

No.

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD LLOYD ODOM, Petitioner,

v.

STATE OF TENNESSEE, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE TENNESSEE SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

- I. Whether, when a collateral review court is determining whether trial counsel was ineffective in failing to present certain mitigating evidence, an analysis of the nexus between the new mitigating evidence and the underlying crime is violative of the Eighth Amendment and this Court's decisions in *Tennard v. Dretke*, 542 U.S. 274 (2004) and *Smith v. Texas*, 543 U.S. 37 (2004).
- II. Whether the Tennessee Court of Criminal Appeals violated Petitioner's Sixth Amendment rights and contravened this Court's *Strickland v. Washington*, 466 U.S. 668 (1984) line of precedent in finding that Petitioner's sentencing counsel were not deficient and that their performance did not prejudice him when they failed to investigate mitigating evidence regarding Petitioner's brain damage.

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INTRODUCTION

Over forty years ago in *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976), this Court first announced that, “the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind” must guide a decision to impose the death penalty. This Court has repeatedly affirmed this central tenet of the Eighth Amendment, which ensures that sentencers can express a “reasoned moral response to the defendant’s background, character, and crime” and give full weight to factors mitigating against a sentence of death. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989); see *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978). In *Tennard v. Dretke*, 542 U.S. 274, 287 (2004), this Court reiterated that a limitation on mitigating evidence that would require a defendant to establish a nexus between the evidence and the crime committed would prevent a sentencer from giving that mitigating evidence full weight, which is something the Eighth Amendment “cannot countenance.”

The Court has also recognized that the Eighth Amendment is not the only constitutional provision which restrains the imposition of the death penalty. Beginning with its decision in *Strickland v. Washington*, 466 U.S. 668 (1984), the Court has been persistent in its recognition that the Sixth Amendment requires a certain minimum standard of legal representation in capital cases. See *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000). The Court has repeatedly reiterated that some mitigating evidence is simply so powerful that trial counsel’s deficient failure to

investigate or present it entitles a defendant to an entirely new trial. *See Rompilla*, 545 U.S. 374; *Wiggins*, 539 U.S. 510; *Williams*, 529 U.S. 362.

The question presented in this petition is how these lines of Supreme Court precedent intersect when collateral review courts determine whether trial counsel's failure to investigate certain mitigating evidence prejudiced a capital defendant. This Court should grant certiorari to resolve current splits among federal circuit courts of appeal and state courts of last resort regarding whether a collateral review court may find that a defendant was not prejudiced by deficient trial counsel performance on the grounds that the un-presented mitigating evidence has no nexus to the underlying crime. This Court should also grant certiorari to correct the Tennessee state court's plain misapplication of its *Strickland* precedents to Petitioner's case in finding that his counsel's failure to investigate brain damage was not deficient performance and did not prejudice Petitioner.

OPINION BELOW

Petitioner seeks review of the judgment of the Tennessee Court of Criminal Appeals entered on October 20, 2017, upholding Mr. Odom's convictions and sentences upon denial of post-conviction relief. The relevant opinion of the Tennessee Court of Criminal Appeals in this matter is included with this Petition as Appendix A. The order of the post-conviction court denying relief is attached as Appendix B. Petitioner filed an application for permission to appeal to the Supreme Court of Tennessee which was denied on April 23, 2018. The order of that court denying permission to appeal is attached as Appendix C.

STATEMENT OF JURISDICTION

The Tennessee Court of Criminal Appeals entered its judgment and opinion on October 20, 2017. *Odom v. State*, No. W2015–01742–CCA–R3–PD, 2017 WL 4764908 (Tenn. Crim. App. Oct. 20, 2017), *see* Appendix A. Mr. Odom sought permissive review by the Supreme Court of Tennessee, which was denied on April 23, 2018. *See* Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: “In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.”

The Eighth Amendment to the United States Constitution provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

The Fourteenth Amendment to the United States Constitution provides in relevant part: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

STATEMENT OF THE CASE

Richard Lloyd Odom was convicted and sentenced to death for the 1992 felony murder of Mina Ethel Johnson during the perpetration of a rape. *State v.*

Odom, 928 S.W.2d 18 (Tenn. 1996). On direct appeal, the Tennessee Supreme Court vacated Mr. Odom’s death sentence, finding several prejudicial errors. *Id.* On remand for a new sentencing proceeding, Mr. Odom was again sentenced to death. *State v. Odom*, 137 S.W.3d 572 (Tenn. 2004). On direct appeal, the Tennessee Supreme Court again vacated Mr. Odom’s second death sentence and remanded for a third sentencing hearing. *Id.* In 2009, Mr. Odom received a third death sentence, which the Tennessee Supreme Court affirmed on direct appeal. *State v. Odom*, 336 S.W.3d 541 (Tenn. 2011).

The mitigating circumstances presented at Mr. Odom’s third sentencing hearing consisted primarily of testimony about his difficult childhood, his “near spotless” prison record since being incarcerated for this crime, and testimony from a psychologist who opined that Mr. Odom had “schizoid personality features” and that he would do well in a structured prison environment. *See id.* at 572. No evidence was presented about Petitioner’s neurological deficiencies or his organic brain damage.

After the Tennessee Supreme Court affirmed Mr. Odom’s third and final death sentence, Mr. Odom timely filed for post-conviction relief. *See Pro Se Petition & Amended Petitions*. In his petitions, Mr. Odom claimed, *inter alia*, that he had been denied effective assistance of counsel due to his sentencing counsel’s failure to conduct and present critical neurological evaluations. *See First Amended Petition, Grounds of Petition 9(vi)*. At the subsequent evidentiary hearing, Mr. Odom’s post-conviction counsel elicited voluminous testimony from witnesses—including two

clinical neuropsychology and neuropsychiatry experts—who opined about the significant neurological deficits and brain damage they discovered after conducting appropriate evaluations of Mr. Odom. *See* Post-Conviction Hearing Transcript (“PCH Tr.”), 634:10–636:9; 637:4–647:19. During the evidentiary hearing, the post-conviction court judge focused heavily on the nexus between the mitigating evidence Mr. Odom’s experts presented about his organic brain damage and the crime Mr. Odom committed. *See* PCH Tr. 423:8–424:13; 660:8–11. (“So I assume you know he’s charged with murdering somebody? . . . So what does this [brain damage evidence] have to do with that?”) (“So if you have brain damage does that mean you act certain ways or you don’t act certain ways or what does that do to you?”).

The post-conviction court denied relief. *See* Appendix C. The court found that Mr. Odom’s counsel was not deficient under *Strickland* in failing to pursue a neurological evaluation of him. Mr. Odom appealed that decision to the Tennessee Court of Criminal Appeals. Mr. Odom argued, *inter alia*, that the post-conviction court misapplied *Strickland* and that his sentencing counsel’s failure to fully investigate his brain damage constituted deficient performance which prejudiced him at his sentencing. *See* CCA Brief 30–47.

On appeal, the Tennessee Court of Criminal Appeals affirmed the lower court’s denial of post-conviction relief. *Odom*, 2017 WL 4764908. The state appellate court again held that sentencing counsel’s failure to investigate Mr. Odom’s brain damage was not deficient performance. *See id.* at *30. The Criminal Court of Appeals further held that even if counsel’s performance were deficient, it could not

have prejudiced Mr. Odom because neither of the expert witnesses who presented the new mitigating evidence of brain damage could draw an affirmative causal connection between the brain damage and the crime. *Id.* at *31. The state appellate court specifically made the following statements in its opinion:

Dr. Brawley could not confirm the Petitioner’s neurological damage contributed to his actions at the time of the murder in this case.

...

Dr. Merikangas did not say . . . that the petitioner’s brain damage prevented him from knowing right from wrong, and he did not comment on whether the Petitioner’s brain damage caused the Petitioner to commit the two murders.

...

“Neither Dr. Brawley nor Dr. Merikangas could specifically state whether the Petitioner’s brain damage affected his actions at the time of the murder in this case.

Id. at *31. These excerpts constitute the bulk of the Court of Criminal Appeals’ prejudice analysis. *See id.*

Mr. Odom petitioned for permission to appeal the intermediate court’s decision to the Tennessee Supreme Court. In his petition, in addition to citing error in the lower courts’ *Strickland* analyses on the deficiency prong, Mr. Odom also argued that the Criminal Court of Appeals erred by basing its finding of no prejudice on the fact that Mr. Odom’s expert witnesses did not draw a causal nexus between the newly discovered mitigating evidence and the crime, in violation of *Tennard*, 542 U.S. 274. PTA Brief at 52–54. On April 23, 2018, in a one-sentence summary dismissal, the Tennessee Supreme Court entered a judgment denying Mr. Odom’s application for permission to appeal the Criminal Court of Appeals’ decision. TSC Denial, Appendix C.

This petition followed.

REASONS FOR GRANTING THE PETITION

In *Tennard*, 542 U.S. at 287, this Court affirmatively held that a capital sentencing proceeding which excluded mitigating evidence on the grounds that the defendant did not establish a causal nexus between the mitigating evidence and the crime was plainly violative of the Eighth Amendment. Despite the Court's clear language in *Tennard* and subsequently in *Smith v. Texas*, 543 U.S. 37 (2004), there remains an enduring circuit split regarding the application of *Tennard*. More specifically, several federal circuit courts and state courts of last resort have disagreed on whether and to what extent a collateral review court may use "nexus reasoning" to find that trial counsel's failure to present newly discovered mitigating evidence did not prejudice a defendant. The Court should grant certiorari to resolve this conflict.

This Court has also written prolifically about the importance of effective assistance of counsel, especially in capital cases where counsel's performance is often wholly determinative of whether a defendant lives or dies. Since its first announcement in *Strickland v. Washington*, 466 U.S. 668, this Court has consistently found that some counsel's performance falls so far below the bar of what constitutes professionally reasonable conduct that it prejudices the defendant, affects the fairness of his sentencing proceeding, and effectively denies him the rights guaranteed by the Sixth Amendment. See, e.g., *Porter v. McCollum*, 558 U.S. 30 (2009); *Rompilla*, 545 U.S. 374, *Wiggins*, 539 U.S. 510; *Williams*, 529 U.S. 362.

This is especially true where—as in Petitioner’s case—counsel fail to investigate critical mitigating evidence that likely would have informed their decision of whether or not to pursue an alternative mitigation strategy. *See Wiggins*, 539 U.S. at 523. Despite this Court’s clear mandate to the contrary, the Tennessee state court found that counsel’s failure to investigate Petitioner’s existing brain damage was neither deficient performance nor prejudicial to Petitioner. *Contra Sears v. Upton*, 561 U.S. 945 (2010); *Wiggins*, 539 U.S. at 523. This Court should grant certiorari to correct the Tennessee state court’s constitutionally untenable decision.

I. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE APPLICABILITY OF *TENNARD*’S BAR ON “NEXUS REASONING” TO ANALYSES OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS BY COLLATERAL REVIEW COURTS.

1. The Tennessee State Court’s Decision Using Nexus Reasoning to Preclude a Finding of *Strickland* Prejudice Contravenes the Plain Language of *Tennard* and *Smith*.

In *Tennard*, 542 U.S. 274, this Court added to its long line of precedent regarding mitigating evidence in capital cases. The *Tennard* Court held that under the Eighth Amendment, a sentencing body must be able to “fully consider and give effect to [] mitigating evidence,” by considering *all* mitigating evidence, regardless of whether a nexus can be drawn between that evidence and the crime itself. *Tennard*, 542 U.S. at 287 (citing *Penry*, 492 U.S. at 315). Later that same term, this Court again “unequivocally rejected” the idea that a defendant must show that mitigating evidence is causally related to the crime in order for a sentencer to be allowed to consider it. *Smith*, 543 U.S. at 45.

In contravention of the plain language of *Tennard* and *Smith*, the Tennessee state court based its ineffective assistance of counsel prejudice analysis on impermissible nexus reasoning:

[a]lthough the Petitioner presented more detailed evidence of his brain damage in post-conviction, Dr. Brawley could not confirm the Petitioner's neurological damage contributed to his actions at the time of the murder in this case . . . Dr. Merikangas also testified that the Petitioner had brain damage, which had probably been present his entire life. According to Dr. Merikangas, that brain damage affected the Petitioner's ability to control his impulses and would not necessarily prevent him from attempting to escape prison in the future. Dr. Merikangas did not say, however, that the Petitioner's brain damage prevented him from knowing right from wrong, and he did not comment on whether the Petitioner's brain damage caused the Petitioner to commit two murders. . . . [W]e cannot conclude that counsel's failure to present this type of evidence prejudiced the Petitioner. Neither Dr. Brawley nor Dr. Merikangas could specifically state whether the Petitioner's brain damage affected his actions at the time of the murder in this case.

Odom, 2017 WL 4764908 at *31.

While this Court has not yet decided such a case, Petitioner submits that there is no reason that this Court's logic in *Tennard* and *Smith* does not extend to analyses of ineffective assistance of counsel claims. In support of this position, Petitioner points to the fact that within the same term, this Court applied the nexus reasoning bar to two different cases which came to the Court via two completely different procedural routes. *Compare Tennard*, 542 U.S. at 281 (reviewing denial of a certificate of appealability related to a federal habeas petition) *with Smith*, 543 U.S. at 404 (reviewing state criminal court of appeals denial of post-conviction relief). Furthermore, for the reasoning set forth in Part (2) below, declining to extend the *Tennard/Smith* bar on nexus reasoning to ineffective assistance of

counsel claims would risk compromising the critical role mitigating evidence plays in a jury's decision to spare a defendant's life. The state court's use of nexus reasoning to find no prejudice in Petitioner's case is thus intolerable under the Eighth Amendment, and this Court should grant certiorari to prevent such a result.

2. Use of Nexus Reasoning by Collateral Review Courts in Assessing Ineffective Assistance of Counsel Claims Allows Critical Mitigating Evidence to Be Undermined in Violation of the Eighth Amendment.

This Court has frequently reiterated the crucial role that mitigating evidence plays in capital sentencing proceedings. *See Penry*, 492 U.S. at 319; *Eddings*, 455 U.S. 104; *Lockett*, 438 U.S. 586; *Woodson*, 428 U.S. 280. In this sense, the additional teachings of *Tennard* and *Smith* are not revolutionary; they simply augment this Court's long line of precedent emphasizing the Eighth Amendment's command that sentencers in capital cases be allowed to consider and weigh for themselves *all* mitigating evidence—regardless of its relationship to the crime—in determining whether a defendant's life is worth sparing.

Because “death is qualitatively different from a sentence of imprisonment,” full consideration of mitigating evidence is required by the Eighth Amendment to ensure a heightened reliability that death is the appropriate punishment in a given case. *Woodson*, 428 U.S. at 305. It is for precisely this reason that a collateral review court analyzing a capital defendant's *Strickland* claim should also be bound by this Court's reasoning in *Tennard* and *Smith* and should be barred from using nexus reasoning to find that counsel's performance did not prejudice a defendant.

In using nexus reasoning to sustain a finding of no prejudice under *Strickland*, a post-conviction court implicitly holds that *because* there is no nexus between the mitigating evidence and the crime, there is no reasonable probability that just one juror would have weighed the new mitigating evidence differently. But that is simply not the test for prejudice under *Strickland*; a defendant need not show that a juror would find some evidence mitigating *as a result of* its causal relationship to the crime. Indeed, such a rule would be plainly violative of *Tennard* and *Smith* inasmuch as it suggests that there is no such thing as “inherently mitigating” evidence. *See Tennard*, 542 U.S. at 287. A reviewing court’s role in finding whether a defendant has been prejudiced under *Strickland* is to determine whether just *one juror* would have weighed the new mitigating evidence differently and changed her vote to life. *See Wiggins*, 539 U.S. at 537. In making that determination, the court assumes the role of a hypothetical juror and reweighs the aggravating and mitigating evidence in light of the mitigating evidence not investigated or presented at the original sentencing. *See Wiggins*, 539 U.S. at 534. It would strain logic to hold that the reviewing court, in its role as a hypothetical juror, may use an analysis that an actual juror would be barred from using under *Tennard* and *Smith*.

Perhaps more critically, allowing a reviewing court to base a finding of no prejudice on nexus reasoning would violate the spirit of this Court’s long held commitment to ensuring that the “diverse frailties” of capital defendants are considered before a jury makes the awesome decision to allow the state to take

someone's life. *See Woodson*, 428 U.S. at 304; *see also Penry*, 492 U.S. at 319; *Eddings*, 455 U.S. 104; *Lockett*, 438 U.S. 586. Jurors find all sorts of things mitigating, despite the fact that they may have no causal connection whatsoever to the underlying crime; this is the underpinning of the Court's decisions not just in *Tennard* and *Smith*, but also originally in *Lockett*. Just as it does from sentencing juries, the "fundamental respect for humanity underlying the Eighth Amendment," *Woodson*, 428 U.S. at 304, demands more from reviewing courts than a cursory analysis of causality.

The Tennessee state court decision was thus doubly erroneous—erroneous for failing to apply the plain language from this Court's decisions in *Tennard* and *Smith* to review of a *Strickland* claim, and erroneous for otherwise failing to recognize how such reasoning more generally runs afoul of the Eighth Amendment. *See Woodson*, 428 U.S. at 304. This Court should, therefore, grant certiorari to ameliorate the Eighth Amendment violations inherent in a system in which a sentencing body is permitted to give little or no effective weight or consideration to newly discovered and potentially life-saving mitigating evidence.

3. The Tennessee State Court's Decision Falls Amongst a Split Between Federal Circuit Courts and Other State Courts of Last Resort Which This Court Should Resolve.

The division of authority regarding the intersection between this Court's *Strickland* and *Tennard/Smith* lines of precedent independently warrants this Court's review on certiorari. Federal circuit courts, federal district courts, and state courts of last resort have directly addressed the issue, and the decisions are almost precisely split: the Ninth Circuit and the Missouri Supreme Court have held that

this Court's decisions in *Tennard* and *Smith* preclude the use of nexus reasoning by post-conviction courts conducting *Strickland* analyses. See *Lambright v. Schriro*, 490 F.3d 1103 (9th Cir. 2007); *Hutchinson v. State*, 150 S.W.3d 292 (Mo. 2004), *abrogated on other grounds*, *Mallow v. State*, 439 S.W.3d 764 (Mo. 2014). The Eleventh Circuit, the Delaware Supreme Court, and the California Supreme Court, in contrast, have upheld death sentences in spite of a lower reviewing court's finding of no ineffective assistance of counsel on the basis of nexus reasoning. See *Lynch v. Sec'y, Fl. Dept. Corr's*, 776 F.3d 1209 (11th Cir. 2015); *Hannon v. Sec'y Dept. of Corr.*, 562 F.3d 1146 (11th Cir. 2009); *Ploof v. State*, 75 A.3d 840 (Del. 2013); *In re Crew*, 254 P.3d 320 (Cal. 2011). Many other federal district courts have indirectly addressed the issue by implicitly either rejecting or condoning the use of nexus reasoning in *Strickland* analyses. This circuit split on a critical aspect of capital sentencing procedure—determining whether a defendant received ineffective assistance of counsel—merits this Court's urgent consideration.

In *Lambright*, a three-judge panel of the Ninth Circuit Court of Appeals vacated the defendant's death sentence, per curiam, on the grounds that the District Court had impermissibly used nexus reasoning when deciding the defendant's ineffective assistance of counsel claim:

[a]t the outset, we reject the district court's analysis with respect to deficient performance and prejudice because it is predicated on the application of a legal test that is clearly inapplicable. The district court disregarded virtually all of the mitigating evidence that *Lambright* presented at the evidentiary hearing on the basis that it had no "explanatory nexus" to the crime. In so doing, it misapplied controlling Supreme Court and Ninth Circuit precedent.

490 F.3d at 1114. The Ninth Circuit further held that the District Court had “violate[d] the rule set forth in *Tennard* [and] *Smith v. Texas*” because it “did not consider [as] mitigating any evidence without an explicit nexus to the crime, or it gave such evidence de minimus weight.” *Lambright*, 490 F.3d at 1115.

Unlike the Ninth Circuit’s explicit rejection of the use of nexus reasoning in *Strickland* analyses under *Tennard*, the Eleventh Circuit has implicitly adopted such an approach. In *Lynch*, the Eleventh Circuit found that the Florida Supreme Court made a reasonable determination of the facts when it held that there was no prejudice where the petitioner “had failed to present any evidence connecting any cognitive condition to his behavior” and had presented “little to no testimony establishing that any impairment or schizoaffective symptoms contributed to his actions.” 776 F.3d at *1223.

Likewise in *Hannon*, the Eleventh Circuit, affirming the defendant’s death sentence, held:

[w]e agree with the district court that the state court did not unreasonably apply *Strickland* when it weighed the factors and concluded that Hannon failed to establish prejudice from the alleged lack of investigation into mitigation evidence . . . [N]o expert presented evidence to establish any nexus between Hannon’s alleged mental impairment and his behavior and the crimes. In fact, Dr. Crown testified that he was not asked to assess Hannon’s competency or to address whether his brain damage affected his behavior on the date of the crimes

....
Thus, the state court reasonably concluded that Hannon failed to demonstrate that if the mental health testimony presented during the post-conviction hearing had been presented at trial along with the other mitigation evidence that was presented during both the guilt and penalty phases of the trial there is a reasonable probability that the result of the proceeding would have been different

562 F.3d at 1157 (emphasis added). The Eleventh Circuit again expressly relied on nexus reasoning to determine that trial counsel's failure to investigate mitigating evidence did not prejudice the defendant because no expert testified about how the mitigating evidence was connected to the defendant's crime. *See id.* Unsurprisingly, the court did not make a relevant citation to either *Tennard* or *Smith* in either opinion.

Several federal district courts have more expressly rejected *Tennard's* applicability to *Strickland* analyses. *See Rodriguez v. Davis*, No. 5:13-CV-233-C, 2016 WL 4098339, at *23 (N.D. Tex. 2016) (holding that "*Tennard* does not purport to establish standards for *Strickland* claims" and declining to find that state court's finding of no prejudice was an unreasonable application of *Tennard*); *Barbee v. Stephens*, No. 4:09-CV-074-Y, 2015 WL 4094055, at *51 (N.D. Tex. 2015) ("*Tennard* does not purport to establish standards for counsel's representation under *Strickland* . . . The Court, therefore, rejects Barbee's implication that *Tennard* sets a standard for counsel's representation under the Sixth Amendment."). Conversely, at least one other federal district court has expressly renounced the use of nexus reasoning when determining whether the failure to present certain mitigating evidence prejudiced a defendant. *See Jefferson v. Sellers*, 250 F. Supp. 3d 1340, 1384 n.13 (N.D. Ga. 2017) (holding that trial counsel's failure to conduct neuropsychological testing to further investigate the petitioner's brain damage was prejudicial, regardless of whether he was able to link his mental impairment to the crimes).

State courts of last resort are also conflicted on this issue. In 2004, just after the *Tennard* decision, the Missouri Supreme Court reversed and remanded a defendant's death sentence on the grounds that the post-conviction court had erroneously considered the nexus between mitigating evidence not investigated by trial counsel and the crime in dismissing the defendant's ineffective assistance of counsel claim. See *Hutchinson*, 150 S.W.3d at 305, 308; see also *State v. Payne*, 146 Idaho 548, 569 (Idaho 2008) (finding that pre-*Ring* sentencing court did not properly weigh mitigating and aggravating factors when it "considered the mental health evidence only in the context of whether there was a nexus between [the defendant's] mental health and the crime," and holding that, under *Tennard* and *Smith*, "mental health evidence is relevant to mitigation even where there is not such a nexus"). The California Supreme Court, in contrast, has expressly used nexus reasoning to uphold a finding of no *Strickland* prejudice on post-conviction review. See *In re Crew*, 254 P.3d at 307–08 (finding no *Strickland* prejudice because defendant failed to establish a casual connection between the previously un-presented evidence of his dysfunctional family environment and the crime he committed).

The Delaware Supreme Court, along with several federal district courts, has taken somewhat of a middle-ground approach. In *Ploof*, 75 A.3d 840, the state supreme court, reviewing a post-conviction court's finding of no ineffective assistance of trial counsel in a capital case, found no prejudice under *Strickland*. While the court cited *Tennard* and the Ninth Circuit's decision in *Lambright* for the

proposition that “the United States Supreme Court [has] explicitly rejected a requirement that mitigating evidence have some nexus to a crime in order to find prejudice,” it nonetheless engaged in nexus reasoning in order to assess the *weight* of the un-investigated mitigating evidence in conducting its prejudice analysis. *See Ploof*, 75 A.3d at 864 n.105, 856 n.57; *see also Quintero v. Westbrook*, No. 3:09-cv-00106, 2017 WL 1196520, at *52 n.53 (M.D. Tenn. 2017) (holding that, while there is no requirement that an impairment have a nexus to the crime in order to be considered mitigating, “the existence or lack of such a nexus is a factor that a sentencing jury may consider,” and “there is no reasonable probability in this case that the jury would have found an impairment without such a nexus to match or exceed the weight of the aggravating factors”); *Sanders v. Davis*, No. 1:92-cv-05471-LJO-SAB, 2017 WL 2591907, at *56 (E.D. Cal. 2017) (“It appears settled that a court may assign less weight to mitigating factors that did not influence a defendant’s conduct at the time of the crime . . . Causal nexus and any lack thereof may be considered in assessing the quality, strength and overall weight of the mitigating evidence.”).

This “weight-not-admissibility” argument is not unlike the reasoning employed by the Arizona Supreme Court over the fifteen-year period in which it infused nexus reasoning into its direct review of capital sentences. *See McKinney v. Ryan*, 813 F.3d 798, 802 (9th Cir. 2015). Under Arizona’s capital sentencing statute, the Arizona Supreme Court is required to conduct *de novo* review and re-weighing of aggravating and mitigating factors in any capital case in which the death penalty

has been imposed. Ariz. Rev. Stat. Ann. § 13–755. After this Court’s decision in *Tennard* expressly rendered the Arizona Supreme Court’s practice unconstitutional, the state supreme court clarified that it

do[es] not require that a nexus between the mitigating factors and the crime be established before [it] consider[s] the mitigation evidence. See *Tennard v. Dretke*, 542 U.S. 274, 287 (2004). But the failure to establish such a causal connection may be considered in assessing the quality and strength of the mitigation evidence.

State v. Newell, 212 Ariz. 389 (Ariz. 2006) (emphasis added); see *McKinney*, 813 F.3d at 818. The Ninth Circuit, ultimately rejecting the distinction articulated by the Arizona Supreme Court, argued that “the Arizona Supreme Court’s consistent articulation and application of its causal nexus test” before and after *Tennard* demonstrated that it was not, as a matter of law, fully considering as mitigating evidence that did not have a causal nexus to the crime, in violation of this Court’s mandate in *Eddings*. See *McKinney*, 813 F.3d at 803–04.

In short, federal and state courts are hopelessly splintered as to whether and how this Court’s mandate in *Tennard* and *Smith* extends to reviewing courts tasked with determining whether trial counsel’s failure to present mitigating evidence prejudiced a defendant. Some courts find nexus reasoning by a reviewing court in a *Strickland* analysis plainly violative of *Tennard* and *Smith*; others read *Tennard* and *Smith* much narrower and hold that those decisions simply have no bearing on how a reviewing court applies *Strickland*. Still, others hold that while *Tennard* and *Smith* prohibit reviewing courts from refusing altogether to consider causally unrelated mitigating evidence, they do not preclude a reviewing court from giving

such mitigating evidence limited weight in determining that its presentation at sentencing would not have changed even one juror's vote. Such disparate interpretation and application of this Court's precedent in cases with the highest possible stakes threatens unfairness and inconsistency, and Petitioner urges this Court to clarify this critical line of capital punishment precedent.

4. Should This Court Grant Certiorari to Clarify its Holdings in *Tennard* and *Smith*, it Should Hold That Those Precedents Preclude Reviewing Courts from Using Any Nexus Reasoning When Analyzing *Strickland* Claims.

As described in Part (3) above, reviewing courts of varying jurisdictions across the country have read *Tennard* and *Smith* to impose vastly different requirements on their analyses of prejudice under *Strickland*. In Petitioner's case, the Tennessee Criminal Court of Appeals took the narrowest possible approach. It did not purport to engage in a comprehensive analysis of what *weight* jurors might have given the undiscovered evidence of Petitioner's brain damage, or of how the jurors' assessment of that evidence's weight might have been affected by its causal nexus to the crime. Instead, without engaging in the requisite "just one juror" reasonable probability analysis, *see Wiggins*, 539 U.S. at 537, the state court simply stated "we cannot conclude that counsel's failure to present this type of evidence prejudiced the Petitioner. Neither [expert witness] could specifically state whether the Petitioner's brain damage affected his actions at the time of the murder in this case." *Odom*, 2017 WL 4764908 at *31. However, even assuming, *arguendo*, that the state court had couched its decision in terms of what weight the jury most likely would have assigned the brain damage evidence in light of its nexus to the crime,

Petitioner submits that this Court should hold that such reasoning is still forbidden by *Tennard* and *Smith*.

Petitioner does not deny the difficulty of a reviewing court's task in determining post-hoc what hypothetical weight a juror *might* have placed on undiscovered mitigating evidence. But allowing reviewing courts to simplify their inquiry by assigning no, or even limited, weight to mitigating evidence which has no causal nexus to the crime would flout available information about juror decision-making. It is clear that jurors empirically find some characteristics of a defendant mitigating despite the fact that they may be wholly unrelated to the crime committed. See Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?*, 98 Colum. L.Rev. 1538, 1559, Table 4 (1998) (finding that jurors were less likely to vote for death where a defendant had a background of extreme poverty, was seriously abused as a child, or had been previously institutionalized but was never given any real help). Petitioner submits that in resolving the current conflict among circuits about the use of nexus reasoning in deciding ineffective assistance of counsel claims, this Court should find that *Tennard* and *Smith* preclude the use of *any* nexus reasoning when a reviewing court is determining whether counsel's performance was deficient or prejudiced a defendant. Such a bright line rule would guide reviewing courts towards a more faithful application of *Wiggins* in which the *actual, empirical thought processes of jurors*—as opposed to hypothetical nexus analyses—are used to determine whether one juror would have changed her vote. Unless this Court grants certiorari to

resolve the enduring split in authority on this issue, there is a grave risk that mitigating evidence that may well have swayed a juror to spare a defendant's—like Petitioner's—life, will continue to be unconstitutionally dismissed by reviewing courts.

II. THIS COURT SHOULD INDEPENDENTLY GRANT CERTIORARI TO CORRECT THE LOWER COURT'S PLAIN MISAPPLICATION OF ITS *STRICKLAND* PRECEDENT.

1. The Tennessee State Court's Decision Denied Petitioner His Sixth Amendment Right to Counsel by Failing to Find that His Counsel's Performance Was Deficient Under *Strickland*.

In *Strickland*, this Court first announced that in some cases, counsel's performance can be so deficient that it “deprive[s] the defendant of a fair trial, a trial whose result is reliable.” 466 U.S. at 687. Recognizing the utmost importance of mitigating evidence in capital cases, this Court has paid particular attention to ineffective assistance of counsel claims where a defendant alleges that his trial counsel failed to investigate or raise important evidence in mitigation. *See Porter*, 558 U.S. 30; *Rompilla*, 545 U.S. 374; *Wiggins*, 539 U.S. 510; *Williams*, 529 U.S. 362. Even in spite of the passage of a federal statute which mandates deference to state court interpretations of Supreme Court precedent on federal habeas review, *see* 28 U.S.C. § 2254, this Court has repeatedly vacated state death sentences on the grounds that trial counsel failed to investigate or present critical mitigating evidence. *See Porter*, 558 U.S. 30; *Rompilla*, 545 U.S. 374; *Wiggins*, 539 U.S. 510; *Williams*, 529 U.S. 362.

The fact that trial counsel presented *some* evidence in mitigation is not determinative in the *Strickland* performance inquiry: that much is clear from this

Court's decisions in *Rompilla*, *Wiggins*, and *Williams*. See *Rompilla v. Beard*, 545 U.S. 374, *Wiggins v. Smith*, 539 U.S. 510; *Williams v. Taylor*, 529 U.S. 362. The Court's decision in *Wiggins* is particularly instructive. In *Wiggins*, trial counsel hired a psychologist to conduct neurological tests on the defendant and were aware of mitigating evidence about defendant's "disgusting" childhood, "misery as a youth" and his multiple foster care placements as a child, but chose to pursue an alternative, "non-principal actor" mitigation strategy instead. See 539 U.S. at 515, 523. Vacating the defendant's death sentence, this Court held: "our principal concern in deciding whether [trial counsel] exercised reasonable professional judgment *is not whether counsel should have presented a mitigation case*. Rather, we focus on whether the *investigation supporting counsel's decision* not to introduce mitigating evidence of Wiggins' background *was itself reasonable*." *Id.* at 522–23 (internal quotations and citations omitted) (emphasis added). The teaching of *Wiggins* is that counsel's performance is deficient when he fails to thoroughly investigate certain critical mitigating evidence, not because the Court will second-guess counsel's strategic decisions but because a decision to pursue a certain mitigation strategy cannot be deemed reasonable or tactical if it was based on insufficient information about alternative strategies. See *id.* at 522–23.

The Court also emphasized in *Wiggins* that its analysis of whether counsel's performance was deficient under "prevailing professional norms" is directly informed by prevailing standards set by professional groups such as the American Bar Association. See *id.* at 522–23. The Court has explicitly instructed that the

“standards for capital defense work articulated by the American Bar Association (ABA) [are] standards to which we long have referred as ‘guides to determining what is reasonable.’” *Id.* at 524 (quoting *Strickland*, 466 U.S. at 688).

The applicability of *Wiggins* to Petitioner’s case could not be more clear. Petitioner’s sentencing counsel were unquestionably on notice that Petitioner likely suffered from neurological impairments—they had *multiple* reports from previous psychological evaluations which had not only identified the possibility of organic damage but had also explicitly recommended that Petitioner undergo neurological testing and imaging. *See* CCA Brief 35–36. And yet, in spite of recommendations to conduct a full neurological exam not only from several doctors who saw Petitioner but also from counsel’s *own mitigation specialist*, Petitioner’s counsel simply chose not to investigate Petitioner’s brain damage because it did not fit with their predetermined mitigation strategy. *See* PC Vol. 15, 205–06.

