No. 18-___

IN THE

# Supreme Court of the United States

TONY VON CARRUTHERS,

*Petitioner*,

v.

TONY MAYS, WARDEN,

*Respondent.*

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

**PETITION APPENDIX VOLUME II**


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## TABLE OF APPENDICES

**APPENDIX B**

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 2:08-cv-02425-JPM-dkv

TONY VON CARRUTHERS,
*Petitioner*,

*v.*

WAYNE CARPENTER, WARDEN,
RIVERBEND MAXIMUM SECURITY INSTITUTION,
*Respondent*.

ORDER DENYING PETITIONER'S
REQUEST FOR HEARING

ORDER GRANTING IN PART AND DENYING IN
PART RESPONDENT'S MOTION
FOR SUMMARY JUDGMENT

ORDER DENYING PETITION PURSUANT
TO 28 U.S.C. § 2254

ORDER OF DISMISSAL

ORDER DENYING A
CERTIFICATE OF APPEALABILITY

AND

ORDER CERTIFYING APPEAL WOULD NOT BE
TAKEN IN GOOD FAITH

G. Forced Self Representation (Claim 8, Amended Petition ¶¶ 267-93)
   1. Teague
   2. Procedural Default
   3. Merits

H. Severance (Claim 9, Amended Petition ¶¶ 294-303)

I. Gag Order (Claim 10, Amended Petition ¶¶ 304-12)
   1. The Relevant Standard for Gag Orders
   2. Harmless Error

J. Anonymous Jury (Claim 11, Amended Petition ¶¶ 313-23)
   1. Procedural Default
   2. Merits

K. Excessive Security (Claim 12, Amended Petition ¶¶ 324-28)
   1. Procedural Default
   2. Merits

L. Withheld Exculpatory Evidence (Claim 13, Amended Petition ¶¶ 329-41) and False Testimony (Claim 14, Amended Petition ¶¶ 342-64)
   1. Procedural Default
   2. Merits
      a. Alfredo Shaw
         1. False Testimony
         2. Promise or Deal
      b. Jimmy Maze and Charles Smith
         1. Jimmy Maze
         2. Charles Smith
         3. O.C. Smith

M. Trial Court Precluded Presentation of Defense (Claim 15, Amended Petition ¶¶ 365-76)

N. Judicial Interference with Support Services (Claim 16, Amended Petition ¶¶ 377-96)
   1. Procedural Default
   2. Merits

O. Admission of Specified Evidence (Claim 17, Amended Petition ¶¶ 397-12)

P. Confrontation Clause (Claim 18, Amended Petition ¶¶ 413-17)

Q. Nakeita Shaw's Competence as a Witness (Claim 19, Amended Petition ¶¶ 418-21)

R. Judicial Bias (Claim 20, Amended Petition ¶¶ 422-42 )

S. Improper Closing Argument (Claim 21, Amended Petition ¶¶ 443-44)

T. Jury Instructions (Claim 22, Amended Petition ¶¶ 445-46, & Claim 23, Amended Petition ¶¶ 447-48)

U. Extraneous, Improper Influences on the Verdict (Claim 24, Amended Petition ¶¶ 449-52)

V. Juror 121 (Claim 25, Amended Petition ¶¶ 453-54, and Claim 27, Amended Petition ¶¶ 459-61)

W. Jurors 120 and 127 (Claim 26, Amended Petition ¶¶ 455-58)

X. Unconstitutional Exclusion of Persons from the Courtroom (Claim 28, Amended Petition ¶¶ 462-74)

Y. Sentencing in Carruthers' Absence (Claim 29, Amended Petition ¶¶ 475-78)

Z. Improper Judicial Fact-Finding in Sentencing (Claim 30, Amended Petition ¶¶ 479-84)

AA. Insufficient Evidence (Claim 31, Amended Petition ¶¶ 485-86)

AB. Constitutionality of the Death Penalty (Claim 32, Amended Petition ¶¶ 487-91)

## I. HABEAS PROCEEDINGS

On June 11, 2008, Petitioner Tony Von Carruthers, Tennessee Department of Corrections ("TDOC") prisoner number 139604, a death-sentenced inmate then confined at the Brushy Mountain State Prison in Petros, Tennessee, filed a pro se habeas corpus petition under 28 U.S.C. § 2254 and Motions for leave to proceed in forma pauperis and appointment of counsel. (Electronic Case Filing ("ECF") Nos. 1-3.) On September 3, 2008, the Court entered an Order granting in forma pauperis status and granting in part and denying in part the Motion to appoint counsel. (ECF No. 7.) On September 23, 2008, Carruthers filed a motion for equitable tolling (ECF No. 9), which the Court denied on October 15, 2008. (ECF No. 14.) On November 10, 2008, the Court entered an Order directing the Clerk to serve the habeas petition, directing

Carruthers to file an amended petition, and directing Respondent to respond. (ECF No. 17.)

On December 19, 2008, Carruthers, through counsel, filed an amended petition. (ECF No. 21.)

In January and February 2009, Carruthers filed a pro se letter and Motions for partial summary judgment and for hearing (ECF Nos. 23-25, 31); the pro se Motions were stricken. (See ECF No. 32.) On April 21, 2009, Carruthers filed a Motion to proceed pro se. (ECF No. 40.) On May 6, 2009, his counsel filed a Response to the pro se Motion. (ECF No. 42.) A hearing was held on June 16, 2009; the Court denied the motion to proceed pro se. (ECF Nos. 43, 47.)

On April 9, 2009, Carruthers's counsel filed a Motion for summary judgment, memorandum, and statement of facts. (ECF Nos. 36-38.) On June 18, 2009, Carruthers's counsel filed an amendment/clarification to the amended petition. (ECF No. 49.) On July 8, 2009, Respondent filed an answer to the amended petition. (ECF No. 53.) In July 2009, Respondent filed the state-court record. (ECF Nos. 55-58.) On September 23, 2009, Respondent filed additional documents that were part of the state-court proceedings under seal. (ECF No. 66 (sealed).) On December 21, 2009, the Court denied Carruthers's Motion for summary judgment and Carruthers's claim of fraud on the court (Claim 1). (ECF No. 70.)

On May 25, 2011, Respondent filed a Motion for summary judgment. (ECF No. 114.) On September 30, 2011, Carruthers filed his redacted Response to the Motion for summary judgment and a request for hearing. (ECF No. 129; see id. at 276.) That same day, Carruthers's counsel, Michael Passino, Esq., filed a

Motion under seal entitled "Motion Filed Under Seal Seeking Order That Information from Prior and Present Counsel About Mr. Carruthers's Delusions, Aberrant Behaviors and Inability to Discuss Important Issues Contained in (1) Portions of Petitioner's Response to Motion for Summary Judgment, (2) Portions of Mr. Carruthers's Social History, and (3) a Number of Supporting Exhibits, Is Not Confidential Information and, as Such, It May Be Filed Consistent with RPC 1.14 and RPC 1.16" and a Motion requesting permission to file the Motion under seal. (ECF Nos. 136, 137.) On December 21, 2011, Respondent filed a Reply in support of the Motion for summary judgment. (ECF No. 149.) On March 29, 2012, the Court granted the Motion for in camera review of the ex parte submission and directed the Clerk to unseal Passino's filings. (ECF No. 152.)[1] On April 24, 2012, the Court entered an Order concluding that the information in the ex parte submission may be disclosed, directing the Clerk to docket the ex parte submission as a supplemental Response to the Motion for summary judgment, and allowing Respondent to file a limited supplemental Reply. (ECF No. 157.) That same day, Carruthers's ex parte submission was docketed. (ECF No. 158.) On May 1, 2012, Respondent filed a supplemental Reply in support of the Motion for summary judgment. (ECF No. 160.)

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[1] On April 4, 2012, Carruthers's counsel filed a Notice of intent to file a supplemental brief based on Martinez v. Ryan, 132 S. Ct. 1309 (2012) (ECF No. 154.) Respondent filed a Notice in opposition to the filing on April 17, 2012. (ECF No. 155.) The Court construed Carruthers's Notice as a Motion for permission to file a supplemental brief and denied the Motion on April 23, 2012. (ECF No. 156.)

On September 11, 2012, the Court granted Carruthers's Motion for reconsideration and allowed Carruthers to file a supplemental brief based on Martinez v. Ryan, 132 S. Ct. 1309 (2012). (See ECF Nos. 153-156, 161, 170.) Carruthers filed his initial Martinez memorandum on October 31, 2012. (ECF No. 178.) Carruthers's counsel also filed a post-Martinez discovery Motion and a post-Martinez Motion for relief from the Scheduling Order and discovery deadline. (ECF Nos. 176, 177.) On February 19, 2013, the Court entered an Order postponing a ruling on the Martinez issues related to Carruthers's claims of ineffective assistance of trial counsel until the United States Supreme Court rules in Trevino v. Thaler, 499 F. App'x 415 (5th Cir. 2011), cert. granted, 133 S. Ct. 524 (U.S. Oct. 29, 2012) (No. 11-10189). (ECF No. 184.) The Court postponed ruling on these Motions until the Supreme Court ruled in Trevino. (See ECF No. 185.) The parties filed supplemental briefs on August 30, 2013. (ECF Nos. 190, 191.) On October 2, 2013, the Court entered an Order addressing the applicability of Martinez and denying Carruthers's Post-Martinez discovery Motion and post-Martinez Motion for relief from the Scheduling Order and discovery deadline. (ECF No. 192.)[2] Petitioner filed a Motion to reconsider the

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[2] The Court determined that Carruthers's allegations in ¶¶ 222-39, 241, 243, 244, 246.2-246.3, 247-48, 249, 251-54, 256, 258, 261-63, 265, 268-70, 292-93, 337-41, 347-51, 352-54, 365-76, 390-96, 416, 422-42, 445-48, 462-74, 479-81, 508-09, and 510 of the Amended Petition are not subject to Martinez. (See ECF No. 192 at 8-11, 13-32.) Recently, the United States Court of Appeals for the Sixth Circuit determined that Martinez does apply to a Tennessee defendant's procedural default of a substantial claim

Court's Order, which the Court denied on February 6, 2014. (See ECF Nos. 193, 194.)

The Court finds that a hearing is not necessary to resolve the issues presented in Respondent's Motion for summary judgment and the habeas petition, as amended. Carruthers's request for a hearing pursuant to Local Rule 7.2(d) is, therefore, DENIED.

## II. STATE-COURT PROCEDURAL HISTORY

In 1996, Carruthers was convicted of three counts of premeditated first-degree murder for the deaths of Marcellos Anderson, his mother Delois Anderson, and Fred Tucker; three counts of especially aggravated kidnapping; and one count of especially aggravated robbery. Carruthers v. State, 145 S.W.3d 85, 88 (Tenn. Crim. App. 2003). (See ECF No. 55-2 at PageID[3] 1834-35.) Carruthers was sentenced to death by electrocution for the three murder convictions and received forty years for each of the other offenses. Id. (ECF No. 55-2 at PageID 1836-40, 1907-1909, 1913.)

On September 25, 1997, Carruthers appealed (id. at PageID 2134), and the Tennessee Court of Criminal Appeals affirmed the conviction and sentence. State v. Carruthers, No. W1997-00097-CCA-R3-CD, 1999 WL

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of ineffective assistance at trial. See Sutton v. Carpenter, No. 12-6310, 2014 WL 1041695, at *7 (6th Cir. Mar. 19, 2014). The Court, however, denied Petitioner's request for relief under Martinez because the claims asserted were either not subject to Martinez or insubstantial. (See ECF No. 192.)

[3] The Court uses Page Identification ("PageID") citations to documents in the state-court record and certain exhibits for ease of reference.

1530153, at *61 (Tenn. Crim. App. Dec. 21, 1999) (ECF No. 57-1 at PageID 12181-12234). On December 11, 2000, the Tennessee Supreme Court affirmed. State v. Carruthers, 35 S.W.3d 516 (Tenn. 2000) (ECF No. 56-1 at PageID 8622 (judgment); ECF No. 57-1 at PageID 12239-12316 (opinion)).[4] On June 29, 2001, the United States Supreme Court denied Carruthers's petition for writ of certiorari. Carruthers v. Tennessee, 533 U.S. 953 (2001).

On November 30, 2001, Carruthers filed a pro se petition for post-conviction relief pursuant to the Tennessee Post-Conviction Procedure Act, Tennessee Code Annotated §§ 40-30-101 to -122, in the Criminal Court of Shelby County, Tennessee. (ECF No. 56-1 at PageID 8722-8748.) On December 3, 2001, Carruthers filed another pro se petition. (ECF No. 56-1 at PageID 8696-8705.) On December 5, 2001, Judge Chris Craft appointed the Office of the Post-Conviction Defender ("PCD") as counsel. (Id. at PageID 8765.) The PCD was allowed to withdraw from the case because of a conflict of interest. (Id. at PageID 8768-69.) Judge Craft recused himself because he had worked in the District Attorney's office during the time of Carruthers's indictment. (Id.) On May 10, 2001, Charles Ray was appointed to represent Carruthers, and Judge Walter C. Kurtz was assigned the post-

[4] Co-defendant James Montgomery's convictions were reversed, and his case remanded for a new trial. See Carruthers, 35 S.W.3d at 572. The Tennessee Department of Correction's Felony Offender Information Lookup indicates that Montgomery's sentence ends on December 1, 2016. See Tennessee Felony Offender Information, https://apps.tn.gov/foil/ (click "Search Now," then complete form and click "Search") (last accessed Mar. 18, 2014).

conviction case to sit by special designation. (Id. at PageID 8771-72.)[5]

On August 3, 2004, Carruthers's counsel filed an amended post-conviction petition.[6] (ECF No. 56-2 at PageID 9195-9261; ECF No. 56-3 at PageID 9264-9320.) The State filed its response on August 13, 2004. (ECF No. 56-3 at PageID 9323-9330.) On September 23, 2004, the State filed a motion to dismiss specific grounds in the amended petition without the necessity of an evidentiary hearing. (Id. at PageID 9331-36.) The court dismissed Carruthers's post-conviction claims related to the prosecutor's closing argument, the trial judge, the constitutionality of the death penalty, international law or treaties, the inclusion of aggravating factors in the indictment, a unanimous verdict for the factual findings concerning the aggravating factors, comparative proportionality review, and the rejection of a plea bargain. (Id. at PageID 9444-46.)

The post-conviction court conducted a hearing on August 29-31, 2005, and by agreement of the parties, the proof was to remain open for thirty days. (See ECF No. 56-4 at PageID 9740-41.) A DNA expert was

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[5] On June 17, 2002, Larry E. Copeland was appointed as co-counsel. (ECF No. 56-1 at PageID 8784.) At Ray's retirement, William Ramsay was appointed as Copeland's co-counsel. (ECF No. 56-2 at PageID 9098.)

[6] Before the amended post-conviction petition was filed, the State appealed the post-conviction court's interlocutory order to unseal jury records to allow Carruthers to support his claim of ineffective assistance of appellate counsel related to the questioning of jurors. See Carruthers, 145 S.W.3d at 88, perm. app. denied (Tenn. 2004). The Tennessee Court of Criminal Appeals reversed the post-conviction court's ruling unsealing the juror records. Id. at 96.

scheduled to testify on November 3, 2005. (Id. at PageID 9741.) On February 2, 2006, Judge Walter Kurtz filed a memorandum and order dismissing the post-conviction petition. (Id. at PageID 9740-85.) On February 15, 2006, Carruthers filed a notice of appeal. (Id. at PageID 9787.) The Tennessee Court of Criminal Appeals affirmed the post-conviction court's ruling in Carruthers v. State, No. W2006-00376-CCA-R3-PD, 2007 WL 4355481 (Tenn. Crim. App. Dec. 12, 2007) (ECF No. 57-2 at PageID 12331-78), perm. app. denied (Tenn. 2008).

On September 11, 2006, Carruthers filed a pro se petition for habeas corpus relief in the Criminal Court for Morgan County, Tennessee. Carruthers v. Worthington, No. E2007-01478-CCA-R3-HC, 2008 WL 2242534, at *1 (Tenn. Crim. App. June 2, 2008) (ECF No. 57-3 at PageID 12403-405). The State filed a motion to dismiss, which the court granted on June 25, 2007. Id. The Tennessee Court of Criminal Appeals affirmed. Id. at *3.

**III. THE TRIAL**

Petitioner proceeded pro se at trial. (See ECF No. 55-8 at PageID 5662.) The State was represented by Phillip Gerald Harris, Esq., and J. Robert Carter, Jr., Esq., of the Shelby County District Attorney General's Office. (Id.) Co-defendant James Montgomery was represented by Harold D. Archibald, Esq., and J.C. McLin, Esq. (Id.) The Honorable Joseph B. Dailey was the presiding judge.

Voir dire was conducted on April 15-17, 1996. (See ECF No. 55-7 at PageID 4707 through ECF No. 55-8 at PageID 5659.) The trial began on Thursday, April 18, 1996, and continued until April 26, 1996. (See ECF

No. 55-8 at PageID 5663; ECF No. 55-9 at PageID 7487.)

The day began with the reading of the indictments and the entry of the defendants' pleas of not guilty. (ECF No. 55-8 at Page ID 5698.) In the guilt phase, the State presented testimony from twenty-one witnesses from April 18-23, 1998.[7] Co-defendant James Montgomery presented no proof. (ECF No. 55-9 at PageID 6830.) Carruthers presented the testimony of seventeen witnesses from April 23-26, 1996.[8]

On Thursday, April 25, 1996, at 5:56 p.m., the jury retired from court to begin deliberations in the guilt phase. (Id. at PageID 7497.) Deliberations for the day ended at 9:50 p.m, and the jury resumed deliberations on Friday, April 26, 1996, at 9:00 a.m. (Id. at PageID 7504-7505.) At 11:00 a.m., the jury returned to open court to report its verdict. (Id. at PageID 7505-7508.)

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[7] The State presented the testimony of Michael Harris, Jean Tucker, Joyce Lovett, Ola Jean Anderson, Angela Collins, Laventhia Denise Anderson Briggs, Charles Ray Smith, Archie Yancey, Nakeita Montgomery Shaw, Benton West, Jimmy Lee Maze, Terrell Adair, Andre Jordan Johnson, Chris Hines, Orlandus Buddy Sesley, Jack Ruby, Carolyn Brown, Patrick Williams, Dr. Hugh Edward Berryman, and Dr. O'Brian Cleary Smith. (See ECF No. 55-8 at PageID 5663, 5823, 5977; see also ECF No. 55-9 at PageID 6154, 6327, 6520, 6665.)

[8] Carruthers presented the testimony of Albert James Herman, Jr., Freddy L. McCullough, Alfredo Bernard Shaw, Forrest Baxter Durand, Glenn Faulkner, Wanda Boga, Aldolpho Antonio James, Michael Shea Holmes, Terrence Roderick Carruthers, Richard David Roleson, Antonio Bateman, A.C. Wharton, Jr., Jerry Tyrone Durham, Terry Jerome Durham, Donald M. Justus, Roy Moore, and Glenn Faulkner. (See ECF No. 55-9 at PageID 6827, 6991, 7144, 7303.)

The penalty phase began the same day about 1:30 p.m. (Id. at PageID 7511.) The State presented two witnesses: Toney Sanders and Dr. O'Bryan Cleary Smith. (Id. at PageID 7528-64.) Codefendant James Montgomery presented three witnesses: Nakeita Montgomery Shaw, Mattie M. Calhoun, and himself. (Id. at PageID 7565-79.) Carruthers presented three witnesses: Bishop Richard L. Fiddler, Tonya Miller, and himself. (Id. at PageID 7579-98.)

On April 26, 1996, at 7:40 p.m., the jury began deliberations. (Id. at PageID 7631.) At 10:07 p.m., the jury returned to open court to report its verdict. (ECF No. 55-9 at PageID 7635-43.)

To assess the claims Carruthers raises in his habeas petition, it is necessary briefly to set forth the proof as found by the Tennessee Supreme Court:

> The defendants, Tony V. Carruthers and James Montgomery, were each convicted of first degree murder for killing Marcellos "Cello" Anderson, his mother Delois Anderson, and Frederick Tucker in Memphis in February of 1994. All of the victims disappeared on the night of February 24, 1994. On March 3, 1994, their bodies were found buried together in a pit that had been dug beneath a casket in a grave in a Memphis cemetery.
>
> The Guilt Phase
>
> The proof introduced at the guilt phase of the trial showed that one of the victims, Marcellos Anderson, was heavily involved in the drug trade, along with two other men, Andre "Baby Brother" Johnson and Terrell Adair. Anderson wore expensive jewelry, including a large

diamond ring, carried large sums of money on his person, and kept a considerable amount of cash in the attic of the home of his mother, victim Delois Anderson. When his body was discovered, Anderson was not wearing any jewelry and did not have any cash on his person. Anderson was acquainted with both defendants, and he considered Carruthers to be a trustworthy friend. The proof showed that Anderson's trust was misplaced.

In the summer of 1993 Jimmy Lee Maze, Jr., a convicted felon, received two letters from Carruthers, who was then in prison on an unrelated conviction. In the letters, Carruthers referred to "a master plan" that was "a winner." Carruthers wrote of his intention to "make those streets pay me" and announced, "everything I do from now on will be well organized and extremely violent." Later, in the fall of 1993, while incarcerated at the Mark Luttrell Reception Center in Memphis awaiting his release, Carruthers was assigned to a work detail at a local cemetery, the West Tennessee Veterans' Cemetery. At one point, as he helped bury a body, Carruthers remarked to fellow inmate Charles Ray Smith "that would be a good way, you know, to bury somebody, if you're going to kill them. . . . [I]f you ain't got no body, you don't have a case."

