transfer. That, coupled with the seriousness of the offense, that the offense was premeditated, that the Petitioner had already exhibited signs of aggressive behavior with other students, and that the medical experts seemed to agree that the Petitioner was not eligible for involuntary commitment to a mental health facility, forecloses any finding that there was a substantial likelihood that the Petitioner would not have been transferred but for counsel's error.

Clinard v. Lee, No. 3:13-CV-01190, 2016 WL 5845901, at *4 (M.D. Tenn. Oct. 6, 2016) (record citations omitted). The Warden also urges that the evidence in favor of transfer was overwhelming. True, the evidence that Clinard committed a premeditated murder was unassailable, and the details of the crime are undisputed. But the district court did not account for the evidence that Clinard could be successfully treated before he aged out of the juvenile system, a consideration that was important to Judge Brigham in applying the controlling factor. Nor does the Warden address on appeal the rehabilitation evidence actually presented at the transfer hearing. In light of that evidence and his statutory obligation to consider the rehabilitation issue, Judge Brigham remained undecided when the transfer hearing was cut short. Ultimately, given the seriousness of the crime, Judge Brigham might have granted the transfer motion despite the possibility that Clinard would be successfully rehabilitated by age nineteen. *See State v. Strickland*, 532 S.W.2d 912, 920 (Tenn. 1975) (listing "the seriousness of the alleged crime" as one factor to be considered in transfer decisions). But Judge Brigham's testimony makes clear that denying the motion was also a reasonable probability.

The district court also relied on *Spytma v. Howes*, 313 F.3d 363 (6th Cir. 2002). (*See* R. 45, PID 4628.) In *Spytma*, a 15-year-old participated in the beating, sexual assault, and murder of a neighbor. 313 F.3d at 365. The Michigan juvenile court failed to follow all the procedural requirements of the applicable transfer statute, but this court held that any due process violation was harmless "because no reasonable probate judge would have failed to waive jurisdiction given the

brutality of the crime." *Id.* at 368–70. However, *Spytma* was not an ineffective-assistance case, and there was no testimony from the probate judge. Further, as difficult as the facts of this case are, the facts in *Spytma* were even more disturbing. We therefore find *Spytma* inapposite.

Finally, the Warden argues that we should not dwell on Judge Brigham's testimony and should focus instead on the Agreed Order, drafted by the parties and signed by Judge Brigham after Clinard agreed to be transferred, which states that the requirements of the transfer statute were met. We note that although the Warden's brief mentions the Agreed Order in passing, it was only at oral argument that the Warden contended that the Agreed Order had any particular significance. *See Lindsey v. Detroit Entm't, LLC*, 484 F.3d 824, 831 n.9 (6th Cir. 2007) (issues not raised prior to oral argument are waived). In any event, it is clear from Judge Brigham's testimony that he entered the Agreed Order because the parties asked him to, and that there is a reasonable probability he would have reached a different conclusion if Lovett's deficient performance had not taken the matter out of his hands. *See Clinard III*, 2012 WL 6570893 ("Judge Brigham testified that although he signed the transfer order, he did not have to make a decision to transfer the Petitioner's case to adult court because the Petitioner agreed to the transfer.").

In sum, there is no reasonable argument that Clinard was not prejudiced by his counsel's deficient performance.

C. Remedy

Having concluded that the district court erred in denying the petition, we turn to the question of relief. In his brief, Clinard asserts that we should order his conviction vacated entirely. At oral argument, however, Clinard conceded that, in light of *Kent* and *White v. Sowders*, 644 F.2d 1177 (6th Cir. 1980), an appropriate remedy would be to remand the case to the district court. We agree.

In *Kent*, the Supreme Court found that the petitioner's due process rights were violated when a District of Columbia juvenile court waived its jurisdiction—equivalent to a transfer determination under Tennessee law—without conducting the "full investigation" required by the District's Juvenile Court Act. 383 U.S. at 546–47. The Court went on to discuss its disposition of the case:

> Ordinarily we would reverse . . . and direct the District Court to remand the case to the Juvenile Court for a new determination of waiver. If on remand the decision were against waiver, the indictment in the District Court would be dismissed. However, *petitioner has now passed the age of 21 and the Juvenile Court can no longer exercise jurisdiction over him*. In view of the unavailability of a redetermination of the waiver question by the Juvenile Court, it is urged by petitioner that the conviction should be vacated and the indictment dismissed. In the circumstances of this case . . . we do not consider it appropriate to grant this drastic relief. Accordingly, we vacate the order of the Court of Appeals and the judgment of the District Court

> and *remand the case to the District Court for a hearing de novo on waiver*, consistent with this opinion. If that court finds that waiver was inappropriate, petitioner's conviction must be vacated. If, however, it finds that the waiver order was proper when originally made, the District Court may proceed, after consideration of such motions as counsel may make and such further proceedings, if any, as may be warranted, to enter an appropriate judgment.

Id. at 564–65 (emphasis added; citations and footnotes omitted).

In *White*, this court faced a similar situation. The habeas petitioner in that case had committed a robbery when he was seventeen. *White*, 644 F.2d at 1178. A Kentucky juvenile court waived jurisdiction and allowed White to be tried as an adult, without making the findings of fact required by the relevant Kentucky statute. *Id.* at 1179. The state conceded a *Kent* violation, and this court found the petitioner entitled to relief. *Id.* at 1180–84. By that time, however, the "petitioner [wa]s no longer a minor and [wa]s not subject to juvenile court jurisdiction." *Id.* at 1184. The petitioner argued his conviction should be vacated unconditionally, but this court disagreed, and instead "remand[ed] to the district court for a hearing de novo on the question of waiver." *Id.* at 1185.

Here, because there is a reasonable probability that Clinard would not have been transferred to adult court absent his counsel's ineffective assistance, Clinard is entitled to a new transfer hearing. And, as in *White*, because "an opportunity has already been accorded the state courts to resolve the issue . . . , we believe our

discretion is better exercised by a remand to the district court for the purpose of holding [a new transfer] hearing in that court." *Id.*

V. CONCLUSION

For the foregoing reasons, we **REVERSE** the judgment below and **REMAND** the case for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO. 3:13-cv-01190
JUDGE CRENSHAW

[Filed October 6, 2016]

JASON CLINARD, PETITIONER,
v.
RANDY LEE, Warden RESPONDENT.

M E M O R A N D U M

Petitioner brings this action pursuant to 28 U.S.C. § 2254 against Randy Lee, Warden of the Northeast Correctional Complex, seeking a writ of habeas corpus.

I. Background

On May 5, 2006, a jury in Stewart County found the Petitioner guilty of first degree premeditated murder. (Doc. No. 41-2 at pg. 171.) For this crime, he received a sentence of life imprisonment with the possibility of parole. (Id. at pg. 174).

On direct appeal, the Tennessee Court of Criminal Appeals affirmed the conviction and sentence. (Doc.

No. 41-14.) The Petitioner made no further effort to seek direct review of his conviction. (Doc. No. 33-7 at pg. 6.)

In January, 2009, he filed a *pro se* petition for state post-conviction relief in the Circuit Court of Stewart County. (Doc. No. 33-8.) Following the appointment of counsel, an amendment of the petition and an evidentiary hearing, the trial court denied the Petitioner post-conviction relief. (Doc. No. 33-4.)

During the pendency of a post-conviction appeal, the Petitioner filed a petition for state habeas corpus relief. (Doc. No. 41-35 at pgs. 3-5.) Shortly thereafter, the state habeas petition was summarily denied. (Id. at pg. 96.)

On appeal, the Tennessee Court of Criminal Appeals affirmed the denial of state habeas relief. (Doc. No. 41-38.) Nearly three months later, that court upheld the denial of state post-conviction relief. (Doc. No. 41-32.) The Tennessee Supreme Court refused further review of both the state habeas action (Doc. No. 41-41) and the state post-conviction proceedings. (Doc. No. 41- 34.)

II. Procedural History

On October 28, 2013, the Petitioner initiated this action with the *pro se* filing of a Petition (Doc. No. 1) for writ of habeas corpus. By an order entered December 10, 2015, counsel was appointed to represent the Petitioner. (Doc. No. 16.) Counsel filed an Amended Petition. (Doc. No. 30.) The Amended Petition consists of four claims for relief. These claims include:

1) trial counsel was ineffective when he
   a) waived the transfer hearing rather than allow the Juvenile Court judge to decide whether the Petitioner should be tried as an adult;
   b) failed to call certain medical experts (Drs. Craddock and Faroque) to testify at the transfer hearing;[1]

2) post-conviction counsel was ineffective because he failed to call certain medical experts to testify at a post-conviction evidentiary hearing;[2] and

3) the sentence of life imprisonment with the possibility of parole is cruel and unusual because the Petitioner was a minor at the time of sentencing.

The Respondent was directed to file an answer, plead or otherwise respond to the Amended Petition. (Doc. No. 16.) Presently before the Court are Respondent's Answer (Doc. No. 39) and the Petitioner's Response (Doc. No. 44) to the Answer.

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[1] Jack Lockert, the Public Defender for Stewart County, was originally appointed to represent the Petitioner. He was later replaced by Worth Lovett, a member of the Montgomery County Bar, who was retained by Petitioner's family. These ineffective assistance claims relate to Lovett's representation of the Petitioner.

[2] During post-conviction proceedings, the Petitioner was represented by Clifford McGown, a member of the Humphreys County Bar.

Having carefully considered the Amended Petition, Respondent's Answer, Petitioner's Response to the Answer and the expanded record, it appears that an evidentiary hearing is not needed in this matter. *See* Schriro v. Landrigan, 550 U.S. 465, 474 (2007). Therefore, the Court shall dispose of the Amended Petition as the law and justice require. Rule 8(a), Rules - - - § 2254 Cases.

III. Analysis

As a preliminary matter, the Court notes that in his Response to the Answer (Doc. No. 44 at pgs. 1-2), the Petitioner argues only the merits of the ineffective assistance claims arising from the waiver of his juvenile transfer hearing while conceding that, "at least under current precedent, procedural hurdles foreclose other claims." He acknowledges that his cruel and unusual punishment claim (Claim No. 3) is time-barred. He further concedes that the ineffectiveness of post-conviction counsel (Claim No. 2) is not cognizable as a free-standing claim. Coleman v. Thompson, 501 U.S. 722, 752 (1991). As a consequence, the only issue remaining before the Court is whether counsel was ineffective for waiving Petitioner's juvenile transfer hearing (Claim Nos. 1a-b).[3]

A district court should not entertain a petition for writ of habeas corpus unless the Petitioner has first exhausted all available state court remedies for each claim in his petition. 28 U.S.C. § 2254(b)(1). The

[3] The issue of whether counsel was ineffective for failing to call additional medical experts at the juvenile transfer hearing (Claim No. 1b) is completely dependent upon whether waiver of that hearing was appropriate in this instance.

question of counsel's waiver was fully considered and addressed by the state courts during post-conviction proceedings. (Doc. No. 41-32.) Therefore, this claim has been properly exhausted prior to initiation of this action.

The availability of federal habeas corpus relief is limited with regard to claims that have been previously adjudicated on the merits in state court. Harrington v. Richter, 562 U.S. 86, 92 (2011). When a claim has been adjudicated on the merits in state court, the state court adjudication will not be disturbed unless it resulted in a decision contrary to clearly established federal law or involved an unreasonable application of federal law in light of the evidence. 28 U.S.C. § 2254(d); Nevers v. Killinger, 169 F.3d 352, 357 (6th Cir.1999).

In order for a state adjudication to run "contrary to" clearly established federal law, the state court must arrive at a conclusion opposite to that reached by the United States Supreme Court on a question of law or decide a case differently than the United States Supreme Court on a set of materially indistinguishable facts. Williams v. Taylor, 529 U.S. 362, 405 (2000). To grant the writ for an "unreasonable application" of federal law, the Petitioner must show that the state court identified the correct governing legal principle but unreasonably applied that principle to the facts of the case. Williams, 529 U.S. at 413. In short, the Petitioner "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington, 562 U.S. at 103.

The Petitioner argues that trial counsel was ineffective when he waived the juvenile transfer hearing rather than allow the Juvenile Court judge to decide whether the Petitioner should be tried as an adult.

The Sixth Amendment provides that a criminal defendant is entitled to the effective assistance of counsel. Missouri v. Frye, 132 S.Ct. 1399, 1404 (2012). To establish a violation of this right, the Petitioner bears the burden of pleading and proving that his attorney's performance was in some way deficient *and* that the defense was prejudiced as a result of the deficiency. Strickland v. Washington, 466 U.S. 668, 687 (1984). A deficiency occurs when counsel has acted in a way that falls below an objective standard of reasonableness under prevailing professional norms. Id. at 688. Prejudice arises when there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. Id. at 694.

Where the issue is one of ineffective assistance of counsel, review under the Anti-Terrorism and Effective Death Penalty Act is "doubly deferential," Cullen v. Pinholster, 563 U.S. 170, 190 (2011), because counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690.

A brief recitation of the facts is necessary to place Petitioner's claim in context. In an interview with a T.B.I. agent shortly after surrendering to the police, the Petitioner explained that he awoke that day and prepared himself for school. Before leaving the house, he took a handgun and some ammunition belonging to

his father. (Doc. No. 41-10 at pg. 42.) The Petitioner loaded the gun. (Id. at pg. 49.) As the school bus approached his home, the Petitioner decided to shoot the school bus driver. (Id. at pg. 46.) When asked why, the Petitioner simply said because "I hate her." (Id. at pg. 45.)

As the driver opened the door to the bus, the Petitioner let his nephews board first. He then raised the weapon and opened fire on the school bus driver, hitting her three times. (Id. at pg. 43.) The school bus driver died from her wounds. The Petitioner admitted that he was aware beforehand that this was against the law and that he would probably be sent to prison. (Id. at pg. 48.)

At the time of the shooting, the Petitioner was fourteen (14) years old. The prosecution filed a Petition (Doc. No. 41-1 at pgs. 98-99) seeking to transfer jurisdiction over the Petitioner from Juvenile Court so that he could be tried as an adult. The Petition was set for a hearing and a guardian *ad litem* was appointed for the Petitioner.[4]

At the hearing, counsel for the Petitioner called Dr. William Bernet, a forensic psychiatrist, who testified that he had interviewed the Petitioner and found that he was suffering from major depression and two psychological disorders, all of which could be treated at a juvenile facility. (Doc. No. 33-1 at pgs. 106-107.) Counsel also introduced a favorable evaluation of

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[4] The Juvenile Court appointed Rosella Shackleford, a member of the Montgomery County Bar, to act as Petitioner's guardian *ad litem*.

Petitioner's condition made by Dr. M. Duncan Currey. (Doc. No. 32.)

In rebuttal, the prosecutor called Dr. Kim Stalford, a psychiatrist, who determined that Petitioner would not be a proper subject for rehabilitation in a juvenile facility. (Doc. No. 33-2 at pg. 8.) Stalford's testimony was impeached, however, because she had never interviewed the Petitioner and that her conclusions were based solely upon a review of his mental health records. (Doc. No. 33-1 at pgs. 120-121.)

