NO. 18-5231

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD LLOYD ODOM,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE TENNESSEE COURT OF CRIMINAL APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

I

When a court considers a claim that counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), for failing to offer certain mitigation proof during a capital sentencing proceeding, may the court consider the lack of a nexus between this proof and the offense conduct when weighing the evidence as a part of the prejudice analysis?

II

Did the Tennessee Court of Criminal Appeals properly apply *Strickland* when it found that trial counsel provided effective assistance of counsel in choosing not to present evidence of Petitioner's neurological deficiency during the capital sentencing hearing because it would undercut the mitigation strategy that Petitioner did not pose a risk of future dangerousness and might discredit other mitigation proof?

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The opinion of the Tennessee Court of Criminal Appeals affirming the denial of a petition for post-conviction relief is unreported but may be found at *Odom v. State*, No. W2015-01742-CCA-R3-PD, 2017 WL 4764908 (Tenn. Crim. App. Oct. 20, 2017).

STATEMENT OF JURISDICTION

The opinion of the Tennessee Court of Criminal Appeals was filed on October 20, 2017.[1] (Resp. App. A.) Petitioner filed an application for permission to appeal to the Tennessee Supreme Court, which the court denied on April 23, 2018. (Pet. App. B.) Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a).[2] (Pet. 1.)

STATEMENT OF THE CASE

In 1991, Petitioner raped and murdered an elderly woman in a parking garage in Memphis, Tennessee. A jury later convicted Petitioner of first-degree murder during the perpetration of rape and sentenced him to death. *State v. Odom* (*Odom I*), 928 S.W.2d 18, 20-22 (Tenn. 1996). The Tennessee Supreme Court affirmed the conviction but reversed the death sentence, holding in part that the evidence was insufficient to support two of the aggravating circumstances. *Id.* at 26-27, 32-33. On remand, a jury sentenced the defendant to death a second time. *State v. Odom* (*Odom II*), 137 S.W.3d 572, 575 (Tenn. 2004). The Court of Criminal Appeals affirmed the sentence, but the Tennessee Supreme Court again reversed, finding that evidence of a prior violent felony offense had been improperly admitted. *Id.* at 580-87.

In 2007, Petitioner received a third sentencing hearing. *State v. Odom* (*Odom III*), 336

[1] Petitioner attached an appendix to his petition, which purports to include a copy of the opinion of the Court of Criminal Appeals. However, Petitioner attached a copy of an unrelated order of the Court of Criminal Appeals that addresses a separate filing. A copy of the proper opinion is attached to this response as Appendix A.

[2] On the cover of the petition, Petitioner notes that he seeks review from the Tennessee Supreme Court. However, the final judgment at issue is the judgment of the Court of Criminal Appeals, which Petitioner appears to acknowledge in the body of the petition. (Pet., at 2-3; *see also infra* Section I, Subsection B.)

S.W.3d 541, 549 (Tenn. 2011). Based on the law applicable at the time of the offense, the jury had two sentencing options: death or life with parole after 25 years' imprisonment. *Id.* at 567. Because Petitioner had already served 17 years at the time of the hearing, he would be release-eligible after only eight more years if the jury imposed a life sentence. *Id.* Given these circumstances, the defense team presented testimony from a mitigation specialist, who was qualified as an expert in parole policy and procedure, that Petitioner's chance for release was "close to impossible." *Id.* at 552. Further, she and another witness explained, in the event he received parole in Tennessee, Petitioner would be returned to Mississippi to serve out his life sentence for a prior murder conviction. *Id.* at 552-53.

The defense team also stressed Petitioner's successful record while in prison. *Id.* at 552. During his Tennessee incarceration, he had an "extremely low number" of write-ups and his record was "very positive." *Id.* Many witnesses from the prison, including instructors, testified positively about their experiences with Petitioner. *Id.* at 554. Additionally, Dr. Joseph Angelillo, a clinical psychologist, opined that the structured environment of the Tennessee prison "behaviorally defined" Petitioner's ability to engage in "constructive activities," and he would continue to thrive if given a life sentence. *Id.* at 553.

Finally, the defense team presented proof about the petitioner's abusive and neglected upbringing, including limited evidence about his mental health. Both the mitigation specialist and Petitioner's family testified about the physical and sexual abuse he suffered as a child and young man and how it affected him. *Id.* at 551, 553-54. Dr. Angelillo believed that Petitioner did not receive sufficient mental health treatment as a child, although he could not arrive at a specific diagnosis. *Id.* at 553. The physical and sexual abuse Petitioner suffered, combined with the rejection he had experienced as a child and the lack of adequate mental health treatment, "all had

a profound effect on his development." *Id.* In presenting this theory, the defense team was able to discuss Petitioner's past diagnoses of potential brain damage, weaving it into their larger theory that Petitioner had been failed by the system.[3] *Id.* at 552-53; *Odom v. State (Odom IV)*, No. W2015-01742-CCA-R3-PD, 2017 WL 4764908, at *29, *31 (Tenn. Crim. App. Oct. 20, 2017).

After receiving evidence, the jury sentenced Petitioner to death, relying upon two aggravating circumstances: that Petitioner had previously been convicted of a prior violent felony and that the murder was committed during an attempt to commit robbery. Tenn. Code Ann. § 39-13-204(i)(2) & (7). The Tennessee Supreme Court affirmed the jury's imposition of a death sentence. *Odom III*, 336 S.W.3d at 577.

In 2012, Petitioner filed a *pro se* petition for post-conviction relief, claiming ineffective assistance of counsel and other constitutional violations. (Pet. App. C, at 15a-17a.) Relevant here, Petitioner claimed his 2007 trial counsel were ineffective because they failed to investigate, obtain, and present evidence of "neurological and cognitive impairments." *Odom IV*, 2017 WL 4764908, at *24. Petitioner presented evidence from two mental health professionals, a clinical neuropsychologist and an expert in neurology and psychiatry, who testified that Petitioner suffered asymmetries in cognition and deficits in frontal lobe functioning likely due to brain damage, which was established by a neurological examination. *Id.* at *12, *14-15. The defense team explained that they were aware of Petitioner's history of neurological deficiency, but they decided evidence of such deficiency would undercut their theory that Petitioner posed little risk of future dangerousness and conflicted with a previous evaluation of Petitioner. *See id.* at *7-11.

The post-conviction court denied the petition. (Pet. App. C.) As to this issue, the court noted that trial counsel considered hiring a neurologist but decided against it in part because the

[3] Since there was at least limited discussion of brain damage during the sentencing hearing, Petitioner is wrong when he claims no such evidence was presented. (Pet., at 4.)

defense team believed this proof conflicted with their theory that Petitioner did not pose a risk of future dangerousness. (Pet. App. C., at 52a-54a.) Moreover, the defense team had the benefit of past strategies from Petitioner's previous two sentencing hearings including "serotonin levels[and] brain fingerprinting," which had not been effective. (Pet. App. C, at 53a.)

Further, the court noted, counsel were aware that any neurological proof would conflict with a past evaluation Petitioner underwent while incarcerated in Mississippi, which revealed no "organicity" or "neurological deficits." (Pet. App. C, at 52a-53a.) Counsel was concerned conflicting proof could look "bought and paid for" to the jury. (Pet. App. C, at 53a.) This evaluation also contained difficult statements from Petitioner about a prior murder, including that he shot the victim "for the joy of it" and felt no sorrow about it. (Pet. App. C. at, 52a.)

The court found that 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." (Pet. App. C, at 53a.) The court noted the mitigation investigator testified about her "extensive investigation," which included investigation she had done during the second sentencing proceeding. (Pet. App. C, at 53a-54a.) In fact, she described the "investigation and presentation of mitigation in petitioner's case to be the most th[o]rough she had ever prepared or presented." (Pet. App. C, at 54a.) It also appeared counsel were aware of "all the many prior examinations of petitioner and various diagnosis of the different reviewing mental health and medical professionals." (Pet. App. C, at 53a.) Because it found no deficiency, the post-conviction court did not address prejudice. (Pet. App. C, at 52a-54a.)

On appeal, Petitioner again argued that counsel should have performed more extensive investigation, including hiring a neuropsychologist. Petitioner also addressed prejudice, despite

the post-conviction court's focus on deficiency, although he made no mention of any "nexus" issue. In his reply brief, Petitioner noted that mitigating evidence need not have any nexus to the offense conduct to be relevant, but he did not argue that the court was precluded from considering the absence of a nexus in its prejudice analysis. (Resp. App. C, at 99-100.)

The Court of Criminal Appeals affirmed the denial of post-conviction relief. Relevant to this issue, the court found that "[c]ounsels' decision not to pursue a strictly mental health style of defense in mitigation was developed after they thoroughly investigated the Petitioner's background." *Odom IV*, 2017 WL 4764908, at *28. The court identified three principal reasons counsel chose not to present this evidence: they did not want to provide the State ammunition in the form of Petitioner's prior statements and diagnoses; the jury might view their expert's opinion as "bought and paid for" in light of contradictory mental health evaluations; and counsel did not want to present proof that "Petitioner could not control his impulses because of his brain damage and his brain damage would not prevent him from attempting escape in the future" because it "contradict[ed] their theory that the Petitioner had become well-adjusted in prison, was viewed as a model inmate, and did not pose any future danger in prison." *Id.* On the other hand, the court noted, counsel pursued a reasonable strategy focused upon Petitioner's lack of future dangerousness and the neglect and abuse he had suffered throughout his life. *Id.* at *29-30. Counsel pursued this strategy by presenting testimony from Petitioner's family members as well as testimony about Petitioner's experience in the Mississippi prison system. *Id.*

Although concluding that Petitioner had not established deficient performance, the court "nevertheless" went on to discuss prejudice. *Id* at *30. In post-conviction, Petitioner merely "presented more detailed evidence of his brain damage." *Id.* at *31. While neither of Petitioner's two mental health experts could connect Petitioner's brain damage to his actions at the time of the

murder, each of them testified that Petitioner lacked capacity to control his impulses, which trial counsel were "keen on keeping from the jury." *Id.* Trial counsels' mitigation theory "would have been hampered if mental health experts had testified that the Petitioner lacked the ability to control his actions." *Id.* On the other hand, trial counsel were able to reference this brain damage before the jury without also establishing that Petitioner presented a risk of future dangerousness. *Id.*

Finally, the court concluded that the two aggravating circumstances were "firmly established by the evidence." *Id.* (quoting *Odom III*, 336 S.W.3d at 572). When considering the proof offered at the resentencing hearing, "the additional post-conviction evidence would not have affected the jury's verdict." *Id.*

Petitioner filed a petition for rehearing, which the Court of Criminal Appeals denied. Petitioner then filed an application for permission to appeal to the Tennessee Supreme Court in which he primarily focused upon "Adverse Childhood Experiences" and how they affect development. (Resp. App. C, at 142-75.) Petitioner also argued, however, that the court erred in "requiring" a nexus between the mitigation proof and the offense conduct. (Resp. App. C, at 175-77.) The Tennessee Supreme Court denied review. (Pet. App. B, 5a.)

Petitioner now seeks a writ of certiorari.

REASONS WHY THE PETITION SHOULD BE DENIED

The Court should deny review. First, this case is a poor vehicle to address Petitioner's primary issue, which is whether a court may consider the lack of a nexus between proffered mitigation proof and the offense conduct when assessing prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). The Court of Criminal Appeals only addressed the prejudice prong in dictum, and the nexus issue was not adequately presented to that court. Second, Petitioner has not identified a genuine split of authority for this Court to resolve, as courts generally agree that a sentencer or court may consider the lack of a nexus when weighing mitigation evidence. Third, as to Petitioner's general *Strickland* claim, the Court of Criminal Appeals properly stated the applicable rule of law and did not err in applying it.

I. The Nexus Issue Is Irrelevant to the Outcome of Petitioner's Claim and Was Not Adequately Presented to the Court of Criminal Appeals.

The Court should deny review because this case is not a good vehicle to address the nexus issue. When considering counsels' decision not to present proof of neurological deficiency, the Court of Criminal Appeals discussed prejudice only in dictum, as the post-conviction court did not address prejudice on this issue at all. Moreover, Petitioner did not adequately present this nexus issue to the Court of Criminal Appeals but raised it for the first time in his unsuccessful application for discretionary review to the Tennessee Supreme Court.

A. The Court of Criminal Appeals only addressed prejudice in dictum when considering Petitioner's neurological deficiency evidence.

In *Strickland*, the Court established the now-familiar two-part test for assessing an ineffective assistance of counsel claim. To prevail on a claim, a petitioner must demonstrate (1) deficient performance, and (2) he must show prejudice, which is "a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently

reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 687-88, 695. However, the Court did not require that each of these prongs be considered by the reviewing court or that they be considered in order. *Id.* at 697.

In resolving Petitioner's claim regarding neurological deficiency, the post-conviction court in this case held only that counsel did not perform deficiently. (Pet. App. C, at 52a-54a.) The court did not address the prejudice prong and therefore never discussed a lack of any "nexus" between the mitigation proof and the offense conduct. (Pet. App. C, at 52a-54a.)

The Court of Criminal Appeals, following the post-conviction court's lead, considered at length Petitioner's deficiency argument, ultimately concluding "that counsel's performance in the presentation of mitigating evidence during the second resentencing hearing in this case was not deficient." *Odom IV*, 2017 WL 4764908, at *24-30. Although the court went on to consider prejudice, it made clear that this analysis was not necessary to its decision. *See id.* at *30 ("Although we have concluded that the Petitioner has not satisfied the first prong of the *Strickland* standard, we will *nevertheless* discuss whether counsel's failure to present evidence similar to that introduced during post-conviction would have resulted in any prejudice." (emphasis added)).

Accordingly, the only discussion of prejudice below was unnecessary to the resolution of Petitioner's claim.

This Court "reviews judgments, not statements in opinions." *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956); *see also California v. Rooney*, 483 U.S. 307, 311 (1987) (rejecting a prevailing party's appeal); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) ("[T]his Court reviews judgments, not opinions[.]"). *But see Camreta v. Greene*, 563 U.S. 692, 704-08 (2011) (nevertheless addressing constitutional standards established by the

intermediate appellate court). Therefore, this case is a poor vehicle for review of the nexus issue because a decision in Petitioner's favor would have no effect on the judgment.

B. The nexus issue was not adequately presented to the Court of Criminal Appeals.

Nor was the nexus issue adequately raised below. This Court may review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had" when any right "is specially set up or claimed under the Constitution [of the United States]." 28 U.S.C. § 1257(a). Under this statute and its predecessors, "this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim was either addressed by or properly presented to the state court that rendered the decision [this Court has] been asked to review." *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (internal quotation marks omitted).

Petitioner appears to concede he raised the nexus issue for the first time in his unsuccessful application for permission to appeal to the Tennessee Supreme Court, in which he faulted the Court of Criminal Appeals for "requiring" a nexus between the mitigation proof and the offense conduct.[4] (Pet., at 6; Resp. App. C, at 175-77.) However, when a state supreme court declines to exercise discretionary review over the judgment of an intermediate appellate court, the "[f]inal judgment" susceptible to review by this Court is the judgment of the intermediate court. *See* 28 U.S.C. § 1257(a); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 678 n.1 (1968); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 160 (1954); *Sullivan v. Texas*, 207 U.S. 416,

[4] Before the Court of Criminal Appeals, Petitioner argued in his reply brief that mitigating evidence need not have any nexus to the offense conduct to be *relevant* at the mitigation phase, but he never argued, as he does now, that a reviewing court is *precluded* from considering the absence of any nexus in its prejudice analysis. (*Compare* Resp. App. B, at 99-100, *with* Pet., at 19-20.) Nor did Petitioner identify this argument in his Statement of the Case as required by Sup. Ct. R. 14(1)(g)(i). Moreover, Petitioner filed a petition for rehearing before the Court of Criminal Appeals but did not challenge the court's prejudice analysis on this point.

422 (1908). In this case, because the Tennessee Supreme Court declined to exercise its discretionary review under Tenn. R. App. P. 11, the final judgment subject to review is the judgment of the Court of Criminal Appeals. This Court therefore should decline review because Petitioner did not adequately raise this nexus issue before that court.

Moreover, non-jurisdictional issues raised for the first time in a Tenn. R. App. P. 11 application are typically considered waived. *See State v. Rowland*, 520 S.W.3d 542, 545 (Tenn. 2017). Thus, this issue was not properly raised before any court below.

II. Petitioner Has Not Identified a Genuine Split of Authority.

Petitioner also has failed to establish a genuine split of authority regarding the use of a "nexus" test in a *Strickland* prejudice analysis. Rather, the cases he cites establish that a court may consider the absence of a nexus between mitigation proof and the offense conduct when weighing the evidence during its prejudice analysis, although it may not disregard the evidence on that basis.

A sentencer may not "refuse to consider, as a matter of law, any relevant mitigating evidence." *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982) (emphasis omitted); *see also Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Accordingly, a State may not exclude mitigating evidence simply because there is no causal nexus between that evidence and the crime. *Tennard v. Dretke*, 542 U.S. 274, 285-88 (2004); *see also Smith v. Texas*, 543 U.S. 37, 44 (2004).

The sentencer may, however, "determine the weight to be given relevant mitigating evidence." *Eddings*, 455 U.S. at 114-15. Thus, a sentencer may consider the absence of a causal nexus when assessing the weight of the evidence. *Hedlund v. Ryan*, 854 F.3d 557, 587 n.23 (9th Cir. 2017) ("[A] court may consider causal nexus in assessing the *weight* of mitigating evidence, but not in assessing its *relevance*." (emphasis in original)).

The weight of the mitigating evidence is also the primary focus of *Strickland*'s prejudice

inquiry in the mitigation context, where a defendant must prove "there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. A reviewing court therefore "reweigh[s] the evidence in aggravation against the totality of available mitigating evidence." *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). Because a sentencer may consider the lack of a nexus in weighing mitigation evidence, a court may also consider the lack of a nexus when deciding the prejudice prong of a *Strickland* claim.

As Petitioner acknowledges, a number of courts have explicitly or implicitly held as much. *E.g.*, *Hannon v. Sec'y, Dep't of Corr.*, 562 F.3d 1146, 1157 (11th Cir. 2009) (noting the proof did not "establish any nexus" between the petitioner's mental impairment and his offenses); *Ploof v. State*, 75 A.3d 840, 864 n.105 (Del. 2013) (noting there is "no requirement that a causal nexus exist," but "mitigating evidence that provides an explanation for a defendant's behavior is more powerful than evidence that does not provide an explanation"); *In re Crew*, 254 P.3d 320, 339 (Cal. 2011) (holding mitigation proof may have "elicited some jury sympathy," but there was no prejudice in part because there was "no causal connection" to the offense); *State v. Newell*, 132 P.3d 833, 849 (Ariz. 2006) ("[T]he failure to establish such a causal connection may be considered in assessing the quality and strength of the mitigation evidence.").[5]

Petitioner argues that, contrary to these cases, both the Ninth Circuit and the Missouri Supreme Court preclude courts from considering the lack of a nexus at all. But the Ninth Circuit has held repeatedly that a court may consider the absence of any nexus in weighing mitigation

[5] Petitioner argues that the Ninth Circuit rejected this distinction when it was drawn by the Arizona Supreme Court in *Newell*. To the contrary, the Ninth Circuit has held that *Newell* properly recognized that a court may consider the absence of a nexus when assessing the weight of mitigating evidence. *Hedlund*, 854 F.3d at 587 n.23 (noting that the Arizona Supreme Court "correctly" held as much in *Newell*); *McKinney v. Ryan*, 813 F.3d 798, 817-18 (9th Cir. 2015) (citing *Newell* as a "proper[]" statement of the rule).

proof. *E.g.*, *Poyson v. Ryan*, 879 F.3d 875, 888 (9th Cir. 2018) ("The sentencer may, however, consider causal nexus . . . as a factor in determining the weight or significance of mitigating evidence." (internal quotation marks omitted)); *Hedlund*, 854 F.3d at 587 n.23. Moreover, the Ninth Circuit has applied this principle to the prejudice prong of a *Strickland* analysis. *See Mann v. Ryan*, 828 F.3d 1143, 1159-60 (9th Cir. 2016) (holding that it was clear the court did not exclude mitigating evidence due to the lack of any nexus). *But see Robinson v. Schriro*, 595 F.3d 1086, 1112 (9th Cir. 2010) (holding that the district court erred in relying upon the absence of a nexus to assign evidence "minimal" weight).

The Ninth Circuit case upon which Petitioner heavily relies, *Lambright v. Schriro*, 490 F.3d 1103 (9th Cir. 2007), does not hold otherwise. The district court in *Lambright* "disregarded virtually all of the mitigating evidence that [the petitioner] presented at the evidentiary hearing on the basis that it had no 'explanatory nexus' to the crime," "flatly rejecting the majority of the mitigating evidence" on that basis. *Id.* at 1114-15. This conflicted with *Tennard* because it was "apparent from the district court's order that it either did not consider mitigating any evidence without an explicit nexus to the crime, or that it gave such evidence de minimus weight." *Id.* at 1115. Thus, *Lambright* establishes only that evidence must not be *disregarded* due to the absence of any explanatory nexus to the crime, as other courts have held. *E.g.*, *Barwick v. Sec'y, Fla. Dep't of Corr.*, 794 F.3d 1239, 1256 (11th Cir. 2015).

The same is true for *Hutchinson v. State*, 150 S.W.3d 292 (Mo. 2004), *abrogated on other grounds by Mallow v. State*, 439 S.W.3d 764, 770 n.3 (Mo. 2014), the only other case Petitioner cites for the proposition that a nexus analysis is precluded in this context.[6] In *Hutchinson*, the trial

[6] To the extent Petitioner relies on the Idaho Supreme Court's decision in *State v. Payne*, 199 P.3d 123 (Idaho 2008), for this proposition as well, his reliance is similarly misplaced. The Idaho Supreme Court has recognized that a sentencer may consider the absence of a nexus when weighing mitigation evidence. *See State v. Dunlap*, 313 P.3d 1, 28 (Idaho 2013) (rejecting the defendant's argument that the prosecutor committed misconduct when urging the jury

court held that some mental health evidence "would be irrelevant because it was remote in time from the murders," and a psychiatrist "could not provide any opinion regarding [the petitioner's] state of mind at the time of the crime." *Id.* at 305. Similarly, the trial court rejected proposed testimony from the petitioner's family because they "were unfamiliar with [his] recent activities so their testimony was not relevant." *Id.* (emphasis omitted). The Missouri Supreme Court found error on both points, noting that "[i]mpaired intellectual functioning has mitigating dimension beyond the impact it has on the ability to act deliberately," and "a defendant need not show a nexus between his mental capacity and the crime *to admit* such mitigating evidence." *Id.* (emphasis added) (citing *Tennard*, 542 U.S. at 288-89). Given the trial court's disregard of the evidence, *Hutchinson* did not establish that a court in Missouri is precluded from considering a nexus at all during the prejudice analysis.

Accordingly, Petitioner has failed to establish any genuine split of authority, and the Court should deny review.

III. Petitioner Identifies No Issue Worthy of Review in the *Strickland* Analysis of the Court of Criminal Appeals.

Petitioner also urges the Court to grant review because, in his estimation, the Court of Criminal Appeals got its *Strickland* analysis wrong. But a petition for writ of certiorari will be "rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10. For this reason alone, the petition should be denied.

The Court of Criminal Appeals properly cited to *Strickland* and accurately described the legal standard. *Odom IV*, 2017 WL 4764908, at *16-18, *27-30. The court also cited to and applied relevant capital mitigation cases of this Court, including *Sears v. Upton*, 561 U.S. 945 (2010), *Porter v. McCollum*, 558 U.S. 30 (2009), *Wiggins v. Smith*, 539 U.S. 510 (2003), and

to give mitigation proof little weight due to the absence of a nexus).

Williams v. Taylor, 529 U.S. 362 (2000). *Odom IV*, 2017 WL 4764908, at *27, *30.

Nor has Petitioner established any error by the Court of Criminal Appeals. As to deficient performance, trial counsel in this case decided "not to pursue a strictly mental health style of defense in mitigation . . . after they thoroughly investigated the Petitioner's background." *Id.* at *28. Counsel noted that they were aware there was evidence of brain damage and discussed retaining a neurologist and neuropsychologist, but they ultimately decided not to pursue this strategy. *Id.* at *7, *9-10. Evidence of neurological deficiency, in counsels' view, would have undercut their theory that Petitioner did not pose a risk of future dangerousness. *Id.* at *9-11; (Pet. App. C, at 21a-26a). Instead, counsels' theory was that, while the system had failed Petitioner, he was thriving in prison. *Odom IV*, 2017 WL 4764908, at *10-11. This strategy was driven primarily by the jury's sentencing options: death or life with parole, which would render Petitioner release eligible merely eight years after the resentencing hearing. *Id.* at *8, *10.

Counsel were also concerned that evidence of neurological deficiency or brain damage would discredit their larger mitigation strategy. A 1978 report from a Mississippi State Hospital noted that psychological testing of Petitioner "did not reveal any signs of organi[c]ity or a neurological deficit nor did the neurological examination." *Id.* at *9 (alteration omitted).[7] In light of this report, counsel feared that any new neurological evidence they presented would look "bought and paid for" to the jury. *Id.* at *9-10.

Further complicating the matter, Petitioner's past evaluations risked presenting difficult diagnoses to the jury as well as harmful prior statements of Petitioner. The 1978 report concluded

[7] In its recitation of the facts, the Court of Criminal Appeals appears to conflate some of the language and diagnoses from a 1974 evaluation by Dr. Daniel Cox, which did find mild neurological deficiency, with the 1978 report from the Mississippi State Hospital, which did not. *Compare Odom IV*, 2017 WL 4764908, at *9, *with* (Pet. App. C, at 20a-21a, 52a), *and* (P.C. Vol. VI, Ex. 12, p. 21; Ex. 13, p. 12). However, the 1978 report also refers in part to Dr. Cox's report, quoting portions of it. (P.C. Vol VI, Ex. 13, p. 12.)

Petitioner had antisocial personality disorder, which also undercut counsels' future dangerousness argument. *Id.* at *26-27, *29. Moreover, included within the prior records was Petitioner's indication to prison authorities that he may have committed a prior murder "for the joy of it," and he had no "feelings" or "sorrow" related to that murder. *Id.* at *25.

Assessing that these statements and diagnosis would be difficult to overcome, Petitioner's counsel submitted only limited proof about Petitioner's potential brain damage, which Dr. Angelillo discussed. *Id.* at *29. But counsel focused this proof on their larger theory that the system had failed Petitioner by providing him inadequate treatment, and he now was thriving in prison. *Id.* In pursuing this strategy, the defense team was able to present proof to the jury that Petitioner had limitations without also sacrificing their future dangerousness argument. *See id.* at *31.

The Court of Criminal Appeals also properly concluded that Petitioner had not established any prejudice. The court noted that, while Petitioner offered more detailed evidence of his brain damage than had already been presented to the sentencing jury, his experts could not connect the brain damage to his actions at the time of the murder. *Id.* at *31. Despite this gulf, each of his post-conviction experts discussed Petitioner's potential difficulty controlling his impulses, which was proof trial counsel were "keen on keeping from the jury." *Id.* On the other hand, trial counsel had been able to reference this brain damage without establishing that Petitioner presented a risk of future dangerousness. *Id.* The court, after discussing the proffered mitigation proof, also noted that the two aggravating circumstances were "firmly established by the evidence" and concluded that "the additional post-conviction evidence would not have affected the jury's verdict."[8] *Id.*

[8] Petitioner is wrong that the Court of Criminal Appeals did not discuss the nexus issue in the context of the weight of the evidence. (Pet., at 19.) At the outset of its analysis, the court recognized that the inquiry in this context is whether "the sentencer would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death." *Odom IV*, 2017 WL 4764908, at *17 (internal quotation marks and alteration omitted). Nor did the court

Because Petitioner has identified no issue justifying review, nor any error by the Court of Criminal Appeals, the petition should be denied.

disregard the evidence. *Id.* at *30 ("[A] defendant's background, character, and mental condition are unquestionably significant."). The court then considered the value of the new mitigation evidence in the context of the evidence presented at the sentencing hearing and the strength of the aggravating factors. *Id.* at *31.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been sent by first class mail, postage prepaid, to: Deborah Yvonne Drew, Tennessee Office of the Post-Conviction Defender, P.O. Box 198068, Nashville, TN 37219, on this the 16th day of August, 2018. I further certify that all parties required to be served have been served.

s/ Zachary T. Hinkle
ZACHARY T. HINKLE
Assistant Attorney General

APPENDIX

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Appendix A

Odom v. State, No. W2015-01742-CCA-R3-PD
(Tenn. Crim. App. Oct. 20, 2017)

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
December 6, 2016 Session

RICHARD LLOYD ODOM v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 91-07049 Don R. Ash, Senior Judge

No. W2015-01742-CCA-R3-PD

The Petitioner, Richard Lloyd Odom, appeals the Shelby County Criminal Court's denial of his petition for post-conviction relief from his conviction of first degree felony murder and resulting sentence of death. On appeal, the Petitioner contends that he received the ineffective assistance of counsel, raises various issues related to his post-conviction evidentiary hearing, and challenges the imposition of the death penalty. Having discerned no error, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which ALAN E. GLENN and ROBERT L. HOLLOWAY, JR., JJ., joined.

Jonathan King and Kertyssa Smalls, Assistant Post-Conviction Defenders, for the appellant, Richard Lloyd Odom.

Herbert H. Slatery III, Attorney General and Reporter; Zachary T. Hinkle, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Stephen Jones, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

In 1991, the Petitioner raped and stabbed to death the elderly victim in a Memphis parking garage. A Shelby County Criminal Court Jury convicted him of first degree felony murder committed during the perpetration of rape and sentenced him to death based upon the finding of three aggravating circumstances: (1) the Petitioner had been convicted of one or more prior violent felonies; (2) the murder was especially heinous, atrocious, or cruel; and (3) the murder was committed during the Petitioner's escape from

lawful custody. Tenn. Code Ann. § 39-13-204(i)(2), (5), (8).

Our supreme court affirmed the Petitioner's conviction on direct appeal but reversed his death sentence. *State v. Odom*, 928 S.W.2d 18 (Tenn. 1996). The court concluded that the trial court erred by excluding mitigating evidence and in instructing the jury during sentencing. *Id.* at 21. The court also concluded that the evidence did not support the heinous, atrocious, or cruel and the escape aggravating circumstances. *Id.* The case was remanded for a new sentencing hearing. *Id.*

After the second sentencing hearing, a jury again sentenced the Petitioner to death. The jury found the existence of one aggravating circumstance: the Petitioner had been convicted of one or more prior violent felonies. Tenn. Code Ann. § 39-13-204(i)(2). On appeal of the death sentence, our supreme court again ordered a new sentencing hearing. *See State v. Odom*, 137 S.W.3d 572 (Tenn. 2004). The court concluded that the trial court erroneously admitted detailed and graphic evidence of the Petitioner's prior violent felonies. *Id.* at 575.

At the conclusion of the third sentencing hearing, a jury again sentenced the Petitioner to death. The jury found the existence of two aggravating circumstances: (1) the Petitioner had been convicted of one or more prior violent felonies, and (2) the murder was committed during the commission of a robbery. Tenn. Code Ann. § 39-13-204(i)(2), (7). Our supreme court affirmed the death sentence on appeal. *See State v. Odom*, 336 S.W.3d 541 (Tenn. 2011).

Thereafter, the Petitioner timely filed a petition seeking post-conviction relief. The Office of the Post-Conviction Defender was appointed to represent the Petitioner and amended the petition. Following an evidentiary hearing, the post-conviction court issued a lengthy written order denying relief. This appeal ensued.

A. Trial Evidence

The following is a summary of the evidence of the crime from the 1992 guilt phase of the trial:

> 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 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.

Odom, 928 S.W.2d at 21-22.

The following is a summary of the evidence from the 2007 resentencing hearing:

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.

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."

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.

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 "untreatable, 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 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 release 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.

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.

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 remembered." 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 described 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 recalled 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 classroom. Janaway stated that the other inmates "really respected 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.

Odom, 336 S.W.3d at 549-54 (footnotes omitted).

B. Post-Conviction Evidence

Lead sentencing counsel testified that he was appointed on July 14, 2004, to represent the Petitioner for the 2007 resentencing hearing. Sentencing co-counsel also was appointed, and Glori Shettles with Inquisitor, Inc., was hired as the primary mitigation investigator. Counsel had the benefit of reviewing all of the files and records from the previous hearings in this case, including the mitigation investigation previously performed by Ms. Shettles during the first resentencing hearing. Counsel also had the benefit of talking with the previous attorneys. The defense team held numerous meetings to discuss the course of mitigation. Ms. Shettles regularly kept counsel updated on her investigation, and the defense team discussed the types of experts that might be used. According to lead sentencing counsel, Ms. Shettles recommended securing a forensic psychiatrist to evaluate the Petitioner.

Counsel ultimately filed a motion on October 11, 2007, to secure the services of Dr. Joseph Angelillo, a forensic psychologist. The motion was granted that same day. Lead sentencing counsel said that, although the resentencing hearing was scheduled to commence approximately two months later, he usually requested funding for experts further in advance if they were a "key part" of the case. He said Dr. Angelillo was not a key part of their strategy. According to lead sentencing counsel, the defense relied on Dr. Angelillo merely to determine if anything was missing from the information they already possessed about the Petitioner's mental health. Counsel also filed a motion for additional funding the day the resentencing hearing commenced. The motion was granted the same day.

Lead sentencing counsel acknowledged reviewing a letter from Ms. Shettles to previous counsel advising that it would be beneficial to explore whether the Petitioner suffered from organic or neurological brain damage. He also reviewed a document from prior counsel referencing two episodes where the Petitioner lost consciousness from closed head trauma and another requesting that the Petitioner undergo a PET (Positron Emission Tomography) scan. Lead sentencing counsel also knew about a 1974 psychological evaluation report by Dr. Daniel Cox indicating the Appellant had a verbal IQ of 67, a performance IQ of 100, and a full-scale IQ of 81. That report concluded that the discrepancy between the verbal and performance scores reflected moderate to severe emotional personality disturbance and that there was evidence of mild organic neurological deficiency. Dr. Cox also considered the Petitioner to be "brain damaged, incorrigible, antisocial, unable to respond to usual social contingency programming and a loser with respect to probable adult adjustments." Dr. Cox recommended in 1974 that the Petitioner undergo extensive medical, psychiatric, and psychological evaluations. Lead sentencing counsel said he was not certain he wanted Dr. Angelillo to see Dr. Cox's reports. He admitted that there was concern the Petitioner had organic or neurological

brain damage, and he stated that they discussed retaining a neurologist and neuropsychologist. Lead sentencing counsel said, though, that he would not always present evidence of a defendant's brain damage during a capital sentencing trial. He said it depended on the case.

Counsel knew life without the possibility of parole was not a sentencing option for the Petitioner. However, as part of their defense, they tried to explain to the jury that it was extremely unlikely the Petitioner would ever be considered eligible for parole if given a life sentence. Lead sentencing counsel identified a motion the defense drafted to strike the Petitioner's prior murder conviction from consideration as an aggravating circumstance because the crime was committed while the Petitioner was a juvenile. They decided not to file it, though, because they "felt that it was clear that was coming in, and that we were going to keep some of the details of that out that were going to drift in if we opened the door on it."

On cross-examination, lead sentencing counsel testified that, although their investigation team pursued aspects of the guilt phase of the trial, the presentation of a residual doubt defense during mitigation was not part of their strategy. Lead sentencing counsel acknowledged that the Petitioner was willing to submit to DNA testing and that the investigators identified a handwriting expert willing to examine the Petitioner's statement to the police. Lead sentencing counsel said he reviewed all of the information obtained by their investigators and ultimately concluded there was no evidence to reasonably support a residual doubt defense during the resentencing hearing.

Lead sentencing counsel praised the investigative work performed by Ms. Shettles. He respected her opinion and listened to her suggestions. Lead sentencing counsel thought defense counsel and the investigative team maintained open communication and had a good working relationship. Lead sentencing counsel said it was "the best mitigation [he] ever had" in a capital case. The entire defense team met numerous times and discussed and considered the different mitigation strategies available in this case. According to lead sentencing counsel, possibly the most difficult obstacle they faced was the fact that the jury would be informed the Petitioner would be eligible for parole after serving twenty-five years if given a life sentence, which in the Petitioner's case would have been eight years from the second resentencing hearing. Counsel unsuccessfully objected to that jury instruction. Counsel's strategy then was to convince the jury that the Petitioner would almost certainly never be paroled, especially given his prior murder conviction in Mississippi. To that end, the defense incorporated into their mitigation strategy the fact that the Petitioner stood convicted of another first degree murder. Lead sentencing counsel said they used the prior murder conviction to bolster their case to the jury that even if the Petitioner were paroled in Tennessee, he would be sent directly to Mississippi to serve his other life sentence. Lead sentencing counsel did not think his motion to strike that conviction as an aggravator would be successful, so they decided to "embrace it."

Defense counsel's strategy included generating empathy with the jury based upon evidence of the Petitioner's disadvantaged past and demonstrating the Petitioner would never be released from prison. The Petitioner initially did not want counsel to show the jury evidence of his troubled past. According to lead sentencing counsel, the Petitioner's family members also initially did not fully cooperate with defense counsel. Lead sentencing counsel said, however, that they eventually agreed to assist counsel and testify on the Petitioner's behalf. Lead sentencing counsel said the testimony by the Petitioner's family members was "incredible" and "very compelling." Lead sentencing counsel did not think the mental health aspect of mitigation in this case would have presented the same emotional impact as the testimony by the family members. He said having the family members tell stories about the Petitioner's history was much more compelling than an expert reciting results from an evaluation. Lead sentencing counsel stated, "I really think we put on what we thought was our spear point, and it wasn't enough." According to lead sentencing counsel, Dr. Angelillo's report supported their theory of pursuing empathy through the testimony of the Petitioner's family members. Lead sentencing counsel stated, "I don't think we would have put him on at all if we hadn't thought that, if it didn't move with our theme." The defense attempted to highlight the differences between the prison system in Mississippi, where the Petitioner was housed as a teenager, and the more structured environment in Tennessee, where the Petitioner was housed at Riverbend. According to lead sentencing counsel, the Petitioner had adapted well in his current prison environment, and showing the jury that fact was a main point of the defense.

Again, counsel had the benefit of reviewing all of the evaluations from the previous hearings. Lead sentencing counsel acknowledged that the State would have been allowed to cross-examine their expert witness if the defense questioned a witness about the previous evaluations. Lead sentencing counsel highlighted the statements made by Dr. Cox that counsel believed were "so atrocious." Although counsel did not want the State to exploit that information during cross-examination of their mental health expert, the defense was able to introduce Dr. Cox's opinion into evidence through the testimony of their investigator. That information supported the mitigation theory that the system in Mississippi failed the Petitioner. Lead sentencing counsel said, however, that if the State was allowed to question Dr. Angelillo about previous reports of antisocial personality disorder, their mitigation theory of a lack of future dangerousness in the prison setting would have been compromised.

Lead sentencing counsel was further questioned about a 1978 report from Mississippi State Hospital, where the Petitioner was evaluated after committing the previous murder. The report stated that the Petitioner "had no feelings, no sorrow about it." It also said the Petitioner "showed no signs or symptoms of a psychosis," his "psychological and neurological examination were within normal limits," "there is evidence of mild organic (neurological) deficiencies although I don't believe it is

interfering with him in a major way at this time," and the Petitioner possessed "a moderately disturbed personality with a marginal adjustment." The report diagnosed the Petitioner "as a schizoid personality with possible organic pathology [sic] present." Psychological testing at that time "did not reveal any signs of organisity [sic] or a neurological deficit nor did the neurological examination." The report found that the Petitioner had a full scale IQ of 93, and "he was found to be without psychosis and the clinical impression was a personality disorder with antisocial features [and] he was competent and responsible." Lead sentencing counsel said he reviewed that report prior to the resentencing hearing and thought its findings would have contradicted any allegation the defense asserted concerning the Petitioner's neurological deficits. He reiterated that an evaluation of antisocial personality would not have benefitted their theory of mitigation.