Smith also testified that he overheard Carruthers and Montgomery, who also was incarcerated at the Reception Center, talking about Marcellos Anderson after Anderson had driven Carruthers back to the Reception

Center from a furlough. According to Smith, when Montgomery asked Carruthers about Anderson, Carruthers told him that both Anderson and "Baby Brother" Johnson dealt drugs and had a lot of money. Carruthers said he and Montgomery could "rob" and "get" Anderson and Johnson once they were released from prison.

When Carruthers was released from the Department of Correction on November 15, 1993, he left the Reception Center with Anderson. Carruthers accompanied Anderson to Andre Johnson's house, and received a gift of $200 cash from Anderson, Johnson, and Terrell Adair, who was present at Johnson's house.

One month later, on December 15, 1993, Smith was released from the Department of Correction. Upon his release, Smith warned Anderson and Johnson of Carruthers' and Montgomery's plans to "get them." According to Smith and Johnson, Anderson did not take the warning or the defendants' threats seriously.

In mid-December 1993, Maze, his brother and Carruthers were riding around Memphis together. They came upon Terrell Adair's red Jeep on the street in front of Delois Anderson's home where a drive-by shooting had just occurred. Adair had been injured in the shooting and was in the hospital. Jonathan "Lulu" Montgomery, James Montgomery's brother, was at the scene of the shooting, and he joined Carruthers in the back seat of Maze's car.

According to Maze, Carruthers remarked to Jonathan that, "it would be the best time to kidnap Marcellos," and Jonathan asked, "which one Baby Brother or Marcellos?" Carruthers then nudged Montgomery with his elbow and said "it" was going to take place after James Montgomery was released from prison. About two weeks later, on December 31, Maze saw Carruthers loading three antifreeze containers into a car, and Carruthers indicated to Maze that the containers were filled with gasoline.

On January 11, 1994, James Montgomery was released from prison. After his release, Montgomery told "Baby Brother" Johnson that he, not Johnson, was in charge of the neighborhood. Montgomery said, "It was my neighborhood before I left, and now I'm back and its my neighborhood again." Montgomery asked Johnson if he wanted to "go to war about this neighborhood." When Johnson said, "no," Montgomery replied "You feeling now like I'm about to blow your motherf---g brains out" and "you all need to get in line around here or we're going to war about this." Near the end of January or the first of February 1994, Johnson and Adair saw the defendants sitting together in an older model grey car down the street from Johnson's mother's home. It was late at night, between 11 p.m. and 1 a.m. When the defendants approached Johnson and Adair, Montgomery asked why they thought he was trying to harm them. Montgomery told them, "Look, I told you, we

ain't got no problem with nobody in this neighborhood. We already got our man staked out. If we wanted some trouble or something, we got you right now. We'd kill your whole family." Confirming Montgomery's statement, Carruthers told them, "We already got our man staked out. You all right. If it's any problem, we'll deal with it later." Montgomery explained that he intended to take the "man's" money and drugs, and said, "if the police didn't have no body, they wouldn't have no case."

On February 23, 1994, Marcellos Anderson borrowed a white Jeep Cherokee from his cousin, Michael Harris. Around 4:30 on the afternoon of February 24, 1994, witnesses saw Marcellos Anderson and Frederick Tucker riding in the Jeep Cherokee along with James and Jonathan Montgomery. About 5 p.m. that day, James and Jonathan Montgomery and Anderson and Tucker arrived in the Jeep Cherokee at the house of Nakeita Shaw[9], the Montgomery brothers' cousin. Nakeita Shaw, her four children, and Benton West, also her cousin, were present at the house when they arrived.

The four men entered the house and went downstairs to the basement. A short time later, James Montgomery came back upstairs and asked Nakeita Shaw if she could leave for a while so he could "take care of some

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[9] Shaw is also referred to as Nakeita Montgomery or Nakeita Montgomery Shaw.

business." Nakeita Shaw told West that she thought "they" were being kidnapped, and then she left the house with West and her children. West agreed to care for Nakeita Shaw's children while she attended a meeting.

When Nakeita Shaw returned home after the meeting, she saw only Carruthers and James Montgomery. Montgomery asked her to go pick up her children and to "stay gone a little longer." Nakeita Shaw returned home with her children before 10 p.m. The Jeep Cherokee was gone, but James Montgomery and Carruthers were still present at her home. Montgomery told Nakeita Shaw to put her children to bed upstairs and remain there until he told her he was leaving. Sometime later, Montgomery called out to Nakeita Shaw that he was leaving. She returned downstairs and saw James Montgomery, Carruthers, and the two victims, Anderson and Tucker, leave in the Jeep Cherokee. Prior to trial, Nakeita Shaw told the police that Anderson's and Tucker's hands were tied behind their backs when they left her house. While she admitted making this statement, she testified at trial that the statement was false and that she had not seen Anderson's and Tucker's hands tied when they left her home.

In the meantime, around 8 p.m. on February 24, Laventhia Briggs telephoned her aunt, victim Delois Anderson. When someone picked up the telephone but said nothing, Briggs hung up. Briggs called "a couple of

more times" but received no answer. Briggs was living with Delois Anderson at the time and arrived at her aunt's home around 9:00 p.m. Although Delois Anderson was not home, her purse, car, and keys were there. Food left in Anderson's bedroom indicated that she had been interrupted while eating. Briggs went to bed, assuming her aunt would return home soon. A co-worker, whom Delois Anderson had driven home around 7:15 p.m., was the last person to have seen her alive.

Chris Hines, who had known the defendants since junior high school, testified that around 8:45 p.m. on February 24, 1994, Jonathan Montgomery "beeped" him. Jonathan said, "Man, an---r got them folks." When Hines asked, "What folks?" Jonathan replied, "Cello and them" and said something about stealing $200,000. Jonathan then indicated that he could not talk more on the telephone and arranged to meet Hines in person. Jonathan arrived at Hines' home at about 9:00 p.m. and told him, "Man, we got them folks out at the cemetery on Elvis Presley, and we got $200,000. Man, a n---r had to kill them folks." At that point, James Montgomery "beeped in" and talked with Jonathan. When the telephone call ended, Jonathan asked Hines to drive him to the cemetery. Hines refused, but he allowed Jonathan to borrow his car, which Jonathan promised to return in an hour. When the car was not returned, Hines called James Montgomery's cellular telephone at around 11 p.m. James told Hines that he did

not know where Jonathan was, that Jonathan did not have a driver's license, and that the car should be returned by 4 a.m. because Jonathan was supposed to drive James to his girlfriend's house.

The Jeep Cherokee that Anderson had borrowed was found in Mississippi on February 25 around 2:40 a.m. It had been destroyed by fire. About 3:30 a.m., after he was informed of the vehicle fire by law enforcement officials, Harris telephoned Delois Anderson's home, and Laventhia Briggs then discovered that neither her aunt Delois nor her cousin Marcellos had returned home. Briggs filed a missing person report with the police later that day.

The Montgomery brothers and Carruthers did not return Hines' car until approximately 8:30 a.m. on February 25. The car was very muddy. Hines drove James Montgomery and Carruthers to Montgomery's mother's home and then drove away with Jonathan Montgomery. That morning Jonathan, whom Hines described as acting "paranoid" and "nervous," repeatedly told Hines that "they had to kill some people." About two hours later, James Montgomery and Carruthers came to Hines' home looking for Jonathan. Hines advised Carruthers and James Montgomery that he was celebrating his birthday, and he asked James Montgomery to give him a birthday present. James agreed to give Hines twenty dollars after he picked up his paycheck, and James also agreed to have

Hines' car washed immediately as a birthday present.

Hines, the Montgomery brothers, and Carruthers drove to a carwash, and James Montgomery paid an unidentified elderly man to clean the car. The man cleaned the interior of the car and the trunk of the car. Neither Carruthers nor James Montgomery supervised the cleaning of the car. After Jonathan Montgomery abruptly left the carwash, Carruthers and James Montgomery asked Hines what Jonathan had told him, but Hines did not tell them. Several days later James Montgomery came to Hines' home and offered Hines an AK-47 assault rifle because Montgomery said he had "heard that Hines was into it with some people on the street." James Montgomery told Hines the rifle had "blood on it." Hines testified that he interpreted this statement to mean that someone had been shot with the weapon.

On March 3, 1994, about one week after a missing person report was filed on Delois and Marcellos Anderson, Jonathan Montgomery directed Detective Jack Ruby of the Memphis Police Department to the grave of Dorothy Daniels at the Rose Hill Cemetery on Elvis Presley Boulevard. Daniels' grave was located six plots away from the grave site of the Montgomery brothers' cousin. Daniels had been buried on February 25, 1994. Pursuant to a court order, Daniels' casket was disinterred, and the authorities discovered the bodies of the three victims buried beneath the casket

under several inches of dirt and a single piece of plywood.

An employee of the cemetery testified that a pressed wood box or vault had been placed in Daniels' grave during working hours on February 24 and that it would have taken at least two people to remove the box. Daniels' casket had been placed in the grave inside the box on February 25, and, according to Dr. Hugh Edward Berryman, one of the forensic anthropologists who assisted in the removal of the bodies from the crime scene, there was no evidence to suggest that Daniels' casket had been disturbed after she was buried. Thus, it can be inferred that the bodies of the three victims were placed in the grave and covered with dirt and a piece of plywood prior to the casket being placed in the grave.

Dr. O.C. Smith, who helped remove the bodies from the grave and who performed autopsies on the victims, testified that, when found, the body of Delois Anderson was lying at the bottom of the grave and the bodies of the two male victims were lying on top of her. The hands of all three victims were bound behind their backs. Frederick Tucker's feet were also bound and his neck showed signs of bruising caused by a ligature. A red sock was found around Delois Anderson's neck. Marcellos Anderson was not wearing any jewelry. Dr. Smith testified that Delois Anderson died from asphyxia caused by several factors: the position of her head against her body, dirt in her mouth and nose, and trauma from weight

on her body. Frederick Tucker had received a gunshot wound to his chest, which would not have been fatal had he received medical care. He had also suffered injuries from blunt trauma to his abdomen and head resulting in broken ribs, a fractured skull, and a ruptured liver. Dr. Smith opined that Tucker was shot and placed in the grave, where the force of compression from being buried produced the other injuries and, along with the gunshot wound, caused his death. According to Dr. Smith, Marcellos Anderson had been shot three times: a contact wound to his forehead that was not severe and two shots to his neck, one of which was also not serious. However, the gunshot causing the other neck wound had entered Anderson's windpipe and severed his spinal cord, paralyzing him from the neck down. This wound was not instantaneously fatal. Anderson had also suffered blunt trauma to his abdomen from compression forces. Dr. Smith opined that each victim was alive when buried.

Defendant James Montgomery presented no proof. Carruthers, acting pro se, called several witnesses to rebut the testimony offered by the State, primarily by attacking the credibility of the State's witnesses.

A health administrator at the Mark Luttrell Reception Center testified that, because of an injury to his arm, Carruthers had been given a job change on October 6, 1993, and had not worked at the cemetery after that date. Another official at the Reception Center testified

that Carruthers was not released on furlough after Montgomery arrived at the Reception Center on November 4, 1994. This proof was offered to impeach Smith's testimony that Montgomery and Carruthers discussed robbing and getting Marcellos Anderson after Anderson drove Carruthers back to the Reception Center following a furlough. An investigator appointed to assist Carruthers with his defense testified that he had interviewed Maze, who admitted he did not know anything about the "master plan" to which Carruthers referred in the letters until Carruthers was released from prison. On cross-examination, the investigator admitted that Maze said that when he was released from prison, Carruthers had explained that the master plan involved kidnapping Marcellos Anderson. Carruthers' brother and another witness testified that Jonathan Montgomery was not at the scene of the drive-by shooting involving Terrell Adair. This proof was offered to impeach Maze's testimony that Carruthers and Jonathan Montgomery discussed kidnapping Marcellos on the day that Terrell Adair was shot. Another witness, Aldolpho Antonio James testified that he and Carruthers had been visiting a friend between the hours of 1:00 a.m. and 2:00 a.m. the day before these homicides were first reported on the news. This testimony was offered to provide at least a partial alibi for Carruthers for the early morning hours of February 25, 1994. However, on cross-examination, James

admitted that he did not know the exact date he and Carruthers had been together.

Carruthers also called Alfredo Shaw as a witness. After seeing a television news report about these killings in March of 1994, Alfredo Shaw had telephoned CrimeStoppers and given a statement to the police implicating Carruthers. Alfredo Shaw later testified before the grand jury which eventually returned the indictments against Carruthers and Montgomery. Prior to trial, however, several press reports indicated that Alfredo Shaw had recanted his grand jury testimony, professed that the statement had been fabricated, and intended to formally recant his grand jury testimony when called as a witness for the defense. Therefore, when Carruthers called Alfredo Shaw to testify, the prosecution announced that if he took the stand and recanted his prior sworn testimony, he would be charged with and prosecuted for two counts of aggravated perjury. In light of the prosecution's announcement, the trial court summoned Alfredo Shaw's attorney and allowed Alfredo Shaw to confer privately with him. Following that private conference, Alfredo Shaw's attorney advised the trial court, defense counsel, including Carruthers, and the prosecution, that Alfredo Shaw intended to testify consistently with his prior statements and grand jury testimony and that any inconsistent statements Alfredo Shaw had made to the press were motivated by his fear of

Carruthers and by threats he had received from him.

Despite this information, Carruthers called Alfredo Shaw as a witness and as his attorney advised, Shaw provided testimony consistent with his initial statement to the police and his grand jury testimony. Specifically, Alfredo Shaw testified that he had been on a three-way call with Carruthers and either Terry or Jerry Durham, and during this call, Carruthers had asked him to participate in these murders, saying he had a "sweet plan" and that they would each earn $100,000 and a kilogram of cocaine. Following his arrest for these murders, Carruthers was incarcerated in the Shelby County Jail along with Alfredo Shaw, who was incarcerated on unrelated charges. Carruthers and Alfredo Shaw were in the law library when Carruthers told Alfredo Shaw that he and some other unidentified individuals went to Delois Anderson's house looking for Marcellos Anderson and his money. Marcellos was not there when they arrived, but Carruthers told Delois Anderson to call her son and tell him to come home, "it's something important." When Anderson arrived, the defendants forced Anderson, Tucker, who was with Anderson, and Delois Anderson into the jeep at gunpoint and drove them to Mississippi, where the defendants shot Marcellos Anderson and Tucker and burned the jeep. According to Alfredo Shaw, the defendants then drove all three victims back to Memphis in a stolen vehicle. Alfredo

Shaw testified that, after they put Marcellos Anderson and Tucker into the grave, Delois Anderson started screaming and one of the defendants told her to "shut up" or she would die like her son and pushed her into the grave. Carruthers also told Alfredo Shaw that the bodies would never have been discovered if "the boy wouldn't have went and told them folks." Carruthers told Alfredo Shaw that he was not going to hire an attorney or post bond because the prosecution would then learn that the murders had been a "hit." Carruthers told Alfredo Shaw that Johnson also was supposed to have been "hit" and that Terry and Jerry Durham were the "main people behind having these individuals killed." Carruthers said that the Durhams wanted revenge because Anderson and Johnson had previously stolen from them.

In response to questioning by Carruthers, Alfredo Shaw acknowledged that he had told the press that his statement to police and his grand jury testimony had been fabricated, but said he had done so because Carruthers had threatened him and his family. According to Alfredo Shaw, one of Carruthers' investigators had arranged for a news reporter to speak with him about recanting his grand jury testimony.

As impeachment of his own witness, Carruthers called both Jerry and Terry Durham, twin brothers, as witnesses. The Durhams denied knowing Alfredo Shaw and said they had never been party to a three-way telephone call

> involving Alfredo Shaw and Carruthers. Carruthers also called attorney AC Wharton who testified that he was initially retained by Carruthers' mother to represent her son on these murder charges, but was required to withdraw because of a conflict of interest. This testimony was offered to impeach Alfredo Shaw's statement that Carruthers had said he was not going to hire an attorney or post bond. Finally, Carruthers called an administrative assistant from the Shelby County jail who testified that jail records, indicated that Alfredo Shaw was not in the law library at the same time as Carruthers in either February or March of 1994. According to jail records, Alfredo Shaw was in protective custody for much of that time and, as a result, would have been escorted at all times by a guard. However, on cross-examination, this witness admitted that the jail records regarding the law library were not always complete or accurate and that Alfredo Shaw had been housed outside of protective custody from mid-March to early April 1994 which would have afforded him the opportunity to interact with Carruthers.

Carruthers, 35 S.W.3d at 524-30 (footnotes omitted).

## IV. PETITIONER'S FEDERAL HABEAS CLAIMS

Carruthers raises the following issues:

1. Fraud on the court (ECF No. 21 at 51-52; ECF No. 49 at 1-2)[10];
2. Sex discrimination in selecting the grand jury foreperson (ECF No. 21 at 52-54);
3. No uniform standards guide Tennessee prosecutors in deciding whether to seek the death penalty and no standard governed the prosecutor (id. at 54);
4. The indictments did not allege aggravating circumstances (id.);
5. The trial court failed to require the state to elect which indictment it intended to proceed upon at trial (id. at 54-55);
6. Carruthers was not competent to be tried and sentenced (id. at 55-62);
7. Pre-trial counsel rendered ineffective assistance (id. at 62-73);
8. The trial court required Carruthers to represent himself in violation of his constitutional rights (id. at 73-82; ECF No. 49 at 2);
9. The trial court denied the motion to sever (ECF No. 21 at 82-83);
10. The trial court entered a gag order (id. at 83-85);
11. The trial court empaneled an anonymous jury (id. at 85-86);

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[10] The Court previously dismissed this claim. (ECF No. 70 at 18-19.)

12. The trial court allowed excessive security measures inside the courtroom (id. at 86-87);
13. The state withheld exculpatory evidence (id. at 87-91);
14. The state knowingly presented and/or condoned false testimony (id. at 91-94);
15. The trial court precluded Carruthers from presenting his defense that others with motive and opportunity killed the victims (id. at 95-97);
16. The trial court denied and/or interfered with Carruthers's employment of support services (id. at 97-99);
17. The trial court admitted specified evidence (id. at 99-101);
18. The admission of specified evidence violated Carruthers's right to confront the witnesses against him and to due process (id. at 101-02);
19. The trial court failed to ascertain Nakeita Montgomery Shaw's competence as a witness (id. at 103);
20. The trial judge was biased against Carruthers (id. at 103-06);
21. The prosecution made improper remarks during closing argument at the guilt and sentencing stages (id. at 106-07);
22. The trial court gave the jury improper instructions at the guilt phase of trial (id. at 107-09);
23. The trial court gave the jury improper instructions at the sentencing phase of trial (id. at 109-10);
24. Extraneous, improper influences affected the jury's verdict (id. at 110);

25. Juror 121 misled Carruthers to believe no reason disqualified him from serving (id. at 110);
26. The trial court failed to hold a hearing about Jurors 120 and 127 (id. at 111);
27. The trial court failed to hold a hearing about Juror 121 (id. at 111-12);
28. The trial court denied Carruthers an open and public trial (id. at 112-14);
29. The trial court conducted a sentencing hearing on Carruthers's convictions for especially aggravated kidnapping and especially aggravated robbery in his absence (id. at 114);
30. The trial court made fact findings to determine Carruthers's sentences (id. at 114-15);
31. The evidence is insufficient to support the convictions (id. at 116);
32. The death sentences violate the Sixth, Eighth, and Fourteenth Amendments (id. at 116);
33. Carruthers is actually innocent (id. at 116-17);
34. The death sentence violated the Eighth and Fourteenth Amendments because it is arbitrary (id. at 117);
35. Carruthers's convictions and death sentences violate Article VI, Clause 2, of the Constitution because the State disregarded rights accorded Carruthers by international law (id. at 117-22);
36. Carruthers is actually innocent (id. at 122)[11];
37. Carruthers is incompetent to be executed (id. at 122);

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[11] Claims 33 and 36 appear to be identical.

38. Death by lethal injection and/or electrocution constitute cruel and unusual punishment (id. at 122-28);

39. Appointed counsel rendered ineffective assistance on appeal (id. at 128-31); and

40. The cumulative effect of the constitutional errors render Carruthers's convictions and death sentences unconstitutional (id. at 131).