Sometime during the hearing, a discussion was held in chambers. Counsel recommended to Petitioner that the transfer hearing stop and that he agree to being tried as an adult. (Doc. No. 33-3 at pgs. 55-56.) The Petitioner, in the company of his guardian *ad litem*, agreed to waive the hearing and accept transfer of jurisdiction to the Circuit Court. Counsel told the Juvenile Court judge that "..... the defense was concerned that the record was developing against their client." (Id. at pg. 56.) It is counsel's recommendation to waive the transfer hearing that is the basis for Petitioner's ineffective assistance claim.

A juvenile is entitled to the effective assistance of counsel at a hearing to certify him for treatment as an adult because that certification is so consequential. Kent v. United States, 383 U.S. 541, 544 (1966).

Following the post-conviction evidentiary hearing, the trial court found that counsel's failure "to at least attempt to prevent the transfer using mental health testimony" constituted deficient performance. (Doc. No. 33-4 at pg. 26.) It concluded, however, that there was no prejudice arising from counsel's deficiency because

there was no reasonable probability of preventing Petitioner's transfer.[5] (Id. at pgs. 28-29, 32.) The state appellate court affirmed this conclusion. (Doc. No. 41-32 at pg. 10.)

This Court can discern no legitimate reason for counsel to simply recommend waiving the transfer hearing when there was potential evidence available from which to make an argument against transfer. Thus, the state courts did not err in finding that counsel had been deficient in this regard. Deficient performance, standing alone, however, is not enough to establish ineffective assistance. The Petitioner must also show prejudice. Strickland, *supra.*

Prejudice is shown when there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. (Id. at 466 U.S. 694.) Within the context of this case, prejudice requires showing a reasonable probability that the Petitioner would not have been transferred.

Under Tennessee law, the disposition of the child *shall be* as if the child were an adult if the court finds that there are reasonable grounds to believe that: (a) the child committed the delinquent act as alleged; (b) the child is not committable to an institution for the mentally retarded or mentally ill; and (c) the interests of the community require that the child be put under legal restraint or discipline. Tenn. Code Ann. § 37-1-134(a)(4). In making such a determination, the court shall consider, among other matters : (1) the child's

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[5] Strangely enough, neither the Petitioner nor his attorney testified at the post-conviction evidentiary hearing.

prior delinquency record; (2) the nature of any past treatment efforts and the child's response to those efforts; (3) whether the offense was against person or property, with greater weight in favor of transfer given to offenses against the person; (4) whether the offense was committed in an aggressive and premeditated manner; (5) the possible rehabilitation of the child by use of procedures, services and facilities currently available to the court; and (6) whether the child's conduct was gang-related. Tenn. Code Ann. § 37-1-134(b).

In Strickland, reasonable probability is defined as "a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694. The likelihood of a different result must be substantial, and not just conceivable. Harrington, 562 U.S. at 111-112.

During the post-conviction evidentiary hearing, the Juvenile Court judge testified that he was not disposed one way or the other when the Petitioner chose to waive any further opposition to transfer. (Doc. No. 33-3 at pg. 54.) That, coupled with the seriousness of the offense, that the offense was premeditated, that the Petitioner had already exhibited signs of aggressive behavior with other students, and that the medical experts seemed to agree that the Petitioner was not eligible for involuntary commitment to a mental health facility, (Doc. No. 41-10 at pg. 12), forecloses any finding that there was a substantial likelihood that the Petitioner would not have been transferred but for counsel's error.

Thus, in the absence of any showing of prejudice, the Petitioner has failed to establish his claim for the ineffective assistance of trial counsel. *See* Spytma v.

Howes, 313 F.3d 363, 372 (6th Cir. 2002)(within the context of a fifteen year old juvenile facing a life sentence for second degree murder, "it is likely that the petitioner again would have been transferred to adult court given the nature of the crime, even if the court had obtained more information on juvenile facilities.")

IV. CONCLUSION

The Petitioner's second and third claims have been waived by the Petitioner in his Response to the Respondent's Answer.

The state courts determined that the Petitioner's fully exhausted claim, i.e., the ineffective assistance of trial counsel (Claim Nos. 1a-b) lacked merit. The record supports this finding. The Petitioner has failed to rebut the presumption of correctness accorded to the findings of fact made by the state courts with clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Nor has he shown in what way the legal conclusions made by the state courts with respect to his exhausted claim are either contrary to or an unreasonable application of federal law. Accordingly, this claim has no merit.

An appropriate order will be entered.

/s/ Waverly D. Crenshaw, Jr.
WAVERLY D. CRENSHAW, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO. 3:13-cv-01190
JUDGE CRENSHAW

[Filed October 6, 2016]

JASON CLINARD,	)
Petitioner,	)
	)
v.	)
	)
RANDY LEE, Warden	)
Respondent.	)
	)

O R D E R

In accordance with the Memorandum contemporaneously entered, the Court finds no merit in Petitioner's amended habeas corpus Petition (Doc. No. 30.) Therefore, the amended Petition is **DENIED** and this action is hereby **DISMISSED**. Rule 8(a), Rules - - § 2254 Cases.

In this instance, the Court acknowledges that reasonable jurists could find its assessment of Petitioner's claim of ineffective assistance during his juvenile transfer hearing to be debatable.

Accordingly, should the Petitioner file a timely Notice of Appeal, such Notice shall be treated as an Application for a Certificate of Appealability, 28 U.S.C. § 2253©, which will issue for Petitioner's ineffective assistance of trial counsel claim.

IT IS SO ORDERED.

/s/ Waverly D. Crenshaw, Jr.
WAVERLY D. CRENSHAW, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE

NO. 3:13-1190
JUDGE CRENSHAW

[Filed October 6, 2016]

JASON CLINARD,	)
	)
v.	)
	)
RANDY LEE, Warden	)
	)

ENTRY OF JUDGMENT

Judgment is hereby entered for purposes of Rule 58(a) and/or Rule 79(a) of the Federal Rules of Civil Procedure as to the Order entered 10/06/2016 at DE 46.

KEITH THROCKMORTON, CLERK
s/Elaine J. Hawkins, Deputy Clerk

APPENDIX C

Clinard v. State, Not Reported in S.W.3d (2012)

Court of Criminal Appeals of Tennessee, at Nashville.

2012 WL 6570893

No. M2011–01927–CCA–R3–PC.

[Filed December 17, 2012]

Jason CLINARD	)
	)
v.	)
	)
STATE of Tennessee.	)
	)

Only the Westlaw citation is currently available.

SEE RULE 19 OF THE RULES OF THE COURT OF CRIMINAL APPEALS RELATING TO PUBLICATION OF OPINIONS AND CITATION OF UNPUBLISHED OPINIONS.

Assigned on Briefs June 27, 2012.

Dec. 17, 2012.

Application for Permission to Appeal Denied by Supreme Court May 8, 2013.

Direct Appeal from the Circuit Court for Stewart County, No. 4–1650–CR–05; Robert E. Burch, Judge.

Attorneys and Law Firms

Clifford K. McGown, Jr., for the appellant, Jason Clinard.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; Dan Mitchum Alsobrooks, District Attorney General; and Carey Thompson, Assistant District Attorney General, for the appellee, State of Tennessee.

NORMA McGEE OGLE, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and D. KELLY THOMAS, JR., JJ., joined.

OPINION

NORMA McGEE OGLE, J.

The Petitioner, Jason Clinard, appeals the Stewart County Circuit Court's denial of his petition for post-conviction relief from his conviction of first degree premeditated murder and resulting life sentence. On appeal, he contends that he was prejudiced by trial counsel's agreeing to transfer his case from juvenile to circuit court. Based upon the record and the parties' briefs, we affirm the judgment of the post-conviction court.

I. Factual Background

Following a transfer from juvenile court, a jury convicted the Petitioner of first-degree premeditated murder. This court gave the following factual account of the crime in its direct appeal opinion:

> On March 2, 2005, the 14–year–old defendant shot and killed his school bus driver, Joyce

Gregory, as she sat aboard the bus in front of his house. On the day before the shooting, the victim had reported to the vice-principal of Stewart County High School, where the defendant was a freshman, that the defendant had been "dipping snuff on the bus." As a result of the victim's report, the defendant received "in-school suspension." The evidence established that the March 1, 2005 incident was not the first time the defendant had violated the school bus rules. He had previously been suspended from riding the bus for fighting and had only returned to riding the bus on February 25, 2005. According to the defendant's 16–year–old nephews, Joseph and Bobby Lee Fulks, the defendant believed that the victim was "picking on him" and he "didn't like [the victim] too much."

On the morning of the shooting, the defendant rose as usual, readied himself for school, and ate breakfast. As the three boys walked to the bus, the defendant insisted that the Fulks brothers board the bus ahead of him. As the brothers walked to the back of the bus, the defendant aimed a .45 caliber semi-automatic handgun and fired six jacketed hollow point bullets at the victim. Three shots struck the victim in the torso. The first shot entered the upper right side of the victim's back and exited through the upper left side of the back. The second shot struck the victim in the right side of her chest and traveled through her right lung, trachea, and left lung before coming to rest in the upper left side of her back. The third shot also struck the victim in the right side of her chest and then

> traveled through her right lung, spinal column, and aorta before becoming lodged in the periaortic tissue.
>
> After being shot, the victim attempted to radio for help but succumbed to her injuries before she was able to do so. Meanwhile, the defendant ran around the back of his house and into the woods as Joseph Fulks went inside to telephone 9–1–1. After the victim's foot slipped from the brake, Bobby Fulks steered the bus toward a telephone pole to keep it from going over a steep hill. Bobby Fulks and other high school students helped the remainder of the children out of the emergency exit and into a nearby residence.
>
> By the time the first police officer arrived on the scene, the victim had died. After the officer confirmed that the victim was dead, he saw the defendant's father, Charlie Clinard, walking toward the bus. Mr. Clinard told the officer that the defendant had shot the victim and retreated to the woods behind the family residence. Officers later reached the defendant on his cellular telephone, and he agreed to surrender. Shortly thereafter, the defendant emerged from the woods carrying the .45 caliber handgun in one hand and the magazine in the other. He laid both on the ground and surrendered to the authorities.

State v. Jason Clinard, No. M2007–00406–CCA–R3–CD, 2008 Tenn.Crim.App. LEXIS 715, at ———2–4, 2008 WL 4170272 (Nashville, September 9, 2008). After a sentencing hearing, the trial court sentenced the Petitioner to life in confinement. *Id.* at *4. On appeal,

the Petitioner argued that the trial court erred by not suppressing photographs of the victim, allowing the State to conduct an independent psychological examination of the Petitioner, failing to disqualify the district attorney general's office, and following the statutory sentencing scheme for first degree murder. *Id.* at —— 1–2. This court affirmed the Petitioner's conviction and sentence. *Id.* at *20.

Subsequently, the Petitioner filed a timely petition for post-conviction relief, raising numerous claims of ineffective assistance of counsel.[1] The post-conviction court appointed counsel and scheduled an evidentiary hearing.

At the hearing, Jake Lockert, the Public Defender for the Twenty–Third Judicial District since 1998, testified for the Petitioner that his office was assigned to represent the Petitioner soon after the Petitioner's arrest. Lockert began investigating the case and preparing for the Petitioner's juvenile transfer hearing. He arranged for Dr. William Bernet,[2] a psychiatrist from Vanderbilt, to work with the Petitioner and arranged for two doctors from Middle Tennessee Mental Health Institute (MTMHI) to examine him. Lockert also talked with administrators at secured juvenile facilities and arranged for them to testify at

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[1] The only issue the Petitioner pursues on appeal relates to trial counsel's decision to waive the Petitioner's juvenile transfer hearing.

[2] Throughout the evidentiary hearing transcript, Dr. Bernet is referred to as "Dr. Burnett." However, we will spell his last name as it appears in the curriculum vitae he provided for the juvenile transfer hearing.

the transfer hearing that the Petitioner easily could be treated as a juvenile in those facilities. Other witnesses were prepared to testify at the hearing that the Petitioner had no prior criminal history, that he was a model student involved in extracurricular activities, and that he had shown signs of extreme honesty. Based on Lockert's investigation, he thought he had an overwhelming case for not transferring the Petitioner's case out of juvenile court. He stated, "In my twenty-eight years I've never dealt with a juvenile that had so much evidence in his favor to keep him and be treated as a juvenile. The only factor I found that would weigh against him was just the crime itself."

Lockert testified that his staff spent more than three hundred hours working on the Petitioner's case. At some point, the Petitioner's family hired an attorney to replace the public defender. Lockert spoke with the Petitioner's new counsel and updated counsel on the proof Lockert planned to present at the transfer hearing. However, the Petitioner's new counsel never tried to obtain the Petitioner's file and never met with Lockert to discuss the case face-to-face. Lockert said that the "main battle" in the Petitioner's case was keeping it in juvenile court so that the Petitioner could receive treatment, be released at nineteen years old, and "get on with his life." In the event the Petitioner's case was transferred to adult court, Lockert was prepared to argue at trial that the Petitioner suffered from diminished capacity or was guilty of a lesser-included offense such as second degree murder or manslaughter. Lockert said he would have considered waiving the juvenile transfer hearing only if the State had agreed for the Petitioner to plead guilty to a lesser-included offense.

On cross-examination, Lockert testified that if the Petitioner's case was transferred to adult court, the Petitioner was going to be tried for first degree premeditated murder. Therefore, it was "paramount" to keep the Petitioner's case in juvenile court. Lockert described the facts of the crime as "terrible." Nevertheless, the Petitioner was a sympathetic defendant. Based on the Petitioner's past dealings with the victim, Lockert thought provocation existed. He acknowledged that the evidence showed the Petitioner wore a long jacket on the morning of the crime and fired six shots at the victim. However, Lockert would have argued at trial that the Petitioner had planned to kill himself, not the victim. Mental health experts had diagnosed the Petitioner with depression, which could have been treated through juvenile court programs. Lockert thought the Petitioner was a perfect candidate for rehabilitation. The Petitioner's young age also weighed in favor of his case remaining in juvenile court because there was still time for him to receive treatment in a juvenile facility.

Andrew Brigham, the Juvenile Court Judge for Stewart County, testified for the Petitioner that he appointed the public defender's officer to represent the Petitioner and that Jake Lockert was "very aggressive" in defending the Petitioner's case. At some point, the Petitioner's family hired a new attorney. Judge Brigham said that new counsel was "much more laid back" than Lockert, that new counsel was not aggressive, and the judge "had some concerns" about the quality of new counsel's representation. To the judge's knowledge, new counsel had handled primarily guardian ad litem cases and juvenile work and had never handled a murder case. Judge Brigham stated

that he presided over the Petitioner's juvenile transfer hearing and that the alleged crime was "quite serious." However, he was prepared to consider all of the required factors before he made a decision about whether to transfer the case to adult court.