Lead sentencing counsel talked to defense counsel from the first resentencing hearing about their theory of mitigation before deciding on the approach to take during the second resentencing hearing. Prior to that hearing, counsel filed a notice of potential expert witnesses they considered calling to testify about how serotonin levels related to human behavior. Lead sentencing counsel said that although they had already ruled out that mitigation approach, they wanted the option to change their minds. Lead sentencing counsel also stated that Dr. Angelillo was provided a summary of the defense theory prior to the hearing.

Sentencing co-counsel testified that he reviewed all of the files and records from the previous hearings in this case. He also spoke with counsel from the first resentencing hearing. Sentencing co-counsel said they had the benefit of Ms. Shettles, who also worked on the first resentencing hearing. Sentencing co-counsel considered the defense a team effort wherein everyone involved in the case shared thoughts and ideas about how to proceed with the presentation of mitigating evidence. Sentencing co-counsel confirmed that the defense team discussed using mental health experts but ultimately decided against that particular approach. Sentencing co-counsel summarized their theory of defense as follows:

> [The Petitioner] never had a chance to begin with, from his early childhood, from the horrible family situation, to the torture, to the institution he was sent to in Mississippi that was shut down by the Federal Government for essentially torturing children, to incarceration at Parchman, how he was removed from Parchman and why. How he, once he was re-institutionalized, thrived, and he wasn't a danger to anybody where he was.
>
> And part of the defense, and I think we put on proof that, realistically, [the Petitioner] was never going to get out of prison with the Tennessee conviction and the Mississippi conviction, and that that was sufficient punishment.

Regarding the Petitioner's mental health, sentencing co-counsel testified:

> [The Petitioner] had a long history of – of evaluations and being looked at, and there was a lot of information in there. The danger in my opinion with these older cases is, if I come in with an expert that is new to the case and he comes up with something that is much more magnificent than anybody else has ever seen, I think it's disingenuous to the jury sometimes, and I think it appears to be bought and paid for.
>
> It – from what we had seen earlier in the information we had, could I have found a doctor to – to get up here to the jury and say that that all greatly affected him? Probably.
>
> But I think in the long run, when the State prosecutors were done with that doctor, it would have harmed [the Petitioner's] case more than it would have helped it because I don't think the earlier information would have really corroborated what the new doctor would have said and I only would have put him on if it had been really good, if that makes sense.

When asked how he could know "whether the information is really good without doing the examination," sentencing co-counsel replied,

> It didn't matter if it was good. If I knew if it was really, really good, if I had a doctor who was going to get up here and say that he did all this because he was brain damaged and all of this and all of that, that would have directly gone against what every other doctor had said in the past, and I think that testimony would have looked like it was bought and paid for.

Sentencing co-counsel also thought any residual doubt defense during resentencing had the potential of backfiring. Sentencing co-counsel admitted that the instruction informing the jury that the Petitioner would be eligible for parole after serving twenty-five years of a life sentence was "the single hardest thing some juror's going to be able to get past." He also confirmed that they decided not to move to strike the Petitioner's prior murder conviction for consideration as an aggravating circumstance, in part, because it was part of their strategy to convince the jury the Petitioner would never be released from prison. Sentencing co-counsel, though, did not otherwise believe there was a legal basis for their position. According to sentencing co-counsel, Ms. Shettles testified as an expert about her experience working for the Board of Probation and Parole for twenty years, and it was her opinion that the Petitioner would never be paroled.

During cross-examination, sentencing co-counsel opined, "[W]e had very powerful in my opinion mitigation on his life. Very strong witnesses testifying to the

things that had happened to him as a child, the trouble he got into, how he thrived in prison when he was there, and basically, there was no reason to execute him." He agreed with lead sentencing counsel that no "mental health expert ever could have gotten the emotion that we were able to get out of" the lay witnesses. According to sentencing co-counsel's impression, the jury was able to understand the Petitioner as "a very damaged human being." Sentencing co-counsel said the defense tried to show the jury how the system in Mississippi failed the Petitioner because he never received the help recommended by the mental health experts who evaluated him. In contrast, they were able to show the jury how he had adjusted well to the prison environment in Tennessee. Sentencing co-counsel did not believe presenting evidence both that the Petitioner acted violently in the past because of low serotonin levels or brain damage and that he adjusted well in a controlled prison setting would have been an effective or complementary defense. Sentencing co-counsel did not want to provide "ammunition for the State" by relying upon a diagnosis of

> borderline personality, antisocial behavior. Things like that are never helpful to a defendant and our other stuff showed that that wasn't the way he behaved, and you know, it was a good theory. The system had failed him, but once the system essentially fixed him when he was incarcerated and when he was structured and when he was provided what he needed, he thrived. I mean, he – he – he was a model inmate.

Trial co-counsel testified that she and lead trial counsel were both employed by the Office of the Public Defender at the time of trial and that lead trial counsel previously served as the District Public Defender. Lead trial counsel was deceased at the time of the evidentiary hearing. In addition to the two attorneys, the Petitioner had the benefit of a factual investigator and a mitigation specialist. Trial co-counsel said the Petitioner was examined by Dr. John Hutson, a clinical psychologist, prior to trial. Trial co-counsel recalled reviewing the Mississippi records related to the Petitioner's prior mental health evaluations. She also remembered requesting discovery from the prosecution, but she did not think they received the entire police investigation file. Trial co-counsel said, though, that if the police file identified other people who were in the parking garage at the time, but they were not detained as suspects by the police, then counsel probably would not have pursued them. Defense counsel did not seek to have the Petitioner's signed statement analyzed by a forensic document examiner.

Trial co-counsel testified on cross-examination that she did not think counsel was unprofessional for failing to move for a continuance due to lead trial counsel's health. She did not notice anything concerning about his health, and she stated that if lead trial counsel did not believe he could continue, he would have said so. According to trial co-counsel, the prosecutor on the case at the time would have allowed defense counsel to review the State's entire case file. She also confirmed that the record of the original trial reflected that defense counsel was given the opportunity to review everything the State

possessed in its file.

According to trial co-counsel, the defense team did not notice anything peculiar after interacting with the Petitioner that gave them concern about his mental health. The defense attempted to get any relevant records from the Petitioner's past, including prison and mental health records. One of the first records trial co-counsel reviewed from 1978 opined that the petitioner "was without psychosis, responsible and competent to stand trial" and that "psychological and neurological examinations were within normal limits." Trial co-counsel also learned that the Petitioner earned his G.E.D. in prison in Mississippi and completed some junior college courses. Trial co-counsel said Dr. Hutson's finding of a personality disorder was not helpful. According to trial co-counsel, the Petitioner's family members did not want to testify on his behalf.

Trial co-counsel testified that the decision making process of the defense team was influenced by the information about the case known to them at the time, including the details contained in the Petitioner's confession. As such, trial co-counsel did not see any benefit to testing the clothing the Petitioner wore during the murder. Similarly, she saw no reason to test the hair samples found in the victim's hand or the blood samples from the parking garage. Despite being unsuccessful in moving to suppress the Petitioner's statement, the defense theory during the guilt phase of the trial was that the Petitioner was coerced into confessing.

Betsy Chandler worked at Parchman Prison in Mississippi from 1985 until 2005. She worked in the law library and as a case manager. Ms. Chandler remembered the Petitioner when he was housed at the prison, and she remembered he was victimized by other inmates because he was younger and smaller. She did not remember him receiving many visitors or receiving items from people outside the prison. According to Ms. Chandler, the Petitioner was "emotionally needy" and "worrisome." She also identified a report detailing the Petitioner's placement into protective custody because he was accused of rape and being a problem inmate. Frank Nobles was housed at Parchman Prison with the Petitioner. He testified about the violent nature of the prison environment and how the weaker inmates were victimized by the stronger ones. Mr. Nobles described the Petitioner as a weaker inmate. Robert Tubwell was also housed with the Petitioner at Parchman Prison. Mr. Tubwell remembered the Petitioner seeking the protection of two stronger inmates at different times. The stronger inmates in the prison would typically require things in return for offering protection such as sexual favors, washing clothes, and running errands. The weaker inmates would be referred to as "sons" by their protectors. Mr. Tubwell saw the Petitioner wear makeup and dress in women's clothing one or two times. Mr. Tubwell also remembered the Petitioner filing grievances with guards. According to Mr. Tubwell, inmates often retaliated against inmates who filed grievances against them.

Dr. Tora Brawley, a clinical neuropsychologist, testified on behalf of the

Petitioner. She examined the Petitioner prior to the evidentiary hearing and had the benefit of reviewing records from the Petitioner's past. Dr. Brawley administered the Wechsler Adult Intelligence Scale IV test, which measured IQ as well as different areas of brain function. The Petitioner measured a full-scale IQ of 94, which was average according to Dr. Brawley. His verbal comprehension score was 89, which was low average, and his perceptual reasoning score was 104, which was average. However, Dr. Brawley said the discrepancy between the verbal and performance skills was statistically and clinically significant. She also administered the Wechsler Memory Scale IV test, which examined memory function. The Petitioner performed in the ninth and sixteenth percentiles on verbal memory tests, but he performed in the fiftieth and seventy-fifth percentiles on visual memory tests. The Petitioner performed poorly on non-verbal abstract reasoning and verbal learning tests. He scored in the fourth percentile on a verbal fluency test. Dr. Brawley also observed some asymmetry between the Petitioner's left and right hands after administering a simple test that measured the Petitioner's manual motor speed.

Based upon her examination of the Petitioner, Dr. Brawley concluded that he had significant asymmetries in several areas of cognition to include memory, intellectual, and motor functioning. She also observed deficits in his frontal lobe functioning and mental flexibility. Those deficits most probably affected the Petitioner's behavior and personality over his life span and could have significantly impacted his judgment, impulsivity, and decision making. Dr. Brawley said the results from some of the Petitioner's past records corresponded with her findings. She also said the fact that the Petitioner previously escaped from prison would be consistent with his inability to make good choices. She stated, however, that the Petitioner's issues and deficits had likely improved over time because he had been confined for many years in a very structured prison environment in Tennessee. According to Dr. Brawley, neuropsychological impairment was not synonymous with mental retardation.

On cross-examination, Dr. Brawley testified that drug use could contribute to neurological damage. She said the Petitioner suffered head trauma, which resulted in loss of consciousness, on three occasions when he was between seventeen and twenty-one years old. Dr. Brawley said the Petitioner's neurological damage may or may not have contributed to his actions at the time of the murder. During the examination, the Petitioner informed Dr. Brawley that two of the top three stressors he faced at that time were being "locked up for something [he] didn't do" and "trying to get the work records of Tanya D. Tiller," both of which related to his guilt.

Alysandra Finn, an investigator with the Office of the Post-Conviction Defender, was assigned to investigate the mitigating evidence on behalf of the Petitioner. She testified that she uncovered information not reported by Glori Shettles during the second resentencing hearing. The Petitioner's biological father, Richard Norman Smith, was born out of wedlock. Mr. Smith did not have a good relationship with his mother, who

committed suicide when Mr. Smith was sixteen years old. Mr. Smith's stepfather started binge drinking soon thereafter. Mr. Smith's brother and nephew also committed suicide. Mr. Smith wreaked havoc in the community as a teenager and was eventually placed in a juvenile facility.

Ms. Finn also interviewed the Petitioner's biological mother, Holly Taylor (Nellie Ruth Holly). Ms. Taylor's father was extremely abusive to her and her sister and acted violently towards others in the community. Ms. Taylor's father raped his daughter from another marriage and was eventually murdered in prison. Ms. Taylor's mother was described as mean and uncaring. Ms. Taylor's mother remarried, and her new husband sexually abused Ms. Taylor and her sister. According to Ms. Finn, Ms. Taylor was described as a mean child. When Ms. Finn interviewed Ms. Taylor, she was living in filth in a tiny trailer.

The Petitioner's parents were teenagers when they met. By the time they married, they were both drinking and partying regularly. Ms. Taylor continued to drink during her pregnancies. The Petitioner had an older sister and a younger sister. Neither parent was described as caring or loving. The Petitioner's mother informed Ms. Finn that she was a lot meaner to the children than their father was. The Petitioner's father physically abused the Petitioner's mother. The family eventually settled in Mississippi. Ms. Taylor abandoned the family when the Petitioner was one and one-half years old. The Petitioner's father then had to take on additional employment, so he would leave the children with a neighbor, Gladys McClendon. The Petitioner and his sisters were not well-cared for by their father; the Petitioner was seen with cigarette burn marks on his arms and feet at the time. Ms. McClendon's home was the de facto day care for the neighborhood. The Petitioner and his sisters eventually spent more time living with Ms. McClendon. The Petitioner was finally adopted when he was about two years old by Ms. McClendon's daughter, Shirley[1], and Shirley's husband, Jimmy Odom. The Petitioner's two sisters were adopted by other member of the community. According to Ms. Finn, neither fared much better in their adoptive households than the Petitioner. At the time of her investigation, Ms. Finn said both sisters suffered from depression. Mr. Smith resisted the adoptions at first but ultimately agreed when he was threatened with being reported for sexually abusing his daughters. The Petitioner's biological parents attempted to reconcile at some point but to no avail.

Shirley was fifteen when she married Jimmy Odom, who was sixteen. They had three biological children together. Jimmy Odom had just been released from prison when the Petitioner arrived in the family. The Odoms were described as incompetent parents. Jimmy Odom was always partying, and Shirley Odom "had no control over the house. It was filthy." Jimmy Odom was known to be a womanizer, and the Odoms had an abusive

[1] Because some of the Petitioner's family members share a surname, we will refer to them by their first names for clarity. We mean no disrespect to these individuals.

and volatile relationship. They eventually divorced when the Petitioner was four years old, and Gladys McClendon resumed primary responsibility for the Petitioner. She also cared for many other children at the same time. Ms. Finn described the scene at the McClendon house as "constant chaos." Ms. McClendon was extremely cruel to the Petitioner. She did not want him around and would beat him.

Shirley Odom married a man named Marvin Bruce when the Petitioner was about five years old. Mr. Bruce was an alcoholic, and he and Shirley had three biological children together. According to Ms. Finn, the Petitioner was treated as the outcast and severely abused by Mr. Bruce and Shirley. The Petitioner wet the bed until he was about nine years old, and Mr. Bruce would hang the sheets outside of the house to embarrass the Petitioner. Shirley also would humiliate the Petitioner when he wet the bed by pulling down his pants and smacking his "privates" in front of the other children. Shirley drank during the day. The house was a mess, and there were times when there was no food in the house. The children were filthy and were not taught how to maintain any personal hygiene. The police were frequently called to the home.

When the Petitioner was twelve years old, he and his brother Larry would solicit oral sex for money. According to Ms. Finn, the Petitioner also started living on the streets at that age. At a young age, the Petitioner was reported to have started having "spells" during which he would "check out" and would not respond when called. The Petitioner was placed in special education in school. The Petitioner stayed in trouble with the police and eventually was placed in Columbia Training School, a juvenile facility. The Petitioner was described as malnourished at the time. The juveniles were punished if they attempted to escape, and the Petitioner spent one hundred and twenty days in the "hole" in isolation for running away. The Petitioner received no mail or visitors when he was at Columbia. The Petitioner was evaluated by Dr. Cox once before he entered the training school and once while in attendance. Dr. Cox requested that the Petitioner undergo an EEG, which Ms. Finn said was unusual.

After the Petitioner left the juvenile training school, he was arrested and convicted of homicide in 1978 and incarcerated at Parchman Prison to serve a life sentence. Ms. Finn described the conditions at the prison at that time. Hundreds of inmates were housed in individual units consisting of open bunk bedding. Violence among the inmates apparently was widespread, and the smaller white inmates were particular targets. Ms. Finn described the relationships between the "gal boys" or "sons," the weaker inmates, and their "protectors" or "daddies," the stronger inmates. The "sons" would exchange sexual favors for protection. "Punks," as they were called, were former "sons" who became "free game" to the rest of the inmates. According to Ms. Finn, the Petitioner was described as having been both a "son" and a "punk." As part of the role of "son," the Petitioner at times was forced to wear makeup and women's clothing. Ms. Finn also said the guards routinely beat the inmates.

The Petitioner's brother, Larry, was incarcerated at Parchman with the Petitioner, and he attempted suicide a couple of times. According to Ms. Finn, Larry had similar experiences as the Petitioner because of his size. The Petitioner's other brother, Jimmy, Jr., who also was housed at Parchman, associated himself with the Aryan Brotherhood, became an "enforcer," and was able to protect himself. Ms. Finn learned that Jimmy, Jr., did not associate with the Petitioner or Larry because of their status as "sons" and "punks" and, thus, did not protect them for fear of retaliation from his gang.

Ms. Finn referred to reports that the Petitioner had been assaulted in prison. According to Ms. Finn, however, the prisoners who reported assaults faced ridicule and retaliation from other inmates and the guards because the reports apparently were not kept confidential. Records reflected that the Petitioner contracted syphilis at Parchman. Ms. Finn said that although his two brothers received visitors in prison, the Petitioner did not. The Petitioner was eventually transferred from Parchman Prison to a county jail. According to Ms. Finn's findings, the Petitioner was transferred because he was assisting with an official investigation. The Petitioner escaped from that jail prior to committing the murder in this case.

Dr. James Merikangas testified for the Petitioner as an expert in neurology and psychiatry. Dr. Merikangas reviewed the Petitioner's numerous historical reports and conducted an interview with the Petitioner. He also conducted a neurological examination, including an MRI (Magnetic Resonance Imaging) and PET scan, as well as a physical examination of the Petitioner. Dr. Merikangas said executive functioning, which was the ability to plan and control behavior, was located in the frontal lobe of the brain. Based upon his review of the Petitioner's records, including reports of the Petitioner's mother drinking while pregnant, a high fever the Petitioner experienced as a child, and the various head injuries the Petitioner suffered, as well as his initial physical examination of the Petitioner, Dr. Merikangas concluded that the Petitioner had some sort of brain damage which needed to be explored further.

The MRI, which according to Dr. Merikangas examined the anatomy of the brain, revealed loss of brain tissue in the Petitioner's temporal lobe. In addition, the Petitioner had an enlarged third ventricle which reflected a loss of cognitive functioning. Dr. Merikangas also identified scarring of the brain tissue, which likely was caused by head injuries, as well as evidence of damage associated with fetal alcohol syndrome among other things. Dr. Merikangas testified that, based upon the discrepancy between the Petitioner's verbal and performance IQ scores, there was a disconnect between the functionality of the Petitioner's left and right brain hemispheres. The PET scan, which measured brain function, revealed that the Petitioner's temporal lobes were not functioning as well as the rest of his brain. Dr. Merikangas said the temporal lobes, which controlled behavior, were likely to be damaged during head trauma. The PET scan also revealed asymmetry between the functionality of the left and right hemispheres of the Petitioner's brain. Dr. Merikangas also administered a Diffusion Tensor Imaging

(DTI) test, which was a type of MRI that examined the flow of fluid in the axons, or nerve connections in the brain. The DTI revealed some problem with the connections between the two sides of the Petitioner's brain.

Reviewing a previous IQ score the Petitioner received in 1974, Dr. Merikangas testified that the full-scale score of 81 was just above borderline mental retardation and that the thirty-three-point difference between the verbal and performance scores was highly significant and suggestive of brain damage. Dr. Merikangas also reviewed a report from a 1976 EEG, which revealed evidence of brain damage. According to Dr. Merikangas, the fact that the Petitioner had an EEG a couple of years later, which was normal, did not necessarily discount the earlier abnormal results. Although the Petitioner was treated for syphilis at a young age, Dr. Merikangas could not comment on whether the disease affected his brain.

Dr. Merikangas testified that the test results revealed brain damage, which the Petitioner probably had his entire life. When asked by the court what it meant to have brain damage, Dr. Merikangas answered, "It generally means that your intelligence is not as good as it should be, and your ability to plan and carry out actions or to control your impulses is not as good as it should be." According to Dr. Merikangas, studies showed that emotional and psychological abuse of children could inhibit the development of their brains. In the Petitioner's case, Dr. Merikangas attributed his brain damage to a combination of his long-term history of physical, sexual, and psychological abuse and physical head trauma, i.e., both congenital and acquired brain damage. Dr. Merikangas testified that "many parts" of the Petitioner's brain were damaged. He ruled out a diagnosis of personality disorder.

During cross-examination, Dr. Merikangas testified that he was not aware the Petitioner escaped from Parchman Prison in 1981. He further testified that knowledge of that information would not change his opinion. He said, though, that the Petitioner's brain damage would not prevent him from attempting to escape in the future. Dr. Merikangas did not opine whether 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 him to commit the two murders. Dr. Merikangas opined that drug use did not cause the Petitioner's brain damage. Although Dr. Merikangas did not think the Petitioner's brain damage had improved any, he said the Petitioner's behavior had improved while on death row. Dr. Merikangas acknowledged that the Petitioner had a subsequent full-scale IQ score in the 90s, but he also opined that a similar discrepancy between the verbal and performance scores indicated brain damage. Dr. Merikangas could not explain why the Petitioner had two different readings from EEGs conducted in 1976 and 1978, but he said they were not relevant to his diagnosis.

Sean Lester, the Custodian of Records for the Shelby County Medical Examiner's Office, testified for the State. Mr. Lester was asked to identify any evidence remaining

from the autopsy of the victim in this case. He located three items: two glass vacuum containers, one labeled "rectal swabs" and one labeled "vaginal swabs," and a sealed envelope labeled "hair and fiber from right hand." To Mr. Lester's knowledge, there had never been a request to test those samples for DNA. James Hill, an officer with the Memphis Police Department's Latent Fingerprint Section, provided for the record in this case all of the fingerprint-related evidence retained by the department. William D. Merritt, an investigator with the Shelby County District Attorney General's Office, provided for the record in this case all of the residual evidence remaining in the custody of the trial court clerk that was not introduced during any of the earlier trials.

Glori Shettles testified on behalf of the State. She worked for Inquisitor, Inc., for twenty-one and one-half years as a mitigation investigator prior to working for the Shelby County Public Defender's Office. She said that she worked on approximately ninety capital cases during her career and that she worked with defense counsel during the Petitioner's first and second resentencing hearings. According to Ms. Shettles, the attorneys made their own arrangements for expert witnesses during the first resentencing hearing. She said, though, that she obtained some of the Petitioner's records related to his mental health. Ms. Shettles said that, having worked on both hearings, she had an advantage in preparing mitigating evidence during the second resentencing hearing because she did not have to duplicate some of the investigation. She prepared a comprehensive mitigation timeline of the Petitioner's history to give counsel in preparation of the hearing. Ms. Shettles further said she had difficulty prior to the first resentencing hearing soliciting information and assistance from the Petitioner's family, but she said she experienced better cooperation from the family members during her work on the second resentencing hearing.

Ms. Shettles thought she developed a good working relationship with lead sentencing counsel and sentencing co-counsel. Ms. Shettles said both attorneys were very responsive and maintained open lines of communication. She said she was much more involved in the mental health aspect of mitigation during the second resentencing hearing than the first, and she identified the several experts she contacted during her investigation. Ms. Shettles also attested to the amount of time she spent on her investigation into potential mental health evidence. She recommended experts who counsel ultimately decided not to rely upon at the hearing. Nevertheless, Ms. Shettles testified that her investigation into the Petitioner's background was as thorough as any other case in which she had participated.

II. Analysis

The Petitioner's post-conviction petition is governed by the Post-Conviction Procedure Act. *See* Tenn. Code Ann. §§ 40-30-101 to -122. To obtain post-conviction relief, a petitioner must show that his or her conviction or sentence is void or voidable because of the abridgment of a constitutional right. Tenn. Code Ann. § 40-30-103. The

petitioner must establish the factual allegations contained in the petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(2)(f). Evidence is clear and convincing when there is no serious or substantial doubt about the accuracy of the conclusions drawn from the evidence. *Hicks v. State*, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998).

Once the post-conviction court rules on the petition, its findings of fact are conclusive on appeal unless the evidence preponderates against them. *State v. Nichols*, 90 S.W.3d 576, 586 (Tenn. 2002) (citing *State v. Burns*, 6 S.W.3d 453, 461 (Tenn.1999)); *Cooper v. State*, 849 S.W.2d 744, 746 (Tenn. 1993). The Petitioner has the burden of establishing the evidence preponderates against the post-conviction court's findings. *Henley v. State*, 960 S.W.2d 572, 579 (Tenn. 1997). This court may not re-weigh or reevaluate the evidence or substitute its inferences for those drawn by the post-conviction court. *Nichols*, 90 S.W.3d at 586. Furthermore, the credibility of the witnesses and the weight and value to be afforded their testimony are questions to be resolved by the post-conviction court. *Bates v. State*, 973 S.W.2d 615, 631 (Tenn. Crim. App. 1997).

The Petitioner challenges aspects of his original trial attorneys' representation as well as the representation of his attorneys during the third sentencing hearing. He also presents issues related to the conduct of the 1992 trial, the 2007 resentencing hearing, and the post-conviction evidentiary hearing, as well as familiar issues against the imposition of the death penalty. For the sake of clarity in the opinion, we have reorganized the order of the issues the Petitioner presents in his appellate brief.

A. Ineffective Assistance of Counsel

Claims of ineffective assistance of counsel are regarded as mixed questions of law and fact. *State v. Honeycutt*, 54 S.W.3d 762, 766-67 (Tenn. 2001); *Burns*, 6 S.W.3d at 461. As such, the post-conviction court's findings of fact underlying a claim of ineffective assistance of counsel are reviewed under a de novo standard, accompanied by a presumption that the findings are correct unless the preponderance of the evidence is otherwise. *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001) (citing Tenn. R. App. P. 13(d)). However, a post-conviction court's conclusions of law are reviewed under a purely de novo standard, with no presumption of correctness. *Id*.

The Sixth Amendment provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. This right to counsel is "'so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment.'" *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963) (quoting *Betts v. Brady*, 316 U.S. 455, 465 (1942)). Inherent in the right to counsel is the right to the effective assistance of counsel. *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct

so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *see Combs v. Coyle*, 205 F.3d 269, 277 (6th Cir. 2000).

The United States Supreme Court has adopted a two-prong test to evaluate a claim of ineffectiveness:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687. The performance prong of the *Strickland* test requires a showing that counsel's representation fell below an objective standard of reasonableness, or "outside the wide range of professionally competent assistance." *Id.* at 690. "Judicial scrutiny of performance is highly deferential, and '[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'" *Combs*, 205 F.3d at 278 (quoting *Strickland*, 466 U.S. at 689).

Upon reviewing claims of ineffective assistance of counsel, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U .S. at 689. Additionally, the courts will defer to trial strategy or tactical choices if they are informed ones based upon adequate preparation. *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). Finally, we note that criminal defendants are 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 (1987) (quoting *United States v. Cronic*, 466 U.S. 648, 655 n.38 (1984)). Notwithstanding, we recognize that "[o]ur duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Id.* at 785.

If a petitioner shows that counsel's performance fell below a reasonable standard, then he or she must satisfy the prejudice prong of the *Strickland* test by demonstrating "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. "A reasonable

probability is a probability sufficient to undermine confidence in the outcome." *Id.* In evaluating whether a petitioner satisfies the prejudice prong, this court must determine "whether counsel's deficient performance render[ed] the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993) (citing *Strickland*, 466 U.S. at 687). In other words, a petitioner must establish the deficiency of counsel was of such a degree that it deprived the petitioner of a fair sentencing hearing and called into question the reliability of the outcome. *Nichols*, 90 S.W.3d at 587. That is, the evidence stemming from the failure to prepare a sound defense or to present witnesses must be significant, but it does not necessarily follow that the trial would have otherwise resulted in a lesser sentence. *State v. Zimmerman*, 823 S.W.2d 220, 225 (Tenn. Crim. App. 1991). "A reasonable probability of being found guilty of a lesser charge, or a shorter sentence, satisfies the second prong in *Strickland*." *Id.* Similarly, a petitioner must show "'there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death.'" *Henley*, 960 S.W.2d at 579-80 (quoting *Strickland*, 466 U.S. at 695).

Reviewing courts must indulge a strong presumption the conduct of trial counsel falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. Our supreme court has stated:

> "Hindsight can always be utilized by those not in the fray so as to cast doubt on trial tactics a lawyer has used. Trial counsel's strategy will vary even among the most skilled lawyers. When that judgment exercised turns out to be wrong or even poorly advised, this fact alone cannot support a belated claim of ineffective counsel."

Hellard, 629 S.W.2d at 9 (quoting *Robinson v. United States*, 448 F.2d 1255, 1256 (8th Cir. 1971)). "It cannot be said that incompetent representation has occurred merely because other lawyers, judging from hindsight, could have made a better choice of tactics." *Id.* This court must defer to counsel's trial strategy and tactical choices when they are informed ones based upon adequate preparation. *Id*.

As noted earlier, criminal defendants are not entitled to perfect representation, only constitutionally adequate representation. *Denton*, 945 S.W.2d at 796. "Thus, the fact that a particular strategy or tactic failed or even hurt the defense does not, alone, support a claim of ineffective assistance." *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992). Moreover, "an accused is not deprived of the effective assistance of counsel because a different procedure or strategy might have produced a different result." *Vermilye v. State*, 754 S.W.2d 82, 85 (Tenn. Crim. App. 1987).

1992 Counsel

1. Jury Selection

The Petitioner contends that his original trial counsel were ineffective for failing to utilize a jury questionnaire or retain an expert in jury selection, failing to ensure the jury could consider and give effect to mitigation evidence, failing to inquire about the prospective jurors' attitudes toward mental health defenses, and failing to question jurors about potential biases and other grounds for disqualification.

This court has addressed the role of defense counsel during jury selection in a capital case:

> Jury selection implicates an accused's state and federal constitutional rights to a competent, fair-minded, and unbiased jury. *See Smith v. State*, 357 S.W.3d 322, 347 (Tenn. 2011) (recognizing that "[b]oth the United States and the Tennessee Constitutions guarantee a criminal defendant the right to a trial by an impartial jury.") . . . The process of voir dire is aimed at enabling a defense lawyer (as well as a prosecutor) to purge the jury of members not meeting these criteria. *See United States v. Nell*, 526 F.2d 1223, 1229 (5th Cir. 1976) ("[T]he principal way this right [to an impartial jury] is implemented is through the system of challenges exercised during the voir dire of prospective jurors."); *Smith*, 357 S.W.3d at 347 (recognizing that "'[t]he ultimate goal of voir dire is to ensure that jurors are competent, unbiased and impartial.'") (quoting *State v. Hugueley*, 185 S.W.3d 356, 390 (appx) (Tenn. 2006) . . . . As emphasized by the United States Supreme Court,
>
> > The process of voir dire is designed to cull from the venire persons who demonstrate that they cannot be fair to *either* side of the case. Clearly, the extremes must be eliminated – i.e., those who, in spite of the evidence, would automatically vote to convict or impose the death penalty or automatically vote to acquit or impose a life sentence.
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> *Morgan v. Illinois*, 504 U.S. 719, 734 n.7, 112 S. Ct. 2222 (1992) (quoting *Smith v. Balkcom*, 660 F.2d 573, 578 (5th Cir. 1981)).
>
> As the United States Court of Appeals for the Sixth Circuit has asserted, "[a]mong the most essential responsibilities of defense counsel is to protect his client's constitutional right to a fair and impartial jury by using voir dire to identify and ferret out jurors who are biased against the defense." *Miller v. Francis*, 269 F.3d 609, 615 (6th Cir. 2001). By posing appropriate questions to prospective jurors, a defense lawyer is able to exercise challenges in a manner that ensures the jury passes constitutional

muster. *See United States v. Blount*, 479 F.2d 650, 651 (6th Cir. 1973).

> 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). Also, "[a] strategic decision cannot be the basis for a claim of ineffective assistance unless counsel's decision is shown to be so ill-chosen that 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 that the resulting jury was not impartial. *See Smith*, 357 S.W.3d at 348 (citing *James A. Dellinger v. State*, No. E2005-01485-CCA-R3-PD, 2007 WL 2428049, at *30 (Tenn. Crim. App., Aug. 28, 2007)).

William Glenn Rogers v. State, No. M2010-01987-CCA-R3-PD, 2012 WL 3776675, at *35-36 (Tenn. Crim. App. at Nashville, Aug. 30, 2012).

The post-conviction court ruled as follows on this particular claim of ineffective assistance of counsel:

> Initially, this court notes [post-conviction] counsel asked attorney [trial co-counsel] 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.

We agree with the post-conviction court. The argument presented by the Petitioner in his brief on appeal on the issue of jury questionnaires and a selection expert consists solely of the following statement: "Mr. Odom's 1992 trial counsel failed to move for and/or utilize a jury questionnaire or retain expert assistance in jury selection." The Petitioner offers no other argument, citation to authorities, or appropriate references to the record in support thereof. This ground for relief must, therefore, be considered waived. *See* Tenn. Ct. Crim. App. R. 10(b) ("Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court."). In any event, the Petitioner has failed to demonstrate any actual prejudice resulting from counsels' failure to utilize questionnaires or an expert during jury selection. Nothing in the record suggests the jury impaneled was impartial. "It is incumbent upon the petitioner and his post-conviction counsel to demonstrate how a jury questionnaire or an expert in the field of jury selection might have made a difference." *Prentiss Phillips v. State*, No. W2004-01626-CCA-R3-PC, 2005 WL 1123612, at *6 (Tenn. Crim. App. at Jackson, May 12, 2005). This court held in *Prentiss Phillips* that, because the petitioner did not call a jury expert during the evidentiary hearing, it was unable to find prejudice. The same holds true here.

The Petitioner presents similarly meager arguments regarding counsel's questioning about jurors' attitudes toward mitigation and mental health defenses: "They also failed to ensure the jurors could consider and give effect to mitigation evidence, as required by *Morgan v. Illinois*, 504 U.S. 719 (1992). Further, they failed to inquire about the potential jurors' attitudes toward mental disorders and mental state defenses." These unsubstantiated assertions must also be considered waived. *See* Tenn. Ct. Crim. App. R. 10(b). Regardless, because the Petitioner was granted a new sentencing hearing following his initial direct appeal, no prejudice can be shown in this instance.

As to the questioning of specific jurors, the post-conviction court stated:

> 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 [trial co-counsel] 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.

Citing *Smith v. State*, the post-conviction court held that bias cannot be presumed "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." 357 S.W.3d at 348.

The Petitioner did not present any proof during the evidentiary hearing that would call into question trial counsel's performance with regard to the questioning of these jurors. Regardless, the trial transcript reveals that counsel did question each juror about whether their past experiences would affect their ability to remain impartial and neutral. Accordingly, the Petitioner's argument that "[d]efense counsel ignored these glaring biases" is without merit especially when all three jurors (Christopher, Davis, and Nettles) stated they could remain impartial despite their experiences. As to Juror Bradley, the Petitioner acknowledges that this juror was rehabilitated during voir dire. The Petitioner, however, did not ask trial co-counsel during the evidentiary hearing why a peremptory challenge was not used against that particular juror. Accordingly, it must be presumed that counsels' decision in that respect was reasonable trial strategy. Counsel cannot be deemed to have been ineffective in this instance. The Petitioner is not entitled to relief with respect to 1992 counsels' actions during jury selection.

2. Jury Instructions

The Petitioner contends that counsel were ineffective during the original trial for failing to object to the trial court's jury instruction, which listed first degree murder as the first option to consider and "not guilty" as the final option. As the post-conviction court observed, however, our supreme court has held that sequential jury instructions do not deprive a defendant of his or her constitutional right to a jury trial. *See State v. Davis*, 266 S.W.3d 896, 905 (Tenn. 2008). Accordingly, counsel cannot be deemed ineffective for failing to challenge the jury charge in this respect.

3. Motion to Suppress Statement

The Petitioner contends that his original trial counsel were ineffective for failing to argue competently that his statement to the police should have been suppressed. The Petitioner complains that counsel filed only three "boilerplate" motions to suppress the statement and did not present any evidence in support of their argument at the suppression hearing other than the testimony of the Petitioner himself. The Petitioner

argues that counsel should have presented evidence of his troubled past to demonstrate how he endured "reasonable fear and confusion during the nightlong interrogation." He also argues that his statement to the police would have been suppressed if the trial court had been aware of his brain damage.

The post-conviction court disagreed, stating:

> This court finds trial counsel were not ineffective in this regard. Attorney [trial co-counsel] 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 [hearing] 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.

Based upon our review of the record, we conclude that trial counsel were not ineffective in the handling of the motion to suppress. As noted above, the fact that a particular strategy or tactic failed does not equate with deficient performance. *Cooper*, 847 S.W.2d at 528. Trial counsel moved to suppress the statement but were simply unsuccessful in their attempt. Regardless, the Petitioner has not otherwise shown any resulting prejudice. "In order to show prejudice, [the] Petitioner must show by clear and convincing evidence that (1) a motion to suppress would have been granted and (2) there was a reasonable probability that the proceedings would have concluded differently if counsel had performed as suggested. *Vaughn v. State,* 202 S.W.3d 106, 120 (Tenn. 2006)

(citing *Strickland,* 466 U.S. at 687, 104 S. Ct. at 2064-65). "In essence, the petitioner should incorporate a motion to suppress within the proof presented at the post-conviction hearing." *Terrance Cecil v. State*, No. M2009-00671-CCA-R3-PC, 2011 WL 4012436, at *8 (Tenn. Crim. App. at Nashville, Sept. 12, 2011). Contrary to his argument, the Petitioner presented no clear and convincing evidence demonstrating a motion to suppress would have been granted under some alternate theory. Accordingly, we agree with the post-conviction court's findings in this respect. Although he challenged trial counsel's failure to contest the signature on the statement as being his own, he does not raise that issue on appeal. The Petitioner is not entitled to relief on this claim.

4. Presentation of Case

The Petitioner argues that counsel were ineffective during the guilt phase of the original trial because they presented no witnesses on his behalf and failed to effectively cross-examine the State's witnesses. As the State observes, the Petitioner does not now identify any potential witness trial counsel should have called to testify. In order to prevail on a claim of ineffective assistance of counsel for failure to call a witness at trial, a petitioner should present that witness at the post-conviction hearing. *Pylant v. State*, 263 S.W.3d 854, 869 (Tenn. 2008). "'As a general rule, this is the only way the petitioner can establish that . . . the failure to have a known witness present or call the witness to the stand resulted in the denial of critical evidence which inured to the prejudice of the petitioner.'" *Id*. (quoting *Black v. State,* 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990)).

As to the cross-examination of State witnesses, in the Petitioner's brief on appeal, he merely references the supplemental amended petition for post-conviction relief he filed in which he challenged counsel's failure "to effectively cross-examine police witnesses on the poor chain of custody and crime scene handling of fingerprint evidence." The post-conviction court concluded that the Petitioner failed to establish ineffective assistance of counsel on this ground:

> 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 [sic] 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. . . .

> 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 [deficient] in failing to challenge the fingerprint evidence in his case, petitioner has failed to demonstrate he was prejudiced by counsel's inaction.

The Petitioner does not explain how the post-conviction court's ruling in this respect is erroneous; instead, he simply refers to the authority cited in his supplemental amended petition. In other words, the Petitioner offers no argument on appeal in support of his claim that trial counsel were ineffective for failing to cross-examine the State's witnesses effectively. The issue must therefore be considered waived on appeal. *See* Tenn. Ct. Crim. App. R. 10(b). Regardless, we agree with the post-conviction court that the Petitioner is otherwise unable to demonstrate any resulting prejudice.