## V. THE LEGAL STANDARD

The statutory authority for federal courts to grant habeas corpus relief for persons in state custody is provided by 28 U.S.C. § 2254. A federal court may grant habeas relief to a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

### A. Waiver and Procedural Default

Twenty-eight U.S.C. §§ 2254(b) and (c) provide that a federal court may not grant a writ of habeas corpus on behalf of a state prisoner unless, with certain exceptions, the prisoner has exhausted available state remedies by presenting the same claim sought to be redressed in a federal habeas court to the state courts. Cullen v. Pinholster, 131 S. Ct. 1388, 1398 (2011). The petitioner must "fairly present"[12] each claim to all

[12] For a claim to be exhausted, "[i]t is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." Anderson v. Harless, 459 U.S. 4, 6, (1982) (per curiam) (citations omitted). Nor is it enough to make a general appeal to a broad constitutional guarantee. Gray v. Netherland, 518 U.S. 152, 163 (1996).

levels of state court review, up to and including the state's highest court on discretionary review, Baldwin v. Reese, 541 U.S. 27, 29 (2004), except where the state has explicitly disavowed state supreme court review as an available state remedy, O'Sullivan v. Boerckel, 526 U.S. 838, 847-48 (1999). Tennessee Supreme Court Rule 39 eliminated the need to seek review in the Tennessee Supreme Court in order to "be deemed to have exhausted all available state remedies." Adams v. Holland, 330 F.3d 398, 402 (6th Cir. 2003); see also Smith v. Morgan, 371 F. App'x 575, 579 (6th Cir. 2010) (per curiam) (stating that the Adams holding promotes comity by requiring that state courts have the first opportunity to review and evaluate claims and by mandating that federal courts "respect the duly promulgated rule of the Tennessee Supreme Court that recognizes the court's law and policy-making function of that court and the court's desire not to be entangled in the business of simple error correction.").

The procedural-default doctrine is integral to the exhaustion requirement. See Edwards v. Carpenter, 529 U.S. 446, 452-53 (2000) (noting the interplay between the exhaustion rule and the procedural-default doctrine). If the state court decides a claim on an independent and adequate state ground, such as a procedural rule prohibiting the state court from reaching the merits of the constitutional claim, a petitioner ordinarily is barred from seeking federal habeas review. Coleman v. Thompson, 501 U.S. 722, 729-30 (1991) (stating that a federal habeas court will not review a claim rejected by a state court "if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment."). If a claim has never been

presented to the state courts, but a state court remedy is no longer available (e.g., when an applicable statute of limitations bars a claim), the claim is technically exhausted, but procedurally barred. See id. at 732; Hicks v. Straub, 377 F.3d 538, 551 (6th Cir. 2004) (noting that the procedural-default doctrine prevents circumvention of the exhaustion doctrine).

Under either scenario, a petitioner must show "cause" to excuse his failure to present the claim fairly and "actual prejudice" stemming from the constitutional violation or, alternatively, that a failure to review the claim will result in a fundamental miscarriage of justice. Coleman, 501 U.S. at 750. The latter showing requires a petitioner to establish that a constitutional error has probably resulted in the conviction of a person who is actually innocent of the crime. Schlup v. Delo, 513 U.S. 298, 321 (1995); see also House v. Bell, 547 U.S. 518, 536-39 (2006) (restating the ways to overcome procedural default and further explaining the actual innocence exception).

**B. Merits Review**

Section 2254(d) establishes the standard for addressing claims that have been adjudicated in state courts on the merits:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable applica-

> tion of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2). The petitioner carries the burden of proof for this "difficult to meet" and "highly deferential [AEDPA] standard," which "demands that state-court decisions be given the benefit of the doubt." Pinholster, 131 S. Ct. at 1398 (citations and internal quotation marks omitted).[13]

Review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Id. at 1399. A state court's decision is "contrary" to federal law when it "arrives at a conclusion opposite to that reached" by the Supreme Court on a question of law or "decides a case differently than" the Supreme Court has "on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 412-13 (2000).[14] An "unreasonable application" of federal law occurs when the state court "identifies the correct governing legal principle from" the

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[13] The AEDPA standard creates "a substantially higher threshold" for obtaining relief than a de novo review of whether the state court's determination was incorrect. Schriro v. Landrigan, 550 U.S. 465, 473 (2007).

[14] The "contrary to" standard does not require citation of Supreme Court cases "so long as neither the reasoning nor the result of the state-court decision contradicts them." Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam); see also Mitchell v. Esparza, 540 U.S. 12, 16 (2003) (per curiam) (same); Treesh v. Bagley, 612 F.3d 424, 429 (6th Cir. 2010) (same).

Supreme Court's decisions "but unreasonably applies that principle to the facts of the prisoner's case." Id. at 413. The state court's application of clearly established federal law must be "objectively unreasonable." Id. at 409. The writ may not issue merely because the habeas court, in its independent judgment, determines that the state-court decision applied clearly established federal law erroneously or incorrectly. Renico v. Lett, 130 S. Ct. 1855, 1862 (2010); Williams, 529 U.S. at 411.

There is little case law addressing the standard in § 2254(d)(2) that a decision was based on "an unreasonable determination of facts." In Wood v. Allen, 558 U.S. 290, 301 (2010), the Supreme Court stated that a state-court factual determination is not "unreasonable" merely because the federal habeas court would have reached a different conclusion. In Rice v. Collins, 546 U.S. 333, 341-42 (2006), the Court explained that "[r]easonable minds reviewing the record might disagree" about the factual finding in question, "but on habeas review that does not suffice to supersede the trial court's . . . determination."[15]

"Notwithstanding the presumption of correctness, the Supreme Court has explained that the standard of

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[15] In Wood, 558 U.S. at 293, 299, the Supreme Court granted certiorari to resolve whether, to satisfy § 2254(d)(2), a petitioner must establish only that the state-court factual determination on which the decision was based was "unreasonable," or whether § 2254(e)(1) additionally requires a petitioner to rebut a presumption that the determination was correct with clear and convincing evidence. The Court ultimately found it unnecessary to reach that issue. Id. at 293. In Rice, 546 U.S. at 339, the Court recognized that it is unsettled whether there are some factual disputes where § 2254(e)(1) is inapplicable.

§ 2254(d)(2) is 'demanding but not insatiable.'" Harris v. Haeberlin, 526 F.3d 903, 910 (6th Cir. 2008) (quoting Miller-El v. Dretke, 545 U.S. 231, 240 (2005)). "Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review." Miller-El v. Cockrell, 537 U.S. 322, 340 (2003). A state-court adjudication will not be overturned on factual grounds unless it is objectively unreasonable in light of the evidence presented in the state-court proceeding. See Ayers v. Hudson, 623 F.3d 301, 308 (6th Cir. 2010).

### C. Summary-Judgment Standard

Under Federal Rule of Civil Procedure 56, on motion of a party, the court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party moving for summary judgment "bears the initial burden of demonstrating the absence of any genuine issue of material fact." Mosholder v. Barnhardt, 679 F.3d 443, 448 (6th Cir. 2012) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). "Once the moving party satisfies its initial burden, the burden shifts to the nonmoving party to set forth specific facts showing a triable issue of material fact." Id. at 448-49 (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)).

"In considering a motion for summary judgment, [a court] must draw all reasonable inferences in favor of the nonmoving party." Phelps v. State Farm Mut. Auto. Ins. Co., 736 F.3d 697, 702-03 (6th Cir. 2012) (citing Matsushita, 475 U.S. at 587). "The central issue is 'whether the evidence presents a sufficient

disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Id. at 703 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986)). "[A] mere 'scintilla' of evidence in support of the non-moving party's position is insufficient to defeat summary judgment; rather, the non-moving party must present evidence upon which a reasonable jury could find in [his] favor." Tingle v. Arbors at Hilliard, 692 F.3d 523, 529 (6th Cir. 2012) (quoting Anderson, 477 U.S. at 252).

Rule 12 of the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules") permits federal courts to apply the Federal Rules of Civil Procedure to petitions for habeas corpus "to the extent that they are not inconsistent with any statutory provision or these rules." Habeas Rule 12. The AEDPA's significant deference to a state court's resolution of factual issues guides summary-judgment review in habeas cases. A federal habeas court must presume the underlying factual determinations of the state court to be correct, unless the petitioner "rebut[s] the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); see also Malone v. Fortner, No. 3:09-0949, 2013 WL 1099799, at *1 n.3 (M.D. Tenn. Mar. 14, 2013) ("[S]ummary judgment rules in evaluating the evidence do not apply given the statutory presumption of correctness of facts found by the state courts."). The Court applies general summary-judgment standards on federal habeas review only insofar as they do not conflict with the language and intent of the AEDPA.

## VI. ANALYSIS OF CARRUTHERS'S CLAIMS

### A. Gender Discrimination in the Selection of the Grand Jury Foreperson (Claim 2, Amended Petition ¶¶ 202-12)

Carruthers alleges that historically there have been few brief time periods when a woman has served as foreperson on a Shelby County grand jury and that the foreperson on the grand jury that indicted him was not female. (ECF No. 21 at 52-53.) He alleges that Tennessee Rule of Criminal Procedure 6(g), which establishes the process for selecting forepersons, is susceptible to discrimination or abuse. (Id. at 53-54.)

Respondent argues that this claim is procedurally defaulted because it was not presented for review to the Tennessee Court of Criminal Appeals. (ECF No. 114-1 at 5-6.) Carruthers argues that he can establish cause for any prejudicial default of this claim through ineffective assistance of trial and/or appellate counsel. (ECF No. 129 at 247-50.) Respondent contends that Carruthers's argument fails because Carruthers did not exhaust the ineffective-assistance claims on which he relies to establish cause for the procedural default of Claim 2. (ECF No. 149 at 2-3.)

Carruthers did not exhaust his claim of discrimination in selecting a jury foreperson in the state court. He failed to exhaust a related ineffective-assistance-of-counsel claim or demonstrate cause and prejudice to excuse his failure to exhaust an ineffective-assistance claim related to the selection of the grand jury foreperson. He has not demonstrated cause and prejudice to overcome the procedural default of Claim 2. See Carpenter, 529 U.S. at 451-52 (quoting Murray v. Carrier, 477 U.S. 478, 489 (1986)) ("'[A] claim of ineffective

assistance,' . . . generally must 'be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default.'" (alteration in original)). Carruthers has not demonstrated that a miscarriage of justice would result from the Court's failure to address this claim.

Claim 2 is procedurally defaulted. Accordingly, summary judgment is GRANTED and Claim 2 is DENIED.

### B. No Uniform Standards for Prosecutors (Claim 3, Amended Petition ¶¶ 213-15)

Carruthers alleges that there are no state-wide standards in Tennessee to guide prosecutors in deciding whether to seek the death penalty and that no standards guided the prosecutors in this case. (ECF No. 21 at 54.) Respondent argues that this claim is procedurally defaulted because it was not presented for review to the Tennessee Court of Criminal Appeals. (ECF No. 114-1 at 5-6.) Carruthers does not specifically respond to the Motion for summary judgment as it relates to this claim. (See ECF No. 149 at 3-4.) He did not exhaust this claim in the state courts. He has not demonstrated cause and prejudice or that a miscarriage of justice would result from the Court's failure to address this claim. Claim 3 is procedurally defaulted; summary judgment is, therefore, GRANTED based on procedural default.

Further, the Supreme Court has refused to strike down various death-penalty statutes on the ground that those laws grant prosecutors discretion in determining whether to seek the death penalty. Gregg v. Georgia, 428 U.S. 153, 199, 206-07 (1976) ("[T]hat the state prosecutor has unfettered authority to select

those persons whom he wishes to prosecute for a capital offense" does not indicate that the system is unconstitutional); Campbell v. Kincheloe, 829 F.2d 1453, 1465 (9th Cir. 1987) (noting that the Supreme Court has rejected the argument that a death penalty statute "is unconstitutional because it vests unbridled discretion in the prosecutor to decide when to seek the death penalty."); see also Proffitt v. Florida, 428 U.S. 242, 254 (1976) (rejecting argument that arbitrariness is inherent in the Florida criminal justice system because it allows discretion at each stage of a criminal proceeding). Claim 3 is also without merit and, therefore, DENIED.

### C. Defective Indictment (Claim 4, Amended Petition ¶¶ 216-17)

Carruthers alleges that the indictments did not allege aggravating circumstances and, thus, the Shelby County grand jury did not find facts supporting the imposition of the death penalty. (ECF No. 21 at 54.) Respondent argues that this claim is procedurally defaulted because it was not presented for review to the Tennessee Court of Criminal Appeals. (ECF No. 114-1 at 5-6.) Carruthers does not specifically respond to the Motion for summary judgment as it relates to this claim. (See ECF No. 149 at 3-4.) Carruthers has not exhausted this claim in the state courts. He has not demonstrated cause and prejudice or that a miscarriage of justice would result from the Court's failure to address this claim. Claim 4 is procedurally defaulted. Summary judgment is, therefore, GRANTED.

Further, the federal right to presentment or indictment by a grand jury does not extend to the States through the Fourteenth Amendment. Hurtado v.

California, 110 U.S. 516, 520-21 (1884); see also Branzburg v. Hayes, 408 U.S. 665, 688 n.25 (1972) ("[I]ndictment by grand jury is not part of the due process of law guaranteed to state criminal defendants by the Fourteenth Amendment"). The Fifth Amendment grand jury right does not apply to state prosecutions. Williams v. Haviland, 467 F.3d 527, 531-33 (6th Cir. 2006); see Hall v. Bell, No. 2:06-CV-56, 2010 WL 908933, at *42-43 (E.D. Tenn. Mar. 12, 2010) (a state-court decision denying relief in a death-penalty case for failure to allege aggravating factors in an indictment is not "contrary to" or an "unreasonable application" of relevant Supreme Court precedent). Claim 4 is also without merit and, therefore, DENIED.

### D. Failure to Elect Indictment (Claim 5, Amended Petition ¶¶ 218-21)

Carruthers alleges that in March 1994, the Shelby County grand jury issued indictment Nos. 94-02797, 94-02798, and 94-02799, charging him with the first-degree murders of Fred Tucker, Delois Anderson, and Marcellos Anderson, respectively. (ECF No. 21 at 54-55.) In November 1995, the Shelby County grand jury issued indictments No. 95-11128, charging especially aggravated kidnapping of the three victims, and No. 95-11129, charging especially aggravated robbery of Marcellos Anderson. (Id. at 55.) Carruthers argues that the trial court did not require the State to elect the indictments with which it would proceed at trial. (Id.)

#### 1. Procedural Default

Respondent argues that the claim is procedurally defaulted because it was presented under a state-law theory in the Tennessee Court of Criminal Appeals. (ECF No. 114-1 at 6.) Carruthers argues that a

constitutional claim was fairly presented on direct appeal and should be resolved on the merits in this habeas proceeding. (ECF No. 129 at 231-32, 240-41.) He relies on United States v. Herbst, 565 F.2d 638, 643 (10th Cir. 1977), for the proposition that an indictment must "apprise the accused of the nature of the crime charged, so that he will be enabled to prepare a defense and plead the judgment in bar." (Id. at 232.) He argues that Herbst calls to mind the right guaranteed by the federal constitution in Cole v. Arkansas, 333 U.S. 196, 201 (1948), that "[n]o principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." (Id.)

Carruthers argues that on direct appeal, the Tennessee Court of Criminal Appeals considered his claim. (ECF No. 129 at 240-41 n.76.) See Carruthers, 35 S.W.3d at 572-74. On direct appeal, he challenged his "reindictment and conviction" based on Rule 8 of the Tennessee Rules of Criminal Procedure. (ECF No. 56-6 at PageID 10223.) He argued that the second indictment was "more akin" to a superseding indictment and cited Herbst, 565 F.2d at 643, for the proposition that a superseding indictment may be returned anytime before trial on the merits of an earlier indictment. (Id. at PageID 10224.)

When determining whether a claim has been "fairly presented," the Court looks to see whether the petitioner has taken any of the following four actions:

> (1) reliance upon federal cases employing constitutional analysis; (2) reliance upon state cases employing federal constitutional

> analysis; (3) phrasing the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right; or (4) alleging facts well within the mainstream of constitutional law.

Whiting v. Burt, 395 F.3d 602, 613 (6th Cir. 2005) (quoting McMeans v. Brigano, 228 F.3d 674, 681 (6th Cir. 2000)). Although Carruthers relied on federal cases, those cases do not employ a constitutional analysis relevant to the claim. In Herbst, the petitioner argued that the government's decision to proceed with a superseding indictment was vindictive in nature. 565 F. 2d at 643. The court stated that a superseding indictment may be returned at any time before trial on the merits, and "no prejudice in fact is an incident of such proceeding." Id. Herbst does not cite Cole or any other constitutional principle supportive of Carruthers's argument. Gray v. State, 250 S.W.2d 86, 89 (Tenn. 1952), the state-court case on which Carruthers relied, does not employ a federal constitutional analysis relevant to this claim. (See ECF No. 56-6 at PageID 10225-10226.) Carruthers has not framed his claim in terms of constitutional law and has not alleged facts within the mainstream of constitutional law.[16] Claim 5 was not fairly presented and has not been exhausted in the state courts.

Carruthers asserts ineffective assistance of trial and/or appellate counsel as cause for any procedural

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[16] The Tennessee Court of Criminal Appeals' analysis does not invoke constitutional law, see infra pp. 37-40.

default. (ECF No. 129 at 247-248, 250.)[17] Respondent argues that Carruthers cannot establish cause because he failed to exhaust an ineffective-assistance-of-counsel claim related to this issue. (ECF No. 149 at 5.) Carruthers has not exhausted an independent claim of ineffective assistance of trial counsel or appellate counsel related to Claim 5 and cannot establish cause.[18] See Carrier, 477 U.S. at 489, supra p. 31. The Court has held that Martinez does not establish cause for Petitioner's procedural default. (See ECF No. 192 at 31-32.) Carruthers has not established cause and prejudice and has not demonstrated that a miscarriage of justice would result from the Court's failure to address the claim. Claim 5 is, therefore, procedurally defaulted.

**2. Merits**

Respondent argues that the claim is also without merit. (ECF No. 114-1 at 7.) The Tennessee Court of Criminal Appeals stated:

> Consolidation of Indictments
>
> Appellant Carruthers claims the trial court erred by not requiring the state to elect upon which indictments it intended to proceed upon at trial. In March 1994, both appellants

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[17] Carruthers argues that "[a]ny failure of counsel to present this issue to Tennessee's courts thus constitutes ineffective assistance." (ECF No. 129 at 250.) This section only addressed the right to effective counsel at trial and appeal.

[18] In the habeas petition, Carruthers made a broad allegation that appellate counsel were ineffective for "failure to raise on appeal any and all claims raised in this amended petition." (See ECF No. 21 at 130.) There was no specific allegation of ineffective assistance at any stage of the proceedings related to Claim 5.

were originally indicted on three counts of first degree murder. Subsequently, in November 1995, both appellants were indicted on three counts of especially aggravated kidnapping and one count of especially aggravated robbery. All of these offenses arose from the same criminal episode and involved the same three victims. . . .

Carruthers contends that the murder indictments should have been dismissed. Because the state was not forced to elect between the two indictments, according to the appellant's argument, he "could not reasonably have known whether he was defending murder charges or charges of kidnapping and robbery." The appellant further claims that if the trial court had followed "normal procedure," he would have never been tried on the murder charges. The state disagrees and asserts that the appellant was properly tried on all charges.

Tenn. R. Crim. P. 8(a) (emphasis added) regarding mandatory joinder of offenses provides:

Two or more offenses shall be joined in the same indictment, presentment, or information, with each offense stated in a separate count, or consolidated pursuant to Rule 13 if the offenses are based upon the same conduct or arise from the same criminal episode and if such offenses are known to the appropriate prosecuting official at the time of the return of the indictment(s), presentment(s), or information(s) and if they are within the jurisdiction of a single court. A defendant shall not be

subject to separate trials for multiple offenses falling within this subsection unless they are severed pursuant to Rule 14.

The Advisory Commission Comments to Rule 8 further provide, in pertinent part:

This rule is designed to encourage the disposition in a single trial of multiple offenses arising from the same conduct and from the same criminal episode, and should therefore promote efficiency and economy. Where such joinder of offenses might give rise to an injustice, Rule 14(b)(2) allows the trial court to relax the rule.

The Commission wishes to make clear that section (a) is meant to stop the practice by some prosecuting attorneys of "saving back" one or more charges arising from the same conduct or from the same criminal episode. Such other charges are barred from future prosecution if known to the appropriate prosecuting official at the time that the other prosecution is commenced, but deliberately not presented to a grand jury.

Carruthers' argument ignores the basic premise behind the Rule. The purpose of Rule 8 is to promote efficient administration of justice and to protect the rights of the accused. The rule clearly permits a subsequently returned indictment to be joined with a previous indictment where the alleged offenses relate to the same criminal episode. See King v. State, 717 S.W.2d 306 (Tenn. Crim. App. 1986). This practice, however, does have certain

limitations which, as the comments note, safeguard an accused against prosecutorial abuse. For example, a prosecutor cannot simply decide to "save" charges on other offenses arising out of the same conduct until after a trial is had on the original charges. Obviously, this would result in multiple trials and prejudice the defendant. This concern, however, is not present in the case at hand because the subsequent indictments were returned well before the start of trial.