Judge Brigham testified that on the day of the transfer hearing, Dr. Bernet testified first for the defense because the doctor had a prior engagement scheduled. Then the State presented its evidence in favor of transferring the case to circuit court. At some point, an in-chambers meeting occurred in which defense counsel recommended to the Petitioner that he agree to a transfer. Judge Brigham said, "Quite frankly the decision was surprising and I was caught off guard." He said he was surprised because defense counsel had not presented any witnesses other than Dr. Bernet. Judge Brigham said defense counsel recommended the transfer because defense counsel was concerned that "the record was developing" against the Petitioner. Judge Brigham also recalled that new counsel had mentioned "in an offhand way at some point during these proceedings" that the Petitioner could face the death penalty in adult court. However, pursuant to Tennessee Code Annotated section 37–1–134, the Petitioner would not have been eligible for the death penalty. Defense counsel may have had other reasons for recommending the transfer, but Judge Brigham did not remember them. He stated that at the time of defense counsel's recommendation, he had not yet made a decision as to how he would rule on the transfer. In particular, he was going to consider possible rehabilitation programs available to the Petitioner in juvenile court, the Petitioner's amenability to rehabilitation, and evidence showing the

existence of premeditation. He stated, "There was a lot still I was going to weigh."

On cross-examination, Judge Brigham testified that probable cause as to whether the Petitioner had committed the act was "still somewhat in the air" when the Petitioner waived the remainder of the transfer hearing. Dr. Bernet was in favor of the Petitioner's case remaining in juvenile court. However, experts from MTMHI had concluded that the Petitioner was not committable. Judge Brigham had been expecting the defense to present testimony about programs that could rehabilitate the Petitioner and whether he could be rehabilitated by the time he turned nineteen years old. Judge Brigham said he was concerned about the Petitioner's being released from custody at nineteen because "we were dealing with a relatively short period of time." He acknowledged that the defense would have had to present overwhelming proof that the Petitioner could be rehabilitated before he would have decided not to transfer the case to circuit court. He acknowledged signing a transfer order, stating that all of the requirements of the juvenile transfer statute had been satisfied. He said that he probably would not have signed the order if he had not believed enough evidence existed to transfer the Petitioner's case to adult court.

On redirect examination, Judge Brigham testified that although he signed the transfer order, he did not have to make a decision to transfer the Petitioner's case to adult court because the Petitioner agreed to the transfer.

Agent Joe Craig of the Tennessee Bureau of Investigation testified for the State that the Petitioner shot the victim with a .45 caliber semi-automatic

handgun and that the Petitioner obtained the gun from the home he shared with his parents. Agent Craig was present at the transfer hearing and was going to testify as the State's final witness. However, the hearing ended before he was called to testify. Agent Craig testified for the State at the Petitioner's trial. His testimony at the transfer hearing would have been the same as his trial testimony.

On cross-examination, Agent Craig testified that he had testified in many homicide cases and that he was present in the courtroom during the Petitioner's trial. When asked to give his opinion on the effectiveness of trial counsel's representation of the Petitioner, he stated, "I recall driving-leaving the courthouse having some concerns about the-possibly retrying this case."

On redirect examination, Agent Craig acknowledged that the Petitioner gave a statement in which he said he planned to kill the victim. The Petitioner loaded and concealed the weapon before he shot the victim.

In a written order, the post-conviction court found that trial counsel's performance was deficient because counsel should have "at least [attempted] to prevent the transfer using mental health testimony" and because counsel agreed to the transfer without receiving a "significant concession" from the State. Regarding prejudice, the post-conviction court noted that the only witness who testified for the Petitioner at the transfer hearing was Dr. Bernet, who did not find that the Petitioner suffered from a mental illness or serious emotional disturbance and did not think the Petitioner was committable. The post-conviction court addressed all of the factors set out by the juvenile transfer statute, Tennessee Code Annotated section

37–1–134, and concluded that there was no reasonable probability that the Petitioner would not have been transferred to adult court if all of the evidence had been presented during the transfer hearing.

II. Analysis

The Petitioner claims that the post-conviction court properly found that trial counsel rendered deficient performance and that he established prejudice through the testimony of Jake Lockert and Judge Brigham. The State contends that the trial court erred by finding that trial counsel's performance was deficient because trial counsel, who did not testify at the hearing, could have made a strategic decision to waive the remainder of the transfer hearing. In addition, the State argues that the Petitioner has failed to establish prejudice because he cannot show that he would have avoided a transfer to adult court even if trial counsel had not agreed to the transfer.

To be successful in a claim for post-conviction relief, a petitioner must prove all factual allegations contained in his post-conviction petition by clear and convincing evidence. *See* Tenn.Code Ann. § 40–30–110(f). " 'Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.' " *State v. Holder,* 15 S.W.3d 905, 911 (Tenn.Crim.App.1999) (quoting *Hodges v. S.C. Toof & Co.,* 833 S.W.2d 896, 901 n. 3 (Tenn.1992)). Issues regarding the credibility of witnesses, the weight and value to be accorded their testimony, and the factual questions raised by the evidence adduced at trial are to be resolved by the post-conviction court as the trier of fact. *See Henley v. State,* 960 S.W.2d 572, 579

(Tenn.1997). Therefore, the post-conviction court's findings of fact are entitled to substantial deference on appeal unless the evidence preponderates against those findings. *See Fields v. State,* 40 S.W.3d 450, 458 (Tenn.2001).

A claim of ineffective assistance of counsel is a mixed question of law and fact. *See State v. Burns,* 6 S.W.3d 453, 461 (Tenn.1999). We will review the post-conviction court's findings of fact de novo with a presumption that those findings are correct. *See Fields,* 40 S.W.3d at 458. However, we will review the post-conviction court's conclusions of law purely de novo. *Id.*

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, "the petitioner bears the burden of proving both that counsel's performance was deficient and that the deficiency prejudiced the defense." *Goad v. State,* 938 S.W.2d 363, 369 (Tenn.1996) (citing *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). To establish deficient performance, the petitioner must show that counsel's performance was below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose,* 523 S.W.2d 930, 936 (Tenn.1975). To establish prejudice, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694. Notably,

> [b]ecause a petitioner must establish both prongs of the test, a failure to prove either

> deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim. Indeed, a court need not address the components in any particular order or even address both if the [petitioner] makes an insufficient showing of one component.

Goad, 938 S.W.2d at 370 (citing Strickland, 466 U.S. at 697).

Juvenile courts have original jurisdiction over children who are alleged to be delinquent. Tenn.Code Ann. § 37–1–134; *see also Howell v. State,* 185 S.W.3d 319, 326 (Tenn.2006). Tennessee Code Annotated section 37–1–134(a) provides the circumstances under which a juvenile court shall transfer a juvenile accused of conduct that constitutes a criminal offense to adult court. For a child less than sixteen years old and charged with a certain offense, such as first degree murder, the child must be provided with notice and a hearing. Tenn.Code Ann. § 37–1–134(a)(1)–(3). The child is to be treated as an adult if the juvenile court finds that there are reasonable grounds to believe that (1) the "child committed the delinquent act as alleged"; (2) the "child is not committable to an institution as for the developmentally disabled or mentally ill"; and (3) the "interests of the community require that the child be put under legal restraint or discipline." Tenn.Code Ann. § 37–1–134(a)(4)(A)–(C). Moreover, Tennessee Code Annotated section 37–1–134(b) lists the following factors that the judge must consider in deciding whether to treat a juvenile as an adult.

> (1) The extent and nature of the child's prior delinquency records;

> (2) The nature of past treatment efforts and the nature of the child's response thereto;
>
> (3) Whether the offense was against person or property, with greater weight in favor of transfer given to offenses against the person;
>
> (4) Whether the offense was committed in an aggressive and premeditated manner;
>
> (5) The possible rehabilitation of the child by use of procedures, services and facilities currently available to the court in this state; and
>
> (6) whether the child's offense would be considered a criminal gang offense, as defined in § 40–35–121, if committed by an adult.

Regarding the first prong of the *Strickland* test, the post-conviction court determined that trial counsel rendered deficient performance because he should have attempted to prevent the transfer using mental health testimony and advised the Petitioner to agree to the transfer without seeking any concessions from the State. The State contends that the post-conviction court erred by finding deficient performance because counsel made a strategic or tactical decision to recommend waiving the transfer hearing. The State also argues that because neither the Petitioner nor trial counsel testified at the evidentiary hearing, the Petitioner cannot show that trial counsel's strategic or tactical decision was unreasonable.

Turning to the instant case, we initially note that at the beginning of the post-conviction evidentiary hearing, the State announced that it may call trial counsel to testify and that a subpoena had been issued

for him. However, the State never called trial counsel as a witness. "We have observed on many occasions that original counsel, when available, should always testify in a post-conviction proceeding when there is an allegation that he was ineffective." *State v. Hopson,* 589 S.W.2d 952, 954 (Tenn.Crim.App.1979). Moreover, "the state should present the attacked counsel to show what occurred." *State v. Craven,* 656 S.W.2d 872, 873 (Tenn.Crim.App.1982); *Garrett v. State,* 530 S.W.2d 98, 99 (Tenn.Crim.App.1975). We are puzzled as to why the State did not call trial counsel to testify about his recommendation that the Petitioner waive the remainder of the transfer hearing.

In any event, Dr. Bernet testified for the Petitioner at the transfer hearing, and the Petitioner's psychological evaluation from MTMHI was introduced into evidence. However, Judge Brigham testified that he had not made up his mind about whether to transfer the Petitioner's case, that he was waiting for the defense to present testimony about programs that could rehabilitate the Petitioner, and that he was caught off guard by defense counsel's decision to waive the hearing. Jake Lockert testified that he had arranged for administrators at secured juvenile facilities to testify at the transfer hearing that the Petitioner easily could be treated. Nevertheless, trial counsel made no attempt to show that the Petitioner should remain and be treated in juvenile facilities.

Regarding the State's claim that trial counsel made a strategic decision to waive the hearing, we recognize that possible reasons to waive a juvenile transfer hearing include the desire to have a bond set or the possibility that a voluntary transfer might increase the

chances of a favorable plea offer from the State. *See, e.g., James Clark Blanton, III v. State,* No. M2001–02421–CCA–R3–PC, 2003 Tenn.Crim.App. LEXIS 661, at * 16, 2003 WL 21766251 (Nashville, July 30, 2003). On the other hand, in *Mozella Newson v. State,* a case involving a fourteen-year-old accused of carjacking, robbing, and kidnapping two victims, this court stated the following with regard to trial counsel's "strategy" in failing to present available evidence at the defendant's juvenile transfer hearing:

> The proof at the hearing established that the Appellant was fourteen years old, had no prior history of delinquency, attended the eighth grade, and was not a disciplinary problem at her school. We would agree that, because the Appellant conceded her presence during the crimes and because the State's proof placed her at the scene with a gun which she used to accomplish serious crimes, the only viable strategy available to the Appellant was that of seeking adjudication as a juvenile. However, trial counsel failed to introduce any available evidence which could have precluded waiver of juvenile jurisdiction. Trial counsel explained that he made no attempt to introduce evidence because it would have been futile, as it would not have prevented transfer of the case in his opinion based solely on the egregious facts of the case. We must reject trial counsel's fatalistic reasoning. It is the obligation and duty of an attorney to represent a client zealously and to serve as an advocate within the bounds of the law. Tenn. R. Sup.Ct. 8, Canon 7. If evidence is relevant and germane to an issue, counsel

> should present the evidence and advocate for his client unless reasoned trial strategy dictates otherwise. Trial counsel's decision not to introduce evidence in this case was not based upon trial strategy. We can see no rationale or advantage to be gained by trial counsel's decision to forego the presentation of available evidence that the Appellant was amenable to disciplinary measures of the juvenile court, particularly, in a case such as this where the only viable strategy available was that of preventing transfer.

No. W2005–00477–CCA–R3–PC, 2006 Tenn.Crim.App. LEXIS 401, at * *18–19, 2006 WL 1896382 (Jackson, July 11, 2006).

Once again, we are perplexed that the State did not have trial counsel testify at the hearing. Obviously, the Petitioner received no benefit from agreeing to the transfer. Therefore, we are left to conclude that the only viable strategy in this case was to prevent the transfer and agree with the post-conviction court that trial counsel's failure to present mental health testimony at the transfer hearing resulted in deficient performance.

Regarding the second prong of *Strickland,* the post-conviction court concluded that the Petitioner failed to show he was prejudiced by counsel's deficient performance because he failed to demonstrate that, had counsel not advised him to waive the transfer hearing, there would have been no transfer. Again, we agree with the post-conviction court.

The Petitioner has included the transcript of the juvenile transfer hearing in the appellate record. At the hearing, Dr. Bernet testified for the Petitioner that he evaluated the Petitioner in 2005 and diagnosed him with severe depression, intermittent explosive disorder, and attention deficit hyperactivity disorder (ADHD). All of the conditions were treatable in juvenile facilities. Dr. Bernet stated that the Petitioner's receiving long-term residential psychiatric treatment until he was nineteen years old "should be long enough certainly to address his psychiatric issue." The Petitioner's genetic makeup made him more susceptible to stress, which caused him to be depressed and suicidal. Dr. Bernet concluded that the Petitioner was not insane at the time of the crime, was competent, and was not committable. The Petitioner received As and Bs in school but had been in a few fights prior to his shooting the victim. He did not abuse drugs and had not been involved with a gang.

Dr. Kimberly Stalford, a psychiatrist, testified for the State at the transfer hearing that she reviewed the Petitioner's medical records from MTMHI and Dr. Bernet's reports. She stated that she questioned the severity of the Petitioner's depression and that his depression was treatable. The Petitioner's genetic predisposition for stress, however, could not be treated. Dr. Stalford concluded that the Petitioner planned to kill the victim. She said that the Petitioner had a long history of "acting out" and violent behavior and that his history of violence was the best predictor for his future use of violence.

The parties introduced into evidence the Petitioner's evaluation from MTMHI. According to the evaluation,

the Petitioner was not eligible for involuntary commitment. Several additional witnesses, including police officers and one of the Petitioner's nephews present at the time of the shooting, testified for the State about the facts of the case.

The post-conviction court concluded that the evidence presented at the transfer hearing was more than sufficient to show that the Petitioner committed the delinquent act as alleged. The post-conviction court also concluded, based on the limited mental health evidence presented at the transfer hearing, that the Petitioner was not committable to an institution for the developmentally disabled or mentally ill. Next, the post-conviction court addressed whether the interests of the community required that the Petitioner be put under legal restraint or discipline. In making that determination, the post-conviction court noted that although the Petitioner had no prior record of delinquency and there had been no past efforts to treat him, he had been disciplined for fighting in school. The court also noted that the Petitioner committed a crime against a person, which received greater weight in favor of transfer than a crime committed against property, and that the offense was committed in an aggressive and premeditated manner. The court noted that Dr. Bernet testified that the Petitioner could be successfully treated by the time he was nineteen years old. However, Dr. Stalford doubted that the Petitioner could be successfully treated at all. Finally, the court noted that there was no proof the Petitioner's conduct was a criminal gang offense. Considering all the factors, the post-conviction court concluded that "there is no reasonable probability that Petitioner would not

have been transferred to adult court had all of the evidence been presented to the juvenile court."