This course of action contravened the ABA guidelines regarding standard mental health assessments for capital defendants. “[M]ental health experts are essential to defending capital cases. Neurological and psychiatric impairment, combined with a history of physical and sexual abuse, are common among persons convicted of violent offenses....” 2003 ABA Guidelines, Commentary to Guideline 4.1—The Defense Team and Supporting Services. “In fact, the prevalence of mental illness and impaired reasoning is so high in the capital defendant population that ‘[i]t must be assumed that the client is emotionally and intellectually impaired.’” 2003 ABA Guidelines, Commentary to Guideline 10.5—Relationship with the Client

(internal footnote omitted). Thus, a competent and reliable mental health evaluation is of critical import. “Counsel must ... obtain a *thorough* physical and neurological examination. Diagnostic studies, *neuropsychological testing*, *appropriate brain scans*, blood tests or genetic studies, and consultation with additional mental health specialists may also be necessary.” 2003 ABA Guidelines, Commentary to Guideline 4.1—The Defense Team and Supporting Services (footnotes omitted; emphasis added).

In finding that Petitioner’s counsel’s performance was not deficient, the Tennessee state court opinion relied heavily on the fact that Petitioner’s counsel had chosen to pursue an alternative mitigation strategy. *See Odom*, 2017 WL 4764908 at 24–30. The state court talked at length about the fact that there were numerous discussions about which mitigation strategy to pursue, and that counsel ultimately decided to present “a theory of mitigation to the jury based upon the fact petitioner, due to his prior life sentence in Mississippi, would never be released from prison if the jury gave a life sentence.” *Id.* at 26. The court went on to conclude that “[c]onsidering [that] a theory based upon cognitive impairments had been previously unsuccessfully utilized by 1999 trial counsel, this court does not find 2007 trial counsel were ineffective in failing to present an alternative mitigation theory.” *Id.* at 27.

This reasoning is plainly violative of this Court’s mandate in *Strickland* and particularly in *Wiggins*. That counsel ultimately chose a different strategy is entirely beside the point; a finding of *Strickland*-level deficiency is not precluded

simply because counsel forewent the mitigation strategy that would have been supported by the un-investigated evidence. *See Strickland*, 466 U.S. at 690–91 (“[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.”). Rather, the question is whether, in *making* their decision about which strategy to pursue, counsel’s investigation into each possible strategy was sufficient enough to render the ultimate decision a reasonably informed one. Here, as in *Wiggins*, Petitioner’s counsel based their decision to forgo a reduced culpability mitigation defense on an unreasonable investigation in which they plainly failed to comply with prevailing standards of representation by failing to conduct neurological testing and imaging, and failing to discover evidence of Petitioner’s organic brain damage. In holding that Petitioner’s sentencing counsel’s performance was not deficient, the Tennessee state court did not faithfully apply this Court’s binding precedent to Petitioner’s case.

Insofar as the state argues that Petitioner’s sentencing counsel reasonably relied on the results from neurological testing done at the Parchman Prison Medical Division in deciding not to pursue further testing, that is, in and of itself, an unreasonable investigation and thus constitutes deficient performance. In finding no deficiency of counsel’s performance, the Tennessee state court reasoned:

[lead sentencing counsel] testified when petitioner was confined to Parchman he was given a battery of psychological tests and underwent

a physical examination. He stated the petitioner's EEG was normal and the records indicate petitioner suffers from traits of anti-social personality disorder but had no other psychological issues. Testing was conducted by the Parchman officials to determine if petitioner possessed any “organicity” or neurological deficits. This examination found no neurological deficits and petitioner was found to have a full scale IQ of 93 . . . [Sentencing co-counsel] stated usually a defense team would want to put forward evidence of brain damage, if it exists, in a capital case. However, in petitioner's case, there was a long history of evaluations which did not support such a claim.

Odom, 2017 WL 4764908 at *25.¹ Petitioner submits that the state court's conclusion is erroneous for several reasons.

First, the state court's characterization that Petitioner had a “long history” of evaluations which did not suggest brain damage belies the factual record. Indeed, the 1978 Mississippi State Hospital evaluation is the *only* evaluation suggesting that Petitioner did not have neurological deficits, and it directly contradicts several other evaluations—conducted before *and after* the Mississippi State Hospital assessment—by other medical professionals who opine about possible organic brain damage and explicitly recommend further testing. *See* CCA Brief at 34–36.

Second, at the time of Mr. Odom's third sentencing hearing in 2007, the single Mississippi State Hospital evaluation indicating a lack of neurological deficits was almost thirty years old. Neuropsychology is a constantly and rapidly evolving field. The first MRI machine was invented *the very same year* that Mr. Odom's Mississippi State Hospital evaluation was done; MRIs are now, of course, ubiquitous, and widely considered the gold standard for diagnosing traumatic brain

¹ The psychological evaluation referenced by the intermediate appellate court was conducted at Mississippi State Hospital prior to Petitioner's previous trial and subsequent incarceration in Parchman prison. *See* PC Ex. 13 at 8.

injuries. See Bruce Lee & Andrew Newberg, *Neuroimaging in Traumatic Brain Imaging*. NeuroRx®: 2 J. Am. Soc'y Experimental NeuroTherapeutics 372–83 (2005). It was simply unreasonable for Mr. Odom's 2007 sentencing counsel to rely on such outdated, technologically primitive neurological testing results.

Third, this Court in other contexts has expressly recognized the import of conducting independent mental health evaluations which are not tinged by the state's influence. Just last year, this Court reiterated its holding in *Ake v. Oklahoma*, 470 U.S. 68 (1985) that “a defendant must receive the assistance of a mental health expert who is sufficiently available to the defense and *independent from the prosecution* to effectively assist in evaluation, preparation, and presentation of the defense.” *McWilliams v. Dunn*, 137 S. Ct. 1790, 1799 (2017) (internal quotations omitted) (emphasis added). By analogy, it is simply not reasonable for counsel to base a decision not to investigate a defendant's potential brain damage simply on the fact that a *state prison's* mental health facility once determined, thirty years prior, that such brain damage did not exist.

It was deficient performance for Mr. Odom's counsel to either not know about the unreliability of neurological test results coming out of an institution with such a sordid history, or to not care enough to investigate the matter further. Mr. Odom's 2007 sentencing counsel had a duty not to simply take the evaluation from the state prison at its word, especially in light of the prison's reputation and considering the *numerous* other contradictory findings by other medical professionals. Moreover, counsel's conduct was all the more unreasonable in light of the fact that they *did*

eventually engage a mental health professional, but did so two months prior to sentencing, giving him insufficient time to perform adequate neurological evaluations of Petitioner or to rebut the state prison facility's conclusions. CCA Brief at 37.

For all of the foregoing reasons, this Court should find that counsel's investigation was deficient under *Strickland*, and that the Tennessee state court erred in holding otherwise.

2. The Tennessee State Court's Decision Denied Petitioner His Sixth Amendment Right to Counsel by Failing to Find That His Counsel's Deficient Performance Prejudiced Him Under *Strickland*.

The Tennessee Criminal Court of Appeals also misapplied this Court's precedent in finding that counsel's deficient performance did not prejudice Petitioner. In order to prove that Petitioner suffered prejudice as a result of his counsel's ineffectiveness, Petitioner need only prove that there is a "reasonable probability that at least one juror would have struck a different balance" in weighing the aggravating and mitigating circumstances and would have voted for life instead of death. *Wiggins*, 539 U.S. at 537.

This Court has made explicit that failure to investigate mitigating evidence can be *Strickland*-prejudicial, *regardless of whether counsel would have changed their mitigation strategy* as a result of uncovering that evidence. *See Wiggins*, 539 U.S. at 536. In *Wiggins*, this Court reasoned as follows:

[t]he dissent nevertheless maintains that *Wiggins'* counsel would not have altered their chosen strategy of focusing exclusively on *Wiggins'* direct responsibility for the murder. But as we have made clear, counsel were not in a position to make a reasonable strategic choice as to

whether to focus on Wiggins' direct responsibility, the sordid details of his life history, or both, because the investigation supporting their choice was unreasonable . . . We further find that had the jury been confronted with this [] mitigating evidence, there is a reasonable probability that it would have returned with a different sentence.

539 U.S. at 536 (internal citations omitted). Petitioner's counsel were in precisely the same misinformed position that Mr. Wiggins' counsel were in: they made a "tactical" choice which was based on imperfect information as a result of their own failure to investigate Petitioner's neurological deficits and brain damage. And, as with Mr. Wiggins' jury, there is a reasonable probability that Petitioner's jury would have returned a different sentence had they been confronted with this powerful mitigating evidence.

Indeed, the empirics show that there is not just a reasonable probability but a *high likelihood*, that the undiscovered evidence of Petitioner's organic brain damage, if presented at his sentencing proceeding, would have changed the jury's decision. A study done as part of the Capital Jury Project—one of the most comprehensive efforts ever undertaken to empirically understand how juries make capital sentencing decisions—concluded that "circumstances over which a defendant ha[s] no control and that diminish his individual responsibility at the time of the offense are highly mitigating" in the minds of jurors. See Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?*, 98 Colum. L.Rev. 1538, 1564 (1998). With respect to mitigating evidence about organic brain damage specifically, other empirical studies have shown that neuroimaging and expert testimony—like that presented at Petitioner's post-conviction evidentiary

hearing but neither investigated nor presented at his sentencing hearing—are especially mitigating:

[f]or defendants diagnosed with psychopathy, when jurors were persuaded that the defendant’s behavior was the result of a genuine brain-based defect, which through no fault of his own contributes to his dangerous behavior, jurors were more likely to see him as less responsible for his behavior and were more likely to spare his life. The most persuasive form that evidence took was when neuroimages accompanied the neuroscience expert testimony.

Michael J. Saks et al., *The Impact of Neuroimages in the Sentencing Phase of Capital Trials*, 11 J. of Empirical Legal Stud. 105 (2014). This type of data is the most powerful and reliable information we have about how juries actually make decisions in capital cases; it is thus of the utmost relevance and importance when a post-conviction court is reviewing whether there is a reasonable probability that a juror considering the new mitigating evidence “would have struck a different balance” and voted for life instead of death. *Wiggins*, 539 U.S. at 537.

Moreover, this Court’s own precedent, in addition to the strong empirical evidence cited above, plainly precludes the type of reasoning the state court engaged in in reaching the conclusion that Petitioner’s counsel’s performance did not prejudice him. In *Sears*, 561 U.S. 945, this Court granted certiorari and vacated a petitioner’s death sentence, per curiam, on a factual record strikingly similar to that of Petitioner’s case here. In *Sears*, the petitioner’s trial counsel failed to investigate or discover evidence of petitioner’s frontal lobe damage, and counsel instead pursued a mitigation strategy in which they presented evidence of the devastating impact a death sentence would have on the petitioner’s family. 561 U.S. at 947. In

finding that petitioner’s counsel’s deficient performance prejudiced him, this Court concluded:

the [state] court curtailed a more probing prejudice inquiry because it placed undue reliance on the assumed reasonableness of counsel's mitigation theory . . . [T]hat a theory might be reasonable, in the abstract, does not obviate the need to analyze whether counsel's failure to conduct an adequate mitigation investigation before arriving at this particular theory prejudiced Sears. The “reasonableness” of counsel's theory was, at this stage in the inquiry, beside the point: Sears might be prejudiced by his counsel's failures, whether his haphazard choice was reasonable or not.

Sears, 561 U.S. at 953. This Court went on to hold that “[a] proper analysis of prejudice under *Strickland* would have taken into account the newly uncovered evidence of Sears' ‘significant’ mental and psychological impairments . . . to assess whether there is a reasonable probability that Sears would have received a different sentence *after a constitutionally sufficient mitigation investigation.*” *Sears*, 561 U.S. at 956 (emphasis added).

Notwithstanding this Court’s clear language in *Sears*, the Tennessee state court concluded in Petitioner’s case:

[sentencing counsel’s] theory of mitigation . . . would have been hampered if mental health experts had testified that the Petitioner lacked the ability to control his actions . . . Given the mitigating evidence presented by counsel during the second resentencing hearing, and in light of the discussion herein, we conclude that the additional post-conviction evidence [of defendant’s brain damage] would not have affected the jury's verdict.

Odom, 2017 WL 4764908 at *31. Petitioner submits that, in so holding, the state court placed undue weight on the presumed reasonableness of sentencing counsel’s alternative strategy, without fully considering “whether counsel's failure to conduct

an adequate mitigation investigation *before* arriving at this particular theory” prejudiced him, in direct contravention of *Sears*. 561 U.S. at 953.

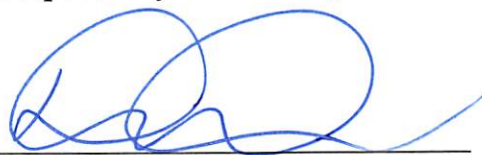
In sum, this Court’s reasoning in *Strickland*, *Wiggins*, and particularly *Sears* mandates a different conclusion than that which was reached by the Tennessee Court of Criminal Appeals. The empirical evidence also strongly supports Petitioner’s position that there is a reasonable probability that, had his sentencing jury been aware of his significant neurological deficits and brain damage, at least one juror would have voted her vote to life. *See Wiggins*, 539 U.S. at 537. Petitioner submits that he was therefore prejudiced by his counsel’s failure to investigate this crucial mitigating evidence, and that this Court should find that the state court’s decision to the contrary was in direct violation of this Court’s precedent and requires reversal.

CONCLUSION

For the past 26 years, and in spite of numerous substantive and procedural errors at all levels of its state court system, the State of Tennessee has been relentless in its pursuit of executing Petitioner Richard Lloyd Odom. The State’s most recent series of errors stems from the post-conviction court’s misapplication of this Court’s *Tennard/Smith* and *Strickland* lines of precedent. The state court’s decision contributes to growing conflict amongst lower courts about what types of analyses are permissible when considering *Strickland* claims, and denies Petitioner relief from his counsel’s patently deficient failure to investigate or discover evidence of his neurological deficits and organic brain damage. For the foregoing reasons,

Petitioner requests that the Writ be granted, and that Petitioner be afforded such further relief from his unconstitutional sentence of death as the Court may find appropriate.

Respectfully submitted,



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IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON



RICHARD ODOM v. STATE OF TENNESSEE

Criminal Court for Shelby County
No. 91-07049

No. W2017-01027-CCA-R28-PD

ORDER

This matter is before the Court on the Petitioner's application for permission to appeal the post-conviction court's denial of his motion to reopen his post-conviction petition. The State has responded in opposition to the motion.

The Petitioner was convicted by a Shelby County jury of first degree murder during the perpetration of rape on October 13, 1992. After conviction, the jury sentenced the Petitioner to death finding three aggravating circumstances outweighed any mitigating circumstances. Upon appeal, our Supreme Court affirmed the conviction but overturned the sentence of death. *State v. Odom (Odom I)*, 928 S.W.2d 18 (Tenn. 1996). On remand for resentencing, the Petitioner was again sentenced to death based upon the finding of an aggravator that the Petitioner was previously convicted of one or more felonies, the statutory elements of which involved the use of violence to the person. Again, on appeal, our Supreme Court overturned the death sentence imposed by the jury. *State v. Odom (Odom II)*, 137 S.W.3d 572 (Tenn. 2004). In 2007, a third sentencing hearing was held in which the Petitioner was again sentenced to death with the jury finding as aggravating circumstances that the Petitioner had previously been convicted of a prior violent felony and that the murder was committed during an attempt to commit robbery. This sentence was affirmed by our Supreme Court. *State v. Odom*, 336 S.W.3d 541 (Tenn. 2011).

The Petitioner later timely filed a petition for post-conviction relief alleging constitutional violations including, among other arguments, ineffective assistance of counsel. After hearing, the post-conviction court denied relief and the appeal of that decision is currently pending before this Court.

On January 10, 2017, the Petitioner filed a motion to reopen his post-conviction petition alleging that a new constitutional right had been recognized by the ruling of the United States Supreme Court in *Hurst v. Florida*, 136 S.Ct. 616 (2016), that required retroactive application. The motion was denied by the post-conviction court and the Petitioner timely filed an application for permission to appeal with this Court.

Tennessee Code Annotated section 40-30-117(a) authorizes the reopening of post-conviction proceedings only under the following circumstances:

(1) The claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. The motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial; or

(2) The claim in the motion is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or

(3) The claim asserted in the motion seeks relief from a sentence that was enhanced because of a previous conviction and the conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the motion must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid; and

(4) It appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.

T.C.A. § 40-30-117(a). The decision whether to grant a motion to reopen is within the discretion of the post-conviction court. *Id.* at (c).

The Petitioner asserts that he is entitled to relief under Tennessee Code Annotated section 40-30-117(a)(1) in that the decision of the United States Supreme Court in *Hurst* created a new constitutional right that would provide an avenue of relief. This Court must first assess whether the *Hurst* decision created a new constitutional right that would afford any relief to the Petitioner. Tennessee Code Annotated section 40-30-122 addresses interpretation of a new rule of constitutional law stating in part:

“For purposes of this part, a new rule of constitutional criminal law is announced if the result is not dictated by precedent existing at the time the

petitioner's conviction became final and application of the rule was susceptible to debate among reasonable minds.”

Tenn. Code Ann. § 40-30-122. Further, the courts have determined that a “case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government [or] ... if the result was not dictated by precedent existing at the time the defendant's conviction became final.” *Teague v. Lane*, 109 S.Ct. 1060, 1070 (1989) (citations omitted); *see also Van Tran v. State*, 66 S.W.3d 790, 810-11 (Tenn. 2001).

Following the legal reasoning set out above, we cannot find that the trial court abused its power determining that no new constitutional right was created through the *Hurst* ruling. The Supreme Court's opinion in *Hurst* arose out of an application of the United States Supreme Court decision in *Ring v. Arizona*, 122 S.Ct. 2428 (2002), to the Florida capital sentencing procedure. *Hurst*, 136 S.Ct. at 617. Specifically, *Hurst* espoused no new rule of law but only made a present determination on the constitutionality of the Florida sentencing procedure. *Id.* There was no new substantive law developed and therefore there is no basis for relief on the Petitioner's motion to reopen post-conviction proceedings.

Even if a new retroactively applicable constitutional right was created by the *Hurst* decision, such ruling would not be applicable to the Tennessee procedure for sentencing in a capital case. The Petitioner argues that the service of the trial court as “thirteenth juror” in confirming the sentence of death by a jury violates the finding in *Hurst*, as well as its predecessor case *Ring*, that all findings of fact relative to a death sentence must be found by a jury. Under the Florida capital sentencing procedure addressed in *Hurst*, the trial court judge had the sole discretion of the application of a sentence of death and the jury opinion was merely advisory. *Id.* at 620. Even if the jury chose not to recommend a sentence of death, the trial court judge could impose a death sentence against the recommendation of the jury. *Id.* Those same facts are not true for the Tennessee capital case sentencing procedure. As mentioned earlier, in Tennessee the trial court judge serves as the “thirteenth juror” but only to affirm the sentence of death given by the jury. With the affirmation role of the trial court, the jury makes all the factual findings necessary for the imposition of the death penalty and the trial court judge serves only to safeguard the rights of the defendant. If the jury imposes a sentence of less than death, the trial court judge cannot increase the sentence to impose the death penalty. Given this procedure, even if *Hurst* did announce a new retroactive rule of law it would have no bearing on the present case or any current Tennessee capital case.

As with the argument against the role of the trial court judge as “thirteenth juror, even if a new substantive constitutional right was created in *Hurst* the Petitioner would not be entitled to relief on his argument that *Hurst* created a new substantive law related to the determination of whether a prior conviction for felony murder was a crime “whose statutory elements involve the use of violence to the person.” *See* Tenn. Code Ann. §39-

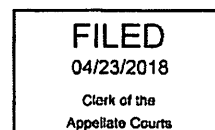
13-2014(i)(2). Upon review of the *Hurst* opinion, this court can find no basis for this argument that would allow relief pursuant to Tennessee Code Annotated section 40-30-117. Our Supreme Court has previously ruled that the determination of whether the statutory elements of a crime involve the use of violence to a person is a legal determination to be made by the trial court judge. *State v. Cole*, 155 S.W.3d 185 (Tenn. 2005). The *Cole* case was decided after *Ring* and therefore the application of *Ring* by the *Hurst* court would not result in the creation of a new constitutional right to allow the Petitioner to proceed in this matter. The law in regards to the legal determination referenced is well settled in Tennessee and is not affected by the *Hurst* ruling. Therefore, the trial court did not abuse its discretion in deny the petition to reopen.

As set out above, we find that the Petitioner has failed to demonstrate that he is entitled to reopen his post-conviction petition pursuant to Tennessee Code Annotated section 40-30-117(a). IT IS HEREBY ORDERED that the Petitioner's application for permission to appeal is DENIED. Because the Petitioner is indigent, costs of the appeal are taxed to the State.

PER CURIAM

JOHN EVERETT WILLIAMS, JUDGE
CAMILLE R. McMULLEN, JUDGE
J. ROSS DYER, JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON



RICHARD LLOYD ODOM v. STATE OF TENNESSEE

**Criminal Court for Shelby County
No. 91-07049**

No. W2015-01742-SC-R11-PD

ORDER

Upon consideration of the application for permission to appeal of Richard Lloyd Odom and the record before us, the application is denied.

PER CURIAM

Filed 7-28-15
Richard DeSaussure, Clerk
BY Terrillia Leiper

IN THE CRIMINAL COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION VI

RICHARD ODOM)
Petitioner)
vs.) NO. 91-07049
STATE OF TENNESSEE)
Respondent)

POST CONVICTION ORDER

This matter came to be heard upon Petitioner Richard Odom's petition for post conviction relief. Petitioner contends he received ineffective assistance of counsel both at trial and on appeal of his conviction and sentence. Additionally, petitioner raises various claims of prosecutorial misconduct, trial court error, and constitutional violations. Having reviewed the pleadings filed by the parties, the testimony and evidence presented at the hearing on this matter, and relevant portions of the trial record, this court finds both petitioner's trial and appellate counsel provided effective representation. Regarding petitioner's additional claims, this court finds none of the claims raised by petitioner entitle him to a new trial and/or sentencing hearing. Thus, petition for post conviction relief of petitioner is hereby DENIED.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

In July, 1991, petitioner, Richard Odom, was indicted for first degree murder during the perpetration of a rape. Prior to trial, the State filed a notice of intent to seek the death penalty. In October, 1992, petitioner was convicted of first degree murder and sentenced to death. However, on direct appeal of his conviction and sentence, the appellate courts reversed petitioner's death sentence and remanded the case to the Shelby County Criminal Court for re-sentencing. See State v. Odom 928 S.W.2d 18 (Tenn. 1996). In 1999, following a second capital sentencing proceeding, petitioner was again sentenced to death. On appellate review of his first re-sentencing proceeding, the Tennessee Supreme Court determined, because the trial court had

erroneously admitted detailed and graphic evidence of the petitioner's prior violent felony, a third sentencing hearing was required. In January 2008, following a third capital sentencing proceeding, petitioner was once again sentenced to death. His 2008 sentence of death was affirmed by the Tennessee Supreme Court in March of 2011. The following recitation of facts from the Tennessee Supreme Court's opinion on direct appeal of petitioner's conviction and initial sentence of death provides an accurate summary of the proof presented at the guilt phase of petitioner's trial¹:

The record indicates that at approximately 1:15 p.m. on May 10, 1991, Ms. Mina Ethel Johnson left the residence of her sister, Ms. Mary Louise Long, to keep a 2:30 p.m. appointment with her podiatrist, Stanley Zellner, D.P.M. She agreed to purchase a few groceries while she was out. Johnson had not returned at 5 p.m.; this delay prompted Long to call Zellner. He told Long that Johnson had not kept her appointment. As a result of a subsequent call from Long, Zellner agreed to return to his office and look for Johnson's car in the parking garage. He located her car in the parking garage and observed her body inside. He went immediately to the Union Avenue police precinct and notified officers.

Investigating officers found Johnson's body on the rear floorboard of her car with her face down in the back seat. Her dress was up over her back, and an undergarment was around her ankles. One of several latent fingerprints lifted from the "left rear seat belt fastener" of Johnson's car matched a fingerprint belonging to the defendant, Richard Odom, alias Otis Smith.

The medical examiner testified that Johnson had suffered multiple stab wounds to the body, including penetrating wounds to the heart, lung, and liver. These wounds caused internal bleeding and, ultimately, death. The medical examiner noted "defensive," wounds on her hands. Further examination revealed a tear in the vaginal wall and the presence of semen inside the vagina. In the medical examiner's opinion, death was neither instantaneous nor immediate to the wounds but had occurred "rather quickly."

Three days after the incident, Sergeant Ronnie McWilliams of the Homicide Unit, Memphis Police Department, arrested the defendant. As a result of a search incident to arrest, McWilliams confiscated a large, open, lock-blade knife from the defendant. When they arrived at the homicide office, McWilliams told the defendant of the charges against him and read his Miranda rights to him. The defendant executed a "Waiver of Rights" form, signing "Otis Smith." A short

¹ Since petitioner's original sentence of death was vacated and a new sentencing proceeding ordered, this court does not find the proof presented at the original sentencing is relevant to the proceedings currently before this post conviction court. Likewise, since petitioner's subsequent death sentencing was overturned following the appellate court's review of his re-sentencing proceeding, this court has not included a recitation of the proof presented at petitioner's first re-sentencing hearing. This court has, however, included a recitation of the proof presented at petitioner's second re-sentencing hearing as it is relevant to the issues before this court.

time later he acknowledged having identified himself falsely, executed a second rights waiver by signing "Richard Odom" and gave McWilliams a complete, written statement.

In his statement, the defendant said that his initial intention was to accost Johnson and "snatch" her purse after having seen her in the parking garage beside her car. He ran to her and grabbed her; both of them fell into the front seat. He then pushed her over the console into the rear seat. He "cut" Johnson with his knife. Johnson addressed him as "son." This appellation apparently enraged the defendant; he responded that "[he] would give her a son." He penetrated her vaginally; he felt that Johnson was then still alive because she spoke to him. Beyond the first wound, the defendant claimed not to have remembered inflicting the other stab wounds. Thereafter, the defendant climbed into the front seat and rifled through Johnson's purse. He found nothing of value to him, except the car keys, which he later discarded. He then went to an abandoned building where he had clothing and changed clothes.

The defendant presented no evidence at this phase of the trial. Based on the evidence above, the jury convicted the defendant of first-degree murder committed in the perpetration of rape.

State v. Odom 928 S.W.2d 18 (Tenn. 1996). The following excerpts from the Tennessee Supreme Court's opinion on review of petitioner's second re-sentencing proceeding sets forth the relevant proof presented in support of the aggravating circumstances and the proof of mitigation offered by petitioner:

At the third sentencing hearing, the State offered proof that at approximately 1:15 p.m. on the date of her murder, the victim, a seventy-eight-year-old woman, left the residence of her sister, Mary Louise Long, for an appointment with Dr. Stanley Zellner, a podiatrist. When the victim had not returned by 4:30 p.m., Ms. Long called Dr. Zellner, who informed her that the victim had failed to attend her scheduled appointment. Ms. Long first telephoned the police department to report the victim's disappearance and then contacted John Sullivan, a long-time acquaintance, who agreed to help look for the victim. The two "traced the route" the victim had to drive and found her car in a parking garage. When Sullivan approached the vehicle, he observed the body of the victim on the floor of the backseat. After returning to the car, he did not inform Ms. Long what he had seen, explaining that "she was a very nervous, high strung person." As he drove out of the parking garage, Sullivan encountered a police car parked on a nearby street and told the officer where he could find the body. Sullivan then drove Ms. Long to her residence before returning to the crime scene to provide the police with a statement. Ms. Long died prior to the third sentencing hearing. Her testimony at the initial proceeding was read into evidence.

Donna Michelle Locastro, who was employed by the Memphis Police Department at the time of the murder, had taken Ms. Long's missing person's call prior to the discovery of the body. She and her partner, Don Crowe, first called the local hospitals, the city wrecker dispatch, and the traffic bureau before setting out on the route the victim would have driven to her appointment. The officers arrived at the parking garage at approximately 8:00 p.m., shortly after Sullivan had discovered the body. When Officer Locastro looked inside the vehicle, she noticed what appeared to be blood on the right front passenger's seat and a wallet wedged between the emergency brake and the driver's seat. She also saw that the victim was clutching what appeared to be a check in her left hand. She and other officers secured the area and contacted the homicide unit.

Detective Ronnie McWilliams, who was assigned to the case on the day after the murder, testified that a fingerprint found in the vehicle led to the identification of "Otis Smith" as a potential suspect. Three days after the murder, "Smith" was arrested. He had in his possession an "Old Timer's Light Blade Knife," which had a fold-out blade of over four inches. During the arrest, Detective McWilliams informed "Smith" of his rights. When he signed a waiver, however, Detective McWilliams observed that "Smith" had started to sign another name. Later, when his true identity was established, "Smith" signed a second waiver under the name Richard Odom.

In a written statement to the police, the Defendant, thirty years old at the time and unemployed, admitted killing the victim and provided details of the crime. He stated that just before the murder, he was in the stairwell trying to relax. When another individual entered the stairway, he entered the garage area at the same time the victim arrived. Claiming that he intended only to steal her purse so he could "get something to eat and catch a nap," he told officers that when he ran over to grab her purse, he "somehow grabbed her arm or hand or whatever and we kind of fell back into the car." He stated that he always kept his knife open because of potential danger in the area and that "somehow or another," while "[p]ushing the lady off of me and over the back seat . . . [,] I managed to . . . cut her, I guess." The Defendant also told the police that when "[t]he lady called me, son, I told her, I would give her a son [and] I went to the back . . . seat with her. I don't know if I stabbed her when I got in the back seat with her or when I got back in the front seat." The Defendant admitted that he raped the victim and insisted that she was still alive at the time, claiming that she remarked that she had never had sex before. He told police that he could not remember whether he had stabbed the victim again after the rape. The Defendant acknowledged searching the victim's purse and wallet, but claimed that he found nothing of value and left the items in the car. While admitting that he took the victim's car keys, he stated that he threw them away as he left the parking garage. At the conclusion of his interrogation, the Defendant remarked, "I need help mentally and psychologically, something I can't express just freely and openly."

Dr. Jerry Thomas Francisco, the Shelby County Medical Examiner at the time of the murder, conducted the autopsy. He found a stab wound at the front of the victim's chest and two on the right side of her body towards the back. He also observed cuts on the victim's right hand, which he described as defensive wounds. The knife wound to the front of her chest passed into the right side of the heart, causing two tears which, in turn, caused blood to accumulate in the heart cavity and the left side of her chest. A wound near the side penetrated her chest cavity and produced a tear in the lung, which caused bleeding in the lung cavity. The other wound to the side passed through her abdominal cavity into the liver, which produced bleeding in the peritoneal cavity. Dr. Francisco, who determined that the victim was 5 feet 6 inches in height and weighed 113 pounds, characterized each of the three wounds as lethal. In his opinion, the victim died between one and two hours after the wounds were inflicted. During his examination of the body, Dr. Francisco also discovered a tear of the vagina, a wound he described as caused by forcible penetration. Fluid samples from the victim's vaginal area "[r]evealed the presence of sperm and enzymes that are present in seminal fluid." It was Dr. Francisco's opinion that the vaginal injuries were likely the product of forcible rape.

The proof also established that the Defendant had been convicted of murder in Rankin County, Mississippi, in 1998, seven years after the victim's murder. The 1998 conviction was for a murder that had occurred some twenty years earlier. The Defendant was sentenced to a term of life. At the request of defense counsel, the judgment of conviction was admitted as an exhibit so that the jury would understand that there was "a detainer in Mississippi waiting on [the Defendant] no matter what happens in this case." When a juror asked if a prior conviction could be considered an aggravating factor, the trial court explained that "I cannot discuss with you whether you should find it to be an aggravating circumstance," but confirmed that the State was seeking to prove two aggravating circumstances, one of which was a prior felony conviction involving the use of violence to the person.

The defense counsel, in an effort to persuade the jury to spare the Defendant's life, called Glori Shettles, an investigator who was qualified as an expert in the field of mitigation, and several other witnesses to testify. Because Ms. Shettles had previously worked for the Tennessee Board of Probation and Parole, she also qualified as an expert in parole procedure and policies. She testified that her background study indicated that the Defendant, who had one older and one younger sister, was born in 1960 to Norman and Nellie Smith, who were twenty and seventeen years old respectively. Ms. Shettles described his home life as "unstable" and testified that his mother abandoned the family before the Defendant was two-and-a-half years old. The Defendant never saw his birth mother again. After the Defendant and his sisters were sometimes left at a daycare center "for days," the State intervened and the Defendant and his two sisters were adopted by members of the Odom family. The Defendant was adopted by Jimmy and Shirley Odom, who had three biological children at the time: Cindy, Jimmy

Jr., and Larry, ranging in ages from two to seven. When the Defendant, at age three, joined the Odom family, he had cigarette burns on his body. Burns on his feet were so severe that he was unable to wear socks and shoes. About a year after adopting the Defendant, the Odoms divorced, and his adoptive mother married Marvin Bruce, who allegedly mistreated the Defendant and his brother Larry. According to Ms. Shettles, Bruce used "excessive discipline" on both boys and ridiculed the Defendant for wetting the bed by hanging his sheets and clothes outside for others to see. Ms. Shettles also learned that when the Defendant and Larry were bathing, Bruce "would scrub them excessively . . . would pull and tug on their penis [and] call them names and make fun of them." Her investigation indicated the Defendant had also endured cruelty at the hands of Shirley Odom's mother, who never accepted the Defendant as part of the family and treated him differently from her biological grandchildren; no one Ms. Shettles interviewed "[had] the impression that [Shirley Odom's mother] cared anything for" the Defendant.