Although there is no written trial court order consolidating the indictments in this case, not only was consolidation mandated by the rules, it was clearly understood by the court and all parties involved in this case. As soon as the 1995 indictments were returned, the appellants filed a motion to dismiss. After a hearing on December 19, 1995, the trial court denied the motion, and the matter proceeded on all charges. In fact, counsel admitted that they knew they were going to trial on the murder charges; they moved to dismiss the new charges. Carruthers' claim that he did not know what charges the state was prosecuting is wholly without merit. Not only did the appellant file a motion to dismiss the subsequent charges, which was denied, the style of the pleadings and orders filed in this case after the return of the 1995 indictments, including letters Carruthers wrote to his attorney, refer to both the 1994 and 1995 indictments. Moreover, jury selection had already started in early January 1996, when the state

> moved for a continuance. There certainly was no confusion as to charges being tried when a jury was again selected and trial finally began three months later in April 1996. All of the indictments were read to the jury at the beginning of the trial.
>
> As this Court observed in King,
>
> > We do not perceive that any evil results from subsequent indictments being returned against a defendant charging him with additional offenses which are based on the same conduct or which arise from the same criminal episode upon which prior indictments have been returned; when the defendant has not been tried on any of the offenses at the time the subsequent indictments are returned. As previously noted, the purpose of Rule 8 is to prevent multiple trials on charges arising from the same conduct or from the same criminal episode except under the circumstances stated in the rule.
> >
> > 717 S.W.2d at 308. To follow the appellant's suggestion in this case would result in the non-prosecution of three murder charges. Surely this type of windfall was not contemplated by the drafters of the Rules. The appellant has simply failed to show how he was unprepared to defend on kidnapping and robbery charges that stemmed from the same criminal episode in which three individuals were killed.

Carruthers, 1999 WL 1530153, at *33-35.

Carruthers argues that in order for an indictment to be sufficient it must inform the defendant of the charges against which he must defend. (ECF No. 129 at 213, 250.) He asserts that he faced charges in two separate indictments without formal notice of which indictment he must defend against. (Id. at 214, 250.)

Carruthers was informed of the charges in both indictments. He does not argue that the Tennessee Court of Criminal Appeals' decision is contrary to or an unreasonable application of clearly established Supreme Court precedent or is based on an unreasonable determination of facts. In Pointer v. United States, 151 U.S. 396, 399-404 (1894), the Supreme Court held there is no error in refusing to compel an election between charges when it appears that they were so closely connected in respect of time, place, and occasion that it is difficult to separate the proof. In Johnson v. United States, 82 F.2d 500, 504 (6th Cir. 1936), the Sixth Circuit held that there was no error in consolidating indictments where the appellants were the only defendants in each indictment and the charges were for acts or transactions that were connected. Further, the court did not err by not requiring the district attorney to elect the indictment that would be prosecuted. Id. "Appellee was not required to abandon either [indictment], and both might be tried at the same time unless some substantial right of appellants were prejudiced thereby." Id. The matter was in the court's discretion. Id. Carruthers's constitutional rights were not violated by the consolidation of these indictments. See Duckett v. McDonough, 701 F. Supp. 2d 1245, 1268 (M.D. Fla. Mar. 25, 2010) (denying ineffective-assistance-of-counsel claim related to counsel's stipulation to consolidation of charges of sexual battery and

first-degree murder where they were committed by the same person in a single episode). Claim 5 is without merit. Summary judgment is GRANTED and Claim 5 is, therefore, DENIED.

### E. Competence to Stand Trial and Be Sentenced (Claim 6, Amended Petition ¶¶ 222-39)

Carruthers alleges that when he was housed at the Shelby County Jail, he suffered unconstitutional living conditions, "giving rise to high levels of fear and anxiety for inmates, and even more so with respect to inmates who suffered from mental and emotional disorders." (ECF No. 21 at 55-56.) He alleges that on or around October 21, 1994, Larry Nance, then Carruthers's counsel, requested a psychological evaluation, which the trial court granted. (Id. at 57.) On December 16, 1994, Dr. John Hutson determined that Carruthers was competent to stand trial and that his "ability to appreciate the wrongfulness of his behavior and conform his behavior" was not substantially impaired. (Id.) Around January 17, 1995, Carruthers's new counsel, Craig Morton, filed a motion for a second psychiatric evaluation, which the trial court denied. (Id. at 57-58.) Morton argued at the hearing that he did not have access to Hutson's entire report and the underlying records, and that without those records it was difficult "to make an argument as to why we feel" Carruthers should be re-evaluated. (Id. at 58.) Carruthers argues that

> Notwithstanding a record replete with descriptions by a series of Mr. Carruthers's appointed counsel of his unusual, abrasive and bizarre behavior, similar kinds of remarks

> and observations by the trial court, and a case file bourgeoning with Mr. Carruthers's letters to his counsel, the District Attorney, the trial court, the Tennessee Board of Professional Responsibility, and others that contained unusual matters, symbols, and observations, Mr. Carruthers was not examined by a psychologist or psychiatrist other than Dr. Hutson during the time between his arrest and the verdicts of the jury.

(ECF No. 21 at 58, ¶ 229.) He alleges that his counsel did not obtain a social history or obtain records that would have shown that he and several of his family members had a serious history of mental illness. (Id. at 59.) Further, he alleges that neuropsychological testing demonstrates that, at the time of his arrest, he suffered organic brain damage and that psychological and neuropsychological testing and Carruthers's social and medical history demonstrate that he suffered substantial mental illness. (Id.) Carruthers alleges that the effects of his mental illness and brain damage affected his ability to communicate and work with his lawyers, and the conditions in the Shelby County Jail aggravated his symptoms. (Id. at 60.) He asserts that these adverse effects are reflected in a record full of complaints, comments, and evidence about his conduct and rendered him incompetent to stand trial. (Id. at 60-61.) He contends that his pre-trial counsel and the trial court failed in their duties based on the evidence before them and that, but for their failures, he would have been declared incompetent. (Id. at 61-62.)

### 1. Procedural Default

Respondent argues that the claim was not presented to Tennessee state courts for review and is procedurally defaulted. (ECF No. 114-1 at 9; ECF No. 160 at 2.) Carruthers argues that this claim should not be denied as defaulted because: (1) the substantive issues cannot be forfeited or defaulted; (2) there is an excuse for any default; and (3) there are genuine issues of material fact that are disputed. (ECF No. 129 at 114.) He acknowledges that the issue of his competence to stand trial was never presented in the Tennessee appellate courts. (Id. at 115, 165.)

Carruthers's competence became an issue in the post-conviction proceedings because his counsel filed a petition for a guardian ad litem when Carruthers instructed counsel that he did not want competency issues raised in the post-conviction proceedings even after his expert found that he was incompetent to stand trial. (Id. at 169-171; see also ECF No. 56-3 at PageID 9337-9339.) Carruthers testified unequivocally that he did not want his postconviction counsel to raise his competency as an issue. (ECF No. 56-3 at PageID 9452.) Carruthers declined to waive the issue of competency after several months of proceedings that involved the post-conviction court's appointment of a mental health expert, Carruthers's refusal to be evaluated, and the court's ultimate determination was that he was competent to waive the claim. (Id. at PageID 9548-51; ECF No. 56-4 at PageID 9578-81.) In its final order, the post-conviction court stated:

> The petitioner and his counsel in this proceeding have chosen purposely not to raise any issues regarding the petitioner's mental state, possible insanity defense, or

> competency to stand trial or waive counsel. The Court has previously held that the petitioner is competent to waive such claims in this proceeding and by purposely not raising them in this proceeding he has waived these claims.

(ECF No. 56-4 at PageID 9746-9747.)

**a. Forfeiture, Default, or Waiver of Right**

Carruthers argues that a substantive claim of incompetence to stand trial cannot be forfeited or defaulted. (ECF No. 129 at 116, 165.) He relies on Medina v. California, 505 U.S. 437, 448-49 (1992), for the proposition that "[t]he competence of the accused is so central to the foundation of our criminal justice system that if the defendant is incompetent, proceedings must be suspended." (Id. at 166.) He asserts that the right not to be tried when incompetent cannot be waived under Johnson v. Zerbst, 304 U.S. 458, 464 (1938), without first determining that there was knowing, voluntary, and intelligent relinquishment of the right and that there was no Zerbst hearing or inquiry about whether he made a knowing and voluntary waiver of his claims. (Id. at 167-68, 171.) He asserts that to the extent Respondent's summary-judgment Motion is based on the state court's finding of waiver, summary judgment must be denied because the right not to be tried while incompetent cannot be waived. (Id. at 169.)

Carruthers cites Tenth and Eleventh Circuit cases to support his claim that a substantive competency claim cannot be procedurally defaulted. (ECF No. 129 at 166.) Respondent asserts that Carruthers's argument contradicts Sixth Circuit precedent in Ludwig v.

United States, 162 F.3d 456, 458 (6th Cir. 1998), and Coleman v. United States, No. 98-3539, 1999 WL 685935, at *2-3 (6th Cir. Aug. 27, 1999) (per curiam). (ECF No. 149 at 8.) Respondent distinguishes cases stating that a competence-to-stand-trial claim cannot be waived from the instant situation involving procedural default. (Id.) He argues that "'allowing a petitioner to raise a competency claim for the first time in a federal habeas petition is contrary to the principles of comity, federalism and judicial economy that are essential to habeas corpus jurisprudence." (Id. (quoting Byrd v. Jones, No. 1:04-CV-785, 2008 WL 151243, at *8 (W.D. Mich. Jan. 14, 2008).)

There is no clearly established precedent on this issue. The Sixth Circuit has not established a per se rule that a substantive due process claim for mental incompetence is not subject to procedural default,[19] as

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[19] The Ninth Circuit has rejected the argument that mental incompetency claims can never be procedurally defaulted. Lee v. Schiro, No. CV 04-039-PHXMHM, 2006 WL 2827162, *7 (D. Ariz. Sept. 25, 2006). A claim alleging actual incompetence to stand trial is subject to the same state procedural default rules as other claims. See Martinez-Villareal v. Lewis, 80 F.3d 1301, 1306-07 (9th Cir. 1996) (rejecting the argument that mental-incompetency claims can never be procedurally defaulted and upholding the conclusion of the state court that petitioner's competency claim is procedurally defaulted); LaFlamme v. Hubbard, No. 97-16973, at *2 (9th Cir. June 9, 2000) ("Pate[v. Robinson, 383 U.S. 375, 384 (1966)] does not restrict the scope of the procedural default rule because the standards for evaluating the defenses of waiver and default are different."); see also Lyons v. Luebbers, 403 F.3d 585, 593 (8th Cir. 2005) ("[R]egardless of how incompetent Lyons . . . was, Lyons was represented during the state court

some circuits have.[20] In Ludwig, the Sixth Circuit determined that a defendant's claim that he was not competent to enter a plea raised for the first time in a motion to vacate pursuant to 28 U.S.C. § 2255 was procedurally barred. 162 F.3d at 458; see also Coleman, 1999 WL 685935, at *2-3 (same); Hill v. Mitchell, No. 1:98-CV-452, 2006 WL 2807017, at *75 (S.D. Ohio Sept. 27, 2006) (rejecting the argument that a substantive claim of incompetence can never be procedurally defaulted); Franklin v. Bradshaw, 695 F.3d 439, 448-49 (6th Cir. 2012) (finding a competency claim to be procedurally defaulted). In Hodges v. Colson, 727 F.3d 517, 540 (6th Cir. 2013), the Sixth Circuit stated that "neither the Supreme Court nor this court" has adopted a rule that substantive competency claims cannot be procedurally defaulted, and declined to adopt such a rule.

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proceedings, and Lyons's incompetence did not prevent his counsel from raising the competency issue.").

[20] The Tenth Circuit in Sena v. New Mexico State Prison, 109 F.3d 652, 654 (10th Cir. 1997), held that the failure to appeal in the state court a substantive claim that the petitioner was mentally incompetent at the time that he entered his guilty plea did not bar federal habeas review. The Eighth Circuit in Vogt v. United States, held, "'[T]he procedural default rule . . . does not operate to preclude a defendant who failed to request a competency hearing at trial or pursue a claim of incompetency on direct appeal from contesting his [or her] competency to stand trial and be sentenced through post-conviction proceedings." 88 F.3d 587, 590 (8th Cir. 1996) (alterations in original) (quoting Adams v. Wainwright, 764 F.2d 1356, 1359 (11th Cir. 1985)); see also Pate, 383 U.S. at 384 (noting that "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial.").

### b. Ineffective Assistance of Post-Conviction Counsel

Carruthers argues ineffective assistance of post-conviction counsel as cause for the default of the competency claim. (ECF No. 129 at 176.) He contends that it is clear that he suffers from anosognosia and that he does not recognize and is not willing to accept that he suffers severe mental illness and brain damage. (Id. at 176-177.) He relies on Martinez to argue that ineffective assistance of post-conviction counsel constitutes cause and prejudice for procedural default. (Id. at 176.) Carruthers asserts multiple failures of post-conviction counsel that he contends constitute ineffective assistance. (Id. at 177-178.)

Respondent contends that Carruthers's argument that ineffective assistance of counsel is cause for the default is foreclosed because ineffective assistance related to this issue was not raised on post-conviction review, where no right to effective assistance attaches. (ECF No. 149 at 8.)

The Court has determined that Martinez does not excuse the procedural default of Carruthers's competency claim. (See ECF No. 192 at 8-9, 23-26, 28-29.) See Hodges, 727 F.3d at 540 (denying Martinez relief related to the procedural default of a substantive competency claim). Petitioner's argument that ineffective assistance of post-conviction counsel creates cause and prejudice for the procedural default of this claim fails.

### c. Miscarriage of Justice

Carruthers argues that any procedural default of this claim must be excused under a miscarriage of justice exception. (ECF No. 129 at 179.) He asserts that, given the complete inability to recognize how seriously

ill he is, there is a serious question about whether he can be subjected to a capital sentencing hearing consistent with Eighth and Fourteenth Amendment principles, resulting in a trial "in form only." (Id. at 181.)

The miscarriage of justice exception is not tied to the determination of whether Carruthers had a fair trial but to whether he is actually innocent, see supra p. 26.[21] Carruthers has not made a showing of actual innocence. His argument that a miscarriage of justice excuses the procedural default of this claim fails.

Claim 6 is procedurally defaulted and summary judgment is GRANTED. Claim 6 is, therefore, DENIED.

### F. Ineffective Assistance of Pre-Trial Counsel (Claim 7, Amended Petition ¶¶ 240-66)

#### 1. Federal Habeas Allegations

In Carruthers's amended petition, he alleges that appointed counsel represented him for approximately twenty-two months prior to the trial court determining that Carruthers would represent himself at trial. (ECF No. 21 at 62, ¶ 241.) During that time, counsel purportedly failed to: (1) interview fact witnesses (id.

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[21] If the Court were to conduct a merits review, the state trial court's determination that Carruthers was competent to stand trial is a finding of fact that is entitled to the presumption of correctness. Maggio v. Fulford, 462 U.S. 111, 117 (1983); Mackey v. Dutton, 217 F.3d 399, 412 (6th Cir. 2000). Carruthers was found competent to stand trial based on the evaluations of Dr. John Hutson in 1994 and Dr. Lynn Zager in 1995. (See ECF No. 132-3 at PageID 17716-17717.) Dr. Stephen A. Montgomery determined that Carruthers's ability to make a rational choice in the post-conviction proceeding was not substantially affected by his mental state. (ECF No. 56-3 at PageID 9567-9568.)

at 62-65, ¶¶ 242-251); (2) interview mitigation witnesses (id. at 65-69, ¶¶ 252-254); and (3) obtain support services (id. at 69-73, ¶¶ 255-264). Carruthers contends that the failures of appointed counsel created "an environment in which the trial court ultimately ordered that Mr. Carruthers must represent himself at his capital murder trial," denying him his Sixth Amendment right to counsel and his rights under the Eighth and Fourteenth Amendments. (Id. at 73, ¶ 265.)

Carruthers alleges that his appointed counsel failed to interview any of the 125 potential witnesses identified by the State during the first seventeen months of trial preparation and had "created" only six pages of information from fact witnesses at the conclusion of their representation. (Id. at 62, ¶¶ 242, 245.) Carruthers contends that his appointed counsel would have learned:

- that a powerful drug distribution cartel killed the victims because Marcellos Anderson took a large quantity of cocaine and money (id. at 63, ¶ 246.1);
- of the false testimony of Charles Ray Smith, Jimmy Lee Maze, and Alfredo Shaw, and of deals that the prosecution made with these individuals in exchange for their testimony (id. at 63-64, ¶¶ 246.2-249.9); and
- that Nakeita Montgomery's mental health issues made her testimony unreliable (id. at 64, ¶ 250).

Carruthers alleges that his counsel failed to conduct pretrial interviews of potential mitigation witnesses and obtain basic social history documents. (Id. at 65, ¶ 253.) He contends that this investigation would have revealed that he was born premature with breathing problems (¶ 253.1); his father was a crack

addict and had an emotional disorder (¶¶ 253.2, 253.9.4); he had an uncle who was a heroin addict and one who suffered from paranoid schizophrenia (¶¶ 253.3, 253.9.1); he had aunts who had been diagnosed with paranoid schizophrenia, schizo-affective disorder, and bipolar effective illness (¶¶ 253.4, 253.9.2, 253.9.3); he suffered multiples injuries that could have caused brain damage (¶ 253.5); his sister attempted suicide (¶ 253.6); his mother suffered a nervous breakdown (¶ 253.7); he was admitted to a mental hospital for psychiatric observation and diagnosed with depression and adjustment disorder (¶ 253.8); his family lived in a housing project and had at times been on welfare (¶ 253.11); he had difficulties at school and with a transitory upbringing (¶ 253.14); Carruthers's drug and pill usage and cuts and scars on his body were reported to the juvenile courts (¶ 253.16); he had been shot (¶ 253.17); and he bit a hole in the seat of a police cruiser (¶ 253.18). Carruthers alleges that this information would have revealed symptoms of organic brain damage, bipolar disorder type II, schizo-affective disorder, and the failure to diagnose Carruthers because of poverty, racial stereotyping, and bias. (Id. at 69, ¶¶ 253.23-253.26.)

Carruthers alleges that his counsel failed to obtain support services from an independent forensic pathologist to determine whether the victims were alive when they were placed in the grave and the location where the victims were killed. (Id. at 69, ¶¶ 255-56.) Carruthers asserts that, if his appointed counsel had obtained the appropriate support services, he may not have been sentenced to death. (Id. at 69-70, ¶¶ 256-57.)

Carruthers alleges that had counsel obtained an independent forensic DNA testing expert to evaluate evidence taken from the crime scene, they would have learned that he was not involved in the victims' deaths. (Id. at 70-71, ¶¶ 258-259.)

Carruthers alleges that had counsel secured the services of an independent mental health professional and/or mitigation specialist to determine his competence to stand trial and to represent himself or any mental disease or defect that he suffered, the trial court would have found him incompetent to stand trial and to represent himself. (Id. at 71-72, ¶¶ 261-263.) He alleges that these expert services would have mitigated the punishment the sentencing jury would impose. (Id. at 72-73, ¶ 264.) Carruthers alleges that the failures of counsel resulted in an environment in which the trial court ultimately ordered him to represent himself. (Id. at 73, ¶ 265.)

**2. Relevant Post-Conviction Allegations**

In Ground One of Carruthers's post-conviction petition, he alleged ineffective assistance of pre-trial counsel Larry Nance, Craig Morton, Coleman Garrett, Glenn Wright, William Massey, and Harry Sayles based on the theory that counsel failed to interview fact and mitigation witnesses and obtain support services.[22] (ECF No. 56-2 at PageID 9206-9207.) Carruthers alleged that Nance met only once with Carruthers's family, was not actively engaged in his case, and that, had Nance performed his duties, Carruthers

[22] The allegations in the habeas petition are not the same allegations raised on post-conviction. The Court will only address ineffective-assistance claims in this Order to the extent it deems those claims exhausted in the state court.

would have been able to provide valuable investigative assistance including the names of witnesses who would support the defense and provided mitigation evidence and assistance related to gathering records relevant to the mitigation case. (Id. at PageID 9207-9208.) Carruthers alleged that Nance failed to adequately prepare by failing to locate and interview all relevant witnesses, including Adolpho James, Bobbi Dickerson, a list of 125 potential witnesses, and especially, potential witnesses Jimmy Maze, Chris Hines, Alfredo Bernard Shaw, Andre Johnson, Reginald Burke, Terrell Adair,[23] Charles Ray Smith, Richard Roleson, Nakeita Montgomery, Keith Brooks, Benton West, and Dr. O.C. Smith. (Id. at PageID 9208.) Carruthers alleged that Nance failed to employ an investigator or investigate the facts surrounding the crimes. (Id. at PageID 9208-9209.)

Carruthers alleged that Nance failed to request necessary expert assistance to review and assist in matters of forensic science and counter the testimony of Dr. O.C. Smith that the victims were buried alive. (Id. at PageID 9209.) Carruthers alleged that Nance failed to obtain the services of a psychologist despite being granted authorization to do so. (Id.) Carruthers further alleged that had Nance obtained a psychologist and obtained evaluations, he could have appropriately explored the possibility that Carruthers's inappropriate conduct in his relationship with counsel was the result of a mental defect, mental illness, or cognitive defect. (Id. at PageID 9209-9210.) Carruthers asserts that Nance's failure to investigate the

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[23] The name is incorrectly listed as "Adair Terrell" in the post-conviction petition. (See ECF No. 56-2 at PageID 9208.)

psychological and/or psychiatric basis of Carruthers's irrational behavior constituted ineffective assistance. (Id. at PageID 9210.) Carruthers also argued that Nance should have sought funds for experts services related to "the deleterious effects of growing up in urban Memphis" and for a ballistics expert. (Id.) He alleged that Nance failed to file adequate pre-trial motions to obtain adequate investigative services, a jury selection expert, a forensic pathologist, forensic DNA evidence experts, and mental health experts. (Id. at PageID 9210-9211.) Carruthers alleged that Nance failed to do the necessary investigation to develop and pursue a comprehensive mitigation strategy for sentencing. (Id. at PageID 9212.)