The Petitioner argues that the testimony of Jake Lockert, who testified about the proof he developed for the transfer hearing, and Judge Brigham, who testified that the issue of transfer was very much in doubt when counsel agreed to waive the hearing, established that he was prejudiced by counsel's deficient performance. However, the post-conviction court considered all of the evidence presented at the transfer hearing, considered all of the evidence presented at the evidentiary hearing, and addressed all of the factors set out in the juvenile transfer statute. The Petitioner did not present any additional evidence at the evidentiary hearing to address those factors. Therefore, we conclude that the Petitioner has failed to establish that but for counsel's deficient performance, his case would not have been transferred from juvenile court to adult court.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the judgment of the post-conviction court.

All Citations

Not Reported in S.W.3d, 2012 WL 6570893

APPENDIX D

IN THE CIRCUIT COURT OF STEWART COUNTY, TENNESSEE AT DOVER

No. 4-1650-CR-05

[Filed August 19, 2011]

JASON CLINARD	)
	)
vs.	)
	)
STATE OF TENNESSEE	)
	)

MEMORANDUM OPINION ON PETITION FOR POST-CONVICTION RELIEF

Petitioner has filed a pro-se Petition to for Post-Conviction Relief. Counsel was appointed and a hearing was held on said petition on the 3rd day of August 2011. After said hearing, this Court did take the matter under advisement.

FACTS

Facts of Trial and Appeal

The facts of this case as found by the Court of Criminal Appeals are:

On March 2, 2005, the 14-year-old petitioner shot and killed his school bus driver, Joyce Gregory, as she sat aboard the bus in front of his house. On the day

before the shooting, the victim had reported to the vice-principal of Stewart County High School, where the petitioner was a freshman, that the petitioner had been "dipping snuff on the bus." As a result of the victim's report, the petitioner received "in-school suspension." The evidence established that the March 1, 2005 incident was not the first time the petitioner had violated the school bus rules. He had previously been suspended from riding the bus for fighting and had only returned to riding the bus on February 25, 2005. According to the petitioner's 16-year-old nephews, Joseph and Bobby Lee Fulks, the petitioner believed that the victim was "picking on him" and he "didn't like [the victim] too much."

On the morning of the shooting, the petitioner rose as usual, readied himself for school, and ate breakfast. As the three boys walked to the bus, the petitioner insisted that the Fulks brothers board the bus ahead of him. As the brothers walked to the back of the bus, the petitioner aimed a .45 caliber semi-automatic handgun and fired six jacketed hollow point bullets at the victim. Three shots struck the victim in the torso. The first shot entered the upper right side of the victim's back and exited through the upper left side of the back. The second shot struck the victim in the right side of her chest and traveled through her right lung, trachea, and left lung before coming to rest in the upper left side of her back. The third shot also struck the victim in the right side of her chest and then traveled through her right lung, spinal column, and aorta before becoming lodged in the periaortic tissue.

After being shot, the victim attempted to radio for help but succumbed to her injuries before she was able

to do so. Meanwhile, the petitioner ran around the back of his house and into the woods as Joseph Fulks went inside to telephone 9-1-1. After the victim's foot slipped from the brake, Bobby Fulks steered the bus toward a telephone pole to keep it from going over a steep hill. Bobby Fulks and other high school students helped the remainder of the children out of the emergency exit and into a nearby residence.

By the time the first police officer arrived on the scene, the victim had died. After the officer confirmed that the victim was dead, he saw the petitioner's father, Charlie Clinard, walking toward the bus. Mr. Clinard told the officer that the petitioner had shot the victim and retreated to the woods behind the family residence. Officers later reached the petitioner on his cellular telephone, and he agreed to surrender. Shortly thereafter, the petitioner emerged from the woods carrying the .45 caliber handgun in one hand and the magazine in the other. He laid both on the ground and surrendered to the authorities.

Shortly after the petitioner's arrest on March 2, 2005, the juvenile court ordered, based upon an agreement between the prosecution and defense counsel, that the petitioner be "placed in a hospital or treatment resource . . . for the purposes of evaluation and for treatment necessary to the evaluation for not more than 30 days . . . pursuant to T.C.A. 37-1-128.

Subsequently, a transfer hearing was held in juvenile court. At the transfer hearing, the petitioner primarily contested transfer from juvenile to circuit court on the basis of his diminished mental capacity. Eventually, however, the petitioner agreed to the transfer.

At the conclusion of the trial, the jury convicted the petitioner of the single, charged offense of first degree premeditated murder. Because the State had not sought a sentence of life imprisonment without the possibility of parole, the petitioner received the statutorily mandated sentence of life imprisonment.

On appeal, the petitioner assigned four errors, to wit:

(1) The trial court erred in not suppressing photographs of the victim,

(2) The trial court erred in allowing the State an independent psychological examination of the petitioner,

(3) The trial court erred in failing to disqualify the District Attorney General's Office, and

(4) The trial court erred in following the statutory sentencing scheme that resulted in the petitioner's life sentence.

State v. Jason Clinard (unreported) Tenn. Crim. App. at Nashville # M2007-00406-CCA-R3-CD opinion filed September 9, 2008. The Court of Criminal Appeals rejected the petitioner's assignments and affirmed the conviction. This Court has found no indication of an application for permission to appeal to the supreme court.

Facts of Post Conviction Hearing

In due course, the petitioner filed a Petition for Post Conviction Relief and a hearing was held thereon. At said hearing, the following evidence was presented:

William B. "Jake" Lockert, III, the Public Defender for the 23rd Judicial District, testified that he was appointed to represent the petitioner by Stewart County Juvenile Court Judge Andy Brigham before the transfer hearing. Upon his appointment, Mr. Lockert immediately contacted the Office of the District Attorney for the 23rd Judicial District and requested that they not take any statement from the petitioner unless a public defender was present. A statement was taken from the petitioner without the presence of a public defender and a motion to suppress the statement was filed. The motion was subsequently denied.

Mr. Lockert testified that his office began to investigate the case almost immediately. It quickly became apparent that a mental health defense should be pursued. Mr. Lockert's theory of defense centered upon preventing a transfer to adult court based upon the petitioner's mental state. Mr. Lockert testified that he had located two mental health professionals who would testify that the petitioner's mental problems could be successfully treated through the juvenile court system. He further testified that the petitioner had no previous problems with the law and that his previous activities were those of an upstanding young man.

Prior to the transfer hearing, the petitioner's family hired a private lawyer, Worth Lovett, and the Office of the Public Defender was relieved. Mr. Lockert testified that he called Mr. Lovett on the telephone and told him the results of his investigation. Mr. Lovett never called Mr. Lockert and never came by his office to pick up the petitioner's file. Mr. Lockert testified that his file filled about three-fourths of a copy paper box and were estimated to be between six hundred (600) and one

thousand (1000) pages. He testified his staff put in over three hundred (300) hours on the investigation.

Mr. Lockert testified that, in his opinion, the best defense for the petition was to prevent the transfer. He opined that if all the mental health evidence was presented at the transfer hearing, that the chances were very good that the case would stay in juvenile court. He was of the opinion that he could show that the petitioner could be successfully treated in the juvenile court system. In his opinion, if the case went to adult court there would not be much chance of success. The best theory in adult court would be a "diminished capacity" defense or to try for a conviction on a lesser included offense based upon the animosity of the victim toward the petitioner, leading the petitioner to act in a state of passion.

On cross-examination, Mr. Lockert testified that he had never had a case in his twenty-eight (28) years of practicing criminal law that was as good as this one to prevent a transfer to adult court.

The report of the mental evaluation of the petitioner was entered as Exhibit #1.

Mr. Lockert testified that he obtained funds from the Administrative Office of the Courts to engage the services of Dr. Burnett. In Mr. Lockert's opinion, Dr. Burnett was well thought of by the mental health professionals at Middle Tennessee Mental Health Institute and might be influential in persuading the evaluation of MTMHI toward not recommending a transfer to adult court.

Judge Andy Brigham, Judge of the Juvenile Court of Stewart County, testified that he contacted the

Office of the Public Defender as soon as he was aware that a juvenile was involved in the shooting. A petition was filed in juvenile court charging the petitioner with first degree murder. Judge Brigham testified that Mr. Lockert, the Public Defender, was "all over" the petitioner's case. Mr. Lockert filed a motion to dismiss and to suppress the statement given by the petitioner to law enforcement. Later, he applied to Judge Brigham for funds to hire Dr. Burnett.

Before the transfer hearing, probably within the first ninety (90) days, Worth Lovett was hired by the petitioner's family, replacing the Office of the Public Defender. Judge Brigham testified that Mr. Lovett was not as aggressive as Mr. Lockert, describing Mr. Worth as "more laid back". Judge Brigham further testified that he was concerned that Mr. Worth lacked the experience for a first degree murder case and inquired of the petitioner whether he was sure that he wanted to discharge the Public Defender and hire Mr. Lovett. Later, Judge Brigham became more concerned about Mr. Worth's competence when Mr. Worth expressed concern that the petitioner would be subject to the death penalty if transferred when, in fact, the juvenile transfer statute prohibits the death penalty in the event of a transfer. (The transfer hearing was prior to the release of the opinion of the United States Supreme Court in *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)).

Judge Brigham testified that, after a considerable amount of proof had been introduced at the transfer hearing and while the State was still presenting its proof, Mr. Lovett announced that the petitioner had agreed to the transfer. Defense witness, Dr. Burnett,

had already testified out of order. On cross-examination, Judge Brigham testified that the reason given by defense counsel for agreeing to the transfer was that the record of the transfer hearing was developing unfavorably to the petitioner. The agreed order for transfer was admitted as Exhibit #2 to the post conviction hearing.

Copies of the transcripts of the juvenile proceedings and the petitioner's trial were admitted as Exhibit #3 to the post conviction hearing. As an aside, the clerk has advised this Court that the original trial transcript which was in the records of the appellate court clerk was lost in the flooding in Nashville.

The State introduced one witness at the post conviction hearing. Joe Craig, a TBI agent, testified that he investigated the crime. He testified at the petitioner's trial and was prepared to testify at the petitioner's transfer hearing but the agreement to transfer was reached before he was called.

Agent Craig testified that Cumberland City (Stewart County) Chief of Police Jason Gilespie obtained a .45 caliber semi automatic handgun from the petitioner. The handgun had been obtained by the petitioner from the petitioner's father's closet. Agent Craig testified that his later testimony at the petitioner's trial was substantially the same as he would have testified at the transfer hearing.

On cross-examination, Agent Craig testified that Mr. Worth's cross examination of him at the petitioner's trial was "limited".

On re-direct examination, Agent Craig testified that the petitioner's confession included all of the elements necessary to obtain a conviction of first degree murder.

Facts of Transfer Hearing

The main trust of Petitioner's presentation at his post conviction hearing was the ineffectiveness of his trial counsel at his transfer hearing. A transcript of the juvenile court proceeding was made Exhibit #3 to the post conviction hearing. For this reason, this Court hereinafter finds the facts of the abortive transfer hearing.

The proceedings against the petitioner in juvenile court that day consisted of a motion to suppress the statement given by Petitioner; a renewed motion to disqualify the Office of the District Attorney of the 23rd Judicial District and the partial transfer hearing (Petitioner's trial counsel waived the transfer hearing on behalf of Petition during the hearing and allowed the transfer by agreement). Although it is far from clear, apparently it was the agreement of counsel that the testimony introduced in the hearing of the other motions would be considered in the transfer issue as well. The actual transfer hearing did not begin until page 199 of the Transfer Transcript. For this reason, this Court will make findings concerning the testimony of pertinent witnesses at all three hearings.

At the beginning of the hearing, the parties agreed to submit two exhibits as substitutes for the testimony of the witnesses.

Exhibit #1 was Dr. Janie Berryman's report. It was entered as a substitute for her testimony. (This report does not appear in the record submitted to this Court).

Exhibit #2 was the report of Middle Tennessee Mental Health Institute (hereinafter MTMHI) admitted as substitute for testimony. This report was also referred to as the JOCC report. (This report does not appear in the record of the transfer hearing but was entered as an exhibit to the post conviction hearing.

Dr. William Burnett, a psychiatrist called by Petitioner, testified that he interviewed Petitioner on three occasions and formed conclusions concerning Petitioner's mental condition.

When questioned about Petitioner's mental ability to intelligently understand and waive his Miranda rights, Dr. Burnett testified that he "thought he (Petitioner) had three different diagnoses in March of 2005": (1) major depression, recurrent, severe with psychotic features; (2) intermittent explosive disorder; (2) attention deficit hyperactivity disorder (ADHD). Transfer Transcript p.48.

On cross-examination by the State, Dr. Burnett was asked, "Dr. Burnett, is Jason committable on a voluntary basis?". Dr. Burnett responded, "No, I don't believe he is". Transfer Transcript p. 49. This Court wonders if this transcription is inaccurate and should have said, "... on an involuntary basis" since voluntary commitment is specifically not a factor to be considered in the transfer hearing, however, this Court must consider the transcript as written.

Dr. Burnett testified that Petitioner was not insane at the time of the crime. Transfer Transcript, p. 49. However, Dr. Burnett testified that Petitioner reported

some sort of auditory or visual hallucination at some point. Transfer Transcript, p. 50.

Significantly, Dr. Burnett reported that Petitioner did not have a psychosis. "He just had some occasional psychotic symptoms." Transfer Transcript, p 80.

On redirect examination, Dr. Burnett testified that there was appropriate treatment available for Petitioner's conditions. Transfer Transcript, p. 104. Specifically, Dr. Burnett testified that Petitioner could be successfully treated for depression and intermittent explosive disorder. Transfer Transcript, p 106.

Dr. Burnett testified, "I think in terms of predicting violence in juveniles there's a whole list of risk factors that he doesn't have, which I think is a good prognostic sign". Transfer Transcript, p 107.

Dr. Burnett testified that treatment was available through the juvenile justice system, one facility of which Dr. Burnett was familiar was Woodland Hills, at which Dr. Burnett was a consultant for "a couple of years. Transfer Transcript, p. 106.

With regard to whether Petitioner's condition is treatable, Dr. Burnett testified, "... The depression is treatable. The explosive disorder is treatable, the stressors are avoidable. Actually of the risk factors that I mentioned this morning that he's stuck with is genetic makeup which we can't really change that." Transfer Transcript, p 107.

On re- cross examination, Dr. Burnett testified, "Well, I would envision between now and age 19 to be a long term treatment program. But if we're only talking about the way psychiatric treatment programs

work, that is, a long term residential psychiatric treatment program that should be long enough certainly to address his psychiatric issues."

Question: "All of them?"

Answer: "By address I'm not saying that anybody ever, you know, get totally – cured of everything that's wrong with them but it certainly is long enough to address the depression and to help him deal with the stressors and learn how to avoid the stressors and deal with anger situations as they come up. In other words, that's what happens in residential treatment centers." Transfer Transcript, p. 111-2.

On examination by the Guardian ad litem, Dr. Burnett testified that, in his opinion, the program of treatment that would extend to four plus years would be long enough to effectively rehabilitate Petitioner. Transfer Transcript, p. 117.

Dr. Kimbery Stalford, a consulting psychiatrist, testified that she didn't interview Petitioner but reviewed his medical records from MTMHI. Transfer Transcript, p. 119. She testified that these are the type of records that Dr. Stalford normally reviews in making a consultation diagnosis with patients that she normally treats. Transfer Transcript, p. 120.