Although the Defendant's birth father was still alive at the time of trial, he declined to attend the trial because of poor health. The Defendant's birth mother declined Ms. Shettles' requests for an interview, but had previously acknowledged to others that she "wasn't mother material." At the time of the sentencing hearing, Larry Odom was serving a seventy-five month sentence in the Oregon State Penitentiary for a 2001 sexual battery conviction.

The Defendant, when an adolescent, ran away from the Bruce home and subsequently was ordered into the Mississippi juvenile court system. A psychological evaluation performed for the authorities there when the Defendant was fourteen years old indicated that he suffered from impaired insight, memory, and reasoning. He was diagnosed as having a moderate to severe personality disturbance. The evaluator determined that the Defendant only read at "a beginning second grade level" and "strongly urge[d] that he not [be] place[d] . . . in any academic situation." It was recommended that he enter a "complete evaluation program" in order to avoid psychosis or mental deterioration to the point of institutionalization.

Thereafter, the Defendant was placed in a Caritas program, but was found unfit to participate after thirty days. After his release in 1975, the Defendant was returned to the juvenile authorities. He escaped to be with his birth father, who lived one hundred and thirty miles away. Afterward, he voluntarily returned and was placed at the Columbia Training Center. According to Ms. Shettles, the Defendant tried to run away from Columbia several times. Because on one occasion the Defendant was treated for "a severe contusion of the right eye and jaw," Ms. Shettles speculated that he had been beaten while institutionalized there. During this period, a psychologist, who predicted that the Defendant would be incarcerated his whole life, described him as "brain damaged, incorrigible, antisocial, unable to respond to usual social contingency program [sic] and a loser with respect to probable adult adjustments." The psychologist also believed that

the Defendant was “un-treatable, unmanageable and a liability to society for the rest of his natural life,” commenting that “if this youngster changes for the better, it will be an act of God.” When the Defendant was fifteen, he was conditionally released and, for a time, helped care for his uncle, who had lost his legs to gangrene.

Ms. Shettles testified that in 1977, a class action lawsuit was filed “on behalf of the people that had been housed at Columbia Training Center,” see Morgan v. Sproat, 432 F. Supp. 1130 (S.D. Miss. 1977), which involved allegations of constitutional violations based on the treatment of the youth who resided there. She also testified that in 2002, the United States Attorney General conducted an investigation regarding alleged civil rights violations, including “unconstitutionally abusive disciplinary practices such as hogtying, pole shackling, improper use and over use of restraints and isolation, [and] staff assaulting youths.”

Ms. Shettles then addressed the Defendant’s record at Riverbend Maximum Security Prison, where he had been incarcerated since 1992. During the period since the victim’s murder, he had obtained his GED and a paralegal certification. He worked as a teacher’s aide, participated in life skills and Bible study classes, and also engaged in various arts and crafts. He was described by a correctional officer as a hard worker, having a positive attitude, being helpful, and treating other inmates and staff with courtesy. The Defendant’s only infraction was in 1996, when he threw a mop bucket towards a guard, who, while standing behind a glass barrier, had allegedly taunted him. Ms. Shettles remarked that one write-up during this period of time was an “extremely low number.” She also commented that the Defendant’s prison record was “very positive,” rating “in the top three.” In her capacity as an expert on parole procedures, Ms. Shettles described the Defendant’s chances for re-lease on a life sentence as “close to impossible.” She made specific reference to the Defendant’s other murder conviction in Mississippi, his escape from jail just prior to the murder of the victim, and prior theft and robbery convictions. She also testified that even if the Defendant received parole in Tennessee, he would be returned to Mississippi to serve the remainder of the life sentence there.

The trial court instructed the jury that the escape was not to be used as an aggravating circumstance, and that the evidence could only be considered, if at all, “to rebut any mitigating circumstances about his behavior in prison.” The trial court also gave curative instructions, explaining to the jury that the robbery was not a crime of violence and had no bearing on the aggravating circumstance relied upon by the State.

After reviewing the exhibits pertaining to mitigation, the jury submitted a series of written questions, including whether “mandatory parole” and “parole” could be “define[d] in layman’s terms.” Afterward, defense counsel recalled Ms. Shettles, who testified that if the Defendant was given a life sentence in this case, he would

not be eligible for mandatory parole. She also explained that if sentenced to life imprisonment, the Defendant would be eligible for discretionary parole after twenty-five years, but that his prior murder conviction and his escape from prison in Mississippi made parole highly unlikely.

The trial court properly instructed the jury that it could not consider parole as an aggravating factor, and that any proof presented that the Defendant might get parole could only be used to rebut the mitigating circumstances. Tim Terry, an inmate records manager at Riverbend, confirmed that if the Defendant ever received parole in Tennessee, he would be returned to Mississippi to serve his life sentence there. He provided assurances that, in the event the Defendant received a life sentence for the victim's murder, he would not be moved from Riverbend to a local county jail.

Dr. Joseph Angelillo, a clinical psychologist who qualified as an expert in forensic psychology, evaluated the Defendant and reviewed his social history. While admitting that he was unable to make a specific diagnosis, Dr. Angelillo found indications of "schizoid personality features," marked by a tendency to do things alone, sub-par social skills, lack of joy, withdrawal from others, and a fear of relationships "unless [there is] absolute assurance that they're going to be accepted." In his opinion, the lack of sufficient mental health treatment afforded the Defendant as a child, the rejection he had experienced, and the physical and sexual abuse he had undergone all had a profound effect on his development. Dr. Angelillo testified that the Defendant's time in the structured environment of Riverbend had "behaviorally defined . . . his ability . . . to engage in constructive activities." He believed that the Defendant would continue to thrive in this structured environment if given a life sentence.

Dorothy Rowell, the Defendant's adoptive aunt, also testified on his behalf, describing him as a "part of our family." She stated that her mother had adopted one of the Defendant's sisters, and that the other had been adopted by Ms. Rowell's sister. Ms. Rowell, who had spent a substantial amount of time with the children prior to the Odoms' divorce, described the Defendant as "[v]ery sweet," "[v]ery loving," "[a]lways smiling," "[h]appy, and a [v]ery precious little boy." She stated, however, that after the divorce of his adoptive parents "[h]e wasn't the happy smiling little boy that I remem-bered." She testified that the Defendant, when a teenager, "was very, very good" with her invalid brother, Charles, and "[t]reated him like a baby."

Cindy Martin, the Defendant's adoptive sister, described the Defendant as "[t]he sweetest person you would ever want to meet" prior to the time Marvin Bruce, his stepfather, became a part of his life. She de-scribed Bruce as "horrible" and a "terrible person" who mistreated the Defendant. She stated that after Bruce's arrival, the children stayed with their grandmother more often, and while Ms. Martin enjoyed being there because her grandmother generally "spoil[ed] kids,"

their grandmother "never really accepted [the Defendant] as her grandchild" and "would hit him with anything she could find."

Jimmy Odom, Jr., the Defendant's older adoptive brother, testified that prior to the Odoms' divorce, the Defendant was treated well, and that they were "kind of like a family then." He also claimed that things changed after his mother remarried, and that the Defendant "wasn't treated like a child" and "never was loved." He described their grandmother as "a mean woman" who often struck the Defendant "with belts and stuff like that," and who never accepted the Defendant into the family. He called Marvin Bruce "a pervert -- [j]ust a sorry person." He stated that if the Defendant ever tried to reach for food at the dinner table before someone else, his stepfather "would pop him up beside his head, . . . and just make him wait." Although he never witnessed Bruce sexually abusing the Defendant, Jimmy, Jr. stated that he had "no doubt" that he had physically abused him. He testified that there was "no love in our family" and that, as a result, the Defendant "never had a chance."

Like the Defendant, Jimmy, Jr. was housed at Columbia Training School for a time. He stated that on each day of their detention, the residents spent forty-five minutes reading and forty-five minutes on mathematics, but that the rest of the day was spent "in the fields." He testified to the excessive forms of discipline at the school, asserting that "[t]hey would whup you with a board" and that "if you couldn't take the licks they would get other people to hold you down." He also stated that when residents ran away, they would receive a beating from the staff. Jimmy, Jr., who was an inmate at Parchman Prison at the same time as the Defendant and their brother Larry, described it as "a real bad prison," where juvenile inmates are not housed separately. He stated that both Larry and the Defendant were sexually abused by the older inmates there and that his efforts to take up for his younger brothers often resulted in fights at the prison.

Several others who had become acquainted with the Defendant during his time in prison also testified on his behalf. Celeste Wray, who had been involved in prison ministries for eighteen years, corresponded with the Defendant on a regular basis and developed a friendship with the Defendant. She stated that her letters from the Defendant had "been pleasurable and enjoyable" and that they were "always very respectfu[l], which I appreciated." Ricky Harville, who was an instructor at Riverbend, testified that the Defendant worked as his aide when he began teaching at the prison in 2003. He re-called that the Defendant assisted the other inmates with reading and writing and that his interaction with them was "very positive." He stated that the Defendant was "very helpful," that he approached his job in a very positive manner, and that he served as a role model for other inmates who sought educational opportunities. In his opinion, the Defendant would continue to impact other inmates in a positive way if he received a life sentence. Gordon Janaway, a former teacher in various correctional institutes, taught the Defendant in a GED class at Riverbend. He testified that after the Defendant obtained his certificate, he became a clerk in the class-room. Janaway

stated that the other inmates “really res-pected him because he had earned a GED . . . which is not easy to do in corrections.” Jim Boyd, who taught a life skills course at Riverbend, met the Defendant while conducting a class. Boyd testified that the Defendant was “an active participant” in the class and observed that the Defendant had changed “for the better” during his time in prison. Finally, Helen Cox, who was also involved in the life skills course, testified that she kept a photo of the Defendant on her desk that was taken the day he received his GED. She described the Defendant as a part of her extended family.

State vs. Odom, 336 S.W.3d 541 (Tenn. 2011), cert denied, Odom v. Tenn., 2011 U.S. LEXIS 7329 (U.S., Oct. 11, 2011).

Following the Tennessee Supreme Court’s review and affirmation of his sentencing of death, petitioner sought post conviction relief in this court. In February, 2012, petitioner filed a pro se petition for post conviction relief. This court entered a stay of execution and appointed attorneys from the Office of the Post Conviction Defender to represent petitioner. Thereafter, in June of 2012, petitioner’s counsel filed an Amended Petition for Post Conviction Relief. A hearing on petitioner’s claims was conducted April 28 through April 30, 2014.² A subsequent hearing date was scheduled for June, 2014. However, no proof was presented on this date. The parties were allowed to file written closing arguments. Post conviction counsel submitted written closing arguments to the court in October, 2014, and in early November, 2014, the State followed with its written final arguments. Thereafter, at the end of November, 2014, post conviction counsel filed a reply to the State’s written arguments.

PETITIONER’ S ALLEGATIONS

Petitioner contends both his 1992 and 2007 trial counsel provided ineffective representation. Specifically, he alleges counsel:

1. failed to request sufficient resources to conduct a constitutionally adequate defense and failed to object to the unconstitutional limitations and restrictions placed on the resources made available to the defense in capital cases;
2. failed to conduct an adequate investigation of the guilt stage issues;

² This court notes this matter was originally assigned to Division 6 of the Shelby County Criminal Court whose presiding judge at the time of assignment was the Honorable John Fowlkes. Thereafter, Judge Fowlkes was appointed to the Federal District Court and Judge John Campbell was chosen by Governor Bill Haslam to fill the vacancy created by Judge Fowlkes’ appointment to the federal bench. Since Judge Campbell was formerly an employee of the Shelby County District Attorney General’s Office and had initially participated in petitioner’s post conviction case as a representative of the State, the undersigned Senior Judge was assigned to handle petitioner’s post conviction hearing.

3. failed to conduct an adequate investigation into petitioner's prior convictions and challenge the state's use of those convictions as an aggravating circumstance;
4. failed to conduct an adequate investigation of petitioner's social history;
5. failed to retain, properly consult with, and properly develop the testimony of the kinds of qualified medical, psychiatric, and scientific experts required in his case and failed to properly investigate and present a defense of insanity, diminished capacity, and impaired capacity at both the guilt and sentencing stages;
6. failed to investigate and retain experts with the requisite expertise to support a claim petitioner is exempt from the death penalty on the basis of mental retardation and failed to challenge the reliability of his confession due to his intellectual disability;
7. failed to timely retain, properly inform, consult with, and develop the testimony of defense expert, psychologist Dr. Joseph Angelillo;
8. failed to file a change of venue motion based on the widespread publicity surrounding the case;
9. failed to move to recuse the trial Judge on the basis of comments made during pre-trial hearings for his 1999 resentencing;
10. failed to competently present claims relating to motion to suppress petitioner's statements;
11. failed to timely file a motion to continue based upon defense counsel's medical condition;
12. failed to conduct an adequate *voir dire* of the jurors and request the jury be sequestered after selection;
13. failed to challenge the jury being informed he was restrained during the trial;
14. failed to present witness in his defense and failed to subject state witnesses to proper cross examination;
15. failed to object and/or move for a mistrial when the trial court permitted unidentified jurors to question certain witnesses;
16. failed to object to the prosecutor's closing remark petitioner had anally raped the victim, when there had been no evidence presented the victim had been anally raped;
17. failed to advise petitioner he had a limited right against self-incrimination if he chose to testify at the sentencing phase;
18. were ineffective in telling the jurors in closing arguments the crime scene photographs were "the worst of the worse;"
19. failed to challenge unconstitutional jury instructions;
20. failed to poll the jury;

Petitioner also asserts the cumulative effect of all of trial counsels' deficiencies combined with other constitutional errors in his case undermine the reliability of the verdicts in his case and necessitate a new trial. Petitioner contends trial counsels' failures in this regard resulted in a complete breakdown of the adversarial process in his case.

In addition to his claims of ineffective assistance of counsel, petitioner argues: (1) juror misconduct necessitates a new trial; (2) race and gender discrimination permeated the selection

of the grand jury foreperson; (3) trial court error necessitates a new trial; (4) the state committed prosecutorial misconduct necessitating a new trial; (5) constraints in a defendant's ability to challenge prior convictions used to support an aggravating factor create structural due process claims which dictate his conviction and sentence be vacated and his retrial barred; (6) the death penalty is unconditional as applied in Tennessee and as specifically applied in his case; (7) the Tennessee Supreme Court's direct appellate review of the proportionality of the sentence in all capital cases is substantively and procedurally inadequate; (8) lethal injection constitutes cruel and unusual punishment; and, (9) petitioner is intellectually disabled and therefore ineligible for the death penalty.

TESTIMONY PRESENTED AT THE POST CONVICTION HEARING

Attorney Marty McAfee testified he served as lead counsel for petitioner during his 2007 resentencing proceeding. He was appointed July 14, 2004.³ McAfee testified in preparing for petitioner's 2007 resentencing proceedings he reviewed the file from the petitioner's prior proceedings, the trial testimony from petitioner's prior proceedings, and consulted petitioner's prior counsel. McAfee testified he has been practicing law since 1996 and his practice has consisted almost entirely of criminal defense. He stated he has handled at least forty jury trials, has prepared approximately fifteen capital cases for trial, and is certified as a criminal trial specialist in Tennessee and a criminal trial advocate nationally. McAfee testified he regularly attends seminars involving capital litigation and mitigation. McAfee agreed with the prosecution's assessment capital litigation has evolved significantly since 1991.

McAfee stated Gerald Skahan served as second chair counsel on petitioner's 2007 resentencing proceeding and Glori Shettles served as a mitigation investigator. He stated Shettles and Inquisitor, Inc., had worked on the case in at least one of petitioner's prior proceedings. McAfee testified Inquisitor Inc. provides both guilt and mitigation investigation. He stated, in his opinion, they are the best at investigating capital cases. In particular, he opined Glori Shettles is a very capable and experienced mitigation investigator. He stated Shettles worked on the case prior to his joining the defense team and trusted Shettles' opinion, her

³ See *Richard Odom vs. State of Tennessee*, Shelby County Criminal Court Case No. 01-1 2388, Exhibit 1 to Post Conviction Hearing .

instincts, and her ability to conduct appropriate interviews and gather information. McAfee stated there was good communication between himself, Shettles, and attorney Skahan.

McAfee testified the focus of the defense team at the 2007 resentencing trial was obviously not guilt or innocence but focused on mitigation. Had there been some issue of importance relating to guilt or innocence which impacting potential mitigation, then the team would have investigated such issues. However, he did not recall any such concerns in petitioner's case. McAfee testified he is familiar with the concept of residual doubt as a mitigation theory. The defense team had access to guilt phase investigators and would have developed such a theory if they felt information warranted this theory. He stated there was free and open communication between the attorneys and investigators and, if the investigators felt there were leads which needed to be followed, they would have informed counsel.

McAfee testified Shettles' role was to develop mitigation. He opined the mitigation presented in petitioner's case was the best mitigation case he has ever had in a capital case. McAfee testified Shettles conducted mitigation interviews and collected numerous records and social history documents, Shettles was involved in all aspects of the investigation and preparation of petitioner's case, and Shettles recommended expert assistance, in particular an expert in corrections to address petitioner's future dangerousness. He explained, at the time of the commission of the offense for which petitioner was convicted, a life sentence was explained differently than it is today. He stated the defense argued the petitioner should be entitled to the new jury charge explaining the impact of a life sentence but their request was denied.

McAfee identified an email from Shettles to him and attorney Skahan in which Shettles recommends the team hire a psychiatrist. She also indicated she had read about a forensic psychiatrist specializing in low serotonin levels and asked counsel whether they would like her to make contact with this individual. McAfee testified Shettles outlined her progress on the investigation through various memos she sent to counsel and the defense team routinely met to discuss the progress of the case. McAfee testified there were numerous discussions about theories of mitigation and the proper strategy for the resentencing proceeding. He stated certain strategies were rejected such as a theory based upon serotonin levels, brain fingerprinting, and a defense based upon supposed neuropsychological deficiencies or disorders. He was aware of the prior investigations and theories of defense.

McAfee testified his billing records indicated he spent numerous hours reviewing various psychological and mental health records and preparing potential mental health witness. McAfee stated the defense team retained the services of forensic psychologist, Dr. Joseph Angelillo, and he received a proposal for forensic services from Dr. Angelillo on July 7, 2005.⁴ McAfee was shown a document indicating the team filed an *ex parte* motion seeking the services of Dr. Angelillo on October 11, 2007.⁵ The defense motion indicates Angelillo is needed to evaluate petitioner's mental health as it related to petitioner's social history background, in particular his extensive childhood trauma. McAfee identified a sealed order granting the defense request for Dr. Angelillo also dated October 11, 2007.⁶ McAfee acknowledged the expert was retained approximately two months prior to trial. On cross examination McAfee identified a curriculum vitae from Dr. Wolters. According to email communication between McAfee and Shettles it appears McAfee spoke with Dr. Wolters on August 31, 2007.⁷

McAfee stated Dr. Angelillo's testimony was not a key component to the defense case. Rather, he stated the details of petitioner's childhood and youth formed the primary defense and indicated testimony about the circumstances of petitioner's background were supplied by various witnesses. McAfee was asked to review a document indicating Dr. Angelillo interviewed petitioner on November 2, 2007 and again on November 27, 2007, one week prior to the start of petitioner's resentencing proceeding. Dr. Angelillo's report was dated December 6, 2007.⁸ McAfee also identified an additional motion and order for funding for Dr. Angelillo dated December 3, 2007, the first day of petitioner's resentencing proceeding.⁹ The document indicated Dr. Angelillo was still working on his report at the time of the filing of the motion.

McAfee was aware petitioner had been evaluated during his youth. He identified a group of documents addressed to petitioner's prior counsel recommending petitioner be evaluated to determine whether he suffered from organic brain damage. According to McAfee, the

⁴ See *Richard Odom vs. State of Tennessee*, Shelby County Criminal Court Case No. 01-12388, Exhibit 22 to Post Conviction Hearing .

⁵ See *Richard Odom vs. State of Tennessee*, Shelby County Criminal Court Case No. 01-12388, Exhibit 4 to Post Conviction Hearing .

⁶ *Id.*

⁷ See *Richard Odom vs. State of Tennessee*, Shelby County Criminal Court Case No. 01-12388, Exhibit 21 to Post Conviction Hearing .

⁸ See *Richard Odom vs. State of Tennessee*, Shelby County Criminal Court Case No. 01-12388, Exhibit 5 to Post Conviction Hearing .

⁹ See *Richard Odom vs. State of Tennessee*, Shelby County Criminal Court Case No. 01-12388, Exhibit 6 to Post Conviction Hearing .

documents indicated petitioner had previously been treated for two episodes of lost consciousness from close head trauma.¹⁰ He stated the same set of documents indicated Dr. Kenner had previously recommended petitioner have a PET Scan and the document suggested no such scan was ever conducted.¹¹

McAfee identified a print out of an electronic document which appears to have been offered by the defense at petitioner's resentencing proceeding. This document includes a report outlining an evaluation of petitioner by Dr. Daniel Cox, which indicates petitioner had a verbal IQ of 67, performance IQ of 100, and a full scale IQ of 81. McAfee testified Dr. Cox's report further stated petitioner's recent and remote memory and abstract reasoning were both impaired and indicated petitioner was operating at below average in these areas. He stated Dr. Cox explained the discrepancies in petitioner's verbal and performance IQ scores reflected moderate to severe emotional personality disturbance with evidence of mild organic neurologic deficiencies. However, McAfee testified Dr. Cox indicated the organic neurological damage was not currently interfering with petitioner's abilities. He stated Dr. Cox reported petitioner should be considered as operating in the dull to normal intellectual range.¹²

McAfee testified a letter to an official at the Columbia Training School from Dr. Cox indicated in 1974 Dr. Cox found petitioner to be incorrigible, anti-social, and brain damaged. He testified the document further indicates Dr. Cox recommended petitioner needed an extensive medical and psychiatric observation and analysis. McAfee testified he could not recall whether he provided these documents to Dr. Angelillo, and some of the conclusions drawn by Dr. Cox may not have been helpful to the defense. Therefore, McAfee may not have passed the information along to Dr. Agelillo. McAfee acknowledged the documents relating to Dr. Cox's evaluation could raise the possibility petitioner had suffered brain damage as a child or adolescent. However, he stated there does not appear to be a definite diagnosis of neurological impairment or organic brain damage due to head trauma.

On cross examination, McAfee recalled Dr. John Hutson testified at petitioner's prior proceedings. He stated prior counsel asked Dr. Hutson to examine petitioner for intermittent

¹⁰ See *Richard Odom vs. State of Tennessee*, Shelby County Criminal Court Case No. 01-12388, Exhibit 7 to Post Conviction Hearing .

¹¹ Id.

¹² See *Richard Odom vs. State of Tennessee*, Shelby County Criminal Court Case No. 01-12388, Exhibit 7 to Post Conviction Hearing.

explosive disorder and possible brain lesions,¹⁴ and prior counsel also faxed Dr. Hutson asking whether he could support the need for a neurological examination.¹⁵ McAfee stated he recalled Dr. Hutson indicated he found a paucity of mitigation in 1991. In comparison, Dr. Angelillo's report indicates a defense theory based upon emotional family background and personal history could be quite compelling. McAfee acknowledged there were some potential pitfalls to introducing neurological testimony, including undercutting the defense theory of limited future dangerousness. McAfee testified petitioner underwent numerous examinations over the years. He stated Dr. Cox's assessment included particularly damaging information, specifically as it relates to future dangerousness.¹⁶ Specifically, McAfee recalled the records from Parchman prison indicated petitioner stated, "maybe I did it for the joy of it," referring to firing the second shot which killed the victim in the Mississippi case and indicated "he had no feelings" or "sorrow" with regard to his actions. The report also referenced Dr. Cox's findings and indicated Dr. Cox had diagnosed petitioner as possible schizotypal personality. Regardless, according to McAfee, the defense team successfully exploited portions of Dr. Cox's opinion to enhance their mitigation theory.

McAfee believed the defense had considered retaining a neurologist and conducting a neurological examination of petitioner. However, McAfee testified, when petitioner was confined to Parchman, he was given a battery of psychological tests and underwent a physical examination. He stated the petitioner's EEG was normal, the records indicate petitioner suffers from traits of anti-social personality disorder but had no other psychological issues, and testing was conducted by the Parchman officials to determine if petitioner possessed any "organicity" or neurological deficits. The Parchman examination found no neurological deficits and petitioner was found to have a full scale IQ of 93. McAfee stated much of this information had been discussed in petitioner's prior sentencing proceedings. In some cases he would raise the issue of brain damage as mitigation; however, in petitioner's case, the defense theory was centered on petitioner's future dangerousness and behavior within the prison system. McAfee testified the defense team considered these records in developing a theory of mitigation. However, he again pointed out a diagnosis of anti-social personality disorder directly undercut their arguments

¹⁴ See *Richard Odom vs. State of Tennessee*, Shelby County Criminal Court Case No. 01-12388, Exhibit 15 to Post Conviction Hearing.

¹⁵ See *Richard Odom vs. State of Tennessee*, Shelby County Criminal Court Case No. 01-12388, Exhibit 16 to Post Conviction Hearing.

¹⁶ See Exhibit 12.

regarding future dangerousness. He further stated these records would have contradicted any claim the defense team would have made regarding neurological deficits or disorders.

On cross examination, McAfee testified the goal of the defense strategy was to generate some empathy for petitioner. He stated an important part of this strategy was the testimony of the lay witnesses. According to McAfee, the defense theory of mitigation was two-fold: (1) petitioner's family and the state of Mississippi failed petitioner; and (2) petitioner will likely never be released and has proven to do well within the prison system. McAfee testified the defense relied upon the lay witnesses to provide background into petitioner's childhood and adolescence. McAfee stated counsel got more cooperation out of the family than previous counsel. He stated the presence and testimony of the petitioner's family was compelling. He stated, in his opinion, Dr. Angelillo's testimony did not generate the same type of beneficial emotional testimony. McAfee stated the humanizing stories of trauma provided by the petitioner's family were far more compelling than an expert's testimony. For example, McAfee testified the defense team investigated petitioner's incarceration at Parchman prison and presented testimony from petitioner's brother who was incarcerated with petitioner at Parchman.

McAfee testified petitioner's prior murder conviction was used as an aggravating circumstance during the 2007 resentencing proceeding. He stated he drafted a motion to strike the offense as an aggravating circumstance because petitioner was a juvenile when the offense was committed.¹⁷ However, he stated both he and Skahan agreed they should not file the motion because they were conceding the murder as part of their mitigation. He stated, in an effort to keep the details of the murder from the jury and as part of the defense argument a life sentence would confine petitioner for the foreseeable future, counsel determined they should not pursue the motion. He stated they used the negative fact of petitioner's prior conviction and attendant sentence to enhance their defense argument petitioner likely would never be released from prison if given a sentence of life for his Tennessee conviction.

McAfee recalled, in petitioner's 2007 resentencing proceeding, jurors were allowed to ask witnesses questions directly. He stated counsel could have objected if they thought the question should not be posed to the witness. However, he could not recall whether counsel did

¹⁷ See *Richard Odom vs. State of Tennessee*, Shelby County Criminal Court Case No. 01-12388, Exhibit 8 to Post Conviction Hearing.

so during the jury questioning of Dr. Angelillo. McAfee testified he believed Dr. Angelillo's testimony was handled by co-counsel, Gerald Skahan.

On cross examination, McAfee identified an extensive letter sent to him by petitioner indicating petitioner did not wish to pursue a mental health theory as mitigation but wanted instead to raise a mitigation theory of residual doubt.¹⁸ However, he stated, after discussions with petitioner and co-counsel he was able to convince petitioner a theory of limited future dangerousness and a presentation of his social history was a more appropriate mitigation strategy.

Gerald Skahan testified he was appointed to represent petitioner on July 14, 2004. Although he was designated second chair, he stated he shared responsibilities and made decisions together with attorney McAfee. On cross examination, Skahan testified he had been a criminal defense attorney for twenty-two years and had handled over one hundred jury trials, including approximately forty capital cases. He attended and taught seminars on capital case litigation. Skahan agreed with the prosecution's assessment capital litigation has evolved since 1991.

Skahan reviewed the records from the prior proceedings and may have spoken to some of petitioner's prior counsel. Skahan stated he was assisted by Ron Lax and Glori Shettles who conducted the guilt phase and mitigation investigation respectively. Skahan stated, in his opinion, at the time of petitioner's 2007 resentencing, Inquisitor, Inc. was the best investigative and mitigation assistance available. He stated he had worked with them many times prior to his appointment in petitioner's case, and he trusted and relied upon the work performed by the investigators from Inquisitor.

Skahan testified this was the third proceeding involving petitioner's Tennessee charges. He stated in some respect he benefitted from the prior proceedings. Skahan testified a lot of mitigation evidence and social history records had been collected during previous proceedings. Shettles reviewed those documents and added to the prior file. According to Skahan, Shettles was able to get some of the petitioner's family to speak with her, but encountered difficulty in getting the petitioner's family members to speak with the defense team. He stated Shettles may have made recommendations regarding the need for certain expert assistance in the case. Skahan

¹⁸ See Exhibit *Richard Odom vs. State of Tennessee*, Shelby County Criminal Court Case No. 01-12388, Exhibit 14 to Post Conviction Hearing.

specifically recalled discussing the potential of utilizing a defense based on low serotonin levels and raising other psychological issues.

Skahan testified there was a lot of discussion regarding what approach to take in defending petitioner. He stated the group discussed a "shotgun" approach where a lot of different issues would be raised, and a strictly mental health defense was also discussed. However, the team ultimately chose to focus on petitioner's background and childhood, including his incarceration in the Mississippi group home which was eventually closed by the State. Skahan testified the defense decided to attempt to demonstrate to the jury the petitioner had thrived while in incarcerated and would likely never be released; it assisted the defense team to have an institutional record which demonstrated petitioner was doing well during his incarceration.

Skahan testified he did not retain an expert to examine petitioner's possible brain injury because previously an MRI or CAT-SCAN had been performed and the report was not helpful. He stated Dr. Angelillo did exam petitioner. Skahan stated usually a defense would want to put forward evidence of brain damage if it exists in a capital case. However, in petitioner's case, there was a long history of evaluations which did not support such a claim, and to present such proof might appear disingenuous when considered in light of petitioner's complete mental health history. He stated in such instances there is the potential such testimony may appear to be "bought and paid for." Skahan testified he reviewed petitioner's complete mental health and medical history.

Skahan testified petitioner maintained his innocence. He recalled petitioner wanted to argue guilt/innocence as a mitigation theory and the defense team convinced him a resentencing proceeding was not the right time to challenge guilt. However, the defense agreed with petitioner not to acknowledge guilt at the resentencing proceeding. According to Skahan, this made it even more difficult to argue an organic brain injury made petitioner commit the offense.

On cross examination, Skahan stated he has previously successfully utilized a defense based upon low serotonin levels, and he had utilized other mental health defenses in previous cases. Skahan testified he believed the biggest hurdle to overcome in petitioner's resentencing proceeding was the court instructed the jury petitioner would be eligible for parole after twenty five years if given a life sentence. He stated the defense team made a motion to strike the court's instruction. However, Judge Craft denied their motion. He stated the defense team considered

filing a motion to prevent the State from using petitioner's juvenile conviction from Mississippi as an aggravating circumstance but subsequently decided not to file such a motion because the murder conviction and life sentence which went along with it was a means to argue to the jury petitioner would never be released if given a life sentence for the Tennessee murder. He opined such a motion would not be successful. Skahan testified it was his recollection Shettles testified as an expert on issues related to parole. He further stated an individual from Mississippi testified about the meaning of a life sentence in the state of Mississippi. He stated, by using Shettles as a witness, he was able to utilize petitioner's prior mental health evaluations in a positive way; the defense argued petitioner never really had a chance to succeed and be a productive member of society.

Skahan testified he tried to demonstrate to the jury how the petitioner arrived at this point in his life. He believed there was powerful mitigation relating to petitioner's childhood and his prior experiences when incarcerated. He opined the civilian witnesses called by the defense team were effective in evoking empathy for petitioner. He did not believe testimony from a mental health expert would have been as effective. Skahan testified the petitioner's older brother was incarcerated at Parchman at the same time petitioner was incarcerated at the prison and indicated he was unable to protect petitioner who was small and very young when incarcerated there. He believed the testimony was extremely emotional and indicated the effect on the jury was visible. This testimony, according to Skahan, included petitioner's sister testified about the difficult circumstances of petitioner's childhood, including physical abuse, and testified petitioner was "forsaken." In addition, there was also testimony from the horrible conditions of the juvenile facility in Mississippi, and an art teacher from the prison also testified about petitioner and indicated she was unafraid of petitioner and petitioner was thriving in prison. Skahan testified the goal was to present a picture of petitioner as a very "damaged" human being who when incarcerated was not dangerous or incapable of rehabilitation.

Skahan testified some of petitioner's prior mental health records contained warnings about petitioner's mental condition. However, he stated the fear of the defense team was the introduction of this information might show evidence of future dangerousness. He stated the goal of the defense team was to demonstrate petitioner had been failed by the system. He opined they did not make an argument based on mental defects because it did not make sense to say petitioner is really dangerous and he can't help it but he'll do really well in prison. He stated he

was concerned, if petitioner was evaluated, the defense team could end up with an adverse diagnosis such as anti-social personality disorder.

Carolyn Watkins testified she served as second chair counsel at petitioner's 1992 trial. She identified a document indicating she was appointed to the case in May of 1991. Prior to petitioner's 1992 trial, attorneys were not required to be certified as first or second chair. However, she had received specialized training in the area of capital litigation. She stated she worked at the direction of first chair attorney, Thompson. Watkins stated attorney Thompson worked part time for the public defender's office and part time in private practice. She stated Thompson had a reputation as a very good and tenacious attorney. She stated she did not question Thompson's physical or mental condition and indicated if Thompson felt he was unwell and unable to go to trial he would have requested a continuance. In addition to herself and Thompson, Watkins testified the defense team also had a fact investigator and a mitigation investigator.