5. Juror Question

The Petitioner argues that trial counsel should have objected during the guilt phase of the trial when a juror asked the medical examiner a question about the depth of one of the stab wounds to the victim in relation to the length of the blade on the knife found on the Petitioner at the time of his arrest. After testifying about the nature of the stab wounds to the victim, the medical examiner testified that, although he could not affirmatively state that the exact knife found on the Petitioner caused the wounds "to the exclusion of all others in the world," that knife was "quite consistent with producing the wounds" to the victim. At the conclusion of the medical examiner's testimony, a juror, with permission from the trial court, asked the medical examiner a question about the knife. The following is the entire verbal exchange between the juror and the medical examiner:

> Juror: Yes, sir. Sir, could you tell me how long that blade is on that knife?
>
> Witness: I would have to have a ruler to measure it. It looks like about three inches. (Pause) It appears to be about three inches, but I would have to have a ruler to actually measure it.
>
> Juror: And you said the penetration was four inches –
>
> Witness: That's correct.

Juror: -- amongst the --

Witness: What happens is that as the knife is penetrating the chest cavity there's some give to the chest cavity, so a three inch blade can produce a five inch deep wound. It's because of that give.

Trial Judge: All right, doctor, you may step down.

The Petitioner argues that the previously unsolicited testimony from the medical examiner prejudiced his defense. The Petitioner cites *State v. Jeffries*, 644 S.W.2d 432 (Tenn. Crim. App. 1982), and Tennessee Rule of Criminal Procedure 24.1 in support of his argument. The post-conviction court noted that Rule 24.1 was not adopted until 2003 and, thus, inapplicable to the Petitioner's claim. The court also recognized that prior to the implementation of Rule 24.1, "although the practice was discouraged, there was no outright bar to juror questioning at the time of" the trial in 1992. *See Byrge v. State*, 575 S.W.2d 292 (Tenn. Crim. App. 1978); *Raynor v. State*, 447 S.W.2d 391 (Tenn. Crim. App. 1969).

Initially, we agree with the State that the Petitioner has failed to carry his burden of establishing deficient performance on the part of trial counsel. The Petitioner did not question trial co-counsel as to why trial counsel did not object when the trial court allowed the juror to question the witness. Given that the knife blade was shorter than the depth of the stab wounds, the failure to object very well may have been tactical.

In any event, even if counsel should have objected, the post-conviction court correctly ruled that at the time of the Petitioner's trial, there was no absolute prohibition to a juror being permitted to question a witness. As this court announced in *Byrge*, "[E]ach case must be judged on its own facts in determining whether error has been committed." 575 S.W.2d at 295. Given the nature of the medical examiner's testimony and the limited line of questioning by the juror, the Petitioner has failed to demonstrate that the trial court would have sustained an objection to the juror's question. To the extent the Petitioner couches his argument in terms of trial court error, said issue is waived because the Petitioner failed to raise it on direct appeal. *See* Tenn. Code Ann. § 40-30-106(g). Accordingly, the Petitioner is not entitled to relief on this ground.

6. Investigation

The Petitioner contends that his original trial counsel "failed to investigate other suspects and evidence supporting an argument that someone else may have been responsible for the incident." The testimony of trial co-counsel is summarized above. She identified the members of the defense team, which included two attorneys and two investigators, and she described the team's strategy. Trial co-counsel explained that the

decision making process was influenced by information about the case they already knew, including the Petitioner's confession. Upon review of the evidence presented in post-conviction, the post-conviction court concluded that the Petitioner failed to demonstrate how trial counsel were ineffective in their factual investigation: "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."

The Petitioner does not support his blanket statement on appeal that "the defense team failed to conduct any meaningful investigation into the State's case" with references to any other evidence his attorneys should have uncovered. We agree with the State that the Petitioner is required to demonstrate how counsel's action or inaction affected the outcome of the trial. The Petitioner has simply failed to carry his burden on this particular claim and is, therefore, not entitled to any relief. *See Tony Carruthers v. State*, No. W2006-00376-CCA-R3-PD, 2007 WL 4355481at *40 (Tenn. Crim. App. at Jackson, Dec. 12, 2007) ("Moreover, the petitioner did not produce any witnesses or evidence that pretrial counsel failed to investigate or uncover that would have altered the outcome of the trial."); *Demarcus Sheriff Smith v. State*, No. W2001-01353-CCA-R3-PC, 2002 WL 1482697, at *4 (Tenn. Crim. App. at Jackson, Mar. 8, 2002) ("If the claim is based upon a failure to properly investigate, then the evidence or witness must be produced so that the post-conviction court judge can properly evaluate the evidence or the witness.") This court may not guess as to what evidence further investigation may have uncovered. *Black*, 794 S.W.2d at 757.

2007 Counsel

1. Evidence of Petitioner's Neurological and Cognitive Impairments

The Petitioner claims that counsel rendered ineffective assistance during the third sentencing hearing by not timely investigating, obtaining, and presenting evidence of his neurological and cognitive impairments in mitigation despite the existence of evidence that those impairments had existed since 1974. The Petitioner argues that his attorneys waited too long before requesting the services of Dr. Angelillo to determine whether they overlooked anything regarding the Petitioner's mental health. He also argues that the fact that Dr. Angelillo was called as a witness belies counsel's assertion that they had ruled out a mental health strategy in mitigation. Dr. Angelillo could not offer a specific diagnosis about the Petitioner's potential brain damage. The Petitioner blames counsel for the incomplete evaluation because they did not retain the services of Dr. Angelillo in a timely manner. The Petitioner contends that a mental health expert would have complimented and contextualized lay witness and mitigation expert testimony by explaining that the Petitioner's traumatic experiences throughout childhood and adolescence compromised his brain development. The Petitioner also argues that counsel's fear of arming the prosecution with ammunition of a personality disorder

diagnosis came to fruition when Dr. Angelillo testified that the Petitioner had signs of a personality disorder.

The Petitioner insists that had counsel further investigated evidence of his brain damage, they would have been able to introduce the same type of evidence presented during the post-conviction hearing. Citing *Davidson v. State*, the Petitioner asserts, "Because mental illness can render a defendant less morally blameworthy, capital defense attorneys who possess compelling evidence of mental defects have an obligation to make a reasonable and fully-informed decision about presenting that evidence to the jury." 453 S.W.3d 386, 405 (Tenn. 2014). He argues that, despite numerous "red flags" in the reports found by counsel during their investigation, counsel did not subject him to neuropsychological testing, which would have revealed impairments in his executive functioning and cognitive deficits. According to the Petitioner's argument, had counsel presented the same type of mental health evidence he presented during the post-conviction hearing, there is a reasonable probability that at least one juror would have voted against the death penalty.

In addressing this claim, the post-conviction court issued the following findings:

> At the post-conviction hearing [lead sentencing counsel] testified he believed the defense had considered retaining a neurologist and conducting a neurological examination of petitioner. However, [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. [Lead sentencing counsel] stated much of this information had been discussed in petitioner's prior sentencing proceedings. In some cases, [lead sentencing counsel] 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. [Lead sentencing counsel] 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.
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> [Lead sentencing counsel] 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, [lead sentencing counsel] 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 [sentencing co-counsel] 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. [Sic].

[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. To present such proof, according to [sentencing co-counsel], 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. [Sentencing co-counsel] 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 [lead sentencing counsel and sentencing co-counsel] 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.

The court continued:

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. Angelillo 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, [lead sentencing counsel and sentencing co-counsel] 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 [lead sentencing counsel and sentencing co-counsel] 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 [sentencing co-counsel] acknowledged some of petitioner's prior mental health records contained warnings about petitioner's mental condition. However, according to [sentencing co-counsel], 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 an[d] utilization of Dr. Angelillo's services.

Our supreme court has summarized the following principles specific to mitigation in a capital case:

> Capital defendants possess a constitutionally protected right to provide the jury with mitigation evidence that humanizes the defendant and helps the jury accurately gauge the defendant's moral culpability. *Porter v. McCollum,* [558 U.S. 30, 41, 130 S. Ct. 447 (2009)]; *Williams v. Taylor,* [529 U.S. 362, 393, 120 S. Ct. 1495 (2000)]. Accordingly, capital defense attorneys have an obligation to conduct a thorough investigation of the defendant's background. *Williams v. Taylor,* 529 U.S. at 396, 120 S. Ct. 1495. Defense counsel should make an effort to discover all reasonably available mitigating evidence and all evidence to rebut any aggravating evidence that the State might introduce. *Wiggins v. Smith,* [539 U.S. 510 524, 123 S. Ct. 2527 (2003)].
>
> To provide effective representation, counsel must make either a reasonable investigation or a reasonable decision that particular investigations would be unhelpful or unnecessary. *Wiggins v. Smith,* 539 U.S. at 521, 123 S. Ct. 2527. Either way, counsel's decision must indicate a reasoned strategic judgment. *Wiggins v. Smith,* 539 U.S. at 526, 123 S. Ct. 2527. Defense counsel should investigate the defendant's medical history, educational history, employment and training history, family and social history, adult and juvenile correctional experiences, and religious and cultural influences. *Wiggins v. Smith,* 539 U.S. at 524, 123 S. Ct. 2527.
>
> Counsel is not required to investigate every conceivable line of mitigating evidence, no matter how unlikely it is to help the defense. Nor must counsel present mitigating evidence in every case. But "strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitation of the investigation." *Wiggins v. Smith,* 539 U.S. at 533, 123 S. Ct. 2527 (internal quotation marks omitted). To determine whether counsel's actions were reasonable, a reviewing court should "consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith,* 539 U.S. at 527, 123 S. Ct. 2527.

Davidson, 453 S.W.3d at 402.

The *Davidson* court concluded that trial counsel rendered ineffective assistance

during sentencing because they failed to present evidence of the defendant's brain damage and cognitive disorders. The Petitioner in the case at hand relies on *Davidson* for the proposition that his attorneys were ineffective for the same reason. Our supreme court reached its conclusion in *Davidson*, however, based upon counsel's "superficial investigation." *Id.* at 392. The attorneys in that case did not introduce any neuropsychological evidence in mitigation, and our supreme court concluded that their actions were not reasonably informed trial strategy but instead were the result of "inattention and a disturbing lack of time and resources." *Id.* at 404. Trial counsel testified that he was "overworked and understaffed" and that co-counsel "was suffering from significant health problems," which led the defense team to conduct a "cursory investigation" into the defendant's background. *Id.* at 398. Trial counsel "was unable to give a satisfactory explanation for his truncated investigation other than that he was harried and overworked," and he admitted that he should have pursued the defendant's mental health evidence further. *Id.* at 399. Counsel in *Davidson* also admitted that he probably did not completely review the report prepared by the mitigation specialist. *Id.* at 400. Moreover, Ms. Shettles, the same mitigation specialist used by the Petitioner's attorneys in this case, testified in *Davidson* that "she did 'very, very little. I was given a very, very brief period of time to complete tasks and I was asked specifically to do very, very few things.'" *Id.* at 399.

The testimony from the evidentiary hearing in this case presents an entirely different picture than that revealed in *Davidson*. Both attorneys testified about the extent of their representation in this case. They had the benefit of reviewing the records of two previous sentencing hearings as well as Ms. Shettles' exhaustive investigation into the Petitioner's background. Ms. Shettles testified that she had served as an investigator on approximately ninety death penalty cases, that she developed a good working relationship with defense counsel, and that her investigation into the Petitioner's background was as thorough as any other case in which she had participated. Lead sentencing counsel also testified that the information gathered by Ms. Shettles was the best mitigation he had ever received from an investigator in a capital case. Based upon our review of the record and the evidence presented at the hearing, there is no doubt the attorneys conducted a reasonably thorough investigation into the Petitioner's background.

Counsels' decision not to pursue a strictly mental health style of defense in mitigation was developed after they thoroughly investigated the Petitioner's background. Both attorneys testified that they were aware of the numerous reports included in Ms. Shettles' investigation that revealed evidence of potential brain damage. As recounted above in the fact section, both attorneys also explained why they chose not to focus their defense on the Petitioner's brain damage. Counsel feared that during cross-examination, the State would be able to exploit reports that the Petitioner made comments he committed the previous murder in Mississippi "for the joy of it" and "had no feelings, no sorrow about it." Likewise, counsel did not want to provide the State with the opportunity to highlight other reports suggesting the Petitioner suffered from various

personality disorders, reports that showed no signs or symptoms of psychosis, or reports suggesting prior neurological examinations were within normal limits. Counsel also explained that even if they found a mental health expert who could affirmatively testify about the Petitioner's brain damage, the jury might view the expert's opinion as having been "bought and paid for," especially in light of the fact that there were contradictory reports the State could highlight on cross-examination. Counsel further explained that presenting evidence, such as evidence elicited during the post-conviction hearing that the Petitioner could not control his impulses because of his brain damage and his brain damage would not prevent him from attempting escape in the future, would contradict their theory that the Petitioner had become well-adjusted in prison, was viewed as a model inmate, and did not pose any future danger in prison.

The Petitioner argues that trial counsel "offer[ed] fallacious circular reasoning" regarding their decision to call Dr. Angelillo as a witness. According to the Petitioner, if counsel wanted to avoid arming the State with the ammunition of a personality disorder, they should have never requested that Dr. Angelillo perform psychological testing or questioned him during trial about his diagnosis of a personality disorder. As the State observes in its brief on appeal, though, counsel intended to limit Dr. Angelillo's testimony by "hit[ing] the high points" and not "drag[ging] out mental health in front of the Jury." Although Dr. Angelillo could not render a specific diagnosis, he would testify that evidence of a personality disorder was the product of the Petitioner's upbringing and environment. Counsel intended for Dr. Angelillo to explain to the jury that the system had failed the Petitioner because he never received sufficient mental health treatment. Indeed, Dr. Angelillo opined that "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." *Odom*, 336 S.W.3d at 553. Dr. Angelillo also testified that the Petitioner had a history of brain damage. Contrary to the Petitioner's argument, Dr. Angelillo's testimony fit squarely within counsel's theory "that the [Petitioner's] time in the structured environment of Riverbend had 'behaviorally defined . . . his ability . . . to engage in constructive activities.' [Dr. Angelillo] believed that the [Petitioner] would continue to thrive in this structured environment if given a life sentence." *Id.*

The Petitioner focuses part of his argument on this issue on the fact that counsel did not retain the services of Dr. Angelillo until approximately two months before trial. As explained above, however, counsel had thoroughly investigated the Petitioner's background and had decided by that time to pursue a different theory of mitigation. According to counsel, Dr. Angelillo was hired to see if counsel missed anything obvious, and he ultimately helped to explain to the jury how the lack of treatment and abuse the Petitioner experienced affected his development. Lead sentencing counsel testified, "I don't think we would have put him on at all if we hadn't thought that, if it didn't move with our theme." As the post-conviction court concluded, counsel reviewed all relevant records, discussed a possible mental health defense, considered results from previous

hearings, and decided, based upon the Petitioner's station in life at the time of the second resentencing hearing, that their best defense was to generate empathy through family testimony and demonstrate that the Petitioner would not pose any future danger because he would never be released from prison, even with a life sentence. Counsel were able to convince family members to testify on the Petitioner's behalf even though they had refused to get involved in prior hearings. Through family members and other lay witnesses, counsel were able to paint a picture about the Petitioner's awful childhood and adolescence and were able to describe the horrific conditions the Petitioner experienced in the various institutions where he spent time in Mississippi. Indeed, Ms. Shettles recounted to the jury the information she obtained through her extensive investigation, one which she said was the most thorough of any of the ninety or so capital cases on which she worked. Counsel said that the testimony by the Petitioner's family members was "incredible" and that no "mental health expert ever could have gotten the emotion that [they] were able to get out of" the lay witnesses.

We agree with the following assessment by the post-conviction court:

> Based upon the testimony of [sentencing co-counsel, lead sentencing counsel], 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 [had] 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.

In analyzing a claim that counsel provided ineffective assistance during sentencing, we must keep in mind the principles we recited earlier in this opinion, in addition to those summarized by our supreme court in *Davidson*, including "the strong

presumption that counsel provided adequate assistance and used reasonable professional judgment to make all strategic and tactical significant decisions." *Id*. at 393. In order for counsel's strategic and tactical choices to be entitled to deference, they must be "informed ones based upon adequate preparation." *Goad v. State,* 938 S.W.2d 363, 369 (Tenn. 1996). Similarly, the presentation of some mitigating evidence does not "foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant." *Sears v. Upton,* 561 U.S. 945, 955, 130 S. Ct. 3259, 3266 (2010). An inquiry into whether counsel rendered ineffective assistance in the presentation of mitigation requires a "probing and fact-specific analysis" that includes consideration of "the totality of the available mitigation evidence -- both that adduced at trial and the evidence adduced in the [collateral] proceeding." *Id.* at 955-56; 130 S. Ct. at 3266; *see also Wiggins v. Smith,* 539 U.S. at 527.

Based upon our review of the records, we conclude that counsel's performance in the presentation of mitigating evidence during the second resentencing hearing in this case was not deficient. Counsel chose a reasonable strategy during sentencing based upon an extensive investigation and after careful consideration of all the circumstances. Thus, we will not second-guess that decision now. As the case law cited above illustrates, there is no requirement that counsel pursue a particular strategy or theory of mitigation, just as long as counsel's ultimate decision was reached after a thorough investigation into a defendant's background.

Although we have concluded that the Petitioner has not satisfied the first prong of the *Strickland* standard, we will nevertheless discuss whether counsel's failure to present evidence similar to that introduced during post-conviction would have resulted in any prejudice. When considering whether a capital defendant was prejudiced by counsel's failure to present sufficient mitigating evidence, our supreme court has directed the reviewing courts to consider the following: (1) the nature and extent of the mitigating evidence that was available but not presented; (2) whether substantially similar mitigating evidence was presented to the jury in either the guilt or penalty phase of the proceedings; and (3) whether there was such strong evidence of aggravating factors that the mitigating evidence would not have affected the jury's determination. *Goad*, 938 S.W.2d at 371. In the context of capital cases, a defendant's background, character, and mental condition are unquestionably significant. "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). "This evidence often serves to humanize the defendant and reveals aspects of the defendant's life or inner workings that might affect the jury's assessment of the defendant's moral culpability for the crime." *Davidson*, 453 S.W.3d at 395.

The right capital defendants have to present a vast array of personal information in mitigation during the sentencing phase, however, is constitutionally distinct from the question of whether counsel's choice about what information to present to the jury was professionally reasonable. The basic concerns of counsel during a capital sentencing proceeding are to neutralize the aggravating circumstances advanced by the State and to present mitigating evidence on behalf of the defendant. Although there is no requirement to present mitigating evidence, counsel does have the duty to investigate and prepare for both the guilt and the penalty phase. *See Goad*, 938 S.W.2d at 369-70; *Zagorski v. State*, 983 S.W.2d 654, 657 (Tenn. 1998). In determining whether counsel breached this duty, counsel's performance is reviewed "for 'reasonableness under prevailing professional norms,' which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's prospective at the time.'" *Wiggins v. Smith*, 539 U.S. at 523 (quoting *Strickland*, 466 U.S. at 688-89)). Counsel is not required to investigate "every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." *Id*. at 533. Nor is counsel required to interview every conceivable witness. *See Hendricks v. Calderon*, 70 F.3d 1032, 1040 (9th Cir. 1995). In other words, counsel's duty to investigate and prepare is not limitless. *Id*.

Although 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. Brawley also testified that the Petitioner was stressed about being "locked up for something [he] didn't do." She opined that deficits in the Petitioner's frontal lobe functioning and mental flexibility most probably affected the Petitioner's behavior and personality over his life span and could have significantly impacted his judgment, impulsivity, and decision making. She also opined, however, that the Petitioner's mental state likely had improved over time because he had been confined in a very structured prison environment in Tennessee for many years. 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. Dr. Merikangas did opine, like Dr. Angelillo, that the Petitioner functioned better in the prison environment in Tennessee.

Considering the *Goad* factors listed above, we 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. Both doctors commented on the Petitioner's inability to control his impulses, something which counsel was keen on keeping from the jury. As Dr. Angelillo testified, both Drs. Brawley and Merikangas testified that the Petitioner's condition had improved while in prison. During the

resentencing hearing, Dr. Angelillo referenced the Petitioner's history of brain damage and explained that the lack of mental health treatment and abuse the Petitioner suffered had a profound effect on his development. As the State aptly notes, counsel were "able to walk a very fine line: present all of the evidence of the Petitioner's limitations they could without also presenting evidence that the Petitioner suffered from a degenerative disease that would make him dangerous in the future." Counsel's theory of mitigation, which we have already concluded was reasonably reached upon a thorough investigation, would have been hampered if mental health experts had testified that the Petitioner lacked the ability to control his actions. Both post-conviction experts confirmed the Petitioner functioned better in prison. Counsel were able to demonstrate that fact to the jury. They were also able to present evidence that it would be almost impossible for the Petitioner ever to be released from prison if given a life sentence. As to the strength of the two aggravating factors, the prior murder and the fact that the instant murder was committed during a robbery attempt, our supreme court observed that they "were firmly established by the evidence." *Odom*, 336 S.W.3d at 572. 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 would not have affected the jury's verdict. The Petitioner is not entitled to relief on this issue.

2. Evidence of Petitioner's Repeated Sexual Assaults

The Petitioner also argues that trial counsel failed to investigate adequately and present sufficient evidence that he suffered repeated sexual assaults. The Petitioner refers to the abuse he suffered at home as a child and adolescent as well as the abuse he suffered in Parchman Prison. The evidence introduced at the 2007 resentencing hearing and the post-conviction evidentiary hearing is summarized above. In his brief, the Petitioner recites much of that testimony. The jury heard from four witnesses about the abuse the Petitioner suffered at the hands of his stepfather, who was described as "a pervert – just a sorry person." The jury also heard from Ms. Shettles and Jimmy, Jr., about the sexual abuse the Petitioner endured as a juvenile in prison in Mississippi. The Petitioner recounts the evidence introduced during the evidentiary hearing and argues that had trial counsel discovered those additional witnesses, counsel would have been able to present a more compelling picture about the abuse he suffered and how it affected his mental and emotional health.

In denying relief on this issue, the post-conviction court noted that counsel did introduce evidence of the Petitioner's abuse during the 2007 resentencing hearing. Trial counsel attempted, albeit unsuccessfully, to preclude opening the door to evidence about the Petitioner's prior escape from prison. Thus, the post-conviction court concluded that counsel made a strategic decision to exclude extensive evidence relating to the Petitioner's time at Parchman. The post-conviction court also noted that the post-conviction testimony by Ms. Chandler referred to an incident when the Petitioner was accused of rape and was identified as a "problem inmate" because it was not the first such

report. As the post-conviction court stated, evidence of that nature would have been damaging to defense counsel's theory that the Petitioner had performed well in prison and did not pose any future danger.

Upon review of the record, we conclude that the Petitioner has failed to establish how counsel's performance was deficient in presenting evidence of his abuse in support of their theory of gaining empathy from the jury. As noted above, the jury was informed that the Petitioner was sexually abused at home and in prison in Mississippi. Counsel had the benefit of Ms. Shettles' extensive investigation, which revealed evidence of abuse. Counsel were also able to convince some of the Petitioner's family members to testify on his behalf, and their testimony referred to the childhood and prison abuse the Petitioner suffered. The Petitioner seems to suggest that the witnesses who testified about the abuse were not qualified or competent. For example, he states that counsel "failed to do a complete investigation and instead presented testimony regarding the sexual victimization at Parchman through [his] brother Jimmy, [Jr.]." He asserts that counsel should have called other inmates besides the Petitioner's adoptive brother to testify about the conditions at Parchman. However, there is no requirement that counsel present cumulative evidence during sentencing. *See Nichols v. State*, 90 S.W.3d 576, 601-02 (Tenn. 2002).

Regardless, considering the *Goad* factors cited above, we find that the evidence introduced during post-conviction was similar in nature to the evidence at the resentencing hearing. Although post-conviction counsel was able to find additional witnesses, "[a] reasonable investigation is not an investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources but also with the benefit of hindsight, would conduct." *Tyrone Chalmers v. State*, No. W2006-00424-CCA-R3-PD, 2008 WL 2521224, at *37 (Tenn. Crim. App. at Jackson, June 25, 2008). Similarly, "[a] reasonable investigation does not require that counsel leave no stone unturned." *Perry Anthony Cribbs v. State*, No. W2006-01381-CCA-R3-PD, 2009 WL 1905454, at *48 (Tenn. Crim. App. at Jackson, July 1, 2009). This is not a case where counsel failed to introduce any, or just cursory, mitigation. Even assuming counsel should have called additional witnesses to testify about the abuse the Petitioner suffered, the strength of the aggravating circumstances weighs against a finding of prejudice. The Petitioner is not entitled to relief on this ground.

3. Jury Selection

The Petitioner argues that counsel were ineffective during jury selection in the second resentencing hearing for failing to ask jurors case-specific questions, failing to "life-qualify" the jurors properly, and failing to object when the State improperly defined "mitigation." The Petitioner also seems to suggest that the State improperly excluded jurors who expressed reservations about the death penalty. The post-conviction court disagreed, stating:

> [T]his 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 . . . ineffective in failing to cite to a specific case. Moreover, even if counsel were ineffective in this regard, this court find[s] petitioner has failed to demonstrate he was prejudiced by counsels' inaction.

The Petitioner does not identify the "case-specific" questions counsel should have asked. Regardless, counsel did attempt to question a prospective juror about whether the specific facts of this case would prevent him from following the judge's instructions on the law. The trial judge, however, refused to allow them to embark on that line of questioning. Contrary to the Petitioner's assertion, counsels' performance cannot be deemed deficient in that respect. Moreover, the Petitioner has failed to demonstrate any resulting prejudice. As to his claim that counsel failed to "life-qualify" the jurors adequately, this court has stated that "not questioning as to whether a prospective juror can fairly consider a life sentence does not necessarily constitute deficient performance." *Tyrone Chalmers*, No. W2006-00424-CCA-R3-PD, 2008 WL 2521224, at *27 (citations omitted). The Petitioner acknowledges, however, that counsel did question whether jurors could vote for life if they did not find the aggravation outweighed the mitigation. Accordingly, based upon this court's review of the entire jury selection, during which the trial judge and the parties explained to the jury the concepts of aggravating and mitigating evidence and the weighing process, this court cannot conclude that counsels' performance was deficient in this respect. Furthermore, the Petitioner has failed to establish any prejudice resulting from counsels' failure to object to the State's alleged improper definition of "mitigation." Upon our review of the record, the jury was properly instructed on the law of capital cases in Tennessee. To the extent the Petitioner complains about the actions of the State during jury selection, his challenges must be considered waived in the post-conviction context. *See* Tenn. Code Ann. § 40-30-106(g). The Petitioner is not entitled to relief on these issues raised against defense counsel during the second resentencing hearing.

4. Polling of Jury

The Petitioner also argues that counsel were ineffective for failing to poll the jury following the return of the sentence in 2007. Without any proof or citation to any controlling authority, the Petitioner asserts that "[i]n light of the jury deliberating for more than ten hours over [his] sentence, counsel should have requested that the jury be polled to ensure that the verdict was not coerced." Noting that polling of the jury is discretionary, *see* Tennessee Rule of Criminal Procedure 31(e), the post-conviction court concluded that the "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." Despite waiver of this issue, *see* Tennessee Court of Criminal Appeals Rule 10(b), the trial court did affirm that all twelve jurors signed the verdict form. *See* Tenn. Code Ann. § 39-13-204(g). The Petitioner has shown neither deficiency nor prejudice with respect to counsels' performance. Therefore, he is not entitled to relief on this claim.

5. Jury Instructions

The Petitioner contends that counsel were ineffective during the 2007 resentencing hearing for failing to object to the trial court's instruction to the jury on reasonable doubt. This issue has been previously determined. Tenn. Code Ann. § 40-30-106(h). During its review of the death sentence imposed by the jury in 2007, our supreme court affirmed this court's ruling that the instruction at issue did not result in a violation of the Petitioner's due process rights. *Odom*, 336 S.W.3d at 570 n.12. Accordingly, the Petitioner is not entitled to relief on this issue. The Petitioner's challenge to 1992 counsels' failure to object to a similar instruction also must fail.

The Petitioner also contends that counsel should have objected to the instruction that the jury must be unanimous in its decision to render a life sentence. However, this issue also has been previously determined, *State v. Richard Odom*, No. W2008-02464-CCA-R3-DD, 2010 WL 10094693, at *35 (Tenn. Crim. App. at Jackson, Mar. 4, 2010), *aff'd*, *Odom*, 336 S.W.3d at 577, and the instruction at issue has been approved by our supreme court, *State v. Ivy*, 188 S.W.3d 132, 163 (Tenn. 2006). Accordingly, counsel cannot be deemed ineffective for failing to object.

6. Closing Argument

The Petitioner argues that counsel were ineffective during closing arguments during the second resentencing hearing by stating that the crime scene photos were "the worst of the worst." According to his argument, counsel's comments were, in essence, a stipulation that the State had proven its case for the death penalty. The post-conviction court disagreed, saying as follows:

> This court finds, although perhaps poorly worded, the statements of trial counsel did not rendered [sic] 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 [State to its] 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.

We agree with the post-conviction court. The prosecutor repeatedly referred to the crime scene photos during her closing remarks:

> The death penalty – this process that you have sat through all week is reserved for the worst of the worst. The worst of the worst.
>
> And the State of Tennessee does not take this lightly. The State of Tennessee does not ask you to just ignore and put your blinders on to everything that you've heard.
>
> It is difficult to sit and listen to what you had to listen to. It's difficult to look at these pictures.
>
> And we don't ask you to do it just because. We ask you to do it because the law demands it.
>
> . . . .
>
> No. You may never forget this.
>
> I will submit to you, you will never block out some of the images that you had forced upon you this week.
>
> . . . .
>
> If this were a matter of the two aggravators exist [sic], the State's proven them and that's it, you would never get to know about the case. You would never see the pictures of [the victim's] body, her frail, dead, naked body in the back of her car.
>
> . . . .
>
> If it was just as easy as us telling a computer he's been convicted of murder before and this murder was during a robbery, we wouldn't need jurors. We wouldn't need you ladies and gentlemen to take a week out of

your life and look at pictures that you'll never forget and listen to words that make you sick, if it were just that easy.

In rebuttal, defense counsel attempted to defuse the State's emphasis on the photographs and to dispute the fact that this case was "the worst of the worst." Counsel's argument, the one the Petitioner now complains about being a concession that the death penalty was warranted in this case, was, in pertinent part, as follows:

> [The judge] read you a jury instruction and part of it – you're going to have these instructions. When he's done talking about the aggravating circumstances, it has this line, read this line. You shall not consider any other facts or circumstances as an aggravating circumstance in deciding whether the death penalty would be appropriate punishment in this case.
>
> So when they put pictures up on the board of [the victim], what does that law say? Don't consider that for death.
>
> And that is under the theory of them proving their case to you. After we sat up here and told you we're not contesting the fact that he was convicted.
>
> Do you know why? Because if you're not mad as hell at [the Petitioner], you're not going to give him the death penalty.
>
> And when you put pictures of a seventy-eight year old woman who's been raped in the back of a car up there, it makes you mad as hell. It should.
>
> And they do that to inflame you, knowing it is not an aggravator and cannot be considered by you.
>
> But they know you are not able to put that out of our [sic] mind. But we talked about sympathy and prejudice before we started this journey. You have to do it.
>
> The worst of the worst. Show me a murder that's not bad. All crime scene pictures are bad.
>
> They're seeking the death penalty because the law says they have the right to seek it. They don't have to seek it against anybody. It's their choice. It's why we're here.
>
> If they didn't seek it, he gets life.

But those pictures are terrible. The worst of the worst. It's so bad – nobody's saying [the victim] wasn't a great woman. I'm sure she was. She lived seventy-eight years. It's too bad she couldn't have lived more.

Would it have been better if it had been a twenty-four year old mother of three? Would it have been better if it had been a child? No.

Is it any worse than somebody getting gunned down in a liquor store? No. It's not. They're all bad.

It's hard to limit yourself to just those aggravators.

I want to talk about the witnesses a little bit. John Sullivan was the first witness to come up here. Nice man. A good man. No doubt about that.

But there's a trick in trying to make you mad as hell. What purpose was there in showing pictures of [the victim] to that man?

They could have easily been introduced by the police officer, the next witness. Why introduce them through John Sullivan?

Because it's going to make you forget the burden, it's going to make you mad as hell that that seventy-five year old man had to sit up here and look at those pictures when he didn't have to.

Because they don't want you to use the law. They want you to use passion and anger and you can't.

There was absolutely no reason to make that man look at those pictures.

The next witness, Miss Locastro identified them, too. There was absolutely no reason not to put them in through her.

Keep in mind, these facts that they proved to you were never disputed. They could have put on his statement.

But by showing you the horrible pictures and they are horrible, my God, they're horrible, [the prosecutor] said, look at them when you're in the back. Why? It's not an aggravator. It has nothing to do with your aggravator at all. Look at them, look at them, look at them, look at them.

> Because they've got to get you mad as hell to kill [the Petitioner]. That's why.

When read in context, this court does not find that, as the Petitioner now claims, defense counsel's remarks were an "admission that [the Petitioner's] actions warranted the death penalty." Accordingly, counsel's performance cannot be deemed to have been deficient in this respect. The Petitioner is not entitled to relief on this claim.

7. Prosecutorial Misconduct

The Petitioner contends that counsel were ineffective for failing to object to a statement made by the prosecutor during closing arguments in 2007 that the Petitioner anally raped the victim when no evidence was introduced to support that statement. The post-conviction court noted that defense counsel were not questioned during the evidentiary hearing about their decision in this regard. Nevertheless, the court held that the Petitioner otherwise failed to demonstrate prejudice because "[t]he 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."

The statement at issue by the prosecutor was a single, isolated remark. The propriety of this statement was raised on direct appeal as "an ancillary argument" to an issue regarding the admission of the crime scene photographs during the second resentencing hearing. *Richard Odom*, No. W2008-02464-CCA-R3-DD, 2010 WL 10094693, at *20. Despite the fact that there was no contemporaneous objection by defense counsel, this court concluded that some of the prosecutor's remarks during closing argument, including the statement that the Petitioner anally raped the victim, were not an improper attempt to urge the jury to weigh nonstatutory aggravating circumstances. *Id.* at *22. Our supreme court affirmed this court's holding. Although it did not specifically reference the statement at issue in its opinion, as this court did, the court held that "even if the argument on behalf of the State at any point crossed the line of impermissibility, . . . the trial court properly instructed the jury as to the weighing of the aggravating and mitigating circumstances; it must be presumed that a jury has followed the instructions given by the court." *Odom*, 336 S.W.3d at 562.

Thus, even though this issue could be considered previously determined for post-conviction purposes, in the context of an ineffective assistance of counsel claim, we conclude that the Petitioner is not entitled to relief. As the post-conviction court observed, defense counsel were not questioned about why they did not object to the statement. "The decisions of a trial attorney as to whether to object to opposing counsel's arguments are often primarily tactical decisions." *Derek T. Payne v. State,* No. W2008-02784-CCA-R3-PC, 2010 WL 161493, at *15 (Tenn. Crim. App. at Jackson, Jan. 15,

2010). Trial counsel could have decided not to object for several valid reasons, including not wanting to emphasize the unfavorable statements. *Id.* (citing *Gregory Paul Lance v. State,* No. M2005-01675-CCA-R3-PC, 2006 WL 2380619, at *6 (Tenn. Crim. App. at Nashville, Aug. 16, 2006)). Accordingly, trial counsel must be given the opportunity to explain why they did not object to the allegedly prejudicial remarks. "Without testimony from trial counsel or some evidence indicating that [their] decision was not a tactical one, we cannot determine that trial counsel provided anything other than effective assistance of counsel." *State v. Leroy Sexton,* No. M2004-03076-CCA-R3-CD, 2007 WL 92352, at *5 (Tenn. Crim. App. at Nashville, Jan. 12, 2007). The Petitioner has not demonstrated how trial counsel's failure to object to the prosecutor's remarks was anything other than a tactical decision. Again, counsel were not asked why they did not object to this particular statement. Moreover, the jury was properly instructed on its duty under the law. Accordingly, we conclude that trial counsel were not ineffective in this regard.

The Petitioner also argues that counsel were ineffective for failing to object when the prosecutor defined "mitigation" as follows: "mitigation means to make something less serious, to take away from the severity of it;" "What is the mitigation? What makes this less serious?" The preceding analysis applies equally to the Petitioner's argument regarding these statements. Accordingly, he is not entitled to relief. To the extent he challenges the actions of the prosecutor in making these statements, the issue must be considered waived for post-conviction purposes. *See* Tenn. Code Ann. § 40-30-106(g).

8. Evidence of Prior Violent Crime

The Petitioner argues that counsel were ineffective during the resentencing hearing in 2007 by failing to object to the State's reliance on his previous conviction for first degree murder. According to the Petitioner, because he was a juvenile when he committed that crime, counsel should have moved to remove that prior conviction from the jury's consideration on cruel and unusual punishment grounds. Counsel did, in fact, prepare a pretrial motion to strike the Petitioner's previous murder conviction as an enhancement factor. Relying upon the same authority as the Petitioner does now, *Roper v. Simmons*, 543 U.S. 551 (2005), and *Thompson v. Oklahoma*, 487 U.S. 815 (1988), the motion advanced almost the identical argument the Petitioner now presents on appeal. Counsel, however, chose not to file the motion. Counsel decided not to contest the prior murder conviction because they believed it could benefit their argument to the jury that the Petitioner would never be released from prison if given a life sentence in this case. Counsel testified that "if we had thought that we could wave a magic wand and that [the prior murder conviction] wasn't coming in, we would have done that, too. But – but we did not think that could be avoided and thus, we had to embrace it."

The Petitioner now claims that counsel's proffered strategy "defies logic and sound judgment." As discussed above, though, we conclude that counsel chose a reasonable strategy during sentencing based upon an extensive investigation and after

careful consideration of all the circumstances.

> "Hindsight can always be utilized by those not in the fray so as to cast doubt on trial tactics a lawyer has used. Trial counsel's strategy will vary even among the most skilled lawyers. When that judgment exercised turns out to be wrong or even poorly advised, this fact alone cannot support a belated claim of ineffective counsel."

Hellard, 629 S.W.2d at 9 (quoting *Robinson*, 448 F.2d at 1256). "It cannot be said that incompetent representation has occurred merely because other lawyers, judging from hindsight, could have made a better choice of tactics." *Id.* This court must defer to counsel's trial strategy and tactical choices when they are informed ones based upon adequate preparation. *Id*. As noted earlier, criminal defendants are not entitled to perfect representation, only constitutionally adequate representation. *Denton*, 945 S.W.2d at 796. "Thus, the fact that a particular strategy or tactic failed or even hurt the defense does not, alone, support a claim of ineffective assistance." *Cooper*, 847 S.W.2d at 528.

The Petitioner is engaging in the sort of hindsight analysis this court must avoid. Counsel gave an objectively reasonable explanation for not pursuing the motion to strike the Petitioner's previous murder conviction from the jury's consideration. Contrary to the Petitioner's assessment, their performance in that respect cannot be considered deficient.

In *Thompson*, the United States Supreme Court held that the Eight Amendment precludes the execution of a defendant convicted of first degree murder for an offense committed when the defendant was under sixteen years old. 487 U.S. at 838. In *Roper*, the court raised the prohibitive age at the time of the offense to under eighteen years old. 543 U.S. at 574. In *State v. Davis*, the Tennessee Supreme Court was presented with the same issue raised by the Petitioner herein. 141 S.W.3d 600 (Tenn. 2004). In that case, the defendant argued that his prior conviction of first degree murder should not be used to support the prior violent felony aggravating circumstance because he was a juvenile when he committed that offense. *Id.* at 616. The defendant argued that, because he would not have been eligible for the death penalty for the prior murder conviction, it should not be used to impose the death penalty for a later offense. *Id.* Our supreme court disagreed. Recognizing the distinction with the imposition of the death penalty for a juvenile offender, the court held that "there was no constitutional or statutory restriction against the use of [the defendant's] prior conviction for first degree murder" committed while the defendant was a juvenile to support the prior violent felony aggravating circumstance. *Id.* at 618. In reaching its conclusion, the court reasoned,

> *As a constitutionally necessary first step under the Eighth Amendment*, the Supreme Court has required the states to narrow the sentencers' consideration of the death penalty to a smaller, more culpable class of

> homicide defendants. . . . A proper narrowing device . . . provides a principled way to distinguish the case in which the death penalty was imposed from the many cases in which it was not . . . , and must differentiate a death penalty case in an objective, even-handed, and substantially rational way from the many murder cases in which the death penalty may not be imposed. . . . As a result, a proper narrowing device insures that, even though some defendants who fall within the restricted class of death-eligible defendants manage to avoid the death penalty, those who receive it will be among the worst murderers—those whose crimes are particularly serious, or for which the death penalty is peculiarly appropriate.