Dr. Stalford testified that she had concerns about Dr. Burnett's diagnosis of "major depressive disorder with psychotic features". Transfer Transcript, p. 121. Her review of the nurses' notes on March 2 - 10 gave no indication of depression or hallucinations. She further testified that the facts before the crime gave no indication of depression. p. 123.

With regard to whether Petitioner was malingering, Dr. Stalford testified that she was of the opinion that Petitioner exhibited, "a level of malingering amnesia because it's clear from this and that he knew what he had done and what the thought process was why he did it, and then later on doesn't remember what happens.

And at one point at Middle Tennessee I believe that he said was (sic) the first thing he remembered was being in the woods. And I do believe that that's a level of malingering or faking amnesia. He called it exaggeration. I think it's semantics but I do have concern about that." Transfer Transcript, p. 126-7.

Dr. Stalford testified that Petitioner's depression could be treated but that his making decisions between what is right and what is wrong because of his depression may not be treatable. Transfer Transcript, p. 127-8.

Dr. Stalford testified that the crime was not an intermittent explosive event. Transfer Transcript, p. 130.

Significantly, Dr. Stalford testified, "... there is nothing that jumps off the page that says, this person has a severe mental illness". To which Petitioner's trial counsel responded, "I see. But nothing jumped off of the page to say he does not; is that correct?". Dr. Stalford testified, "No, that's not correct." Transfer Transcript, p. 137.

Finally, Dr. Stalford testified, "Much of the psych testing does not support diagnosis of severe depression". Transfer Transcript, p. 143.

Martha Ann Fiese, a certified psychiatric registered nurse called by Petitioner, testified that she had worked at Western State Psychiatric Hospital for twenty-five (25) years and now teaches nursing at Austin Peay State University. She testified that the practice of psychiatric nursing of which she was familiar gave more attention to the patients who gave the most problems. The patients who did not give problems got little attention. Transfer Transcript, p. 169. On cross-examination that Petitioner's mother was her sister. Transfer Transcript, p. 175.

The other witnesses, Deputy Tom Textor (in transcript as "Texture"), Chief Jason Gillespie, Josepth Fults and Bobby Fults testified to the facts of the murder, which are not in contest in the allegations of Petitioner's petition.

At the conclusion of the post conviction hearing, this Court did take the matter under advisement.

ISSUES PRESENTED

In his Petition for Post Conviction Relief, Petitioner cited the following grounds therefor:

1. Conviction was based on the unconstitutional failure of the prosecution to disclose to Petitioner evidence favorable to Petitioner.

2. Conviction was based on action of a grand jury or petit jury that was unconstitutionally selected and impaneled.

3. Denial of effective assistance of counsel.

   a. Appellate counsel failed to file an application for permission to appeal to the Supreme Court

or notify Petitioner of the time constraints to do so himself.

b. Trial counsel failed to adequately represent Petitioner in the pre-trial and pre-hearing proceedings.

c. Trial counsel failed to inform and advise Petitioner as to the nature and cause of every accusation made against Petitioner.

d. Trial counsel failed to investigate and prepare for trial.

e. Trial counsel failed to formulate a defense.

f. Trial counsel failed to interview all witnesses.

g. Trial counsel failed to raise, prepare, file and litigate all pertinent and significant issues with regard to Petitioner's case.

h. Trial counsel failed to properly make requests for discovery concerning all exculpatory evidence.

i. Trial counsel failed to fully inform Petitioner of the applicable range of punishment and did not determine if Petitioner actually understood the range of punishment, thereby vitiating the judgements of conviction.

k. Trial counsel failed to file a proper motion to suppress the insufficient evidence against Petitioner.

l. Trial counsel failed to file a motion to dismiss the indictment due to the void charge contained

in the indictment as he was not provided due process in the juvenile transfer hearing.

m. Trial counsel failed to file a motion to dismiss the indictment based upon the fact that Hispanics and blacks were systematically and unconstitutionally excluded from serving on the grand jury of Stewart County.

n. Trial counsel failed to file a motion for an ex parte hearing in order to show Petitioner's need for obtaining funds from the court for adequate supportive services, experts and investigative services in order to properly prepare an adequate defense.

o. Trial counsel failed to file all motions essential to an adequate defense.

p. Trial counsel failed to consult and communicate with Petitioner at crucial stages prior, during, and subsequent to trial.

q. Trial counsel failed to timely provide Petitioner with a copy of the indictment.

r. Trial counsel failed to challenge the defective indictment against the Petitioner, which failed to allege an offense and failed to contain all necessary elements of the offenses.

s. Trial counsel failed to properly move the court for and obtain a bill of particulars as to the offenses alleged in the indictment against Petitioner.

t. Trial counsel failed to challenge the unconstitutional selection of the grand jury.

u. Trial counsel failed to investigate and present all available evidence that would support Petitioner's claim of innocence regarding the charges against him.

v. Trial counsel failed to have the venue of the trial changed.

w. Trial counsel failed to properly or fully cross-examine all State witnesses at the transfer hearing and at trial.

x. Trial counsel failed to properly voir dire jurors concerning their inherent biases and prejudices against Petitioner.

y. Trial counsel failed to properly inquire of the venire, either individually or collectively, their ability to render a fair and impartial verdict at the trial.

z. Trial counsel failed to inquire of the venire, either individually or collectively, their ability to apply the law to the facts of the case as instructed by the trial court.

aa. Trial counsel failed to inquire of the venire, either individually or collectively, whether they knew or were related in any way to Petitioner, counsel, prosecutor, district attorney, or any witness expected to testify at trial or whether the veniremen would attach any greater weight to their testimony by reason of their relationship to these people.

bb. Trial counsel failed to object to the prosecutor's improper, inflammatory,

prejudicial, inappropriate and misleading and inaccurate statements concerning the law, the evidence, and the petitioner during voir dire, opening, direct examination, cross-examination, closing and rebuttal closing at Petitioner's trial.

cc. Trial counsel failed to object to jury instructions, which shifted the burden of proof on elements of the alleged crimes to Petitioner.

dd. Trial counsel failed to properly challenge the excessive and inappropriate sentences imposed upon Petitioner by the trial court under the facts of this case, and failed to introduce all available mitigating evidence showing the sentences were excessive and improper.

ee. Trial counsel failed to object to jury instructions which failed to charge all lesser included offenses.

ff. Trial counsel failed to object to the prosecutor's improper, inflammatory, prejudicial, inappropriate and misleading and inaccurate statements concerning the law, the evidence, and the petitioner during voir dire, opening, direct examination, cross-examination, closing and rebuttal closing at Petitioner's trial.

gg. Trial counsel failed to object to jury instructions, which shifted the burden of proof on elements of the alleged crime to Petitioner

hh. Trial counsel failed to properly challenge the excessive and inappropriate sentences imposed upon Petitioner by the trial court under the facts of this case, and failed to introduce all available

mitigating evidence showing the sentences were excessive and improper.

ii. Trial counsel failed to object to jury instructions which failed to charge all lesser included offenses.

jj. Trial counsel failed to properly cross-examine all witnesses and elicit all of the facts in the case. As a result, the jury was prevented from hearing and otherwise weighing all of the facts before reaching a verdict.

kk. Trial counsel failed to object or raise in the motion for new trial all unconstitutional errors occurring during Petitioner's trial.

ll. Trial counsel failed to adequately and effectively represent Petitioner by failing to prepare for or present any mitigating circumstances or evidence at or during Petitioner's sentencing hearing in this matter.

(Note: sub-issues ff, gg, hh and ii are verbatim restatements of sub-issues bb, cc, dd and ee.)

4. Illegal evidence.

5. Prosecutorial Misconduct.

In its opening and closing arguments, the State improperly:

a. vouched for the credibility of its witnesses by implying that the State witnesses were truthful and would not lie;

b. misstated the facts and the law applicable to the case against the petitioner;

c. improperly implied to the jurors that Petitioner would go right out into the community and commit other crimes if the jury did not convict and sentence Petitioner; and

d. improperly implied that the State would have never investigated and charge Petitioner if he was not guilty.

6. Errors by the Trial Judge.

The trial judge:

a. improperly allowed irrelevant, inadmissible and false evidence to be presented and considered by the jury;

b. improperly conducted the voir dire of the jury;

c. failed to properly question prospective jurors regarding the weight they would give to testimony of law enforcement personnel when the State's case relied on the possible testimony of officers and certain jurors in fact stated that they had prior involvement with law enforcement personnel;

d. failed to charge the jury on all defenses;

e. kept relevant facts from the jury regarding Petitioner's sentences;

f. failed to properly give curative instructions regarding the numerous instances of prosecutorial misconduct by the State;

g. improperly charged the jury on mandatory presumptions as to elements of the offenses in question;

h. repeatedly and improperly defined reasonable doubt;

i. failed to properly define all the elements of the offenses alleged against Petitioner;

j. failed to properly require the State to elect the specific and particular offenses for which Petitioner was being tried and for which convictions were being sought;

k. failed to properly charge the jury on all lesser included offenses;

l. erred in denying the Motion for Judgment of Acquittal; and

m. improperly certified that the transcript of Petitioner's trial was complete when it did not include: (1) the reading of the indictment; (2) the opening statements; (3) the charge to the jury and closing arguments, thus denying Petitioner an effective appeal.

ANALYSIS

This Court now considers Petitioner's grounds for relief *seriatim.*

1. Conviction was based on the unconstitutional failure of the prosecution to disclose to Petitioner evidence favorable to Petitioner.

Petitioner alleges that the State withheld potentially exculpatory evidence from Petitioner. He submits that this evidence consists of:

1. "inconsistent statements and other evidence by and concerning state witnesses which in fact

contradicted the State's theory of the case against Petitioner, (sic) and which were favorable to Petitioner's defense";

2. "statements and other exculpatory evidence by State witnesses pertaining to Petitioner's lack of culpability to commit the offenses in this matter";

3. "evidence and statements withheld [which] rendered invalid the elements necessary to support a conviction of first degree premeditated murder";

4. "evidence ... material to the guilt and punishment of the Petitioner (sic)"; and

5. "Inconsistent statements made by witnesses, (sic) and other evidence, (sic) which showed that the Petitioner (sic) was actually innocent of the alleged offenses".

At the hearing on the Petitioner's post conviction petition, no evidence was introduced of any statements or other evidence which would have been exculpatory. T.C.A. § 40-30-110 (f) provides in part, "The petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence....". Petitioner has failed to produce any evidence in support of his allegations, thus, he has failed to carry his burden of proof.

The issue is without merit.

2. Conviction was based on action of a grand jury or petit jury that was unconstitutionally selected and impaneled.

At the hearing of Petitioner's post conviction petition, Petitioner failed to present any evidence of the

actual racial and/or ethnic composition of either the grand or petit jury or the jury panel from which each was drawn. Likewise, he failed to present any evidence of the race or ethnicity of the grand jury foreman. In addition, Petitioner failed to present any evidence of the selection procedures of potential jurors or any evidence of the racial/ethnic composition of Stewart County. Without this information, it is impossible to determine the validity of Petitioner's claims.

T.C.A. § 40-30-110 (f) provides in part, "The petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence ....". Petitioner has failed to produce any evidence in support of his allegations, thus, he has failed to carry his burden of proof.

The issue is without merit.

3. Denial of effective assistance of counsel.

In order to prevail on an ineffective assistance of counsel claim, the petitioner must ultimately show that the adversarial process failed to produce a reliable result. *Cooper v. State*, 849 S.W.2d 744, 747 (Tenn. 1993) [citing *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)]; *Butler v. State*, 789 S.W.2d 898, 899 (Tenn. 1990) [also citing *Strickland v. Washington*, supra].

Proving failure of the adversarial process because of ineffective assistance of counsel requires the petitioner to satisfy both prongs of a two-pronged test. See *Butler*, supra at 899. First, the petitioner must prove that counsel's performance was deficient in that it failed to meet the threshold of competence demanded of attorneys in criminal cases. *Butler*, supra at 899.

Second, the petitioner must prove actual prejudice resulting from the deficient performance. *Cooper*, supra at 747 (citing *Strickland*, supra at 687). Actual prejudice is established by demonstrating that, but for his counsel's deficient performance, the results of his trial would have been different and, thus, the adversarial process failed to produce a reliable result. *Best v. State*, 708 S.W.2d 421,422 (Tenn. Crim. App. 1985) See also *Strickland,* 466 U.S. at 694 (the prejudice prong requires a petitioner to demonstrate that there is a reasonable probability that but for counsel's professional errors, the result of the proceeding would have been different."). "The probable result need not be a acquittal. A reasonable probability of being found guilty of a lesser charge, or a shorter sentence, satisfies the second prong in *Strickland." Brimmer v. State*, 29 S.W. 3d 497, 508-09 (Tenn. Crim. App. 1998). Should the petitioner in a post-conviction relief petition fail to establish either factor, he is not entitled to relief. Our supreme court described the standard of review as follows:

> Because a petitioner must establish both prongs of the test, a failure to prove deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim. Indeed, a court need not address the components in any particular order or even address both if the defendant makes an insufficient showing of one component.

Goad v State, 938 S.W. 2d 363, 370 (Tenn. 1996).

On claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy,

and cannot criticize a sound, but unsuccessful, tactical decision made during the course of the proceedings. *Adkins v. State*, 911 S.W. 2d 334, 347 (Tenn. Crim. App. 1994). Such deference to the tactical decisions of counsel, however, applies only if the choices are made after adequate preparation for the case. *Cooper v State*, 847 S.W. 2d 521, 528 (Tenn. Crim. App. 1992). The fact that a strategy or tactic failed or hurt the defense does not, alone, support a claim of ineffective assistance of counsel.

A person charged with a criminal offense is not entitled to a perfect presentation. *State v Cage*, (unreported) No. M2000-01989-CCA-R3-PC Tenn. Crim. App. at Nashville, opinion filed August 7, 2001.

Petitioner has cited numerous instances in which he alleges that his trial counsel was ineffective:

a. Appellate counsel failed to file an application for permission to appeal to the Supreme Court or notify Petitioner of the time constraints to do so himself.

Rule 14, Rules of the Supreme Court of Tennessee provides in part:

> Permission for leave to withdraw as counsel for an indigent party after an adverse final decision in the Court of Appeals or Court of Criminal Appeals and before preparation and filing of an Application for Permission to Appeal in the Supreme Court must be obtained from the intermediate appellate court by filing a motion with the Appellate Court Clerk not later than fourteen (14) days after the intermediate court's entry of final judgment. The motion shall state that:

> (1) based upon counsel's review of the opinion of the intermediate appellate court, the brief filed on behalf of the indigent party in that court presents such issues as are available for second-tier appellate review if sought by the party acting pro se, and (2) the written notification prescribed by this rule and a copy of the intermediate court's opinion have been forwarded to the indigent party.

There is no proof in the record that trial counsel for Petitioner did not comply with Rule 14. This Court has been unable to find a ruling by the Supreme Court upon an application for permission to appeal, therefore, this Court must assume that no such petition was filed. Neither Petitioner nor his appellate counsel testified at the post conviction hearing. Petitioner has failed to prove at the hearing of the post conviction petition that his appellate counsel did not seasonably notify him of the ruling of the Court of Criminal Appeals and supply him with a copy of same.