Watkins testified the intake interview would have been the first opportunity the entire defense team met with petitioner. Watkins testified the entire defense team was present for the intake interview of petitioner. Watkins testified at the intake interview the team gathered social and family history background information from petitioner. At this time, according to Watkins, the petitioner reported he had obtained a GED while incarcerated at Parchman and attended junior college courses. She opined this information would have indicated petitioner was unlikely to suffer from intellectual difficulties or mental health issues. She further stated her conversations with petitioner did not indicate a need for a neurological examination. Watkins further stated the petitioner was able to provide his version of the events relating to the murder. Petitioner reported he needed money and decided to take the victim's purse. He stated the victim did not have any money. He indicated he did not intend to kill the victim and does not remember stabbing or raping her. Petitioner reported carrying an open knife with him everywhere. Watkins testified the intake form indicates the team reviewed records from Columbia Training School where petitioner was housed as a juvenile. She stated jail records documented several but not all of the visits with petitioner by the defense team.

Watkins testified she did not recall petitioner having a neurological examination. However, she stated petitioner did undergo a psychological evaluation. Watkins agreed brain damage might be relevant to evaluating the voluntariness of a defendant's testimony or

evaluating potential defenses. She testified she generally asked clients if they had any prior contact with or utilized social services, prior contact with the Department of Human Services, or prior contact with other agencies. She stated, if the client indicated contact with one of these entities, the defense team would request documents from those agencies. In addition, according to Watkins, the defense team asked clients where he or she attended school and the client's school records were obtained by the mitigation investigator. The petitioner's confidentiality waiver for request for files and requests for records would be made part of the Public Defender's file.

Watkins identified a document from Dr. Cox to the defense mitigation investigator indicating Dr. Cox recommended a neuropsychological workup. She also reviewed other medical records indicating petitioner had an abnormal EEG. She stated had she had these documents prior to trial it may have influenced the defense team's decision whether to request neurological testing. However, on cross examination by attorney King, King provided medical records to Watkins from Whitfield Hospital in Mississippi which she identified indicating petitioner was given an EEG found to be in normal levels and a psychological examination found no evidence of psychosis and petitioner was able to stand trial. The records also indicated petitioner was suffering from anti-social personality disorder. Watkins stated the case notes from Whitfield showed no medical history of serious illness, injuries or operations and psychological and psychiatric evaluations were within normal limits.

Watkins also stated the defense team had petitioner evaluated by Dr. Hutson prior to his trial in Tennessee. She acknowledged Dr. Hutson found petitioner had never been diagnosed with any significant psychiatric disorder precluding him from appreciating the wrongness of his conduct or his ability to conform his conduct to requirements of the law. Hutson stated the petitioner may have a personality disorder but such disorder would not provide a viable defense. Watkins acknowledged, although Dr. Hutson's testimony could not support a defense to the crime, the defense team was able to present proof about the petitioner's background and family history through his testimony. Watkins stated the defense needed Dr. Hutson to testify about the petitioner's social history and background because, although the defense team contacted the petitioner's family about possibly providing testimony, none of petitioner's family members agreed to participate in petitioner's case.

Watkins testified she was aware petitioner had been convicted of murder in Mississippi and was incarcerated at Parchman prior to commission of the offense which was the subject of the petitioner's 1992 trial. She identified a document outlining items investigator Joyce King was attempting to obtain as part of the trial preparation in petitioner's case. Watkins stated the listed records included medical and psychological records from petitioner's incarceration in Mississippi. She stated to her knowledge there were no issues with petitioner's competency at the time of petitioner's trial in Mississippi.

Watkins identified a Motion for Production of Police Reports filed August 16, 1991, by her on behalf of petitioner. Watkins had no independent recollection of arguing the motion or the outcome but stated if the record reflected the motion was denied, she would defer to the record. Watkins reviewed the police file and stated, after reviewing the file, she likely would not have conducted additional investigation into other possible suspects based upon information contained in the file. Watkins testified she would have considered individuals on which to follow up those individuals the police believed to actually be suspects rather than random individuals listed in a police report. Moreover, on cross examination, she stated, based upon the petitioner's confession and other physical evidence linking him to the crime, she found little value in the untested physical evidence. This included hairs clutched in the hand of the victim, blood smears found on the 19th Floor of the building where the murder occurred, blood droplets found above the victim's vehicle, and additional fingerprint evidence.

Specifically, as it relates to the fingerprint evidence, Watkins acknowledged on cross examination the petitioner admitted to committing the murder and thus the defense had no reason to question the validity of the fingerprint evidence. Moreover, she stated, once the fingerprints for the petitioner were compared and matched the print found in the victim's vehicle, the police developed no other suspects. Watkins agreed the police were able to tie the petitioner, who was using the name Otis Smith, to the murders due to their investigation into individuals linked to possible stolen credit cards used in the area near the murders. She agreed the police suspected one of the victim's credit cards may have been stolen and thus began to investigate other individuals in the area who were known to have used stolen credit cards. She agreed attorney Thompson asked the police at trial about their investigation into these individuals and their comparison of these individuals' fingerprints to the latent print recovered from the victim's car. Watkins further stated notes contained in the Public Defender file indicated near the time of the

murder petitioner was “snatching purses” and committing thefts in and around the area of the murder, including breaking into the drink machine at the parking garage where the victim was murdered. Thus, the defense had no reason to question the logical link made by police in connecting petitioner to the murder.

Watkins identified her notes from the intake interview. Watkins notes reflect petitioner indicated he had blood on his pants. Watkins stated she did not request to test the petitioner’s clothing because she did not believe it would be beneficial to her client. Watkins testified there was no DNA testing conducted in petitioner’s case in 1992. She stated, at the time of trial, such testing was rare.

Watkins identified statements made by petitioner and received by the defense as part of discovery provided by the State. She stated the statement is initialed at the bottom of each page. She testified her office never considered having a forensic handwriting expert examine the document. Watkins testified petitioner never informed counsel that he did not make the written statement introduced at trial. Rather, she stated petitioner admitted being at the scene, attempted to steal the victim’s purse, and stabbed the victim. Watkins’ notes from the intake interview indicate petitioner provided additional details of the murder, not previously provided to police, to the defense team.

Watkins testified petitioner’s confession and account of the murder affected the defense team’s decision making process in the case. She stated the defense argued the statements were coerced. She stated the trial court did not suppress the statement, but the defense team argued to the jury petitioner had been coerced by the police. Watkins testified, at the penalty phase, the defense team attempted to raise issues relating to the petitioner’s background and childhood, but Watkins stated the trial court did not allow them to introduce much of the proof they had prepared.

Watkins stated the fact investigator went out to interview witnesses and take statements where possible. She identified an activity log for the fact investigator showing six different entries between May 1991 and April 1992. However, Watkins testified investigator Evans log sheets do not encompass the entirety of his investigation in petitioner’s case. She stated it was not uncommon for investigators to do work on the case without logging their time. In fact, Watkins identified certain documents indicating Evans conducted investigation in the case which does not appear on the log sheets. She stated documents from the file indicate Sam Evans

conducted extensive interviews with witnesses John Sullivan, Catherine Black, Willie Hammon, and Jimmy Odom prior to petitioner's trial. She identified a note to her from Evans indicating he obtained a statement from various witnesses and asked her to review the tape. Watkins testified the investigator Evans also attempted to collect certain records prior to trial. Watkins identified attorney activity logs for petitioner's case. She stated the logs reflect the work of all members of defense team and very likely did not capture all the activity by the attorneys working on the case.

Betsy Chandler testified she was formerly employed by the Mississippi Department of Corrections. She stated she began working at Parchman Prison in 1985 as an ombudsman in the law library. Chandler described an altercation she witnessed in a room attached to the law library. She recalled an inmate screaming and witnessed an inmate stab another inmate. Chandler stated she later became a case manager at Parchman. She stated if an inmate was having problems with another inmate, then the inmate would come to her or speak with the unit manager. She described a form an inmate could complete called a red tag, which required the inmate to provide the name of the individual with whom he had a problem and why he felt he could not live with or be around this individual. She stated red tags were sometimes used by inmates to manipulate where the inmate was housed. Therefore, she stated Parchman officials conducted an investigation to determine the accuracy of the information provided by the inmate. If a red tag was approved, then the two affected inmates could never be housed together again. Chandler stated the red tag could be perceived by other inmates as weakness or could indicate an inmate could not take care of themselves. She opined such perception could then lead to physical assaults, sexual assaults, thefts of personal property, or other actions in which other against the affected inmate.

Chandler testified, in her experience, she considered petitioner to be a weaker inmate. She stated petitioner was small, young, and, in her opinion, victimized by other inmates. She stated although she had no specific details about any assaults or victimization of petitioner by other inmates, she perceived petitioner had difficulties while incarcerated at Parchman. Chandler did not recall petitioner having any visitors, mail, or packages. She stated it appeared petitioner was in some ways dependent on other inmates. Chandler described petitioner as emotionally needy and desirous to please others. She opined petitioner was targeted for sexual victimization. She stated an inmate has limited options once an inmate is targeted for sexual assault. She stated an inmate can participate in the sexual assault or could go into protective custody, which

involves an going into a lock down unit for twenty-three hours a day. She stated once in protective custody it is hard for an inmate to rejoin the general population. Chandler stated inmates are counseled on the challenges of protective custody prior to moving them to the lock down unit. She identified a document known as a "staff request" which showed petitioner was transferred to protective custody. She stated the document indicated petitioner had been accused of rape and the document indicated petitioner had repeatedly been in trouble.

Frank Nobles testified he was incarcerated with petitioner at Parchman Prison and served part of this time in a lock down unit. He described the lock down unit consisted of inmates housed in four man cells wherein the doors were rarely locked and because there is limited activity in a lock down unit, physical and sexual assaults were prevalent. He stated the weaker inmates were targets of sexual assaults and their personal possessions were often taken. Nobles testified the stronger inmates often took "possession" of the weaker inmates and the weaker inmates would at times enter into this relationship in order to protect themselves from being victimized by additional inmates. Nobles explained the roster showed where the inmates were each day. For example, the roster would show if an inmate went to the doctor or to speak with the warden or a case officer. He stated if you were on the roster you could be labeled as a snitch and inmates who were labeled snitches were often victimized. He testified a weaker inmate who was the property of a stronger inmate could be distinguished by his demeanor or the fact he did chores for the stronger inmate. When questioned by the court, Nobles acknowledged he only knew Odom from the law library and is not aware if the petitioner was ever in lock down.

Robert Tubwell testified he was incarcerated with petitioner at Parchman Prison. He was seventeen years old when first incarcerated at Parchman and assigned as a writ writer in the law library. He stated he was assigned to the same unit as petitioner and also saw petitioner when petitioner periodically visited the law library. Tubwell stated the guards were unable to monitor inside the units, because there was one guard per single cell unit and one hundred and ninety-two inmates. He explained a dormitory style unit was assigned three guards and housed about two hundred twenty inmates, with about sixty to a room. Tubwell stated when he first entered Parchman he was repeatedly "tested," that other inmates would proposition him. How an inmate responded to this test led to different results: if an inmate did not resist he was sexually assaulted, if an inmate did resist he may be physically assaulted, and if an inmate continued to fight back he may be left alone. However, he continued, if an inmate was labeled weak then he would become

targeted for assault. He stated sometimes weaker inmates would develop a relationship with a stronger inmate to survive, wherein the weaker inmate would seek the protection of a stronger inmate in exchange for doing chores and performing sexual favors. Tubwell testified he observed petitioner in such relationships first hand. Tubwell recalled petitioner was in a relationship like this with two different inmates, one known to the other inmates as "psycho." He observed Odom hung around the stronger inmates, the stronger inmates referred to Odom as "son," and, on several occasions, petitioner dressing in women's clothing at the direction of the stronger, controlling inmate. Tubwell stated the protectors or stronger inmates were referred to by the weaker inmate as "daddy," and if a son lost the protection of a daddy, the son would become vulnerable to other predatory inmates.

Tubwell observed Odom with scratches on his face and cuts on his body and once observed Odom on crutches. He described inmates were also subject to abuse by guards. Tubwell stated the "red room" was a room controlled by the guards, and if an inmate went into such a room it was because he was going to be beaten by the guards. Tubwell stated guards would assault inmates who filed grievances or who did not pay for contraband the guards had smuggled in for inmates. In the alternative, he described the guards may also retaliate by putting false charges in an inmates' file. Tubwell claimed one particular guard would often retaliate against inmates who broke the rules or filed grievances by "tak[ing] a ride and not come back," by which Tubwell meant such inmates would be killed. Tubwell stated the majority of the inmates were black and weaker white inmates were often made to be sons. Tubwell stated Odom was forced into being a son to receive the protection and if he would not have agreed he may have been killed.

Tora Brawley, a clinical neuropsychologist, testified as an expert witness, stating she conducted a neuropsychological examination of petitioner. Brawley testified petitioner performed well on the neuropsychological testing she performed. On the WAIS IV, petitioner obtained a full scale IQ of 94; however, the most significant aspect of the testing was the differential between petitioner's verbal comprehension score of 89 and his perceptual reasoning score of 104. She stated this discrepancy was statistically significant, and petitioner's prior IQ testing indicated a similar discrepancy. Brawley stated additional neuropsychological testing demonstrated petitioner has poor verbal skills, and a non-verbal abstract reasoning test she administered showed found petitioner was severely impaired in his ability to think abstractly

and to be cognitively flexible. Brawley testified she found petitioner also has frontal lobe and temporal lobe deficits. She stated the frontal lobe damage would lead to impulsivity and poor decision making.

Brawley testified her findings were consistent with those of Dr. Merikangas. She stated the petitioner's medical and psychiatric records indicate several individuals had previously requested neuropsychological testing for petitioner. She acknowledged petitioner was previously diagnosed with personality disorder; however, she stated it is important to first rule out medical and neurological causes prior to making such a diagnosis and no such testing was conducted in petitioner's case. Brawley opined petitioner's test scores on intellectual functioning tests have improved over the years and this can be explained by petitioner being housed in a controlled environment. Brawley stated petitioner's neurological functioning has likely also improved while incarcerated. She acknowledged petitioner obtained a GED, paralegal certificate, and participated in some religious studies while incarcerated. Brawley explained self-education is possible in a structured environment despite petitioner's cognitive deficits.

On cross examination, Brawley testified petitioner has a history of drug use. She opined such drug use could have contributed to petitioner's neurological damage. She stated petitioner reported several incidents of head trauma as a result of physical abuse or physical altercations as well as having memory loss associated with each of the reported incidents of head trauma. Brawley testified she did not evaluate petitioner's competency or criminal responsibility and did not form an opinion as to those issues, but rather evaluated petitioner to determine cognitive functioning and possible cognitive deficits.

Aleysandra Finn testified she is employed as an investigator with the Tennessee Post Conviction Defender's Office (hereinafter, PCDO). She stated prior to joining the Office of the Tennessee Post Conviction Defender she worked as a juvenile probation officer. She reviewed the social history documents collected by prior counsel and by the PCDO, as well as conducted interviews with petitioner's family members, individuals from the juvenile facilities where petitioner was housed, and individuals associated with petitioner's incarceration at Parchman Prison. She also interviewed petitioner to determine where he had been housed during his multiple incarcerations and to identify potential mitigation witnesses. Finn stated she gathered information relating to petitioner's biological father, Richard Norman Smith, and learned Smith was born out of wedlock and his mother remarried. Finn testified Smith did not have a good

relationship with his mother but did not have a relationship with his step-father. Finn stated Smith was treated differently than the other siblings and eventually placed in a juvenile facility. When Smith was sixteen years old, Finn testified, Smith's mother committed suicide and his step-father began drinking heavily. She stated Smith's brother, David, was addicted to pain medication and also committed suicide. .

Finn stated she also gathered information about petitioner's biological mother, Holly Taylor.¹⁹ Finn testified Taylor's father was emotionally and physically abusive to Holly's mother, her sister, and Holly. She described that Taylor and her sister recall seeing their father shoot their uncle in the arm and beating a man with a hammer. She stated Taylor's father was eventually incarcerated for raping a daughter from a previous marriage. Taylor's father was murdered while incarcerated. Finn stated Taylor's mother was described as "mean" and "uncaring." Once Taylor's father went to prison, Taylor's mother remarried, and, starting at a very young age, Taylor and her sister were repeatedly sexually molested by their step father.

Taylor's sister informed her mother of the abuse and the stepfather admitted the abuse. Thereafter, Taylor's step father informed the girls if they told about the abuse he would leave them on the street to starve. Finn testified Taylor began acting out sexually as a result of the abuse. She stated Taylor tried to end the abuse. Taylor told her step father she was going to write letters to family members and reveal the abuse and then commit suicide.

Finn testified Taylor met petitioner's father at age fifteen and petitioner's mother and father were heavy drinkers. After she became pregnant with petitioner, petitioner's mother "spiraled out of control." Finn stated Taylor reported wanting to harm or kill her children, Taylor acknowledged she was not a loving or caring mother, and Taylor further acknowledged she would periodically leave home and abandon the family for periods of time.

Finn testified petitioner's father was also not a loving or caring parent and petitioner's father believed petitioner was not his child. According to Finn, petitioner, as a baby, would cry and could not be consoled and indicated petitioner's mother would ignore his cries. She stated petitioner's father would hand over the money he earned to petitioner's mother and assumed she was buying clothes and food for the children. However, petitioner's mother spent the money on other items and accumulated credit card debt. Petitioner's parents' relationship was abusive, and

¹⁹ It appears petitioner's mother went by several different names. In past proceedings she was referred to as Nelly. However, the witness indicated petitioner's mother refers to herself as Holly.

petitioner and his siblings were often neglected and abused. Finn described several incidents of abuse reported to her by petitioner's mother and siblings.

Eventually, petitioner's mother left the home with much of the family's belongings. Finn stated petitioner's father took on additional work and a lady in the neighborhood, Gladys McClendon, eventually took the children into her home and raised them. Finn testified petitioner's father subsequently abandoned the children and McClendon's daughter, Shirley became Petitioner's adoptive mother.²⁰ When petitioner came to live with the McClendon's, he had burn marks on his arms and feet which appeared to have been caused by cigarettes burned into his skin. Petitioner's father was accused of sexually molesting petitioner's half sister and his sisters. At some point, petitioner's father and mother reconciled and considered taking the children back. However, petitioner's mother indicated she did not want the children. Finn reported petitioner's mother stated if she had not abandoned the children, she likely would have killed them.

Shirley and Jimmy Odom were petitioner's adopted parents. Shirley was sixteen when she married Jimmy, who was seventeen. The couple had three biological children: Cindy Odom, Jimmy Jr., and Larry. Jimmy, Jr., was conceived while Jimmy Odom was incarcerated at Parchman Prison. Petitioner was approximately two years old when he began living with his adopted family. Finn stated the Odom marriage was volatile and stated Jimmy Odom was an alcoholic. She testified the Odom home was filthy and extremely cluttered with only small paths for movement around the house. Eventually, the couple divorced and custody was given to Jimmy. However, Jimmy did not want the children and told Shirley she could keep the children, but she did not want the children either. According to Finn's testimony, Shirley left Richard, Larry, and Jimmy with her mother, Gladys McClendon, and Shirley took Cindy with her while living with a friend. Thereafter, the boys were passed between the McClendon household and their father, Jimmy Sr. Petitioner was approximately four years old at the time. Finn testified Gladys was extremely cruel to petitioner. She stated several family members indicated Gladys did not like petitioner and would physically abuse him. She described one incident in which petitioner hid under the bed and after Gladys found him, she beat him so severely her son James had to stop her.

²⁰ Other members of the McClendon family adopted some of petitioner's siblings.

Finn testified when petitioner was approximately five years old, Shirley married a man named Marvin, who was an abusive alcoholic. She stated Shirley also began to drink more when she married Marvin. Gladys eventually sent the Odom children and petitioner to live with Shirley and Marvin who also had three children of their own. According to Finn, Jimmy Odom, Jr., described his time with Shirley and Marvin as "the dark time" and indicated every time he would discuss this period in his life he would break down and cry. Finn stated Jimmy Jr. eventually spent time in Parchman Prison. Finn testified Larry Odom stated Marvin once put a gun to his head.

Family members reported Marvin would beat the children with the buckle of his belt. The family reported the older children would run out of the house, could hear Marvin beating petitioner, and could hear petitioner screaming. The family reported petitioner eventually became numb to the beatings and no longer cried or responded to the beatings. Finn testified petitioner wet the bed, was often publicly shamed by Shirley and Marvin, and Shirley would spank petitioner's private parts each time he wet the bed. Finn stated petitioner was often hungry, even after eating, and, as a punishment Marvin, forced hot sauce down petitioner's throat.

Finn testified Shirley and Marvin's home was filthy, the children were often neglected, and Shirley was often drunk during the day. A neighbor reported you could often hear yelling and screaming from the house and the police were often at the home. Finn stated the children were often dirty and unkempt. She stated petitioner and the Odom children took care of themselves. She stated, at approximately twelve years old, petitioner and Larry began hanging out at the Greyhound bus station, charging men five dollars for oral sex.

Finn stated documents from petitioner's social history indicate some of the children, including petitioner, were living in vacant buildings. Finn testified petitioner eventually ran away from home, and, along with his adopted brothers Larry Odom and Jimmy Odom, Jr., deemed "incorrigible" and committed to Columbia Training School, a juvenile facility. She stated when a child ran away from Columbia Training School there were several punishments. She stated Jimmy reported being paddled and indicated during one of these occasions he was paddled so hard his underwear was torn from his body by the force of the beating. Later, in lieu of paddling, petitioner spent considerable time in detention in the "hole," which consisted of a small room with a window in the door for staff to pass by, a concrete floor, and a "Turkish"

toilet. Finn stated she reviewed the records and found petitioner spent one hundred and twenty days in the hole and, during this time, petitioner had very limited human contact.

Finn testified Jimmy Jr. received mail from home and visits from Shirley and Jimmy Sr. She stated Larry received visits from Jimmy Sr. and had money placed into his commissary account. However, petitioner received no visitors, no mail, and no financial support. She stated children at Columbia Training School were housed in one room cottages. She stated each cottage was looked over by cottage parents, who received no training.

Finn testified a lawsuit was filed challenging the conditions at the Columbia Training School and other similar facilities in Mississippi. She stated the lawsuit alleged the children were punished by being stripped, hog tied, and thrown into the detention cells; the schools imposed enforced labor at the Dairy Farm located at the facility; and violence at the facilities between the children was rampant. She stated the disciplinary hearings at Columbia Training School were recorded, and, in one such hearing, petitioner described being beat up by a larger inmate at the school. Finn testified petitioner once left the school, stole a car, and fled to Texas. Upon his return, petitioner appeared to have been badly beaten. She stated on another occasion petitioner ran away and returned to the home of his biological father.

Finn testified petitioner was small for his age, undernourished, and family members reported petitioner would have regular "spells" starting at a young age, indicating petitioner would just "check out" or "go somewhere in his head." She stated in the sixth grade petitioner missed thirty three days of school, received mostly "Ds" and "Fs" but was still promoted to the next grade, and was in special education classes.

Finn testified prior to entering Columbia Training School petitioner was evaluated by Dr. Cox. She stated Dr. Cox performed another evaluation of petitioner after he was sent to Columbia Training School and recommended petitioner be administered an EEG, which was performed by Dr. Tipton. Finn testified it was unusual for a child from the training schools to be referred for an EEG, and Dr. Tipton stated he recalled petitioner was "moderately mentally retarded." Finn testified petitioner was eventually paroled from Columbia Training School and then was later incarcerated at a facility known as Oakley Training Academy. Thereafter, petitioner was released and later housed in a local jail. She stated, during his incarceration, petitioner was beaten unconscious by the other inmates. Eventually petitioner was arrested and convicted for homicide and incarcerated at Parchman Prison.

Finn testified Parchman Prison is divided into "units" or "camps." She stated the inmates are housed in open bunk bedding and even the isolation units contained multiple man cells which were rarely locked. During the time petitioner was incarcerated, inmates described an incident in which the guards lined up all the inmates and took turns beating them. She stated inmates also related stories in which the guards would discipline a single inmate in a room they referred to as the "red room." Additionally, at the time of entering Parchman, petitioner was five feet eight inches tall and weighed one hundred and eighty pounds. Finn testified weak inmates became the "gal boy" or "son" of stronger inmates. She stated if an inmate loses the protection of the "daddy" or stronger inmate, then he becomes a "punk" and may be abused by numerous stronger inmates. Finn stated petitioner's brother Larry tried to commit suicide while incarcerated at Parchman and petitioner's brother Jimmy Jr. was able to protect himself and became an enforcer for the Arian Brotherhood under an inmate known as "psycho," who was the "daddy" to petitioner. According to Finn, Jimmy Jr. stated he could not assist his brothers or he would become a target himself and Jimmy Jr. stated would rather kill his brothers than become a victim of gang rape.

Finn testified she reviewed petitioner's Parchman records and stated the records indicated petitioner was hospitalized after being attacked and beaten in an attempted gang rape. Additionally, petitioner's prison medical records indicated petitioner suffered from various medical conditions, including a particularly virulent strain of syphilis. She stated petitioner was forced to wear women's clothing and makeup. Finn stated petitioner eventually requested protective custody. She stated while all three men were incarcerated at Parchman Jimmy Sr. would visit with Larry and Jimmy Jr. but did not visit with petitioner.

On cross examination, Finn testified she reviewed the file of Glori Shettles, who served as mitigation investigator at both of petitioner's re-sentencing proceedings. Finn admitted she has never testified in front of a jury, was not aware mitigation investigators at trial are limited by the court in the amount of funding available to conduct the mitigation investigation, and could not state how many hours she spent investigating petitioner's case. However, Finn testified her investigation began in January 2013 and was investigating only one other case at the time. Finn stated she located Holly Taylor in lower Mississippi, through petitioner's sister, Carol. Although Finn acknowledged some information provided by Jimmy Jr. was contradicted by his prior sworn

testimony, she attempted to corroborate information she received with accounts from at least two individuals. According to Finn, a mitigation investigation is never complete.

Dr. James Merikangas, testified as an expert in the field psychiatry. He stated he evaluated petitioner at Riverbend in January 2014. Dr. Merikangas testified he reviewed petitioner's medical, educational and prison records as well as the evaluations of other mental health and medical professionals. Dr. Merikangas stated based upon his testing he determined petitioner has brain injury and indicated he then tried to determine the cause of the brain injury. Dr. Merikangas testified the records he reviewed suggest petitioner's mother may have consumed a significant amount of alcohol while pregnant with petitioner. While he acknowledged he could not say with certainty petitioner's mother actually consumed alcohol while she was pregnant with petitioner, Dr. Merikangas stated alcohol during pregnancy can cause brain damage. He stated petitioner had symptoms of fetal alcohol spectrum, meaning he does not have all the features of fetal alcohol syndrome but has some of them. He stated people born with this condition may be less intelligent, have less impulse control, and suffer from attention deficit disorder. He stated scans of petitioner's brain show thinning of brain tissue in an area of the brain associated with fetal alcohol syndrome. Dr. Merikangas further testified petitioner had serious head injuries as an infant and later as a child. He also stated, at four years of age, petitioner had a high fever which could have resulted in some brain damage.

Dr. Merikangas stated his diagnosis is corroborated by petitioner's IQ testing which shows petitioner performs much higher on testing dealing with one hemisphere of his brain versus the other hemisphere which appears to be affected by the brain damage. Dr. Merikangas testified a prior psychologist did a neurological examination of petitioner and found petitioner had some serious cognitive issues. Thus, the doctor ordered an EEG and the abnormal EEG confirmed the doctor's suspicions about petitioner's possible brain damage. Dr. Merikangas further stated he performed an MRI of petitioner's brain, which shows damage to the temporal lobe of petitioner's brain and indicates petitioner has lost tissue in the basal ganglia area of the brain.

Dr. Merikangas explained the more brain tissue lost the less well a brain functions. He stated petitioner has an enlarged ventricle which is a sign of degenerative brain disease. Dr. Merikangas stated petitioner's MRI also showed scarring of the brain which is an indicator of long term brain injury. Dr. Merikangas testified he also administered additional testing and

found not only are petitioner's temporal lobes structural different, but also abnormally functioning. However, he could not state the exact cause of the dysfunction.

Dr. Merikangas testified he reviewed petitioner's juvenile records and Dr. Cox's evaluation of petitioner, which Dr. Cox reported a full scale IQ of 81. Dr. Merikangas acknowledged subsequent to this testing, petitioner's IQ was again tested resulting in a score in the 90s. He acknowledged an 81 IQ was above the range of borderline intellectual functioning, but a thirty three point difference between the verbal and performance portions of the test indicated petitioner suffered from brain damage. He stated an EEG of petitioner's brain from 1976 indicated petitioner had suffered a brain injury in the left side of his brain. He acknowledged he is aware petitioner had a normal EEG two years later, but opined it is not unusual for brain damaged individuals to at times have a normal EEG. He acknowledged the 1978 discharge diagnosis following the administration of the EEG indicated petitioner suffered from traits related to anti-social personality disorder but was competent to stand trial. Dr. Merikangas further acknowledged Dr. Lancaster's notes to the 1978 examination indicate the petitioner reported no prior head injuries. However, Dr. Merikangas testified he also reviewed other MDOC records regarding an incident report from 1981 stating petitioner was jumped by four other inmates and transferred to the hospital, placed in protective custody.

Dr. Merikangas further testified he reviewed the MDOC records relating to petitioner's diagnosis of syphilis, stating syphilis affects the brain by causing psychosis and dementia. He stated petitioner was found to have "secondary syphilis," which manifested in outward symptoms and, due to the severity of his condition, could have affected petitioner's brain and the other organs in the body. However, Merikangas could not determine whether the brain damage he observed was the result of the syphilis infection. Dr. Merikangas opined petitioner has congenital and acquired brain damage. He stated petitioner's early childhood abuse was detrimental to his psychological and neurological development. Under the DSMV-IV criteria, Merikangas testified, personality disorder is excluded as a diagnosis based upon petitioner's brain damage.

On cross examination, Dr. Merikangas testified he was not aware petitioner escaped from Parchman Prison, but the fact does not change his opinion petitioner suffers from brain damage. He reviewed the 1993 psychological summary and evaluation of petitioner by Riverbend and acknowledged the comments contained in the Riverbend assessment indicated petitioner had no

physical abnormalities; had no psychotic or delusional condition; no evidence communication barriers; and no noted neurological deficits. Dr. Merikangas stated this assessment was not consistent with his diagnosis or opinion regarding petitioner's psychological and neurological condition. Dr. Merikangas testified he also reviewed the 1978 evaluation of petitioner by the Mississippi State Hospital in Whitfield, Mississippi, which listed a history of alcohol and drug abuse. He acknowledged he could not rule out drug use as the primary cause of petitioner's brain damage. However, Dr. Merikangas explained if drugs were the cause of the damage then the scans would show damage to many areas of the brain. Instead, he testified petitioner's scans showed damage to one specific area of the brain and such damage was usually indicative of head trauma. Dr. Merikangas acknowledged Dr. Cox reported he found petitioner had mild neurological deficiencies but found petitioner's condition was not interfering with petitioner's cognitive abilities in a major way.

Dr. Merikangas stated he could not say petitioner's brain damage meant petitioner did not know right from wrong and could not say it prevented him from knowing what he was doing when he committed the crime. He could not specifically state petitioner's brain damage makes him violent. Finally, Dr. Merikangas acknowledged he previously testified in federal court he desired to have the death penalty abolished, and agreed the federal District Court found out of the eight experts testifying in the case, Dr. Merikangas, was the least objective.²¹ Dr. Merikangas acknowledged the District Court found he had testified in ninety seven murder proceedings, twice for the prosecution and ninety-five times for the defense. Dr. Merikangas further acknowledged the Court found he is a staunch opponent to the death penalty and his lectures and writing clearly indicate the doctor has an agenda.

The State presented testimony from several witnesses, including Sean Lester, the custodian of records for the Shelby County Medical Examiner's Office. He stated he was asked by the prosecution to review the Myra Johnson autopsy file to determine what physical evidence still existed in the file. He stated he found three items: two glass vacuum containers, one labeled rectal swabs and one labeled vaginal swabs, and another sealed manila envelope labeled hair and fiber from right hand. Lester stated the swabs were currently refrigerated and had been refrigerated since their collection. He stated there was never a request for testing on those items.

²¹ See *United States vs. William Merriweather, Jr.*, 2014 WL 5770213 (N.D. Ala. filed November 05, 2014), *Richard Odom vs. State of Tennessee*, Shelby County Criminal Court Case No. 01-12388, Exhibit 57 to Post Conviction Hearing.

James Hill testified he is employed by the Memphis Police Department's latent fingerprint division. He stated when latent lifts are collected at crime scenes by the Memphis Police Department they are retained and submitted for comparison by his department. He testified the prosecution asked him to bring with him all the physical property relating to this case which is currently in the control of his Department. The items Hill provided to the State were submitted into evidence as part of petitioner's post conviction proceedings.

William Merritt testified he is an investigator with the Shelby County District Attorney General's Office. He stated he was asked to ascertain all the evidence in the custody of the Shelby County Clerk's Office relating to petitioner's case. Merritt testified he obtained three boxes of evidence in the custody of the clerk's office. He stated this was the "residual" evidence not previously introduced in any of the petitioner's trials. The State introduced this evidence as an exhibit to petitioner's post conviction proceeding. Merritt stated these items were located at the Clerk's offsite storage facility.

Glori Shettles testified she formerly worked for Inquisitor Inc., a private investigative company. Through her employment with Inquisitor, Inc., she was hired to perform the mitigation investigation in petitioner's 1999 resentencing proceeding and subsequent 2007 resentencing proceeding. She stated she has performed mitigation work on approximately ninety capital cases, and, in each case, she was responsible for interviewing the client, speaking with family members and other collateral witnesses, preparing a social history, working with the attorneys to prepare a strategy, and recommending and obtaining appropriate experts. Shettles testified she routinely attended training in the area of capital litigation and stated the training would cover the area of mental health and neurological health.