Id. at 617 (emphasis added; omissions in original). Our supreme court later held the same in *State v. Cole*. 155 S.W.3d 885, 905 (Tenn. 2005) (rejecting argument that death penalty was arbitrarily imposed based upon prior violent felony committed while a juvenile). Addressing Cole's challenge on post-conviction that the Eighth Amendment prohibited use of his juvenile conviction in support of the prior violent felony aggravator, this court concluded that the issue had been previously determined on direct appeal. *Detrick Cole v. State*, No. W2008-02681-CCA-R3-PD, 2011 WL 1090152, at *52 (Tenn. Crim. App. at Jackson, Mar. 8, 2011).

Thus, contrary to the Petitioner's assertion, even if counsel had decided to file the motion to strike consideration of the Petitioner's juvenile conviction, the case law cited above demonstrates that it would have been denied. Accordingly, the Petitioner is unable to establish any resulting prejudice from counsel's decision. The Petitioner is not entitled to relief on this claim.

9. Residual Doubt Defense

The Petitioner argues that his attorneys at the second resentencing hearing failed to investigate adequately his guilt to determine whether a residual doubt defense was viable. While recognizing that the ability of the Petitioner to present evidence at a resentencing hearing, which may mitigate his culpability of the crime, *see State v. McKinney*, 74 S.W.3d 291 (Tenn. 2002), the post-conviction court concluded that the Petitioner failed to establish deficiency on the part of counsel for failing to pursue such a defense in mitigation:

> 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. [Lead sentencing counsel] 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 impact[ed] potential mitigation [then] the team would have investigated such issues. However, he did not recall any such concerns in petitioner's case. [Lead sentencing counsel] 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.

[Lead sentencing counsel] 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. However, after discussions with petitioner and [sentencing co-counsel], [lead sentencing counsel] 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 [sentencing co-counsel] 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 [if] 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 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.

On appeal, the main substance of the Petitioner's entire argument in support of his contention that counsel should have pursued a residual doubt defense is as follows:

Residual doubt presents a unique opportunity as a mitigating circumstance during a capital resentencing proceeding. Indeed, [the

> Petitioner's] 2007 [lead sentencing counsel] noted the advantages to presenting residual doubt as a mitigating circumstance during a resentencing hearing as opposed to presenting such evidence as a mitigating circumstance at the initial sentencing proceeding: "we're in a better position than you usually are, because, usually, you spend all, you know, four or five days saying, 'We didn't do it,' and then, right after that, you have to go beg for someone's life, right after you spit on them for four days."
>
> Moreover, multiple comprehensive surveys have found that lingering or residual doubt is by far the strongest mitigating factor for capital jurors. Following [lead sentencing counsel's] reasoning above, the jury in [the Petitioner's] 2007 resentencing proceeding would have been even more receptive to considering residual doubt as a mitigating factor as they had not been tainted by a guilt proceeding. [The Petitioner's] counsel were thus ineffective for failing to present persuasive evidence of residual doubt to his 2007 resentencing jury and he was prejudiced as a result. [Internal citation to record and footnote citing law review articles omitted].

The Petitioner offers absolutely no evidence that counsel should have presented in support of a residual doubt defense during resentencing. Upon our independent review, we fully adopt the post-conviction court's findings and conclusion on this issue. The Petitioner has failed to demonstrate how counsel's decision not to pursue a residual doubt defense in mitigation was deficient. He is not entitled to relief on this claim.

B. 1992 Trial Errors

1. *Brady* Violation

The Petitioner argues that the State's failure to disclose evidence favorable to his defense denied him due process in violation of the principles announced in *Brady v. Maryland*. The evidence cited by the Petitioner includes the identity of other alleged suspects and untested and undisclosed physical evidence recovered from the crime scene. The State asserts that the Petitioner has waived this issue by failing to raise it on direct appeal or during the subsequent resentencing hearings. The Petitioner does not explain in his reply brief how waiver does not bar consideration of this issue on post-conviction other than to state generally that counsel were ineffective for failing to raise it. Although the State asserted waiver in the post-conviction court, the post-conviction court did not comment on whether the issue had been waived but instead examined the merits of the Petitioner's *Brady* claim.

"A ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent

jurisdiction in which the ground could have been presented unless . . . [t]he failure to present the ground was the result of state action in violation of the federal or state constitution." Tenn. Code Ann. § 40-30-106(g). Waiver notwithstanding, because the Petitioner insinuates that his attorneys were ineffective for failing to raise the *Brady* issue, we will review the post-conviction court's ruling on the merits of the issue.

The post-conviction court stated as follows:

> Petitioner asserts, in August 1991, trial counsel filed a Motion for Production of Police Reports and specifically requested the *Brady* 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 [sic] 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 "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 [sic] 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 were [sic] 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, [trial co-counsel] 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. Although having no specific recollection of the discovery in this case, [trial co-counsel] 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. Again, [trial co-counsel] 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. Once again, [trial co-counsel] 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.

[Trial co-counsel] was asked about a statement in the record relating to the 1992 trial made on September 11, 1992, in which [lead trial counsel] stated in response to questions about the defense motion for discovery, "we have been provided everything the state has." In another passage from the same hearing [lead trial counsel] 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. [Trial co-counsel] has been over my file and if there is any in there she's got it. She read my file and there is not any information in my files she has not read or has not been made available for her." In response to the court's questioning, [trial co-counsel] agreed she received discovery and stated, "Mr. Harris has been very generous in

> allowing us to review his file." [Trial co-counsel] 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, [trial co-counsel] did not recall if, at the end of the hearing, Harris offered [trial co-counsel] and [lead trial counsel] 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 [lead trial counsel] and Harris.

In *Brady v. Maryland*, the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). The State's duty to disclose extends to all favorable information irrespective of whether the evidence is admissible at trial. *Id.* This duty, however, does not extend to information the defendant already possesses, or is able to obtain, or to information not in the possession of the prosecution or another governmental agency. *State v. Marshall*, 845 S.W.2d 228, 233 (Tenn. Crim. App. 1992). *Brady*, however, applies not only to evidence in the prosecution's file but also to "any favorable evidence known to others acting on the government's behalf in the case, including the police." *State v. Jackson*, 444 S.W.3d 554, 594 (Tenn. 2014) (citations omitted). In order to sustain a *Brady* claim, a defendant must establish the following:

> 1. The defendant must have requested the information (unless the evidence is obviously exculpatory, in which case the State is bound to release the information, whether requested or not);
>
> 2. The State must have suppressed the information;
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> 3. The information must have been favorable to the accused; and
>
> 4. The information must have been material.

State v. Edgin, 902 S.W.2d 387, 389 (Tenn. 1995).

"Favorable" evidence is that which is deemed to be exculpatory in nature or that which could be used to impeach the State's witnesses. *Johnson v. State*, 38 S.W.3d 52, 55-56 (Tenn. 2001). "'[E]vidence which provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendant's story, calls into question a material, although not indispensable, element of the prosecution's version of the events, or challenges the credibility of a key prosecution witness'" falls within the *Brady* disclosure requirement. *Jackson*, 444 S.W.3d at 593 (quoting *Johnson*, 38 S.W.3d at 56-

57). Evidence is deemed material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

> [The] touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

Kyles v. Whitley, 514 U.S. 419, 434 (1995) (quoting *Bagley*, 473 U.S. at 678). Materiality requires a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435. In deciding whether the evidence is material, the suppressed evidence must be "considered collectively, not item by item." *Id.* at 436.

Based upon our review of the record, we conclude that the evidence does not preponderate against the post-conviction court's finding that the State did not suppress the evidence at issue. Trial co-counsel testified that the prosecutor maintained an open-file policy and, thus, permitted defense counsel to view everything the prosecution possessed. During a pretrial hearing in 1992, the trial court granted the Petitioner's request for discovery, including any exculpatory evidence, but denied his request for statements of the State's witnesses. The prosecution stated, however, and trial co-counsel agreed, that the defense was given access to view the State's entire file. The Petitioner relies on a statement by the prosecutor that "police reports that are statements of witnesses or contain statements of witnesses, possibly, are discoverable after the witness testifies." However, the trial court ruled in accordance with Tennessee Rule of Criminal Procedure 26.2 that the prosecution was required to produce a witness' statement for examination and use only after the witness testified.

According to the State, the Petitioner has failed to demonstrate that trial co-counsel did not review the police reports during discovery, especially when the prosecutor repeatedly stated that defense counsel had reviewed their entire file. We agree. The Petitioner seems to suggest that the State violated *Brady* by not providing them with copies of the witness statements. As trial co-counsel testified during post-conviction, though, the prosecutor would say to defense counsel, "Here is the prosecutor's file. You may read it. Don't copy anything you're not supposed to have." This would include copying any witness statements. The Petitioner's statement in his brief on appeal that "[t]he record establishes that the district attorney file reviewed by defense counsel did not include the police reports and exculpatory material" is

unfounded. The parties stipulated during the evidentiary hearing that the police reports were included in the prosecutor's trial file, and the State argued in its post-hearing brief, without any rebuttal from the Petitioner, that the police reports were in the prosecution's file, which defense counsel was permitted to review in its entirety. Although the Petitioner asserts on appeal that defense counsel were provided with only seven pages of the 194-page police report, he fails to cite to the record in support of his assertion.

Moreover, the Petitioner has failed to demonstrate how the list of the other alleged suspects would have been favorable to his defense. Indeed, as trial co-counsel testified during the evidentiary hearing, defense counsel would not have conducted an investigation into those individuals, especially if the police did not look into them any further. As she stated, "[W]e would have considered suspects to follow up on those persons that the police thought of as suspects, not just people they generically mentioned." Nor has he demonstrated how any of the physical evidence listed above would have been favorable. Although the hairs were produced during post-conviction, the Petitioner apparently chose not to have them tested. As to the evidence of blood on a floor in the parking garage above where the crime occurred, the Petitioner merely speculates that it could have led to another suspect. Additionally, as the State argues, evidence of blood spots on the ceiling above the victim's car was not necessarily inconsistent with the Petitioner's own statement that he did not remember where at the scene he stabbed the victim. Regardless, trial co-counsel testified that she did not even seek to have the Petitioner's bloody clothes tested because she did not think it would help the defense. With regard to the other fingerprint evidence, the Petitioner does not explain how testing of that evidence would have been favorable to his defense when his own fingerprint was found inside the victim's car.

Finally, the Petitioner has failed to establish materiality. Instead, he merely contends that "the Court must put itself in the shoes of the jurors, not simply rely on its own judgment." Materiality, however, requires a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435. The evidence of the Petitioner's guilt, which included his own confession to the murder, was overwhelming. Accordingly, he is not entitled to relief on his *Brady* claim.

2. Prosecutorial Misconduct

The Petitioner argues that the State improperly stated during voir dire at the original trial that the mitigating evidence would have to outweigh the aggravating circumstances in order for the jury to return a life sentence. He also alleges prosecutorial misconduct during opening and closing arguments in the guilt phase of his original trial. According to the Petitioner, the prosecution made misleading, inflammatory, and improper statements which requires reversal of his conviction.

The Petitioner has waived this issue as it relates directly to claims of prosecutorial misconduct. *See* Tenn. Code Ann. § 40-30-106(g). As the State observes, the Petitioner did not present these specific challenges on direct appeal even though he had the opportunity to do so. In an apparent attempt to avoid waiver, the Petitioner also argues in his brief on appeal that trial counsel were ineffective for failing to object to this alleged prosecutorial misconduct. As the State also observes, however, the Petitioner did not include this particular claim of ineffective assistance of counsel in his grounds for relief in his original or amended petitions. Therefore, the post-conviction court did not have the opportunity to address it. Accordingly, as couched in terms of an ineffective assistance of counsel claim, the issue must also be considered waived. *Walsh v. State*, 166 S.W.3d 641, 645 (Tenn. 2005) (citing Tenn. Code Ann. § 40-30-110(f)); *see also Travis A. Bledsoe*, No. W2009-01486-CCA-R3-PC, 2010 WL 1980184, at *2 (Tenn. Crim. App. at Jackson, May 18, 2010) (discussing waiver of issue for failing to present to trial court, raising issue for first time on appeal, and changing theory of issue between trial and appellate courts). As to the underlying claims of prosecutorial misconduct, however, the post-conviction court held that the jury was properly instructed on the burden of proof required for the return of a sentence of death and that statements of counsel during argument are not to be considered evidence.

The Petitioner did not question trial co-counsel about counsels' actions during the original trial. As we noted above, "The decisions of a trial attorney as to whether to object to opposing counsel's arguments are often primarily tactical decisions." *Derek T. Payne*, No. W2008-02784-CCA-R3-PC, 2010 WL 161493, at *15. Trial counsel could have decided not to object for several valid reasons, including not wanting to emphasize the unfavorable statements. *Id.* (citing *Gregory Paul Lance*, No. M2005-01675-CCA-R3-PC, 2006 WL 2380619, at *6). Accordingly, trial counsel must be given the opportunity to explain why they did not object to the allegedly prejudicial remarks. "Without testimony from trial counsel or some evidence indicating that [their] decision was not a tactical one, we cannot determine that trial counsel provided anything other than effective assistance of counsel." *Leroy Sexton,* No. M2004-03076-CCA-R3-CD, 2007 WL 92352, at *5. Moreover, as the post-conviction court found, the jury was properly instructed on its duty under the law. *See, e.g., State v. Sexton*, 368 S.W.3d 371, 424 (Tenn. 2012) (despite prosecutor's misstatement regarding burden of proof, error was mitigated by proper jury instruction). Accordingly, despite waiver of this issue, this court concludes that the Petitioner has failed to demonstrate how trial counsel were otherwise ineffective in this regard. He is not entitled to relief on this claim.

3. Juror Misconduct

According to the Petitioner, because the jury foreperson of the original trial in this case did not reveal during voir dire that he had been arrested for public intoxication in 1989, said charge having been subsequently dismissed, the Petitioner should be granted a new trial. Following the post-conviction evidentiary hearing, the Petitioner moved to

supplement the record with several items, including the foreperson's arrest record. The State filed a response to the motion and objected to supplementation of the record with the arrest record because it was not introduced during the hearing and none of the witnesses were questioned about it. Although the Petitioner raised the issue in his supplemental amended petition for post-conviction relief, he did not question any of the witnesses about the foreperson's arrest record, and he did not otherwise seek to introduce it into evidence during the hearing. The record reflects that the motion to supplement was filed following the close of proof.

On appeal, the State argues that the evidence of the foreperson's arrest record has not been included in the record properly and, thus, was not considered by the post-conviction court during its review of this issue. Although the post-conviction court held a hearing on the motion to supplement the record, it did not issue an oral ruling at the conclusion of that hearing, and the record does not contain a copy of a written order disposing of the motion. As the State observes, though, the post-conviction court stated in its final order denying post-conviction relief that the "Petitioner offered no evidence in support of" this issue. Therefore, it would appear that the post-conviction court did not grant the motion to supplement the record with the foreperson's arrest record and, thus, did not review the arrest record. The Petitioner did not respond in his reply brief to the State's argument regarding the incomplete record. Having considered the current composition of the record, we conclude that we are prevented from considering the foreperson's arrest record as evidence. *See, e.g., Donald Keith Solomon v. State*, No. M2012-02320-CCA-R3-PC, 2013 WL 5969605, at *6 (Tenn. Crim. App. at Nashville, Nov. 7, 2013) ("However, the State points out, and we agree, that these records were not introduced as evidence or otherwise received by the post-conviction court and, thus, may not be considered by this court on appeal. *See* Tenn. R. App. P. 24(g)."). Regardless, the Petitioner has otherwise waived consideration of this issue because he could have, but did not, raise it earlier. *See* Tenn. Code Ann. § 40-30-106(g). The foreperson's 1989 arrest record would have been available to the Petitioner before his 1992 trial. Accordingly, he is not entitled to relief on this issue.

C. Post-Conviction Proceeding

1. Subpoena Process

The Petitioner argues that the State improperly collected three boxes of work product from Inquisitor, Inc., via a subpoena *duces tecum* approximately two weeks before the evidentiary hearing. Although the Petitioner acknowledges that the subpoena issued by the prosecutor was facially valid, he argues that the documents requested were not returned to the post-conviction court but instead were collected and viewed by the State without his knowledge or consent. The Petitioner, thus, argues that his due process rights were violated.

After the record was filed on appeal and at the same time the Petitioner filed his appellate brief, he moved this court to supplement the record with the return receipt of the subpoena at issue herein as well as the affidavits of Nancy Oswald, then acting director of Inquisitor, Inc., and Jessica Thompson, an employee of the Office of the Post-Conviction Defender. The two affidavits suggested that the prosecutor personally retrieved the subpoenaed files from the office of Inquisitor, Inc. In support of his motion, the Petitioner stated the following:

> In his brief, Appellant alleges that his right to due process has been violated by the actions of the State and the trial court. As proof of this violation, Appellant alleges that the State improperly obtained and reviewed, extrajudicially, the complete files of Appellant's trial investigator, Inquisitor. Some of the circumstances regarding the State's acquisition of attorney-client privileged materials unfolded during the post-hearing . . . and are in the record in the form of the transcripts. However, because the State never revealed the abuse of process by which the prosecution obtained Appellant's Inquisitor files, Appellant was unaware of the circumstances referenced herein and in the attached documents until appellate briefing had commenced.
>
> While preparing Appellant's brief, undersigned counsel contacted Inquisitor regarding the location of their original file in Mr. Odom's case. Undersigned counsel learned from Inquisitor that the Assistant District Attorney General handling the post-conviction case had subpoenaed Mr. Odom's Inquisitor files to the courthouse for the commencement of the evidentiary hearing. The version of the subpoena return receipt in the Shelby County Criminal Court Clerk's file, attached, reflects this. The recent contact with Inquisitor revealed that the circumstances of the State's acquisition of the file are contrary to the version of events documented in the clerk's file. Counsel learned from Inquisitor that—instead of following the procedure dictated by the subpoena and Rule 17 of the Tennessee Rules of Criminal Procedure—the prosecutor personally retrieved the files from Inquisitor on the same day the subpoena was served, nearly two weeks before the hearing date listed on the subpoena. Thus, it is necessary to modify and correct the record so that it "conform[s] to the truth." *See* Tennessee Rules of Appellate Procedure, Rule 24(e).
>
> Undersigned counsel was given no notice of the subpoena by the State, Inquisitor, or the clerk. As this information was discovered after the closing of proof and the filing of the record in this matter, this evidence is not yet properly included in the record before this Court.

This court granted the request to supplement the record with a copy of the return receipt of the subpoena. However, we denied the motion with regard to the two affidavits, stating, "The Appellant did not submit the affidavits of Jessica Thomson and Nancy Oswald and the attached business records to the post-conviction court for consideration. This court is appellate only and may not consider matters not presented to the post-conviction court." The Petitioner has not petitioned this court to reconsider its ruling, and we see no reason to do so at this time.

As the State argues in its brief, the Petitioner has failed to cite adequately to the record on appeal in support of his argument. *See* Tenn. Ct. Crim. App. R. 10(b). Moreover, he did not present this issue to the post-conviction court for review; thus, it must be considered waived. *Cauthern v. State*, 145 S.W.3d 571, 599 (Tenn. Crim. App. 2004). Regardless, other than argument, there is nothing in the record supporting the Petitioner's contention that the State violated his rights. As noted already, we denied his request to supplement the record with the affidavits of Ms. Thomson and Ms. Oswald.

In his reply brief, the Petitioner asks that this court review the issue for plain error. The plain error doctrine allows an appellate court to review an issue that has been waived if the issue constitutes a "plain error" that affects the substantial rights of a party and consideration of the issue is necessary to do substantial justice. *See* Tenn. R. App. P. 36(b). We consider five factors when deciding whether an error constitutes plain error: (a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is "necessary to do substantial justice." *State v. Smith,* 24 S.W.3d 274, 282 (Tenn. 2000) (citing *State v. Adkisson,* 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)). As the State observes, however, the plain error rule may not be applied in post-conviction proceedings to grounds that would otherwise be deemed waived. *See Grindstaff v. State*, 297 S.W.3d 208, 219 (Tenn. 2009). The Petitioner argues that "the State should not be permitted to subvert subpoena process with impunity, secretly obtaining documents *to which it may well be entitled*, in an attempt to try [him] by ambush." (Emphasis added.) Unavailability of plain error review notwithstanding, the Petitioner simply has failed to demonstrate how any substantial right was adversely affected as a result of the issuance of the subpoena or the retrieval of the contested documents. He is not entitled to relief on this issue.

2. Attorney-Client and Work Product Privileges

Next, the Petitioner contends that his prior trial attorneys violated his rights by improperly providing their files to the State for use in preparation of the evidentiary hearing. He relies upon the attorney-client privilege, the work product doctrine, and the attorneys' professional duty of confidentiality in support of his argument that the files are protected from disclosure without his consent. The Petitioner also argues that the

prosecution violated their ethical duties as officers of the court by failing to inform him that they were seeking to obtain his attorneys' files. The Petitioner insists that the conduct of his trial attorneys and the prosecutors in this respect "raises serious concern regarding: fundamental fairness, the appearance of impropriety, the breakdown of adversarial process, defense counsel functioning as the prosecutor, defense counsel's abandonment of their former client, and defense counsel's self-interest." The State argues that the Petitioner has waived the attorney-client privilege and work product doctrine by challenging his attorneys' representation on post-conviction. The State further argues that any violation by counsel of their ethical duties does not render the evidence inadmissible at the post-conviction hearing. During the evidentiary hearing, the post-conviction court overruled the Petitioner's objections related to questioning about, and the introduction of, these files.

We agree with the State. "If the client attacks the competency of his attorney, the [attorney-client] privilege is viewed as waived regarding the representation in issue." *Bryan v. State*, 848 S.W.2d 72, 80 (Tenn. Crim. App. 1992). As this court explained in *Bryan*:

> To the limited extent of the issue raised by the petitioner regarding his [attorney's representation], an implied waiver of privilege would be appropriate upon the state's showing that the information possessed by the trial attorney was vital to its defense in the post-conviction action. A post-conviction case is not a criminal prosecution, but is a means to address a petitioner's allegations of constitutional wrongdoing in a previous convicting or sentencing process. However, once a petitioner alleges and seeks to prove constitutional error, the state should be entitled to prove the absence of such error. Fairness in the judicial process demands no less.

Id. at 81.

Although the Petitioner mentions the "entire files" of all of his prior trial attorneys, the only item he specifically identifies in his brief is 1992 trial counsel's initial "intake interview" with the Petitioner wherein the Petitioner allegedly divulged additional crimes he committed, said he had been to the garage where the murder occurred, recalled seeing the victim drive into the garage, and said he possessed a knife at the time. The Petitioner has attacked aspects of counsel's representation during the original trial, including their failure to investigate the facts of the case adequately. In order to defend that claim, the State was allowed to question counsel about their strategy, which was based, in part, upon the Petitioner's own statements. Accordingly, the Petitioner has waived his attorney-client privilege in this respect. *See David Lynn Jordan v. State*, No. W2015-00698-CCA-R3-PD, 2016 WL 6078573, at *83 (Tenn. Crim. App. at Jackson, Oct. 14, 2016), *perm. app. denied*, (Tenn. July 19, 2017); *Christopher Kinsler v. State*, No. E2015-00862-CCA-R3-PC, 2016 WL 1072854, at *7 n.1 (Tenn. Crim. App. at

Knoxville, Mar. 17, 2016); *George T. Haynie, Jr. v. State*, No. M2009-01167-CCA-R3-PC, 2010 WL 3609162, at *8 (Tenn. Crim. App. at Nashville, Sep. 16, 2010).

We conclude that the same rationale applies equally to the Petitioner's argument under the work product doctrine. "An attorney's work product consists of those internal reports, documents, memoranda, and other materials that the attorney has prepared or collected in anticipation of trial." *Wilson v. State*, 367 S.W.3d 229, 235 (Tenn. 2012) (citing *State v. Hunter*, 764 S.W.2d 769, 770 (Tenn. Crim. App. 1988)). "'The central purpose of the work product doctrine is to protect an attorney's preparation for trial under the adversary system.'" *Id. (*quoting *Swift v. Campbell,* 159 S.W.3d 565, 572 (Tenn. Ct. App. 2004)). "The doctrine is based on an attorney's right to conduct his or her client's case with a certain degree of privacy, preventing the discovery of materials prepared by opposing counsel in anticipation of litigation and protecting from disclosure an adversary's 'mental impressions, conclusions, and legal theories of the case.'" *Id.* (quoting *Memphis Publ'g Co. v. City of Memphis,* 871 S.W.2d 681, 689 (Tenn. 1994)).

Aside from the previously mentioned "intake interview," the Petitioner does not identify any item he thinks should be protected under the doctrine. Again, however, because he challenges the representation of his trial attorneys, he has waived protection of the work product doctrine. As the record clearly reflects, the Petitioner asked his former attorneys questions surrounding the content of their files. Thus, the State was permitted to use those files to defend counsels' representation. *See Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 226 (Tenn. Ct. App. 2002) ("Litigants may not use the work product doctrine as a sword and a shield."). The Petitioner is not entitled to relief on this claim.

The Petitioner also claims within this issue that trial counsel had a continuing ethical duty not to disclose any confidential information. In support of his claim, the Petitioner cites to a Formal Ethics Opinion of the Board of Professional Responsibility of the Tennessee Supreme Court. *See* TN Eth. Op. 2013-F-156 (Tenn. Bd. Prof. Resp.), 2013 WL 9636579 (June 14, 2013). Therein, the Board was posed with the following question: "May a criminal defense lawyer alleged by a former criminal client to have rendered ineffective assistance of counsel voluntarily provide information to the prosecutor defending the claim outside the court supervised setting?" The Board concluded,

> [T]he Tennessee Rules of Professional Conduct do not strictly prohibit a former defense lawyer alleged to have rendered ineffective assistance of counsel from providing information to the prosecution prior to or outside an in-court proceeding. Exceptions to the confidentiality rules *permit, but do not require*, the former defense lawyer to make limited voluntary disclosures of information to the prosecution outside the in-court supervised proceeding.

Id. at *5 (emphasis in original). In reaching its conclusion, the Board explained:

> A former client seeking relief from a criminal conviction on the basis of ineffective assistance of counsel must establish that the former defense lawyer's performance fell below an objective standard of reasonableness and that the performance, or lack thereof, prejudiced the former client. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The prosecution is placed in the position of having to defend against the allegations of ineffective assistance by the former defense lawyer to preserve the conviction. Both the prosecution and the former defense lawyer, therefore, have an interest in defending against the claim. The question arises when the prosecution seeks or requests the former defense lawyer to provide information, their file(s) or an informal interview prior to or outside the in-court judicial proceeding. While ABA Formal Op. 10-456 stated ". . . it is highly unusual" for a trial lawyer accused of providing ineffective representation to assist the prosecution in advance of testifying in a judicial proceeding, anecdotally, it does not appear unusual in Tennessee.

Id. at *1. The Board continued:

> RPC 1.6(b)(5) provides a permissive "self-defense" exception to confidentiality. The rule, in applicable part, provides, "[a] lawyer may reveal information relating to the representation of a client *to the extent the lawyer reasonably believes necessary* . . . to respond to allegations in any proceeding concerning the lawyer's representation of the client." (emphasis added). The exception is, by its terms, limited and permits, but does not require, the former defense lawyer to disclose information relating to the former representation, but only to the "extent the lawyer reasonably believes necessary." "Reasonably believes" is an objective standard which "denotes that the lawyer believes the matter in question and that the circumstances are such that a lawyer of reasonable prudence and competence would ascertain the matter in question." RPC 1.0(j)[.] The exception gives the lawyer discretion to determine not only whether to make a disclosure but, if so, what disclosure will be made. "A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule." RPC 1.6, cmt. [14]. If a disclosure is made, the exception requires the lawyer to narrow or limit his disclosure only to information that the lawyer reasonably believes necessary to respond to the specific allegations of the petition, no greater than is necessary to accomplish of the exception's purpose. See RPC 1.6, cmts. [[13][14]. The exception does not require that the disclosures be made in an in-court supervised proceeding or setting nor with the supervision or approval of the court.

Id. at *3.

The Petitioner complains that counsel gave their *entire* files without narrowing their disclosure. Although the Board stated in its opinion that "[i]ndiscriminate, unlimited nor *carte blanche* disclosure of information relating to the former representation possessed by or in the file(s) of the former defense lawyer is not permitted," *Id.* at *1, the Petitioner fails to point to any specific item, other than the "intake interview," which should have been withheld and why. The attorneys were not questioned about their decisions to disclose their files to the State. We must presume, therefore, that they reasonably believed their actions were necessary to assist the State in its defense of their representation. Regardless, the Petitioner does not explain how any alleged violation of the Rules of Professional Conduct by his former attorneys entitles him to post-conviction relief. The opinion of the Board relied upon by the Petitioner does not authorize the relief requested. Indeed, he cites no controlling authority supporting his request for a new post-conviction proceeding based upon the actions of counsel. Tenn. Ct. Crim. App. R. 10(b). The same holds true for his claim that the prosecution violated their ethical duties by failing to inform post-conviction counsel that they were seeking the files. He is not entitled to relief on this claim.

3. Politicization of Case

The Petitioner argues that his "case has been repeatedly used as a political tool to challenge the death penalty, and the repeated politicization of this case has been to the detriment of [the Petitioner], the judiciary, due process principles, and the right to be free from cruel and unusual punishment." The Petitioner focuses on the judicial retention elections occurring after our supreme court released its opinion in the initial direct appeal affirming the finding of guilt but reversing the Petitioner's sentence of death and remanding for a new sentencing hearing. Justice Penny White did not author the opinion but joined in the majority. *Odom*, 928 S.W.2d at 33. Justice White was not retained on the bench following the retention elections in August 1996. The Petitioner suggests that her vote to overturn his death sentence led to her removal. The Petitioner also refers to retention elections in general and suggests that the behavior and rulings of the judges in this State change near election time. The Petitioner supports his argument with numerous news and law review articles and refers to comments offered by two United States Supreme Court Justices in dissenting opinions suggesting that Alabama judges succumb to political pressure during retention election years. According to the Petitioner's argument, his "case has resulted in ongoing due process violations at *every* stage of judicial review and appeal. The bell cannot be unrung, but [the Petitioner] should be granted the relief to which he was entitled at his first resentencing."

The post-conviction court held that this issue was without merit. The court found that "[t]here was little or no publicity surrounding the litigation of his post-conviction claims." We agree. To the extent the Petitioner is challenging any politicization

surrounding the earlier proceedings in this case, he has waived consideration of the issue. *See* Tenn. Code Ann. § 40-30-106(g). Moreover, the Petitioner cites no controlling legal authority authorizing the relief requested. *See* Tenn. Ct. Crim. App. R. 10(b). We agree with the State's well-observed comments on this issue:

> [T]he [P]etitioner has not demonstrated that he has, at any stage, been denied a fair hearing or review. Nor has the [P]etitioner pointed to any specific decision of this Court or our Supreme Court that was contrary to law. In fact, after the removal of Justice White, our Supreme Court reversed the [P]etitioner's second death sentence in [*State v. Odom*, 137 S.W.3d 572 (Tenn. 2004)]. It is therefore unclear how the alleged politicization has prejudiced him.

The Petitioner's argument on this novel issue relies solely on assumptions. The Petitioner has not shown any actual deviation from the course of judicial conduct mandated by the Post-Conviction Procedure Act or the Rules of Post-Conviction Procedure. Tenn. Code Ann. §§ 40-30-101 et seq.; Tenn. Sup. Ct. Rule 28. Indeed, the Petitioner never requested recusal of the judge presiding over his post-conviction proceeding. The Petitioner is not entitled to relief on this issue.

4. Destruction and/or Loss of Evidence

Next, the Petitioner argues that he "has been prejudiced by the passage of time that has elapsed between the events that underlie his conviction – a 1991 homicide for which he was convicted in 1992 – and his first opportunity to present guilt/innocence phase related claims in state post-conviction proceedings in 2014." According to his argument, the Petitioner was unable to test two pieces of evidence in post-conviction, a knife found on his person at the time of his arrest and his signed confession, because the State lost or destroyed them. The Petitioner also refers to several other pieces of evidence that he was unable to examine in post-conviction: photographs of lineup; other crime scene photographs; the seatbelt buckle containing the fingerprint matched to the Petitioner; samples and documentary evidence of blood observed at other portions of the crime scene; and samples and documentary evidence of blood recovered from above the victim's car. The Petitioner asserts generally that "[t]he State violated due process by destroying material evidence that may have exculpated [him]." The Petitioner's argument on this issue is not altogether clear, but he appears to argue that he was not afforded a full and fair evidentiary hearing because he was unable to test the evidence.

Both the United States and Tennessee Supreme Courts have held that the full scope of due process protections does not extend to post-conviction proceedings. *Pennsylvania v. Finley*, 481 U.S. 551, 554-55 (1987); *Stokes v. State*, 146 S.W.3d 56, 60 (Tenn. 2004). "'[T]he opportunity to collaterally attack constitutional violations occurring during the conviction process is not a fundamental right entitled to heightened

due process protection.'" *Stokes*, 146 S.W.3d at 60 (quoting *Burford v. State*, 845 S.W.2d 204, 207 (Tenn. 1992)). "All that due process requires in the post-conviction setting is that the defendant have 'the *opportunity* to be heard at a meaningful time and in a meaningful manner.'" *Id.* at 61 (quoting *House v. State*, 911 S.W.2d 705, 711 (Tenn. 1995)). The record reflects that the Petitioner requested to view all of the evidence in custody or control of the State. The trial court granted his request and directed the State to make available to the Petitioner the prosecution's entire file (minus attorney work product) and any items requested by the Petitioner which were contained in the Memphis Police Department's file. The post-conviction court noted that prior to the filing of the post-conviction petition in this case, the entire supreme court record, including the original exhibits from the 1992 trial, was destroyed by the historic flood that occurred in Nashville in 2010. The court also noted that prior to the 2007 resentencing hearing, the Shelby County Clerk's Office either lost or destroyed the knife purportedly used in the murder. The post-conviction court further observed, however, that most of the items contained in the destroyed supreme court record were duplicates of originals maintained by the parties, the trial court clerk, or the police department. The record reflects that the State provided the Petitioner with everything it possessed.

The post-conviction court concluded that the Petitioner was not denied due process or a fair hearing and, thus, was not entitled to post-conviction relief. The Petitioner was given the opportunity to test some of the items he requested, including two glass vacuum containers, one labeled "rectal swabs" and one labeled "vaginal swabs," and a sealed envelope labeled "hair and fiber from right hand," as well as all of the fingerprint evidence maintained by the police department. The Petitioner did not seek to test any of that evidence, however. Although the Petitioner focuses his due process argument on the missing knife and his original statement, as discussed below, the fact that those items are not available for testing does not warrant the granting of post-conviction relief. The same holds true for the other missing items referenced by the Petitioner. Based upon our review of the extensive post-conviction proceedings that occurred in this case, it is evident that the Petitioner had a fair and reasonable opportunity to be heard on his alleged grounds for relief.

In further support of his due process claim, he cites *State v. Merriman*, 410 S.W.3d 779 (Tenn. 2013), and *State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999). Those cases stand for the proposition that the loss or destruction of potentially exculpatory evidence may violate a defendant's right to a fair trial. "[T]he State's duty to preserve evidence is limited to constitutionally material evidence described as 'evidence that might be expected to play a significant role in the suspect's defense.'" *Merriman*, 410 S.W.3d at 785 (quoting *Ferguson*, 2 S.W.3d at 917)). If the State fails in its duty, a trial court must examine (1) the degree of negligence involved, (2) the significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available, and (3) the sufficiency of the other evidence used at trial to support the conviction in order to determine whether a trial conducted

without the missing or destroyed evidence would be fundamentally fair. *Id*.

As both the post-conviction court and the State observe, however, it is unclear whether *Ferguson*, which discusses remedies for the State's failure to preserve evidence prior to trial, even applies in the post-conviction context. *See Tommy Nunley v. State*, No. W2014-01776-CCA-R3-PC, 2015 WL 1650233, at *3 (Tenn. Crim. App. at Jackson, Apr. 13, 2015), *perm. app. denied*, (Tenn. Sep. 21, 2015); *Tommy Nunley v. State*, No. W2003-02940-CCA-R3-PC, 2006 WL 44380, at *6 n.3 (Tenn. Crim. App. at Jackson, Jan. 6, 2006); *Edward Thompson v. State*, No. E2003-01089-CCA-R3-PC, 2004 WL 911279, at *2 (Tenn. Crim. App. at Knoxville, Apr. 29, 2004). Addressing a similar claim regarding lost or destroyed evidence as the one advanced by the Petitioner herein, this court has previously recognized that

> the items in questions [sic] 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.

Gerald Lee Powers v. State, No. W2009-01068-CCA-R3-PD, 2012 WL 601173, at *40 (Tenn. Crim. App. at Jackson, Feb. 22, 2012). For comparison, the Post-Conviction DNA Analysis Act of 2001 provides that a trial court shall or may order DNA testing of evidence in certain cases, including those in which a defendant has been convicted of first degree murder, if the evidence is still in existence. Tenn. Code Ann. §§ 40-30-304, -305. If the evidence is determined to be missing, however, a trial court may properly dismiss the post-conviction petition requesting the testing. *See Danny Miller v. State*, No. E2011-00498-CCA-R3-PC, 2012 WL 1956526, at *3 (Tenn. Crim. App. at Knoxville, May 31, 2012). *See also Powers v. State*, 343 S.W3d 36, 48 (Tenn. 2011) (stating that the evidence must still be in existence before testing will be ordered).

Notwithstanding whether such a challenge is available on post-conviction, the post-conviction court undertook a *Ferguson* analysis and determined that the Petitioner's due process rights were not violated:

> 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* [*James Thomas*] *Jefferson v. State of Tennessee*, No. M2003-01422-CCA-R3-PC, [2005 WL 366891, at *10-11 (Tenn. Crim. App. Feb. 16, 2005)]. In *Jefferson* the evidence at issue was destroyed prior to trial. Petitioner argued trial counsel were ineffective in failing to request 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(1) (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.

. . . .

The assertion [that] 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.

. . . .

> 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.

We agree. The Petitioner confessed to his involvement in the crime. Moreover, he was given an opportunity to test other evidence possessed by the State, including biological samples, but apparently declined to do so. Though he complains about not being able to examine the original signed statement, as the State notes, he did not offer proof that an examination of a copy of the original statement, which is available, would otherwise be insufficient. *See Pylant*, 263 S.W.3d at 869. Based upon our review, we conclude that the Petitioner was not deprived of his due process right to a meaningful opportunity to present his grounds for post-conviction relief. He is not entitled to relief on this issue.

5. Admission of Video

The Petitioner argues that the post-conviction court erred by allowing the State to play a videotape during Ms. Shettles' testimony of a 1991 Memphis news broadcast in which the Petitioner discussed his recollection of the charged offense. The video was not played during any of the previous trials in this case. The post-conviction court overruled the Petitioner's objection to the admission of the video, but the court did agree that the video was not entirely relevant. On appeal, the Petitioner states that the videotape is neither relevant nor reliable and that the State failed to properly authenticate the record. He does not explain, however, how its admission affected his ability to present his case for post-conviction relief. The post-conviction court did not rely upon the video in ruling on any of the issues that have been presented on appeal. This court has reviewed the

record in light of the Petitioner's argument and concludes that this issue is without merit.