T.C.A. § 40-30-110 (f) provides in part, "The petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence ....". Petitioner has failed to produce any evidence in support of his allegations, thus, he has failed to carry his burden of proof.

In addition, the explicit provisions of Rule 14 of the Supreme Court of Tennessee provides in pertinent part: "This rule shall apply to any case in which counsel has been appointed for an indigent party pursuant to Rule 13, Tenn. S. Ct. R.". Since Petitioner's trial counsel was retained rather than appointed, the provisions of Rule 14 do not apply to this case.

b. Trial counsel failed to adequately represent Petitioner in the pre-trial and pre-hearing proceedings.

Petitioner alleges that his trial counsel was ineffective in representing him in the transfer hearing by agreeing on his behalf to agree to the transfer of his case to adult court without actively contesting the matter in juvenile court and requiring the juvenile court to rule on the transfer.

The proof introduced at Petitioner's post conviction hearing establishes that Petitioner's trial counsel agreed to the transfer of Petitioner's case from juvenile court to be tried in circuit court as an adult. This agreement occurred during the presentation of the State's case during the transfer hearing. Petitioner received no concessions from the State for his agreement to transfer.

Public Defender Jake Lockert testified at Petitioner's post conviction petition hearing that he was of the opinion that the best theory of defense for Petitioner was to prevent the transfer to adult court and to resolve the case in juvenile court. He further testified that he was of the opinion that preventing the transfer was possible because it could be established that Petitioner could be successfully treated in juvenile court within the time constraints established by law.

Applying the first prong of *Stringfield*, this Court examines whether Petitioner's trial counsel was ineffective in agreeing to transfer Petitioner's case to adult court without gaining any concessions from the State therefor.

The Sixth Amendment guarantees to a criminal defendant the right "to have the assistance of counsel for his defense." This means the effective assistance of counsel, and "requires the guiding hand of counsel at every step in the proceedings". *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932). A preliminary hearing is a critical state in a criminal prosecution and a defendant is guaranteed the right to competent counsel at a preliminary hearing. *McKeldin v. State*, 516 S.W. 2d 82 (Tenn. 1974). "Every criminal lawyer 'worth his salt' knows the overriding importance and the manifest advantages of a preliminary hearing. In fact the failure to exploit this golden opportunity to observe the manner, demeanor and appearance of the witnesses for the prosecution, to learn the precise details of the prosecution's case, and to engage in that happy event sometimes known as a 'fishing expedition', would be an inexcusable dereliction of duty, in the majority of cases". *Id,* at 86,7. The "transfer hearing" in Juvenile Court is no less a critical stage than the preliminary hearing, indeed, it is the exact counterpart of the General Sessions preliminary hearing to the extent of the issue of probable cause. The rule should be the same for both proceedings. *State v. Womack*, 591 S.W. 2d 437 (Tenn. Crim. App. 1979). The right to a transfer hearing is sufficiently fundamental to be considered a matter of due process, in the context of juvenile justice, but can be waived. *State v. Hale*, 833 S.W.2d 65(Tenn. 1992).

The Tennessee Supreme Court has held that counsel performed deficiently when, in a juvenile transfer hearing, counsel failed to utilize available psychological evidence given that counsel's strategy was to prevent the transfer of the juvenile. *State v.*

Howell, 185 S.W.3d 319, 328 (Tenn. 2006); See also, *Narrell C. Pierce v. State* (unreported) Tenn. Crim. App. at Nashville #M2006-01308-CCA-R3-PC, opinion filed August 7, 2007. Given that the proof against Petitioner concerning the actual commission of the crime was, frankly, overwhelming, the failure of Petitioner's trial counsel to at least attempt to prevent the transfer using mental health testimony constituted ineffective assistance of counsel. This is true in spite of the fact that a valid defense to the charge of murder in the first degree was an attempt to convince the jury that Petitioner should be convicted of a lesser included offense, e.g., voluntary manslaughter. If Petitioner's trial counsel was able to prevent the transfer, Petitioner would only be subject to commitment to a mental health facility until he reached the age of nineteen (19) while conviction of voluntary manslaughter in adult court would result in a considerably longer sentence in the state penitentiary. Although the late waiver allowed Petitioner's trial counsel to examine the State's witnesses and learn the basic facts of the State's case, the failure to have the juvenile judge consider and rule upon the issue of Petitioner's commitability to a mental health facility resulted in Petitioner's losing his best chance to minimize his potential punishment.

Trial counsel's decision to agree to the transfer without receiving in return some significant concession from the State constitutes ineffective assistance of counsel.

This being the case, this Court must now consider the second prong of *Stringfield*, whether this ineffective assistance of counsel resulted in prejudice to Petitioner.

The proceeding resulting in Petitioner's transfer was, to use understatement, unusual. The motion to suppress Petitioner's statement, the renewed motion to disqualify the prosecutor's office and the transfer hearing was heard in the same proceeding. It is evident from the transcript of the proceeding that the intent of both parties was to utilize the testimony of the mental health professionals for purposes of the motion to suppress Petitioner's statement and the transfer hearing, although the exact method of presentation of the said evidence was somewhat confused. According to the proof presented at Petitioner's post conviction hearing, the State had presented all of its witnesses except Special Agent Joe Craig at the transfer hearing before Petitioner's trial counsel agreed to the transfer. S.A. Craig testified at the post conviction hearing and stated that his testimony at trial was the same as it would have been had he testified at the transfer hearing. Since the agreed transfer occurred during the State's case, we cannot be certain what Petitioner's evidence would have been but it is unlikely that any witnesses would have been presented to refute the facts constituting the crime itself. Petitioner's mental health witnesses had already testified and no proof was adduced at the post conviction hearing that any other mental health witnesses were available to testify concerning Petitioner's transfer. This Court safely may assume, then, that the evidence contained in the Transfer Transcript (plus the testimony of S.A. Craig) would have been the entire proof presented at the transfer hearing. At this point, this Court must observe that the report of Dr. Janie Berryman was presented and considered at the transfer hearing but is not included in either the Transfer Transcript or the evidence presented at the post conviction hearing.

Thus, Dr. Berryman's evidence cannot be considered in evaluating counsel's performance at the transfer hearing.

T.C.A. § 37-1-134 provides in pertinent part:

> (a) After a petition has been filed alleging delinquency based on conduct that is designated a crime or public offense under the laws, including local ordinances, of this state, the court, before hearing the petition on the merits, may transfer the child to the sheriff of the county to be held according to law and to be dealt with as an adult in the criminal court of competent jurisdiction. The disposition of the child shall be as if the child were an adult if:
>
> (1) ...
>
> (4) The court finds that there are reasonable grounds to believe that:
>
> (A) The child committed the delinquent act as alleged;
>
> (B) The child is not committable to an institution for the developmentally disabled or mentally ill; and
>
> (C) The interests of the community require that the child be put under legal restraint or discipline.
>
> (b) In making the determination required by subsection (a), the court shall consider, among other matters:
>
> (1) The extent and nature of the child's prior delinquency records;
>
> (2) The nature of past treatment efforts and the nature of the child's response thereto;

> (3) Whether the offense was against person or property, with greater weight in favor of transfer given to offenses against the person;
> (4) Whether the offense was committed in an aggressive and premeditated manner;
> (5) The possible rehabilitation of the child by use of procedures, services and facilities currently available to the court in this state; and
> (6) Whether the child's conduct would be a criminal gang offense, as defined in § 40-35-121, if committed by an adult.

The proof adduced at the post conviction hearing establishes that the proof at the transfer hearing was more than sufficient to meet the criteria of subsection (A) ("The child committed the delinquent act as alleged"). In the prejudice context of *Strickland*, Petitioner only need prove that there was a reasonable probability of his not being transferred as a result of his trial counsel's ineffectiveness. See *Brimmer v. State*, 29 S.W. 3d 497, 508-09 (Tenn. Crim. App. 1998). This Court finds that there is no such reasonable probability with regard to T.C.A. § 37-1-134 (a) (4) (A).

A juvenile court is precluded under T.C.A. § 37-1-134 (a) (4) (B) from transferring juveniles to criminal court when those juveniles are subject to the "involuntary commitment" procedures of T.C.A. §§ 33-6-401 et. seq. Amenability to "voluntary admission" of the juvenile pursuant to T.C.A. §§ 33-6-201 et. seq. does not prohibit a transfer of the juvenile to criminal court for trial as an adult. *State v. Simmons*, 108 S.W.3d 881, 2002 Tenn. Crim. App. LEXIS 433 (Tenn. Crim. App. 2002), appeal denied, State v. Simmons and Jackson,

Tenn. M1999-01388-SC-R11-CD, LEXIS 534 (Tenn. Nov. 12, 2002).

T.C.A. § 33-6-422 provides in pertinent part:

> Finding of probable cause – Involuntary commitment for care for up to fifteen (15) days.
>
> If, after the hearing is waived or is completed and the court has completed its consideration of the evidence, including the certificates of the examining professionals, and any other information relevant to the mental condition of the defendant, **the court finds probable cause to believe that the defendant is subject to care and treatment under§ 33-6-502,** and that if involuntary treatment is not continued the defendant's condition resulting from mental illness or serious emotional disturbance is likely to deteriorate rapidly to the point that the defendant would be again admissible under § 33-6-403, the court may order the defendant held for care and treatment pending a hearing under chapter 6, part 5, of this title, for not more than fifteen (15) days after the probable cause hearing unless a complaint is filed under chapter 6, part 5, of this title, within the fifteen (15) days (emphasis added).

T.C.A. § 33-6-502 provides in pertinent part:

> Prerequisites to judicial commitment for involuntary care and treatment.
> IF AND ONLY IF
>
> (1) a person has a **mental illness or serious emotional disturbance,** AND

> (2) the person **poses a substantial likelihood of serious harm because of the mental illness or serious emotional disturbance,** AND
>
> (3) the person needs care, training, or treatment because of the mental illness or serious emotional disturbance, AND
>
> (4) all available less drastic alternatives to placement in a hospital or treatment resource are unsuitable to meet the needs of the person, THEN
>
> (5) the person may be judicially committed to involuntary care and treatment in a hospital or treatment resource in proceedings conducted in conformity with chapter 3, part 6, of this title (emphasis supplied).

With respect to subsection (B), the question then becomes whether there is a "reasonable probability" that Petitioner would not have been transferred due to the fact that he had a mental illness or serious emotional disturbance and posed a substantial likelihood of serious harm because of the mental illness or serious emotional disturbance if his trial counsel had not waived his transfer.

Dr. William Burnett diagnosed Petitioner with three mental or emotional disorders: (1) major depression, recurrent, with severe psychotic features; (2) intermittent explosive disorder; and (3) attention deficit hyperactivity disorder. Transfer Transcript, p. 48. He did not testify that any or all these diagnoses constituted mental illness or serious emotional disturbance. He did testify on direct examination, " ... I

think that all of these conditions would cause some degree of impairment" Transfer Transcript, p48.

On cross-examination, he testified that he did not believe Petitioner to be committable on a voluntary basis and that he was not insane at the time of the crime, although Petitioner did report auditory or visual hallucinations. Transfer Transcript, p. 49 - 50.

Dr. Burnett further testified that Petitioner did not have a psychosis, just some occasional psychotic symptoms. Transfer Transcript, p. 80.

Dr. Kimberly Stalford testified on direct examination by the State that she had concerns about Petitioner's diagnosis of "major depressive disorder with psychotic features". Transfer Transcript, p. 121. She further testified that the facts of the case prior to the commission of the crime gave no indication of depression. Transfer Transcript, p. 123. In her opinion, the crime was not an intermittent explosive event. Transfer Transcript, p. 130.

On cross-examination, Dr. Stalford testified, "... there is nothing that jumps off the page that says, this person has a severe mental illness". When Petitioner's trial counsel responded, "I see. But noting jumped off the page to say he does not; is that correct?", Dr. Stalford replied, "No, that's not correct."Transfer Transcript, p 137.

Dr. Stalford further opined, "Much of the psych testing does not support diagnosis of severe depression". Transfer Transcript, p 143.

The Psychological Evaluation by MTMHI (Exhibit #1) concluded:

"(4). Jason is not eligible for involuntary commitment to an institute for the mentally ill or admission to an institution for the mentally retarded". MTMHI evaluation p. 3. and

"Commitability:

Jason is not subject to involuntary care and treatment pursuant to the provisions of Tennessee Code Annotated, Title 33, Chapter 6, Part 5; he does not pose an imminent risk to himself or others due to a mental illness or serious emotional disturbance." MTMHI evaluation p. 9.

It would have been very useful if either counsel had asked the specific question of whether Petitioner was suffering from a mental illness or a serious emotional disturbance. An examination of the entire transcript reveals no direct or circumstantial evidence that Petitioner was suffering from either a mental illness nor a serious emotional disturbance. This being the case, the juvenile judge had no alternative but to conclude that Petitioner was "not committable to an institution for the developmentally disabled or mentally ill". Thus, there is no reasonable probability that the juvenile court would have refused to transfer Petitioner to adult court on the ground that he was committable to an institution for the developmentally disabled or mentally ill.

The final factor in determining whether a juvenile shall be transferred to be tried as an adult is subsection (C) ("The interests of the community require that the child be put under legal restraint or discipline"). In making this determination, the juvenile

court is required to consider *inter alia* the factors set out in T.C.A. § 37-1-134 (b):

> (1) The extent and nature of the child's prior delinquency records;
>
> (2) The nature of past treatment efforts and the nature of the child's response thereto;
>
> (3) Whether the offense was against person or property, with greater weight in favor of transfer given to offenses against the person;
>
> (4) Whether the offense was committed in an aggressive and premeditated manner;
>
> (5) The possible rehabilitation of the child by use of procedures, services and facilities currently available to the court in this state; and
>
> (6) Whether the child's conduct would be a criminal gang offense, as defined in § 40-35-121, if committed by an adult.

With regard to the first two factors, Petitioner had no prior delinquency record and there had been no past efforts to treat Petitioner. While this is true, Petitioner had been the subject of disciplinary action at school. Transfer Transcript, p. 229.

Factor three is whether the offense was against person or property. Obviously murder in the first degree is the most serious offense that can be committed against a person. The juvenile court is required to give greater weight in favor of transfer when the offense is against a person.

Factor four is whether the offense was committed in an aggressive and premeditated manner. The proof introduced at the transfer hearing established without question that Petitioner committed the murder of the victim in an aggressive and premeditated manner.

Factor five is a consideration of the possible rehabilitation of the child by use of procedures, services and facilities currently available to the court in this state.

Dr. William Burnett testified that Petitioner could be successfully treated for depression and intermittent explosive disorder. Transfer Transcript, p106. He further testified, "I think in terms of predicting violence in juveniles there's a whole list of risk factors that he doesn't have, which I think is a good prognostic sign." Transfer Transcript, p 107.