Shettles testified a mitigation investigation is never complete. She stated with more time more information can be gathered. Shettles testified she was salaried when working for Inquisitor. However, the company was paid an hourly fee for their services; the court would initially approve a certain number of hours for completing the mitigation report. In addition, if out of state travel was required for the investigation a separate affidavit had to be prepared and reimbursement sought separate from the prior approved funding. In order to prepare a defense in the confines of the funding limits, Shettles stated, the attorneys and investigators were required to prioritize and review the issues most relevant and helpful to the defense strategy. She testified part of her job as a mitigation investigator involves developing proof of mental health and

neurological issues identified through records and interviews of family members and other mitigation witnesses. Additionally, she is responsible for advising attorneys about potential experts who may be needed to assist the defense. However, she agreed some attorneys may take this task on themselves and she would be less involved in the expert proof area of the mitigation case.

Regarding the investigation relating to petitioner's second trial, Shettles did not recall having any discussion with petitioner's attorneys relating to potential expert witnesses. However, she acknowledged if her records reflected otherwise, the records would be more accurate than her memory. In the first resentencing, she stated, the attorneys primarily handled the expert proof. Shettles testified, during petitioner's second resentencing, she exhausted all the funding provided by the court; she requested more funding which was denied. However, Shettles acknowledged she was at an advantage in performing her investigation in petitioner's case because she had the benefit of the mitigation investigation which was conducted during petitioner's first trial and initial resentencing proceeding. Shettles stated she was able to begin the third resentencing investigation where she left off in the prior proceeding. Shettles agreed, in addition to funding limits, a mitigation case is limited by the time frame the court sets for bringing the case to trial. In petitioner's third proceeding, Shettles opined she was at an advantage because she had the benefit of the time spent investigating petitioner's mitigation case in the prior proceeding.

Shettles testified she tried to obtain records from Oakley Training School but the records had been destroyed. In 1999, she was able to obtain records from Columbia Training School and highlighted the evaluation performed by Dr. Cox for 2007 counsel. In January, 2005, she sent an email to attorneys Skahan and McAfee stating she wanted to discuss potential experts and possibly revisit those already obtained. She identified another document indicating she informed counsel of Dr. Kenner's evaluation of petitioner and stated Dr. Kenner recommended a neuropsychological consult but the court would not allow a continuance for Dr. Auble to perform an evaluation of petitioner. She stated she was attempting to locate jurors from the second Odom trial to determine what might be effective in developing a mitigation case for petitioner's third proceeding.

Shettles testified part of her job was to gather information from family members and get family members to participate in petitioner's case, but there was a great deal of resistance from

petitioner's family members. She stated, during petitioner's second trial, some family members were willing to speak with her but they were not willing to testify at trial. During her work in preparation for petitioner's third proceedings, Shettles stated she continued to develop relationships with petitioner's family and attorney McAfee accompanied her on visits with the family. Shettles opined McAfee's participation in the interviews assisted her in getting additional cooperation from petitioner's family and attributed to their willingness to participate in the trial proceedings. Shettles testified she conducted an interview with Carol Rowsy, who asked if petitioner would ever be released and expressed fear of petitioner. Rowsy further stated petitioner was smart enough to escape again if given an opportunity. She indicated this was the feeling of several family members. However, Shettles testified with additional time and funding she was able with some family members to overcome this fear and gain their participation.

Shettles testified she had a good relationship with attorneys McAfee and Skahan. She stated the working relationship with these two attorneys was very cooperative and indicated she played a major role in developing the mental health proof associated with petitioner's mitigation case. She identified notes from a conversation she had in December 2004 with Dr. Hutson, a 2005 conversation with Dr. Kenner,²² and a July 6, 2005 conversation she had with psychologist Joseph Angelillo. The notes indicated this information was communicated to the attorneys and the attorneys were informed Dr. Angelillo had recommended a neuro-psychological evaluation. She identified additional notes from subsequent conversations with Dr. Kenner, a document outlining a mitigating strategy based upon possible brain trauma, a document indicating she had a telephone call with former Mississippi youth services officer David Love, and a document indicating she spoke with other officials relating to youth services and corrections in Mississippi, including Dr. Cox.

Shettles testified her notes from her conversation with David Love indicating Love was surprised petitioner had not been executed and reflect Love indicated petitioner was "totally insane, one of the meanest little bastards he'd ever met – was a psychopath or sociopath." She stated Love further stated, if released, petitioner would "do it again" and stated he would never forget someone like petitioner. Shettles testified she spoke with various individuals about the conditions at Parchman Prison.

²² Kenner was an expert utilized by 1999 trial counsel in preparation for petitioner's first resentencing proceeding.

Shettles identified a seventy page mitigation timeline she prepared, outlining the chronological narration of the information gathered through records and interviews. Shettles' time sheets for petitioner's trial show the numerous hours she spent preparing petitioner's mitigation, including extensive investigation into possible mental health mitigation.²³ Shettles testified she was satisfied with the work performed in petitioner's third proceeding and the case presented in the third proceeding. She stated she was happy with the cooperation she was able to get from the petitioner's family and the working relationship she had with 2007 counsel. She opined the mitigation investigation in petitioner's third proceeding was as thorough as any she has conducted in any other capital case in which she has assisted.

FINDINGS²⁴

I. Ineffective Assistance of Trial Counsel

Petitioner contends his rights under Article I, §§ 8, 9, and 16 of the Tennessee Constitution, and Amendments VI, VIII, and XIV of the United States Constitution were violated by counsel rendering ineffective assistance at both his trial, resentencing and on direct appeal of his convictions and sentences. To succeed on a challenge of ineffective assistance of counsel, the petitioner bears the burden of establishing the allegations set forth in his petition by clear and convincing evidence. Tenn. Code Ann. §40-30-110(f). The petitioner must demonstrate counsel's representation fell below the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Under Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), a petitioner must establish (1) deficient performance and (2) prejudice resulting from the deficiency. 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).

²³ See *Richard Odom vs. State of Tennessee*, Shelby County Criminal Court Case No. 01-12388, Exhibits 73 and 74 to Post Conviction Hearing.

²⁴ This court has reviewed all of the allegations submitted in petitioner's original *Petition for Post Conviction Relief Amended Petition for Post Conviction Relief* and *Supplemental Amended Petition for Post Conviction Relief*. Any claim not specifically addressed in this order, has been found by this court to be without merit.

When evaluating an ineffective assistance of counsel claim, the reviewing court should judge the attorney's performance within the context of the case as a whole, taking into account all relevant circumstances. Strickland, 466 U.S. at 690; State v. Mitchell, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The reviewing court must evaluate the questionable conduct from the attorney's perspective at the time. Strickland, 466 U.S. at 690; Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). In doing so, the reviewing court must be highly deferential and "should indulge a strong presumption counsel's conduct falls within the wide range of reasonable professional assistance." Burns, 6 S.W.3d at 462. Defendant in a criminal case is not entitled to perfect representation, only constitutionally adequate representation. Denton v. State, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). In other-words, "in considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.'" Burger v. Kemp, 483 U.S. 776, 794, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987) (quoting United States v. Cronin, 466 U.S. 648, 665 n.38, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)). Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. Williams v. State, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). The fact a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. House, 44 S.W.3d at 515 (citing Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996)). However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation. House, 44 S.W.3d at 515.

It is unnecessary for a court to address deficiency or prejudice in any particular order or even to address both if the petitioner makes an insufficient showing on either. Strickland, 466 U.S. at 697, 104 S.Ct. at 2069. In order to establish prejudice, the petitioner must establish 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." State v. Burns, 6 S.W.3d 453, 463 (Tenn. 1999) (quoting Strickland, 466 U.S. at 694, 104 S.Ct. at 2068).

A. Requesting Resources and Challenge Limits to Resources

Petitioner contends both his 1992 and 2007 trial counsel were ineffective in failing to request sufficient resources to conduct a constitutionally adequate defense and failing to object to unconstitutional limits placed on the resources made available to the defense in capital cases. Specifically, petitioner asserts trial counsel failed to request sufficient resources for expert assistance relating to issues concerning: (i) jury selection; (ii) potential change of venue; (iii) his medical conditions including substance abuse, neurological impairments and intellectual disability; and (iv) presentation of mitigation. He further asserts trial counsel should have objected to the unconstitutional limitations placed upon funding in capital cases, including: (i) the inadequate compensation to defense counsel; (ii) inadequate compensation for experts; (iii) unreasonable caps on fees and expenses for experts; (iv) unreasonable geographic limitations for experts; and (v) the overall “chilling effect” created by Tennessee rules and procedures in obtaining the necessary expertise and other resources to provide a constitutionally adequate defense.

1. Request for Services

As to petitioner’s assertion trial counsel should have obtained services relating to jury selection and a potential change of venue, this court finds petitioner has failed to present any evidence in support of his claims. Thus, he is not entitled to relief based upon this claims. As it relates to the adequacy of petitioner’s investigation and request for funding in support of his physical condition, mental health claims, mental state at the time of the offense, and general presentation of mitigation this court finds neither 1992 nor 2007 counsel were ineffective in requesting the necessary funding to investigate and present any such claims.

a. Claims of Intellectual Disability²⁵

Petitioner argues, given his record of head trauma, poor academic performance, and likely brain damage, both 1992 and 2007 counsel should have secured the necessary expert services to assist them in evaluating his impaired intellectual capacity and should have presented proof he was intellectually disabled. This court finds petitioner has failed to present any

²⁵ In addition to his claims relating to ineffective assistance of counsel, petitioner raises an individual claim of intellectual disability. For the same reasons discussed above, this court finds petitioner is not entitled to have his sentence of death vacated based upon his claim he is intellectually disabled and therefore ineligible for the death penalty.

evidence demonstrating petitioner is in fact intellectually disabled under the Tennessee statute. Thus, this court finds counsel were not ineffective in failing to raise such a claim.

Tennessee Code Annotated §39-13-203 precludes a defendant who is intellectually disabled at the time of committing first degree murder from being sentenced to death. See Tenn. Code Ann. §39-13-203. The statute defines intellectual disability as: (1) significantly sub-average general intellectual functioning as evidenced by an IQ of seventy (70) or below; with (2) deficits in adaptive behavior; and (3) manifestation of symptoms prior to the age of eighteen (18). Tenn. Code Ann. §39-13-203(a). All three prongs of this definition must be satisfied to establish intellectual disability. A defendant claiming to be intellectually disabled at the time of the commission of an offense must demonstrate he is intellectually disabled by a preponderance of the evidence. Tenn. Code Ann. §39-13-203(c); State v. Howell, 151 S.W.3d 450, 465 (Tenn. 2004). In other words, in order to succeed on his motion, defendant must demonstrate it is more probable than not or more likely than not he meets each of the three criteria set forth in the statute. See Van Tran, 2006 Tenn. Crim. App. LEXIS 899, at * 59 (citing 32A C.J.S. Evidence 1312 (2005)).

Initially, this court notes the development of jurisprudence surrounding claims of intellectual disability was not well developed in the 1990s and the prevalence of such claims in the capital litigation context was slight. It is against this backdrop the court must evaluate the 1992 trial counsels' lack of request for services related to the presentation of claims of intellectual disability. This court finds, based upon the evidence presented at the post conviction hearing and the records available to both 1992 and 2007 counsel, it is unlikely any such request would have been granted. Moreover, even if requested and presented to the court, it is unlikely counsel would have been successful in meeting their burden of proof as it relates to intellectual disability claims.

None of the testing conducted to measure petitioner's functional intelligence indicated petitioner fell within the range of persons considered to be intellectually disabled. Some testing placed petitioner in the normal range of intellectual functioning and one test placed petitioner in borderline range of low intellectual functioning but did not indicate petitioner fell into the category of individual who are intellectually disabled. Tora Brawley stated petitioner performed well on the neuropsychological testing she performed and, on the WAIS IV, petitioner obtained a full scale IQ of 94 which placed him in the normal range of intellectual functioning. Although

Brawley indicated the wide discrepancy between petitioner's verbal and performance scores indicated petitioner likely suffered from some form of brain damage, she did not find petitioner was intellectually disabled.

Brawley acknowledged petitioner's test scores on intellectual functioning tests have improved over the years. She noted this can be explained by petitioner being housed in a controlled environment and stated petitioner's neurological functioning has likely also improved while incarcerated. She observed petitioner obtained a GED, paralegal certificate, and participated in some religious studies while incarcerated. She stated self-education is possible in a structured environment despite petitioner's cognitive deficits. Other earlier intelligence testing confirmed Brawley's conclusions.

Dr. Merikangas was also unable to support a claim of intellectual disability. He testified he reviewed petitioner's juvenile records and Dr. Cox's evaluation of petitioner. He stated Dr. Cox reported a full scale IQ of 81, which placed petitioner in the low range of intellectual functioning. Merikangas like Brawley emphasized the significant differential between petitioner's verbal and performance scores and indicated his examination of petitioner revealed petitioner had considerable damage to his brain. However, Dr. Merikangas could not say petitioner was intellectually disabled due to his brain impairments.

Based upon this testimony, this court finds, even if counsel were deficient in failing to seek the assistance of an expert for the purposes of evaluating petitioner's intellectual functioning, petitioner has failed to demonstrate he was prejudiced by counsels' inaction as he is clearly not intellectually disabled under the Tennessee statute. Because this court finds petitioner has presented no evidence suggesting he is intellectually disabled, this court further finds petitioner was not prejudiced by trial counsels' failure to seek expert assistance in challenging his statement to police based upon his intellectual disability. Petitioner is not entitled to relief based upon this claim.

b. Mental State

Petitioner alleges 1992 trial counsel failed to retain experts who were necessary to evaluate petitioner's mental state at the time of the offense. He argues trial counsel should have retained experts with the requisite expertise relating to his medical and psychiatric conditions at or near the time of the offense, including: (1) the effects of diagnosed and undiagnosed mental

disorders; (2) the effects of diagnosed and undiagnosed medical conditions; and (3) the stressors affecting petitioner at the time of the offense.

Initially, this court notes 1992 counsel did have petitioner evaluated to determine if a defense based upon insanity or a mental state defense (i.e. diminished capacity) could be presented and Dr. Hutson determined the petitioner has never been diagnosed with any significant psychiatric disorder, such as would be likely to impair his ability to appreciate the wrongfulness of his actions, or to impair his ability to conform his behavior to the requirements of the law. Hutson further opined the petitioner likely can be diagnosed as a personality disorder but indicated such disorder would not sustain a mental health defense. Thus, this court finds 1992 trial counsel were not ineffective in failing to request services in this regard and in failing to utilize such services.

Petitioner contends, had Hutson been provided all of the relevant medical and mental health records from petitioner's background, his determination may have been different and argues trial counsel were thus ineffective in failing to adequately prepare Hutson to perform his evaluation. However, this court finds, even if counsel were deficient in this regard, petitioner has failed to demonstrate he was prejudiced by trial counsels' inaction. At the post conviction hearing, both Dr. Merikangas and Dr. Brawley stated they had not been asked to evaluate petitioner's mental state at the time of the offense. More importantly, Dr. Merikangas specifically stated he could not say petitioner's brain damage meant petitioner did not know right from wrong and could not say it prevented him from knowing what he was doing when he committed the crime. Thus, this court finds petitioner has failed to demonstrate he was prejudiced by any inaction on the part of trial counsel relating to the retention, preparation, or presentation of claims relating to his mental state at the time of the offense.

c. Physical & Mental Health

Petitioner argues both 1992 and 2007 trial counsel were ineffective in failing to obtain the services of and in failing to properly utilize the services of a neuropsychologist; a properly qualified and informed psychiatrist or other medical expert; and a neuropharmacologist or addiction expert. Petitioner argues trial counsel should have been aware of red flags indicating further investigation into his cognitive functioning and psychiatric health was needed. He cites numerous medical and psychiatric evaluations, records and reports which he contends counsel

should have utilized in seeking the appropriate expert services. He further argues counsel should have analyzed his history of substance abuse and reported drug and alcohol use in the days and hours leading up to the murder and sought expert assistance to evaluate his addiction issues. Additionally, he contends 1992 trial counsel failed to properly utilize the services of Dr. Hutson and 2007 trial counsel failed to timely retain and properly inform and consult with psychologist, Dr. Joseph Angelillo.

i. Neurological & Neuropsychological examination

Petitioner asserts 2007 resentencing counsel knew or should have known his family, medical, and mental health history required neuropsychological, neurological, and psychiatric evaluations and consultations. Counsel for petitioner argues 2007 counsel were aware, over the past thirty years, various mental health professionals urged petitioner to undergo such examinations, including: (1) Dr. Cox's 1974 psychological evaluation of petitioner at age fourteen documenting evidence of mild organic deficiencies; impaired judgment and insight and abstract reasoning; memory problems and indications of lack of socialization and training, (2) Dr. Cox's 1975 psychological evaluation including intelligence testing with a score of sixty-seven on his verbal I.Q. and a full scale score of eighty-one; (3) a 1976 letter from Dr. Cox referencing petitioner's brain-damaged status and the State of Mississippi's failure to provide petitioner with necessary medical, psychiatric and psychological evaluations and referencing Dr. Cox's plan to arrange a neurological evaluation and EEG for petitioner; (4) an intelligence assessment of eighteen-year-old petitioner conducted by Mississippi State Hospital during a competency to stand trial evaluation indicating a twenty-eight point difference between verbal and performance scores; (5) a 1998 affidavit by clinical psychologist Dr. John Hutson asserting the necessity of an updated psychological evaluation, the necessity of a thorough psychological evaluation for mitigation purposes, and the necessity of an in-depth neurological exam fully exploring all neurological factors which should be considered by a capital jury at sentencing; (6) a request for PET scans by psychiatrist William Kenner; and, (7) a request for neuropsychological testing by Dr. Kenner, including Kenner's affidavit detailing his psychological evaluation of petitioner indicating the need for additional neuropsychological testing.

Petitioner contends several red flags from his social history indicated the need for further investigation including: (1) I.Q. score discrepancies; (2) prenatal exposure to alcohol; (3) history of several head injuries; (4) a significantly high fever during early childhood requiring hospitalization; and (5) an abnormal EEG reading, necessitating further neurological testing. He argues 2007 counsel ignored their own mitigation expert's recommendation to obtain a neuropsychological expert to testify about his temporal lobe impairments.

At the post conviction hearing attorney McAfee testified he believed the defense had considered retaining a neurologist and conducting a neurological examination of petitioner. However, McAfee testified when petitioner was confined to Parchman he was given a battery of psychological tests and underwent a physical examination. He stated the petitioner's EEG was normal and the records indicate petitioner suffers from traits of anti-social personality disorder but had no other psychological issues. Testing was conducted by the Parchman officials to determine if petitioner possessed any "organicity" or neurological deficits. This examination found no neurological deficits and petitioner was found to have a full scale IQ of 93. McAfee stated much of this information had been discussed in petitioner's prior sentencing proceedings. In some cases, McAfee testified he would raise the issue of brain damage as mitigation; however, in petitioner's case, the defense theory was centered on petitioner's future dangerousness and behavior within the prison system. McAfee testified the defense team considered these records in developing a theory of mitigation. However, he again pointed out a diagnosis of anti-social personality disorder directly undercut their arguments regarding future dangerousness. He further stated these records would have contradicted any claim the defense team would have made regarding neurological deficits or disorders.

McAfee testified petitioner underwent numerous examinations over the years. He stated Dr. Cox's assessment included particularly damaging information, specifically as it relates to future dangerousness. Specifically, McAfee recalled the records from Parchman prison further indicated petitioner stated, "maybe I did it for the joy of it," referring to firing the second shot which killed the victim in his Mississippi case and indicated "he had no feelings" or "sorrow" with regard to his actions. The report also referenced Dr. Cox's findings and indicated Dr. Cox had diagnosed petitioner as possible schizo personality. Attorney Skahan likewise testified he was concerned about the information which might be elicited if the defense team pursued a

defense based upon mental health and neurological deficits and stated based upon the prior evaluations.

Skahan stated usually a defense team would want to put forward evidence of brain damage, if it exists, in a capital case. However, in petitioner's case, there was a long history of evaluations which did not support such a claim. To present such proof, according to Skahan, might appear disingenuous when considered in light of petitioner's complete mental health history; in such instances, there is the potential such testimony may appear to be "bought and paid for." Thus, the defense chose to present emotional testimony from the petitioner's family relating to his traumatic childhood and difficulty in the Mississippi juvenile system as well as a picture of petitioner as a productive member of the penal system and someone highly amendable to rehabilitation so long as he is confined to the prison system. Skahan testified he reviewed petitioner's complete mental health and medical history before rejecting a mitigation theory based upon mental health issues or cognitive impairments.

Both attorneys McAfee and Skahan testified there were numerous discussions about theories of mitigation and the proper strategy for the resentencing proceeding. He stated certain strategies were rejected such as a theory based upon serotonin levels, brain fingerprinting, and eventually a defense based upon supposed neuropsychological deficiencies or disorders. Likewise mitigation investigator Shettles testified numerous theories of mitigation were considered and rejected. Shettles specifically stated the defense team had the benefit of seeing the two prior proceedings and reviewing what worked and what did not work as a mitigation theory and indicated they formed the mitigation strategy based in part of the failures of those prior proceedings.

Based upon the testimony of Skahn, McAfee, and Shettles, this court finds 2007 trial counsels' decision not to pursue a neurological evaluation of petitioner or a mitigation theory based upon cognitive impairment was made after extensive investigation into petitioner's background and social history and considerable discussions about the viability of various strategies. In particular, Shettles testified about the extensive investigation she performed on petitioner's case. It appears counsel were fully apprised of all the many prior examinations of petitioner and various diagnosis of the different reviewing mental health and medical professionals. Shettles collected numerous documents, contacted various experts, conducted research about possible theories, interviewed witnesses and worked diligently to develop a

relationship with petitioner's family to facilitate their participation in petitioner's defense which prior to the 2007 proceeding had been very limited. Due to the fact Shettles worked on petitioner's 1999 resentencing proceeding and his 2007 resentencing proceeding, Shettles has several years to investigate and develop mitigation in petitioner's case. As a result, she testified she found the investigation and presentation of mitigation in petitioner's case to be the most thorough she had ever prepared or presented. Thus, this court finds trial counsel were not ineffective in pursuing a theory based upon petitioner's terrible past and the failures of the system in addition to an argument indicating petitioner posed little future dangerousness. Petitioner is not entitled to relief based upon this claim.

ii. Neuropharmacological Expert

This court finds petitioner has presented no evidence in support of their claim trial counsel were ineffective in failing to retain, consult, or present evidence from an expert in the field of addiction medicine or the effects of substance abuse on one's brain chemistry and brain functioning. Moreover, even if petitioner could demonstrate counsel were ineffective in this regard, he would fail to meet the prejudice prong of the *Strickland* standard. Limited testimony was presented at the post conviction hearing about petitioner's use of drugs and alcohol. However, no testimony was presented demonstrating what evidence an addiction expert might have presented at petitioner's trial or what if any value such testimony would have added to petitioner's mitigation case. Thus, petitioner is not entitled to relief based upon this claim.

iii. Use of Retained Experts

Petitioner argues trial counsel failed to provide the retained experts all of the information needed to make a complete and proper assessment of his cognitive and psychological issues. Specifically, petitioner asserts 2007 trial counsel ignored their own mitigation expert's recommendation to obtain a neuropsychological expert to testify to his temporal lobe impairments. He asserts counsel did not request funding for a qualified expert until nearly two months prior to his resentencing hearing. He argues, because of trial counsels' failure to timely act, Dr. Angelillo did not have adequate time to review his extensive social history and mental health background and records. Petitioner contends Dr. Angelillo administered personality testing to petitioner but conducted no intelligence testing or neuropsychological testing. He

contends the testimony of Dr. Angelillo at trial demonstrates his lack of preparedness. He asserts Dr. Agelillo informed the jury, because he did not have the data he had requested by prior mental health experts, notably a neuropsychological evaluation, a PET scan, and an EEG, he was unable to administer the tests necessary to evaluate petitioner to determine if he had a major mental disorder. He argues, as a consequence, Dr. Angelillo stated he had a difficult time determining how much of petitioner's impairments and behaviors were due to physical organic brain injury and how much was due to psychological issues.

At the post conviction hearing, attorneys McAfee and Skahan testified Dr. Angelillo's testimony was not the primary focus of their mitigation strategy. Rather, counsel stated they attempted to present a theory of mitigation to the jury based upon the fact petitioner, due to his prior life sentence in Mississippi, would never be released from prison if the jury gave a life sentence. Counsel stated in conjunction with this argument they attempted to demonstrate petitioner had a good record while incarcerated and would not pose a danger to others if the jury spared his life. Trial counsel testified, in addition to this primary theory, the defense also used petitioner's difficult background to argue to the jury petitioner was essentially forsaken by the system. Both attorneys McAfee and Skahan indicated they felt this proof was best presented by the petitioner's family members and indicated the role of Dr. Angelillo was merely to enhance and support much of the information provided by the family and to support their assertion petitioner posed no real future dangerousness so long as he was incarcerated.

At trial, Dr. Angelillo testified the lack of sufficient mental health treatment afforded the petitioner as a child, the rejection he had experienced, and the physical and sexual abuse he had undergone all had a profound effect on his development. Dr. Angelillo testified the petitioner's time in the structured environment of Riverbend had been beneficial in modifying his behaviors and modulating his ability to engage in constructive activities. Dr. Angelillo expressed an opinion the petitioner would continue to thrive in this structured environment if given a life sentence. In addition to the testimony of Dr. Angelillo, Glori Shettles, the mitigation investigator in both petitioner's 1999 and 2007 resentencing proceedings testified as an expert in parole procedures and stated it was very unlikely petitioner would ever be released from prison. Her statements were supported by other prison officials. Shettles spent extensive time interviewing and building relationships with petitioner's family. Due to these relationships Shettles was able to convince several family members to testify on petitioner's behalf. Petitioner's family

described the extremely difficult, neglectful and abusive circumstances of petitioner's childhood and petitioner's brother described the conditions experienced by petitioner while incarcerated at Columbia Training School and Parchman Prison. Both attorneys and Shettles stated this testimony was incredibly powerful.

Considering a theory based upon cognitive impairments had been previously unsuccessfully utilized by 1999 trial counsel, this court does not find 2007 trial counsel were ineffective in failing to present an alternative mitigation theory. Under these circumstances, this court does not find the use of Dr. Angelillo as a compliment to this theory instead of as the centerpiece of mental health mitigation case was ineffective.

It appears the decision to forego a strictly or even primary mental health based theory of mitigation was made after extensive investigation by counsel and the mitigation investigator after substantive deliberations amongst the entire defense team. When asked about the decision at the post conviction hearing, counsel provided reasoned responses explaining the exact investigation and considerations that went into making the decision to follow a different strategy than prior counsel. Specifically, attorney Skahan acknowledged some of petitioner's prior mental health records contained warnings about petitioner's mental condition. However, according to Skahan, the fear of the defense team was the introduction of this information might show evidence of future dangerousness. He stated the goal of the defense team was to demonstrate petitioner had been failed by the system. He expressed his concern that, if petitioner was evaluated, the defense team could end up with an adverse diagnosis such as anti-social personality disorder.

Based upon all the proof presented at the post conviction hearing, the testimony presented at petitioner's 2007 resentencing proceeding and the evidence presented at the prior proceedings, this court finds counsel were not ineffective in their preparation and utilization of Dr. Angelillo's services. Petitioner is not entitled to relief based upon this claim.

2. Challenging Limitations on Services

This court finds petitioner's assertion Tennessee does not provide for adequate funding of the resources necessary to present a constitutionally adequate defense in capital cases has been previously been rejected by our the appellate courts. See Jerry Ray Davidson v. State, No. M2010-02663-CCA-R3-PD, 2013 WL 485222, *43 (Tenn. Crim. App., February 7, 2013), reversed on other grounds by Davidson v. State, 453 S.W.3d 386 (Tenn. 2014) (citing Andrew

Thomas v. State, No. W2008-01941-CCA-R3-PD, 2011 WL 675936 at *42-45 (Tenn. Crim. App., Feb.23, 2011), perm. to app. denied (Tenn. Aug. 25, 2011) (rejecting argument Tennessee fails to ensure adequate counsel and resources in capital cases). Thus, petitioner is not entitled to relief based upon this claim.

B. Guilt Phase Investigation

Petitioner asserts 1992 and 2007 trial counsel were ineffective in failing to conduct an adequate investigation into the facts comprising the allegations against him. As it relates to 1992 counsel, petitioner asserts trial counsels' investigation was limited to a three-month period between May and August of 1991. Moreover, he argues 1992 counsel failed to adequately investigate and challenge the veracity of his statement to police. As it relates to petitioner's 2007 counsel, the petitioner alleges trial counsel should have argued resentencing him without also retrying the guilt/innocence determination deprived the jurors of essential information necessary to support a viable mitigation case based upon residual doubt and mitigation relating to his diminished capacity and/or insanity.

1. 1992 counsel

Petitioner asserts trial counsel failed, generally, to conduct an adequate investigation into the facts of his case. At the hearing on petitioner's claims, 1992 second chair counsel, Carolyn Watkins, testified she had reviewed the defense file from petitioner's trial. She stated although she may have requested additional testing of certain physical evidence, she likely would not have conducted additional investigation of the factual allegations surrounding the murder. She stated several individuals were investigated by the defense team. However, Watkins testified the defense did not investigate all of the individuals listed in each of the police reports. Rather, she stated the defense team followed up on those individuals the police believed to be suspects. Watkins identified various documents outlining the interviews conducted by the defense team guilt phase investigator.

Watkins stated the defense was constrained by the fact petitioner had given a statement to police in which he admitted to robbing, raping and stabbing the victim. She indicated petitioner provided defense counsel with additional details of the crime which he had not revealed to

police. Watkins stated the records from the Public Defender file also indicated petitioner had committed several thefts and “snatched purses” in and around the area of the murder, including breaking into the drink machine at the parking garage where the victim was murdered. Watkins testified petitioner’s confession and account of the murder affected the defense team’s decision making process in the case. She stated the defense argued the statements were coerced. However, the trial court did not suppress the statement. Nevertheless, the defense team argued to the jury petitioner had been coerced by the police. Watkins testified based upon all of the evidence, including the petitioner’s confession and the fact his fingerprints were found at the scene, she found no evidentiary value in testing the petitioner’s clothing, blood evidence found in the parking garage or hair in the victim’s hand which appeared to belong to the victim.

This court finds petitioner has failed to demonstrate 1992 trial counsel’s general investigation of the factual allegations against him was deficient. It appears trial counsel investigated other possible suspects; reviewed the physical evidence and relevant reports of the incident; and, interviewed certain witnesses. Given the constraints on the defense based upon petitioner’s confession to the crime and physical evidence confirming his presence at the crime scene, counsel chose the only strategy available to them and attempted to challenge the validity of petitioner’s statement. This court finds under the circumstances counsel’s tactical choices in this regard were reasonable and based upon proper investigation.

2. 2007 Counsel

Petitioner argues 2007 counsel should have presented a mitigation defense based upon residual doubt. Petitioner claims 2007 re-sentencing counsel were ineffective in failing to argue they should have been allowed at his re-sentencing proceeding to re-litigate the guilt and innocence determination in order to present a more complete mitigation defense based upon residual doubt. Specifically, petitioner asserts trial counsel should have argued petitioner was not guilty due to his diminished capacity and/or insanity and thus should have the opportunity for a new jury to litigate the issue of his guilt after considering a defense based upon these theories.

This court first addresses the presentation of residual doubt mitigation, generally. “Residual doubt evidence” consists of proof admitted during the sentencing phase indicating the petitioner did not commit the offense, notwithstanding the jury’s verdict following the guilt phase. State v. McKinney, 74 S.W.3d 291, 307 (Tenn.2002) (citing State v. Hartman, 42 S.W.3d

44, 55–56 (Tenn.2001)). Tennessee appellate courts have held a defendant is allowed “to present evidence at a re-sentencing hearing to establish residual doubt as a non-statutory mitigating circumstance.” Hartman, 42 S.W.3d at 55. The Court held in doing so, a defendant may rely upon residual doubt evidence heard by the prior jury in the guilt phase of the trial. See McKinney, 74 S.W.3d at 307.

In petitioner’s case, it appears 2007 counsel chose not to present a defense based upon residual doubt due to the unsuccessful attempts at litigating guilt in petitioner’s prior proceedings. Attorney McAfee testified the focus of the defense team at the 2007 resentencing trial was not guilt or innocence but rather mitigation based upon petitioner’s background and record while incarcerated to demonstrate a lack of future dangerousness. He stated had there been some issue of importance relating to guilt or innocence which impacting potential mitigation than the team would have investigated such issues. However, he did not recall any such concerns in petitioner’s case. McAfee testified he is familiar with the concept of residual doubt as a mitigation theory and stated the defense team had access to guilt phase investigators and would have developed such a theory if they felt information warranted this theory.

McAfee identified an extensive letter sent to him by petitioner indicating petitioner did not wish to pursue a mental health theory as mitigation but wanted instead to raise a mitigation theory of residual doubt.²⁶ However, after discussions with petitioner and co-counsel, McAfee stated he was able to convince petitioner a theory of limited future dangerousness and a presentation of his social history was a more appropriate mitigation strategy. Attorney Skahan also testified he evaluated petitioner’s case and, although petitioner maintained his innocence, he concluded a strategy based upon residual doubt was not the strongest proof available to the defense. Rather, he stated the defense team attempted to portray petitioner as a broken individual who had been failed by the system but, who once incarcerated, had thrived and posed limited future dangerousness is given a sentence less than death. To this end, counsel presented testimony from petitioner’s family members describing petitioner’s difficult childhood, presented testimony from petitioner’s brother about petitioner’s incarceration at Parchman Prison, and presented testimony from Glori Shettles regarding petitioner’s record while incarcerated.