D. Challenges to the Death Sentence

1. Life without Possibility of Parole

The Petitioner contends that he has been deprived of due process of law and the right to be free from cruel and unusual punishment because he was not eligible to be sentenced to life without the possibility of parole. The Petitioner previously raised this claim. This court rejected it, and our supreme court affirmed the ruling. As the supreme court stated:

> In 1993, the General Assembly amended the capital sentencing statutes to provide for the sentence of life imprisonment without the possibility of parole. *State v. Keen,* 31 S.W.3d 196, 213 (Tenn. 2000) (citing 1993 Tenn. Pub. Acts ch. 473), *cert. denied,* 532 U.S. 907, 121 S. Ct. 1233 (2001). Prior to 1993, the only punishments available for a person convicted of first degree murder were life imprisonment and death. *See id.; State v. Cauthern,* 967 S.W.2d 726, 735 (Tenn.), *cert. denied,* 525 U.S. 967, 119 S. Ct. 414 (1998). In *Keen,* our supreme court held that neither the state nor federal constitution required that a jury be allowed to consider life without parole for offenses committed prior to July 1, 1993. 31 S.W.3d at 217 n. 7.

Odom, 137 S.W.3d at 596-97. Accordingly, this issue has been previously determined for post-conviction purposes. Tenn. Code Ann. § 40-30-106(h). The Petitioner is not entitled to relief.

2. Delay in Execution

The Petitioner argues that the Eight Amendment's prohibition against cruel and unusual punishment prevents the State from carrying out his death sentence because of the length of time between his conviction for first degree murder and the imposition of the death sentence following the second resentencing hearing. Citing *State v. Austin*, 87 S.W.3d 447 (Tenn. 2002), the post-conviction court denied relief on this ground. We agree.

In *Austin*, our supreme court considered whether a "twenty plus years delay in imposing the death penalty has eviscerated any justification for carrying out the sentence of death." 87 S.W.3d at 485. The court held:

> [W]e 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.

Id. at 486. Accordingly, given our supreme court's opinion on this issue, the Petitioner is not entitled relief.

3. Constitutionality of Tennessee's Death Penalty Statute

The Petitioner advances numerous challenges to the imposition of the death penalty. To the extent that any of these claims have not been previously determined or waived for post-conviction purposes, *see* Tennessee Code Annotated Section 40-30-106(g) and (h), they are otherwise without merit. The Petitioner asserts the following: (1) his right to equal protection was violated by a lack of statewide standards for pursuing the death penalty; (2) the death penalty impinges upon his fundamental right to life and the prohibition against cruel and unusual punishment; (3) the death sentence was imposed in an arbitrary and capricious manner because (a) no uniform standards or procedures for jury selection existed to ensure open inquiry concerning potentially prejudicial subject matter, (b) the death qualification process skewed the makeup of the jury and resulted in a guilt-prone jury, (c) he was prohibited from addressing each juror's popular misconceptions about matters relevant to sentencing, (d) he was prohibited from presenting a final closing argument in the penalty phase, (e) the jury was required to agree unanimously to a life verdict, (f) the jurors likely believed they were required to unanimously agree to the existence of mitigating circumstances because of the failure to instruct the jury on the meaning and function of mitigating circumstances and the effect of a non-unanimous verdict, and (g) the jury was not required to make the ultimate determination that death was the appropriate penalty; (4) the death penalty was inappropriate because the aggravating circumstances were not included in the indictment; (5) the proportionality review process was not conducted in a manner sufficient to satisfy due process or the "law of the land"; (6) the appellate review process was not meaningful because (a) the courts could not reweigh proof due to the absence of written findings concerning mitigating circumstances, (b) the information relied upon for comparative review was inadequate and incomplete, and (c) the methodology, in which only cases where a death sentence was upheld are reviewed, is fundamentally flawed; and (7) Tennessee's current protocol for carrying out executions is illegal under state and federal laws. Each of these exact claims have been rejected previously by the courts of this state. *See, e.g., Robert Faulkner v. State*, No. W2012-00612-CCA-R3-PD, 2014 WL 4267460, at *102-103 (Tenn. Crim. App. at Jackson, Aug. 29, 2014). The Petitioner's contention that the death penalty fails to promote any compelling state interest has also been rejected. *See State v. Holton*, 126 S.W.3d 845, 872 (Tenn. 2004).

4. Proportionality Review

The Petitioner argues that the sentence of death in this case is disproportionate given his cognitive impairments, mental illness, intoxication at the time of the offenses, and inability to premeditate the offenses. Our supreme court previously held on direct appeal that the Petitioner's death sentence was not excessive or disproportionate to the penalty imposed in similar cases. *Odom*, 336 S.W.3d at 572-73. Accordingly, the Petitioner is not entitled to relief on this claim.

III. Conclusion

For the foregoing reasons, we conclude that the post-conviction court did not err by denying post-conviction relief to the Petitioner. The Petitioner has failed to establish the existence of any error warranting relief. Thus, his cumulative error argument is also without merit. Accordingly, the judgment of the post-conviction court is affirmed.

_____

NORMA McGEE OGLE, JUDGE

Appendix B

Petitioner's Reply Brief
Before the Court of Criminal Appeals

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

RICHARD LLOYD ODOM,	)	
	)	
Appellant,	)	
	)	
vs.	)	**CCA No. W2015-01742-CCA-R3-PD**
	)	
STATE OF TENNESSEE,	)	**POST-CONVICTION**
	)	
Appellee.	)	**(CAPITAL CASE)**

REPLY BRIEF OF APPELLANT

Submitted by:

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ORAL ARGUMENT REQUESTED

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

RICHARD LLOYD ODOM,	)	
	)	
Appellant,	)	
	)	
vs.	)	CCA No. W2015-01742-CCA-R3-PD
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	Exhibits	[Trial year] Ex. [# of exhibit], [pg #]

Post-Conviction	Transcript of the evidence:	PC V[#], [pg #]
	Technical Record:	PC TR V[#], [pg #]
	Exhibits:	PC Ex. [# of exhibit], [pg #]

PC CCA Appeal	State's Brief in Response	SB at [pg#]
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The Appellant, Richard Lloyd Odom, will be referred to as: "The Appellant, Richard Odom, Mr. Odom, Richard, and Petitioner." The Appellee will be referred to as the "State."

INTRODUCTION

Richard Odom's judgment, insight, memory, reasoning, and decision-making have been impaired throughout his life due to damage to the frontal, temporal, and parietal lobes of his brain. He suffered traumatic sexual victimization from childhood on, trapped in a violent "training" center and prison in Mississippi in conditions which offered no safety, no respite—only humiliation, servitude, and pain. This evidence would have stirred sufficient compassion or understanding in the jurors so as to result in a life sentence. However, the 2007 jury that ultimately sentenced Mr. Odom to death, after deliberating for ten hours, never heard this compelling evidence, because defense counsel failed to investigate it. Counsel's failure to investigate and present the unique and devastating life circumstances Mr. Odom endured denied Mr. Odom his constitutional right to effective assistance of counsel and the jurors their right to consider mitigating evidence and afford the individual sentencing consideration mandated by the Eighth Amendment.

ARGUMENT

I. 2007 Trial Counsel Failed to Conduct an Adequate Investigation of Mr. Odom's Mental Health and Therefore Could Not Make a Strategic Decision to Limit the Presentation of Compelling and Highly Mitigating Evidence that Mr. Odom Has Suffered from Brain Damage His Entire Life.

A. 2007 Trial Counsel Conducted Minimal Investigation into Brain Damage.

The State argues that the 2007 defense team conducted a constitutionally adequate investigation of Mr. Odom's mental health. (SB at 41.) However, the State's argument disregards trial counsel's failure to investigate the numerous red flags contained within their files, which precluded them from presenting to the jury compelling evidence concerning Mr. Odom's lifelong history of brain damage. The State acknowledges counsel collected mental health records from psychologist Dr. Cox, but ignores his repeated admonitions for additional testing. (SB at 39); (PC Ex. 74.) Dr. Cox eventually arranged for Mr. Odom to have an electroencephalogram (EEG), which counsel knew had come back abnormal, but was had not been followed up on with any additional neurological assessment. (PC Ex. 54 at 70.)

The State also disregards 2007 counsel's failure to heed numerous defense experts who urged additional testing to assess brain damage. Dr. Hutson,[1] a clinical psychologist, executed a 1999 affidavit opining that psychological and neurological testing were imperative because prior testing was insufficiently comprehensive for capital sentencing purposes. (PC Ex. 17 at 1154-55.) Similarly, the 1999 defense psychiatrist stated that a neuropsychological examination was a prerequisite for completing his own assessment and necessary to meet "the standard of care in the community for a forensic examination in a capital case." *State v. Odom*, No. W2000-02301-CCA-R3-DD, *19 (Tenn. Crim. App. Oct. 15, 2002). Therefore, 2007 counsel knew of at least three experts who, in their professional judgment, determined testing necessary to accurately and thoroughly evaluate Mr. Odom's brain damage and its impact on his cognitive functioning. "Any reasonably competent attorney would have realized that pursuing such leads was necessary to making an informed choice among possible defenses." *Wiggins v. Smith,* 539 U.S. 510, 511 (2003). Instead, counsel "failed to investigate adequately to the point of ignoring the leads their limited enquiry yielded." *Rompilla v. Beard*, 545 U.S. 374, 379 (2005) (citing *Wiggins*, 539 U.S. at 510).

Rather than acknowledge the demonstrated need for further investigation, the State argues that the normal EEG, which was part of the "extensive" 1978 workup, justified 2007 counsel's decision not to pursue a brain damage defense. (SB at 52.) The State mischaracterizes the examination, which was merely a competency evaluation to determine his fitness to stand trial—not to assess brain damage, a condition capital jurors weigh as compelling mitigation. The State also claims that 2007 counsel's knowledge of the 1999 serotonin defense constituted an adequate investigation into brain damage. (SB at 40-41.) However, investigation of Mr. Odom's serotonin deficiency did not obviate the need to investigate his brain damage. The purpose of the serotonin defense was to

[1] The 1992 defense similarly failed to investigate and present proof of Mr. Odom's brain damage, instead intending to offer proof of Mr. Odom's traumatic childhood through the testimony of Dr. Hutson, which was improperly limited by the trial court and resulted in the reversal of the death sentence. *State v. Odom*, 928 S.W.2d 18 (Tenn. 1996).

address serotonin's function on Mr. Odom's central nervous system. (1999 V3, 492-93.) On the other hand, neurology and neuropsychology, two specialties instrumental in diagnosing brain damage, respectively focus on the "diseases and conditions of the brain," (PC V17 at 613), and the relationship between the brain and behavior. (PC V16 at 403.) Brain damage has been found to be a compelling mitigator, unlike serotonin deficiency, which was discredited in the 1999 resentencing proceedings and in the scientific community at large.

Finally, the State argues that Dr. Angelillo's testimony demonstrates counsel's adequate investigation. (SB at 39.) His testimony shows the opposite. Dr. Angelillo was yet another expert who urged appropriate testing. (2007 V11, 1260.) Dr. Angelillo speculated that Mr. Odom likely had brain damage, but lacking confirmation, he was unable to diagnose Mr. Odom. (*Id.* at 1260-63; PC Ex. 26.) When pressed, however, he noted that his testing indicated schizoid and antisocial personality disorder. (*Id.* at 1260.) Further, the evaluation was not pertinent to the underlying investigation of brain damage because counsel had already abandoned that avenue of investigation prior to their last-minute retention of Dr. Angelillo. (PC V14, 37-38.)

Despite the State's focus on the limited and unpersuasive mitigation introduced by counsel, the question that this Court must decide is not whether 2007 counsel exercised reasonable professional judgement in the *presentation* of their mitigation, but instead whether the *investigation* supporting counsel's decision not to introduce mitigating evidence **was itself reasonable**. *Wiggins*, 539 U.S. at 523. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms," *Strickland v. Washington,* 466 U.S. 668, 688 (1984). Trial counsel knew that Mr. Odom likely suffered from undiagnosed brain damage.

Lawyers are not trained mental health experts. *State v. Kiser*, 284 S.W.3d 227, 249-50, n.20 (Tenn. 2009). Therefore, there is "a particularly critical interrelation between expert psychiatric assistance and minimally effective assistance of counsel." *Wilcoxson v. State*, 22 S.W.3d 289, 311 (Tenn. Crim. App. 1999). Counsel failed to investigate Mr. Odom's brain damage and then, just

two months before the proceeding began, sought the assistance of a psychologist who ultimately testified that his opinion was incomplete because defense counsel failed to conduct a sufficient mental health evaluation. (PC V14 at 41; PC Ex. 5.) Trial counsel also knew that multiple experts, over the course of thirty-three years (including one of their own experts), had reiterated the necessity of conducting these evaluations due to the limited nature of the previous evaluations. Though the State argues that counsel's decision was strategic, they were in no position to make such a choice absent the investigation to support a strategic decision. *Wiggins*, 539 U.S. at 536. In sum, 2007 counsel's minimal investigation of Mr. Odom's mental health was inadequate to support any strategic decisions.

B. 2007 Trial Counsel's "Strategic" Reasons for Not Investigating Mr. Odom's Brain Damage are Post-Hoc Rationalizations Warranting No Deference.

The State argues that 2007 trial counsel had several strategic reasons for deciding not to investigate Mr. Odom's brain damage, including: 1) proof that Mr. Odom's brain damage conflicted with their theory of a lack of future dangerousness; 2) new evidence of brain damage would have conflicted with Mr. Odom's prior evaluations; 3) Mr. Odom's mental health history contained harmful diagnoses and comments; and, 4) presenting such evidence would have implicitly conceded guilt. (SB at 49-57.) These reasons do not justify counsel's deficient performance.

First, the State argues that presenting proof of brain damage would have conflicted with defense counsel's theory that Mr. Odom lacked future dangerousness. (SB at 49.) The State relies on *Cox v. Ayers*, 613 F.3d 883 (9th Cir. 2010), for the proposition that counsel's decision not to pursue a potential mitigation theory was reasonable if they could present the jury with evidence demonstrating a lack of future dangerousness. (SB at 50.) Their reliance is misplaced. In *Cox,* the defense team made repeated and unsuccessful attempts to discover more information about an allegation that Mr. Cox's mother abused him. 613 F.3d at 894-95. An investigation into Mr. Cox's gang affiliation similarly proved fruitless, so counsel decided to focus on other theories of mitigation.

Id. at 896. The Ninth Circuit found that counsel's decision was reasonable given their conscientious and *extensive* investigation into potential defenses. *Id.* at 897. In contrast, Mr. Odom's counsel failed to conduct a constitutionally adequate investigation into other theories of mitigation. Mr. Cox's attorneys assessed the red flags in their collected records and retained appropriate expert assistance. Mr. Odom's attorneys did not. Accordingly, *Cox* is distinguishable.

The State's argument assumes that proof of Mr. Odom's brain damage would have revealed a propensity for violence, which would have contradicted the stated theory of a lack of future dangerousness. This argument not only reduces Mr. Odom's brain damage to a simple statement that he is incapable of self-control, but it also ignores well-settled precedent that brain damage is indeed mitigating and requires an adequate investigation to be deemed a reasonable strategy. The proof at post-conviction actually corroborated 2007 counsel's theory that Mr. Odom had positively adjusted to prison. Counsel presented proof that Mr. Odom had only had one disciplinary write-up for a non-violent offense while on death row, an unusually low number. (2007 V12, 1422-23.) The proof also showed that Mr. Odom was interacting with other inmates in a positive way. (*Id.*, 1439.) Post-conviction testimony likewise demonstrated that Mr. Odom had positively adjusted to prison; Dr. Brawley testified that he had actually shown improvement due to the relatively stable prison environment free from stressors such as abuse, inadequate food, and lack of shelter. (PC V16, 413, 429.) Thus, Mr. Odom's brain damage, which 2007 counsel seemingly conflated with a blanket inability to control himself, did not hinder his ability to conduct himself without incident in prison.

By conflating brain damage with future dangerousness, 2007 counsel and the State both ignore well-settled precedent that brain damage is indeed mitigating and, therefore, worth investigating. Two United States Supreme Court decisions are directly on point. In *Williams v. Taylor*, the defendant had made several confessions to various crimes, which were introduced by the State during the penalty phase along with expert evidence that there was a "high probability that Williams would pose a serious continuing threat to society." 529 U.S. 362, 368 (2000). The evidence counsel

failed to present at trial showed Williams had mental retardation, brain damage, and was abused as a child. *Id.* at 370. At the habeas hearing, the State's experts retracted their previous opinions and found that Williams would present no future danger if kept in a structured environment. *Id.* at 370-71. The United States Supreme Court found that counsel failed to conduct an adequate investigation of the defendant's background. *Id.* at 396.

In *Rompilla v. Beard*, defense counsel failed to examine a file regarding Rompilla's prior conviction, which contained red flags relevant to his childhood, mental health, substance abuse, and history of incarceration, which would have corrected their misconceptions concerning his upbringing and mental capacity. 545 U.S. at 391. Post-conviction counsel's investigation found Rompilla suffered from organic brain damage, which affected several of his cognitive functions since childhood and impaired his ability to appreciate the criminality of his behavior or conform his conduct to the law. *Id.* The United States Supreme Court found that counsel's failure fell below the line of reasonable practice. *Id.* at 390.

Mr. Odom's parole eligibility does not change the analysis. *Williams* and *Rompilla* demonstrate the mitigating value of brain damage. Despite the lack of alternative sentencing options, 2007 counsel had an obligation to investigate Mr. Odom's brain damage. Counsel's choice to ignore the red flags indicating undiagnosed brain damage cannot be considered objectively reasonable. At the post-conviction hearing, counsel testified that they were concerned that the jury only had two options: death or life with the possibility of parole in just eight years. (PC V14 at 143.) Counsel, however, decided to forego investigation of Mr. Odom's brain damage before they knew that the jury would be informed that a life sentence included the possibility of parole, a decision the trial court rendered just a week before the 2007 proceeding began. (2007 V1 at 99-100.) Despite the trial court's intention to keep from the jury the fact that Mr. Odom had already served seventeen of the required twenty-five years and its admonishment that the defense team was bringing problems on themselves, counsel chose to inform the jury how long Mr. Odom had already

spent on death row as part of their theory of positive prison development. (2007 V1 at 101, 102, 110.) Counsel's reliance on Mr. Odom's parole eligibility to justify their decision not to investigate and present proof that Mr. Odom's brain damage rendered him a risk to society, (PC V14 at 133), is a post-hoc rationalization of their failure to investigate. Moreover, it is an example of counsel prioritizing their own interests over those of their client as is the wholesale disclosure of Mr. Odom's file to the district attorney before his post-conviction hearing. Next, the State argues that 2007 counsel properly decided to limit proof regarding Mr. Odom's brain damage because it "would have conflicted with prior evaluations of the petitioner." (SB at 52.) This argument incorrectly assumes that the prior evaluations were sufficient to determine the extent of Mr. Odom's brain damage. Indeed, Mr. Odom did not have the proper testing to evaluate his brain damage prior to the post-conviction proceedings. Until an evaluation is conducted, there can be no diagnosis and, thus, no conflict.[2]

Mr. Odom's prior examinations did not include an actual evaluation for brain damage, but repeatedly red flagged its likely existence. The proof offered at post-conviction did not conflict with these prior evaluations. Rather, it confirmed that Mr. Odom suffers from actual brain damage, as opposed to the "potential brain damage" offered in 2007. (SB at 23, 39, 59, 62, 63.) To the extent the State supports this argument by relying upon the EEG administered in 1978, which showed "no organicity or neurological deficit," (PC Ex. 13 at 8), Mr. Odom replies that the EEG is not designed to evaluate brain damage. As Dr. Merikangas explained during the post-conviction proceeding, an EEG is not a reliable predictor of brain damage because it only measures brain

[2] In *Hamblin v. Mitchell*, the Sixth Circuit addressed the district court's finding that defense counsel made a strategic decision in not further investigating their client's mental condition because the investigation might not reveal anything. 354 F.3d 482 (6th Cir. 2003). The appellate court determined that "counsel was obligated to find out the facts, not to guess or assume or suppose some facts may be adverse." *Id.* at 492. "Because counsel does not know what an investigation will reveal is no reason not to conduct the investigation." *Id.* The Sixth Circuit was unequivocal that "this complete failure to investigate simply cannot be condoned and constitutes a clear constitutional violation." *Id.*

function at the time of testing. (PC V17 at 669-70.) If a neurologist who has conducted thousands of neurologic examinations and read thousands of EEGs, (PC V17 at 617), finds no value in a normal EEG result, neither should the State—especially when it had the opportunity to present evidence to the contrary and did not.

The State also argues that the 2007 defense team wanted to shield the jury from hearing about Mr. Odom's harmful prior diagnoses of various personality disorders. (SB at 54.) However, the expert testimony at the post-conviction hearing actually rebutted this evidence. Dr. Merikangas opined that the previous diagnoses of personality disorder were invalid because they are preempted by Mr. Odom's brain damage. (PC V17 at 684.) Thus, further investigation would have allowed counsel to eradicate Mr. Odom's antisocial personality disorder diagnosis, which counsel found to be damaging to a defense of lack of future dangerousness. (PC V14 at 137, 140.) Coincidently, counsel's assertion that they did not assess Mr. Odom's brain damage for fear of discovering "ammunition for the State," (PC V15 at 231-32), falls flat considering that their own expert testified that Mr. Odom exhibited symptoms of schizoid and antisocial personality disorders—the very evidence they allegedly were trying to avoid. (2007 Vol. 11 at 1262-63; PC Ex. 26.)

In addition, the State argues that the 2007 defense team devised a plan with Dr. Angelillo to minimize these harmful prior diagnoses and support a broader theme that the system had failed Mr. Odom. (SB at 55.) However, counsel testified that they had retained Dr. Angelillo as a fail-safe, to see if they had missed anything, (PC V14, 39)—not to investigate brain damage. They had already made the purported strategic decision to ignore Mr. Odom's brain damage. Thus, Dr. Angelillo's limited testimony was not strategic, but instead counsel's attempt to salvage a witness whose effectiveness was stymied by their own inattention.

The State erroneously argues that *Davidson v. State*, 453 S.W.3d 386 (Tenn. 2014), does not apply to Mr. Odom's case because 2007 trial counsel made a "reasonable and fully informed decision about presenting" evidence of Mr. Odom's brain damage to a jury. (SB at 44-45.) This

argument presumes that trial counsel conducted an adequate investigation, which is not the case. Given the wealth of information known to and ignored by counsel—expert recommendations to seek additional testing, consistent discrepancies in the limited earlier testing indicative of brain impairment, and numerous documents in Mr. Odom's mental health history alluding to the probability of brain damage—it is impossible that counsel's "investigation" was adequate; it was certainly not reasonable. *Id.* at 404.

A closer look at *Davidson* shows that his case and Mr. Odom's are uniquely similar. Indeed, the Tennessee Supreme Court could have been describing Mr. Odom's case when it acknowledged "defense counsel in a capital case possessed evidence that their client suffered from lifelong cognitive impairments and personality disorders and that he was predisposed to sexual violence." *Davidson*, 453 S.W.3d at 389. Mr. Davidson's trial counsel had records that "painted a dim picture" of his mental health and social history. *Id.* at 390. These records are not unlike the records in Mr. Odom's case, which noted his potential brain damage. Mr. Davidson's records also included "warnings from those who had tried and failed to rehabilitate Mr. Davidson that he would be a serious danger to the public following his release from prison." *Id.* This statement is essentially identical to Dr. Cox's opinion that Mr. Odom was "untreatable, unmanageable, and a ***liability to society for the rest of his natural life.***" (PC Ex. 12 at 28 (emphasis added).) Mr. Davidson spent time at a mental health facility, where he was found competent to stand trial and capable of premeditation, despite the facility acknowledging his mental illness and troubled social history. 453 S.W.3d at 390. This is similar to Dr. Tipton's report that acknowledged Mr. Odom's problems with controlling his temper, difficulty with reading and writing, and "post-traumatic minimal brain damage superimposed," (PC Ex. 74 at 26.)

The cases differ with respect to the teams' approach to neuropsychological testing, but the results are the same—no testing was done until post-conviction. Mr. Davidson's counsel retained a neuropsychologist, but she was not given adequate time to properly evaluate him. 453 S.W.3d at

390. Mr. Odom's defense team never retained a neuropsychologist. Instead, it hired a psychologist who was not qualified to assess existence of cognitive impairments.

The *Davidson* Court was clear that the question there, as the question here must be, is "whether the undisputed facts concerning trial counsel's pursuit and presentation of mitigation evidence show that counsel's performance was constitutionally deficient and prejudicial." *Id.* at 392. It also instructed that a determination of the reasonableness of counsel's decision not to investigate or present mitigation evidence requires a "probing and fact-specific analysis," which considers the "totality of the mitigation evidence." *Id.* at 395.

In assessing counsel's performance, the Tennessee Supreme Court considered the fact that counsel were aware that Mr. Davidson had undergone testing that yielded an abnormal result, *id.* at 396, much like Mr. Odom's IQ testing showed a discrepancy in his scores which was indicative of brain damage. (PC V16 at 424-25; PC Ex. 47 at 3.) Like Mr. Odom, Mr. Davidson received an abnormal EEG score. 453 S.W.3d at 396. The records in counsel's possession also indicated that, like Mr. Odom, Mr. Davidson's brain damage caused a defect in his judgment. *Id.* at 396; (PC Ex. 54 at 21).

Mr. Davidson's records, like Mr. Odom's, also contained adverse information. He reported that raping girls was amongst his favorite activities, and admitted to raping over one hundred girls and women in his life. *Id.* at 396-97. He fantasized about raping a woman he knew, and discussed his "plans to continue assaulting women when he [got] out." *Id.* at 397. This information bears resemblance to Mr. Odom's statement that he might have committed the prior murder "for the joy of it," and that "he had no feelings, no sorrow about it now," although one could easily argue the evidence in Mr. Davidson's records is even more damaging. (PC Ex. 13; PC V14 at 137.)[3] Just

[3] It bears mentioning that this statement was not admitted until the post-conviction proceedings. The State only obtained access to the statement through its improper procurement of Mr. Odom's attorney files, which is discussed on page 74 of Petitioner's Brief. Therefore, it is unlikely this statement would have been presented to the jury.

like Mr. Davidson, Mr. Odom was deemed antisocial, (PC Ex. 12 at 35), and found to have impaired impulse control. (PC Ex. 50; PC V17 at 660.)

As in Mr. Odom's case, post-conviction counsel retained expert assistance and discovered that Mr. Davidson suffered from frontal lobe brain damage. *Davidson*, *supra* at 400. He also suffered from deficits in reasoning, abstraction, and executive function. *Id.* at 401. Mr. Davidson's brain damage, like Mr. Odom's, manifests in "significant impairments in his capacities to plan, consider, or evaluate and effectively carry out behavior." *Compare id. and* (PC Ex. 47 at 3.) ("[T]hey can have a significant impact on judgment, impulsivity and decision making.") In finding defense counsel's investigation deficient, the Court noted that counsel possessed "several decades worth" of records drawing their client's mental health into question. *Davidson*, *supra* at 403. Mr. Odom's counsel had similar records. The Court commented that the records indicated problems with judgment, insight, and impulse control. *Id.* Mr. Odom's records contain similar indications. The Court also recognized that counsel would have been able to present evidence of brain damage, instead of just personality disorder, if counsel had conducted an adequate investigation. *Id.* at 403. The same is true of Mr. Odom's case.

Even in the face of the adverse information contained in Mr. Davidson's files, the Court found deficient counsel's failure to inform the jury about Mr. Davidson's brain damage during the penalty phase. *Id.* at 404. ("[C]ounsel held in their hands compelling evidence that Mr. Davidson has a broken brain and a tragic past.") Furthermore, the Court dismissed two of the arguments the State now advances. The Court determined that a "mental health mitigation case and a residual doubt argument are not exclusive." *Id.* at 405 (citing *Rompilla*, 545 U.S. at 378, 386, 389-90). In other words, counsel was still obligated to make a reasonable and fully-informed decision about presenting compelling evidence of mental defects because "mental illness can render a defendant less morally blameworthy." *Id.* at 405. Additionally, the Court addressed the State's argument that, for various reasons, proof of Mr. Odom's brain damage would have hurt more than it could have

helped. The Court was unpersuaded by this argument because the jury was already aware of Mr. Davidson's violent history. *Id.* This would have also been the case with Mr. Odom. Thus, the mental health evidence held "little potential to demean [Mr. Davidson or Mr. Odom] in the jury's eyes. However, it had great potential to help explain the invisible mental machinations that made him behave this way." *Id.*

Ultimately, counsel made decisions prior to adequate investigation to abandon one theory in pursuit of another. The fact that pursuing a strategy based on Mr. Odom's trauma, even if executed haphazardly, was a reasonable decision does not excuse counsel's failure to investigate his brain damage. Had counsel done so, they would have found evidence that constituted compelling mitigation on its own, and also strengthened the other theories of their case. The similarities between *Davidson* and Mr. Odom's case are striking. Just as Mr. Davidson's counsel performed deficiently by failing to present brain damage, *id.*, Mr. Odom's trial counsel were likewise deficient.

C. Mr. Odom Was Prejudiced By Counsel's Failure to Investigate and Resulting Inability to Present His Brain Damage.

The State alleges that Mr. Odom has to demonstrate prejudice relying on the factors enumerated in *Goad v. State*, 938 S.W.2d 363, 371 (Tenn. 1996) (SB at 58). With respect to the first *Goad* factor regarding the nature and extent of the mitigating evidence that was available but not presented, the State argues proof of Mr. Odom's brain damage was "not highly probative of his moral culpability," because neither of the post-conviction experts could relate Mr. Odom's brain damage to the instant offense. (SB at 58.) The State's argument both imposes the non-existent requirement that proof have a nexus to the underlying offense and underestimates the value of the proof demonstrating Mr. Odom's brain damage.

"The sentencer in capital cases must be permitted to consider any relevant mitigating factor." *Davidson*, *supra* at 394 (citing *Porter*, 558 U.S. at 42). This is particularly true in weighing states such as Tennessee, where jurors must choose death if the aggravating circumstances outweigh the

mitigation beyond a reasonable doubt. T.C.A. §39-13-204(g)(1). Evidence need not be specifically related to the defendant's culpability for the crime in order to be compelling mitigation. *Skipper v. South Carolina,* 476 U.S. 1, 5 (1986) (citing *Lockett v. Ohio,* 438 U.S. 586, 604 (1978)). Still, the proof of Mr. Odom's brain damage, especially considered in tandem with the proof of his horrific sexual victimization in prison, was particularly potent because it explained why his attempt to rob the victim escalated into a killing. As established in Mr. Odom's statement, the victim's use of the word "son" triggered an adverse response. *State v. Odom*, 928 S.W.2d 18, 35 (Tenn. 1996). Proof of Mr. Odom's hellish existence at Parchman, especially contextualizing the term "son" in the prison rape context, would have explained why Mr. Odom reacted to the word. Proof that Mr. Odom's brain damage impairs his judgment, insight, and decision making, (PC Ex. 54 at 21; PC Ex. 47 at 3), would have allowed the jury to understand why he was unable to stifle that response or judge the consequences of his actions.

Additionally, the State's argument that proof of Mr. Odom's impulse control and anger issues would have made him seem too high a risk to keep alive, (SB at 59), oversimplifies Mr. Odom's condition, mischaracterizes the testimony of Dr. Brawley and Dr. Merikangas, and ignores proof that Mr. Odom is capable of controlling himself in a structured environment. The State extrapolates from the testimony that brain damage *impairs* Mr. Odom's impulse control, by interpreting these statements as dispositive conclusions that self-control is *impossible* for Mr. Odom. (SB at 59.) The doctors make no such statements. Indeed, Mr. Odom's unusually low number of disciplinary write-ups in prison, (2007 V12, 1422), support the testimony at post-conviction that Mr. Odom is capable of controlling his impulses in a structured environment. (PC V16, 429.)

Lastly, the record demonstrates that the 2007 jury was interested in evidence related to Mr. Odom's brain damage. They submitted questions asking for more information regarding the psychological reports, including organic pathology and cortical functioning. (2007 V12 at 1363.) Dr. Angelillo, who was not a neurologist and had only conducted personality testing, was recalled to

the stand to provide clarification and gave a vague response that organic pathology meant that something was wrong in the brain. (*Id.* at 1476.) He also explained that cortical functioning relates to the cortex, where higher level functioning occurs. (*Id.* at 1479.) Furthermore, a juror also illustrated the persuasiveness of congenital brain problems by asking in open court whether personality disorders were something a person was born with or whether they developed based on life experiences. (*Id.* at 1475.) Dr. Angelillo responded that they are mostly attributed to the latter. (*Id.*) Thus, counsel's failure to investigate and present evidence of Mr. Odom's brain damage denied the jury of the very proof they were actively seeking.

With respect to the second *Goad* factor, whether substantially similar evidence was presented during the trial, the State argues that Dr. Angelillo told the jury about Mr. Odom's "potential brain damage." (SB at 59.) Again, the State overstates the evidence—telling the jury that Mr. Odom had potentially mitigating brain damage is *not* the same as telling the jury that Mr. Odom has actually mitigating brain damage. Indeed, Dr. Angelillo cited the lack of information about Mr. Odom's brain damage as one of the reasons he had difficulty specifically diagnosing Mr. Odom. (2007 V11, 1259.) Thus, the 2007 jury heard proof that Mr. Odom might have brain damage, or might not have brain damage, from an expert who testified that he was unable to complete an appropriate evaluation of Mr. Odom without additional testing.

The State further argues that the 2007 defense team was not ineffective for failing to present evidence substantially similar to the unsuccessful 1999 serotonin defense, relying on the 199 evidence demonstrating Mr. Odom's problems with impulse control. (SB at 60.) (claiming "the explanation of their effect on the petitioner were very similar.") Once again, the State's argument rests upon a fundamental mischaracterization of the evidence and ignores the fact that the serotonin defense did not involve any analysis of the structure or function of Mr. Odom's brain. *State v. Odom*, 137 S.W.3d 572, 578-9 (Tenn. 2004). This argument similarly disregards 1999 counsel's intention to present the testimony of psychiatrist Dr. Kenner, who refused to render an opinion

without necessary neuropsychological testing. *State v. Odom*, 2002 WL 31322532, *19. As a result, the only mental health evidence introduced in 1999 was the limited testimony of molecular neurobiologist Dr. Steven Rossby, which was subsequently discredited when Dr. Rossby conceded that there were no studies or literature supporting his opinion, a fact reiterated by Dr. Hutson on rebuttal. *State v. Odom*, 137 S.W.3d at 579; (1999 V16, 1232-93.)

In contrast, the proof offered at post-conviction demonstrated Mr. Odom's congenital and acquired brain damage affects more than just his impulse control. (PC V17 at 682.) The images of his brain show a significant loss of brain tissue in multiple areas, which results in decreased brain functioning. (*Id.* at 638-39.) Mr. Odom's damaged brain affects his decision-making, and how his brain actually communicates with his muscles. (*Id.* at 628.) His thinking, emotion, and ability to plan are impaired as well. (*Id.*) Despite the State's attempt to equate the serotonin defense with brain damage, the proof demonstrates that Mr. Odom's brain damage was not substantially similar to the evidence that was presented to the jury in 1999.

In addition, the fact that counsel presented *some* mitigation evidence does not foreclose an inquiry into whether a facially deficient investigation might have prejudiced the defendant. *Sears*, 561 U.S. at 955. Indeed, deficiency *and* prejudice have been found in cases in which "counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase." *Id.* at 954. A mitigation theory rooted in Mr. Odom's protracted history of trauma is compelling in and of itself. However, the reasonableness of that theory is a separate question from the reasonableness of their failure to investigate Mr. Odom's brain damage. Brain damage would have strengthened their mitigation theory of trauma—Mr. Odom's brain was damaged from birth, and that this damage was made worse because of the trauma he endured. The trauma, particularly that sustained in Parchman, also would have been more potent because it is being inflicted upon a brain-damaged man who is biologically incapable of coping. Further investigation and presentation of brain damage could have only helped their purported strategy.

The United States Supreme Court offered guidance for addressing a failure to investigate where counsel had still presented some mitigation evidence in *Rompilla*. In that case, defense counsel presented testimony from five members of the defendant's family, which the jury found relatively persuasive. 545 U.S. at 378. Still, the Court found that counsel's failure to investigate the court file on Rompilla's prior conviction was deficient. *Id.* at 383. In assessing whether that failure was prejudicial, the *Rompilla* Court determined that effective counsel would have discovered mitigation leads illustrating the weaknesses in their chosen defense and led to the discovery of Rompilla's brain damage. *Id.* at 390-92. The Court held that the undiscovered "mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [Rompilla's] culpability," and "was sufficient to undermine confidence in the outcome." *Id.* at 393 (citing *Wiggins* and *Strickland*, respectively). Mr. Odom's case is no different.

The State claims "the actual evidence presented in mitigation for Rompilla was far less extensive than this case." (SB at 62.) Again, the State exaggerates the evidence. The 2007 proof suggested that Mr. Odom suffered from potential brain damage that was undefined, without discussion of its actual nature or impact. In contrast, post-conviction proof consisted of uncontroverted, objective proof that Mr. Odom indeed suffers from brain damage, with specific information about how that brain damage mars his daily life and the role that it played in the offense.

With respect to the third *Goad* factor, whether there was such strong evidence of aggravating factors that the mitigating evidence would not have affected the jury's determination, the State argues that the aggravating factors in this case were undisputed and based upon irrefutable evidence, while the proof of his brain damage is weak. (SB at 60.) However, "substantial deficits in mental cognition and reasoning—*i.e.*, 'problems with planning, sequencing and impulse control,'" are highly significant mitigating circumstances. *Sears*, 561 U.S. at 949. In *Williams v. Taylor*, the Court found prejudicial counsel's failure to introduce proof that he was "borderline mentally retarded," abused as a child, and committed to the custody of social services while his parents were

incarcerated for perpetrating said abuse. 529 U.S. at 395-96. The Court noted the strength of the State's case in aggravation based on future dangerousness, and determined that proof that Williams turned himself in and behaved well in prison "may not have overcome a finding of future dangerousness," but "the graphic description of Williams's childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability." *Id.* at 398. Furthermore, the Court advised that seemingly adverse evidence could perceived as mitigating by a jury aware of his mental deficits could interpret his behavior as a "compulsive reaction rather than the product of cold-blooded premeditation." *Id.*

The State fails to distinguish *Davidson.* (SB at 63.) In *Davidson*, the Tennessee Supreme Court found prejudicial counsel's failure to present compelling mitigation evidence of brain damage. 453 S.W.3d at 406 ("[E]vidence illuminating Mr. Davidson's mental health issues could have colored the jury's consideration of the aggravating factors in a way that favored Mr. Davidson.") Ultimately, the Court could not "escape the fact that 'the available mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [Mr. Davidson's] moral culpability.'" *Id.* at 405 (citing *Wiggins*, 539 U.S. at 538).

The *Davidson* Court's prejudice analysis is no less instructive in Mr. Odom's case simply because Mr. Davidson faced different sentencing options than Mr. Odom. First, persuasive evidence presented in 2007 demonstrated the Mr. Odom is unlikely to ever be released from prison. Second, "[t]he after-effect of a jury's verdict, such as parole availability, is not a proper instruction or consideration for the jury during deliberations." *State v. Bush*, 942 S.W.2d 489, 503 (Tenn. 1997). Third, the judge in Mr. Odom's 2007 resentencing proceeding instructed the jury that they could not consider parole as an aggravating circumstance, (2007 V12 at 1376, 1378, 1379, 1380), and juries are presumed to follow the trial court's instructions. *State v. Banks*, 271 S.W.3d 90, 134 (Tenn. 2008). Thus, the State has failed to rebut the presumption that parole eligibility did not a factor into their sentencing determination. Nor does it factor into a legal prejudice analysis. In

addition, the *Davidson* Court made no distinction between life and life without the possibility of parole in assessing the prejudicial effect of counsel's deficient performance. 453 S.W.3d at 405 (noting only that the newly-discovered mitigating evidence may have "led to a sentence less than death."). The Court found that at least one juror could have found Mr. Davidson undeserving of death, without considering the alternative sentencing options. This Court should do the same. Reliance on Mr. Odom's parole eligibility to excuse prejudice would essentially punish Mr. Odom for his unconstitutional 1992 and 1999 proceedings. *State v. Odom*, 928 S.W.2d 18, 33 (Tenn. 1996); *State v. Odom*, 137 S.W.3d 572, 587 (Tenn. 2004). Mr. Odom's constitutional protections are not lessened because he had to be resentenced, through no fault of his own, where the only choices were death and parole eligibility in just eight years.