Carruthers made similar allegations that Morton failed to investigate, gather records relevant to mitigation, locate and interview witnesses, and obtain appropriate mental health and other experts. (Id. at PageID 9214-9220.) Carruthers made similar allegations against Garrett (id. at PageID 9220-9227); Sayles (id. at PageID 9228-9234); and Massey (id. at PageID 9234-9240). Carruthers alleged that Wright did not produce any work product and also alleged that "each and every deficiency alleged against Craig Morton, III, Esq., and Coleman Garrett, Esq., applies equally to" Wright. (Id. at PageID 9227-9228.)

**3. Procedural Default**

The Court determined that Martinez did not establish cause and prejudice for the procedural default of the allegations in ¶¶ 241, 243, 244, 246.2-246.3, 247-48, 249, 251-54, 256, 258, 261-63, and 265 in Claim 7 of the Amended Petition and determined that

those allegations are not substantial. (See ECF No. 192 at 12-27.)

#### 4. The Tennessee Court of Criminal Appeals' Decision

On appeal of the denial of post-conviction relief, the Tennessee Court of Criminal Appeals stated:

> 2. Ineffective Assistance of Pretrial Counsel
>
> The petitioner contends that the various attorneys who represented him prior to trial collectively rendered ineffective assistance due to their alleged failure to conduct any meaningful factual investigation or otherwise prepare for trial. He asserts that such deficiencies constituted the constructive complete denial of counsel at a critical stage in the proceeding, sufficient to justify a presumption of prejudice under the standard announced in United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). In the alternative, he asserts that pretrial counsel's failure to conduct an investigation or otherwise prepare for trial resulted in actual, demonstrable prejudice under the more familiar Strickland standard. Specifically, he contends that it was pretrial counsel's failure to conduct any meaningful investigation and preparation that directly led to his "involuntary self-representation, with the disastrous results that the [Tennessee] Supreme Court catalogued in its decision on direct appeal."
>
> The State responds by arguing that the petitioner's forfeiture of the right to counsel by his egregious and outrageous conduct necessarily

included the forfeiture of his right to effective assistance of counsel. The State acknowledges our supreme court's direct appeal opinion footnote in which it commented that the petitioner retained the right to raise an ineffective assistance claim with respect to any stage of the proceedings where he was represented by counsel. The State contends, however, that under the circumstances of this case, where the petitioner forfeited the right to counsel some four months prior to trial, "it is not possible to gauge the effect of the actions of the various counsel who represented [the petitioner] at the pre-trial stage against the outcome of the proceedings." The State further argues that this case does not fall within any of the narrow situations in which prejudice may be presumed.

a. Presumed Prejudice

The petitioner first contends that pretrial counsel's failure to conduct any meaningful preparation or investigation meant that he effectively had no counsel during the critical, investigatory pretrial phase of the proceedings. As such, he argues that his case is one in which prejudice may properly be presumed under Cronic, without the necessity of conducting an inquiry into counsel's actual performance or the effect it had on the trial. We respectfully disagree.

In Cronic, the United States Supreme Court identified three scenarios involving the right to counsel where the circumstances are "so likely to prejudice the accused that the cost of

litigating their effect in a particular case is unjustified." 466 U.S. at 658, 104 S. Ct. at 2046 (footnote omitted). In these circumstances, a presumption of prejudice is justified without the necessity of inquiring into counsel's actual performance at trial. Id. at 662, 104 S. Ct. at 2048. These scenarios are: (1) situations involving "the complete denial of counsel," where the accused is denied the presence of counsel at "a critical stage" in the proceeding; (2) situations where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing;" and (3) situations where "counsel is available to assist the accused during trial, [but] the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Id. at 659-60, 104 S. Ct. at 2047.

The petitioner asserts that pretrial counsel's billing records and testimony reflect that they "did nothing of substance during their respective tenures on the case, apart from routine motion practice, court appearances, obtaining discovery, limited conferences with Petitioner, and interviewing one major prosecution witness, Nakeita Shaw." The record, however, reflects that pretrial counsel actively and diligently worked on the case during their tenures, often in the face of abusive, uncooperative, and threatening behavior on the part of the petitioner. As revealed in both the evidentiary hearing testimony and in our

supreme court's direct appeal opinion summary of counsel's representation, pretrial counsel, among other things, met regularly with the petitioner, appeared at numerous pretrial report hearings, reviewed discovery, filed and argued numerous substantive pretrial motions, and interviewed a number of potential witnesses. The petitioner may not have been satisfied with the schedule in which pretrial counsel conducted their investigation, but this was by no means a case in which he suffered the complete denial of counsel during a critical stage of the proceeding. Cf. Powell v. Alabama, 287 U.S. 45, 57, 53 S. Ct. 55, 60, 77 L. Ed. 158 (1932) (presuming prejudice based on fact that counsel was not appointed until the morning of trial); Mitchell v. Mason, 325 F.3d 732, 742-44 (6th Cir. 2003) (concluding that the petitioner was constructively denied counsel when counsel only met with him for a total of six minutes and was suspended from practice of law for last month of seven-month pretrial period). Accordingly, we, like the post-conviction court, will review the petitioner's allegations of ineffective assistance of counsel under the familiar Strickland standard, which requires the petitioner to show both a deficiency in counsel's performance and actual prejudice resulting to his case.

b. Failure to Investigate and Prepare Led to Petitioner's Compelled Self-Representation

In the alternative, the petitioner contends that his various pretrial counsel collectively

rendered ineffective assistance under the standards of Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975), and Strickland, 466 U.S. at 686, 104 S. Ct. at 2063-64, in that their failure to conduct any meaningful factual investigation, particularly in the face of a list of 125 potential witnesses, led directly to his "disastrous" and compelled self-representation. The petitioner asserts that there was "nothing remotely resembling pretrial investigation . . . before Mr. Billings' entry into the case on January 16, 1996, eight days after [the trial court] had ordered Petitioner to defend himself pro se." We, again, respectfully disagree.

The post-conviction court made the following findings of fact and conclusions of law with respect to the petitioner's ineffective assistance of pretrial counsel claim:

> The Court rejects the petitioner's claim that he is entitled to relief for the failures of his series of appointed counsel.
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> . . . .
>
> In the Supreme Court of Tennessee decision in this case[,] the court chronicled the succession of lawyers that represented the petitioner prior to his trial in Memphis. . . . This Court heard the testimony of all these lawyers and their efforts to investigate the case and their relationship with the petitioner. There is no doubt that for all of them their efforts and ability to investigate the case were

seriously distracted by the petitioner's behavior. . . .

The deficiency in the petitioner's claim is that there was no evidence presented from witnesses to support the contention that the petitioner was prejudiced. In other words, if there were witnesses not found because of a faulty investigation, the court did not hear from those witnesses. . . . [T]he claim of ineffective assistance of counsel prior to trial must fail for failure to prove prejudice.

The one possible exception to the above is the testimony of Mr. Bille as to the DNA evidence. Here, it appears that the petitioner's theory is that competent counsel would have hired a DNA expert and that this testimony would have been helpful to the petitioner at trial. The testimony of Mr. Bille indicated that there was a blanket-like cloth taken from the grave site, and that on this blanket-like cloth blood was found that did not belong to any of the three (3) victims and did not belong to any of the three (3) defendants. The petitioner asserts that this proof is important and that it is exculpatory and possibly could have [a]ffected the results of the trial. The Court disagrees.

The testimony of Mr. Bille and the DNA results are only very minimally helpful to the petitioner. In no way does this evidence negate all other proof in the case and it is rank speculation to assume

> that this indicates that a third party might have committed this crime. There is no proof as to the age of the blood, or any explanation of how the blood got on the piece of cloth. This evidence does not carry the prejudice prong of the Strickland test.

The record supports the findings and conclusions of the post-conviction court. As noted by the post-conviction court, our supreme court detailed the succession of lawyers who were appointed to represent the petitioner, as well as the major actions each undertook in preparation for the case. The court also chronicled the obstacles that counsel faced in their attempts to investigate and prepare for trial, which took the form of unfounded accusations and personal attacks against counsel and direct and indirect threats against counsel and counsel's family and employees. Furthermore, while not precluding the petitioner from raising an ineffective assistance of counsel claim in the post-conviction setting, our supreme court concluded that the trial record did not support the petitioner's claim that he was forced to represent himself because his appointed counsel were incompetent:

> [The petitioner] also claims that he was denied due process because he was forced to choose between incompetent counsel and no counsel at all, and he asserts that the trial judge should have held a hearing to determine the validity of his complaints about his attorneys.

We disagree. There is simply no evidence indicating that any one of the many attorneys appointed to represent [the petitioner] was ineffective. In fact, the record fully supports the trial court's repeated findings that the attorneys were qualified, competent, and highly skilled trial lawyers. The record demonstrates that the trial court closely supervised the case, inquired about defense counsel's progress, allowed [the petitioner] to voice his concerns about counsel, and conscientiously reviewed and considered letters from [the petitioner] containing allegations about his attorneys. Based upon this information, the trial court repeatedly found the attorneys representing [the petitioner] to be competent. Most of [the petitioner's] complaints about his attorneys were outrageous personal attacks that had little or nothing to do with legal representation. Indeed, these allegations were so outrageous that the letters were sealed at trial and remain a sealed exhibit to the record on appeal. Although we have reviewed the letters, it is not necessary to reveal the specific nature of the offensive and unfounded allegations. Suffice it to say that, given the nature of the allegations and the trial court's close and careful supervision of the case, a formal hearing to determine counsel's competency was not necessary.

Carruthers, 35 S.W.3d at 550-51 (footnotes omitted).

The evidence at the post-conviction evidentiary hearing, likewise, fails to show that pretrial counsel were deficient in their investigation or trial preparation or that any alleged deficiencies led to the petitioner's self-representation. Larry Nance and his co-counsel, Craig Morton, filed numerous pretrial motions on the petitioner's behalf, including motions for discovery, for investigative services, for a mental examination, to exclude evidence, for individual voir dire, for impeachment evidence, for a competency evaluation of prosecution witnesses, for another mental evaluation of the petitioner, to dismiss the indictments, to suppress the statements of codefendant Jonathan Montgomery, for a severance, for expert services, and for a notice of an alibi defense. Nance estimated that he met with the petitioner at least a dozen times during the six months of his representation and confirmed that his billing records reflected he had spent approximately 60.15 hours on the case prior to Morton's appointment and 18.9 hours after Morton's appointment. He said that the State did not provide discovery, which included over 100 potential witnesses, until approximately two months before his withdrawal from the case. Nonetheless, during that limited time he was able to locate and interview several witnesses. He also communicated with the co-defendant's counsel and spoke with the petitioner's family. Morton

testified that he spent 213 hours working on the case, during which time he, among other things, interviewed several witnesses and talked at length with the petitioner and his family.

Coleman Garrett, who was appointed as lead counsel when Nance was relieved of representation, testified that he spent 97.5 out-of-court hours and 28.5 in-court hours on the petitioner's case. He said he had numerous meetings with the petitioner and issued several subpoenas, including one to the chief jailer. However, he, like previous counsel, soon became the target of the petitioner's unfounded attacks and accusations, making his work extremely difficult. Garrett testified that it was "somewhat impossible to prepare for this case because of lack of cooperation, because of communication problems, because of team members' attitudes about whether they wanted to continue on the case, and it was a difficult situation." However, he said that had he stayed on the case, he "certainly would have put together any necessary experts, retained necessary experts, would have prepared for mitigation in this situation, and would have been prepared to put forth the best defense that [they] could put together on [the petitioner's] behalf notwithstanding the fact that this was a very difficult situation to deal with."

William Massey, who, along with Harry Sayle, was next appointed to represent the petitioner, testified that he worked

approximately 125 hours on the petitioner's case. Among other things, he and Sayle reviewed expert and police reports, interviewed a number of witnesses, met with the petitioner to discuss expert witnesses, requested and received additional funds for investigative services, requested a ballistics and a mitigation expert, and filed numerous pretrial motions. He said they also worked extensively with Montgomery's counsel and investigator, who shared information with them. Sayle testified that the petitioner would not listen to anything he and Massey had to say and appeared to request joint meetings with Montgomery and Montgomery's lawyers simply so that he and Montgomery could get together and talk. Like the petitioner's other counsel, Sayle described abusive and threatening behavior by the petitioner directed toward counsel and counsel's families.

The petitioner contends that the prejudice he suffered from pretrial counsel's alleged deficiencies in investigation and pretrial preparation was his "forced" self-representation. However, it is abundantly clear from the record that the petitioner's compelled self-representation resulted from his own misbehavior and nothing else. All of the counsel appointed to represent the petitioner were competent and experienced trial attorneys who were taking the appropriate steps in their preparation of the case at the time they were relieved from representation. 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. In this respect, we agree with the trial court that the DNA results of the piece of white cloth, obtained by Todd Bille, were inconclusive and would not have changed the outcome of the trial. In sum, the petitioner has failed to establish that, but for any deficiency on the part of pretrial counsel, the result of the proceedings would have been different or that he would have received a sentence other than death. We conclude, therefore, that the petitioner is not entitled to relief on the basis of this claim.

Carruthers, 2007 WL 4355481, at *36-40 (alterations in original).[24]

**5. The Legal Standard**

A claim that ineffective assistance of counsel has deprived a habeas petitioner of his Sixth Amendment right to counsel is controlled by the standards stated in Strickland v. Washington, 466 U.S. 668 (1984). To demonstrate deficient performance by counsel, a petitioner must demonstrate that "counsel's representation fell below an objective standard of reasonableness." Id. at 687-88. "A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance. [Strickland, 466 U.S.] at 689, 104 S. Ct. 2052. The

[24] On direct appeal, the Tennessee Supreme Court stated that Carruthers forfeited or waived the right to the effective assistance of counsel. See Carruthers, 35 S.W.3d at 549-51.

challenger's burden is to show 'that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.' Id., at 687, 104 S. Ct. 2052." Harrington v. Richter, 131 S. Ct. 770, 787 (2011).

To demonstrate prejudice, a prisoner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.[25] "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.' [Strickland, 466 U.S.] at 693, 104 S. Ct. 2052. Counsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' Id., at 687, 104 S. Ct. 2052." Richter, 131 S. Ct. at 787-88; see also id. at 791-72 ("In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. . . . The likelihood of a different result must be substantial, not just conceivable.") citations omitted); Wong v. Belmontes, 558 U.S. 15, 27 (2009) (per curiam) ("But Strickland does not require the State to 'rule out' [a more favorable outcome] to prevail. Rather, Strickland places the burden on the defendant,

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[25] "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant . . . ." Strickland, 466 U.S. at 697. If a reviewing court finds a lack of prejudice, it need not determine whether, in fact, counsel's performance was deficient. Id.

not the State, to show a 'reasonable probability' that the result would have been different.").

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010).

> An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom.

Richter, 131 S. Ct. at 788 (citations omitted).

When an ineffective-assistance claim is reviewed under § 2254(d), the review is "doubly deferential." Knowles v. Mirzayance, 556 U.S. 111, 123 (2009).

> Establishing that a state court's application of Strickland was unreasonable under § 2254(d) is all the more difficult. The

> standards created by Strickland and § 2254(d) are both "highly deferential," and when the two apply in tandem, review is "doubly" so. The Strickland standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.

Richter, 131 S. Ct. at 788 (citations omitted).

**a. Clear and Convincing Evidence**

Carruthers asserts that, pursuant to the Tennessee Post-Conviction Procedures Act, Tenn. Code Ann. § 40-30-110(f), the state courts required Petitioner to establish facts in support his ineffective-assistance-of-counsel claims by clear and convincing evidence. (ECF No. 129 at 212.) He contends that the state court post-conviction standard requires him to show "that there was no serious or substantial doubt that counsel performed deficiently and that performance prejudiced him." (Id.) He argues that the state court's "clear and convincing" evidence standard is contrary to clearly established federal law. (Id.) He relies on Walker v. Johnston, 312 U.S. 275, 286 (1941), to argue that clearly established federal law "recognizes post-conviction facts as established when a preponderance of evidence supports them." (Id.)

Respondent contends that the State's clear and convincing evidence standard as to the threshold required for establishing factual issues has previously been found constitutionally permissible. (ECF No. 149 at 15.)[26] See Howell v. Hodge, No. 2:06-CV-108, 2010 WL 1252201, at *13-14 (E.D. Tenn. Mar. 24, 2010) (finding that the claim was adjudicated under the appropriate legal standard despite the petitioner's arguments about the post-conviction standard that factual allegations be proven by clear and convincing evidence).

The standards Carruthers references apply in two very different circumstances. Tennessee's "clear and convincing evidence" standard applies to proof of factual allegations contained in a post-conviction petition, not to legal determinations. See Tenn. Code Ann. § 40-30-110(f); see Howell, 2010 WL 1252201, at *13. In Walker, 312 U.S. at 287, the Supreme Court refers to a standard of proof to establish facts by a preponderance of the evidence at a hearing in a federal habeas case. Carruthers's exhausted ineffective-assistance-of-counsel claims do not, as in Walker, present the necessity for an evidentiary hearing, and this Court must look to whether the state court's analysis of Carruthers's ineffective-assistance-of-counsel claim is contrary to the Supreme Court precedent in Strickland.

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[26] Respondent argues that Carruthers did not allege this argument in his petition, and it is not properly before the Court on summary judgment. (ECF No. 149 at 15.) Any § 2254 petition addresses whether a standard contrary to or an unreasonable application of Supreme Court precedent was applied in the state court. Therefore, the Court will address that argument in the context of § 2254(d)(1).

On appeal of the denial of post-conviction relief, the Tennessee Court of Criminal Appeals set forth its standard of review for post-conviction relief:

> The post-conviction petitioner bears the burden of proving his allegations by clear and convincing evidence. [Tenn. Code Ann.] § 40-30-110(f) (2006). . . . The issue of ineffective assistance of counsel, which presents mixed questions of fact and law, is reviewed de novo, with a presumption of correctness given only to the post-conviction court's findings of fact.

Carruthers, 2007 WL 4355481, at *34. The court then correctly stated the standard in Strickland, noting that the same standard that applied in federal cases applies in Tennessee. Id. at *35. The Tennessee Court of Criminal Appeals' reference to the postconviction standard for factual allegations does not equate to the court's decision being contrary to Supreme Court precedent. See Howell, 2010 WL 1252201, at *13-14 (reference to the "clear and convincing evidence" standard for factual allegations in postconviction hearings is not contrary to the standard of whether there is a reasonable probability that the outcome would be different); see also Hughes v. Carlton, No. 3:05-0120, 2005 WL 3338726, at *4 (M.D. Tenn. Dec. 8, 2005) (the state court used the correct standard under federal law despite reference to "clear and convincing" standard for post-conviction factual findings). Carruthers's argument that the state court used a standard contrary to clearly established Supreme Court precedent fails.

### b. Different Outcome or Prejudice Standard

Carruthers argues that the court "misapplied" Strickland by requiring proof that the result would have been "different" instead of requiring petitioner "to show a reasonable probability 'sufficient to undermine confidence in the outcome.'" (ECF No. 129 at 215.) He focuses on the following language:

> In sum, the petitioner has failed to establish that, but for any deficiency on the part of pretrial counsel, the result of the proceedings would have been different or that he would have received a sentence other than death.

(Id.); Carruthers, 2007 WL 4355481, at *40. Carruthers asserts that Strickland does not require the petitioner to show that the outcome would have been different. (Id.)

Respondent argues that Carruthers failed to mention that the Tennessee Court of Criminal Appeals set forth the proper Strickland standard for prejudice, and the court's failure to include the words "reasonable probability" in the summation of its analysis does not establish the application of the wrong standard. (ECF No. 149 at 15-16.) See Carruthers, 2007 WL 44355481, at *36 (the petitioner must show that there is a reasonable probability that, absent counsel's errors, the sentencer would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death). Respondent contends that the context of the opinion demonstrates that Carruthers did not meet the reasonable probability standard, noting that the evidence did not "carry the prejudice prong of the Strickland test," id. at *38, and making the stronger

finding that the result would have been the same notwithstanding the one omission (evidence related to Bille) on which Carruthers presented additional post-conviction evidence. (Id. at 16.) Respondent notes that even Bille's evidence would not have changed the outcome of the case. (Id.) See Carruthers, 2007 WL 4355481, at *40 ("[W]e agree with the trial court that the DNA results of the piece of white cloth, obtained by Todd Bille, were inconclusive and would not have changed the outcome of the trial.").

Respondent argues that the court did not force Carruthers to show that the result would be different, but stated that the result most definitely would not have been different. (Id.) Respondent argues that,

> In light of the court's multiple prior recitations of the appropriate Strickland standard, and the directive that state court's be given any benefit of the doubt, plus the court's reference to the post-conviction court opinion applying that standard, a statement that the petitioner's proffered evidence would not have changed the trial result does not constitute the use of a standard contrary to clearly established law.

(Id. (citation omitted).) He further asserts that the court's prejudice determination is mooted by the fact that the court did not find deficient performance. (Id. at 17.)