This court finds petitioner has failed to demonstrate trial counsel’s tactical decisions in this regard were the result of insufficient investigation or deficient representation. Petitioner

²⁶ See Exhibit 14.

presented no proof indicating a mitigation defense based upon residual doubt would have been more advantageous to petitioner than the strategy employed by trial counsel. Despite maintaining his innocence, petitioner confessed to the crime and physical evidence placed him at the scene. Thus, this court finds little value would have been added to petitioner's 2007 mitigation defense by including an argument based upon residual doubt or by abandoning other mitigation in favor of solely focusing on residual doubt as a mitigation theory.

Next, specifically addressing petitioner's contention 2007 counsel should have presented residual doubt proof based upon a claim of diminished capacity or insanity, this court likewise finds petitioner is not entitled to relief based upon this claims. Petitioner has presented no evidence suggesting such a defense would have been viable. None of the myriad of experts evaluating petitioner found petitioner's limited cognitive functioning would have supported an insanity defense or a defense related to diminished capacity. Thus, this court finds counsel were not ineffective for failing to argue to the court they should be allowed to re-litigate this issue or for failing to pursue a mitigation strategy based upon such claims.

C. Investigation of Prior Convictions

Petitioner argues his 2007 trial counsel were ineffective in failing to prevent the State from using his conviction for the murder of Mary Rebecca Roberts to provide the prior violent aggravating circumstance. Petitioner contends he was a juvenile when this offense was committed and argued juvenile offenses are not appropriate offense under the prior violent felony aggravating circumstance. Additionally, petitioner argues both his 1992 and 2007 counsel failed to conduct an investigation into the murder of Mary Rebecca Roberts. He contends had counsel conducted such an investigation they would have discovered petitioner provided dramatically varying accounts of the offense and witnesses provided inconsistent descriptions of petitioner's relationship with the victim's husband. Petitioner also asserts both 1992 and 2007 counsel failed to conduct an adequate investigation into his prior convictions for robbery which were also used to support the prior violent felony aggravating circumstance.

Relying on Thompson vs. Oklahoma, 487 U.S. 815, 836-38 (1988) and Roper vs. Simmons, 545 U.S. 551, 560 (2005), which stands for the proposition an execution of a juvenile (under the age of eighteen) offender violates the Eighth Amendment's bar against "cruel and

unusual punishment,” petitioner attempts to extrapolate the holdings of the high court to bar the imposition of the death penalty based upon an aggravating circumstance which relies upon a juvenile conviction as proof of its existence. Petitioner acknowledges the Tennessee Supreme Court has upheld a death sentence where the State used a juvenile conviction to support an aggravating circumstance. See State v. Davis, 141 S.W.3d 600, 618 (Tenn. 2004). However, petitioner argues the Court only addressed the appropriateness of using juvenile convictions under Tennessee’s statutory scheme and failed to address the constitutionality of using such convictions. This court need not address petitioner’s constitutional claims. Even if trial counsel were ineffective in failing to challenge the state’s aggravating circumstance based upon the use of petitioner’s juvenile conviction, the state had other adult offenses which they could and in fact did present to support this aggravating circumstance.²⁷ As to petitioner’s contention trial counsel failed to fully investigate the circumstances surrounding petitioner’s robbery convictions, this court finds petitioner has failed to present any evidence supporting this allegation. Moreover, this court notes the prior violent felony aggravating circumstance was not the only aggravating circumstance found by the jury. The jury also found the murder was committed while the petitioner was engaged in the commission of a robbery. Therefore, this court finds petitioner has failed to demonstrate he was prejudiced by counsel’s inaction and is not entitled to relief based upon this claim.

D. Social History Investigation

Petitioner asserts both his 1992 and 2007 trial counsel failed to conduct an adequate investigation of petitioner’s social history, including his years spent incarcerated in the Mississippi Department of Corrections. He argues 2007 trial counsel acknowledged they had specifically failed to present evidence related to petitioner’s life while incarcerated in Mississippi. Post conviction counsel assert there is significant evidence petitioner was sexually assaulted while incarcerated in Mississippi, and trial counsels’ investigation into this aspect of his social history was deficient. Petitioner contends counsel did not speak to any guards or inmates who might have first-hand knowledge of the attacks and presented no expert testimony regarding the impact of his victimization and their decision to limit their investigation was

²⁷ The State introduced a 1991 Shelby County conviction for robbery.

neither reasonable nor strategic. Petitioner asserts counsel had been warned by the trial court references to petitioner or inferences petitioner behaved as a model prisoner would open the door to his prior escape. Thus, he argues, once counsel decided to pursue a mitigation theory based upon minimal future dangerousness they should have been aware his escape may be introduced and should have instead presented their own evidence regarding his victimization while imprisoned in Mississippi.

At the post conviction hearing, petitioner presented testimony from several individuals who described the general conditions at Parchman prison. Betsy Chandler testified she “believed” petitioner was victimized while incarcerated at Parchman but stated she had no personal knowledge about any specific instance of victimization. Frank Nobles described conditions in the lock down unit of Parchman where he was housed. However, he stated he only knew petitioner from the law library and did not know if petitioner was ever housed in the lockdown unit. Robert Tubwell testified he was housed in the same unit with petitioner at Parchman prison. He stated petitioner was involved in a sexually exploitive relationship with at least two other stronger inmates and was made to perform sexual favors and other tasks in exchange for the protection of the stronger inmate. Additionally, mitigation investigator Aleysandra Finn testified regarding her investigation into petitioner’s time at Parchman prison and the general conditions at the prison during the time in which petitioner was incarcerated there. Finn also testified prison records indicated petitioner had been gang raped and beaten while incarcerated at Parchman.

Some testimony regarding petitioner’s sexual abuse while incarcerated at Parchman was presented at petitioner’s 2007 resentencing trial. Petitioner’s brother, Jimmy Odom, Jr., testified he was incarcerated at Parchman Prison with petitioner and their other brother Larry. He stated that both petitioner and Larry Odom were sexually abused by older inmates and that his efforts to take up for his younger brothers often resulted in fights at the prison. This court does not find 2007 trial counsel were ineffective in failing to present additional proof relating to petitioner’s possible victimization while incarcerated at Parchman prison. In an effort to preclude the state from presenting evidence of petitioner’s escape, counsel made a strategic decision to exclude extensive evidence relating to petitioner’s time at Parchman. Additionally, it appears counsel may also have been trying to prevent the introduction of disciplinary action taken against petitioner for an alleged rape while he was incarcerated at Parchman, a fact which would have

damaged their mitigation strategy of arguing petitioner had performed well in prison and did not pose any future dangerousness if the jury were to spare his life. Although counsel were unsuccessful in preventing evidence of petitioner's escape from being placed before the jury, this court does not find they were ineffective in making these choices.

Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. Williams v. State, 599 S.W.2d 276, 27980 (Tenn. Crim. App. 1980). "The fact that a particular strategy or tactic failed or hurt the defense, does not, standing alone, establish unreasonable representation. House v. State, 44 S.W.3d 508, 515 (Tenn. 2001)(quoting Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996)). The real inquiry is whether the strategy and tactical choices were informed ones based upon adequate preparation. Id. This court finds 2007 counsels' tactical choices were based upon thorough investigation and considerable contemplation of the possible avenues of mitigation available to them and the various unsuccessful strategies previously employed by 1992 and 1999 counsel. Moreover, given the testimony of Jimmy Odom, Jr., this court finds even if counsel were ineffective in this regard, petitioner has failed to demonstrate he was prejudiced by counsel's inaction. Thus, he is not entitled to relief based upon this claim.

E. Change of Venue

Petitioner argues 1992 and 2007 trial counsel were ineffective in failing to seek a change of venue due to the publicity surrounding his case. Specifically, petitioner contends the case was closely tied to the publicity surrounding Tennessee Supreme Court Justice Penny White's non-retention. He asserts his sentence was vacated in 1996 in a majority decision in which Justice White concurred and which generated significant statewide publicity and debate about the death penalty and ultimately resulted in Justice White not being retained to the Tennessee Supreme Court. He argues the campaign to oust Justice White consisted of direct mailings to approximately two thousand residents and included detailed information about petitioner's case including his prior conviction for the murder of Mary Rebecca Roberts and his status as an escapee at the time of the killing of the victim in the instant case. He argues due to the scrutiny of Justice White he became the "poster child" for the death penalty in Tennessee.

This court finds petitioner failed to present sufficient evidence to support this allegation. Although some limited testimony was presented relating to an interview petitioner gave to a local news station, petitioner failed to present any evidence demonstrating the jury pool was tainted by excess publicity or the political debate about the death penalty and the retention of Justice White. Additionally, petitioner presented no evidence suggesting a particular juror was unable to be impartial due to his or her exposure to pretrial publicity. Thus, petitioner is not entitled to relief based upon this claim.

F. Recusal of Trial Judge

Petitioner avers 2007 trial counsel should have moved to recuse Judge Chris Craft on the basis of comments Judge Craft made during pre-trial hearings for the 1999 resentencing proceedings. Post conviction counsel assert Judge Craft stated in reference to petitioner, "he was not a nice person," is "kind of dangerous," and "doesn't like women." Petitioner contends Judge Craft's comments demonstrated Judge Craft was prejudice against him. This court finds petitioner is not entitled to relief based upon this claim.

At the time of petitioner's 2007 resentencing proceeding the rules relating to recusal required a judge to disqualify himself "... in a proceeding in which the judge's impartiality might reasonably be questioned." Tenn. Sup.Ct. R. 10, Canon 3E(1). In interpreting the Canon, the Tennessee Supreme Court concluded "[a] trial judge should grant a recusal whenever the judge has any doubts about his or her ability to preside impartially." Allev v. State, 882 S.W.2d 810, 820 (Tenn.Crim.App.1994). However, under the 2007 rules, recusal was also necessary "when a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality." Id. The Courts noted this objective standard took into account, "disqualification is required if there is an appearance of partiality to the reasonable observer, and it precludes a judge from avoiding recusal merely by avowing his or her impartiality." State v. Conway, 77 S.W.3d 213, 225 (Tenn.Crim.App.2001) (quoting State v. Connors, 995 S.W.2d 146, 149 (Tenn.Crim.App.1998)); see also State v. Mark A. Schiefelbein, Nos. M2005-00166-CCA-R3-CD, M2005-02370-CCA-R10-CO, 2007 Tenn.Crim.App. LEXIS 213, at ----122-23, 2007 WL 465151 (Nashville, Feb. 14, 2007), perm. to appeal denied, (Tenn.2007). The appellate Courts concluded the "issue to be

determined is not the propriety of the judicial conduct of the trial judge, but whether he committed an error which resulted in an unjust disposition of the case.” State v. Hurley, 876 S.W.2d 57, 64 (Tenn.1993); State v. Boggs, 932 S.W.2d 467, 472 (Tenn.Crim.App.1996).

Reviewing the trial court’s comments in context, this court does not any reasonable basis for questioning the trial court’s impartiality. See former Tenn. R. Sup. Ct. 10, Canon 3(E)(1). Thus, counsel were not ineffective in seeking the recusal of Judge Craft. Moreover, even if counsel were ineffective in this regard, petitioner has failed to demonstrate he was prejudiced by counsels’ inaction. Had this issue been properly presented, the trial court would not have abused its discretion in declining to recuse itself from hearing petitioner’s resentencing proceeding. This court does not find the trial judges comments resulted in an unjust disposition of petitioner’s case.

G. Suppression of Petitioner’s Statement

Petitioner asserts trial counsel were ineffective in failing to competently present claims relating to a motion to suppress his statement. He contends his statement to police was a key piece of evidence in the State’s case against him and argues trial counsel were wholly ineffective in challenging his statement to police. He argues trial counsel filed a basic form motion to suppress his statement and presented no evidence in support of the motion other than his testimony. He argues trial counsel should have been aware he was suffering from intellectual and cognitive impairments which could cast doubt upon the reliability of his statement.; thus, trial counsel should have requested the necessary expert assistance to aid them in challenging the validity of petitioner’s confession. Petitioner further asserts trial counsel should have challenged the statement based upon the fact the initials on the four pages of the statement vary widely from one another and bear little resemblance to his handwriting.

This court finds trial counsel were not ineffective in this regard. Attorney Carolyn Watkins testified the defense argued the statements were coerced but the trial court did not suppress the statement. However, although the statements were not suppressed, she stated, the defense team argued to the jury petitioner had been coerced by the police into giving a statement. Furthermore, as noted elsewhere in this order, counsel did have petitioner evaluated and Dr. Hutson did not indicate petitioner was suffering from any conditions which could support a

challenge to the voluntariness or reliability of his confession. Likewise, neither Tora Brawley nor Dr. Merikangas could say with certainty petitioner's cognitive deficits would have precluded him from exercising a valid waiver and voluntarily providing a statement to police. The record in this case indicates, petitioner had the cognitive ability to be deceptive during his police interrogation as he initially provided police with a false name. Petitioner was able to discuss the commission of the offense in great detail both with the police and with the defense team. Moreover, at the Motion to Suppress Sergeant McWilliams testified the petitioner had indicated he understood his rights and stated the petitioner had never been threatened or coerced. Upon hearing all the proof the trial court found petitioner was not credible. This court finds nothing about the testimony offered by Dr. Merikangas or Brawley would have likely influenced the trial court's conclusion the statement was voluntarily and knowingly given. Thus, even if counsel were ineffective in failing to employ this strategy, this court finds petitioner has failed to demonstrate he was prejudiced by their inaction as it appears such an argument likely could not have been sustained.

Finally, at the post conviction hearing, attorney Watkins testified the defense team did not consider having a handwriting expert review petitioner's statement because petitioner never denied making the statement or initialing each page. In fact, petitioner told defense counsel he committed the offense. Petitioner presented no evidence at the post conviction hearing contradicting the officer's assertion petitioner initialed each page of the statement. Therefore, this court finds petitioner is not entitled to relief based upon his claim the trial court was ineffective in failing to challenge the validity of the statement based upon alleged discrepancies in the initials located on each page of the statement.

H. Motion to Continue

Petitioner asserts 1992 trial counsel should have moved for a continuance of his trial based upon lead counsel's medical conditions. He contends on October 13, 1992, attorney Thompson informed the court of a medical problem requiring an EEG. Petitioner asserts this medical condition may have contributed to counsel's apparent confusion at the September 11, 1992 motion hearing where petitioner asserts counsel was unprepared to argue many of the stock motions filed prior to trial.

This court finds these allegations are without merit. Petitioner presented absolutely no evidence in support of these allegations. Moreover, 1992 second chair counsel, Carolyn Watkins, testified attorney Thompson worked part time for the public defender's office and part time in private practice. She stated Thompson had a reputation as a very good and tenacious attorney. She stated she did not question Thompson physical or mental condition and indicated if Thompson felt he was unwell and unable to go to trial he would have requested a continuance. Petitioner is not entitled to relief based upon this claim.

I. Jury Issues

Petitioner raises the following claims of ineffective assistance of counsel relating to the jury: (1) both 1992 and 2007 trial counsel were ineffective in failing to conduct a competent jury selection, including failing to life qualify the jury and inquire into the attitudes of prospective jurors towards mental disorders and mental health defenses; and (2) counsel were ineffective in failing to request the jury be sequestered after selection.

1. Jury Selection

Petitioner challenges both 1992 and 2007 trial counsels' representation during jury selection.

a. 1992 counsel

Petitioner asserts his 1992 counsel were ineffective in failing to conduct a competent *voir dire* of the jury. Specifically, he argues 1992 counsel generally failed to:

- (i) move for and utilize a jury questionnaire;
- (ii) retain expert assistance in the area of jury selection;
- (iii) properly life qualify the jurors;
- (iv) object to prosecutorial misconduct;
- (v) *voir dire* the jury for bias and other grounds for disqualification
- (vi) integrate a theory of defense for either guilt or sentencing into the *voir dire* process;
- (vii) competently define mitigation;

(viii) object to the fixed-response questions asked by the trial court during the opening of *voir dire* of each prospective juror;

(ix) inquire into prospective jurors attitudes toward mental disorders and mental state defenses.

This court finds even if 1992 counsel were ineffective in their *voir dire* of the jury, petitioner has failed to demonstrate he was prejudiced by their deficient performance. Despite its significance, a trial lawyer is “accorded particular deference when conducting *voir dire*” and his or her “actions during *voir dire* are considered to be matters of trial strategy.” Hughes v. United States, 258 F.3d 453, 457 (6th Cir.2001). Therefore, “[a] strategic decision cannot be the basis for a claim of ineffective assistance unless counsel’s decision is shown to be so ill-chosen it permeates the entire trial with obvious unfairness.” Id. Thus, it is imperative for a petitioner claiming ineffective assistance of counsel during jury selection to demonstrate the resulting jury was not impartial. See Smith, 357 S.W.3d 322, 348 (Tenn. 2011) (citing James A. Dellinger v. State, No. E2005-01485-CCA-R3-PD, 2007 WL 2428049, at *30 (Tenn.Crim.App. Aug.28, 2007)). This court concludes petitioner has failed to make such a demonstration in this case.

Initially, this court notes trial counsel asked attorney Watkins very few questions about the jury selection in petitioner’s case and presented little evidence in general relating to the selection of the jury in petitioner’s case. As to his contention trial counsel should have utilized a jury questionnaire, this court finds petitioner has presented no evidence to support his claim prospective jurors’ responses would have differed had a jury questionnaire been utilized. There simply was no proof presented at the post-conviction hearing to suggest prospective jurors would have been more candid in their responses if responding via a jury questionnaire. Moreover, this court notes juror questionnaires are discretionary and are routinely either denied or modified by trial courts. This was likely particularly true in the early 1990s. Thus, this court does not find trial counsel’s failure to request a questionnaire, alone, falls so far below the accepted level of representation as to render their representation of petitioner ineffective. Petitioner also asserts absent a jury consultant, trial counsel failed to conduct adequate *voir dire* and failed to select a fair and impartial jury. However, this court finds petitioner has again failed to present evidence supporting his claim the jury was not fair and impartial based upon the failure of trial counsel to hire a jury consultant.

As to the issue of life qualifying the jury, this court finds, although trial counsel may not have extensively inquired into each potential jurors ability to consider mitigation and if appropriate impose a sentence less than death, both the prosecution and the court thoroughly covered the sentencing process. Thus, even if this court were to find trial counsels' questioning of the jurors on this issue was deficient, given the jurors were properly informed by the court of their obligations to consider all forms of punishment and hold the state to their burden of proof, this court finds petitioner was not prejudiced by counsels' inaction.

Petitioner also asserts trial counsel failed to inquire into potential bias of certain prospective jurors. Specially, he argues trial counsel failed to: (a) sufficiently rehabilitate Juror Bradley who stated he expected the defense team to prove petitioner's innocence; (b) sufficiently question Juror Christopher who was robbed at gunpoint while working as a bank teller; (c) sufficiently question Juror Davis who was also a victim of robbery; (d) question Juror Nettles, a robbery victim, and the mother of a Memphis Police Officer who stated she believed a police officer's credibility was higher than the other witnesses. None of these witnesses testified at petitioner's post conviction hearing and post conviction counsel did not question attorney Watkins about the defense teams questioning or lack of questioning of these jurors. Thus, this court finds even if trial counsel were ineffective in their questioning of the jurors, petitioner has failed to demonstrate he was prejudiced by counsels' inaction.

The Tennessee Supreme Court recently dealt with a post-conviction claim of ineffective assistance of counsel during *voir dire* in another capital case. Smith, 357 S.W.3d at 346--49. The petitioner claimed he was due a new trial because his lawyer did not ask the jurors during *voir dire* about their past experiences as a victim of crime. Id. at 346. One of the jurors who sat on the petitioner's trial testified at the post-conviction hearing, shortly before the trial, his daughter's boyfriend had been murdered. Id. The juror also testified, "the impact of [the victim's] death on his own family had been great." Id. at 347. Noting the "'proper fields of inquiry [during voir dire] include the juror's occupation, habits, acquaintanceships, associations and other factors, including his [or her] experiences, which will indicate his [or her] freedom from bias,'" Id. (quoting State v. Onidas, 635 S.W.2d 516, 517 (Tenn.1982)), the Smith court emphasized, "potential bias arises if a juror has been involved in a crime or incident similar to the one at trial." Id. (citing Ricketts v. Carter, 918 S.W.2d 419, 422 (Tenn.1996); Durham v. State, 182 Tenn. 577, 188 S.W.2d 555, 558 (Tenn.1945)). Accordingly, the court held,

“questions to cull the jury for persons who might be biased due to their past experiences with the criminal justice system are a critical part of a competent *voir dire* in criminal cases,” and “the failure to ask the prospective jurors about their past experiences as victims or associates of victims is objectively unreasonable.” *Id.* at 347–48, 188 S.W.2d 555 (citing *Hughes*, 258 F.3d at 460). Thus, it is possible for defense counsel to be deemed deficient in their performance during *voir dire* based on a failure to ask critical questions aimed at revealing bias against the defense, “absent a showing that counsel had a strategic reason for not asking the question.” *Id.* at 347. However, even if a petitioner is successful at demonstrating deficient performance during *voir dire*, as was the petitioner in *Smith*, relief will not be granted unless the petitioner also demonstrates “the deficiency resulted in having a juror seated who was actually biased.” *Smith*, 357 S.W.3d at 348 (citing *James A. Dellinger vs. State of Tennessee*, 2007 WL 2428049, at *30); see also *Goeders v. Hundley*, 59 F.3d 73, 75 (8th Cir.1995). Recently, considering a claim of ineffective assistance of counsel during jury selection, the United States Court of Appeals for the Sixth Circuit clarified

[b]ias may be actual or implied. Actual bias is bias in fact—the existence of a state of mind that leads to an inference that the person will not act with impartiality. The doctrine of presumed or implied, as opposed to actual, bias provides that, in certain “extreme” or “exceptional” cases, courts should employ a conclusive presumption that a juror is biased. We may presume bias only where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances. Examples of such a relationship are that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction.

Treesh v. Bagley, 612 F.3d 424, 437 (6th Cir.2010) (internal quotation marks and citations omitted).

Similarly, the *Smith* court denied the petitioner’s claim for relief on the basis of trial counsel’s deficient performance during jury selection because the petitioner had “introduced no evidence of actual bias or partiality.” *Smith*, 357 S.W.3d at 348. The Tennessee Supreme Court categorically rejected the petitioner’s claim bias should be presumed under the circumstances, holding it had “never presumed bias absent either an affirmative statement of bias, willful concealment of bias, or failure to disclose information that would call into question the juror’s bias.” *Id.*

As noted above, petitioner presented no testimony at the post-conviction hearing establishing juror bias. Absent other proof adduced at the post-conviction hearing, a petitioner claiming a biased jury must rely upon the transcript of the *voir dire*. See Holder v. Palmer, 588 F.3d 328, 339 (6th Cir .2009) (where defendant is alleging ineffective assistance of counsel in jury selection, defendant “must show through a review of *voir dire* testimony that a ‘fair trial was impossible’”) (quoting Ritchie v. Rogers, 313 F.3d 948, 952 (6th Cir.2002)). This court’s review of the *voir dire* in this case belies the petitioner’s claim of a constitutionally infirm jury.

Next, this court addresses petitioner’s claims trial counsel should have objected to prosecutorial misconduct in the form of the state reciting the entire First Degree Murder statute including the list of all statutory aggravating factors. Petitioner argues most of the listed factors did not apply to his case and presenting them during *voir dire* prejudiced potential jurors. This court finds nothing improper in the state’s remarks. The state was attempting to explain the capital sentencing process to the jury in general terms. Petitioner failed to present any evidence suggesting any of the jurors serving on his case were prejudiced by the state’s comments.

Petitioner also asserts trial counsel provided deficient representation during jury selection because they failed to integrate their theory of defense for either the guilt phase or the penalty phase of his trial into their *voir dire* questioning and inquire into jurors attitudes regarding mental health and mental defenses. The failure to make certain inquiries to determine how receptive the jury would be to specific mitigating factors or defenses during *voir dire* does not necessarily constitute ineffective assistance of counsel. The scope of *voir dire* is a tactical decision and generally reviewing courts should not second-guess strategic or tactical choices made by trial counsel. See Butler v. State, 789 S.W.2d 898, 900-901 (Tenn.1990). Moreover, “where a juror has shown no inherent prejudice, the burden is on the [d]efendant to show that a juror is in some way biased or prejudiced.” State v. Caughron, 855 S.W.2d 526, 539 (Tenn.1993). Again, petitioner has failed to present any evidence demonstrating bias on the part of a juror based upon his or her attitudes toward mental health or mental defenses and failed to ask attorney Watkins about the defense team’s decisions in *voir dire*. Absent any evidence to the contrary, this court presumes trial counsels’ decision not to present their defense during *voir dire* was tactical and declines to second guess counsels’ decisions.

Next, this court does not find trial counsel were ineffective when they described mitigating circumstances as, an “explanation or proof that makes [the crime] less terrible than the

ordinary case.” Even if counsel were ineffective in this regard, this court finds petitioner has failed to demonstrate he was prejudiced by counsels’ statements. During *voir dire* and at the end of the sentencing phase of the trial, the court properly instructed the jury as to the definition and role of mitigating circumstances in the capital sentencing context.

Finally, this court does not find counsel were ineffective in failing to object to the court’s questioning of jurors during the opening of the *voir dire*. Petitioner argues the court asked fixed-response questions which suggested to the jurors the correct response and failed to properly establish whether a juror could actually be fair and impartial. He argues trial counsel compounded the trial court’s failure in this regard by also asking fixed-response questions allowing jurors to continue to disguise potential bias. Again, trial counsel failed to present any evidence demonstrating he was prejudiced by the actions of the court or inaction of counsel. No jurors were presented at the hearing on petitioner’s post conviction claims and no evidence of actual bias was put forth by petitioner.

b. 2007 Counsel

Petitioner avers by failing to challenge certain jurors for cause or in the alternative effectively exercise their peremptory challenges, his 2007 trial counsel provided ineffective assistance of counsel and denied him a fair jury selection process. He also contends trial counsel failed to properly life qualify the jury, explain mitigation to the jury panel, and failed to cite legal authority supporting their position they should be allowed to delve into the specific facts of the case in order to determine whether a juror was properly life qualified. This court finds petitioner’s allegations are without merit.

Petitioner offers no evidence in support of assertion certain jurors should have either been challenged for cause or struck through peremptory challenge, in fact he fails to list a single juror to whom he asserts these allegations apply. Additionally, this court finds the jurors were properly life qualified through the questioning of the court, the state and defense counsel. Although defense counsel did not provide an explicit definition of mitigation to the jury, the court and the state provided explanations to the jury regarding the definition, nature and role of mitigation.

Finally, this court does not find trial counsel was ineffective in their attempts to question jurors about their reactions to specific circumstances of the offense. It appears counsel did

attempt to question the jurors about their reactions to specific aspects of the offense; however, the trial court ruled they could not question jurors about the exact circumstances of the offense. This court does not find counsel were not ineffective in failing to cite to a specific case. Moreover, even if counsel were ineffective in this regard, this court find petitioner has failed to demonstrate he was prejudiced by counsels' inaction.

2. Sequestration

Petitioner argues trial counsel should have requested the jury be sequestered after their selection. It appears jury selection was completed on the evening of October 13, 1991, but the jurors were not sworn in by the court until the following day. He argues this procedure violated the rule of sequestration and counsel were ineffective in acquiescing to the separation of the jury. This issue is wholly without merit. At the time of petitioner's trial, Tenn. Code Ann. § 40-18-116 provided "in all criminal prosecutions except those in which a death sentence may be rendered, the judge of the criminal court may, in his discretion, with the consent of the defendant, and with the consent of the district attorney general, permit the jurors to separate at times when they are not engaged upon the actual trial or deliberation of the case." Until the time in which the jurors were sworn and took the juror's oath, they were not actually serving as jurors on the cause. Because the jurors were going to be sequestered, the court released the potential jury panel for the evening to collect their belongings and ordered them to return the following day to be sworn as jurors in petitioner's case. This court finds no violation of the rule occurred and counsel were not ineffective for failing to object to this procedure.

J. Shackles²⁸

Petitioner contends trial counsel were ineffective in failing to prevent him from appearing in shackles before the jury. Petitioner has presented no citation to the record to support his position that he was shackled during either trial and has presented no other evidence to support his position the jury was informed of his restraints. Moreover, the court's independent review of

²⁸ In addition to his claim of ineffective assistance of counsel, petitioner raises an independent claim alleging his due process rights were violated by the trial court's requiring he be shackled and by informing the jury he was shackled. Again this court can find no indication in the record the jury was improperly informed petitioner was being restrained. Therefore, petitioner is likewise not entitled to relief based upon the alleged trial court error.

both the 1992 and 2007 proceedings reveals any recognition or comment to the jury regarding petitioner being restrained was inadvertent and was not so prejudicial as to necessitate a new trial. Thus, petitioner is not entitled to relief based upon this claim.

The use of shackles on a defendant is not, in itself, sufficient to establish a due process violation. Rather, the physical indicia of innocence is a qualified right which depends upon the circumstances of each case. State v. Hall, ___ 3d ___ (Tenn. filed March 20, 2015). Petitioner had previously escaped from prison where he was incarcerated for murder and at the time of his 1992 trial faced a possible death sentence. By the time of his 2007 proceeding, petitioner had been convicted of murder and twice sentenced to death. Thus, he posed a significant security risk giving the trial court wide discretion to impose whatever restraints or security measures it deemed appropriate. See, e.g., State ex rel. Hall v. Meadows, 215 Tenn. 668, 389 S.W.2d 256, 259–60 (1965) (allowing use of handcuffs on four-time escapee); Thompson, 832 S.W.2d at 582 (identifying security risk based on prior attempted escape); Rivera v. State, 1 Tenn.Crim.App. 395, 443 S.W.2d 675, 679 (1969) (allowing use of handcuffs on two-time escapee). Moreover, petitioner has not presented any evidence to support his claim the use of shackles improperly influenced the jury during either the guilt or penalty phase of his 1992 or his 2007 resentencing. At the post-conviction hearing, no evidence was presented indicating a juror saw the shackles as petitioner was brought into the courtroom at some unspecified time “during the course of the trial.

K. Presentation of Proof & Cross Examination of State Witnesses

Petitioner contends his 1992 counsel failed to present any witnesses on his behalf during the guilt/innocence phase of his trial. Additionally, he contends 1992 trial counsel were ineffective in failing to challenge the State’s presentation of fingerprint evidence linking him to the crime. Specifically, petitioner asserts trial counsel should have challenged the chain of custody relating to the fingerprint evidence. He argues within fifteen minutes of the first officers arriving on the scene, numerous police personnel were milling about the crime scene and several individuals has access to the interior of the car where his fingerprints were found. He contends trial counsel failed to ask any questions challenging the possible contamination of the crime scene. He further argues trial counsel were ineffective in questioning Officer William Lee

regarding the methodology Lee used to lift the print implicating him in the crime. Specifically he argues trial counsel should have asked Lee about whether he photographed the print prior to the lift. Finally, petitioner contends trial counsel were ineffective in failing to question latent print examiner, James Holder, about the inherent subjectivity in latent print identification. Finally, petitioner contends trial counsel were ineffective in failing to question State witness Kathy Helms about her failure to pick petitioner out of a line-up.

This court finds petitioner has failed to present any proof in support of this allegation. There was no testimony about latent print examination presented at the post conviction hearing. No evidence was presented demonstrating the crime scene was not properly secured; chain of custody properly maintained; or, the lifting and examination of the prints properly conducted. Moreover, in addition to the fingerprint evidence, petitioner gave a statement in which he admitted to being present at the crime scene and raping and stabbing the victim. Thus, even if counsel were ineffective in failing to challenge the fingerprint evidence in his case, petitioner has failed to demonstrate he was prejudiced by counsel's inaction.

Finally, this court finds petitioner has failed to present any evidence in support of his claim trial counsels' failure to question Kathy Helms about her failure to identify petitioner amounted to ineffective assistance or resulted in substantial prejudice to his case indicating he was denied a fair trial. Thus, he is not entitled to relief based upon this claim.

L. Juror Questioning of Witnesses²⁹

Petitioner contends 1992 counsel were ineffective in failing to object to or move for a mistrial based upon the trial court allowing a juror to question State witness, pathologist Dr. Jerry Francisco, and permitting Dr. Francisco to answer the juror questions posed to him. He contends the dialogue between the jurors and Dr. Francisco elicited previously unheard testimony concerning the length of the knife recovered from petitioner upon his arrest and the fact such a blade could have produced a wound of the depth identified on the victim.

²⁹ Petitioner asserts as an independent issue the trial court abused its discretion in failing to follow the procedure set forth in Rule 24.1 by allowing the jurors to directly correspond with the witnesses and failing to consult the parties about whether the questions should have been asked of the witness. This court finds, although the trial court may not have strictly complied with the rule, petitioner has not demonstrate the court abused its discretion to the point he was denied a fair trial based upon the jurors being allowed to directly interact with the witnesses. Thus, he likewise is not entitled to relief based upon his independent claims of trial court error.

Additionally, petitioner argues 2007 trial counsel were ineffective in failing to object to or move for a mistrial based upon the trial court allowing a juror to question defense witness, Dr. Joseph Angelillo. Petitioner asserts the trial court improperly allowed the juror to ask the question in open court in violation of Rule 24.1 of the Tennessee Rule of Criminal Procedure. He contends he was prejudiced by having Dr. Angellilo endorse the juror's question relating to whether a personality disorder is something an individual is born with or something which develops based upon how the individual is raised. Essentially, he argues Dr. Angelillo commenting the question was a "good question" improperly elevated the status of the individual juror thereby tainting the jury deliberation process.

Rule 24.1 of the Tennessee Rules of Criminal Procedure provides the trial court "may permit a juror to ask a question of a witness" and provides a procedure for the submission of juror questions:

(1) Written Submission of Questions.

The juror shall put the question in writing and submit it to the judge through a court officer at the end of a witness' testimony. A juror's question shall be anonymous and the juror's name shall not be included in the question.

(2) Procedure After Submission.