An effective advocate would have presented to the jurors proof that Mr. Odom was born with a broken brain, and that Mr. Odom's brain damage permeated every aspect of his life—from his inability to cope with his history of horrific abuse, to his difficulty controlling his responses to adverse situations outside of a regimented environment free of stressors. "To hold in this case that serious consideration of such evidence could not have change[d] the calculation the jury previously made when weighing the aggravating and mitigating circumstances of the murder...is to ignore reality." *Id.*

II. 2007 Trial Counsel Failed to Conduct an Adequate Investigation of Mr. Odom's History of Unrelenting Sexual Victimization, and Thus Could Only Superficially Present What Should Have Been Compelling Mitigating Evidence.

A. 2007 Trial Counsel Conducted Minimal Investigation of the Sexual Abuse Mr. Odom Suffered in Prison.

The State argues 1) that trial counsel conducted an adequate investigation into Mr. Odom's history of sexual abuse in prison, but decided to limit the presentation of such evidence to avoid opening the door to proof of a prior escape, and 2) that the proof produced at post-conviction was merely cumulative. (SB at 63.) The State's argument fails to take into account the unreasonableness of counsel's decision to limit investigation and minimizes the evidence presented in post-

conviction.

Counsel's presentation of evidence of sexual abuse at the 2007 sentencing hearing was minimal. An adequate investigation into Mr. Odom's time in Parchman would have led counsel to witnesses such as Betsy Chandler, Robert Tubwell, and Frank Nobles who could present compellingly detailed evidence of the chronic sexual, physical, and psychological torture endured by Mr. Odom, who arrived at Parchman as a physically small and intensely traumatized seventeen-year-old boy. Defense counsel also would have been able to educate the jury about the slave-like existence of those thrust into prison rape culture by necessity, particularly the terminology associated with it, which was directly relevant to understanding the instant offense. Instead, counsel limited their investigation and presentation of highly compelling evidence of Mr. Odom's sexual trauma to "rudimentary knowledge...from a narrow set of sources." *Wiggins*, 593 U.S. at 524-25. Other witnesses—like Mr. Nobles, Ms. Chandler, and Mr. Tubwell—were "easily within counsel's reach," and would have been discovered by trial counsel, if they had only bothered to look. *Wallace v. Stewart*, 184 F.3d 1112, 1116 (9th Cir. 1999). Although 2007 trial counsel presented "*some* mitigation evidence during [the] penalty phase," it was "not the significant mitigation evidence a constitutionally adequate investigation would have uncovered." *Sears*, 561 U.S. at 946.

Counsel did not have to resort to superhuman measures to uncover Mr. Odom's sexual abuse in prison. In fact, and as the State notes, the post-conviction investigation was based in part on following up on the investigation done by Inquisitor. (SB at 66; PC V16, 464-65.) Post-conviction counsel merely "went through those documents [obtained by Inquisitor] and picked out persons of interest to talk to." (PC V16, 464-65.) Had 2007 counsel likewise pursued the leads uncovered by Inquisitor, they would have found the cogent evidence presented in post-conviction. Their "failure to pursue avenues of readily available information" was deficient. *Doe v. Ayers*, 782 F.3d 425, 435 (9th Cir. 2015) ((citing *Frierson v. Woodford*, 463 F.3d 982, 989 (9th Cir. 2006) (citing *Rompilla v. Beard*, 545 U.S. 374, 381-83 (2005))).

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Again, the State ignores counsel's failure to follow the leads from their limited investigation, deems counsel's investigation adequate, and instead focuses on their presentation. However, the State's proposition that counsel purposely limited proof of Mr. Odom's sexual abuse in Parchman to avoid proof of a prior escape being introduced, (SB at 63), is illogical. Counsel's reliance on Mr. Odom's life sentence in Mississippi to show that he would spend the rest of his life in prison opened the door to proof of the escape. (PC V14, 27, 117-18; PC. V15, 206-07, 219-21.) More importantly, counsel had not conducted an investigation sufficient to support such a decision. Without thoroughly investigating and presenting evidence of his tortured existence in Parchman, counsel could only gloss over the horrors of Mr. Odom's sexual abuse. Indeed, they would have wanted to introduce this evidence; any conclusion that their failure to do so was strategic is an improper "*post hoc* rationalization of counsel's conduct." *Wiggins*, 539 U.S. at 526-27.

B. Mr. Odom Was Prejudiced by Counsel's Failure and Resulting Inability to Present Compelling Evidence of His Harrowing History of Sexual Victimization.

When a defendant has a history of sexual or violent crimes, counsel must present evidence that contextualizes that history and humanizes the defendant to allow the jury to accurately gauge his moral culpability. *Davidson*, 453 S.W.3d at 405. Evidence of being raped in prison is compelling mitigation. *Doe*, 782 F.3d at 455 ("Prison rape is the most devastating thing you can experience."). Had the jury heard evidence about what happened to Mr. Odom in "that man-made hell," it would have "stirred sufficient compassion or understanding in the jury to result in a life sentence." *Id.* Thus, counsel's failure to present this evidence in a meaningful way prejudiced Mr. Odom. Coincidentally, the State makes no claim that the evidence presented at the post-conviction hearing was unmoving, but instead dismisses it as cumulative. (SB at 71.)

The proof adduced at the post-conviction hearing showed that Mr. Odom was a weak inmate, never standing up for himself. (PC V15, 367; PC V16, 394.) These inmates were targeted for sexual assault, beatings, and theft of property. (PC V15, 356-57.) In an effort to protect himself,

Mr. Odom sought the protection of a stronger inmate in exchange for "sexual favors, washing clothes, fetching things..." (PC V15, 386.) These arrangements were far from consensual; weaker inmates like Mr. Odom "didn't have much of a choice." (PC V15, 360.) He was forced to either submit to the will and whim of his protector, risk being "physically brutalized" for disobeying his protector, or lose his protection altogether, making him vulnerable to "open season" attacks by any and every one. (PC V16, 391.)

Inmates like Mr. Odom, who were forced to perform sexual favors or other tasks in exchange for protection from widespread attacks were called "sons," a term that relegated its bearer to a piece of property "completely shunned" by everyone else but his protector, known as a "daddy." (PC V17 at 577.) Being labeled as a son was a widely-known prison insult, informing others that its bearer was subservient to the wishes of his daddy. (PC V16, 389-90.) Mr. Odom was beholden to at least two daddies while at Parchman. The first, an inmate named Clem, openly and often referred to Mr. Odom as his son. (PC V16, 389-90.) Clem was "a cold blooded type of person," with a predilection for "stabbing you or whatever he have [sic] to do if you cross him in any way." (*Id.* at 388.) He exercised total control over Mr. Odom, forcing him to obey or risk being "stabbed, beat, or killed." (*Id.* at 389-90.) The other, an inmate named Psycho, was the leader of the Aryan Brotherhood. (PC V17 at 576.) Psycho's penchant for raping boys was common knowledge. (*Id.*)

Mr. Odom was also subjected to the humiliation of being forced to wear women's clothing, makeup, and wigs smuggled in by guards to "dress the part" for his daddy. (PC V17 at 585-86.) Despite the sexual violence, physical abuse, and widespread humiliation, this was Mr. Odom's "only way to survive." (PC V17 at 581.) During one period of vulnerability, Mr. Odom was attacked by four inmates attempting to gang rape him. (PC V17 at 581.) Mr. Odom suffered injuries to his head and body, and was sent to the hospital for medical attention. (*Id.* at 582.) He also suffered other medical problems related to his sexual abuse in prison, including hemorrhoids, rashes, and syphilis. (*Id.* at 587.)

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Had counsel conducted an adequate investigation and presented what they discovered, they would have been able to draw a direct connection between his history of abuse, his brain damage, and the instant offense. The jury would have understood that the word "son," triggered an adverse reaction in Mr. Odom because it was indicative of sexual servitude, degradation, oppression, and fear given his history of sexual victimization. Proof of Mr. Odom's brain damage would have explained why he was biologically unable to suppress that response or appropriately judge the consequences of his terrible actions. Understanding how the instant offense happened may have convinced at least one of them to vote for a sentence less than death.

The State overstates the extent of the 2007 testimony concerning Richard's brutal victimization at Parchman. While the State purports Ms. Shettles told the jury Mr. Odom had been raped in prison, (SB at 65), she actually testified she never discussed sexual assault in prison with him at all, she merely interpreted one of Mr. Odom's prison records referencing homosexual activity to be an *indication* of his sexual victimization. (2007 V11 at 1240.) With respect to Jimmy Odom, Jr.'s testimony, he never stated that his brothers were "held down and raped" in the bathrooms." (SB at 65.) This statement was a generalized comment about the harsh environment in Parchman, not a direct observation of his brothers' treatment in prison. Jimmy Odom, Jr. was an enforcer for the Aryan Brotherhood and thus, worked under Psycho, a man known to be sexually abusive to Mr. Odom. (PC V17 at 579.) He did not reveal his relation to or associate with Richard and Larry Odom because they were "punked out." (*Id.* at 580.) Doing so would have ruined his reputation, and he would rather die or kill his brothers than to lose his position as enforcer and share their fate. (*Id.*) His testimony that his brothers were being sexually abused, (2007 V12, 1404), was similarly vague and unmoving, unlike the testimony at the post-conviction hearing, which applied directly to Mr. Odom and offered the jury much more compelling and visceral evidence about Mr. Odom's existence amidst unrelenting abuse in prison. Counsel likewise failed to elicit testimony from Dr. Angelillo about how the trauma Mr. Odom suffered in prison might have affected him.

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Moreover, the evidence of Mr. Odom's abuse in prison was complimentary to the proof of his brain damage. Mr. Odom suffered several instances of head trauma and memory loss while incarcerated. (PC V17 541, 581.) Dr. Merikangas explained that the brain damage he found was likely caused, in part, by Mr. Odom's head trauma and that the torture he endured there was also detrimental. (*Id.* at 662, 683-84.) It is likely that at least one juror would have been moved by proof that someone so biologically damaged had been subjected to such anguish, which is a far cry from Dr. Angelillo's generalized testimony that Mr. Odom's history had a profound effect on his development. *State v. Odom,* 336 S.W.3d 541, 553 (Tenn. 2011). Mr. Odom was therefore prejudiced by trial counsel's failure to investigate and present testimony of this nature.

Despite the State's argument that the post-conviction proof is cumulative, (SB at 67,) the fact that some of the testimony overlapped does not automatically deem it inadmissible or otherwise unworthy of consideration. *See State v. Haase*, No. M2012-02244-CCA-R3-CD, 2013 WL 6732908, *16 (Tenn. Crim. App. 2013). This Court has found that even proof of a somewhat cumulative nature can be considered if it has probative value. *Id.* Certainly, Mr. Odom's traumatic history of sexual and physical abuse, the details of which exacerbated his brain damage and was directly related to the instant offense, has more than probative value; it is the type of compelling mitigation that would persuade at least one juror to vote for a sentence less than death.

Finally, the State argues that extensive proof of Mr. Odom's horrific sexual abuse in prison may have been, "at best, a double-edged sword." (SB at 70-71.) The argument relies solely on a "staff request" from 1980 that indicated that Mr. Odom had been accused of rape and was being moved to a different unit because he was a "problem inmate." (PC V15, 348-50.) However, the State fails to consider Ms. Chandler's testimony that unsubstantiated allegations, like the staff request, were commonly lodged to manipulate the system and obtain different lodging without being sent to protective custody. (*Id.* at 352.) Still, Ms. Chandler was unequivocal that Mr. Odom was targeted to be the victim of sexual assault. (*Id.* at 345.)

"This is not a case in which the new evidence 'would barely have altered the sentencing profile.'" *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (quoting *Strickland* 466 U.S. at 700). An effective defense could have contextualized Mr. Odom's contentious history. *Davidson,* 453 S.W.3d at 405 (citing *Sears*, 561 U.S. at 951). "[T]he available mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of [Mr. Odom's] moral culpability" and led to a sentence less than death. *Id.* at 405. This is especially true in light of the fact that the 2007 jury deliberated over the scant proof provided by 2007 counsel for over ten hours. The compelling, detailed evidence of Mr. Odom's sexual slavery could very well have made a difference to one juror. Thus, Mr. Odom was prejudiced by counsel's failures and is entitled to sentencing relief.

The proof at post-conviction vividly illustrated the violent nature of the prison, which forced Mr. Odom to become a "son," a name that relegated its bearer to a piece of property shunned by all but the possessor. It contextualized his response to the victim's use of the word "son." This evidence would have helped his jury to better understand the offense—especially in light of his appalling history of abuse and lifelong brain damage. *Sears*, 561 U.S. at 951.

III. The State's Argument That Mr. Odom Has Waived Claims is Erroneous.

Throughout its Brief, the State argues that Mr. Odom has waived several of his post-conviction claims because the claims were not raised on direct appeal. (SB 84, 91, 100, 115, 126, 171.) To the extent that the State argues these claims were not, but could have been previously raised on direct appeal, Mr. Odom has alleged that appellate counsel was ineffective in his failure to do so. (PB at 111, 118.)

The State also argues that Mr. Odom's claim that his right to a fair and impartial jury was violated due to jury foreperson Scobey's failure to disclose his prior arrest has been waived because he failed to raise it "before." (SB at 167.) To the extent the State is claiming that the issue should have been raised in the trial court, the Tennessee Supreme Court has considered claims regarding jury composition on the merits, although said claim was not raised in the motion for new

trial. *See State v. Hugueley*, 185 S.W.3d 356, 377 (Tenn. 2006) ("Nevertheless, because this is a capital case, and because this issue involves Defendant's fundamental constitutional rights to a fair and impartial jury, we choose to address [the claim] on the merits."). To the extent that the State is arguing that Mr. Odom did not raise the claim in post-conviction, the State is incorrect. Mr. Odom's claim regarding juror Scobey is included on page 17 of Mr. Odom's Supplemental Amended Petition for Post-Conviction Relief.

Lastly, the State argues Mr. Odom's claim regarding the State's abuse of subpoena power is waived because it was not presented to the post-conviction court and no citations to the record were made. (SB at 92.) This Court may exercise its discretion and consider this claim as plain error to "prevent manifest injustice" and to "do substantial justice." *State v. Adkisson*, 889 S.W.2d 626, 636, 638-39 (Tenn. Crim. App. 1994). With Mr. Odom's life hanging in the balance, the State should not be permitted to subvert subpoena process with impunity, secretly obtaining documents to which it may well be unentitled, in an attempt to try Mr. Odom by ambush. Further, Mr. Odom requests this Court to review any other claims that the State has alleged are waived under this rule.

CONCLUSION

Mr. Odom is a man who was born with a broken brain, subjected to vicious cycles of abuse—by his biological family, adoptive family, step-family, the juvenile detention structure, and the penal system. He was biologically incapable of coping. He was forsaken by the system. The jury was entitled to hear this compelling mitigation when making the grave decision about whether Mr. Odom should live or die. The reliability of Mr. Odom's conviction and sentence is questionable at best, when the failures by all parties, particularly those charged with humanizing him, worked together to draw an inaccurate picture of Mr. Odom as the worst of the worst. Indeed, counsel continues to abandon Mr. Odom through their words, such as their post-hoc rationalizations that preponderate against the record, and their deeds, including giving carte blanche disclosure of Mr. Odom's files to the district attorney. (PB at 74.)

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For the reasons noted in Mr. Odom's Brief and this Reply, Mr. Odom respectfully requests this Court to reverse the decision of the post-conviction court; grant his Petition for Post-Conviction Relief; set aside his conviction and sentence for first-degree murder; and grant any other appropriate relief. Further, absent a finding of reversible error in Mr. Odom's guilt and/or sentencing proceedings, this Court should: 1) remand Mr. Odom's case for a new post-conviction proceeding; 2) order the record to be sealed; 3) order the Office of the Shelby County District Attorney General to destroy Mr. Odom's improperly obtained records; and 4) issue an order appointing a new post-conviction judge, and a special prosecutor.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the forgoing has been mailed via U.S. Mail, postage pre-paid, to the Office of the State Attorney General, Zachary T. Hinkle, Assistant Attorney General, Criminal Justice Division, P.O. Box 20207, Nashville, Tennessee, 37202–0207 on this the 16th day of December, 2016.

Kertyssa Smalls

Kertyssa Smalls

Appendix C

Petitioner's Application for Permission to Appeal to the Tennessee Supreme Court (Appendices Excluded)

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

RICHARD LLOYD ODOM	)	W2015-01742-SC-R11-PD
	)	**CCA No. ~~W2017-01027-CCA-R28-PD~~**
Appellant,	)	
	)	**Shelby County Case No. 91-07049**
v.	)	
	)	
STATE OF TENNESSEE	)	
	)	**CAPITAL CASE**
Appellee.	)	**POST-CONVICTION**

ON APPLICATION FOR PERMISSION TO APPEAL
FROM THE JUDGMENT OF THE COURT OF CRIMINAL APPEALS

APPLICATION OF APPELLANT RICHARD LLOYD ODOM FOR PERMISSION TO APPEAL

Submitted by:

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Counsel for Appellant Richard Lloyd Odom

IF GRANTED, ORAL ARGUMENT REQUESTED

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

RICHARD LLOYD ODOM	)	
	)	**CCA No. W2017-01027-CCA-R28-PD**
Appellant,	)	
	)	**Shelby County Case No. 91-07049**
v.	)	
	)	
STATE OF TENNESSEE	)	
	)	**CAPITAL CASE**
Appellee.	)	**POST-CONVICTION**

ON APPLICATION FOR PERMISSION TO APPEAL
FROM THE JUDGMENT OF THE COURT OF CRIMINAL APPEALS

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IF GRANTED, ORAL ARGUMENT REQUESTED

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PROCEDURAL INTRODUCTION

Designations to the materials in this case shall be as follows:

Trials: 1992; 1999; 2007	Transcript of the evidence:	[Trial year] Vol. [#], [pg #]
	Technical Record	[Trial year] TR Vol. [#], [pg #]
	Exhibits	[Trial year] Ex. [# of exhibit], [pg #]

Post-Conviction	Transcript of the evidence:	PC Vol. [#], [pg #]
	Technical Record:	PC TR Vol. [#], [pg #]
	Exhibits:	PC Ex. [# of exhibit], [pg #]

The Appellant, Richard Lloyd Odom, will be referred to as: "The Appellant;" "Richard Odom;" "Mr. Odom;" "Richard;" and "Petitioner." The Appellee will be referred to as the "State."

JURISDICTIONAL STATEMENT

Appellant, Richard Lloyd Odom, pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure, seeks discretionary review of the judgment of the Court of Criminal Appeals in this capital post-conviction case. In a judgment and opinion entered on October 20, 2017, the Court of Criminal Appeals affirmed the post-conviction court's denial of Mr. Odom's claims for post-conviction relief. *Odom v. State*, 2017 WL 4764908, No. W2015–01742–CCA–R3–PD (Tenn. Crim. App., Jackson, Oct. 20, 2017) (copy attached as Appendix 1). A petition for rehearing was filed on November 14, 2017, and denied on December 7, 2017.

This Application has been filed within the time prescribed by Rule 11(b) of the Tennessee Rules of Appellate Procedure. Mr. Odom requests this Court to grant this application and review all issues adjudicated by the lower court, as well as Mr. Odom's Motion to Supplement the Record, which the post-conviction court failed to adjudicate.

PROCEDURAL HISTORY

1. Sentencing and Direct Appeals

Richard Odom was convicted of first degree murder and sentenced to death for the murder of Mina Ethel Johnson on May 10, 1991. *State v. Odom*, No. 02C01–9305–CR–00080, 1994 WL 568433 (Tenn. Crim. App. Oct. 19, 1994). The Court of Criminal Appeals reversed the death sentence and ordered a second sentencing hearing. *Id.* This Court affirmed the lower court's ruling, found additional grounds for sentencing relief, and remanded for a new sentencing trial. *State v. Odom*, 928 S.W.2d 18 (Tenn. 1996).

On September 28, 1999, a second jury sentenced Mr. Odom to death. The Court of Criminal Appeals affirmed the sentence of death, but this Court remanded the case for a third sentencing trial. *State v. Odom*, 137 S.W.3d 572 (Tenn. 2004). This second remand for

resentencing was Mr. Odom's last chance to have trial counsel develop and present to the jury complete and compelling evidence in mitigation of Mr. Odom's brain damage and sexual trauma.

At the third sentencing hearing in 2007, the State alleged two statutorily-defined aggravating circumstances: (1) that Petitioner had been previously found guilty of a felony involving the use of violence to the person; and (2) that the murder was committed while Petitioner was engaged in the commission of a robbery. *See* Tenn. Code Ann. § 39–13–204(i)(2), (7). The jury returned a verdict of death. This Court affirmed the death sentence on March 3, 2011. *State v. Odom*, 336 S.W.3d 541 (Tenn. 2011). Mr. Odom filed a Petition for Writ of Certiorari in the United States Supreme Court, which was denied on October 11, 2011.

2. Post-Conviction Proceedings

Mr. Odom filed a Pro Se Petition for Post-Conviction Relief on January 24, 2012. The post-conviction trial court appointed the Office of the Post-Conviction Defender on March 28, 2012. Mr. Odom filed amended and supplemental petitions on June 1, 2012, and March 4, 2014, respectively. An evidentiary hearing was held April 28–30, 2014. The post-conviction court issued its Order denying relief on July 28, 2015. PC TR Vol. 5, 713–815. The post-conviction court found no deficiency or prejudice for any claims relating to ineffective assistance of counsel regarding investigation, development, and presentation of mitigation. The Court of Criminal Appeals also found no deficiencies in counsel's performance and no prejudice to Mr. Odom. *Odom v. State*, 2017 WL 4764908.

FACTS RELEVANT TO THE QUESTIONS PRESENTED

From the time he was in utero through his childhood and adolescence, Richard Odom was submerged in chronic toxic stress. His habitual state of trauma intensified with each physical

beating, sexual battery, emotional cruelty, physical deprivation, and parental abandonment. Richard was not given a single experience in his childhood or adolescence that could have counterbalanced the onslaught of assaults on his developing brain. Although the information was readily available, 2007 trial counsel failed to educate the capital sentencing jury about the extent of Richard's truly adverse childhood experiences, his brain damage, and the critical link between his trauma and brain deficits. Counsel also failed to explain to the jury why his severe trauma and resulting brain damage ruled out any diagnosis of personality disorder, including prior misdiagnoses of antisocial personality disorder, and how it mitigated the homicide he committed as a juvenile.

A. Richard Odom's childhood is defined by abuse and neglect

Richard Odom's tragic story began before he was born. His biological father, Richard "Norman" Smith, had a volatile relationship with his own mother and was physically abused by his stepfather. PC Vol. 16, 468–70. Norman's mother, Richard's biological grandmother, committed suicide when Norman was sixteen years old. *Id.*, 470. Richard's paternal uncle and paternal cousin also committed suicide. *Id.*, 471.

Richard's biological mother, Holly Taylor, was abused by her father and fled her childhood home with her mother to escape his violence. PC Vol. 16, 473. Her father was later imprisoned for raping another one of his daughters and then killed by fellow inmates. *Id.*, 474. Holly's mother remarried. For years, Holly's stepfather molested Holly and her sister. Holly escaped his sexual abuse by marrying Richard's father Norman when she was still a minor. *Id.*, 475–77, 480.

Holly drank and partied throughout her pregnancies with Richard and his two sisters. *Id.*, 482. Family members recognized Holly was "spiraling out of control," and, in later years, she

acknowledged that, "After every child I got crazier." *Id.*, 483. During the first couple of years of Richard's life, it was commonplace for Holly to deprive her children of food and force them to go to bed hungry. *Id.*, 490. She left them in the yard or locked them in a closet when she wanted to leave the house to go party. *Id.* She abandoned her family several times, sometimes leaving the state for weeks at a time. PC Vol. 16, 483, 485. When Holly walked out on her family for the last time, she left all three of her young children locked out of the house in the yard in the rain. *Id.*, 490–91. Richard was just one and a half years old. *Id.*

Richard's father Norman was cruel to him and never believed Richard was his son. *Id.*, 486. Richard, still under two years of age, had cigarette burns all over his arms. *Id.*, 495. Norman eventually abandoned Richard and his two sisters at neighbor Gladys McClendon's home, a place frequented by drifters in the area. *Id.*, 493, 507. When Norman abandoned his children with Gladys, who he barely knew, he left them with no diapers, clothes, or shoes. *Id.*, 495.

Richard and his sisters were then split up and adopted out to different relatives of Gladys, although no one actually wanted Richard and his eldest sister Cathy. *Id.*, 496. At last, Richard was adopted by Shirley and Jimmy Odom, a couple in their early twenties who already had three small children. *Id.*, 501–05. Jimmy was an alcoholic recently released from prison. *Id.*, 503. Their relationship was volatile and sometimes physically abusive. *Id.*, 504. When Shirley and Jimmy divorced, two years after adopting Richard, neither wanted the children. Four-year-old Richard and his adoptive brothers, Jimmy Jr. and Larry, were sent to stay with Gladys McClendon. *Id.*, 505.

Gladys was extremely cruel to Richard, bullying and physically abusing him. *Id.*, 509. Once, Gladys beat Richard so badly another adult in the home stepped in to stop her violence. *Id.*, 509–10. She also humiliated Richard by forcing him to dress like a girl. *Id.*, 520. Although

Shirley did not want her sons or Richard, once she married Marvin Bruce, Gladys insisted that Shirley take them back. *Id.*, 512.

While living with his adoptive mother Shirley and adoptive stepfather Marvin Bruce, Richard was subjected to horrific abuse. Neighbors heard constant yelling and the police were summoned on several occasions. The children were seen out at night unsupervised. *Id.*, 516. Marvin drank excessively and became meaner as his intoxication increased. *Id.*, 511. He beat Richard using both the strap and buckle of his belt, as well as sticks. *Id.*, 514. During Marvin's brutal attacks on Richard, Shirley's other children ran outside, thankful that they weren't the victim, but they could still hear Richard screaming. *Id.*, 515. Eventually, Richard became "numb to it and would not say a word. He wouldn't cry. It was just a part of life." *Id.* He was five years old. *Id.*

Marvin and Shirley also inflicted sexual and verbal abuse upon Richard. *Id.*, 519. Shirley humiliated Richard by making him pull down his pants and smacking his genitals with a ruler in front of others. *Id.*, 518. Marvin molested the boys, both in the bath and in their room at night. *Id.* During their beatings, Marvin and Shirley would refer to Richard as a "sissy," "bastard," "little girl," and "little bitch." *Id.*, 519–20. Richard wet his bed regularly until the age of nine. *Id.*, 517. After each bed-wetting, Marvin beat Richard and humiliated him by hanging his urine-soaked sheets outside for the neighbors to see. *Id.*

When Richard and his adoptive siblings weren't beaten, berated, or molested, they were neglected and ignored. They did not bathe or brush their teeth and were always dirty. *Id.*, 517. The house was filthy and often had no food. *Id.*, 516. Other times, food was withheld from Richard as a form of punishment. *Id.*, 520–21. When he complained about being hungry, he was fed hot sauce. *Id.*, 521.

To escape his horrific home life, Richard began living on the streets, sleeping in abandoned sheds or on the streets. *Id.*, 525. Because he lacked the skills and the resources to take care of himself, he began prostituting himself to men at the Greyhound bus station. *Id.*, 522. The men paid Richard five dollars to perform oral sex; he needed the money to survive for that day. *Id.*, 522. He was eleven years old. *Id.*

B. Richard Odom is further victimized through the juvenile system

During adolescence, Richard was arrested several times for being a runaway. PC Vol. 16, 526, 528. When he was processed into the juvenile system, it was noted that he was dirty and malnourished. *Id.*, 527. In 1974, when Richard was 14 years old, an attorney representing Richard requested a psychological evaluation. PC Ex. 54, 20. The evaluation found evidence of mild neurological deficiency and "dull-normal intellect and potentials." PC Ex. 54, 21. Intellectual assessment yielded a full scale score of 81 and revealed a startling thirty-three-point discrepancy between his verbal and performance IQ scores. *Id.* Dr. Daniel Cox, the psychologist conducting the examination, found that Richard's "judgment, insight, recent and remote memory, and abstract reasoning were all impaired." *Id.* He noted that Richard was unable to remember his own middle name and was poorly groomed, unsocialized, and untrained in basic hygiene. *Id.*, 20. Additionally, Richard appeared only marginally adjusted to his emotional and personal situation. *Id.*, 21. Dr. Cox recommended "extensive educational, vocational, social, emotional, and personal training," because Richard was such a "sick" youngster. *Id.*

Eventually, a dirty and malnourished Richard was referred to welfare services where he was deemed incorrigible and sent to a juvenile facility. PC Vol. 16, 526–27. Columbia Training School (CTS) was a juvenile lockdown facility in which children lived in one room and slept on

bunks, and the people charged with supervising them, some of whom did not even have high school educations, slept elsewhere. *Id.*, 533.

The facility had a reputation for violence. PC Vol. 17, 557–58. Richard, who was attacked almost immediately after his arrival by a more seasoned resident who threw him against the wall, held him by his throat, and beat him. *Id.*, 560. On one occasion he sustained injuries so severe he required an x-ray of his skull. *Id.*, 562. Richard fled CTS several times to escape his assaulters. *Id.* When Richard was delivered back to CTS staff they beat him for attempting escape and placed him in an isolated cell in which he slept on a concrete pad, had no window to the outside, and received his food through a slit in the door. PC Vol. 16, 530. Richard spent at least 120 days in such conditions while at CTS. *Id.*, 531.

Richard's step-brothers Jimmy Jr. and Larry were also held at CTS during Richard's time there. Jimmy Jr. and Larry occasionally received visits, mail, and commissary money from Jimmy Sr., Shirley, and Marvin. *Id.* 532–33. Richard, though aware of what his brothers received, never received a visit, a letter, nor a cent from any of them. *Id.*

Richard was also placed in Oakley Training Center, another juvenile lockdown facility. PC Vol. 17, 558. As punishment, kids were stripped of their clothes, hog tied, and thrown into holding cells. *Id.* They had no contact with anyone on the outside. *Id.*

In 1976, Dr. Cox, the same psychologist who had evaluated Richard two years earlier, wrote a letter to one of Mr. Odom's counselors, declaring Mr. Odom was "brain-damaged, incorrigible, antisocial, unable to respond to usual social contingency programming, and a 'loser' with respect to probable adult adjustments." PC Ex. 54, 68. Dr. Cox opined that it was unlikely Mr. Odom would live a usual life span, not only because of multiple suicide attempts, but also because Mr. Odom was incapable of exercising "judgment which is conducive to a healthy

longevity." *Id.* Dr. Cox expressed concern that Mr. Odom had not undergone the "expensive[1] medical/psychiatric/psychological observation and analysis or evaluation," which he had recommended in 1974. *Id.* Dr. Cox stated he had arranged a neurological examination with an electroencephalogram ("EEG") at the University of Mississippi Medical School. *Id.*

Dr. Ancel Tipton, Jr., administered Mr. Odom's neurological examination. He reported that Mr. Odom's EEG was abnormal, likely the result of multiple instances of head trauma with loss of consciousness. PC Ex. 54, 70. He noted that Mr. Odom was "moderately mentally retarded grossly," and that despite Mr. Odom only being fifteen, he had already developed problems with alcohol abuse. *Id.* Richard was paroled from CTS approximately three months later. *Id.*, 132.

In 1978, after he was arrested and charged with homicide, Richard underwent a competency evaluation that included an intelligence assessment at Mississippi State Hospital. Mr. Odom's IQ scores again showed a statistically significant discrepancy between his verbal and performance scores; in this case, a twenty-eight-point difference. PC Ex. 47, 3. This asymmetry was suggestive of "longstanding organicity which should have been fully evaluated." *Id.*

Richard's entire adolescence was a rotation of violent and abusive settings, whether he was living with family members, in juvenile facilities, or on the streets. When each of these environments inevitably proved unbearable, an escape from any one of them only led Richard to the same circumstances of physical and sexual assaults, neglect, emotional torment, and infliction of pain.

[1] This appears to be a typo as the context suggests Dr. Cox meant "extensive."

C. Richard Odom enters sexual slavery

Richard Odom was sent to Parchman, a notoriously violent prison in Mississippi, after he was convicted of a homicide he committed when he was seventeen. 2007 Vol. 11, 1239. Despite his youth and slight stature, 5'8" and 145 pounds, Richard was housed with the older, hardened, and notoriously violent inmates. *Id.*

The induction into the sordid hierarchy of prison rape was swift, with inmates being "sized up" almost immediately upon entry into the prison. PC Vol. 17, 575. The complicated system of involuntary sexual servitude came complete with its own terminology:

> 1) Daddy—An inmate who provides protection to a weaker inmate, sometimes known as a "son," in exchange for sexual favors or other chores. *Id.*, 577. The daddy dictates the actions of the son, including forcing the inmate to service other inmates sexually to satisfy the debts of the daddy or forcing the son to wear women's clothing and makeup. *Id.*, 585–86; PC Vol. 16, 386–87.
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> 2) Son—A weaker inmate who seeks the protection of a stronger inmate known as a daddy. PC Vol. 17, 577. Sons are the property of their daddy and are thus shunned by the rest of the inmates who are prohibited from looking at or talking to the son. *Id.* Also referred to as a "gal boy." *Id.* Being known as a son is an insult. PC Vol. 16, 389–90.
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> 3) Punk—Usually, a former son or gal boy who has lost his daddy. PC Vol. 17, 577. Punks are fair game for other inmates to assault.

Id.

These relationships were by no means consensual. PC Vol. 15, 360. Weaker inmates were given little choice to protect themselves from sexual assault, beatings, and theft of their property. PC Vol. 15, 356–57. They were being raped in bathrooms, although the guards were aware of the assaults. 2007 Vol. 12, 1405. "They take the weak ones, the young ones, and make them their bitches...." *Id.*, 1404.

Targeted boys and young men who were unable to fight, like Richard, often ended up being sexually assaulted and "owned" by the stronger inmate. PC Vol. 15, 358. However, this

relationship did not provide absolute safety, as Richard was coerced into submitting to the wishes of his protector or risk being physically assaulted. PC Vol. 16, 396. Losing the protection of one's daddy was worse than the abuse endured in the arrangement because it meant the weaker inmate was vulnerable to "open season" attacks by other inmates. *Id.*, 391.

Richard was forced into these "relationships" by at least two inmates. *Id.*, 388. One of these inmates had a reputation for physical violence, being described as "a cold-blooded type of person," who was capable "of stabbing you or whatever he have [sic] to do if you cross him in any way." *Id.*, 389. The other inmate, known for his sexually violent nature, had a double-bed mattress in his cell so he could "bring these boys in and rape them on a regular basis." PC Vol. 17, 576.

Richard eventually lost the façade of protection altogether, making him a vulnerable target. *Id.*, 578. He was brutally attacked by four inmates in an attempt to rape him, resulting in him being sent to the hospital for his injuries. *Id.*, 581. He also suffered from other medical problems related to his abuse, including hemorrhoids, rashes, and syphilis. *Id.*, 587. Others reported seeing him with scratches, cuts, and knots, and walking on crutches. PC Vol. 16, 391.

Richard's relatives could not protect him either. Despite having his two adoptive brothers incarcerated with him at Parchman, this did not save him from the assaults. PC Vol. 17, 579. Larry, the younger of the brothers, was subject to the same treatment as Richard and fought him for the protection of the same man. *Id.* Jimmy Jr., who had aligned himself with the Aryan Brotherhood, was aware that his brothers were being tormented but chose to ignore them to protect himself from a similar fate. *Id.* He would rather kill Richard than lose his position in the Aryan Brotherhood and be victimized. *Id.*

Richard also sought protective custody, although this was a misnomer as inmates sheltered here were pegged as being weak once they were returned to general population. PC Vol. 15, 346. This label was hard to shed, but many of the inmates who sought protective custody like Richard were less concerned about being labeled weak indefinitely and were more concerned about their immediate safety. *Id.*, 347. Many of them thought, "I've got to get out of there, away from these people, or I'm going to die." *Id.*

D. Richard Odom is brain-damaged

Dr. Tora Brawley, a neuropsychologist, administered neurological testing and testified at the post-conviction hearing. Dr. Brawley testified that Richard Odom obtained a clinically and statistically significant 15–point split between his verbal comprehension and perceptual reasoning scores on the Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV). PC Vol. 16, 412–13. Dr. Brawley found that Richard suffers from "significant asymmetries in several areas of cognition to include memory, intellectual and motor functioning." PC Ex. 47, 3. Her report further stated:

> These asymmetries correspond with findings noted on previous evaluation conducted in 1974 and 1978, and are definitely suggestive of longstanding organicity which should have been fully evaluated. There were also noted deficits in frontal lobe functioning and mental flexibility. These deficits have most probably adversely affected Mr. Odom's behavior and personality over his life span, as they can have a significant impact on judgment, impulsivity and decision making.

Id. Richard obtained the same score discrepancies on the Wechsler Memory Scale. *Id.* Dr. Brawley explained that the various testing that she administered showed that, in addition to the asymmetries, Richard suffers from temporal lobe deficits, as well as frontal lobe deficits. PC Vol. 16, 421–22. Dr. Brawley testified that the frontal lobe is responsible for "abstract reasoning of your mental flexibility. It's your filter. It's what keeps you from saying and doing things that you shouldn't do." *Id.*, 422.

This brain damage was confirmed by Dr. James Merikangas, a neurologist and forensic psychiatrist retained by post-conviction counsel. Dr. Merikangas concluded:

> The [neuro]images indicate that Mr. Odom has abnormalities of the brain matter in his temporal lobes, frontal lobes, corpus callosum, and parietal lobes. Further, the extent of asymmetry in Mr. Odom's temporal lobe is quite unusual; as evidenced by the MRI, there is a clear abnormality of Mr. Odom's right temporal lobe. There are white matter hyperintensities in the left frontal lobe consistent with previous brain trauma. The PET scan showed decreased metabolism in both of Mr. Odom's temporal lobes. . . . Mr. Odom therefore is an individual born with a damaged brain who went on to have his childhood marred by further brain injury and by environmental/family factors known to have an adverse effect on child development. . . . The temporal lobe is particularly vulnerable to traumatic brain injury; and is an area implicated in disorders of volition and control. We see abnormalities of the temporal lobe with both the structural and functional brain images. The frontal lobe is involved in executive functions including judgment, impulse control, and decision-making as well, and we see abnormalities there.

PC Ex. 50.

During his testimony at the post-conviction hearing, Dr. Merikangas further expounded on the importance of the frontal lobe, citing its responsibility for the ability to plan and have executive function. PC Vol. 17, 626. He also stated that, not only does the frontal lobe help us to determine the proper course of action, it also helps us to execute said action by sending signals to the muscles; thus, the frontal lobe controls behavior. *Id.*, 627. Dr. Merikangas testified that his testing revealed damage to Richard's frontal lobe, thus impairing his thinking, emotion, and the ability to plan and carry out decisions. *Id.*, 628.