Specifically, Dr. Burnett was asked by Petitioner's trial counsel, "Do you know if this treatment is available through the juvenile justice system?". Dr. Burnett answered, "Yes, I believe it is. There are juvenile facilities, one of which is called Woodland Hills which I am familiar with because I was a consultant for a couple of years. " Transfer Transcript, p. 106. He explained, "... The depression is treatable. The explosive disorder is treatable, the stressors are avoidable. Actually of the risk factors that I mentioned this morning that he's stuck with is genetic makeup which we can't really change that." Transfer Transcript, p 107.

Petitioner's guardian ad litem questioned Dr. Burnett, "In your opinion, is a program of treatment that would extend to four plus years be a long enough

effective time to rehabilitate Jason?", to which Dr. Burnett responded, "Yes, I think it would be". Transfer Transcript, p. 117.

Dr. Kimbery Stalford opined, "I do believe that depression, whether it's mild or severe, is a treatable medical problem and to what extent Jason had depression, I feel that it's significantly less than what Dr. Burnett does. That is treatable. However, a depressed person that is having difficulties understands right from wrong. And a depressed person can make opinions and decisions based on that conscience or based on that super ego where the lighthouse that guides us in making decisions. And I don't think that could be treated. I think the tendency to choose violent options and the knowing what's right and wrong but choosing not to do what is right, I'm not sure that that can be treated." Transfer Transcript, p. 127-8.

Dr. Stalford further testified that, in her opinion, the crime was not an intermittent explosive event. Transfer Transcript, p. 130.

Thus, the proof on this issue is in equipoise. The defense expert was of the opinion that Petitioner could be successfully treated within the four years available to the juvenile court system and the State's expert was doubtful that Petitioner could be successfully treated at all. The MTMHI evaluation found that Petitioner was not committable to a mental institution on an involuntary basis.

This Court considers this factor as being in equipoise, favoring neither retention in juvenile court nor transfer to adult court.

The final factor is whether Petitioner's conduct would be a criminal gang offense. There is no proof or indication that this factor is present. This factor weighs in favor of Petitioner.

There is no requirement that all of these factors must be present before a transfer may be ordered. *State v. Isiah Wilson* (unreported). Tenn. Crim. App. at Jackson # W2003-02394-CCA-R3-CD, opinion filed November 8, 2004.

Considering all of the above statutory factors and the facts of the case, this Court is of the opinion that there is no reasonable probability that Petitioner would not have been transferred to adult court had all of the evidence been presented to the juvenile court.

Petitioner has failed to show that the adversarial process failed to produce a reliable result. *Cooper v. State*, 849 S.W.2d 744, 747 (Tenn. 1993) [citing *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)]; *Butler v. State*, 789 S.W.2d 898, 899 (Tenn. 1990) [also citing *Strickland v. Washington*, supra]. Petitioner has failed to demonstrate that his transfer hearing failed to produce a reliable result.

This being the case, the issue is without merit.

c. Trial counsel failed to inform and advise Petitioner as to the nature and cause of every accusation made against Petitioner.

Since neither Petitioner nor his trial counsel testified at the post conviction petition, there was no evidence in support of this allegation. T.C.A. § 40-30-110 (f) provides in part, "The petitioner shall have the

burden of proving the allegations of fact by clear and convincing evidence....". Petitioner has failed to produce any evidence in support of his allegations, thus, he has failed to carry his burden of proof.

d. Trial counsel failed to investigate and prepare for trial.

At the hearing of Petitioner's post conviction relief petition, Petitioner failed to introduce any proof that his trial counsel failed to investigate and prepare for trial. He likewise failed to produce any evidence that his trial counsel failed to discover.

T.C.A. § 40-30-110 (f) provides in part, "The petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence ....". Petitioner has failed to produce any evidence in support of his allegations, thus, he has failed to carry his burden of proof.

e. Trial counsel failed to formulate a defense.

Neither in his post conviction petition nor at the hearing thereon has Petitioner specified what defense he expects his trial counsel to have formulated. A reading of the transcript reveals that Petitioner's trial counsel's theory of defense was to convince the jury to find Petitioner guilty of a lesser include offense, hopefully voluntary manslaughter. Public Defender Jake Lockert testified at Petitioner's post conviction hearing that this would have been his theory of defense if the case went to trial in circuit court. The proof in this case establishes that this allegation is without merit.

f. Trial counsel failed to interview all witnesses.

Petitioner failed to present at his post conviction hearing any witness who had knowledge of Petitioner's case. He likewise failed to show that his trial counsel failed to interview any witness. When a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing." *Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990), perm. to appeal denied (Tenn. July 2, 1990).

T.C.A. § 40-30-110 (f) provides in part, "The petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence ....". Petitioner has failed to produce any evidence in support of his allegations, thus, he has failed to carry his burden of proof.

g. Trial counsel failed to raise, prepare, file and litigate all pertinent and significant issues with regard to Petitioner's case.

In his petition for post conviction relief, Petitioner has failed to specify any "pertinent and significant issues with regard to Petitioner's case". No proof of any such issues was presented at Petitioner's post conviction hearing. It is not the function of this Court to search the record of this case in an attempt to find any such issue which was not properly raised by Petitioner's trial counsel.

Petitioner's trial counsel cannot be found to have been ineffective if the grounds for such ineffectiveness has not been specified.

T.C.A. § 40-30-110 (f) provides in part, "The petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence....". Petitioner has failed to produce any evidence in support of his allegations, thus, he has failed to carry his burden of proof.

h. Trial counsel failed to properly make requests for discovery concerning all exculpatory evidence.

Petitioner has failed to present any evidence of the existence of any exculpatory evidence at his post conviction hearing. Since no exculpatory evidence has been shown to have existed, Petitioner's trial counsel cannot be shown to have been ineffective for failing to request for discovery which has not been shown to exist. T.C.A. § 40-30-110 (f) provides in part, "The petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence....". Petitioner has failed to produce any evidence in support of his allegations, thus, he has failed to carry his burden of proof.

i. Trial counsel failed to fully inform Petitioner of the applicable range of punishment and did not determine if Petitioner actually understood the range of punishment, thereby vitiating the judgements of conviction.

At his post conviction hearing, Petition failed to present any evidence that his trial counsel failed to inform Petitioner of the applicable range of punishment or did not determine whether Petitioner actually understood the range of punishment. Since the sentence upon a conviction of murder in the first degree in this situation is automatic by law, there is no range

of punishment. T.C.A. § 40-30-110 (f) provides in part, "The petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence....". Petitioner has failed to produce any evidence in support of his allegations, thus, he has failed to carry his burden of proof.

k. Trial counsel failed to file a proper motion to suppress the insufficient evidence against Petitioner.

In his petition for post conviction relief nor at his hearing thereon, Petitioner has failed to specify which evidence to which he refers in this allegation. Insufficiency of evidence is not normally a basis for a motion to suppress. T.C.A. § 40-30-110 (f) provides in part, "The petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence ....". Petitioner has failed to produce any evidence in support of his allegations, thus, he has failed to carry his burden of proof.

l. Trial counsel failed to file a motion to dismiss the indictment due to the void charge contained in the indictment as he was not provided due process in the juvenile transfer hearing.

This Court has examined the indictment in this case and finds that it properly charges Petitioner with the crime of murder in the first degree. Any failure of due process in the juvenile transfer hearing does not affect the validity of the indictment itself.

The alleged failure of due process in the juvenile transfer hearing has been addressed hereinabove in subsection "b".

Petitioner has shown no basis for his allegation of ineffectiveness of counsel in this regard.

m. Trial counsel failed to file a motion to dismiss the indictment based upon the fact that Hispanics and blacks were systematically and unconstitutionally excluded from serving on the grand jury of Stewart County.

Petitioner has failed to present any evidence that any racial or ethnic group was systematically excluded from serving of the Stewart County grand jury. T.C.A. § 40-30-110 (f) provides in part, "The petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence....". Petitioner has failed to produce any evidence in support of his allegations, thus, he has failed to carry his burden of proof.

n. Trial counsel failed to file a motion for an ex parte hearing in order to show Petitioner's need for obtaining funds from the court for adequate supportive services, experts and investigative services in order to properly prepare an adequate defense.

In point of fact, Petitioner's trial counsel filed two motions for funds for expert witnesses to support his defense in this case. Both motions were granted. Petitioner has shown no other witnesses which would have been useful in his defense. T.C.A. § 40-30-110 (f) provides in part, "The petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence....". Petitioner has failed to produce any evidence in support of his allegations, thus, he has failed to carry his burden of proof.

o. Trial counsel failed to file all motions essential to an adequate defense.

In his post conviction relief petition, Petitioner failed to specify the motions to which he refers. In addition, no proof was introduced at the hearing of the post conviction petition that any motion which should have been filed was not filed. T.C.A. § 40-30-110 (f) provides in part, "The petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence....". Petitioner has failed to produce any evidence in support of his allegations, thus, he has failed to carry his burden of proof.

p. Trial counsel failed to consult and communicate with Petitioner at crucial stages prior, during, and subsequent to trial.

Petitioner did not testify at the hearing of his post conviction petition. Therefore, he submitted no proof of this allegation. T.C.A. § 40-30-110 (f) provides in part, "The petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence....". Petitioner has failed to produce any evidence in support of his allegations, thus, he has failed to carry his burden of proof.

q. Trial counsel failed to timely provide Petitioner with a copy of the indictment.

Petitioner submitted no proof of this allegation at the hearing of his post conviction petition. T.C.A. § 40-30-110 (f) provides in part, "The petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence....". Petitioner has failed to produce any evidence in support of his allegations, thus, he has failed to carry his burden of proof.

r. Trial counsel failed to challenge the defective indictment against the Petitioner, with failed to allege an offense and failed to contain all necessary elements of the offenses.

T.C.A. § 39-13-202 (a) provides in pertinent part: "First degree murder is:

(1) A premeditated and intentional killing of another;

(2)...".

The indictment in this case reads in pertinent part: "That Jason Clinard ... then and there, did feloniously, intentionally, deliberately, and with premeditation kill Joyce D. Gregory...". The indictment contains the element of deliberation which is no longer an element of first degree murder. This fact was noticed by the State during the trial and the indictment was amended with the agreement of Petitioner's trial counsel to delete the deliberation element. Trial Transcript, pages 404 and 405.

The Court of Criminal Appeals has held that inclusion of the element of deliberation in a felony murder indictment was surplusage and could not have misled the defendant. *State v. Hopper*, 695 S.W.2d 530, 535 (Tenn. Crim. App. 1985). An indictment is not defective because of the inclusion of surplusage if, after eliminating the surplusage, the offense is still sufficiently charged." *State v. March*, 293 S.W.3d 576, 588 (Tenn. Crim. App. 2008); *State v. Culp*, 891 S.W.2d 232, 236 (Tenn. Crim. App. 1994). Petitioner's trial counsel was not ineffective in agreeing to the amendment since the indictment was proper even with the surplusage.

The indictment contained all of the necessary elements of murder in the first degree. Petitioner's trial counsel could not be found to be ineffective for failing to challenge an indictment which was not defective.

Petitioner's trial counsel has not been shown to have been ineffective in this respect.

s. Trial counsel failed to properly move the court for and obtain a bill of particulars as to the offenses alleged in the indictment against Petitioner.

The indictment against Petitioner charges only a single crime and the facts upon which the indictment was based consist of only a single incident. Petitioner has demonstrated no need for a bill of particulars.

t. Trial counsel failed to challenge the unconstitutional selection of the grand jury.

Petitioner has failed to introduce any evidence concerning the selection of the grand jury. Thus, this Court cannot determine whether any unconstitutional selection of the grand jury occurred.

T.C.A. § 40-30-110 (f) provides in part, "The petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence....". Petitioner has failed to produce any evidence in support of his allegations, thus, he has failed to carry his burden of proof.

u. Trial counsel failed to investigate and present all available evidence that would support Petitioner's claim of innocence regarding the charges against him.

Petitioner has failed to introduce at the hearing of his post conviction hearing any evidence of any facts which would support his claim of innocence regarding the charges against him. This being the case, there is no evidence that Petitioner's trial counsel failed in this respect. T.C.A. § 40-30-110 (f) provides in part, "The petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence....". Petitioner has failed to produce any evidence in support of his allegations, thus, he has failed to carry his burden of proof.

v. Trial counsel failed to have the venue of the trial changed.

The record establishes that Petitioner's trial counsel filed a motion for change of venue that was granted in that a jury from Cheatham County was empaneled and tried Petitioner's case. Petitioner has demonstrated no prejudice in physically holding the trial in Stewart County with a jury composed of citizens of Cheatham County prejudiced him in any way.

T.C.A. § 40-30-110 (f) provides in part, "The petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence....". Petitioner has failed to produce any evidence in support of his allegations, thus, he has failed to carry his burden of proof.

w. Trial counsel failed to properly or fully cross-examine all State witnesses at the transfer hearing and at trial.

Petitioner has failed to prove at his post conviction hearing or specifically allege any specific instances in which his trial counsel failed to properly or fully cross-examine all State witnesses at his transfer hearing and at his trial. It is not the function of this Court to search the record for instances of ineffective cross-examination. T.C.A. § 40-30-110 (f) provides in part, "The petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence....". Petitioner has failed to produce any evidence in support of his allegations, thus, he has failed to carry his burden of proof.

x. Trial counsel failed to properly voir dire jurors concerning their inherent biases and prejudices against Petitioner.

The voir dire portion of the trial was not included in the transcript filed by Petitioner in the hearing of the post conviction petition in this action.

T.C.A. § 40-30-110 (f) provides in part, "The petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence....". Petitioner has failed to produce any evidence in support of his allegations, thus, he has failed to carry his burden of proof.

y. Trial counsel failed to properly inquire of the venire, either individually or collectively, their ability to render a fair and impartial verdict at the trial.

The voir dire portion of the trial was not included in the transcript filed by Petitioner in the hearing of the post conviction petition in this action.

T.C.A. § 40-30-110 (f) provides in part, "The petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence....". Petitioner has failed to produce any evidence in support of his allegations, thus, he has failed to carry his burden of proof.

z. Trial counsel failed to inquire of the venire, either individually or collectively, their ability to apply the law to the facts of the case as instructed by the trial court.

The voir dire portion of the trial was not included in the transcript filed by Petitioner in the hearing of the post conviction petition in this action.

T.C.A. § 40-30-110 (f) provides in part, "The petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence....". Petitioner has failed to produce any evidence in support of his allegations, thus, he has failed to carry his burden of proof.

aa. Trial counsel failed to inquire of the venire, either individually or collectively, whether they knew or were related in any way to Petitioner, counsel, prosecutor, district attorney, or any witness expected to testify at trial or whether the veniremen would attach any greater weight to their testimony by reason of their relationship to these people.

The voir dire portion of the trial was not included in the transcript filed by Petitioner in the hearing of the post conviction petition in this action.

T.C.A. § 40-30-110 (f) provides in part, "The petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence....". Petitioner has failed to produce any evidence in support of his allegations, thus, he has failed to carry his burden of proof.

bb. Trial counsel failed to object to the prosecutor's improper, inflammatory, prejudicial, inappropriate and misleading and inaccurate statements concerning the law, the evidence, and the petitioner during voir dire, opening, direct examination, cross-examination, closing and rebuttal closing at Petitioner's trial.