The judge shall review all such questions and, outside the hearing of the jury, shall consult the parties about whether the question should be asked. The judge may ask the juror's question in whole or part and may change the wording of the question before asking it. The judge may permit counsel to ask the question in its original or amended form in whole or part.

(3) Jury Instructions.

When juror questions are permitted, the court shall instruct jurors early in the trial about the mechanics of asking a question and to give no meaning to the fact that the judge chose not to ask a question or altered the wording of a question submitted by a juror.

Tenn. R.Crim. P. 24.1(c). The purpose of the rule is "to assist jurors in their understanding of evidence and to make them feel more involved in the trial process." *Id.*, Advisory Comm'n Comments. Although once described as "a perilous practice which trial courts should scrupulously avoid," Branch v. State, 469 S.W.2d 533, 534 (Tenn.Crim.App.1969), the practice

of permitting jurors to pose questions to witnesses is no longer disfavored in this state. See State v. James, 315 S.W.3d 440, 458 (Tenn.2010) (observing the adoption of Rule 24.1 “changed that policy”). A reviewing court will not find error “[a]bsent a clear abuse of the discretionary authority of the trial judge, one that manifestly prejudices the rights of a defendant.” James, 315 S.W.3d at 460.

This court notes while Rule 24.1 was adopted effective in 2003, it was not in effective at the time of petitioner’s 1992 trial or 1999 resentencing hearing. However, several appellate courts had previously addressed the issue of juror questioning and, although the practice was discouraged, there was no outright bar to juror questioning at the time of petitioner’s 1992 proceeding. See Byrge v. State, 575 S.W.2d 292, 294, 295 (Tenn. Crim. App. 1978) (in prosecution for passing forged instrument, it was harmless error, if any, for juror to ask expert witness during recross-examination question regarding fingerprint comparisons, where juror asked question without warning or prior approval of trial court and asked only one question); Raynor v. State, 1 Tenn.Crim.App. 556, 447 S.W.2d 391 (Tenn.Cr.App. 1969) (holding, although the efforts of jurors to ask questions of witnesses during a trial often present delicate problems and should not be encouraged, the question posed by the juror was proper and any error was harmless). Additionally, Tenn. R. Evid. 611(a) was in place at the time of petitioner’s 1992 trial and provided, “the court shall exercise appropriate control over the presentation of evidence and conduct of the trial when necessary to avoid abuse by counsel.” Therefore, it would appear the determination of whether to allow questions from the jury was within the discretion of the trial court and absent a clear abuse of such discretion a defendant would not be entitled to relief based upon claims relating to improper juror questioning of witnesses.

This court finds trial counsel were not ineffective in failing to object or move for a mistrial based upon the jurors’ questioning of the witness. Moreover, this court finds, even if counsel were ineffective in failing to challenge the juror’s questioning of the witness, the petitioner has failed to demonstrate he was prejudiced by the inaction of counsel. The jury was informed by Officer McWilliams’ the petitioner had been arrested with a knife measuring four inches in diameter. The victim confessed to stabbing the victim and his fingerprints were found near the body. Thus, this court finds nothing improper about the jurors question regarding the ability of the blade found on petitioner’s person to cause the injuries observed on the victim’s body. Furthermore, given the proof against petitioner, this court does not find the medical

examiner's statement the blade found on petitioner could have caused the injuries he observed on the victim was not overly prejudicial. Additionally, this court finds nothing improper about the substance of the juror questions asked of Dr. Angelillo and finds Dr. Angelillo's observation the question was a "good question" did not impermissibly interfere with the jury deliberation process by elevating the status of the questioning juror. Thus, he is not entitled to relief based upon this claim.

M. Prosecutor's Closing Statement

Petitioner argues 2007 trial counsel were ineffective for failing to object to the prosecution arguing in closing argument he anally raped the victim when no evidence was introduced to support the position the victim had been anally raped. This court notes neither counsel McAfee or Skahan were questioned about the prosecutor's remark or their failure to object to the prosecutions argument. Even if counsel were ineffective in failing to challenge the prosecutor's remarks, this court finds petitioner has failed to demonstrate he was prejudiced by trial counsels' inaction. The trial court properly instructed the jury statements, arguments, and remarks of counsel are not evidence and informed the jury if any statements were made they believe are not supported by the evidence, they should disregard them. Thus, this court finds petitioner is not entitled to relief based upon this claim.

N. Advising Petitioner of Right to Testify During Sentencing Phase of Trial

Petitioner avers both his 1992 and 2007 trial counsel failed to advise him he had a limited right against self-incrimination if he chose to testify at the sentencing phase of his trial. He contends trial counsel should have informed him he could testify about mitigating circumstances without being cross-examined about issues of guilt/innocence. Specifically, he argues attorney Skahan admitted he committed error in this regard during his representation of petitioner on appeal of his 2007 death sentence. He argues although the appellate court found petitioner was not entitled to relief on this issue, because Skahan was not in a position to adequately address his own ineffectiveness, the issue should be reconsidered by this court. This court disagrees. The petitioner misstates the holding of the appellate court.

In the appeal of his 2007 death sentence, the Tennessee Supreme Court noted “while conceding his colloquies with counsel and the court ostensibly satisfied the procedural requirements of Momon v. State, 18 S.W.3d 152 (Tenn.1999),’ the petitioner argued that his waiver of the right to testify at the sentencing hearing was not knowing, intelligent and voluntary because he was’ not advised that if he chose to testify about collateral mitigating circumstances he could not be cross-examined about the crime unless he opened the door.”’ State v. Odom, 336 S.W.3d 541 (Tenn. 2011) (citing, Court of Criminal Appeals opinion at 2010 Tenn.Crim.App. LEXIS 223, at *90, *94.) The Court held,

although decided after this sentencing hearing, our opinion in Rimmer held that a criminal defendant does not have to be informed that he will not waive his privilege against self-incrimination if he testifies to collateral mitigating factors in a capital sentencing hearing. 250 S.W.3d at 28. In Rimmer, we observed that “the Defendant has not cited, and we have not found, a case from any other jurisdiction that requires a defendant to acknowledge his awareness of a limited cross-examination rule” before waiving his right to testify at a capital sentencing hearing. Id. Similarly, the Defendant in this appeal has not pointed us to any authority justifying a different result. Accordingly, we find that our intermediate court correctly determined that the Defendant is not entitled to relief on this issue.

Odom, 336 S.W.3d at 570. Based upon the appellate court’s prior review and rejection of these claims, this court finds petitioner is not now entitled to relief based upon a claim of ineffective assistance of counsel.

O. Describing Crime Scene Photos as “worst of the worst”

Petitioner contends 2007 trial counsel were ineffective in stating in closing argument the photos of the crime scene were “the worst of the worst” following the prosecutor’s remark indicating the death penalty is reserved for the “the worst of the worst.” This court finds, although perhaps poorly worded, the statements of trial counsel did not rendered their representation deficient. When considered in the context of the entire closing argument, it is clear defense counsel was simply attempting to acknowledge the photographs of the victim’s murder were difficult for the jury to view. Counsel was suggesting the jury must hold the jury to their burden of proving the aggravating factors; should consider the mitigation presented by the defense; and, should not make a decision based merely on the emotion elicited from having

viewed those photographs. This court finds petitioner is not entitled to relief based upon this claim.

P. Jury Instructions

Petitioner contends his 1992, 1999, and 2007 counsel were ineffective in failing to assert at trial and on appeal the reasonable doubt instruction provided to the jury by the trial court was improper and violated his due process rights. Specifically, petitioner argues stating a “reasonable doubt does not mean a doubt that may arise from possibility,” improperly excluded a possible doubt and did not extend to petitioner the Eighth Amendment’s heightened level of reliability, which ensures the sentence returned by the jury is a reasoned moral response to a defendant’s background, character and the crime. Additionally, petitioner asserts 1992 trial counsel failed to object to the order of instructions which listed first degree murder as the first option and not guilty as the final option. He argues when lesser included offenses are charged the highest degree should not be the first instruction; rather, he contends the trial court should begin with the lesser charges to insure the defendant’s defense is reliably considered by the jurors. Finally, petitioner asserts 2007 trial counsel failed to object to the confusing nature of the sentencing phase instructions which he alleges: (a) emphasized jury unanimity and improperly created the impression jury unanimity was required in the sentencing decision and (b) improperly charged the jury “absolute certainty of guilt is not demanded by the law.” This court finds these claims are without merit.

1. “Reasonable doubt does not mean a doubt that may arise from possibility.”

The petitioner takes issue with the statement, “reasonable doubt does not mean a doubt that may arise from possibility.” This court notes this issue was addressed by the appellate courts during their review of petitioner’s 2007 sentence of death. The Tennessee Court of Criminal Appeals held the instruction did not violate petitioner’s constitutional rights. The Court noted, this issue was addressed by the Tennessee Supreme Court in State v. Rimmer, 250 S.W.3d 12, 30–31 (Tenn. 2008). The court stated a fair interpretation of the phrase is “reasonable doubt does not mean a doubt that may arise from mere possibility no matter how improbable.” Id. at 31. The court concluded the jury instruction did not result in the denial of due process and there

was not a reasonable likelihood the jury applied the burden of proof in an unconstitutional way. Id. The Court further noted, since the conclusion of petitioner's conviction and subsequent resentencing proceedings, appellate courts have discouraged the continued use of this portion of the reasonable doubt instruction. However, the courts have continued to find the instruction does not violate the constitution and the Court declined to grant petitioner relief. This court is bound by the appellate courts' prior holdings on this issue.

2. Order of Consideration

Petitioner contends 1992 counsel should have objected because the trial court failed to charge the primary offense and any lesser included offenses from least to greatest culpability. This court finds the sequential instructions provided by the trial court were proper. The Tennessee Court of Appeals has previously held sequential instructions are proper. See State v. Gallagher, 2003 WL 21463017 (Tenn. Crim. App. filed June 25, 2003 at Knoxville), State v. Raines, 882 S.W.2d 376, 381-82 (Tenn.Crim.App.1994); State v. McPherson, 882 S.W.2d 365, 375 (Tenn.Crim.App.1994); State v. Rutherford, 876 S.W.2d 118, 119-20 (Tenn.Crim.App.1993); State v. Christopher S. Beckham, No. 02C01-9406-CR-00107, Shelby County (Tenn.Crim.App. Sept. 27, 1995), app. granted and case remanded on other grounds (Tenn. July 8, 1996). Although the Tennessee Supreme Court did not take the opportunity in State v. Mann, 959 S.W.2d 503 (Tenn.1997) to directly address sequential instruction, the Court of Criminal Appeals has subsequently noted the Supreme Court affirmed the lower court's ruling on sequential instructions and published the portion of the lower court's opinion dealing with sequential instructions as an appendix to the Supreme Court opinion. Id. at 517, 521. The Court of Criminal Appeals stated, "we view the supreme court's publication of parts of this court's opinion in Mann as an appendix to mean more than the court's acquiescence in this court's opinion." State v. Gallagher, 2003 WL 21463017 (Tenn. Crim. App. filed June 25, 2003 at Knoxville). This court is bound by the appellate courts' ruling on this issue. Therefore, this court concludes the trial court did not err in giving sequential instructions and petitioner is not entitled to relief based upon his claim trial counsel were ineffective in objecting to the trial court's instructions.

3. 2007 Jury Instructions

Petitioner alleges the trial court improperly emphasized jury unanimity and improperly implied jury unanimity was required for the imposition of a life sentence. He contends 2007 counsel were ineffective in failing to challenge this faulty misperception. This court finds the trial court's instructions as to jury unanimity in the sentencing process were appropriate and thus trial counsel had no duty to object to the instructions. Secondly, this court finds petitioner's claim trial counsel should have objected to the trial court instructing the jury "absolute certainty of guilt is not demanded by the law." This court finds, although trial counsel may not have challenged this instruction at trial, counsel did raise the issue on the appeal of petitioner's 2007 sentence of death and the appellate courts concluded the reasonable doubt instruction provided by the trial court to the jury did not violate the constitution. See State v. Odom, 2010 WL 10094693 (Tenn. Crim. App. filed March 4, 2010 at Jackson), affirmed by State v. Odom, 336 S.W.2d 541 (Tenn. 2011). This court is bound by the appellate courts determination of this issue. Moreover, given the appellate court's determination of this issue, this court finds even if ineffective petitioner has failed to demonstrate he was prejudiced by trial counsels' inaction.

Q. Polling the Jury

Petitioner avers 2007 trial counsel were ineffective for failing to individually poll jurors upon return of the death verdict. He argues, in light of the fact the jury deliberated for ten hours over his sentence, counsel should have requested the jury be polled to ensure the verdict was not coerced. Polling of the jury is discretionary. Tenn.R.Crim.P. 31(d) states, "the jury shall be polled at the request of any party or upon the court's own motion." Petitioner presented this court with no proof concerning what, if any, difference polling would have made in the outcome of Petitioner's trial and provided no proof indicating the verdict was anything other than unanimous. Thus, he is not entitled to relief based upon this claim.

R. Selection of Grand Jury Foreperson³⁰

³⁰ This court notes, in addition to his claim of ineffective assistance of counsel, petitioner also raises this issue independently as structural error necessitating a new trial. For the same reasons cited here, this court finds petitioner is not entitled to relief based upon his independent claim of discrimination in the selection of the grand jury foreperson.

Petitioner asserts his 1992, 1999, and 2007 counsel were ineffective in failing to challenge the selection of the grand jury foreperson. Petitioner contends race and gender discrimination permeated the selection of the grand jury foreperson. Petitioner asserts his indictments were unconstitutionally obtained due to the exclusion and underrepresentation of women and white individuals as grand jury forepersons in Shelby County, Tennessee. He contends his rights to due process and equal protection of the law under the Sixth and Fourteenth Amendments were violated by Shelby County's failure to provide a grand jury selected from a fair cross-section of the community. He contends he meets the requirements for establishing a prima facie case of discrimination, and, thus, the burden has shifted to the State to rebut to his claims.

Petitioner argues the foreman of his grand jury was chosen in accordance with Tenn .R. Crim. P. 6(g)(1978) and contends the use of this procedure resulted in him being indicted by a grand jury which did not have a woman or white individual as foreperson. Petitioner asserts, over a twenty year period, from August 1971 to July 1991, a woman served as grand jury foreperson for only twenty-nine of the 240 month period, or twelve percent of the time. He asserts, during the same period, women represented fifty two percent of the population of Shelby County. Petitioner argues white individuals were underrepresented to an even greater degree. He contends at the time of petitioner's trial, the white population of Shelby County was approximately fifty-five percent. However, the grand jury foreperson was white for only fifteen months from 1971 to 1991, or six percent of the time. Petitioner avers the courts have recognized various methods of determining fair and reasonable representation. Applying a method known as statistical decision theory, petitioner asserts he has demonstrated purposeful discrimination against women and white individuals in the selection of the grand jury foreperson.

This court finds the Tennessee Supreme Court has previously rejected such claims. In State v. Bondurant, 4 S.W.3d 662, 675 (Tenn.1999), the Court held the role of the grand juror foreperson in Tennessee is ministerial and administrative and to be entitled to relief, the defendant must demonstrate discrimination in the selection of the entire grand jury panel. Thus, this court finds trial counsel were not ineffective in challenging the selection of the foreperson on these grounds and petitioner is not entitled to relief based upon this claim.

S. Cumulative Trial Court Error

Petitioner contends, even if each of the individual allegations of ineffective assistance of counsel were found not to be prejudicial, the cumulative effect of all combined deficiencies of trial counsel together with other constitutional errors in the case, was so prejudicial as to undermine the confidence in the reliability of petitioner's trials and appeals. This court disagrees. Having found minimal errors by counsel and having rejected petitioner's other claims of constitutional error, this court finds petitioner is not entitled to relief based upon the cumulative effect of any such errors.

II. JUROR MISCONDUCT

Petitioner contends juror misconduct during his 1992 trial resulted in him being denied a right to a fair and impartial jury and necessitates him being provided a new trial. Specifically, petitioner argues: (1) the 1992 jury foreperson improperly failed to reveal his 1989 arrest and charge for public drunkenness in response to questions asked during the jury selection process and (2) improper jury coercion occurred and the jury engaged in improper discussions of the case before being charged to deliberate. Petitioner offered no evidence in support of his position and cited no authority to support the proposition such circumstances should result in him being provided a new trial. Therefore, this court finds he is not entitled to relief based upon these claims.

III. PROSECUTORIAL MISCONDUCT

Petitioner alleges the prosecution committed the following actions of misconduct during his 1992 and 2007 trials: (1) failed to disclose evidence favorable to the defense; (2) destroyed exculpatory evidence; (3) improperly informed the jury of all potential aggravating circumstances; (4) made false and misleading statements during their opening remarks to the jury; and (5) made inflammatory remarks to the jury during closing arguments. This court finds these allegations are without merit.

A. Failure to Disclose Favorable Evidence

Petitioner asserts the State withheld material exculpatory evidence in this case. Specifically, he contends the state withheld the Memphis Police Department investigative files containing potentially exculpatory evidence concerning: (1) the identity of other suspects; (2) untested and undisclosed physical evidence recovered from the crime scene; and (3) inconsistencies concerning physical evidence recovered from the crime scene. Petitioner contends he has met the burden of demonstrating his due process rights were violated by the state's failure to produce the evidence. He argues he has demonstrated the withheld evidence, was favorable to his defense, material, and was either willfully or inadvertently suppressed by the State. See Johnson v. State, 38 S.W.3d 52, 65 (Tenn. 2001); see also Banks v. Dretke, 540 U.S. 688, 691 (2004).

Petitioner asserts, in August 1991, trial counsel filed a Motion for Production of Police Reports and specifically requested the *Brady*³¹ material at issue. He further asserts the State suppressed the information erroneously arguing the police reports contained statements of witnesses and were therefore excepted from pre-trial discovery by the Jencks Act and Tenn. Rule Crim. P. 26.2. Petitioner argues the police files were clearly discoverable. Petitioner alleges the Memphis Police investigative file contains the primary incident report, twelve typed supplemental reports, nine handwritten supplemental reports, extensive evidence logs, and crime scene diagrams. He alleges only seven of the nearly two-hundred pages were ever provided to defense counsel and none of those pages concerned the potential exculpatory evidence relating to the identity of other suspects or untested physical evidence recovered from the crime scene.

Petitioner contends the reports identified numerous other suspects, including the following:

1. Four different witnesses who reported seeing a man in a green work uniform around the crime location at the time of the murder. Petitioner alleges one witness indicated the individual was "acting real strange," and two others reported seeing the individual on the ninth floor of the building, just above the crime scene on the same floor were a "possible blood smear" was photographed by members of the Memphis Police Department;
2. A possible "violent and erratic young man" whom a local firefighter living in the apartment building adjacent to the crime scene had complained about to the Memphis Police Department. Petitioner asserts the firefighter told police the man

³¹ Brady v. Maryland, 373 U.S. 83(1963).

“acts funny and has just gotten out of jail for murder” and had recently assaulted a couple at a nearby apartment building;

3. Lee Thomas Brown whom witnesses described as a “trouble maker” with a “slight mental problem and . . . a considerable temper” and who slept in the garage where the murder occurred. Petitioner asserts police located Brown and he as was wearing a paper hospital gown which he reportedly was given after his emergency commitment to a local hospital on the day preceding the murder. When questioned Brown informed police, at the time of the murder, he was down at Court Square feeding the squirrels;

4. A “bandana wearing street person” who two different witnesses observed seeing in front of the crime scene shortly before the murder. Petitioner alleges one witness described the individual as a neighborhood regular with a drug problem;

5. Kenneth Patterson, a suspect with a history of aggravated rape. Petitioner asserts approximately thirty-six hours after the murder, Patterson was shot and killed by a Memphis police officer responding to a domestic disturbance call.

In addition to the evidence relating to other suspects, petitioner also alleges the undisclosed police reports documented the following potentially exculpatory items of physical evidence recovered from the crime scene which were never disclosed to defense counsel:

1. White hairs clutched in the hand of the victim. Petitioner asserts these hairs are presumably from the perpetrator and therefore highly probative of his actual innocence;

2. A blood smear taken from the 19th floor of the building where the murders occurred. Petitioner alleges the primary occupant of the 19th floor was a criminal defense attorney who regularly saw approximately twenty clients a day, including the man in the green uniform identified by witnesses as “acting strangely.” (see above). Petitioner asserts the presence of blood on the 19th floor suggests the assailant may have gone upstairs rather than down into the alley as the State argued at trial;

3. Scrapings taken from blood spots located on the ceiling above the victim’s car which were never analyzed by the police. Petitioner alleges the mere presence of such scrapings contradicts the State’s theory the stabbing occurred fully inside the vehicle;

4. Fingerprints collected during the course of the investigation other than those matching petitioner;

In order to establish a due process violation based upon an allegation the State failed to disclose exculpatory evidence, the petitioner must first demonstrate the evidence was indeed suppressed. See Johnson, 38 S.W. 3d 52. This court finds petitioner has failed to meet his burden. At the post conviction hearing, attorney Watkins testified Jerry Harris was the lead prosecutor representing the State's interest in petitioner's case. She did not specifically remember discovery in petitioner's case. However, she stated Harris' normal practice would be to make the entire State file available to defense counsel, allow defense counsel to review the file and make notes, and to copy the items the defense was entitled to receive in discovery.

At a pretrial hearing related to petitioner's 1999 trial, Harris stated he was making the entirety of the state's file available to 1999 counsel.³² Although having no specific recollection of the discovery in this case, Watkins stated such a statement was consistent with her prior dealings with prosecutor Harris. The 1999 record also indicated Harris informed the court he had met with defense counsel on several occasions and provided open file discovery.³³ Again, Watkins testified this practice was consistent with her dealings with prosecutor Harris. In April 1999, Harris again informed the court he met with defense counsel and provided open file discovery and made copies for counsel of all material requested by counsel and defense counsel agreed open file discovery had been provided.³⁴ Once again, Watkins testified this experience was consistent with her experience with Harris and indicated she believed this was likely the method of discovery employed in the 1992 trial.

Watkins was asked about a statement in the record relating to the 1992 trial made on September 11, 1992, in which attorney Thompson stated in response to questions about the defense motion for discovery, "we have been provided everything the state has."³⁵ In another passage from the same hearing Thompson responds, "yes" when asked by the court if he has received discovery and Harris states, "I know of no evidence we have that is exculpatory in nature."³⁶ Mrs. Watkins has been over my file and if there is any in there she's got it. She read

³² See State of Tennessee vs. Richard Odom, January 15, 1999 Motion Hearing, Division 8 of Shelby County Criminal Court, Case No. 91-07049, Transcript of Proceedings, Vol. 20, page 3.

³³ See State of Tennessee vs. Richard Odom, February 26, 1999 Motion Hearing, Division 8 of Shelby County Criminal Court, Case No. 91-07049, Transcript of Proceedings, Vol. 21, page 1.

³⁴ See State of Tennessee vs. Richard Odom, April 1, 1999 Motion Hearing, Division 8 of Shelby County Criminal Court, Case No. 91-07049, Transcript of Proceedings, Vol. 22, page 11 and 32.

³⁵ See State of Tennessee vs. Richard Odom, September 11, 1992 Motion Hearing, Division 8 of Shelby County Criminal Court, Case No. 91-07049, Transcript of Proceedings, page 1.

³⁶ *Id.*, at page 3

my file and there is not any information in my files she has not read or has not been made available for her.”³⁷ In response to the court’s questioning, Watkins agreed she received discovery and stated, “Mr. Harris has been very generous in allowing us to review his file.”³⁸ Watkins stated she had no specific recollection of making these statements but stated if the record reflects she did so, then the statements she made were true and accurate and further indicated such statements reflected her general recollection of her dealings with prosecutor Harris. Finally, Watkins did not recall if, at the end of the hearing, Harris offered Watkins and Thompson come back to his office one final time to again review the discovery. However, she stated if the offer were made, she would have likely again reviewed the file with Thompson and Harris.

B. Destruction of Exculpatory Evidence

Next, petitioner alleges the State violated his due process rights by destroying material evidence which may have exculpated him. Specifically, he asserts the Memphis Police Department and the State of Tennessee intentionally and prejudicially failed to collect, analyze, disclose and/or maintain physical evidence from the crime scene. He contends the following items were either not tested, preserved and/or disclosed to counsel: (1) the knife alleged to be the murder weapon; (2) the hairs clutched in the victim’s right hand; (3) photographs included in the lineup; (4) other crime scene photographs; (5) the seatbelt buckle containing the fingerprint matched to petitioner; (6) samples and documentary evidence of blood observed on the 19th floor of the building where the murder occurred; (7) samples and documentary evidence of blood recovered from above the victim’s car; (8) the untested fingerprints recovered from the crime scene; (9) original documents, including Odom’s signed statements; and (10) the original fingerprint lift cards admitted into evidence in the 1992 trial. Petitioner contends the destruction of this evidence constitutes gross negligence by the State and further argues the extent and exculpatory nature of the missing evidence suggests its destruction involved the knowing willful acts of State actors.

³⁷ Id., at page 5

³⁸ Id., at page 6

This court has previously addressed petitioner's due process claims relating to the alleged destruction of certain evidence post trial. The court set forth the law relating to the duty to preserve evidence post trial and wrote in a prior order:

The Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, section 8 of the Tennessee Constitution affords every criminal defendant the right to a fair trial. See Johnson v. State, 38 S.W.3d 52, 55 (Tenn. 2001). In order to satisfy the defendant's due process rights, the United States Supreme Court has held the State has a constitutional duty to furnish a defendant with exculpatory evidence pertaining to the defendant's guilt or innocence or to the potential punishment faced by a defendant. See Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215 (1963). In State v. Ferguson, 2 S.W.3d 912, 914 (Tenn. 1999), our supreme court addressed the issue of when a defendant is entitled to relief when the state has lost or destroyed evidence alleged to have been exculpatory.

In Ferguson the Supreme Court explained, when reviewing a claim relating to lost or destroyed evidence, a reviewing court must first determine whether the state had a duty to preserve the lost or destroyed evidence. Id. at 917. Ordinarily, "the State has a duty to preserve all evidence subject to discovery and inspection under Tenn. R. Crim. P. 16, or other applicable law." Id. However,

"[w]hatever duty the Constitution imposes on the States to preserve evidence, the duty must be limited to evidence which might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value was apparent before the evidence was destroyed, and be of such a nature the defendant would be unable to obtain comparable evidence by other reasonably available means."

Ferguson, 2 S.W.3d at 917 (quoting California v. Trombetta, 467 U.S. 479, 488-89, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984) (footnote and citation omitted)). If the proof demonstrates the State had a duty to preserve the evidence at issue, but failed to do so, then the analysis of the issue focuses on several factors including the degree of negligence involved, the significance of the destroyed evidence considered in light of its probative value and the reliability of any secondary or substantive evidence which remains available, and the sufficiency of the other convicting evidence used at trial to support the conviction. Ferguson, 2 S.W.3d at 917. If the court's consideration of these factors reveals a trial without the missing evidence would lack fundamental fairness, the court may consider appropriate remedies. Id.

Initially, this court notes it is unclear whether Ferguson applies to the post conviction context. Writing for the Tennessee Court of Criminal Appeals in Edward Thompson v. State of Tennessee, No. E2003-01089-CCA-R3-PC (filed March 16, 2004), 2004 Tenn. Crim. App. LEXIS 392, Judge Tipton wrote,

“Tennessee courts have not determined whether Youngblood³⁹ and Ferguson even apply in post conviction cases.” Thompson involved the application of the Tennessee’s *Post Conviction DNA Analysis Act of 2001* and a claim of fundamental unfairness by petitioner relating to the State having lost or misplaced certain evidence. The Court went on to find, even if Youngblood or Ferguson were applied to petitioner, defendant would fail to prevail under either theory. The Court determined the petitioner had not shown fundamental unfairness based upon the State’s loss of the evidence in question. However, the Court also found the application of *Post Conviction DNA Analysis Act* precluded petitioner from receiving relief. Thus, the Court did not specifically reach the question of whether Ferguson should be applied in the post conviction context.

In State v. Powers, No. W2009-01068-CCA-R3-PD (filed November 1, 2011), 2011 Tenn. Crim. App. LEXIS 967, the petitioner claimed he was prejudiced by the State having lost certain evidence. Petitioner alleged his due process rights were violated when the Memphis Police Department’s property room lost certain evidence gathered during the investigation. The evidence was apparently lost after petitioner’s trial and conviction for first degree murder and sentence of death. In denying petitioner’s claim, the Court wrote:

We note that, unlike in State v. Ferguson, 2 S.W.3d 912 (Tenn. 1999), in which our supreme court concluded that a defendant’s right to a fair trial could be violated by the negligent loss or destruction of evidence, the items in questions were available at the trial. Their destruction or loss did not occur until after the petitioner’s conviction. We agree with the State that we cannot presume that these items, which the defense did not utilize at the trial, were exculpatory. The holding in Ferguson is not helpful to the petitioner’s argument in this regard, which we conclude is without merit.

Id. at *111. Although not specifically addressing whether Ferguson has application in the post conviction context, it appears the Court concluded Ferguson’s application to the post conviction context is, at the very least, limited. In Brandon Mobley vs. State of Tennessee, No. E2010-00379-CCA-R3-PC (filed August 18, 2011), 2011 Tenn. Crim. App. LEXIS 637, relying on Ferguson the petitioner argued he was denied his right to a full and fair evidentiary hearing on his post conviction claims because the state had destroyed certain evidence. The State argued there is no duty to preserve evidence for use in collateral proceedings. Id. at *53. The Court noted:

Our courts have not extended the application of *Ferguson* to post conviction proceedings. That being said, we also acknowledge *Ferguson*’s holding that “[g]enerally speaking, the State has a duty

³⁹ See Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 1-02 L.Ed.2d 281 (1988) (holding the prosecutions pretrial failure to preserve evidence which is potentially useful to a defendant may constitute a denial of due process if the defendant can show bad faith on the part of the police.)

to preserve all evidence subject to discovery and inspection under *Tennessee Rules of Criminal Procedure 16*, or other applicable law;’ *Ferguson*, 2 S.W. 3d at 917, and that *Tennessee Supreme Court Rule 28 section 6(C)(7)* provides for discovery in post conviction proceedings ‘of all those items deemed discoverable under *Rule 16 [of the] Tennessee Rules of Criminal Procedure.*’

Brandon Mobley v. State of Tennessee, 2011 Tenn. Crim. App. LEXIS 637 at *54-55 (reversed on other grounds by Mobley v. Tennessee, 397 S.W.3d 70 (Tenn. 2012)). At issue in Mobley were jail visitation logs which the petitioner sought in order to establish his claim of ineffective assistance of counsel. The logs were destroyed prior to the hearing in accordance with the Sheriff’s Department’s operational procedures. In evaluating petitioner’s due process claims, the Court held, “even assuming the extension of Ferguson to post conviction proceedings and the State’s duty to preserve these records, we cannot conclude the destruction of the records by an act of simple negligence . . . resulted in the denial of the petitioner’s right to a full and fair evidentiary hearing.” *Id.* at *55. The court determined other similar evidence existed which contradicted petitioner’s claims. Therefore, the court concluded petitioner was not denied a full and fair hearing based upon the destruction of the jail logs. Again, in Mobley, the Court of Criminal Appeal did not clearly establish whether Ferguson should be applied in the post conviction context. Moreover, this issue was not addressed by the Tennessee Supreme Court in their review of the Mobley case. However, the Court of Criminal Appeals did once again outline how difficult it would be for a post conviction petitioner to meet the criteria established in Ferguson.⁴⁰

Given the lingering doubt regarding the application Ferguson to the post conviction context, this court proceeded to evaluate petitioner’s due process claims as if Ferguson were controlling. As it relates to the missing knife, this court made the following findings:

Initially, this court must determine whether the state had a duty to maintain the knife purportedly used to kill the victim. The knife was introduced during the guilt phase of petitioner’s first and second trial. However, it appears the knife, which was placed in the care of the Shelby County Criminal Court Clerk’s Office, was lost prior to petitioner’s 2007 re-sentencing proceeding. The parties agree that the knife was in the custody of the Clerk’s Office when it went missing. Therefore, it is not clear that the knife was lost by the State. In a similar case to the one before this court, the Tennessee Court of Criminal Appeals held there was no due process violation where the clerk’s office was responsible for the loss or destruction of evidence. See Jefferson v. State of Tennessee, No. M2003-01422-CCA-R3-PC (filed February 16, 2005), 2005 Tenn. Crim. App. LEXIS 139, *10-11. In Jefferson the evidence at issue was destroyed prior to trial. Petitioner argued trial counsel were ineffective in failing to request the court

⁴⁰ See *Richard Odom vs. State of Tennessee*, Shelby County Criminal Court Case No. 01-12388, March 2014 Order of the court.

instruct the jury, pursuant to Ferguson, that they may infer that the missing evidence was favorable to the defendant. The Court found that the evidence was destroyed by the clerk's office and further found there was nothing in the record "to indicate that the clerk conferred with the district attorney general's office before purging these exhibits or any other exhibits that were either discarded or destroyed." Id. at *11. The Court found, "to the contrary, when the district attorney general went in search of the exhibits, he was puzzled as to why he could not find them." Id. The Court determined that "because the State did not have the lost items in its possession or cause the loss of the items, in good or bad faith, there is no due process violation." Id. Here, it appears the State did not have the items in its possession when they were lost and it further appears the State did not confer with the clerk's office regarding the handling of such items. Nevertheless, this court finds, even if the state could be held responsible for the loss of the knife, petitioner is not entitled to relief.