Dr. Merikangas also explained that the images of Richard Odom's brain corroborated the findings of the physical portion of the neurological examination. Richard has significant loss of brain tissue in various areas, which results in decreased brain functioning. *Id.*, 638–39. The images also showed that Richard has an enlarged third ventricle, an indication of the loss of cognitive functioning. *Id.*, 639. Additionally, Richard's brain bears white spots on his frontal lobe, which Dr. Merikangas explained were analogous to scars from previous brain injury and

directly affect brain functions due to the damaged cells' inability to properly communicate with other cells in the brain. *Id.*, 641. The PET scan showed that Richard also suffers from impaired functioning of the temporal lobes, which are "very important for the control of behavior, memory and are frequently abnormal in people with sexual problems." *Id.*, 651. Additionally, the PET scan showed asymmetry in Richard's frontal and parietal lobes. *Id.*, 654. Finally, Dr. Merikangas opined that the damage to Richard's corpus callosum, which is instrumental in allowing right brain/left brain communication and cognition, was likely incurred in utero as such damage is commonly correlated to fetal alcohol effects, as suggested by Richard's mother's regular consumption of alcohol while she was pregnant with him. *Id.*, 644–45.

Both Drs. Merikangas and Brawley noted that the prior mental health experts involved in the case had only administered personality testing, instead of conducting evaluations to assess for brain damage. PC Vol. 16, 426. Therefore, they questioned the accuracy of the previous diagnoses of schizotypal and antisocial personality disorder because medical causation, such as brain damage, had not been ruled out prior to making said diagnoses. *Id.*, 425–27. Ultimately, Dr. Merikangas determined the previous diagnoses of personality disorders to be invalid because they are preempted by Mr. Odom's brain damage according to the Diagnostic and Statistical Manual of the American Psychiatric Association (DSM). PC Vol. 17, 684. All five versions of the DSM require that a mental health professional look for a medical or organic cause before diagnosing a personality disorder; a personality disorder diagnosis is improper if the symptoms are caused by a brain disease or disorder, as in Richard Odom's case. PC Vol. 18, 746.

E. Richard Odom's capital sentencing jury was deprived of evidence of his brain damage

The impairments verified by Drs. Brawley and Merikangas and presented at Richard Odom's post-conviction proceedings existed at the time of his 2007 resentencing hearing, and

many of those impairments were present in his childhood. PC Vol. 17, 660. These impairments could have been presented to the jurors ultimately charged with deciding whether there was any reason to spare his life. Though 2007 defense counsel had the benefit of 1992 and 1999 trial counsel's files and sentencing transcripts, which contained multiple indications of Richard's brain damage and need for further neurological and neuropsychological testing, counsel either ignored or misunderstood the critical information they possessed.

Mr. Odom's original 1992 defense team obtained some of Mr. Odom's educational, juvenile court, medical and mental health records, including the aforementioned 1974 and 1976 mental health evaluations in which multiple doctors opined that Richard suffered from brain damage and was in serious need of an extensive medical/psychiatric/psychological work up. PC Vol. 15, 243–45, 313; PC Ex. 31, 80–82, 157–58. 1992 counsel also retained the services of Dr. John Hutson, a clinical psychologist, but only asked Dr. Hutson to evaluate Mr. Odom's sanity and competency to stand trial. *Id.*, 319–22.

Dr. Hutson subsequently executed an affidavit prior to the 1999 resentencing trial recommending that Richard Odom undergo further psychological evaluation "because of the age of the prior evaluation, new information which has developed, and the limited scope of the prior evaluation." PC Ex. 17, 1154. Dr. Hutson stated that the updated evaluation was "necessary in order for Odom's psychological profile to be fully developed and considered for mitigation purposes." *Id.*, 1155. Additionally, Dr. Hutson opined that a further neurological examination was also necessary because the previous examination conducted in 1978 was "less comprehensive than would be indicated and expected" under the circumstances. *Id.* In his professional opinion, an extensive neurological examination was warranted to "fully explore any possible neurological factors that should be taken into consideration by the sentencing jury." *Id.*

Following Dr. Hutson's recommendation, 1999 counsel retained Dr. William Kenner, a psychiatrist, who advised that a neuropsychological assessment was vital to the completion of his psychiatric evaluation. The neuropsychological testing, however, was not conducted. 2007 Vol. 1, 20. *Id.* Dr. Kenner opined that because he could not complete his evaluation without the necessary neuropsychological testing, he would be unable to testify because his incomplete evaluation "would fall below the standard of care in the community for a forensic examination in a capital case." *State v. Odom*, 2002 WL 31322532 at *19 (Tenn. Crim. App., 2002). On direct appeal, Richard Odom's sentence was again set aside, thus providing the time and opportunity for his counsel to conduct the necessary recommended testing for brain damage. *State v. Odom*, 137 S.W.3d 572 (Tenn. 2004).

Defense counsel for the 2007 sentencing hearing testified at the post-conviction hearing that they had read the record from the previous proceedings and had also consulted with prior counsel or reviewed their files. PC Vol. 14, 23. Specifically, counsel recalled reviewing a letter from mitigation investigator Glori Shettles to former attorney Robert Brooks during the pendency of the 1999 sentencing proceeding in which Ms. Shettles had encouraged counsel to thoroughly review Richard's background in order to explain the psychological significance of what they had discovered about him. *Id.*, 47. Additionally, in that letter Ms. Shettles documented a request for "additional neurological information" as it was apparent that Richard had suffered a loss of consciousness due to closed head trauma, the nature of which was unknown. *Id.*, 48.

Ms. Shettles also drafted a memo to 2007 counsel, informing them that, although she recalled that Dr. Kenner had been approached to conduct the psychiatric evaluation for the 1999 proceeding, she had only recently learned that this had not happened. PC Ex. 70. During a conversation with Dr. Kenner, Ms. Shettles had also learned that he had requested a PET scan

but did not recall if it had been conducted. *Id.* Mr. Odom's 2007 counsel testified that he was aware that a PET scan involved the brain, although he was not sure of anything else in regard to that type of brain imaging. PC Vol. 14, 50.

The 2007 defense team employed the services of Inquisitor, Inc., the firm which had conducted the mitigation investigation for the 1999 proceedings as well. As part of her duties as mitigation specialist, Glori Shettles made recommendations about various experts she felt were necessary to the defense team's success, such as a prison expert regarding future dangerousness and a psychologist. PC Vol. 14, 27–28. Ms. Shettles also recommended that the team retain a psychiatrist. PC Ex. 2.

Mr. Odom's 2007 defense counsel did retain the services of clinical psychologist, Dr. Joseph Angelillo, filing a motion for funding on October 11, 2007. PC Ex. 3. The order granting funding was filed the same day, less than two months before the impending December 3, 2007 sentencing trial. PC Vol. 14, 37–38; PC Ex. 4. Counsel explained that the late retention of a mental health expert was to see if there was anything that they had missed, particularly with respect to mitigation. PC Vol. 14, 39–40. Mitigation, according to counsel, was "the key to the case." *Id.*, 25.

Dr. Angelillo testified at the 2007 sentencing proceeding that he had reviewed the records of Dr. Cox's evaluation and social history information from Glori Shettles, as well as other reports from various doctors and institutions. 2007 Vol. 11, 1258. He also interviewed Mr. Odom approximately one month before the hearing date and drafted a report, which was not completed until after the 2007 sentencing proceedings had already commenced. PC Vol. 14, 41; PC Ex. 5. Dr. Angelillo further testified that he had been unable to specifically diagnose Mr. Odom, although he usually makes diagnoses in most of his cases. 2007 Vol. 11, 1259. Dr. Angelillo

stated that one such hindrance in diagnosing Mr. Odom was the lack of following through with the requests for a neurological evaluation lodged by Drs. Hutson and Cox. 2007 Vol. 11, 1260. He noted that a prior evaluation performed in Mississippi had uncovered some "brain deficits, or some brain compromise," but there was not enough information available to determine "how much of this could be due to physical organic problems and how much of it is psychological." *Id.* He clarified that these evaluations indicated that Mr. Odom has what was "quite probably organic brain damage," and thus, he issued a more general diagnosis of personality disorder. *Id.*, 1260–61. Specifically, Dr. Angelillo found possible evidence of schizoid personality disorder and antisocial personality disorder. *Id.*, 1262–63; PC Ex. 26.

At the post-conviction hearing, 2007 co-counsel Mr. McAfee testified that counsel did not seek further neurological testing despite indications of impaired cognitive functioning—which is the type of evidence one would typically present to a capital jury—because prior counsel had attempted a serotonin defense to no avail. PC Vol. 14, 60–62. Lead counsel Mr. Skahan testified that they did not seek further testing due to the major risk of receiving a diagnosis of a personality disorder, which could be used as "ammunition for the state." PC Vol. 15, 231–32. Mr. Skahan further testified that the defense team did not seek neuroimaging because previous evaluations of that sort had not been helpful. *Id.*, 207. Yet, no neuroimaging had been conducted for Richard Odom until the post-conviction proceedings.

QUESTIONS PRESENTED FOR REVIEW

1. Whether trial counsel rendered ineffective assistance of counsel by failing to investigate Richard Odom's background and present powerful mitigating evidence of his catastrophic life history at his capital resentencing trial? In denying this claim, did the lower courts fail to consider and give effect to Richard Odom's ACE (Adverse Childhood Experience)

factors—which are all quintessential mitigating factors identified in a long line of clearly established federal and state constitutional case law?

2. Whether, in light of the powerful mitigating evidence of brain damage uncovered in post-conviction, the Court of Criminal Appeals properly applied *Strickland v. Washington* when it required a nexus between Richard Odom's brain damage and the underlying offense?

APPLICABLE STANDARD OF REVIEW

This Court employs a *de novo* standard of review for the issues presented. *See, e.g., State v. White*, 362 S.W.3d 559, 565 (Tenn. 2012) (questions of a constitutional dimension are reviewed de novo with no presumption of correctness); *Davidson v. State*, 453 S.W.3d 386, 392 (Tenn. 2014) (questions of ineffective assistance of counsel are reviewed under this standard).

REASONS SUPPORTING REVIEW

Appellant submits that permission to appeal pursuant to T.R.A.P. 11 is appropriate and necessary, and this Court should exercise its supervisory authority to resolve the issues raised herein, because this case presents important questions of constitutional law relevant to Tennessee courts' minimization of the weight of mitigating adverse childhood experiences (ACEs), as well as the courts' erroneous requirement of a causal link between mitigation and the capital crime. This Court should grant this application for permission to appeal to set benchmarks for capital defense counsel and the courts regarding ACEs as evidence in mitigation, and clarify that each instance of adverse childhood experiences that a capital defendant suffered is critical information, both individually and cumulatively, for consideration by capital sentencing jurors and reviewing courts. Further, this Court should grant review in order to correct the ongoing constitutional error of courts requiring a nexus between mitigation and the capital crime.

Pursuant to Rule 11 of the Rules of Appellate Procedure, this Court considers, inter alia, the following factors when determining whether to grant permissive appeal: (1) the need to secure uniformity of decision, (2) the need to secure settlement of important questions of law, (3) the need to secure settlement of questions of public interest, and (4) the need for the exercise of the Supreme Court's supervisory authority. Tenn. R. App. P. 11(a). The issues presented herein meet all four criteria.

I. Adverse Childhood Experiences Are Traumas Linked to Detriments in Mental, Social, and Behavioral Health

Over the last several decades, multiple studies have produced scientific data linking adverse factors in childhood with the probability of a failure to adequately develop. A landmark study of adverse childhood experiences has shown a significant relationship between early trauma and lifelong negative outcomes in mental and physical health. *L.M.L. v. H.T.N.*, 57 Misc. 3d 1207(A), at *6 n.6 (N.Y. Sup. Ct. 2017) (describing the results of a study undertaken by the Centers for Disease Control and Prevention ("CDC") and Kaiser Permanente).[2] The study tracked a sample of 17,000 participants, beginning in 1995–97, over the course of 20 years. *United States v. Blackburn*, No. CR 14-0129 WJ, 2017 WL 3225482, at *3 (D.N.M. July 28, 2017). The results showed a correlation between adverse childhood experiences ("ACEs"), including childhood abuse and household dysfunction, and a "staggering number of adult health risk behaviors, psychosocial and substance abuse problems, and diseases." *L.M.L.*, 57 Misc. 3d 1207(A) at *6 n.6.

[2] The Court summarized the findings in the study, citing Larkin & Records, Adverse Childhood Experiences: Overview, Response Strategies and Integral Theory, Journal of Integral Theory and Practice, Fall 2007, Vol. 2, No. 3, p. 1. Larkin & Records predicted: "History may well show that the discovery of the impact of ACEs on noninfectious causes of death was as powerful and revolutionary an insight as Louis Pasteur's once controversial theory that germs cause infectious disease." *L.M.L. v. H.T.N.*, 57 Misc. 3d 1207(A), at *6 n.6 (N.Y. Sup. Ct. 2017).

The CDC identifies ten types of ACEs associated with long-term negative psychosocial developments. *Jackson v. State*, 213 So. 3d 754, 767–68 (Fla. 2017).[3] These include (1) physical abuse, (2) emotional abuse, (3) sexual abuse, (4) emotional neglect, (5) physical neglect, (6) household substance abuse, (7) household mental illness, (8) parental separation, (9) witnessing acts of domestic violence, and (10) having a household member incarcerated. *Id.*[4] Developing brains respond to the environment, as neurons "change in response to external signals."[5] The more types of ACEs a child encounters the greater the likelihood of low IQ, difficulty controlling emotions, poor social and emotional adjustments, dissociative disorders, depression, and lowered life expectancy. *Jackson v. State*, 213 So. 3d at 767–68.

Based on the ACE study data, the CDC warns that neglect, physical abuse, custodial interference, sexual abuse and other types of child maltreatment lead to poor physical and mental health, well into adulthood.[6] *See* Appendix 2 (Compilation of ACE Data). The physical result of traumatic childhood experiences is improper brain formation and development, which leads to

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[3] Originally, the ACE study identified seven factors: physical abuse, sexual abuse, emotional abuse, exposure to substance abuse, mental illness, violent treatment of mother, and criminal behavior in the household. *See* Feletti, et al. *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults,* Am J. Prev Med (May 1998), Vol. 14, No. 4, pp. 245. (February 4, 2018, 3:45pm) https://doi.org/10.1016/S0749-3797(98)00017-8.

[4] Three additional adverse childhood experiences—poverty, racism, and bullying—recently have been added to the ACE analysis. *See* https://www.tn.gov/content/dam/tn/tccy/documents/ace/ACEs-Handout.pdf (ACE Fact Sheet and Overview – January 2018 developed by the Tennessee Commission on Children and Youth as part of the Building Strong Brains initiative) (last visited February 4, 2018). "Building Strong Brains works to change the culture of Tennessee so that the state's overarching philosophy, policies, programs and practices for children, youth and young adults utilize the latest brain science to prevent and mitigate the impact of adverse childhood experiences." *Id.*

[5] B.D. Perry et al., *Childhood Trauma, the Neurobiology of Adaptation, and "Use-dependent" Development of the Brain: How "States" Become "Traits,"* 16(4) Infant Mental Health J. 271, 274 (1995); *see also* H.R. Cellini, *Child Abuse, Neglect, and Delinquency: The Neurological Link*, 55 Juv. & Fam. Ct. J. 1, 10 (Sept. 2004); Michael T. Baglivio et al., *The Prevalence of Adverse Childhood Experiences (ACE) in the Lives of Juvenile Offenders*, OJJDP J. JUV. JUST. 2 (2014) ("The use of the ACE score as a measure of the cumulative effect of traumatic stress exposure during childhood is consistent with the latest understanding of the effects of traumatic stress on neurodevelopment.").

[6] https://www.cdc.gov/violenceprevention/childmaltreatment/consequences.html (last visited February 4, 2018).

impaired cognitive and socio-emotional skills, lower language development, anxiety, and drug abuse, among other poor outcomes.[7] There is also a causal link between ACE and behavioral problems. Physically abused children are at greater risk for being arrested as juveniles.[8] One study showed a 25% increase in problems like juvenile delinquency and lower academic achievement.[9] Another study, by the National Institute of Justice, found that childhood abuse and neglect increased the likelihood of arrest as a juvenile by 59%. Abuse and neglect also increased the likelihood of adult criminal behavior by 28% and violent crime by 30%.[10]

Numerous courts have credited expert testimony that exposure to these ten ACEs has a cumulative effect on mental health outcomes. *See e.g. Bennett v. Colvin*, 202 F. Supp. 3d 1119, 1125 (N.D. Cal. 2016); *United States v. D.W.*, 198 F. Supp. 3d 18, 39 (E.D.N.Y. 2016); *United States v. Estep*, 378 F. Supp. 2d 763, 765 (E.D. Ky. 2005). For instance, a history of four ACEs increases the likelihood of suicide by twelve times and substance abuse by four, according to a clinical social worker qualified as an expert to address the impact of ACEs. *Blackburn*, 2017 WL 3225482, at *3 (crediting ACEs testimony of government expert during restitution hearing). The Supreme Court of Florida has highlighted expert testimony that exposure to nine ACEs leads to "impaired development, including impaired emotional regulation, executive function, and

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[7] U.S. Department of Health and Human Services, Administration on Children, Youth, and Families. *Understanding the effects of maltreatment on early brain development.* Washington (DC); Government Printing Office: 2001. (Feb. 4, 2018, 4:12pm) http://www.childwelfare.gov/pubs/focus/earlybrain/earlybrain.pdf;
see also Tennessee Adverse Childhood experiences Report (May 26, 2015). (Feb 4, 2018, 4:13pm) https://www.tn.gov/content/dam/tn/tccy/documents/ace/Tennessee%20ACE_Final%20Report%20with%20Authorization%20(1).pdf.

[8] J.E. Langsford et al., *Early physical abuse and later violent delinquency: a prospective longitudinal study. Child Maltreatment.* 2007, Vol. 12 (3): 233.

[9] Barbara Tatem Kelley et al., *In the wake of childhood maltreatment.* Washington (DC) NIJ. 1997.

[10] Widom CS, Maxfield MG. An update on the "cycle of violence." Washington (DC): National Institute of Justice; 2001. Available from: http://www.ncjrs.gov/pdffiles1/nij/184894.pdf (last visited February 4, 2018).

decision making." *Ellerbee v. State*, No. SC15-2010, 2017 WL 6523682, at *16 (Fla. Dec. 21, 2017) (finding ineffective assistance of counsel for failing to present mitigation). Such elevated exposure to ACEs correlates with an increased risk of substance abuse, depression, domestic violence, and suicide, among other negative outcomes. *Id.*

Moreover, the Utah legislature, relying on a variety of studies and research, has found that severe and cumulative exposure to ACEs can "negatively affect the neurobiology and anatomy of a child's developing brain." H.C.R. 10, 62nd Leg., Gen. Sess. (2017 Utah). This often leads to "persistent and sometimes overwhelming dysfunctional emotions . . . and . . . socially inappropriate labile and aggressive behaviors." *Id.* The legislature went on to find that severe traumatic events make children and adults more likely to become "directly engaged with law enforcement and the criminal justice system" and "suffer from significant mental illness including depression, psychosis, and severe anxiety." *Id.*; *see also* 2017 Vermont Laws No. 43 (H. 508) ("[a]dversity in childhood has a direct impact on an individual's health outcomes and social functioning. The cumulative effects of multiple adverse childhood experiences . . . have even more profound public health and societal implications") and Wash. Rev. Code Ann. § 70.305.010 (West 2017) ("adverse childhood experiences . . . in the first eighteen years of life and taken together, are proven by public health research to be powerful determinants of physical, mental, social, and behavioral health across the lifespan . . . and . . . have been demonstrated to affect the development of the brain and other major body systems").

II. Adverse Childhood Experiences Are Quintessential Mitigation in the Capital Jurisprudence of the Supreme Court of the United States, the United States Court of Appeals for the Sixth Circuit, and the Tennessee Courts

Adverse childhood experiences are quintessential mitigation, identified by the Supreme Court as powerful sentencing evidence well before research linked them to lifelong detriments to

mental, social, and behavioral health. Early in its capital mitigation jurisprudence, the Court noted that "youth is ... a time and condition of life when a person may be most susceptible to ... psychological damage," *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). Thus, the Court held that the Eighth and Fourteenth Amendments preclude state courts from refusing, as matter of law, to consider as mitigating circumstances a capital defendant's adversity in childhood. *Id.* at 116.

In *Eddings*, the Court vacated and remanded a death sentence where the sentencing court had refused to consider mitigation related, in part, to adverse experiences during childhood. *Id.* The mitigation in *Eddings*, including "excessive physical punishment" with a strap, lack of rules or supervision at home, a "neglectful background," maternal alcoholism, psychiatric diagnoses, and divorce, fits within six of the ten ACEs described above. *Id.* at 107, 116. Namely, the Court established as mitigation what are designated within the ACEs framework as: (1) physical abuse, (2) emotional neglect, (3) physical neglect, (4) household substance abuse, (5) household mental illness, and (6) parental separation.

The Court would continue over the years to point to ACEs as mitigation in other cases dealing with capital sentencing and strike down any sentencing schemes which precluded jurors from considering and giving effect to this powerful mitigation. *See, e.g.*, *Penry v. Lynaugh*, 492 U.S. 302, 309 (1989) (holding that the Texas jury instructions utilized in Mr. Penry's trial prevented jurors from considering and giving effect to childhood physical abuse and neglect, as well as mental retardation, and thus precluded jurors from providing a "reasoned moral response" to that evidence in rendering its sentencing decision).[11]

[11] The *Penry* decision was abrogated on other grounds by *Atkins v. Virginia*, 536 U.S. 304 (2002) in which the Supreme Court revisited and reversed the holding in *Penry* that execution of the intellectually disabled did not violate the Eighth Amendment.

A. The Supreme Court of the United States consistently classify ACEs as quintessential mitigation in cases examining ineffective assistance of counsel during capital sentencing

The Supreme Court has addressed all ten ACEs associated with maladaptive mental and social outcomes in the context of ineffective assistance of counsel during capital sentencing. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 362, 395 (2000). In *Williams v. Taylor*, the Supreme Court of the United States reversed Williams' death sentence in part because trial counsel failed to discover records that described his "nightmarish childhood." *Id.* The Court found no strategic reason for not investigating and presenting Williams' juvenile records to the sentencing jury as mitigation. *Id.* at 398. These juvenile records described a number of ACEs, including: (1) physical abuse, (2) physical neglect, (3) household substance abuse, (4) parental separation, and (5) household incarceration.[12] *Id.* at 395, 395 n.19. The Court found that presentation of Williams' adverse childhood experiences, "filled with abuse and privation," along with his uninvestigated borderline retardation, could have reasonably altered the jury's sentence. *Id.* at 395.

The Supreme Court has pointed to adverse childhood experiences as essential information to assessing a defendant's moral culpability. *See Wiggins v. Smith*, 539 U.S. 510, 535 (2003). In *Wiggins*, the Court reversed a capital sentence after finding trial counsel deficient for not discovering and presenting a number of traumatic childhood events. *Id.* at 519. The Court described "the physical torment, sexual molestation, and repeated rape" Wiggins suffered during

[12] The juvenile records described how (1) Williams' father beat him severely and repeatedly. Social workers found Williams' and his siblings drunk on whiskey during one state visit. (2) During that visit, the house had floors littered with trash, feces, and standing pools of urine. (3) Williams' parents could not locate the children's clothes due to their intoxication. (4) The social services bureau took custody of Williams' for two years. (5) Both Williams' parents went to prison for neglecting their children. *Williams v. Taylor*, 529 U.S. 362, 395 (2000).

childhood as "powerful" mitigation. *Id.* at 534–35, 536.[13] This proof involved eight separate ACEs, including (1) physical abuse, (2) emotional abuse, (3) sexual abuse, (4) emotional neglect, (5) physical neglect, (6) household substance abuse, and (7) parental separation.[14] *Id.* at 516–17, 525. The Court found that "had the jury been confronted with this considerable mitigating evidence," consisting mostly of adverse childhood experiences, "there is a reasonable probability that it would have returned with a different sentence" than death. *Id.* at 536.

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[13] The Supreme Court has also acknowledged the devastating trauma wrought by child rape in other contexts. *See Kennedy v. Louisiana*, 554 U.S. 407, 435 (2008):

> These facts illustrate the point. Here the victim's fright, the sense of betrayal, and the nature of her injuries caused more prolonged physical and mental suffering than, say, a sudden killing by an unseen assassin. The attack was not just on her but on her childhood. ....Rape has a permanent psychological, emotional, and sometimes physical impact on the child. See C. Bagley & K. King, Child Sexual Abuse: The Search for Healing 2–24, 111–112 (1990); Finkelhor & Browne, Assessing the Long-Term Impact of Child Sexual Abuse: A Review and Conceptualization in Handbook on Sexual Abuse of Children 55–60 (L. Walker ed. 1988). We cannot dismiss the years of long anguish that must be endured by the victim of child rape.

See also Kennedy v. Louisiana, 554 U.S. at 468 (Alito, J., dissenting):

> The rape of any victim inflicts great injury, and "[s]ome victims are so grievously injured physically or psychologically that life *is* beyond repair." *Coker,* 433 U.S., at 603, 97 S.Ct. 2861 (opinion of Powell, J.). "The immaturity and vulnerability of a child, both physically and psychologically, adds a devastating dimension to rape that is not present when an adult is raped." Meister, Murdering Innocence: The Constitutionality of Capital Child Rape Statutes, 45 Ariz. L. Rev. 197, 208–209 (2003). See also *State v. Wilson,* 96–1392, p. 6 (La. 12/13/96), 685 So.2d 1063, 1067; Broughton, "On Horror's Head Horrors Accumulate": A Reflective Comment on Capital Child Rape Legislation, 39 Duquesne L .Rev. 1, 38 (2000). Long-term studies show that sexual abuse is "grossly intrusive in the lives of children and is harmful to their normal psychological, emotional, and sexual development in ways which no just or humane society can tolerate." C. Bagley & K. King, Child Sexual Abuse: The Search for Healing 2 (1990).

[14] The Court noted that (1) Wiggins' mother beat her children for breaking into the kitchen, which she kept locked. During one incident, Wiggins' mother placed his hand on a hot stove burner. The burn required hospitalization. The State eventually placed Wiggins in foster care at the age of six, where his two foster mothers physically abused him. (2) Before Wiggins left her custody, his mother forced him and his siblings to beg for food, as well as to eat paint chips and garbage. (3) Wiggins' second foster father repeatedly molested and raped him. Another foster parent's children allegedly gang-raped Wiggins. (4) Before losing their custody, Wiggins' mother left him and his siblings unattended at home for days at a time. (5) During at least one such period, Wiggins' mother left the children without any food in the home. (6) Wiggins' mother was a chronic alcoholic. (7) As a ward of the foster care system, Wiggins went without both of his biological parents through much of his childhood. *Wiggins v. Smith*, 539 U.S. at 516–17, 525.

Subsequent to the *Wiggins* decision, the Supreme Court has continued to identify ACEs as background that trial counsel should have investigated and presented in capital sentencing, making them quintessential mitigation. *See e.g. Sears v. Upton*, 561 U.S. 945, 948 (2010) (mitigation included physical abuse, emotional abuse, sexual abuse, divorce, and domestic violence); *Porter v. McCollum*, 558 U.S. 30, 33 (2009) (childhood physical abuse and parental domestic violence); *Rompilla v. Beard*, 545 U.S. 374, 391 (2005) (physical and emotional abuse and neglect, household alcoholism, and domestic violence).

B. Adverse childhood experiences are quintessential mitigation in the Sixth Circuit and Tennessee courts

The Sixth Circuit and Tennessee courts have followed Supreme Court precedent in identifying adverse childhood experiences as mitigating circumstances. The Sixth Circuit has repeatedly described ACEs as mitigation and failing to present them at sentencing as ineffective. *Sowell v. Anderson*, 663 F.3d 783, 796 (6th Cir. 2011) (unpresented mitigation included physical abuse, physical neglect, substance abuse in the household, parental separation, and the incarceration of household members); *Jells v. Mitchell*, 538 F.3d 478, 500 (6th Cir. 2008) (physical abuse, domestic violence); *Johnson v. Bagley*, 544 F.3d 592, 603 (6th Cir. 2008) (physical abuse, emotional neglect, household mental illness); *Mason v. Mitchell*, 543 F.3d 766, 780 (6th Cir. 2008) (physical abuse, household substance abuse, emotional neglect); *Hamblin v. Mitchell*, 354 F.3d 482, 490 (6th Cir. 2003) (physical abuse, domestic violence, substance abuse, emotional neglect, physical neglect); *Coleman v. Mitchell*, 268 F.3d 417, 450–53 (6th Cir. 2001) (physical abuse, emotional abuse, sexual abuse, emotional neglect, physical neglect, parental separation); *Carter v. Bell*, 218 F.3d 581, 600 (6th Cir. 2000) (finding mitigation in childhood physical abuse, emotional neglect, physical neglect, household mental illness and substance abuse, and domestic violence).

This description of ACEs as mitigation has also been found in the district courts within the Sixth Circuit, as well. *See, e.g. McNish v. Westbrooks*, 149 F. Supp. 3d 847, 853 (E.D. Tenn. 2016) (physical abuse, sexual abuse, physical neglect, household substance abuse).

The Tennessee courts have similarly recognized numerous adverse childhood experiences as powerful mitigation. *See, e.g., Cole v. State*, No. W2008–02681–CCA–R3–PD, 2011 WL 1090152, at *37 (Tenn. Crim. App. Mar. 8, 2011). In *Cole*, the Court of Criminal Appeals found trial counsel deficient for failing to adequately uncover information involving Cole's traumatic childhood. *Id.* At his sentencing trial, testimony portrayed Cole's upbringing as stable. *Id.* at *22. However, the court described mitigation not discovered by trial counsel but presented in post-conviction that showed Cole's exposure to a number ACEs, including (1) physical abuse, (2) emotional abuse, (3) emotional neglect, (4) household substance abuse, (5) domestic violence, and (6) having a household member incarcerated.[15] *Id.* The court noted the ability of such background mitigation to provide context in capital sentencing. *Id.* at *37.

The Court of Criminal Appeals has identified ACEs as mitigation in a number of other cases addressing ineffective assistance of counsel in capital sentencing. *See, e.g., Faulkner v. State*, No. W2012–00612–CCA–R3–PD, 2014 WL 4267460, at *98 (Tenn. Crim. App. Aug. 29, 2014) (finding trial counsel deficient in failing to present social history information that included childhood physical abuse, physical neglect, and household substance abuse); *Adkins v. State*, 911 S.W.2d 334, 356 (Tenn. Crim. App. 1994) (affirming finding of ineffectiveness for failing to introduce mitigation that included physical abuse and household substance abuse); *Cooper v.*

[15] Evidence submitted at the post-conviction hearing showed that (1) Cole's mother would strike him and his siblings with extension cords or a water hose. Their mother would make them stand outside, naked, in the wintertime when she caught them smoking. (2) She reportedly told her children she wished they never had been born. (3) Their father was essentially unavailable because of involvement with business, hobbies, and friends. (4) Both parents used cocaine. (5) Cole's father beat his mother. (6) Cole's father was arrested as a result of domestic disturbance and his brother incarcerated at a youth facility. *Cole v. State*, 2011 WL 1090152 at *23, *26–28, *30.

State, 847 S.W.2d 521, 525 (Tenn. Crim. App. 1992) (noting that petitioner's alcoholic father died in a fall during his youth, describing mitigation of household substance abuse and parental separation).

This Court has also noted that "numerous adverse childhood experiences" may predispose a person to committing violent acts. *State v. Davidson*, 509 S.W.3d 156, 223 (Tenn. 2016), cert. denied, 138 S. Ct. 105 (2017) (denying relief where defendant had opportunities to better himself, above-average intelligence, and no apparent psychological issues).

The question presented in this case is—in acknowledging the link between adverse childhood experiences, also known as "the diverse frailties of humankind,"[16] and crime—what guidance this Court should provide to the capital defense trial bar to investigate, contextualize, and present the linkage between those ACEs and sequela such as brain damage, so that jurors are able to consider and give effect to mitigation in order to provide a reasoned moral response to the crime.

III. But for Trial Counsel's Deficient Performance Regarding Richard Odom's Multitude of ACEs and Resulting Brain Damage, It Is Reasonably Likely That at Least One Juror Would Have Voted to Spare His Life

Astonishingly, though the factors that comprise what are now referred to as ACEs have been well-established in the capital defense community—since at least the 1980s—as essential mitigation that jurors must consider, Richard Odom's counsel failed to offer minimally competent representation on his behalf. They failed to do so even though they knew, or should have known, that depriving the jury of evidence of Richard's adverse childhood experiences, as well as his resulting brain damage, greatly increased the likelihood that he would be sentenced to death.

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[16] *McCleskey v. Kemp*, 481 U.S. 279, 304 (1987), quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

Though the jury heard some details about abuse in Richard's childhood, they never learned the full extent of the evidence of his family's multigenerational history of mental illness and violence, his childhood torture, and chronic sexual victimization that began in early childhood and escalated into violent sexual servitude during his incarceration at Parchman Prison. Jurors were not informed of his extensive and pervasive brain damage. Without this information, the jury had no understanding that his adverse childhood experiences resulted in his brain damage, his brain damage in turn contributed in his committing homicide while a juvenile, and his incarceration for the homicide led to additional adverse experiences and brain damage. Not only were the scales of justice skewed on the side of aggravation, since not all critical mitigation was before the jury, but also the jurors were left without guidance on how to weigh the aggravating circumstance of the juvenile homicide Richard committed against the partial mitigating evidence of his neglect and abuse that had been presented. Trial counsel failed to answer for the jury the ultimate question of why they should spare Richard Odom's life, even if he had a bad childhood, when he had killed two women. Without the crucial evidence of brain damage—which was the direct result of all the ACEs he suffered—the jury had no context for why he was someone whose actions should be considered less culpable than someone with a normally functioning brain and was, therefore, deserving of their mercy.

Because the post-conviction court and Court of Criminal Appeals failed to give full weight to the quintessential mitigation evidence of brain damage and sexual torture while incarcerated as a juvenile presented during the post-conviction proceedings, this Court must give full consideration to the evidence that Richard suffered all ten categories of ACEs and find that minimally competent trial counsel would investigate, develop, and present evidence as to each ACE factor, which courts have expected trial counsel to do for almost forty years.

A. During his childhood, Richard Odom suffered all ten ACE factors

Only one in one thousand people are exposed to more than seven ACEs. *Ellerbee v. State*, 2017 WL 6523682 at *15–16. While still in early childhood, Richard already had suffered all ten ACEs. These traumatic life experiences placed him in the bottom one percent for quality of life in childhood. *Id.*

1. Physical Abuse

There was not a year from age 0–17 in which Richard was spared brutal physical violence. The physical assaults on Richard began in utero, with his mother Holly drinking during her pregnancy. PC Vol. 16, 482–83. Between the ages of 0–2, Richard was regularly deprived of food. PC Vol. 16, 490. Holly became angry with her toddler children if they attempted to obtain food in the kitchen. *Id.*, 489–90. When his father Norman abandoned him at the home of a neighbor, Gladys McClendon, when Richard was not quite two, he had cigarette burns on his arms. PC Vol. 16, 495. The bottom of his feet had also been burned. *Id.*, 496.

Richard was then physically abused by Gladys, his temporary caretaker who later became his adoptive grandmother. When he was four, Richard moved back in with Gladys after the divorce of Shirley and Jimmy Odom, Richard's adoptive parents. Gladys was known for her extreme cruelty toward Richard. *Id.*, 509. Gladys beat Richard regularly and he began hiding under the bed to avoid getting pummeled. Once, he fell asleep under a bed and failed to answer when Gladys called him. When she found him, she dragged him out from under the bed and battered him so severely that she had to be restrained by another adult. PC Vol. 16, 509–10.

Though difficult to imagine that Richard could be treated worse than he had been in the first five years of his life, his treatment by his adoptive mother Shirley and adoptive stepfather Marvin Bruce was torture. Richard's older adoptive brother Jimmy Jr., a man who in adulthood

had become an enforcer for the Aryan Brotherhood during his many years incarcerated at Parchman Prison, cannot think about the severity of Richard's abuse without being overcome with emotion. He refers to that period of Richard's life as "the dark time." *Id.*, 513–14.

Marvin brutalized Richard with his belt strap, belt buckle, and sticks. PC Vol. 16, 514–17. The beatings began once Marvin started drinking and the more he drank the more severe the blows. *Id.*, 515. During this abuse, Richard's adoptive siblings ran outside, finding the beatings unbearable to witness, but they could still hear Richard screaming. *Id.*, 515. Soon, Richard became "numb to it and would not say a word. He wouldn't cry. It was just a part of life." *Id.* He was five years old. *Id.* While beating him, Marvin and Shirley called him a "sissy," "little girl, "bastard," and a "little bitch." *Id.*, 519–20. Whenever Richard wet the bed, Shirley forced him to pull down his pants in front of Marvin and his siblings and she smacked his penis with a ruler. *Id.*, 518. Marvin and Shirley also withheld food as a form of punishment, and if Richard complained of hunger, they force-fed him hot sauce. PC Vol. 16, 520–21.

While incarcerated as an adolescent, Richard suffered physical violence from staff and other wards. Columbia Training School was known for abusing and failing to protect the wards. PC Vol. 17, 557–58. Richard, who was attacked almost immediately after his arrival, ran away from the facility to flee the abuse. *Id.*, 560. On one occasion he sustained injuries so severe he required an x-ray of his skull. *Id.*, 562. Richard attempted to escape several times. Vol. 16, 560–62. Wards who were picked up and returned after running away were beaten with a board. *Id.*, 529. After one escape, Richard was returned to Columbia covered in bruises. *Id.*, 561–62. As punishment at Oakley Training School, kids were stripped, hog tied, and thrown into holding cells. *Id.*, 558. The widespread abuses at both these facilities resulted in a federal lawsuit. *Id.*, 557–58.

Physical abuse alone is compelling mitigating evidence. *See Sears v. Upton*, 561 U.S. at 948; *Porter v. McCollum*, 558 U.S. at 33; *Rompilla v. Beard*, 545 U.S. at 391; *Wiggins v. Smith*, 539 U.S. at 535; *Williams v. Taylor*, 529 U.S. at 395; *Penry v. Lynaugh*, 492 U.S. at 309; *Eddings v. Oklahoma*, 455 U.S. at 115; *Sowell v. Anderson*, 663 F.3d at 796; *Jells v. Mitchell*, 538 F.3d at 500; *Johnson v. Bagley*, 544 F.3d at 603; *Mason v. Mitchell*, 543 F.3d at 780; *Hamblin v. Mitchell*, 354 F.3d at 490; *Carter v. Bell*, 218 F.3d at 600; *Coleman v. Mitchell*, 268 F.3d at 450–53; *McNish v. Westbrooks*, 149 F. Supp. 3d at 853; *Faulkner v. State*, 2014 WL 4267460; *Cole v. State*, 2011 WL 1090152; *Adkins v. State*, 911 S.W.2d 334.

2. Emotional Abuse

Richard's chronic physical abuse was exacerbated by emotional abuse. Holly, his biological mother, hated him and withheld any expression of love or caring. She refused to console him when he cried. She locked him in closets or outside in the yard when he was younger than two. Norman, his biological father, berated toddler Richard when he sought physical affection. *Id.*, 486. Once abandoned at Gladys' house for a second time, after Shirley and Jimmy Odom divorced when he was four years old, Richard became the target of Gladys' cruelty. She humiliated him by forcing him to dress like a girl. Vol. 16, 520.

Once Richard returned to live with Shirley and Marvin Bruce, when he was five years old, Marvin humiliated Richard whenever he wet the bed by hanging out his urine-soaked sheets for the neighbors to see. Vol. 16, 517. This public shaming continued for several years. *Id.*, 517. Shirley joined in Marvin's emotional abuse. They called Richard a "sissy," "bastard," little girl" and "little bitch," while beating him. Vol 16, 519–20. Adoptive brother Jimmy Jr. described Richard as the brand new puppy that people think is cute for a little while, but when the puppy gets a little older, no one wants the dog around anymore. *Id.*, 513.