The voir dire of the jury was not contained in the transcript submitted at Petitioner's post conviction hearing. This being the case, this Court cannot review the voir dire. T.C.A. § 40-30-110 (f) provides in part, "The petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence....". Petitioner has failed to produce any evidence in support of his allegations, thus, he has failed to carry his burden of proof with regard to the voir dire.

This Court has reviewed the transcript of the State's direct examination, cross-examination, closing and rebuttal argument and has found no improper conduct on behalf of the State. T.C.A. § 40-30-110 (f) provides in part, "The petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence....". Petitioner has failed to produce any evidence in support of his allegations, thus, he has failed to carry his burden of proof.

cc. Trial counsel failed to object to jury instructions, which shifted the burden of proof on elements of the alleged crimes to Petitioner.

This Court has examined the jury instructions contained in the technical record and has found no instruction which "shifted the burden of proof on elements of the alleged crimes to Petitioner'. Thus, trial counsel cannot be found to have been ineffective for not objecting to jury instructions which were not improper.

dd. Trial counsel failed to properly challenge the excessive and inappropriate sentences imposed upon Petitioner by the trial court under the facts of this case, and failed to introduce all available mitigating evidence showing the sentences were excessive and improper.

There was no sentencing hearing in this case. Since the State did not file a notice of seeking the death penalty or life without parole, the sentence of life imprisonment upon a conviction of murder in the first degree was automatic by statute. Trial counsel cannot be held to have been ineffective for not challenging a sentence which was automatic under the law.

ee. Trial counsel failed to object to jury instructions which failed to charge all lesser included offenses.

This Court has reviewed the charge of the trial court contained in the technical record and finds no proper lesser included offenses which were not charged. Thus, trial counsel cannot be held to have been ineffective for not objecting to a proper charge.

ff. Trial counsel failed to object to the prosecutor's improper, inflammatory, prejudicial, inappropriate and misleading and inaccurate statements concerning the law, the evidence, and the petitioner during voir dire, opening, direct examination, cross-examination, closing and rebuttal closing at Petitioner's trial.

This is a verbatim restatement of issue "bb", above.

gg. Trial counsel failed to object to jury instructions, which shifted the burden of proof on elements of the alleged crime to Petitioner

This is a verbatim restatement of issue "cc", above.

hh. Trial counsel failed to properly challenge the excessive and inappropriate sentences imposed upon Petitioner by the trial court under the facts of this case, and failed to introduce all available mitigating evidence showing the sentences were excessive and improper.

This is a verbatim restatement of issue "dd", above.

ii. Trial counsel failed to object to jury instructions which failed to charge all lesser included offenses.

This is a verbatim restatement of issue "ee", above.

jj. Trial counsel failed to properly cross-examine all witnesses and elicit all of the facts in the case. As a result, the jury was prevented from hearing and otherwise weighing all of the facts before reaching a verdict.

Petitioner has not specified which facts should have been elicited but were not. It is not the function of this Court to search the entire record for instances of ineffective cross-examination by trial counsel. The facts which should have been elicited were not introduced at the hearing of the post conviction petition. This being the case, this Court has no idea of what facts should have been elicited. T.C.A. § 40-30-110 (f) provides in part, "The petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence....". Petitioner has failed to produce any evidence in support of his allegations, thus, he has failed to carry his burden of proof.

kk. Trial counsel failed to object or raise in the motion for new trial all unconstitutional errors occurring during Petitioner's trial.

Petitioner has shown no unconstitutional errors that occurred during his trial and this Court has found none. Trial counsel cannot be held to have been ineffective for failure to object to or raise in the motion for a new trial errors which Petitioner has not shown to have existed. T.C.A. § 40-30-110 (f) provides in part, "The petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence....". Petitioner has failed to produce any evidence in support of his allegations, thus, he has failed to carry his burden of proof.

ll. Trial counsel failed to adequately and effectively represent Petitioner by failing to prepare for or present any mitigating circumstances or evidence at or during Petitioner's sentencing hearing in this matter.

There was no sentencing hearing in this case. Since the State did not file a notice of seeking the death penalty or life without parole, the sentence of life imprisonment upon a conviction of murder in the first degree was automatic by statute. Trial counsel cannot be held to have been ineffective for not presenting evidence in a hearing which never took place.

Having considered all of Petitioner's allegations of ineffectiveness of his trial counsel, this Court is of the opinion that the allegation of ineffectiveness of trial counsel is without merit.

4. Illegal evidence.

Petitioner introduced no proof of any illegal evidence introduced at his transfer hearing or at his trial nor has he made any specific allegations of what that illegal evidence may be in any of his pleadings.

T.C.A. § 40-30-110 (f) provides in part, "The petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence....". Petitioner has failed to produce any evidence in support of his allegations, thus, he has failed to carry his burden of proof.

The issue is without merit.

5. Prosecutorial Misconduct

In his petition, Petitioner alleges that the State committed prosecutorial misconduct in its opening and closing arguments, alleging specifically that the State improperly:

> a. vouched for the credibility of its witnesses by implying that the State witnesses were truthful and would not lie;
>
> b. misstated the facts and the law applicable to the case against the petitioner;
>
> c. improperly implied to the jurors that Petitioner would go right out into the community and commit other crimes if the jury did not convict and sentence Petitioner; and
>
> d. improperly implied that the State would have never investigated and charged Petitioner if he was not guilty.

The test for determining whether reversal is required in cases of alleged prosecutorial misconduct is whether the improper statement was so inflammatory that it "affected the verdict to the prejudice of the defendant". *Harrington v. State*, 385 S.W. 2d 758, 759 (Tenn. 1965); see also *State v. Gann*, 251 S.W. 3d 446, 459 (Tenn. Crim. App. 2007). Factors relevant to that determination include: (1) the disputed conduct viewed in light of circumstances and facts in the case; (2) any curative measures taken by the trial court and the prosecution; (3) the prosecutor's intent in making the improper statements; (4) the cumulative effect of the prosecutor's statements and other errors in the record; and (5) the relative strength and weakness of the case.

Gann, 251 S.W. 3d at 460 (citing *Judge v. State*, 539 S.W. 2d 340, 344 (Tenn. Crim. App. 1976).

With regard to Petitioner's allegations of improper argument, the Tennessee Supreme Court has recognized that closing argument is a valuable privilege for both the state and the defense and that counsel is afforded wide latitude in presenting final argument to the jury. See *State v. Cribbs*, 967 S.W. 2d 773, 783 (Tenn. 1998); *State v. Cone*, 665 S.W. 2d 87, 94 (Tenn. 1984). However, a party's closing argument "must be temperate, predicated on evidence introduced during the trial, relevant to the issues being tried, and not otherwise improper under the facts or law." *State v. Middlebrooks*, 995 S.W. 2d 550, 568 (Tenn. 1999). The Supreme Court, citing to standards promulgated by the American Bar Association[1], has identified "five general areas of prosecutorial misconduct": (1) intentionally misstating the evidence or misleading the jury as to inferences it may draw; (2) expressing the prosecutor's personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant; (3) using arguments calculated to inflame the passions or prejudices of the jury; (4) using arguments that would divert the jury from its duty to decide the case on the evidence by injecting issues broader than the guilt or innocence of the accused or by predicting the consequences of the jury's verdict; and (5) intentionally referring to or arguing facts outside the record unless the facts are matters of public knowledge. *State v. Goltz*, 111 S.W. 3d 1, 6 (Tenn.

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[1] See American Bar Association, *ABA Standards for Criminal Justice: Prosecution Function and Defense Function* § 3-5.8, 3-5.9 (3rd ed. 1993).

Crim. App. 2003). (citations omitted). Furthermore, the State's argument may not reflect unfavorably upon defense counsel or the trial tactics employed by defense counsel during the course of the trial. See generally *State v. Goltz*, 111 S.W. 3d 1, 6 (Tenn. Crim. App. 2003); *McCracken v State*, 489 S.W. 2d 48 (Tenn. Crim. App. 1972). As is the case with other areas of prosecutorial misconduct, the argument will constitute reversible error only in the improper statement was so inflammatory that it "affected the verdict to the prejudice of the defendant". *Harrington v. State*, 215 Tenn. 338, 340, 385 S.W. 2d 758, 759 (1965); see also *State v. Gann*, 251 S.W. 3d 446, 459 (Tenn. Crim. App. 2007).

Petitioner's assertion of prosecutorial misconduct is waived for Petitioner's failure to raise the issue at trial or on direct appeal. A ground for relief is generally waived on post-conviction if Petitioner failed to present it before a court of competent jurisdiction. T.C.A § 40-30-106(g). In addition, the Court of Criminal Appeals has concluded that issues of prosecutorial misconduct are more properly the subject of a direct appeal and are not properly issues for post-conviction relief. *John C. Johnson* (unreported) No. M2004-02675-CCA-R3-CO (Tenn. Crim. App. at Nashville, March 22, 2006); see also *Robby Lynn Davidson v State* (unreported), No. M2005-02270-CCA-R3-PC (Tenn. Crim. App. at Nashville, December 4, 2006).

Petitioner has not cited any instance in the record which would support his allegations. This Court has read the opening and closing arguments of all counsel and finds nothing in the record which would support Petitioner's allegations. Nothing stated or implied in

the State's argument even remotely supports Petitioner's argument. The facts do not support Petitioner's allegations.

In addition, Petitioner did not raise the issue of prosecutorial misconduct on direct appeal. Thus, he has waived the issue. This waiver does not affect his allegations of ineffective assistance of counsel as considered hereinabove.

The issue is without merit.

6. Errors by the Trial Judge

In his petition, Petitioner cites numerous alleged errors committed by the trial judge in his trial. This Court deals with Petitioners individual allegations *seriatim:*

> 1. The trial judge improperly allowed irrelevant, inadmissible and false evidence to be presented and considered by the jury;

Petitioner has not specifically cited any specific rulings about which he complains nor has he made any reference to the record. It is not the task of this Court to search the record for possible instances which may support Petitioner's allegations. This notwithstanding, this Court has read the entire record and finds no instance in which the trial judge "allowed irrelevant, inadmissible and false evidence" to be presented to the jury.

2. The trial judge improperly conducted the voir dire of the jury;

Petitioner has cited no specific instance in which the trial judge improperly conducted the voir dire of the

jury. The voir dire of the jury is not included in the transcript of the trial submitted as an exhibit to the post conviction hearing.

T.C.A. § 40-30-110 (f) provides in part, "The petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence....". Petitioner has failed to produce any evidence in support of his allegations, thus, he has failed to carry his burden of proof.

3. The trial judge failed to properly question prospective jurors regarding the weight they would give to testimony of law enforcement personnel when the State's case relied on the possible testimony of officers and certain jurors in fact stated that they had prior involvement with law enforcement personnel;

The voir dire of the jury is not included in the transcript of the trial submitted as an exhibit to the post conviction hearing.

T.C.A. § 40-30-110 (f) provides in part, "The petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence....". Petitioner has failed to produce any evidence in support of his allegations, thus, he has failed to carry his burden of proof.

4. The trial judge failed to charge the jury on all defenses;

Petitioner has failed to allege which possible defenses were available to Petitioner. This Court has read the charge to the jury contained in the technical record and finds no defense which might have been

available to Petitioner which was not charged to the jury.

T.C.A. § 40-30-110 (f) provides in part, "The petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence....". Petitioner has failed to produce any evidence in support of his allegations, thus, he has failed to carry his burden of proof.

5. The trial judge kept relevant facts from the jury regarding Petitioner's sentences;

This allegation makes no sense. The jury has no function regarding sentencing, therefore, any sentencing information would be irrelevant. In this case, upon a conviction of first degree murder, the sentence was automatic.

6. The trial judge failed to properly give curative instructions regarding the numerous instances of prosecutorial misconduct by the State;

Petitioner has failed to prove any instance of prosecutorial misconduct by the State. Therefore, the trial judge was not called upon to deliver any curative instruction on that subject.

T.C.A. § 40-30-110 (f) provides in part, "The petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence....". Petitioner has failed to produce any evidence in support of his allegations, this, he has failed to carry his burden of proof.

7. The trial judge improperly charged the jury on mandatory presumptions as to elements of the offenses in question;

Petitioner has made no specific allegations as to any "mandatory presumptions" which were charged by the trial judge. A reading of the charge to the jury contained in the technical record reveal none.

8. The trial judge repeatedly and improperly defined reasonable doubt;

A reading of the charge to the jury contained in the technical record reveals that the trial judge properly and accurately defined the term "reasonable doubt".

9. The trial judge failed to properly define all the elements of the offenses alleged against Petitioner;

A reading of the charge to the jury contained in the technical record reveals that the trial judge properly defined the elements of the indicted offense and all lesser included offenses.

10. The trial judge failed to properly require the State to elect the specific and particular offenses for which Petitioner was being tried and for which convictions were being sought;

This case involves a single incident which resulted in a one count indictment for first degree murder. There was nothing to elect. This allegation borders on idiotic.

> 11. The trial judge failed to properly charge the jury on all lesser included offenses;

A reading of the charge to the jury contained in the technical record reveals that the trial judge properly charged all lesser included offenses of first degree murder.

> 12. The trial judge erred in denying the Motion for Judgment of Acquittal; and

The record shows that the trial judge gave full and careful consideration to the motion for Judgment of Acquittal before denying the same. Trial Transcript, pages 406 - 409. This Court finds no error in the ruling of the trial court.

> 13. The trial judge improperly certified that the transcript of Petitioner's trial was complete when it did not include: (1) the reading of the indictment; (2) the opening statements; (3) the charge to the jury and closing arguments, thus denying Petitioner an effective appeal.

The trial transcript does in fact contain the opening statements and the closing arguments. The charge to the jury can be found in the technical record. The indictment can also be found in the technical record. There is no indication that the indictment and charge to the jury were not read to the jury as printed.

The trial judge properly approved the transcript upon the expiration of the time for filing exceptions thereto as provided by Rule 24, T.R.A.P. No suggestion of diminution of the record was filed. An examination of the opinion of the Court of Criminal Appeals in Petitioner's case reveals no assignment of error which

was not contained in the record. *State v. Jason Clinard* (unreported) Tenn. Crim. App. at Nashville # M2007-00406-CCA-R3-CD opinion filed September 9, 2008. Petitioner has demonstrated no prejudice from any alleged omission from the transcript. T.C.A. § 40-30-110 (f) provides in part, "The petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence....". Petitioner has failed to produce any evidence in support of his allegations, thus, he has failed to carry his burden of proof.

This Court has found no error committed by the trial judge in this case. The allegation that errors by the trial judge affected the fairness of Petitioner's trial is not supported by the proof. The issue is without merit.

CONCLUSION

Having considered Petitioner's Petition to reopen his Petition for Post Conviction Relief, this Court is of the opinion that it does not have merit and the Petition is denied.

Counsel for the State will kindly prepare an order for the signature of the Court reflecting the ruling of this memorandum opinion.

This memorandum opinion shall become a part of the technical record in this case but need not be copied upon the minutes.

This the 17th day of August 2011.

/s/ Robert E. Burch
Robert E. Burch
Circuit Judge