In Vasquez v. Bradshaw, 345 F. App'x 104, 110-12 (6th Cir. 2009), the Sixth Circuit stated that the Ohio Court of Appeals' denial of an ineffective-assistance claim because the petitioner did not show that the outcome of the proceeding "would have been different" is

not a "casual error." "A 'reasonable probability' of difference does not mean 'would have been different.'" Id. at 111. The Sixth Circuit found that the state court's decision was a "paradigmatic example of an application of law 'contrary to clearly established federal law' that deserves no deference under [§ 2254(d)]." Id. at 112. The court further elaborated:

> Different standards make for different outcomes. Even where a state court explicitly delineated the Strickland test, its decision is contrary to federal law where the court applied an incorrect burden of proof. Indeed, our court has already held that a state's court use of a "would have compelled acquittal" formulation is "contrary to" federal law. While the appellate court did say "reasonable probability" once, the use of the incorrect words cannot be regarded as anodyne shorthand because they actually describe and apply a different standard. The court of appeals emphasized the inability to meet the prejudice prong, underscoring whether the trial "would have been different," and expressly adopted the erroneous legal reasoning of the court below. Accordingly, we hold that the Ohio courts applied law that was contrary to clearly established federal law and we are therefore unconstrained by § 2254(d)(1) . . . and de novo review is appropriate.

Id. (citations and some internal quotation marks omitted).

The Tennessee Court of Criminal Appeals twice stated the correct legal standard for prejudice from

Strickland, and specifically defined "reasonable probability" as it relates to the prejudice prong:

> The prejudice prong of the test is satisfied by showing a reasonable probability, i.e., a "probability sufficient to undermine confidence in the outcome," that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.
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> . . . .
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> "A reasonable probability of being found guilty of a lesser charge, or a shorter sentence, satisfies the second prong in Strickland." State v. Zimmerman, 823 S.W.2d 220, 225 (Tenn. Crim. App. 1991); see also Chambers v. Armontrout, 907 F.2d 825, 832 (8th Cir. 1990). When challenging the imposition of a sentence of death, the petitioner must show that "'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, 104 S. Ct. at 2069).

Carruthers, 2007 WL 4355481, at *35-36.[27] Given that the court articulated the correct standard and stated that Carruthers had not satisfied the prejudice prong, the omission of "reasonable probability" in summation

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[27] The court restated the prejudice prong of Strickland when addressing ineffective assistance of appellate counsel. Carruthers, 2007 WL 4355481, at *41.

of the claim does not demonstrate that the court applied a standard contrary to Strickland. See Holland v. Jackson, 542 U.S. 649, 654-55 (2004) (per curiam) (reversing the Sixth Circuit's determination that the state court acted contrary to federal law by requiring proof of prejudice by a preponderance of the evidence rather than by a reasonable probability, noting it is required that "state-court decisions be given the benefit of the doubt" and that "[r]eadiness to attribute error is inconsistent with the presumption that state courts know and follow the law."); Woodford v. Visciotti, 537 U.S. 19, 23-24 (2002) (per curiam) (ruling that the state court's "occasional shorthand reference" to the Strickland prejudice standard was not a "repudiation of the standard"); see also Gosnell v. Hodge, No. 2:07-CV-130, 2010 WL 3521748, at *5 (E.D. Tenn. Sept. 7, 2010) ("In light of Supreme Court precedent . . . , this Court does not find that the state court repudiated the governing rule in Strickland by its omission of the words 'reasonable probability' from its recitation of the prejudice test . . . .").

Even if it were determined that the Tennessee Court of Criminal Appeals' determination was contrary to Strickland, Carruthers is only entitled to de novo review. See Vasquez, 345 F. App'x at 112. Even under de novo review, because Carruthers "did not produce any witnesses or evidence" and the DNA results that were produced were inconclusive, Carruthers cannot demonstrate that there is a reasonable probability that the outcome of the trial would have been different. See Carruthers, 2007 WL 4355481, at *40; see also Lindsey v. Parker, No. 2:10-CV-193, 2013 WL 3834005, at *8 (E.D. Tenn. July 23, 2013) ("[E]ven under de novo review, Lindsey cannot show that he

was given ineffective assistance of trial counsel" where "Lindsey did not adduce any evidence in state court to support his allegations").

### c. Deficient Performance

Carruthers argues that, after setting aside those facts that Judge Dailey "manufactured"[28], the facts that were announced on the record demonstrate that pretrial counsel did not retain a mitigation specialist, did not obtain a mental evaluation, conducted no guilt phase investigation until shortly before trial, conducted no investigation of Carruthers's education, juvenile or medical history, prepared no social history, and conducted no mitigation investigation. (ECF No. 129 at 215-216.)[29] Carruthers argues that the Tennessee Court of Criminal Appeals' commendation of his pretrial attorneys is contrary to or an unreasonable application of Wiggins v. Smith, 539 U.S. 510, 521 (2003), and Rompilla v. Beard, 545 U.S. 374, 387 (2005). (Id. at 216.) Carruthers contends that the court misread the record and misapplied the law. (Id.) He argues that there are genuine issues of material fact in dispute and submits additional evidence to support his claim, including the declaration of Russell Stetler, the National Mitigation Coordinator for federal death

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[28] Carruthers asserts that Dailey "fabricated and embellished" facts, including "The Legend of Larry Nance" and "The Ghost of Jonathan Montgomery." (ECF No. 129 at 96-101.)

[29] Carruthers's argument in the state court did not specifically address his social history, a mitigation specialist, mitigation investigation, or obtaining a mental evaluation, see supra pp. 51-53. Respondent argues that these claims are procedurally defaulted. (See ECF No. 149 at 10.)

penalty projects (ECF No. 130-7). (ECF No. 129 at 216.)[30]

At the post-conviction hearing, Larry Nance, Craig Morton, Glenn Wright, Coleman Garrett, William Massey, and Harry Sayle testified. Carruthers, 2007 WL 4355481, at *26, 28-30, 32. Nance filed pretrial motions for discovery, investigative services, mental evaluations, and for expert services. Id. at *39. Garrett would have retained experts, developed a defense theory, and a mitigation case had he remained on the case. Id. at *40. Massey and Sayle requested and received funds for investigative, mitigation, and expert services. Id.

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[30] Carruthers does not specify what material facts are in dispute. He only presents the 110-page exhibit, which includes the declaration of Stetler. (See ECF No. 130-7.) Stetler's review of information provided by Carruthers resulted in a conclusion that:

> (1) None of Mr. Carruthers's trial counsel established a relationship of trust or invested sufficient time to build effective rapport. (2) His various trial counsel failed to investigate his case, despite constant prodding from both Mr. Carruthers and the trial court. (3) His various trial counsel failed to engage the services of a mitigation specialist, despite prodding from the court. (4) His various trial counsel failed to investigate his potential mitigation, including his mental infirmities. (5) His various trial counsel failed to engage the services of any mental health professional who might have provided insight into his behaviors and symptoms. (6) Mr. Carruthers repeatedly presented with behaviors that should have been recognized as symptoms of mental disorders. Ultimately, none of Mr. Carruthers's trial counsel took any steps to protect him from the unprecedented harm of being compelled to represent himself in a death penalty trial.

(ECF No. 130-7 at 40-41, ¶ 60; see also id. at 41-66 (Stetler's analysis of what mitigation might have revealed).)

The Tennessee Court of Criminal Appeals looked at counsel's overall performance during the representation to determine whether their performance was deficient and noted that pretrial counsel "actively and diligently worked on the case during their tenures, often in the face of abusive, uncooperative, and threatening behavior on the part of the petitioner." Id. at *37. Counsel "met regularly with the petitioner, appeared at numerous pretrial report hearings, reviewed discovery, filed and argued numerous substantive pretrial motions, and interviewed a number of potential witnesses." Id. The court determined that "[a]ll of the counsel appointed to represent the petitioner were competent and experienced trial attorneys who were taking the appropriate steps in their preparation of the case at the time they were relieved from representation." Id. at *40.

To the extent Carruthers argues that the Tennessee Court of Criminal Appeals "misread" the record, the state court's factual findings are entitled to a presumption of correctness in the absence of clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1). (See ECF No. 129 at 216.) Carruthers has not met his burden and the Court cannot conclude that the state court's factual determinations were incorrect.

The court did not penalize counsel for what they were not able to complete because of the termination of representation. Carruthers was required to represent himself beginning January 8, 1996. (See ECF No. 55-5 at PageID 3627.) Trial began on April 18, 1996. Although Carruthers may not have been satisfied with the timing of counsel's investigation and trial preparation, the record does not demonstrate that counsel's

performance was deficient or that Carruthers was prejudiced. Stetler's declaration is barred from consideration by Pinholster because this claim was exhausted in the state court. Carruthers has not demonstrated that the Tennessee Court of Criminal Appeals' determination was contrary to or an unreasonable application of clearly established Supreme Court precedent or based on an unreasonable determination of facts.

Carruthers's exhausted ineffective-assistance-of-trial-counsel allegations in Claim 7 are without merit. The allegations in Claim 7 are either procedurally defaulted and/or without merit and, therefore, DENIED.

### G. Forced Self Representation (Claim 8, Amended Petition ¶¶ 267-93)

Carruthers alleges that the trial court and appointed counsel held in camera and ex parte meetings about him, and the court considered information discussed in these meetings when it ruled on the record with respect to his right to be represented by competent counsel. (ECF No. 21 at 73-74.) Carruthers contends that his counsel took positions adverse to his interest without his views being heard. (Id. at 74.) He asserts that there were planning sessions about security measures in which he was not involved, and no record of these sessions was made. (Id.) He notes the circumstances surrounding Massey's withdrawal, and the fact that despite having the district attorney's witness list of 125 people, the investigative report only addressed six people. (Id. at 74-77.) Carruthers contends that,

> At no time during the entire process, including prior proceedings relating to Mr.

> Carruthers's representation, did the trial court ever explain to Mr. Carruthers the dangers of self-representation, much less self-representation in a death penalty case, including but not limited to: (1) presenting a defense is not simply a matter of telling one's story; (2) a lawyer has substantial training in trial procedure and the state will be represented by two such attorneys; (3) a person unfamiliar with such procedures and who is untrained may be taken advantage of; (4) there may be defenses which counsel could raise, which if not raised timely will be waived; (5) on appeal he will not be able to complain . . . [about] the competence of self-representation, virtually closing the door to state and federal post-conviction relief in many circumstances; and (6) one's ability to present an effective defense may be diminished by the dual role of acting as an advocate and being an accused.

(Id. at 77.) Carruthers outlines the multiple times that his requests for representation were denied without a hearing and asserts that he was not competent to represent himself and was denied legal materials and resources at the jail. (Id. at 77-81.)

Carruthers alleges that the trial court violated his Sixth, Eighth, and Fourteenth Amendment rights with the following conduct:

- the failure to hold a hearing on his competence to represent himself;
- the failure to advise him of the dangers of self-representation;

- the court's interference with his ability to contact members of his defense team while in jail and during trial;
- the court's consideration of ex parte, in camera adversarial statements of Carruthers's pre-trial counsel in his absence;
- the failure to appoint counsel to represent Carruthers in connection with his counsel's motions to withdraw and for counsel; and
- the failure to appoint counsel for the extraordinary appeal.

(ECF No. 21 at 80-82.)

**1. Teague**

Respondent argues that Carruthers has not identified any clearly established precedent of the United States Supreme Court supporting the theory that a capital defendant is incapable of forfeiting his right to counsel. (ECF No. 114-1 at 16.) Respondent argues that the Tennessee Supreme Court cited numerous federal cases holding that a defendant may forfeit his right to counsel through his abusive actions. (Id.) Respondent contends that a ruling in Carruthers's favor would create a new rule of law that could not be applied retroactively and, therefore, relief is barred by Teague v. Lane, 489 U.S. 288 (1989). (ECF No. 114-1 at 16; ECF No. 149 at 19.)

Carruthers argues that Teague only bars relief in instances where the case would create a new rule of law, and he is only requesting the application of "the well settled Sixth Amendment right to counsel, which a defendant can never impliedly waive or forfeit." (ECF No. 129 at 50-51.) Under Teague, 489 U.S. at

310, "new constitutional rules of criminal procedure will not be applicable to those cases which had become final before the new rules are announced," even though the rules will apply to cases still pending on direct review. As a practical matter, under Teague, a habeas court cannot make new constitutional rules of criminal procedure. Teague, 489 U.S. at 316. Teague provides an exception to the retroactive application bar where a "new rule" of criminal procedure would either decriminalize a class of conduct or is a "watershed" rule that implicates the fundamental fairness and accuracy of a criminal proceeding. Saffle v. Parks, 494 U.S. 484, 494-95 (1990) (citing Teague, 489 U.S. at 311).[31]

The applicability of a Teague bar to review in this case is not certain. Carruthers has raised both issues of forfeiture of a right to counsel and whether a knowing and intelligent waiver of the right was made. The Supreme Court has not fully defined when a defendant's misconduct or defiance warrants a forfeiture of the right to counsel. Fischetti v. Johnson, 384 F.3d 140, 152 (3d Cir. 2004); see also Wilkerson v. Klem, 412 F.3d 449, 454 (3d Cir. 2005) ("[T]he Supreme Court precedents, while not dealing with forfeiture of the right to counsel, provided a 'basis to conclude, as the state judge did, that defiant behavior by a defendant can properly cost that defendant some of his Sixth

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[31] The only example of "a watershed rule" ever cited by a majority of the Supreme Court since issuing the Teague decision is the right to counsel, as set forth in Gideon v. Wainwright, 372 U.S. 335 (1963), establishing that an indigent defendant in a criminal prosecution in a state court has the right to have counsel appointed for him. Fulcher v. Motley, 444 F.3d 791, 815 (6th Cir. 2006).

Amendment protections if necessary to permit a trial to go forward in an orderly fashion.'"). Because there is a lack of Supreme Court precedent addressing the issue before this Court, the Court declines to bar review of Carruthers's forced representation claim based on Teague.

**2. Procedural Default**

Although Respondent does not appear to argue procedural default related to Claim 8, Petitioner argued that the allegations in ¶¶ 268-70 and 292-93 of Claim 8 were subject to Martinez. (ECF No. 178 at 3-4.) The Court determined that Martinez did not establish cause and prejudice for the procedural default of the allegations in ¶¶ 268-70 and 292-93 of Claim 8. (ECF No. 192 at 28-29, 31-32.)

**3. Merits**

On direct appeal, the Tennessee Supreme Court addressed the issue, as a question of first impression, whether Carruthers "both forfeited and implicitly waived his right to appointed counsel and was properly required to proceed pro se." Carruthers, 35 S.W.3d at 516, 533-550. The Tennessee Supreme Court stated:

> Although this Court has never considered the precise question presented in this appeal, when discussing a non-indigent defendant who fired his attorney in open court and thereafter repeatedly protested about going to trial without a lawyer, we recognized that even "[t]hough a defendant has a right to select his own counsel if he acts expeditiously to do so . . . he may not use this right to play a 'cat and mouse' game with the court. . . ."

State v. Chadwick, 224 Tenn. 75, 79, 450 S.W.2d 568, 570 (1970); see also Glasgow v. State, 224 Tenn. 626, 461 S.W.2d 25 (1970); State v. Dubrock, 649 S.W.2d 602 (Tenn. Crim. App. 1983) (holding that non-indigent defendants waived the right to counsel because they refused to hire an attorney). The idea that the right to counsel may not be used to manipulate or toy with the judicial system applies equally to indigent and non-indigent defendants. Although an indigent criminal defendant has a constitutional right to appointed counsel, that right may not be used as a license to manipulate, delay, or disrupt a trial. . . . Accordingly, we conclude that an indigent criminal defendant may implicitly waive or forfeit the right to counsel by utilizing that right to manipulate, delay, or disrupt trial proceedings. We also hold that the distinction between these two concepts is slight and that the record in this case supports a finding of both implicit waiver and forfeiture.

When Garrett and Morton were allowed to withdraw and Massey and Sayle were appointed, the trial court advised Carruthers that Massey and Sayle would be the lawyers representing him at trial and that there would be no further withdrawal and new appointments absent a "gigantic conflict." Despite this admonishment, Carruthers once again launched personal attacks and threats against Massey, threats that eventually extended to Massey's office staff and family members. When Massey renewed his motion

to withdraw on January 2, 1996, the trial court specifically and clearly advised Carruthers that he had two choices-cooperate with Massey or represent himself. Carruthers also was advised that if he chose not to cooperate with Massey and to represent himself, he would be required to comply with all procedural rules as if he were an attorney. The trial court repeated his admonishment at a hearing on January 3, 1996. Despite the trial court's clear warnings, quoted fully earlier in this opinion, Carruthers persisted with his attitude of hostility toward Massey, as is evidenced both by his "glaring" at Massey during the hearings and by the letters Massey received after those hearings. In our view, Carruthers implicitly waived his right to counsel, because, after being warned by the trial court that he would lose his attorney if his misconduct continued, Carruthers persisted in his misconduct.

In so holding, we reject Carruthers' claim that the warnings given him by the trial court were not sufficient to support a finding of implied waiver. . . . We decline to hold that a trial court must provide extensive and detailed warnings when a defendant's conduct illustrates that he or she understands the right to counsel and is able to use it to manipulate the system. We conclude that an implicit waiver may appropriately be found, where, as here, the record reflects that the trial court advises the defendant the right to counsel will be lost if the misconduct persists

and generally explains the risks associated with self-representation. Cf. Kelm, 827 F.2d at 1322 (considering the record as a whole when determining the sufficiency of the trial court's advisements).

Even assuming the warnings given Carruthers were insufficient to support a finding of implicit waiver, however, we conclude that Carruthers' conduct was sufficiently egregious to support a finding that he forfeited his right to counsel. The circumstances culminating in the trial court's ruling have been fully summarized. Carruthers repeatedly and unreasonably demanded that his appointed counsel withdraw and that new counsel be appointed. Carruthers' demands escalated as his scheduled trial dates drew near. As the trial court recognized, the "ploy" to delay the trial became increasingly apparent with each new set of attorneys. In addition, Carruthers' conduct degenerated and his outrageous allegations and threats escalated markedly with each new set of attorneys. As the trial court emphasized, Carruthers was the author of his own predicament and sabotaged his relationship with each successive attorney with the obvious goal of delaying and disrupting the orderly trial of the case. Under these circumstances, the trial court was fully justified in concluding that Carruthers had forfeited his right to counsel. Indeed, in situations such as this one, a trial court has no other choice but to find that a defendant has forfeited the right to counsel; otherwise, an intelligent defen-

dant "could theoretically go through tens of court-appointed attorneys and delay his trial for years." Cummings, 546 N.W.2d at 419.

As did the trial court and the Court of Criminal Appeals, we have carefully considered the ramifications of holding that an indigent criminal defendant in a capital case has implicitly waived and forfeited his valuable right to counsel. We are aware that both implicit waiver and forfeiture are extreme sanctions. However, Carruthers' conduct was extreme and egregious. The sanction is appropriate under the circumstances and commensurate with Carruthers' misconduct. We reiterate that a finding of forfeiture is appropriate only where a defendant egregiously manipulates the constitutional right to counsel so as to delay, disrupt, or prevent the orderly administration of justice. Where the record demonstrates such egregious manipulation a finding of forfeiture should be made and such a finding will be sustained, even if the defendant is charged with a capital offense. Persons charged with capital offenses should not be afforded greater latitude to manipulate and misuse valuable and treasured constitutional rights.

Carruthers also claims that he was denied due process because he was forced to choose between incompetent counsel and no counsel at all, and he asserts that the trial judge should have held a hearing to determine the validity of his complaints about his attorneys.

> We disagree. There is simply no evidence indicating that any one of the many attorneys appointed to represent Carruthers was ineffective.

Carruthers, 35 S.W.3d at 549-50 (footnotes omitted).

To the extent Carruthers argued that his pro se representation was ineffective, the Tennessee Supreme Court stated:

> we agree with the Court of Criminal Appeals' conclusion that when a defendant forfeits or waives the right to counsel, regardless of whether the waiver is explicit or implicit, he or she also forfeits or waives the right to effective assistance of counsel. See Small, 988 S.W.2d at 673; State v. Goodwin, 909 S.W.2d 35, 45 (Tenn. Crim. App. 1995); Cf. Faretta, 422 U.S. at 835 n.46, 95 S. Ct. at 2541 n. 46 ("[W]hatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of effective assistance of counsel.").

Id. at 551. "[A] defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'" Faretta v. California, 422 U.S. 806, 834 n.46 (1975); see also Holmes v. United States, 281 F. App'x 475, 480-81 (6th Cir. 2008) (ineffective assistance of counsel claim fails where there is a valid waiver of the Sixth Amendment right); Wilson v. Parker, 515 F.3d 682, 696 (6th Cir. 2008) (same).

Respondent contends that the Tennessee Supreme Court rendered a lengthy discourse on this

claim and determined that Carruthers forfeited his right to counsel by repeatedly threatening bodily harm to his counsel, their staff and family members; refusing to cooperate with four different appointed attorneys; and demanding new counsel to delay trial. (ECF No. 114-1 at 15.) Respondent argues that the Tennessee Supreme Court found that the sanction was appropriate given Carruthers's misconduct and manipulation, leaving the trial court with no choice but to order him to represent himself. (Id.) See Carruthers, 35 S.W.3d at 550. Respondent asserts that Carruthers has not identified any clearly established precedent supporting his theory that a capital defendant is not capable of representing himself. (Id. at 16.) In the absence of such precedent, Respondent contends that the Tennessee Supreme Court's decision is neither contrary to nor an unreasonable application of clearly established federal law and based on a reasonable determination of the facts. (Id.)