As a young adolescent, Richard was incarcerated at both Columbia Training School and Oakley Training School. Richard was frequently punished at Columbia by being thrown into "the hole," which was a small, windowless cell, with no mattress and only a hole in the floor for a toilet. *Id.*, 530. While at Oakley Training School, he was stripped of his clothes, hog-tied, and thrown into holding cells without contact with anyone on the outside. *Id.*, 558.[17]

Emotional abuse alone is compelling mitigating evidence. *See Sears v. Upton*, 561 U.S. at 948; *Rompilla v. Beard*, 545 U.S. at 391; *Wiggins v. Smith*, 539 U.S. at 535; *Coleman v. Mitchell*, 268 F.3d at 450–53; *Cole v. State*, 2011 WL 1090152.

3. Sexual Abuse

Richard's biological father Norman had a history of molesting young girls. He molested his sister-in-law, Debbie, when she was a child. PC Vol. 16, 498. Once he abandoned Richard and his two sisters at Gladys McClendon's house, Gladys informed Norman that she knew he had been molesting Richard's sisters. *Id.*, 497. Richard spent the first years of his life being raised by a pedophile. Richard was also exposed to sexual predators when living at Gladys' house. When four-year-old Richard returned to stay with Gladys, once his adoptive parents Jimmy and Shirley divorced, he was in a house that was completely accessible to whomever wandered off the street; Gladys' several grandchildren who stayed there were unsupervised and unprotected. Richard's adoptive sister Cindy reported being sexually abused by one of her uncles in a bathroom at Gladys' house. *Id.*, 507–09.

[17] The vast majority of children in juvenile detention centers arrive burdened with histories of exposure to traumatic events. "In one study of juvenile detainees, 93.2% of males and 84% of females reported a traumatic experience" in their past. Gordon R. Hodas, *Responding to Childhood Trauma: The Promise and Practice of Trauma Informed Care,* Pa. Off. of Mental Health & Substance Abuse Servs. 17 (Feb. 2006). For those children who find themselves in juvenile detention centers for having run away from home, these reported traumatic experiences primarily involve physical and sexual abuse at the hands of family members. Wan-Ning Bao et al., *Abuse, Support, and Depression Among Homeless and Runaway Adolescents,* 41 J. Health & Soc. Behav. 408, 408 (Dec. 2000).

Shirley and her second husband, Marvin Bruce, also sexually abused Richard. When Richard wet the bed, Shirley forced him to pull down his pants and then hit his genitals with a ruler. PC Vol. 16, 518. Marvin frequently grabbed and pulled on Richard's penis either when Richard was in the bathroom or, at night, when Marvin went into the room where Richard slept. *Id.*, 518–19. By age eleven, no longer able to endure his tortured existence, Richard was forced to prostitute himself to adult men at the Greyhound Bus station and in the parks in order to survive on the streets. PC Vol. 16, 522–23.

Sexual abuse alone is compelling mitigating evidence. *See Sears v. Upton*, 561 U.S. at 948; *Wiggins v. Smith*, 539 U.S. at 535; *Coleman v. Mitchell*, 268 F.3d at 450–53; *McNish v. Westbrooks*, 149 F. Supp. 3d at 853.[18]

4. Emotional Neglect

Richard's emotional neglect began with his birth to alcoholic teenage parents, Norman and Holly, who themselves had suffered severe childhood trauma and had no coping mechanisms

[18] Richard's sexual victimization as a child continued into his adolescence and adulthood, which is unsurprising as the more ACE factors are present, the higher the risk of being raped. https://acestoohigh.files.wordpress.com/2011/11/aceraped.png (last visited February 4, 2018). Evidence of being raped, violated, and enslaved in prison is compelling mitigation. *See Doe v. Ayers*, 782 F.3d 425, 450–55 (9th Cir. 2015). In that case, the court found deficient and prejudicial performance of trial counsel for failing to pursue and present evidence that Doe entered the criminal justice system at age 17 and "was brutally and repeatedly raped while he was incarcerated." *Id.* at 451. As was the case for teenaged Richard Odom, "these assaults were not only physically painful but terrifying." *Id.* (footnote omitted). Living in that environment causes a "pervasive sense of powerlessness, shame, and rage." *Id.* at 453. Once a person is forced into sexual slavery, he is "owned," has "no means of escape," and is "utterly trapped." *Id.* at 453–54. One of Doe's fellow prisoners stated in his declaration in that case, "Prison rape is the most devastating thing you can experience." *Id.* at 455. The *Doe* Court concluded: "if the jury had heard about what had happened to Doe in 'that man-made hell,' *this evidence alone* would have stirred sufficient compassion or understanding in the jury to result in a life sentence." *Id.* (emphasis added). For the same reasons, the proof presented in Richard Odom's case—which mirrors Doe's proof— is compelling and "at least one member of [his 2007] jury could have decided that Mr. [Odom] was less morally blameworthy (and thus undeserving of death)." *Davidson v. State*, 453 S.W.3d at 405. The *Doe* Court found that although Doe had established prejudice based on the foregoing evidence of the prison sexual violence alone, "[h]is experience of brutalization as a youngster in prison and resulting mental illness are even more powerfully mitigating, however, when viewed alongside evidence of his abusive childhood and substance abuse." *Id.* at 458. Similarly, Mr. Odom's traumatic history as a victim of sexual assaults in prison must be viewed along with his childhood, which included tremendous violence, neglect, and physical, sexual, and emotional abuse. This Court has not spoken to prison rape as mitigating evidence and should do so upon granting review in this case.

or parenting skills. Holly was incapable of loving or caring for her children because she had never been loved or cared for. *Id.*, 483. Neither Holly nor Norman held Richard when he was an infant. He was left to scream and cry with no human touch or attempts to console. PC Vol. 16, 486.

Norman hated Richard because, given Holly's partying and promiscuity, he never believed that Richard was his biological son. PC Vol. 16, 486. Norman expressed no love or care for Richard. *Id.*, 485–86. When Richard was one year old, he toddled up to Norman who was holding Richard's older sister, because Richard too wanted to be held. Instead of holding him, Norman chastised him, telling Richard that he had not called for him. *Id.*, 486. Although Norman chased after Holly whenever she left, he was also having a very public affair with another woman, rendering him even less emotionally available to his children. *Id.*, 487. After Holly left, he started leaving them at Gladys's house, where he permanently abandoned them. *Id.*, 492.

Richard's emotional neglect continued when, at age two, he was adopted by the Odom family. Jimmy and Shirley Odom, who were in their early twenties, had three children of their own. *Id.*, 505. Jimmy Odom, who had just been released from prison when Richard began living with them, spent most of his spare time in bars and chasing women. Shirley, an incompetent mother, left her children and Richard at home at night so that she could try to track down Jimmy. *Id.*, 504. Within two years of taking in Richard, Jimmy and Shirley divorced. They were vocal about neither one of them wanting to keep the children. *Id.*, 505.

Once Shirley married Marvin Bruce, just months after her divorce from Jimmy, Gladys insisted that Shirley take back her sons, Jimmy Jr. and Larry, as well as Richard. Though the boys moved back to Shirley's home, it was evident that Shirley and Marvin did not want them. *Id.*, 511. The only happy memory Larry could recall in all the years of living with Shirley and

Marvin, was watching an episode of "Green Acres," while Shirley and Marvin were away from the home. *Id.*, 525.

Richard knew that while he was incarcerated with his adoptive brothers Jimmy Jr. and Larry at Columbia Training School, his adoptive parents Jimmy and Shirley, and sometimes his adoptive stepfather Marvin, visited Jimmy Jr. and Larry, wrote letters to them and sent them money but never attempted to contact Richard. *Id.*, 531–33.

Emotional neglect alone is compelling mitigating evidence. *See Rompilla v. Beard*, 545 U.S. at 391; *Wiggins v. Smith*, 539 U.S. at 535; *Eddings v. Oklahoma*, 455 U.S. at 115; *Johnson v. Bagley*, 544 F.3d at 603; *Mason v. Mitchell*, 543 F.3d at 780; *Hamblin v. Mitchell*, 354 F.3d at 490; *Coleman v. Mitchell*, 268 F.3d at 450–53; *Carter v. Bell*, 218 F.3d at 600; *Cole v. State*, 2011 WL 1090152.

5. Physical Neglect

During his almost two years with his biological parents, Holly and Norman, Richard was regularly deprived of food and often went to bed hungry. PC Vol. 16, 490. When Richard's older sister Cathy, who was younger than three at the time, tried to get cereal or other food from the kitchen for one-year-old Richard and herself, Holly screamed at them and denied them the food they desperately needed. PC Vol. 16, 490, 520–21. Instead of buying food, Holly spent the family's only money at bars or J.C. Penney's, where she charged excessive amounts that Norman was unable to repay. *Id.*, 487. Whenever Holly left the house, which was often, she either shut the children in a closet or locked them out of the house and left them in the yard. *Id.*, 490. Often when Norman returned home from work, he found their three children—two toddlers and an infant—unattended. *Id.* When Holly abandoned the family for good, she left Richard and his

siblings locked out of the house in the rain, when Richard was one and one-half years old. *Id.*, 491.

A few months after Holly abandoned Richard's family, Norman left Richard and his sisters with Gladys McClendon, a woman who lived in the area but who Norman did not really know. Norman did not return for his children and left them with no clothing or other belongings. *Id.*, 495. When Richard was adopted by Jimmy and Shirley Odom a few months later, it was a continuation of incompetent parenting. *Id.*, 503. Their house was cluttered and filthy. *Id.* There was barely a path cleared to walk from room to room. *Id.* Later, once Shirley married Marvin Bruce, their house was as disheveled and disgusting as the house Shirley and Jimmy shared. *Id.*, 516. At times there was no food in the house. *Id.* Richard did not brush his teeth and was often dirty. *Id.*, 517. No adult paid enough attention to him to teach him basic hygiene. *Id.* As young children, Richard and his adoptive siblings roamed the neighborhood streets at night unsupervised. *Id.*, 512. By age eleven, Richard was living on the streets, sleeping in sheds, and prostituting himself. *Id.*, 523. He was seen wandering the neighborhood during the winter without shoes or adequate clothing. *Id.*

While incarcerated as young adolescents, Richard and his adoptive brothers were noted to be unkempt, malnourished and unsocialized. *Id.*, 528. In youth detention, Richard was kept for over four months in an isolation cell. *Id.*, 531. In addition to physical repercussions from the staff for attempting escape, Richard would frequently be put in an isolated cell in which he slept on a concrete pad, had no window to the outside, and received his food through a slit in the door. *Id.*, 530. Richard spent at least 120 days in such conditions while at CTS. *Id.*, 531.

Physical neglect alone is compelling mitigating evidence. *See Rompilla v. Beard*, 545 U.S. at 391; *Wiggins v. Smith*, 539 U.S. at 535; *Williams v. Taylor*, 529 U.S. at 395; *Eddings v.*

Oklahoma, 455 U.S. at 115; *Sowell v. Anderson*, 663 F.3d at 796; *Hamblin v. Mitchell*, 354 F.3d at 490; *Coleman v. Mitchell*, 268 F.3d at 450-53; *Carter v. Bell*, 218 F.3d at 600; *McNish v. Westbrooks*, 149 F. Supp. 3d at 853; *Faulkner v. State*, 2014 WL 4267460.

6. Household Substance Abuse

Both during her pregnancy with Richard and after he was born, Holly drank alcohol excessively and was always looking for a party. PC Vol. 16, 481–83, 490. By the time he married Holly, Norman was already a heavy drinker and, during their marriage, spent his evenings at home getting drunk while Holly was out at bars or attending nude house parties. *Id.*, 481–82. Jimmy Odom, Richard's adoptive father, was an alcoholic who regularly frequented bars. *Id.*, 503–04. Marvin Bruce, Richard's adoptive stepfather, drank excessively and became meaner the more intoxicated he became. *Id.*, 511. After her marriage to Marvin, Shirley's drinking increased. *Id.*

Household substance abuse alone is compelling mitigating evidence. *See Rompilla v. Beard*, 545 U.S. at 391; *Wiggins v. Smith*, 539 U.S.at 535; *Williams v. Taylor*, 529 U.S. at 395; *Eddings v. Oklahoma*, 455 U.S. at 115; *Sowell v. Anderson*, 663 F.3d at 796; *Mason v. Mitchell*, 543 F.3d at 780; *Hamblin v. Mitchell*, 354 F.3d at 490; *Carter v. Bell*, 218 F.3d at 600; *McNish v. Westbrooks*, 149 F. Supp. 3d at 853; *Faulkner v. State*, 2014 WL 4267460; *Cole v. State*, 2011 WL 1090152; *Adkins v. State*, 911 S.W.2d 334; *Cooper v. State*, 847 S.W.2d 521.

7. Household Mental Illness

Richard's biological mother Holly got crazier with each child and continued to spiral out of control. PC Vol. 16, 482–83. Later in life, she assumed she had suffered post-partem depression. From the time that Richard and his sisters were born, Holly wanted to harm them. She admitted that she would have killed her children had she not abandoned the family when

Richard was one and one-half years old. *Id.*, 483, 501. Holly exhibited abnormal behavior for a young, married mother, like excessive drinking, partying naked with people she did not really know, and opening up credit accounts at stores and running up multiple bills, unbeknownst to her husband Norman. *Id.*, 487, 490–91. Norman was an alcoholic who was genetically predisposed to depression and suicidality. *Id.*, 470–71. Shirley, Jimmy and Marvin, Richard's adoptive parents, were all alcoholics. *Id.*, 503, 511, 516. Marvin exhibited pathological and sadistic behavior. *Id.*, 520.

Household mental illness alone is compelling mitigating evidence. *See Eddings v. Oklahoma*, 455 U.S. at 115; *Johnson v. Bagley*, 544 F.3d at 603; *Carter v. Bell*, 218 F.3d at 600.

8. Parental Separation

During the first one and one-half years of Richard's life, his biological mother Holly left the family multiple times, taking off for days or weeks at a time without notice and without any attempt to call or check on her young children while she was away. PC Vol. 16, 483, 485. Sometimes Richard's father Norman chased after Holly, across multiple states. *Id.*, 485. When Holly abandoned her children the final time, she left them locked out of the house in the rain. A neighbor called Norman at work to come home and get the children out of the rain. *Id.*, 491. At the time, Richard was one and one-half years old. *Id.*

After Holly's final abandonment, Norman began leaving Richard and his siblings at the house of a woman who lived in the area, Gladys McClendon. *Id.*, 492. At first, Norman left the children for days at a time, then weeks. Soon after, he never returned for them. *Id.*, 493. Gladys asked her extended family if anyone was willing to take the children. *Id.*, 494. Although a relative immediately took in Richard's infant sister Carol, none of Gladys' relatives wanted

Richard or his older sister Cathy. *Id.*, 496. Though Norman remained in the neighborhood and Holly eventually returned to the area, neither maintained contact with their children. *Id.*, 499.

Jimmy and Shirley Odom, who already had three young children they could not handle, eventually adopted Richard. *Id.*, 501–05. However, within two years they divorced, when Richard was four years old. *Id.*, 505. Neither Jimmy nor Shirley wanted to keep Richard or their own biological children after the divorce. *Id.* Though Shirley finally agreed to keep their oldest child, Cindy, the boys were dumped at Gladys' house. *Id.*, 505–06. Once Shirley remarried, however, Gladys forced her to take back Richard and her biological sons, Jimmy Jr. and Larry.

Richard sustained such physical torture at the hands of Shirley and her second husband Marvin, that by the time he was eleven years old, Richard escaped by living on the streets, sleeping in sheds and abandoned buildings. *Id.*, 525. His chronic parental separation continued during his years of incarceration at juvenile facilities. Once, after escaping from Columbia Training School, he located his biological father Norman and went to his house. Norman turned him into the police. PC Vol. 17, 562–63.

Parental separation alone is compelling mitigating evidence. *See Sears v. Upton*, 561 U.S. at 948; *Wiggins v. Smith*, 539 U.S. at 535; *Williams v. Taylor*, 529 U.S. at 395; *Eddings v. Oklahoma*, 455 U.S. at 115; *Sowell v. Anderson*, 663 F.3d at 796; *Coleman v. Mitchell*, 268 F.3d at 450–53; *Cooper v. State*, 847 S.W.2d 521.

9. Witnessing Domestic Violence

The marriage of Richard's biological parents Norman and Holly was physically violent. Norman beat Holly, leaving her face bruised. The first time Norman gave Holly a black eye, she sought assistance from the police but was told to handle the matter on her own. PC Vol. 16, 488. Once, Norman beat Richard's sister Cathy, who was a year older than Richard and two years old

at the time, so severely for crying to come inside out of the rain that Holly had to stop his attack. *Id.*, 488–89. Holly recalled that even though Norman was brutal to their children, she was meaner. *Id.*, 489. Norman also molested Richard's sisters, when Carol was an infant and Cathy was under the age of three. *Id.*, 497. Norman sexually molested young girls. Debbie, Holly's half-sister who was four years old at the time Norman abused her, told the family, "Norman made me put his thingy in my mouth and made me suck on it." *Id.*, 498.

The marriage of Richard's adoptive parents Jimmy and Shirley was volatile and they physically fought. *Id.*, 504. Once, Shirley broke a bottle over Jimmy's head after learning of one of his many infidelities. *Id.* Shirley's relationship with her second husband Marvin was even more volatile than her marriage to Jimmy. Marvin and Shirley fought constantly. The neighbors reported hearing constant screaming and the police responded frequently. *Id.*, 516. Once, Marvin held a gun to Larry's head. *Id.*, 520. While incarcerated at a juvenile facility, Jimmy Jr. expressed fear of being sent back to live with Marvin because Marvin beat his face with his fists. *Id.*, 527.

Witnessing acts of domestic violence alone is compelling mitigating evidence. *See Sears v. Upton*, 561 U.S. at 948; *Porter v. McCollum*, 558 U.S. at 33; *Rompilla v. Beard*, 545 U.S. at 391; *Carter v. Bell*, 218 F.3d at 600; *Jells v. Mitchell*, 538 F.3d at 500; *Cole v. State*, 2011 WL 1090152.

10. Incarceration of a Household Member

When at age two Richard was taken in by Jimmy and Shirley Odom, Jimmy had just been released from serving time at Parchman Prison. PC Vol. 16, 502–03. Both of Richard's adoptive brothers, Jimmy Jr. and Larry, were incarcerated frequently, starting when they were young adolescents. *Id.*, 526.

Having a household member incarcerated alone is compelling mitigating evidence. *See Williams v. Taylor*, 529 U.S. at 395; *Sowell v. Anderson*, 663 F.3d at 796; *Cole v. State*, 2011 WL 1090152.

The multiple traumatic events Richard suffered throughout his childhood, both finite and chronic, meet all ten ACEs. Enduring life circumstances in multiple areas of ACEs is associated with long-term negative psychosocial development. *Jackson v. State*, 213 So. 3d at 767–68. For children with histories of abuse, trauma builds on trauma, and the effects are cumulative, ultimately leading to "more severe and chronic posttraumatic stress reactions and other developmental consequences." *Understanding Child Traumatic Stress*, National Child Traumatic Stress Network.[19] The small number of children, like Richard Odom, exposed to at least nine ACEs will have impaired development, including impaired emotional regulation, executive function, and decision making. *Ellerbee v. State*, 2017 WL6523682 at *15–16.

B. Trial counsel was deficient in failing to present adequate evidence of Richard Odom's multiple adverse childhood experiences, as well as evidence of the critical links between those experiences, his brain damage, and his additional adverse experiences during his incarceration at Parchman Prison

The more types of ACEs in a child's life, the greater the likelihood of low intelligence, difficulty controlling emotions, poor social and emotional adjustments, impaired executive functions and decision-making, dissociative disorders, and depression. *Jackson v. State*, 213 So. 3d at 767–68. As the ACEs study shows, ACEs negatively affect neurobiology and anatomy of a child's developing brain, which we see in Richard's juvenile assessments.

Here, as in *Rompilla*, trial counsel did some witness interviews and retained an expert but missed obvious red flags that would have led competent counsel to request neurological and

[19] (Feb. 5, 2018, 3:45pm) http://www.nctsn.org/sites/default/files/assets/pdfs/understanding_child_traumatic_stress_brochure_9-29-05.pdf

neuropsychological testing. *See Rompilla v. Beard*, 545 U.S. 374. A psychological evaluation of Richard in 1974, when he was fourteen years old, found evidence of mild neurological deficiency and "dull-normal intellect and potentials." PC Ex. 54, 21. Although his IQ score was a full scale score of 81, there was a thirty-three point discrepancy between his verbal and performance scores. This significant discrepancy is indicative of brain damage. PC Vol. 17, 645, 665–66. During the examination, Richard was poorly groomed and incapable of basic hygiene, was unsocialized, and could not remember his middle name. PC Ex. 54, 20. Dr. Cox, who performed the evaluation, found impairment in Richard's judgment, insight, recent and remote memory, and abstract reasoning. *Id.*, 21.

In 1976, when Richard was fifteen years of age, Dr. Cox reported to Richard's juvenile detention counselor that Richard was "brain-damaged, incorrigible, antisocial, unable to respond to usual social contingency programming, and greatly unlikely to make positive adjustments in adulthood." PC Ex. 54, 68. Dr. Cox opined that Richard was unlikely to live a usual life span, both due to multiple suicide attempts and because Richard was incapable of exercising "judgment which is conducive to a healthy longevity." *Id.* Dr. Tipton administered a neurological examination, including an EEG of Richard's brain. The EEG result was abnormal, likely due to multiple head traumas that Richard endured during beatings by all his custodial caregivers as well as while in juvenile lock-up. *Id.*, 70. He also noted that, though Richard was only fifteen, he was already abusing alcohol. *Id.* Dr. Tipton concluded that Richard was "moderately mentally retarded grossly."

Having an underdeveloped and damaged brain contributed to Richard committing homicide as a juvenile. Severe traumatic events make children and adults more likely to become

directly engaged with the juvenile and criminal justice systems.[20] As Drs. Brawley and Merikangas testified at the post-conviction evidentiary hearing, the deficits in his frontal lobe caused significant impairment of Richard's abstract reasoning, mental flexibility, judgment, impulse control, and decision-making. Dr. Merikagas testified that adverse childhood experiences, including physical and emotional abuse and dysfunctional home environment, inhibit brain development and that children, like Richard, who suffer these experiences have brains that are undersized in significant areas as well as diminished brain function. PC Vol. 17, 660–62.

The negative impact of all ten ACEs on Richard's brain amplified the consequences of his ACEs, which in turn led to the circumstances of his incarceration, first at an adult county jail and then at Parchman Prison, where he then suffered additional adverse experiences. At age seventeen, Richard was arrested on suspicion of killing a woman. He was transported to the county jail, which was for housing adults. Once placed in a holding cell with several older inmates, Richard was beaten unconscious. PC Vol. 17, 568–69. A 1978 intelligence assessment, conducted while Richard awaited trial on his homicide charge, resulted in a statistically significant discrepancy between Richard's verbal and performance scores—a twenty-eight point difference—which, as with the significantly discrepant scores from his previous two IQ tests, was indicative of brain damage. *Id.*, 645, 665–66.

Richard's resulting incarceration at Parchman Prison, and the horrific conditions there, led to additional adverse experiences and corollary brain damage. Dr. Merikangas testified that because the brain continues to develop into the third decade of life, Richard's adverse

[20] C.S. Widom, M.G. Maxfield. *An Update on the "Cycle of Violence."* Washington (DC): National Institute of Justice; 2001. (Feb 4, 2018, 3:45pm). http://www.ncjrs.gov/pdffiles1/nij/184894.pdf.

experiences at Parchman—his physical and psychological trauma—were also detrimental to his brain development. PC Vol. 17, 683–84.

During his years at Parchman, Richard endured incessant physical violence (ACE factor one) and sexual brutality (ACE factor three). Parchman was a notoriously violent prison, which housed its most vulnerable inmates—adolescents—with adult violent offenders. 2007 Vol. 11, 1239. When Richard entered the prison, he was 5'8" and 145 pounds. Richard was an immediate target of beatings and rapes. Richard, like other young, weak inmates, had to become a sex slave to a feared inmate, and submit to being raped by that stronger inmate in order to be spared from multiple assaults and gang rapes by other prisoners. PC Vol. 15, 356–58, 360; PC Vol. 16, 388–89; PC Vol. 17, 576. Sexual servitude however, did not always shield the weak inmates and prison staff failed to protect Richard and other vulnerable targets. 2007 Vol. 12, 1405, PC Vol. 16, 391, 396.

While at Parchman, Richard continued to experience emotional abuse (ACE factor two), emotional neglect (ACE factor four), and parental separation (ACE factor eight). In order to maintain his protection as another inmate's sex slave, Richard, along with other vulnerable inmates, had to wear women's clothing and make-up to appear female. PC Vol. 17, 584–85. Despite being incarcerated at Parchman along with Jimmy Jr. and Larry, his brothers provided no emotional sanctuary. Larry was also a target of rapes and beatings and fought with Richard over protection from a stronger inmate. Jimmy Jr., though feared as an enforcer for the Aryan Brotherhood, shunned Richard because helping such a weak inmate, considered a punk or someone's son, would make him a target of assault. PC Vol. 17, 579. If forced to choose, Jimmy would have killed Richard and Larry rather than lose his position in the Aryan Brotherhood and be victimized himself. *Id.*

Evidence of each experience that Richard suffered under each of the ten ACE factors individually was a mitigating factor that minimally competent trial counsel would have presented. Additionally, competent counsel would have known that there was a reasonable likelihood that at least one juror would have voted for life given the complete evidence of all of Richard's experiences in all the ACE factors. Moreover, competent counsel would have known that there was a reasonable likelihood that at least one juror would have voted to spare Richard's life because he has a damaged brain. Finally, competent trial counsel would have presented the critical link between Richard's adverse childhood experiences, his resulting brain damage, and his adverse experiences at Parchman which were causally linked to his ACEs and brain damage.

The contrast between what was presented and what could have been presented is particularly stark and compelling where the absent evidence includes, as here, brain damage. *See Sears v. Upton*, 561 U.S. at 945–46 (counsel was ineffective for failing to investigate and present evidence of "significant frontal lobe brain damage Sears suffered as a child, as well as drug and alcohol abuse in his teens"); *Porter v. McCollum*, 558 U.S. at 36, 41 (counsel was ineffective for failing to investigate and present neuropsychological evidence that "Porter suffered from brain damage that could manifest in impulsive, violent behavior" that "substantially impaired . . . his ability to conform his conduct to the law" and constituted "an extreme mental or emotional disturbance" as a result of this brain damage); *Rompilla v. Beard*, 545 U.S. at 392 (evidence in post-conviction established that Rompilla "suffers from organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions."); *Harries v. Bell*, 417 F.3d 631 (6th Cir. 2005) (granting relief where defendant "suffered damage to the frontal lobe of his brain, . . . [damage which] can result from head injuries and can interfere with a person's judgment and decrease a person's ability to control impulses"); *Hamblin v. Mitchell*,

354 F.3d 482 (granting relief where jury did not hear of defendant's brain damage from a severe blow to the head during childhood); *Glenn v. Tate*, 71 F.3d 1204, 1207 (6th Cir. 1996) (granting relief where jury did not hear of defendant's brain damage).

C. Trial counsel was deficient in failing to mitigate Mr. Odom's juvenile homicide conviction, which was used against him as an aggravating factor

Minimally competent trial counsel would or should have known that a prior murder is consistently regarded by capital jurors as the most powerful aggravating evidence, and would have zealously litigated the inadmissibility of that prior conviction as prohibited by the Eighth Amendment, pursuant to *Roper v. Simmons*, 543 U.S. 551 (2005) (sentencing a juvenile to death violates the Eighth Amendment's prohibition against cruel and unusual punishment). If unsuccessful in challenging admissibility, minimally competent counsel, knowing that Mr. Odom's juvenile homicide would be presented against him as aggravating evidence, would have presented the above described mitigating adverse childhood experiences and resulting brain damage to contextualize the prior offense.

At the time of Mr. Odom's 2007 resentencing proceedings, it was widely known in the capital defense community that the majority of capital jurors give great weight to the prior violent felony aggravating circumstance. Most jurors consider a violent criminal history as an indicator of future dangerousness. *See* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?*, 98 Colum. L. Rev. 1538, 1560 (1998). 52.8% of jurors in Garvey's study reported they were more likely to vote for death based on the defendant's history of violent crime, making it one of the most powerful aggravators. *Id.*, 1559. In fact, a Capital Jury Project study of jurors who served on capital cases in Tennessee found that 39.6% of those jurors deliberated under the erroneous belief that the death penalty was required if the defendant would be dangerous in the future. William J. Bowers & Wanda D. Foglia, *Still Singularly*

Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing, 30 Crim. L. Bull. 51, 72–73 (2003).The Capital Jury Project found that over 70% of the capital jurors interviewed believed that death was the only appropriate sentence for a case involving "murder by someone previously convicted of murder." Christopher Letkewicz, *Stacking the Deck in Favor of Death: The Illinois Supreme Court's Misinterpretation of* Morgan v. Illinois, 2 DePaul J. for Soc. Just. 217, 231 (2009).

Not only would minimally competent counsel have presented the jury with the results of Richard's 1974 and 1976 psychological and neurological assessments, such counsel would have consulted with mental health experts and proffered expert testimony that explained the causal link between Richard's tortured childhood and his significant brain damage. At the post-conviction evidentiary hearing, Mr. Odom presented neuropsychological, neurological, and psychiatric evidence that provided a causal link between Richard's ACEs and his brain damage. Dr. Tora Brawley, a neuropsychologist, testified that the significant split between the verbal and performance scores on Richard's various IQ tests indicates that Mr. Odom suffers from significant cognitive asymmetries affecting memory, intellectual and motor functioning. PC Ex. 47, 3. These asymmetries, evident since his 1974 assessment, suggest longstanding organicity that the doctors in 1974 and 1976 should have fully evaluated, and that minimally competent trial counsel should have had evaluated. Dr. Brawley further found that Mr. Odom suffered from temporal lobe and frontal lobe deficits, and that the deficits in his frontal lobe caused significant impairment in his abstract reasoning, mental flexibility, judgment, impulse control, and decision-making. *Id.*; PC Vol. 16, 421–22.

The brain damage evident from Dr. Brawley's neuropsychological assessment was confirmed by Dr. James Merikangas' neurological and psychiatric evaluations as well as his review of Mr. Odom's brain imaging. Dr. Merikangas concluded:

> The [neuro]images indicate that Mr. Odom has abnormalities of the brain matter in his temporal lobes, frontal lobes, corpus callosum, and parietal lobes. Further, the extent of asymmetry in Mr. Odom's temporal lobe is quite unusual; as evidenced by the MRI, there is a clear abnormality of Mr. Odom's right temporal lobe. There are white matter hyperintensities in the left frontal lobe consistent with previous brain trauma. The PET scan showed decreased metabolism in both of Mr. Odom's temporal lobes. . . . Mr. Odom therefore is an individual born with a damaged brain who went on to have his childhood marred by further brain injury and by environmental/family factors known to have an adverse effect on child development. . . . The temporal lobe is particularly vulnerable to traumatic brain injury; and is an area implicated in disorders of volition and control. We see abnormalities of the temporal lobe with both the structural and functional brain images. The frontal lobe is involved in executive functions including judgment, impulse control, and decision-making as well, and we see abnormalities there.

PC Ex. 50.

Dr. Merikangas further expounded on the importance of the frontal lobe, citing its responsibility for the ability to think, plan and carry out decisions, as well as other executive functions. PC Vol. 17, 626, 628. He also stated that, not only does the frontal lobe help us to determine the proper course of action, it also helps us to execute said action by sending signals to the muscles; thus, the frontal lobe controls behavior. *Id.*, 627. Dr. Merikangas also explained that the images of Mr. Odom's brain show significant loss of brain tissue in various areas, which results in decreased brain functioning. *Id.*, 638–39. The images also showed that Mr. Odom has an enlarged third ventricle, an indication of the loss of cognitive functioning. *Id.*, 639. Additionally, Mr. Odom's brain bore white spots on his frontal lobe, which Dr. Merikangas explained were analogous to scars from previous brain injury and directly affect brain functions due to the damaged cells' inability to properly communicate with other cells in the brain. *Id.*, 641. The PET scan showed that Mr. Odom also suffered from impaired functioning of the

temporal lobes, which are "very important for the control of behavior, memory and are frequently abnormal in people with sexual problems." *Id.*, 651. Additionally, the PET scan showed asymmetry in Mr. Odom's frontal and parietal lobes. *Id.*, 654. Finally, Dr. Merikangas opined that the damage to Mr. Odom's corpus callosum, which is instrumental in allowing right brain/left brain communication and cognition, was likely incurred in utero as such damage is commonly correlated to fetal alcohol effects. *Id.*, 644–45. This opinion was supported by evidence that Mr. Odom's mother had consumed alcohol regularly while she was pregnant with him. *Id.*

The fact that the jury was deprived of learning about Richard's evidence in mitigation—information that pertains to all ten ACEs and resulting brain damage—made it even more critical for the post-conviction court and Court of Criminal Appeals to consider and give effect to that evidence presented during the post-conviction proceedings, given the long-established controlling case law on ineffective assistance of counsel for failure to investigate, develop, and present mitigating evidence.

IV. This Court Should Grant Review in Order to Set Needed Benchmarks For Competent Investigation, Development, and Presentation of ACEs as Mitigating Evidence in Capital Sentencing Trials

In the last two decades, this Court has only issued two opinions addressing ineffective assistance of counsel in regard to the failure to develop and present mitigating evidence. The first case in which this Court addressed competency in developing and presenting a case in mitigation was *Goad v. State*, 938 S.W.2d 363 (Tenn. 1996) (failure to present evidence of post-traumatic stress disorder "arising out of defendant's harrowing Vietnam military service experience and his wife's infidelity while he served there"). The second was *Davidson v. State*, 453 S.W.3d 386 (Tenn. 2014). In *Davidson*, this Court found that capital counsel's failure to inform the

sentencing jury of the defendant's brain damage and cognitive impairments was deficient and prejudicial, notwithstanding that such evidence could open the door for the State to show the jury alarming statements from the defendant's mental health records that revealed his "malignant misogyny and his propensity to commit sexual violence." *Id.*, 404. The jury already knew that the defendant had a long history and multiple convictions of sexual violence against women. *Id.*, 405. Highly relevant and compelling psychological mitigation evidence could have colored the jury's consideration of the aggravating factors in a way that favored the defendant. *Id.*

However, no opinion from this Court instructs capital practitioners on the need to investigate, develop, and present evidence of as many ACEs that apply to a capital defendant.

Our state is making a concerted effort to acknowledge, educate, and address the impact of adverse childhood experiences in order to effectuate public policy solutions for the better health and safety of our citizens. *See, e.g.,* the Tennessee Commission on Children and Youth. https://www.tn.gov/tccy/ace/tccy-ace-building-strong-brains.html (Building Strong Brains in Tennessee) (last visited February 4, 2018). "The future prosperity of any society depends on its ability to foster the health and well-being of the next generation. When Tennessee invests wisely in children and families, the next generation will pay that back through a lifetime of productivity and responsible citizenship."[21]

Early experiences literally shape how the brain gets built, establishing either a sturdy or a fragile foundation for all of the development and behavior that follows." *Id.* (Building Strong Brains in Tennessee). When children undergo the torture, abandonment, neglect, and rape that

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21 https://www.tn.gov/content/dam/tn/tccy/documents/ace/ACEs%20A%20Case%20for%20Attention%20and%20Action.pdf (Addressing Adverse Childhood Experiences: A Case for Attention and Action in Tennessee) (last visited February 4, 2018).

Richard Odom endured, jurors must have sufficient information about those circumstances and the consequences—including brain damage—to provide a "reasoned moral response" to the crime. *Penry v. Lynaugh,* 492 U.S. at 328. Similarly, courts cannot properly exercise the awesome responsibility of making decisions about a person's life or death without the benefit of mitigating evidence investigated and presented by defense counsel.

This Court should grant review in this case to establish benchmarks for the investigation, presentation, and contextualization of adverse childhood experiences in the capital sentencing context. Richard Odom provides a model case for the Court to address this issue. As an infant, child, and adolescent he experienced *all ten* adverse childhood experiences, thus exposing him to the greatest possible risk.[22]

V. This Court Should Grant Review in Order to Address the Court of Criminal Appeals' Constitutional Error in Requiring Proof of a Nexus Between Richard Odom's Brain Damage and His Capital Crime

The Court of Criminal Appeals violated well-established constitutional principles by discounting Mr. Odom's brain damage as unconnected to the crime:

> Although 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 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 two murders. . . . Considering the *Goad* factors listed above, we 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 v. State, 2017 WL 4764908 at *31.

In *Lockett v. Ohio*, the United States Supreme Court held that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded

[22] *See Ellerbee v. State*, 2017 WL6523682 at *15–16.

from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U.S. 586, 604 (1978) (footnote omitted; emphasis original). This holding was extended in *Eddings v. Oklahoma*—just as the sentencing statute may not restrict certain factors from being considered as mitigation, the sentencing judge cannot, as a matter of law, refuse to consider appropriate mitigating evidence. 455 U.S. at 108–09, 114–17. "The sentencer [and reviewing court] may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration." *Id.* at 114–15.

The Eighth Amendment requires that a capital sentencing jury consider relevant mitigating evidence even if the defendant does not establish a nexus between such evidence and the offense. *Tennard v. Dretke*, 542 U.S. 274, 287 (2004); *Smith v. Texas*, 543 U.S. 37, 43-45 (2004). The same constitutional constraints apply to reviewing courts, which are charged with weighing mitigation in multiple contexts—particularly the weight of newly developed mitigation in the *Davidson/Wiggins*[23] context. The Court of Criminal Appeals erred as a matter of law in holding that trial counsel's failure to introduce evidence of brain damage did not prejudice Mr. Odom because there was no evidence presented in the post-conviction proceedings that his brain damage caused him to commit the capital offense.

> Unlike at the guilt phase, where the primary focus is on evidence offering a causative explanation, which might reduce formal culpability, mitigating evidence at the penalty phase also serves to increase jurors sympathy for or comprehension of the lives, and crimes, of defendants who have themselves suffered terribly.

Doe v. Ayers, 482 F.3d 425, 462 (9th Cir. 2015). In applying a nexus test to conclude that Mr. Odom's brain damage did not qualify as mitigating evidence, the Court of Criminal Appeals imposed "a test directly contrary to the constitutional requirement that all relevant mitigating

[23] *Davidson v. State*, 453 S.W.3d 386; *Wiggins v. Smith*, 539 U.S. 510.

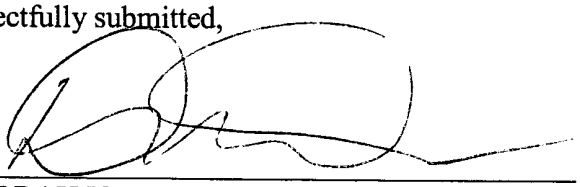
evidence be considered by the sentencing body." *Styers v. Schriro*, 547 F.3d 1026, 1035 (9th Cir. 2008).

This Court should accept review of this case to address this constitutional violation and provide guidance to the trial and post-conviction courts in order to ensure proper consideration of this critical mitigation. As it stands, the only authority to which the lower courts might look encourages disregard of brain damage absent a direct causal connection to the crime. *See State v. Reid*, 91 S.W.3d 247, 287 (Tenn. 2002) (Defendant's proof in mitigation included "mental and behavioral problems from a very early age, and [] brain damage that was caused by either a congenital defect or trauma. However, the proof established no causal connection between this brain damage and the crimes committed by the defendant.")

CONCLUSION

Wherefore, the Appellant Richard Lloyd Odom[24] respectfully moves this Court to grant this Application for Permission to Appeal.

Respectfully submitted,



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[24] Appellant requests that the costs associated with this appeal be taxed to the State of Tennessee and that he be exempted from any appellate bond requirement as Mr. Odom is indigent.

CERTIFICATE OF SERVICE

I hereby certify that an exact copy of this Application for Permission to Appeal has been mailed via U.S. Mail, postage pre-paid, to Zachary Hinkle, Office of the State Attorney General, Criminal Justice Division, P.O. Box 20207, Nashville, Tennessee, 37202-0207 on this the 15 day of February, 2018.

Deborah Y. Drew
Deputy Post-Conviction Defender