Ferguson maintains that the State's duty to preserve evidence extends only to evidence which would play a significant role in a defendant's defense. To establish such materiality a defendant must demonstrate that the evidence possessed an exculpatory value that was apparent before the evidence was destroyed and demonstrate the evidence is of such a nature that the defendant would be unable to obtain comparable evidence by other available means. Ferguson, 2 S.W.3d at 917. In the instant case, petitioner asserts that the evidence is crucial to presenting his post conviction claims. Petitioner bears the burden of proving all factual allegations contained in his post conviction petition by clear and convincing evidence. See Tenn Code Ann. § 40-30-110(f) (2003). "Clear and convincing evidence means any 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. Tool & Co., 833 S.W.2d 896, 901 n.2 (Tenn. 1992)). Petitioner contends that the knife is needed to establish that counsel were ineffective in failing to challenge the medical examiner's testimony regarding the ability of the knife in question to cause certain wounds found on the victim. The medical examiner testified that, even though the knife at issue appeared to be three inches in length, it was capable of causing stab wounds measuring up to five inches in length depending on the placement of the injuries on the victim's body. Specifically, he stated that a knife such as the one at issue could have caused four inch wounds to the victim's chest due to the elastic nature of the chest cavity. Petitioner suggests that, if he had access to the knife, he could have the knife examined and present testimony contradictory to that of the medical examiner which would establish that trial counsel's failure to challenge the trial testimony of the state's medical examiner was in fact negligent and prejudicial and the trial court's comments regarding the knife improperly tainted the jury deliberations.

This court finds that the evidence is not material to the presentation of petitioner's claims. This court finds the assertion that the knife is in any way exculpatory is speculative at best. Given that the petitioner confessed to using the knife to kill the victim and gave a vivid description of the knife and the crime, including the brand name of the knife, and given that the knife was recovered on

the petitioner's person at the time of his arrest, this court does not find that the knife had any apparent potentially exculpatory value at the time that it was placed in the custody of the Clerk's office or at the time that it was actually lost by the Clerk's office. Moreover, even if the court were to also find that knife had some evident potentially exculpatory value prior to its destruction, based upon the defendant's detailed description of the knife, including the brand and model and the fact that photographs of the knife still exist, this court finds that petitioner should be able to obtain comparable evidence to utilize in any type of testing or comparison that he deems necessary to the presentation of his post conviction claims. If the assertion is merely that the State's medical examiner was mistaken in indicating that the knife in question could have caused the wounds on the victim, surely an expert could examine a knife of the same make as the one presented at trial and provide whatever analysis or testimony as is required to support petitioner's claims. It further appears that such comparisons may even be able to be made utilizing the photographs of the murder weapon which appear to still exist.

Therefore, this court finds a due process claim cannot be supported under the Ferguson test.

Moreover, even if this court were to find the State's action led to the loss of the knife and were to find that the knife is in fact material to the presentation of petitioner's post conviction claims and thus should have been maintained by the State, this court finds the remedy sought by the petitioner is not warranted. In determining the appropriate remedy for such a due process violation, the court must consider the degree of negligence involved, the significance of the lost evidence in light of the probative value and reliability of other evidence that remains available to the petitioner, and the sufficiency of the other evidence supporting petitioner's conviction. Ferguson, 2 S.W.3d at 917. In evaluating such factors this court finds a post conviction hearing held without the missing evidence would not be fundamentally unfair.

As stated above, this court finds the State's role in the loss of the evidence in question to be minimal. Moreover, the significance of the knife is slight when compared to the availability of the same type of knife for comparison or the availability of analysis based upon photographic evidence. Finally, the sufficiency of the remaining evidence supporting petitioner's conviction is great. The petitioner's fingerprints were found in the victim's vehicle where the murder occurred. Additionally, as mentioned above, the petitioner confessed to stabbing the victim. For these reasons, this court does not find that a post conviction proceeding conducted without the knife would offend principles of fundamental fairness.

Additionally, as it relates to the line-up, photographs, other documentary evidence and the fingerprint and blood evidence, this court found:

The assertion the line up photos; crime scene photos; autopsy; fingerprint; or blood evidence is in any way exculpatory is speculative at best. Specifically, given the petitioner confessed to stabbing and raping the victim and gave a vivid

description of the crime, this court does not find the autopsy, lineup photos, or various crime scene photos have any apparent exculpatory value. Moreover, post conviction counsel have further failed to demonstrate how the blood or fingerprint evidence would potentially exculpate petitioner. Therefore, this court finds a due process claim cannot be supported under the Ferguson test.

Finally, even if this court were to find the State's action led to the loss of the specified evidence and were to find the evidence is in fact material to the presentation of petitioner's post conviction claims and thus should have been maintained by the State, this court finds the remedy sought by the petitioner is not warranted. In determining the appropriate remedy for such a due process violation, the court must consider the degree of negligence involved, the significance of the lost evidence in light of the probative value and reliability of other evidence which remains available to the petitioner, and the sufficiency of the other evidence supporting petitioner's conviction. Ferguson, 2 S.W.3d at 917. In evaluating such factors this court finds a post conviction hearing held without the missing evidence would not be fundamentally unfair.⁴¹

It now appears certain of these items may not have even been destroyed. Sean Lester, the custodian of records for the Shelby County Medical Examiner's Office, testified at the post conviction hearing he was asked by the prosecution to review the Myra Johnson autopsy file to determine what physical evidence still existed in the file. He stated he found three items: two glass vacuum containers, one labeled rectal swabs and one labeled vaginal swabs, and another sealed manila envelope labeled hair and fiber from right hand. Lester stated the swabs were currently refrigerated and had been refrigerated since their collection. He stated there was never a request for testing on those items.

James Hill testified he is employed by the Memphis Police Department's latent fingerprint division. He stated when latent lifts are collected at crime scenes by the Memphis Police Department they are stored, retained and submitted for comparison by his department. He testified the prosecution asked him to bring with him all the physical property and records relating to any latent lifts taken in connection with this case which are currently in the control of the Memphis Police Department. Hill produced the requested items and the items were entered into evidence as part of the post conviction proceedings. Post conviction counsel were then given an opportunity to have an expert review the items and present evidence in support of their claim. No such proof was presented. This court finds petitioner is not entitled to relief based upon this claim.

⁴¹ See *Richard Odom vs. State of Tennessee*, Shelby County Criminal Court Case No. 01-12388, March 2014 Order of the court.

C. Misconduct During 1992 Trial

Petitioner asserts during his 1992 trial the prosecution committed the following acts of misconduct: (1) improperly informed the jury of all potential aggravating circumstances; (2) made false and misleading statements during their opening remarks to the jury; and (3) made inflammatory remarks to the jury during closing arguments.

1. Reading of Aggravating Circumstances

Petitioner alleges it was improper for the prosecution to read the entire list of statutory aggravating circumstances during their *voir dire* of the jury. He contends most of the factors did not apply to his case, but all of them suggested the heinous types of crimes the defendant *might* have committed, which prejudiced the prospective jurors. Additionally, he argues the State improperly stated the mitigation would have to outweigh one or more aggravating circumstances to vote for life. Initially, this court finds the prosecutions referencing the statutory aggravating circumstances was an attempt by counsel to explain the capital sentencing procedure and was not improper. Although the prosecutor may have misstated the weighing process for determining the appropriate sentence, this court finds petitioner is not entitled to relief. Even if the prosecution's comments were improper, this court finds petitioner was not prejudiced by the prosecution's actions given the trial court properly instructed the jury on the applicable aggravating circumstances and the proper procedure for evaluating the capital sentencing decision. Thus, petitioner is not entitled to relief based upon this claim.

2. False and Misleading Statements

Petitioner asserts the prosecution knowingly, intentionally or recklessly presented false, misleading or unreliable evidence during his 1992 trial. Specifically, he argues, during opening statements, the prosecution improperly described how the murder happened in a location familiar to everyone in the courtroom as they all see or drive by it on a regular basis; thanked God Cathy Helms is still alive after she "dashed" by petitioner, who was "lurking" in a hallway; and, described the murder weapon as "his trusty old timer knife." Petitioner argues no evidence was every presented indicating he acted in a threatening way toward Helms and the State improperly

implied he had attacked others with the murder weapon in this case. This court finds the statements of the prosecution were not improper. The State did not improperly imply any one of the jurors could have been petitioner's victim. Rather, the prosecution simply attempted to set the scene for the jury by pointing out the location of the murder was a well known area of town. Additionally, the prosecution did not assert the petitioner acted violently towards Helms but did contend the petitioner picked his victim at random. Finally, this court finds the state did not improperly imply petitioner had attacked others with his knife. The statement of the prosecutor was a reference to Officer McWilliams testimony the knife recovered from petitioner's person was known as an "Old Timer's Light Blade Knife." Moreover, this court finds, even if the prosecution acted improperly, petitioner has failed to demonstrate he was prejudiced by their actions. The trial court properly instructed the jury statements of counsel are not evidence.

Next, petitioner alleges the prosecution closing argument and rebuttal were also replete with improper and inflammatory remarks, including the following:

1. "As you get older, you become prey. That's something we can all look forward to."
2. "Not just old women who are prey but women of any age," referring to Kathy Helms.
3. Remarks suggesting the defense wasted the jury's time cross-examining fingerprint evidence;
4. Remarks referring to his "cold eyes, scowling face," [Petitioner acknowledges the defense objected and the court sustained the objection and directed the jury to disregard]
5. Stating the victim was "a lady who never harmed anyone," whose "primary goal in life" was to take care of her sister. [Defendant argues no such facts were placed in evidence]
6. the prosecutor's apology for having to show gory crime scene photos to the jury and stating there was no choice but to show them once defense counsel said in opening statement the prosecution had to prove everything [Defendant contends these statements attempted to prejudice the jury against defendant and were misleading because the state had argued for the admission of the photos prior to the defense opening statement]
7. "the prosecution gets paid to look at these photos, the jury shouldn't have to."
8. "Jurors are suppose to be fair and helping Richard Odom is not part of that."
9. "The jury swore to the court to uphold their duty and follow the law." [Defendant argues this statement improperly implied the State, like the court, is impartial and the jury is obligated to the State.]

10. “No witness took the stand to rebut the fingerprint evidence.” [Defendant contends this statement improperly shifted the burden of proof.]

Closing arguments have special importance in the adversarial process. Their purpose is to sharpen and to clarify the issues that must be resolved in a criminal case. Herring v. New York, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975). The lawyers representing the defendant and the State in a criminal trial are expected to be zealous advocates. Burlison v. State, 501 S.W.2d 801, 806 (Tenn. 1973). Their closing arguments provide them with an opportunity to persuade the jury, and thus they should be given great latitude in both the style and the substance of their arguments. Post v. State, 580 S.W.2d 801, 808 (Tenn. Crim. App. 1978); 6 Wayne R. LaFave et al. Criminal Procedure § 24.7(b), at 456 (3d ed. 2007) (“Criminal Procedure”). Thus, Tennessee appellate courts have held, “[w]hile closing arguments must be, among other things, based upon the evidence presented at trial and pertinent to the issues . . . the arguments are considered a valuable privilege that should not be unduly restricted.” State v. Sutton, 562 S.W.2d 820, 823 (Tenn. 1978). As a result, appellate courts have traditionally “give[n] wide latitude to counsel in arguing their position in a case to the jury.” Id. More importantly, the Courts have held, “a criminal conviction should not be lightly overturned solely on the basis of the prosecutor’s closing argument.” Banks, 271 S.W.3d at 131 (citing United States v. Young, 470 U.S. 1, 11–13 (1985); State v. Bane, 57 S.W.3d 411, 425 (Tenn.2001) (holding a prosecutor’s improper closing argument does not automatically warrant reversal)).

However, courts have recognized a prosecutor’s closing arguments can have great weight on jurors. Knight v. State, 190 Tenn. 326, 332, 229 S.W.2d 501, 503 (1950); Turner v. State, 72 Tenn. 206, 210 (1879). Accordingly, a prosecutor’s closing argument must be temperate, must be based on the evidence introduced at trial, and must be pertinent to the issues in the case. State v. Middlebrooks, 995 S.W.2d 550, 557 (Tenn. 1999); Russell v. State, 532 S.W.2d 268, 271 (Tenn. 1976). Nevertheless, even though the scope and tenor of their arguments may be limited, State v. Thomas, 158 S.W.3d 361, 413 (Tenn. 2005) (appendix), prosecutors, no less than defense counsel, may use colorful and forceful language in their closing arguments, as long as they do not stray from the evidence and the reasonable inferences to be drawn from the evidence, United States v. Mullins, 446 F.3d 750, 759 (8th Cir. 2006), or make derogatory remarks or appeal to the jurors’ prejudices, State v. Reid, 164 S.W.3d at 320-21.

An improper closing argument will not constitute reversible error unless it is so inflammatory or improper that it affected the outcome of the trial to the defendant’s prejudice.

See State v. Farmer, 927 S.W.2d 582, 591 (Tenn.Crim.App.1996) (citing Harrington v. State, 385 S.W.2d 758, 759 (Tenn.1965)); see also State v. Thacker, 164 S.W.3d 208, 244 (Tenn. 2005) (appendix); State v. Cribbs, 967 S.W.2d 773, 786 (Tenn. 1998); State v. Reid, 164 S.W.3d at 321. When called upon to review the propriety of a prosecutor's closing argument, the court should consider: (1) the conduct at issue in light of the facts and circumstances of the case, (2) the curative measures undertaken by the trial court and the prosecution, (3) the intent of the prosecutor in making the improper argument, (4) the cumulative effect of the improper argument and any other errors in the record, and (5) the relative strengths and weaknesses of the case. Judge v. State, 539 S.W.2d 340, 344 (Tenn.Crim.App.1976); State v. Reid, 164 S.W.3d at 321; State v. Middlebrooks, 995 S.W.2d at 559-60; see also Tennessee Criminal Practice and Procedure § 29.6 I, at 112.

The appellate courts have previously recognized five general areas of prosecutorial misconduct:

1. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.
2. It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.
3. The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.
4. The prosecutor should refrain from argument which 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 under the controlling law, or by making predictions of the consequences of the jury's verdict.
5. It is unprofessional conduct for a prosecutor to intentionally refer to or argue facts outside the record unless the facts are matters of common public knowledge.

State v. Goltz, 111 S.W.3d 1, 6 (Tenn.Crim.App.2003) (citations omitted).

With regard to comments one and two above, this court finds, although the statements may have been somewhat inflammatory, given the circumstances of the offense and the age of the victim they were not so inflammatory or improper as to have affected the verdict to

petitioner's detriment. As to statements three and ten above, this court finds in the context of the entire argument such comments were not improper. The State was simply arguing the strength of the fingerprint evidence and the inability of the defense to challenge such evidence. As to remark number four above this court finds the trial court properly sustained trial counsel's objection and informed the jury they were to disregard the comment. Considering this curative measure by the trial court, this court does not find such statements affected the verdict to petitioner's detriment. With regard to statement five, this court finds there was testimony about the victim's background and her relationship with her sister. Thus, in the context of the evidence presented and the entirety of the prosecution's closing arguments, this court finds the prosecutor's statements were not improper. As to statements six and seven above this court finds nothing improper about the prosecution's remarks. This court does not find the intent of the prosecution was to inflame the jury or blame the defendant for the introduction of such photographs. Rather, the prosecution was attempting to acknowledge the difficult nature of the photographs and explaining to the jury the introduction of such evidence was necessary in order for the state to adequately meet its burden of proof. With regard to statements eight and nine, this court again finds there was nothing improper about such statements when considered in the context of the entire argument. Finally, this court has reviewed the entirety of the comments of which petitioner complains together and finds the cumulative effect of such comments were not so prejudicial or inflammatory as to warrant a new trial.

IV. DUE PROCESS CLAIMS

A. Loss or Destruction of Evidence

Petitioner asserts his right to due process includes the right to a "fair hearing" conducted in "accord with fundamental fairness." He argues this means a prisoner must be given an opportunity to be heard and an opportunity to deny or explain the evidence presented against him. Petitioner asserts his conviction and sentence of death must be vacated because he has been prejudiced by the passage of time which has elapsed between the events underlying his 1992 conviction and his first opportunity in 2014 to present guilt/innocence related claims as part of his state post conviction proceedings.

Petitioner contends the delay in him being heard is due in large part to prosecutorial misconduct and repeated trial court error. Petitioner alleges since his 1992 conviction and sentence the evidence purportedly inculcating him has been lost or destroyed. He argues because of ineffective assistance of counsel the state's key pieces of evidence, the knife, the fingerprints and his confession, were largely unchallenged. Thus, he contends the post conviction proceedings were his first opportunity to introduce evidence his conviction was not constitutional and the evidence introduced against him was unreliable. However, he asserts he is unable to fully present such claims because the State has lost or destroyed the knife used to stab the victim; the fingerprints taken from him after his arrest and the latent print taken from the backseat of the victim's vehicle; and the original of the written statement alleged to have been initialed and signed by him.

Additionally, petitioner argues he is hampered by the destruction of court records in his case. He contends The Tennessee Supreme Court record of his 1992 conviction has been destroyed and lead counsel is deceased and post conviction counsel have been unable to locate his file or determine whether it actually still exists. Petitioner avers there is no constitutionally adequate way to remedy his inability to confront witnesses and evidence, thereby rendering an evidentiary hearing on several potentially meritorious claims for relief meaningless and futile.

As noted above, this court addressed petitioner's due process claims as it relates to the loss or destruction of the knife and fingerprint evidence prior to the hearing in this matter. The court's findings are outlined in this order under the section dealing with petitioner's claims of prosecutorial misconduct. This court declines to further address petitioner's claims relating to the loss or destruction of these items. Moreover, this court notes, much of what was contained in the 1992 Tennessee Supreme Court record and the defense file should presumably be copies of original items retained either by the prosecution, the Shelby County Clerk's Office, or the Memphis Police Department. Thus, it is not clear a duplicate of much of this evidence was not available to post conviction counsel. Therefore, this court finds petitioner has failed to demonstrate he is entitled to relief based upon due process violations relating to the loss or destruction of this evidence and/or the appellate record.

Next, this court addresses petitioner's claims relating to the destruction of his statement. Petitioner acknowledges 1992 counsel were provided a copy of his written, signed statement. However, he argues the police failed to provide counsel with additional law enforcement

documents pertaining to the written statement as well as other potentially exculpatory reports pertaining to alternate suspects. He argues the prosecution's file contains several different versions of his alleged confession and contends one version contains various pages which are initialed, "R.O." He suggests the initials appear to be in different handwriting than the signature, "Richard Odom." He alleges the questionable initials seem to be more similar to Officer Roleson's handwriting than his own handwriting. Petitioner argues because the police destroyed the original signed and initialed reports, he is precluded from developing such a claim. As discussed above, this court finds absolutely no basis for petitioner's claim the initials or signature is forged and offered no proof supporting this assertion. Thus, due process does not entitle petitioner to relief based upon this claim.

With respect to petitioner's argument the destruction of evidence in addition to the unavailability of 1992 lead counsel and the defense file and the destruction of the Tennessee Supreme Court record when viewed collectively violate his rights to due process and a fair hearing of his claims, this court finds for the same reasons as those stated in evaluating each individual claim petitioner is also not entitled to relief based upon the collective nature of the alleged missing, lost or destroyed evidence.

B. Politicization of Petitioner's Case

Petitioner asserts the politicization of his case impinges his rights to due process and to be free from cruel and unusual punishment. Petitioner argues former Tennessee Supreme Court Justice Penny White, who concurred in the Court's opinion granting him sentencing relief on direct appeal, was ousted from the Court as a result of this case. He asserts Justice White's ouster was accomplished through a well orchestrated political campaign in which certain groups sent out letters to voters describing in great detail the murder of the victim in this case and included inflammatory messages relating to capital punishment. Petitioner contends the politicization of his case prevents him from having a full and fair hearing and the meaningful review of the reliability of his death sentence mandated by the Eighth Amendment. This court finds this issue is without merit. There was little or no publicity surrounding petitioner's litigation of his post conviction claims. Moreover, the Tennessee Supreme Court is made up of an entirely new set of Justices who did not previously participate in the review of petitioner's

conviction and sentence. Thus, petitioner has failed to demonstrate how the political climate nearly twenty years ago continues to affect his ability to obtain a fair and full review of his post conviction claims.

C. No Life Without Parole Option

Petitioner alleges he was denied a full and fair sentencing hearing in violation of the Eighth and Fourteenth Amendments because the date of his capital crime rendered him ineligible for a sentence of Life Without the Possibility of Parole. Petitioner asserts at the time of his 2007 resentencing proceeding he had already served sixteen years. Thus, he argued the jury was informed, if they sentenced him to life in prison, he could be eligible for parole in eight more years. Additionally, he argues he was denied due process by the delay in his sentencing and by the trial court instructing the jury of his parole eligibility. Similar arguments have been raised and rejected by our appellate courts. See State v. Cauthern, 967 S.W.2d 726, 734–36 (Tenn.1998) (holding the fact the Tennessee statute precludes a jury from considering life without the possibility of parole as a sentencing option where the offense was committed before July 1, 1993 does violate the Eighth Amendment); see also Black, 815 S.W.2d 166, 185-191 (Tenn. 1991); State v. Boyd, 797 S.W.2d 589, 597-599 (Tenn.1990); State v. Thompson, 768 S.W.2d 239, 252 (Tenn.1989). In petitioner’s case, the trial court appropriately charged the jury according to the controlling law at the time of trial.

D. Delay in Execution

Post conviction counsel assert petitioner has lived on death row for twenty three years primarily due to the state of Tennessee’s repeated failures to ensure he received a fair trial. Counsel argue in order to survive Constitutional scrutiny, a sentence of death must serve some legitimate and substantial penological goal. Counsel assert executing petitioner for a crime he committed nearly twenty years ago constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and the Article I, Section 16 of the Tennessee Constitution. He asserts as a consequence his death sentence should be set aside and commuted to a life sentence.

This court finds petitioner is not entitled to relief based upon this claim. In State v. Austin, 87 S.W.3d 447 (Tenn. 2002), the Tennessee Supreme Court addressed two recent United States cases⁴² discussing similar challenges and held:

After consideration of the Appellant's claim, we perceive no constitutional violation under either the federal or the Tennessee constitution. We remain unconvinced that neither this state's capital sentencing law nor the accompanying subsequent appellate review of a capital conviction was enacted with a purpose to prolong incarceration in order to torture inmates prior to their execution. As in most cases, the delay in the instant case was caused in large part by numerous appeals and collateral attacks lodged by the Appellant. This issue is without merit.

Austin, 87 S.W. 3d at 486.

E. Constitutionality of Tennessee's Death Penalty Procedures

Petitioner makes the following challenges to the constitutionality of Tennessee's death penalty procedures in general and specifically as applied to his case: (1) the death penalty in Tennessee is arbitrarily and disproportionate in its application and fails to effectively narrow the class of death eligible defendants; (2) Tennessee fails to ensure adequate counsel to capital defendants; (3) the Tennessee Supreme Court's direct appellate review of proportionality of death sentences in all capital cases is both substantively and procedurally inadequate; (4) Tennessee's lethal injection protocol is unconstitutional under the Eight Amendment; (5) Tenn. Code Ann. § 40-23-114 as applied to his case, violates his rights and violates the prohibition against ex post facto laws, as well as his right to be free from cruel and unusual punishment as guaranteed by the Eighth Amendment; (6) Tennessee fails to properly delineate the constitutionally permissible scope of victim impact testimony; (7) death qualification of jurors improperly skews the jury towards being biased against defendants and denies defendants a jury selected from a fair cross section of the community; (8) Tennessee fails to inform the capital jury as to each juror's individual role in reaching a sentencing decision; (9) defense counsel are impermissible denied the opportunity to address popular misconceptions relating to the cost of incarceration, cost of execution and deterrent effect of the death penalty and the method of

⁴² See Lackey v. Texas, 514 U.S. 1045, 115 S.Ct. 1421, 131 L.Ed.2d 304 (1995), petition for reh'g denied, 520 U.S. 1183, 117 S.Ct. 1465, 137 L.Ed.2d 568 (1997) and Knight v. Florida, 528 U.S. 990, 120 S.Ct. 459, 145 L.Ed.2d 370 (1999).

execution; and (10) defense counsel is impermissibly denied the right to make final arguments in the sentencing phase of a capital trial.

This court finds petitioner is not entitled to relief based upon alleged constitutional deficiencies in Tennessee's capital sentencing procedures. The appellate courts have previously dismissed similar constitutional claims. See State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992); State v. Howell, 868 S.W.2d 238 (Tenn. 1993) (rejecting claims the Tennessee capital sentencing scheme fails to adequately narrow the class of death eligible defendants); Andrew Thomas v. State, No. W2008-01941-CCA-R3-PD, 2011 WL 675936 at *42-45 (Tenn. Crim. App., Feb.23, 2011), perm. to app. denied (Tenn. Aug. 25, 2011) (rejecting argument that Tennessee fails to ensure adequate counsel and resources in capital cases); State v. Bland, 958 S.W.2d 651, 663 (Tenn.1997); in State v. Pruitt, 415 S.W.3d 180, 207-12 (Tenn.2013) (holding Tennessee's proportionality review meets constitutional standards of due process); State v. Nesbit, 978 S.W.2d 872, 889 (Tenn.1998) (establishing proper parameters for admissibility of victim impact evidence); State v. Teel, 793 S.W.2d 236, 246 (Tenn.1990) (rejecting claim death qualifying capital juries improperly skews the jury in favor of a sentence of death); State v. Bane, 853 S.W.2d 483, 488 (Tenn.1993) (quoting State v. Bovd, 797 S.W.2d 589, 596 (Tenn.1990), *cert. denied*, 498 U.S. 1074, 111 S.Ct. 800, 112 L.Ed.2d 861 (1991)) (holding the Tennessee statute, taken in its entirety, does not in any way unconstitutionally deprive the sentencer of the discretion mandated by the individualized sentence requirements of the Constitution); Terry, 46 S.W.3d at 170 *cert. denied*, 534 U.S. 1023, 122 S. Ct. 553, 151 L. Ed. 2d 428 (2001); Brimmer, 876 S.W.2d at 86-87; State v. Black, 815 S.W.2d 166, 179 (Tenn. 1991); State v. Cazes, 875 S.W.2d 253 (Tenn.1994) (rejecting argument defense counsel is impermissibly prohibited from addressing jurors' popular misconceptions about matters relevant to sentencing such as the cost of incarceration versus the cost of execution, deterrence, method of execution, and parole eligibility); Brimmer, 876 S.W.2d at 87; Cazes, 875 S.W.2d at 269; Smith, 857 S.W.2d at 24; State v. Caughron, 855 S.W.2d 526, 542 (Tenn. 1993) (rejecting claims a capital defendant should have the opportunity to argue last at the penalty phase of the trial).

As to petitioner's arguments relating to the current lethal injection protocols and the procedures for carrying out a sentence of death if such protocols are found to be constitutionally

inadequate or the requisite drugs unavailable, this court finds petitioner is not entitled to relief based upon these claims.⁴³

Essentially, defendant incorporates into his motion, the same complaints and arguments raised by the plaintiffs in a pending Davison County Chancery Court suit.⁴⁴ Tennessee statutes authorize execution by lethal injection (as the primary method) and electrocution (if lethal injection is declared unconstitutional or the Commissioner of the Department of Correction certifies the lethal injection drugs are unavailable through no fault of the Department). Specifically, Tenn. Code Ann. § 40-23-114: Death by lethal injection – Election of electrocution – Electrocution as alternative method – provides as follows:

(a) For any person who commits an offense for which the person is sentenced to the punishment of death, the method for carrying out this sentence shall be by lethal injection.

(b) Any person who commits an offense prior to January 1, 1999, for which the person is sentenced to the punishment of death may elect to be executed by electrocution by signing a written waiver waiving the right to be executed by lethal injection.

(c) The department of correction is authorized to promulgate necessary rules and regulations to facilitate the implementation of this section.

(d) If lethal injection or electrocution is held to be unconstitutional by the Tennessee supreme court under the Constitution of Tennessee, or held to be unconstitutional by the United States supreme court under the United States Constitution, or if the United States supreme court declines to review any judgment holding lethal injection or electrocution to be unconstitutional under the United States Constitution made by the Tennessee supreme court or the United States court of appeals that has jurisdiction over Tennessee, or if the Tennessee supreme court declines to review any judgment by the Tennessee court of criminal appeals holding lethal injection or electrocution to be unconstitutional under the United States or Tennessee constitutions, all persons sentenced to death for a capital crime shall be executed by any constitutional method of execution. No sentence of death shall be reduced as a result of a determination that a method of execution is declared unconstitutional under the Constitution of Tennessee or the Constitution of the United States. In any case in which an execution method is

⁴³ This court further finds generalized claims regarding the constitutionality of lethal injection as a form of punishment have been rejected by both the United States Supreme Court and the Tennessee appellate courts. See State v. Keen, 31 S.W.3d 196, 233 (Tenn.2000), cert. denied, 532 U.S. 907, 121 S.Ct. 1233, 149 L.Ed.2d 142 (2001) (rejecting general argument that the death penalty is cruel and unusual); State v. Banks, 271 S.W.3d 90, 108 (Tenn.2008) (rejecting specific claim that lethal injection is cruel and unusual).

⁴⁴ See Stephen Michael West, et. al. vs. Derrick D. Scholfield, et. al., Davidson County Chancery Court, Case No. 13-1627-1

declared unconstitutional. the death sentence shall remain in force until the sentence can be lawfully executed by any valid method of execution.

(e) For any person who commits an offense or has committed an offense for which the person is sentenced to the punishment of death, the method of carrying out the sentence shall be by lethal injection unless subdivision (e)(1) or (e)(2) is applicable. If subdivision (e)(1) or (e)(2) is applicable, the method of carrying out the sentence shall be by electrocution. The alternative method of execution shall be used if:

(1) Lethal injection is held to be unconstitutional by a court of competent jurisdiction in the manner described in subsection (d); or

(2) The commissioner of correction certifies to the governor that one (1) or more of the ingredients essential to carrying out a sentence of death by lethal injection is unavailable through no fault of the department.

Tenn. Code Ann. § 40-23-114 (Supp. 2014). As stated above, persons who committed offenses before January 1, 1999 may elect to be electrocuted, but such an election would waive the condemned inmate's right to challenge the "elective" means of execution. See Stewart v. LaGrand, 526 U.S. 115, 119 (1999).

While some states' protocols are statutory, the protocols for carrying out lethal injection and electrocution in Tennessee are left to the Department of Correction. See Tenn. Code Ann. § 40-23-114(c). Thus, each time TDOC enacts a new protocol, inmates will likely respond by filing a new protocol challenge. Because TDOC, as a state administrative agency, promulgates execution protocols, any challenges to the lethal injection or electrocution protocol must first be undertaken administratively via the TDOC grievance process, and then via suit in the Chancery Court for Davidson County. See Tenn. Code Ann. § 4-5-225.⁴⁵ Thus, this court finds this issue is

⁴⁵ (a) The legal validity or applicability of a statute, rule or order of an agency to specified circumstances may be determined in a suit for a declaratory judgment in the chancery court of Davidson County, unless otherwise specifically provided by statute, if the court finds that the statute, rule or order, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the complainant. The agency shall be made a party to the suit.

(b) A declaratory judgment shall not be rendered concerning the validity or applicability of a statute, rule or order unless the complainant has petitioned the agency for a declaratory order and the agency has refused to issue a declaratory order.

(c) In passing on the legal validity of a rule or order, the court shall declare the rule or order invalid only if it finds that it violates constitutional provisions, exceeds the statutory authority of the agency, was adopted without compliance with the rulemaking procedures provided for in this chapter or otherwise violates state or federal law.

not properly before this court. Such matters must be directly addressed to the Chancery Court for Davidson County.

As to the claim the statutory provision providing for electrocution as an alternate means of electrocution violates ex post facto provision of the Constitution, this court finds this issue is without merit. Initially, the court notes the method of execution in Tennessee in 1992 was electrocution. Thus, petitioner was on notice he could be put to death in this manner. Under these circumstances, this court finds the fact the procedure for execution later changed but still allowed for imposition of electrocution under certain circumstances does not violate the defendant's constitutional rights, especially in light of the fact the statute allows petitioner to choose electrocution as the method of execution. Moreover, the Tennessee Supreme Court declared repeatedly that electrocution does not constitute cruel and unusual punishment under the federal and state constitutions. See generally State v. Black, 815 S.W.2d 166, 178-79 (Tenn. 1991). Although, in Black, at least one Tennessee Supreme Court Justice expressed some reservations about electrocution as a method of execution, electrocution withstood all constitutional challenges during the time it was the primary method of execution in Tennessee. Thus, this court finds petitioner is not entitled to relief based upon this claim.

F. Superseding Mississippi Sentence

Petitioner argues he is being unlawfully detained on death row in the State of Tennessee because the judgment of conviction provides his Tennessee death sentence is to be served consecutively to his life sentence in the State of Mississippi. Petitioner requests a stay of all post conviction proceedings until such time as he has served his life sentence in the State of Mississippi. Petitioner cites no authority in support of his request for such relief and this court finds none exists. Thus, petitioner is not entitled to a stay of his proceedings pending the service of his Mississippi sentence.

CONCLUSION

Having found petitioner was not prejudiced by the deficiencies in the representation of his 1992, 1999, or 2007 trial or appellate counsel, this court finds petitioner is not entitled to

relief based upon a claim of ineffective assistance of counsel. Additionally, this court finds petitioner has failed to demonstrate he is entitled to relief due to trial court error, juror misconduct or prosecutorial misconduct. Finally, this court finds petitioner's due process claims and other constitutional claims are without merit and, thus, he is not entitled to have his sentence of death vacated and a new trial and/or sentencing hearing is not warranted. Thus, petitioner's Petition for Post Conviction Relief is hereby **DENIED**.



Senior Judge, Don Ash

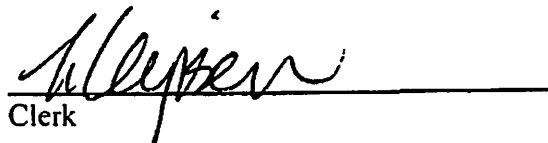
7/20/15

CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing order has been delivered to the following by U.S. Mail, postage pre-paid, this the 28th day of July, 2015:

Steve Jones
Deputy District Attorney General
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Kertyssa Smalls
Assistant Post-Conviction Defender
530 Church Street, Suite 600
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Clerk