Carruthers argues that the trial court forced "an incarcerated, mentally ill, brain damaged man to defend himself in a capital case" and failed to warn Carruthers of the dangers of self-representation. (ECF No. 129 at 4-17.) Carruthers argues that "[t]he Supreme Court is clear in that the right to counsel cannot be impliedly waived or forfeited." (Id. at 18.) He further asserts that his "conduct, which existed in the context of mental illness and brain damage," did not amount to either implied waiver or forfeiture, but "reflected his frustration with his woefully underperforming lawyers and with the trial court's endorsement of his lawyers's inaction." (Id.) Carruthers argues that competent counsel would have informed the trial of his schizoaffective disorder (bipolar type) including the

delusional beliefs, disorganized illogical speech, rapid speech, and concentration problems associated with it and exhibited by Carruthers in the proceedings. (Id. at 19.) He also notes that the symptoms manifested at trial were associated with his brain damage. (Id. at 19-20.)

Carruthers relies on Argersinger v. Hamlin, 407 U.S. 25, 37 (1972), for the "controlling rule" that "'absent a knowing and intelligent waiver, no person may be imprisoned for any offense . . . unless he was represented by counsel at trial.'" (Id. at 27.) He argues that the Tennessee Supreme Court's decision that "an indigent criminal defendant may implicitly waive or forfeit his right to counsel by utilizing that right to manipulate, delay, or disrupt trial proceedings" is contrary to the Supreme Court precedent in Argersinger. (Id.) Carruthers argues that, "if a defendant does not have the mental capacity to represent himself, the court should not honor his desire [to waive or relinquish his right] under the Sixth Amendment right to counsel because such self-representation would violate the Sixth Amendment's right to a fair trial" and that the judge has a protective role in ensuring a valid waiver. (Id. at 30-35.) Further, Carruthers argues that the right to counsel cannot be forfeited. (Id. at 31.)

Carruthers also contends that he was faced with the unconstitutional choice of proceeding with incompetent counsel (in this case, William Massey) or representing himself. (Id. at 45.) He contends that even this "choice" was not his because it was up to Massey whether he would continue with the representation. (Id.) Carruthers further contends that the trial court failed to engage him in a discussion regarding his right to counsel and to obtain verbal assurances indicating

that he was intelligently and knowingly relinquishing his right. (Id.)

Respondent argues that a large number of federal cases have held that forfeiture may take place and that Carruthers left the trial court with no choice but to order him to represent himself. (ECF No. 149 at 18.) See Carruthers, 35 S.W.3d at 546-47. Respondent argues that the trial court was left with no choice but to order Carruthers to represent himself, as Carruthers repeatedly delayed his case by refusing to cooperate and threatening his appointed attorneys to the point that they could not ethically represent him. (Id.) Respondent asserts that Carruthers has not identified any clearly established precedent supporting his theory that a capital defendant is incapable of forfeiting his right to counsel. (Id. at 19.) Respondent argues that, in the absence of Supreme Court precedent, the Tennessee Supreme Court's decision is neither contrary to nor an unreasonable application of clearly established federal law. (Id.)

Carruthers has a right to counsel under the Sixth Amendment. That right to counsel, however, can be waived. "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748 (1970). Carruthers's case involves the more unusual circumstance of the possibility of waiver or forfeiture of a right to counsel based on the defendant's conduct. Still, Carruthers, now years after the trial, asserts that his waiver could not be valid because of his brain damage and mental illness and because the trial court failed to warn him of the dangers of self-representation.

There is no clearly established Supreme Court precedent on the issue of implied waiver or forfeiture of the right to counsel based on a defendant's conduct and/or what, if any, warnings are constitutionally required. See United States v. Goldberg, 67 F.3d 1092, 1100 (3d Cir. 1995). In Gilchrist v. O'Keefe, 260 F.3d 87, 97 (2d Cir. 2001), the court stated, "there is no Supreme Court holding either that an indigent defendant may not forfeit (as opposed to waive) his right to counsel through misconduct nor a general Supreme Court holding that a defendant may not forfeit a constitutional right." In Barrett v. Meeks, No. S-97-1106LKKJFMP, 2006 WL 3300984, at *16 (E.D. Cal. Nov. 14, 2006), report and recommendation adopted by No. S-97-1106LKKJFMP, 2007 WL 933660 (E.D. Cal. Mar. 27, 2007), the court stated:

> The Supreme Court has held that a criminal defendant can forfeit fundamental trial rights such as the right to be present at trial. See Illinois v. Allen, 397 U.S. 337, 343, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970) (defendant can lose right to be present at trial by being disruptive despite trial court's warnings regarding such conduct); Taylor v. United States, 414 U.S. 17, 20, 94 S. Ct. 194, 38 L. Ed. 2d 174 (1973) (affirming trial judge's decision to proceed with trial when the defendant failed to return to the courtroom following a trial recess).
>
> . . . .
>
> Federal circuit courts have interpreted the Allen and Taylor decisions to be consistent with the concept of forfeiture or 'waiver by conduct' of the right to counsel.

The Sixth Circuit has held that "a defendant may engage in conduct which constitutes a waiver of his right to counsel." United States v. Coles, 695 F.3d 559, 562 (6th Cir. 2012). In Coles, the Court noted that the right to counsel does not equate to the absolute right to counsel of the defendant's choice and further determined that the defendant waived his right to counsel following the removal of the fourth assigned counsel. Id. at 562. In Sullivan v. Pitcher, 82 F. App'x 162, 165-66 (6th Cir. 2003) (per curiam), the Sixth Circuit stated that "when all the evidence supports the conclusion that the Sixth Amendment is being used not as a shield but as a sword – other courts have not hesitated to find waiver through conduct."

Further, the Sixth Circuit has held that "waiver by conduct requires no more than the minimum Faretta warnings." King v. Bobby, 433 F.3d 483, 493 (6th Cir. 2006). The Court stated that "King's waiver involves the intersection of two rights: the Sixth Amendment rights to self-representation and to an attorney. When a defendant invokes one, he necessarily waives the other." Id. at 490. The Court noted that King did not make a straightforward assertion of his right to self-representation, but he rejected all of his options except self-representation. Id. at 492. The Court examined the whole record to determine if a knowing and intelligent waiver was made. Id. The Sixth Circuit noted its prior decision in Swiger v. Brown, 86 F. App'x 877 (6th Cir. 2004), and the reasoning that

> The problem in this case was not Swiger's lack of understanding about the risks of self-representation, which he understood. The problem was that a defendant cannot be

> permitted to stop the criminal justice process in its tracks by rejecting appointed counsel and refusing self-representation, which is effectively what he did.

King, 433 F.3d at 493 (quoting Swiger, 86 F. App'x at 882). The Sixth Circuit found that the reasoning in Swiger applied with equal force to King's case. Id. The Sixth Circuit in King described the issue before the trial court as "reining in a defendant who was attempting to manipulate the system by first refusing to retain an attorney, then by refusing to work with his attorney," and determined that the trial court was justified in letting the defendant proceed pro se. Id.

In Fischetti v. Johnson, 384 F.3d 140, 151 (3d Cir. 2004), the Court stated that "the parallel rights to counsel and to self-representation cannot be manipulated to frustrate the orderly processes of the trial court. In Faretta, for example, the Court warned that the 'right of self-representation is not a license to abuse the dignity of the courtroom.'" The court in Fischetti concluded that "defiant behavior by a defendant can properly cost that defendant some of his Sixth Amendment protections if necessary to permit a trial to go forward in an orderly fashion." Id.

The defendant in King did not have the same mental health issues that Carruthers asserts in his habeas petition. In United States v. Back, 307 F. App'x 876, 878 (6th Cir. 2008), the Sixth Circuit held that a trial court was not required to sua sponte order a competency hearing because of a defendant's request to represent himself when the defendant's competence to stand trial was never in question. In the instant case, Carruthers had been determined competent to stand trial, see supra p. 48 n.21, and competent to waive

issues of mental health, see supra pp. 44-45. (See ECF No. 132-3 at PageID 17716-17717.) The mental health evaluations that Carruthers now presents to the Court were not available to the state courts and are barred from consideration by Pinholster.

Given the lack of Supreme Court precedent, the Tennessee Court of Criminal Appeals' decision is not contrary to or an unreasonable application of clearly established Supreme Court precedent and is based on a reasonable determination of facts. Claim 8 is without merit. Summary judgment is GRANTED and Claim 8 is, therefore, DENIED.

### H. Severance (Claim 9, Amended Petition ¶¶ 294-303)

Carruthers alleges that the trial court violated his constitutional rights by denying the multiple motions for severance of his trial with co-defendant James Montgomery's trial despite the fact that they had conflicting defenses and strategies. (ECF No. 21 at 82.) Carruthers alleges that his defense was that he was not involved in the murders and that Montgomery's involvement occurred separate and apart from Carruthers. (Id. at 82-83.) Carruthers asserts that the joint trial allowed the jury to infer his guilt from his association with Montgomery. (Id. at 83.) Carruthers contends that the jury inferred his guilt from the evidence at trial that Montgomery told Terrell Adair that the police would not have a case if they did not have a body and that Montgomery gave Chris Hines an AK-47 assault rifle and said that the weapon had "blood on it." (Id.)

Respondent argues that the claim was not presented to the highest available state court for review

and is procedurally defaulted. (ECF No. 114-1 at 16; ECF No. 149 at 19.) Carruthers does not address this claim in response to the motion for summary judgment.[32] The claim was not exhausted in the state court.[33] Carruthers has not demonstrated cause and prejudice for the failure to exhaust this claim or that a miscarriage of justice will result from the Court's failure to consider Claim 9. Claim 9 is procedurally defaulted and summary judgment is GRANTED. Claim 9 is, therefore, DENIED.

### I. Gag Order (Claim 10, Amended Petition ¶¶ 304-12)

Carruthers alleges a violation of his First, Fifth, Sixth, Eighth, and Fourteenth Amendment rights from the trial court's March 4, 1996, gag order. (ECF No. 21 at 83-84.) He alleges that the trial court did not provide notice or a hearing or consider reasonable alternatives that would ensure a fair trial without restricting his rights. (Id. at 84.) He asserts that the order was not necessary to address any clear and present danger or to ensure that extra-judicial comments did not prejudice the fairness of the trial. (Id. at 84-85.)

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[32] As part of Claim 34, Carruthers asserts that the death penalty is arbitrary because although he and Montgomery were tried together and the State asserted that they committed the murders together, Carruthers was sent to death row, and Montgomery received a term of years for which he is now parole eligible and will be released no later than January 2020. (ECF No. 129 at 273.) See supra p. 8 n.4.

[33] Montgomery raised the issue of severance on direct appeal and was granted a new trial because of the prejudicial effect Carruthers's self-representation had on Montgomery's right to fair trial. See Carruthers, 35 S.W.3d at 524, 552-554.

The Tennessee Supreme Court, on direct appeal, stated:

> Issuance of Gag Order
>
> Carruthers next argues that the trial court committed reversible error by issuing a "gag order" preventing him from speaking to the media. The trial court's order, issued about a month before the trial began, states:
>
> > The Constitutions of the United States and the State of Tennessee guarantee defendants in all criminal cases due process of law and the right to a fair and impartial jury. It is the duty of the trial court to see that every defendant is afforded all his constitutional rights.
> >
> > In order to safeguard those rights, this Court is of the opinion that the following rule is necessary to constitutionally guarantee an orderly and fair trial by an impartial jury. Therefore, this Court orders the following:
> >
> > All lawyers participating in this case, including any defendants proceeding pro se, the assistants, staff, investigators, and employees of investigators are forbidden to take part in interviews for publicity and from making extra-judicial statements about this case from this date until such time as a verdict is returned in this case in open court.
> >
> > Because of the gravity of this case, because of the long history of concerns for the personal safety of attorneys, litigants

> and witnesses in this case, because of the potential danger-believed by this Court to be very real and very present-of undermining the integrity of the judicial system by "trying the case in the media" and of sullying the jury pool, this Court feels compelled to adopt this extraordinary pretrial measure.

Carruthers challenges this order as violating his right to a fair trial, guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 9 of the Tennessee Constitution. Carruthers is correct to rely upon the Sixth Amendment. We note, however, that the United States Supreme Court has stated that a "right to fair trial" claim also implicates the Fifth and Fourteenth Amendment Due Process Clauses. See, e.g., Strickland v. Washington, 466 U.S. 668, 684-85, 104 S. Ct. 2052, 2063, 80 L. Ed. 2d 674 (1984) ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment."). Nonetheless, numerous courts have referred simply to the Sixth Amendment right to a fair trial in this context, and we will do the same. See, e.g., In re Dow Jones & Co., Inc., 842 F.2d 603, 609 (2d Cir.), cert. denied, 488 U.S. 946, 109 S. Ct. 377, 102 L. Ed. 2d 365 (1988); United States v. Ford, 830 F.2d 596, 600 (6th Cir. 1987).

Carruthers also raises First Amendment concerns, which is understandable given that gag

orders exhibit the characteristics of prior restraints. See United States v. Brown, 218 F.3d 415, 424 (5th Cir. 2000). But see Dow Jones, 842 F.2d at 608 (noting a "substantial difference" between a restraint on the press and a restraint on trial participants). Yet the crux of Carruthers' argument on appeal is that his defense was inhibited because he could not respond to the media's coverage of the trial; he could do nothing to alter the jurors' preconceptions about the case gained from their exposure to news reports. Carruthers also argues that his inability to speak to the press may have prevented potential witnesses from coming forward to his defense. Properly stated, then, his argument asserts that the gag order interfered with his right to a fair trial. To the extent Carruthers' brief raises a First Amendment claim, however, we find it moot. By its own terms, the trial court's order ceased to exist upon the return of the verdict, which occurred several years ago. Of course, since a gag order is by definition a restriction on speech, our review of Carruthers' Sixth Amendment claim demands consideration of First Amendment principles. As is clear from the case law, discussed below, the proper standard governing the validity of gag orders explicitly incorporates these principles, as do we in our analysis.

The Court of Criminal Appeals rejected Carruthers' arguments and upheld the gag order in its entirety. As noted in its opinion, the following circumstances were considered by the

trial court as reasons for issuing the gag order: numerous threats to attorneys; the death of one of the co-defendants; the highly-charged emotional climate of the trial (e.g., the courtroom was guarded by S.W.A.T. team members); the gunning down of a deputy jailer in his driveway, which the trial judge thought was related to the case; the fleeing of one witness after reading about the case in the newspaper; and the statements of two witnesses who had already testified that defendant Montgomery threatened to kill them if they talked about the case. Also, as the Court of Criminal Appeals noted, Alfredo Shaw testified that Carruthers threatened him and made arrangements to have a reporter interview him about recanting his story. Thus, the court held that the trial judge was properly concerned about the media's influence on the potential jury pool and the safety of all involved in the trial. The court also held that the public was certainly aware of the trial from the media's coverage and that Carruthers' statements to the press would not likely have led to unknown witnesses coming forward.

We agree with the Court of Criminal Appeals' judgment that under these circumstances a gag order was proper. We hold, however, that under the constitutional standards discussed below, the scope of that order was too broad. Nevertheless, given the circumstances of this case, the error is harmless.

Numerous courts have recognized that the correct standard by which to evaluate the constitutionality of gag orders depends upon who is being restrained: the press or trial participants. See, e.g., Brown, 218 F.3d at 425; Dow Jones, 842 F.2d at 608. If the gag order is directed to the press, the constitutional standard is very stringent. See Montgomery, 929 S.W.2d at 414 (discussing Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976)). Carruthers' appeal before this Court, however, concerns the trial court's gag order directed to him, a defendant, representing himself at trial.

As the United States Court of Appeals for the Fifth Circuit has recently determined, the federal circuit courts are split as to the correct constitutional standard governing gag orders on trial participants. See Brown, 218 F.3d at 425-28. For example, the Sixth Circuit has held that gag orders on trial participants must meet the exacting "clear and present danger" test for free speech cases enunciated in Near v. Minnesota, 283 U.S. 697, 51 S. Ct. 625, 75 L. Ed. 1357 (1931). See Ford, 830 F.2d at 598 ("We see no legitimate reasons for a lower standard for individuals [as compared to the press]."). Accord Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 249 (7th Cir. 1975), cert. denied, 427 U.S. 912, 96 S. Ct. 3201, 49 L. Ed. 2d 1204 (1976) (applying a "serious and imminent threat" test); Levine v. United States District Court, 764 F.2d 590, 595-96 (9th Cir. 1985), cert. denied, 476 U.S.

1158, 106 S. Ct. 2276, 90 L. Ed. 2d 719 (1986) (same). In contrast, the Second, Fourth, and Tenth Circuits analyze the validity of gag orders on trial participants under the less stringent standard of whether the participant's comments present a "reasonable likelihood" of prejudicing a fair trial. See Dow Jones, 842 F.2d at 610; In re Russell, 726 F.2d 1007, 1010 (4th Cir.), cert. denied, 469 U.S. 837, 105 S. Ct. 134, 83 L. Ed. 2d 74 (1984); United States v. Tijerina, 412 F.2d 661, 666-67 (10th Cir.), cert. denied, 396 U.S. 990, 90 S. Ct. 478, 24 L. Ed. 2d 452 (1969). See also News-Journal Corp. v. Foxman, 939 F.2d 1499, 1512-15 (11th Cir. 1991) (discussing the case law authority for the less stringent standard). Without deciding whether to adopt the "reasonable likelihood" standard, the Fifth Circuit determined that the "clear and present danger" test was not required, and analyzed the case before it under a "substantial likelihood" test. See Brown, 218 F.3d at 427-28.

Although this Court has upheld restraints on trial participants, see State v. Hartman, 703 S.W.2d 106 (Tenn. 1985) (order restraining counsel from talking with the public or media about the facts of the case), we have never discussed the underlying constitutional issues. We therefore decide this issue based on our own interpretation of United States Supreme Court precedent and the Tennessee Constitution with guidance from the federal circuit courts. We note that the Court of Criminal Appeals' opinion emphasizes that "[t]he twist

in this case, however, is that Carruthers was representing himself during trial." Although this fact is relevant in applying the constitutional standard to determine whether Carruthers' right to a fair trial was breached, our review of the case law indicates that the constitutional standard is the same regardless of which trial participant is restrained.

The Brown court's decision to follow a "substantial likelihood" test rather than the "clear and present danger" test rests on its interpretation of Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991). The Brown court determined that Gentile rejected the clear and present danger test for trial participants and that Gentile is the Supreme Court's latest discussion of the issue. See Brown, 218 F.3d at 426-28 (noting that the cases endorsing the more stringent test predated Gentile). We agree with the Brown court's holding.

Gentile involved an attorney who held a press conference the day after his client was indicted on criminal charges. See Gentile, 501 U.S. at 1063-65, 111 S. Ct. at 2738-40 (discussing the facts). The attorney proclaimed his client's innocence, strongly suggested that a police detective was in fact the perpetrator, and stated that the alleged victims were not credible. Although the trial court "succeeded in empaneling a jury that had not been affected by the media coverage and [the client] was acquitted on all charges, the [Nevada] state bar disciplined [the attorney] for his

statements." Id. at 1064, 111 S. Ct. at 2739. The Nevada Supreme Court upheld the state bar's disciplinary action, finding that the attorney "knew or reasonably should have known that his comments had a substantial likelihood of materially prejudicing the adjudication of his client's case." Id. at 1065, 111 S. Ct. at 2739. Although the Supreme Court reversed this judgment because it found the Nevada Supreme Court's construction of the disciplinary rule "void for vagueness," id. at 1048-51, 111 S. Ct. at 2731-32, a majority of the Court held that the "substantial likelihood of prejudice" test struck the proper constitutional balance between an attorney's First Amendment rights and the state's interest in fair trials. Id. at 1065-76, 111 S. Ct. at 2740-45.

In so doing, the Court held that the stringent standard governing restraints on the press articulated in Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976) should not apply to restraints on lawyers whose clients are parties to the proceeding. Id. at 1074, 111 S. Ct. at 2744. See also News-Journal Corp., 939 F.2d at 1512-13 (noting that the Supreme Court has suggested restricting trial participants as an alternative to a prior restraint on the media). The Court quoted with approval from Sheppard v. Maxwell, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966) in which the defendant's conviction was overturned because of

prejudicial publicity that prevented him from receiving a fair trial:

> The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures. 384 U.S. at 363, 86 S. Ct. at 1522.

Id. at 1072, 111 S. Ct. at 2743.

As the Brown court held, however, see Brown, 218 F.3d at 426, the Court in Gentile did not conclude that the "substantial likelihood of prejudice" test was required; it held only that this test complies with the First Amendment. See Gentile, 501 U.S. at 1075, 111 S. Ct. at 2745 ("We agree with the majority of the States that [this standard] constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials."). Moreover, Gentile involved a restraint on an attorney's speech; in this case, Carruthers was a party as well as his own attorney. It is necessary, therefore, to decide whether the Gentile rationale applies to parties.

Although unnecessary to its holding, we find significant evidence in the Gentile opinion that the clear and present danger test is not required for gag orders restraining parties or other trial participants. The Court emphasized the distinction between "participants in the litigation and strangers to it" as recognized by an earlier case, Seattle Times Co. v. Rhinehart, 467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984). Id. at 1072-73, 111 S. Ct. at 2743-44. As characterized by the Gentile Court, the Court in Seattle Times "unanimously held that a newspaper, which was itself a defendant in a libel action, could be restrained from publishing material about the plaintiffs and their supporters to which it had gained access through court-ordered discovery." Id. at 1073, 111 S. Ct. at 2744. The Gentile Court then quoted from Seattle Times as follows: "[a]lthough litigants do not 'surrender their First Amendment rights at the courthouse door,' those rights may be subordinated to other interests that arise in this setting" (citation omitted); and further, "on several occasions [we have] approved restriction on the communications of trial participants where necessary to ensure a fair trial for a criminal defendant." Id. The Court also stated that "[f]ew, if any interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right." Id. at 1075, 111 S. Ct. at 2745 (citing

Sheppard, 384 U.S. at 350-51, 86 S. Ct. at 1515-16).

We conclude that the concerns raised in Gentile and Sheppard are applicable regardless of whether a party or his or her attorney is being restrained. A prejudicial statement made to the press by an attorney is not somehow less prejudicial if made by a party. In short, what matters is what is being said and not who is saying it. See Brown, 218 F.3d at 428 ("As the district court pointed out, trial participants, like attorneys, are 'privy to a wealth of information that, if disclosed to the public, could readily jeopardize the fair trial rights of all parties.'"). If anything, as one court has reasoned, extrajudicial comments made by trial participants have the potential to be more harmful than comments made by attorneys:

> Gentile involved a state supreme court rule governing the conduct of members of the bar of that state, while we examine a state trial court's restrictive order entered in a particular case and directed to all trial participants. Because of their legal training, attorneys are knowledgeable regarding which extrajudicial communications are likely to be prejudicial. The other trial participants encompassed by the restrictive order in this case did not have such legal discernment and expertise. Given the public attention generated by this case, defendants, witnesses and law enforcement personnel were eager to talk with the press concerning

> their particular views. While attorneys can be governed by state supreme court or bar rules, other trial participants do not have these guidelines. News-Journal Corp., 939 F.2d at 1515 n.18.

Thus, we conclude that for purposes of the constitutional right to a fair trial, Gentile's rationale applies to all trial participants, meaning that the more stringent clear and present danger test is not required.

Having decided that the clear and present danger test is not constitutionally mandated, we must now decide which test to adopt: the "substantial likelihood of prejudice" test or, as some courts have employed, the "reasonable likelihood" test. As noted, Gentile held only that the substantial likelihood test was constitutional, not that it was required. See Brown, 218 F.3d at 426-28; News-Journal Corp., 939 F.2d at 1515 n.18. Nonetheless, we conclude under both the state and federal constitutions that the substantial likelihood test strikes a constitutionally permissible balance between the free speech rights of trial participants, the Sixth Amendment right of defendants to a fair trial, and the State's interest in a fair trial. Cf. Gentile, 501 U.S. at 1070, 111 S. Ct. at 2742. Accordingly, we hold that a trial court may constitutionally restrict extrajudicial comments by trial participants, including lawyers, parties, and witnesses, when the trial court determines that those comments pose a substantial likelihood of prejudicing a fair trial.

Under this constitutional standard, we hold that the trial court was justified in imposing a gag order on Carruthers. At trial, this case garnered a significant amount of media coverage, raising the concerns expressed in Sheppard. As Carruthers himself notes in his brief:

> This trial was charged with emotion from start to finish. There were allegations of gang affiliations and testimony of large scale narcotics dealings. The courtroom was guarded by S.W.A.T. team members and by Sheriff's deputies who were authorized to search those entering the courtroom. Representatives of news organizations were present daily to record the proceedings.

In addition to its concerns about media coverage, the trial court was presented with the problem of witness intimidation. The trial judge found that witnesses who had already testified stated that defendant Montgomery threatened to kill them if they talked. Moreover, Alfredo Shaw testified that Carruthers had threatened him and made arrangements to have a reporter interview him about recanting his story. Under these unusual circumstances, the trial court was justified in employing heightened measures to ensure that a proper jury could be found and to prevent Carruthers from manipulating the media so as to intimidate witnesses. The trial judge could not ignore these issues. Indeed, he had a constitutional duty under the state and federal constitutions to ensure a fair trial.

Before a gag order can be entered, however, the case law suggests that a trial court should consider reasonable alternative measures that would ensure a fair trial without restricting speech. In the context of restraints on the press, the United States Supreme Court has specifically held that a trial court should consider such measures. See Nebraska Press, 427 U.S. at 563-64, 96 S. Ct. at 2804-05. These measures include: a change of trial venue; postponement of the trial to allow public attention to subside; searching questions of prospective jurors; and "emphatic" instructions to the jurors to decide the case on the evidence. Id. (discussing Sheppard, 384 U.S. at 357-62, 86 S. Ct. at 1519-22).

Although it is not clear whether the need to consider alternatives is also necessary in the context of restraints on trial participants, some federal circuit courts have assumed so, see, e.g., Brown, 218 F.3d at 430-31; Dow Jones, 842 F.2d at 611-12, and the trial judge considered several of the alternatives. The trial court found that neither a change of venue nor a continuance was practical because the case was several years old and one attempt to try the case had already been made. The court appropriately gave careful attention to voir dire and jury instructions, but determined that these alternatives alone were insufficient.

Given the extraordinary nature of this case, we hold that the trial court was entitled to make this judgment. We also note that in

addition to and apart from the concerns about pretrial publicity interfering with the task of finding an unbiased jury, the trial court was concerned about witness intimidation and Carruthers' potential manipulation of the press. None of the alternatives mentioned in Nebraska Press and Sheppard would likely have alleviated these concerns. The trial court reasonably concluded that only a gag order would be effective. Finally, we note that the alternatives mentioned above are not free of cost to the judicial system. As the Gentile Court wrote:

> Even if a fair trial can ultimately be ensured through voir dire, change of venue, or some other device, these measures entail serious costs to the system. Extensive voir dire may not be able to filter out all of the effects of pretrial publicity, and with increasingly widespread media coverage of criminal trials, a change of venue may not suffice to undo the effects of statements such as those made by the petitioner. Gentile, 501 U.S. at 1075, 111 S. Ct. at 2745.

Having decided that the trial court did not err in issuing the gag order, the final issue to consider is the scope of the order. As discussed above, Carruthers' argument on appeal is properly construed as a "right to fair trial" claim rather than a First Amendment claim. Nevertheless, a gag order by definition restricts speech. In determining whether a gag order is appropriate, therefore, a court must

be mindful that "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." Ward v. Rock Against Racism, 491 U.S. 781, 799, 109 S. Ct. 2746, 2758, 105 L. Ed. 2d 661 (1989); see also Procunier v. Martinez, 416 U.S. 396, 413, 94 S. Ct. 1800, 1811, 40 L. Ed. 2d 224 (1974) (the limitation on speech "must be no greater than is necessary or essential to the protection of the particular governmental interest involved") (quoted in Brown, 218 F.3d at 429).

On its face, the trial court's order has no exceptions or limitations: it prohibits the defendants and their attorneys from making any comments to the press about the case. This gag order is considerably broader than any upheld in the cases discussed above. Gentile, though not a gag order case, involved a limitation on attorney speech which prohibited only statements "substantially likely to prejudice" the adjudication of the case. See Gentile, 501 U.S. at 1064, 111 S. Ct. at 2739. Brown involved an order which "left available to the parties various avenues of expression, including assertions of innocence, general statements about the nature of an allegation or defense, and statements of matters of public record." Brown, 218 F.3d at 429-30. The order in Dow Jones was similar. See Dow Jones, 842 F.2d at 606.

Given the history of this trial, we certainly understand why the trial court crafted such a broad order. Indeed, in certain cases, as

> where a defendant takes advantage of a limited gag order or fails to comply with it, an order of such breadth may be justified. Nonetheless, we hold that initial gag orders on trial participants should ordinarily contain the exceptions found in the Brown order and allow trial participants to make general statements asserting innocence, commenting on the nature of an allegation or defense, and discussing matters of public record.
>
> We find the trial court's failure to include these exceptions in the gag order was harmless error. We fail to see how limited statements made by Carruthers to the media about his innocence, allegations or defenses, or matters in the public record would have altered the result of the trial. We do not think that allowing Carruthers to make such statements would have furthered the goal of finding an impartial jury, nor do we think it probable that any new witnesses would have come forward. We also point out that these crimes occurred in 1994, and the gag order was issued only one month before trial in 1996. In the two years preceding issuance of the gag order, Carruthers had access to the media. The record shows both that he availed himself of that access and that the media responded by actively covering the trial and events leading up to the trial. Under these circumstances, the error below was harmless.

Carruthers, 35 S.W.3d at 558-65 (footnotes omitted).

Carruthers argues that the state fails to meet its burden for summary judgment on this claim. (ECF No.

129 at 209-211.) He asserts that the Tennessee Supreme Court's decision suffers from "at least two fatal flaws." (Id. at 216.) First, he argues that the court applied a test requiring invalidation of a gag order "if 'the trial court determines that . . . comments pose a substantial likelihood prejudicing a fair trial,'" while the United States Supreme Court in Gentile v. State Bar of Nevada, 501 U.S. 1030, 1058 (1991), states that the appropriate test is whether extrajudicial remarks pose a "real or specific threat to the judicial process." (Id. at 216-217.) Second, he argues that the court erred by concluding that the gag order was subject to harmless error analysis instead of creating a structural error. (Id. at 217.) Further, he asserts that the Tennessee Supreme Court's failure to grant a new trial despite the existence of a structural error was "contrary to" clearly established law. (Id.)

Respondent argues that that the Tennessee Supreme Court's decision is neither contrary to nor an unreasonable application of clearly established federal law. (ECF No. 114-1 at 19.) He asserts that despite Carruthers's argument, he has presented no clearly established federal law that the trial court's gag order constituted a structural error. (ECF No. 149 at 14.)

**1. The Relevant Standard for Gag Orders**

In Gentile, an attorney held a press conference the day after his client was indicted on criminal charges in violation of a Nevada Supreme Court Rule prohibiting a lawyer from making extrajudicial statements to the press that he knows or reasonably should know will have a "substantial likelihood of materially prejudicing" an adjudicative proceeding. 501 U.S. at 1062-

63. See United States v. Fieger, No. 07-CR-20414, 2008 WL 659767 (E.D. Mich. Mar. 11, 2008) ("[I]t is undisputed that the Supreme Court has held that a party's free speech may be prohibited to the extent that the speech presents a 'substantial likelihood of materially prejudicing' a fair trial."). The Court in Gentile observed,

> The "substantial likelihood" test . . . is constitutional under this analysis, for it is designed to protect the integrity and fairness of a State's judicial system, and it imposes only narrow and necessary limitations on lawyers' speech. The limitations are aimed at two principal evils: (1) comments that are likely to influence the actual outcome of the trial, and (2) comments that are likely to prejudice the jury venire, even if an untainted panel can ultimately be found. Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by "impartial" jurors, and an outcome affected by extrajudicial statements would violate that fundamental right.

Gentile, 510 U.S. at 1075 (citations omitted). Although the Supreme Court stated, "It cannot be said that petitioner's conduct demonstrated any real or specific threat to the legal process," the Court also determined that the "substantial likelihood of material prejudice" test is "a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the States' interest in fair trials." Gentile,

501 U.S. at 1058, 1075.[34] The Court noted that the "clear and present danger" test is the linguistic equivalent to "substantial likelihood of material prejudice" because both standards require an assessment of proximity and degree of harm. 501 U.S. at 1037. The Tennessee Supreme Court's ruling is not contrary to Supreme Court precedent because of its application of the "substantial likelihood of prejudice" standard.

**2. Harmless Error**

The "common thread" connecting the Supreme Court's harmless error cases is that "each involved 'trial error' — error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." Arizona v. Fulminante, 499 U.S. 279, 307 (1991); see also Brecht v. Abrahamson, 507 U.S. 619, 638 (1993) (the harmless error standard applies to "constitutional error of the trial type"); United States v. Marcus, 560 U.S. 258, 263 (2010) (structural errors are "a very limited class" of errors that affect the "framework within which the trial proceeds"). The Supreme Court has

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[34] The Sixth Circuit in Carey v. Wolnitzek, 614 F.3d 189, 200 (6th Cir. 2010), limited the Gentile holding to speech restrictions on attorneys and a determination of the balance of "litigants' fair trial rights with attorneys' free speech rights in upholding a rule prohibiting attorneys involved in a pending trial from making statements likely to prejudice the proceedings." Id. at 200 (citing Gentile, 501 U.S. at 1073 n.5 & 1075, 111 S. Ct. at 2744 n.5, 2745). In United States v. Ford, 830 F.2d 596, 600 (6th Cir. 1987), the Sixth Circuit applied the "clear and present danger" test to a gag order on a defendant congressman undergoing criminal prosecution.

identified the following "structural" errors: the complete denial of counsel, a biased judge, denial of the right to self-representation at trial, racial discrimination in jury composition, denial of a public trial, and a defective jury instruction on the reasonable-doubt standard of proof. Neder v. United States, 527 U.S. 1, 8 (1999); Marcus, 560 U.S. at 263; Becht v. United States, 403 F.3d 541, 547 (8th Cir. 2005). The error in those cases "necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." Washington v. Recuenco, 548 U.S. 212, 218-19 (2006) (alteration in original) (internal quotation marks omitted). The error in the gag order is not a structural error.

The Tennessee Supreme Court's determination is not contrary to or an unreasonable application of clearly established Supreme Court precedent or based on an unreasonable determination of facts. Summary judgment is GRANTED; Claim 10 is, therefore, DENIED.

### J. Anonymous Jury (Claim 11, Amended Petition ¶¶ 313-23)

Carruthers alleges that the empaneling of an anonymous jury violated his Sixth, Eighth, and Fourteenth Amendment rights. (ECF No. 21 at 85.) He alleges that: (1) the trial court did not first hold a hearing or make a record of the factual basis for its extraordinary action (id.); (2) the trial court did not suggest that special procedures be used, that instructions be given to the prospective or empaneled jurors, or solicit the parties' input (id. at 85-86); and (3) the trial court did not explain why the jury needed to be anonymous or give instructions on the fact that the use of an anonymous jury would not effect the deliberations (id. at

86). He asserts that his right to a fair trial by an impartial jury was prejudiced and that this was compounded by the extraordinary security at trial, especially at the return of the guilty verdict and at sentencing when, "Before the guilty verdicts were read shortly after 11:a.m., a dozen armed SWAT members and sheriff's deputies were positioned around the tense courtroom" and after the jury's deliberation at sentencing, "[t]he same security routine followed . . . ." (Id.)

**1. Procedural Default**

Respondent argues that the claim was not presented in the Tennessee state courts and is procedurally defaulted. (ECF No. 114-1 at 19-20.) Carruthers asserts that he argued in his postconviction appellate brief that empaneling an anonymous jury was "unjustified." (ECF No. 129 at 233.) Carruthers contends that his claim about the anonymous jury is not procedurally defaulted because he cited State v Ivy, 188 S.W.3d 132, 143-44 (Tenn. 2006), noting that the Tennessee test for determining whether to empanel an anonymous jury exists to "preserv(e) the individual rights of the accused," including those guaranteed by the Fifth, Sixth, and Fourteenth Amendments. (Id. at 233-34.)

In Carruthers's post-conviction appellate brief, he asserts ineffective assistance of appellate counsel for the failure to challenge the use of an anonymous jury as a violation of Tennessee law and the Sixth and Fourteenth Amendments. (ECF No. 134-1 at PageID 18117.) Carruthers noted that the second prong of the Ivy framework was "whether reasonable precautions will minimize prejudice to the defendant and ensure that fundamental rights are protected." (Id. at PageID

18119, 18122.) Carruthers cited State v. Bobo, 814 S.W.2d 353, 358 (Tenn. 1991), which addressed the "constitutional right to trial by jury." (Id. at PageID 18123.) Carruthers argued that Judge Dailey was completely oblivious to federal precedents resulting in a failure that rose to the "level of . . . Sixth and Fourteenth Amendment violation[s] as well." (Id. at PageID 18124 n.35.) Carruthers raised the issue in his post-conviction appellate brief.[35] The Tennessee Court of Criminal Appeals addressed the anonymous jury argument in the context of an ineffective-assistance-of-appellate-counsel claim, concluded that the trial court did not abuse its discretion by empaneling an anonymous jury, and also that Carruthers was not unduly prejudiced by the anonymous jury. Carruthers, 2007 WL 4355481, at *49-50. Claim 11 was exhausted in the state courts. Summary judgment based on procedural default is, therefore, DENIED.

**2. Merits**

On the merits of the anonymous-jury claim, the Tennessee Court of Criminal Appeals stated:

> c. Anonymous Jury
>
> The petitioner next argues that appellate counsel were ineffective for failing to challenge the impaneling of an anonymous jury.
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> There was no precedent in Tennessee for impaneling an anonymous jury at the time of the petitioner's trial. Since that time, however, our supreme court concluded in State v. Ivy,

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[35] Carruthers asserted ineffective assistance of counsel as cause for any prejudicial default. (ECF No. 129 at 247-48, 252-53.)

188 S.W.3d 132, 143 (Tenn.), cert. denied, --- U.S. ----, 127 S. Ct. 258, 166 L. Ed. 2d 200 (2006), that anonymous juries do not per *se* violate a defendant's right to a fair and impartial trial and that it is within a trial court's discretion to determine whether an anonymous jury is appropriate in any particular case. In analyzing this issue, our supreme court first found that nothing in our statutes or constitution prohibits the impaneling of an anonymous jury in Tennessee. The court then turned to a review of other jurisdictions, noting that "nearly every court that has addressed the issue has recognized that anonymous juries may be impaneled in an appropriate case without violating a defendant's constitutional rights under the United States Constitution." Id. (citing United States v. Talley, 164 F.3d 989, 1001 (6th Cir. 1999); United States v. Edmond, 52 F.3d 1080, 1090 (D.C. Cir. 1995); United States v. Ross, 33 F.3d 1507, 1519 (11th Cir. 1994); United States v. Crockett, 979 F.2d 1204, 1215 (7th Cir. 1992); United States v. Scarfo, 850 F.2d 1015, 1021 (3d Cir. 1988); United States v. Barnes, 604 F.2d 121, 140 (2d Cir. 1979)).

The Ivy court acknowledged that the impaneling of an anonymous jury "requires a court to 'balance the defendant's interest in conducting meaningful voir dire and in maintaining the presumption of innocence, against the jury member's interest in remaining free from real or threatened violence and the public interest in having the jury render a fair and

impartial verdict.'" Id. at 144 (quoting United States v. Amuso, 21 F.3d 1251, 1264 (2d Cir. 1994)). The court, therefore, adopted the two-prong framework used by other courts for determining the appropriateness of an anonymous jury in any particular case: (1) whether there is a strong reason to believe that the jury needs protection; and (2) whether reasonable precautions will minimize prejudice to the defendant and ensure that fundamental rights are protected.

In determining whether the circumstances support a finding that the jury needs protection, a court may consider a defendant's alleged participation in organized crime, a defendant's alleged participation in a group with the capacity to threaten jurors, a defendant's past efforts to interfere with the judicial process, the defendant's possible punishment if convicted, and the pervasiveness of trial publicity that may reveal the jurors' names and expose them to public scrutiny. Id. (citing Edmond, 52 F.3d at 1091; Ross, 33 F.3d at 1520). Reasonable precautions to minimize prejudice to the accused include enhanced voir dire, instructions to the jury as to neutral reasons for their anonymity, and instructions to the jury on the presumption of innocence. Id. (citing Edmond, 52 F.3d at 1093 (noting that jury was instructed that anonymity was routine); Talley, 164 F.3d at 1002 (observing that jury was instructed that anonymity was due to media interest); Crockett, 979 F.2d at

1216 (noting that jury was instructed on the presumption of innocence).

Applying Ivy to the present case, we conclude that the trial court did not abuse its discretion by impaneling an anonymous jury. First, the trial court had ample reasons to believe that this was a case in which the jurors needed to be protected. The record reveals, among other things, that one of the petitioner's codefendants had been found hanged in his cell prior to trial; the petitioner had repeatedly threatened his counsel and their families and staff; the petitioner had several prior convictions for violent offenses; and books on wire-tapping, explosives, and surveillance methods had been found in the petitioner's cell. A history of violence and attempting to obstruct justice may support a determination that impaneling an anonymous jury is appropriate. Id. at 144-45.

Second, the petitioner was not unduly prejudiced as a result of the anonymous jury. The trial court permitted a lengthy voir dire and allowed the parties to question the prospective jurors extensively. As in Ivy, the trial court instructed the jury that the petitioner was presumed innocent, that the prosecution had the burden of establishing guilt beyond a reasonable doubt, and that the indictment was not evidence. Additionally, the trial court instructed the jurors that they "should have [no] sympathy or prejudice or allow anything but the law and the evidence to have any influence upon them in determining their

verdict." Since the jury is presumed to follow jury instructions absent evidence to the contrary, we conclude that these instructions protected against the possibility of prejudice. See id. at 145.

We note that although this case predated Ivy, the trial court, in its decision to impanel the anonymous jury, appropriately balanced the need to ensure the safety and integrity of the trial and all its participants against the potential prejudice to the petitioner:

> I think the record is replete with references of threats and harassment by [the petitioner]. Mr. William Massey filed several affidavits of his own on his own behalf and on behalf of his secretary indicating that he had been threatened personally by [the petitioner], that the car that his daughter drives was specifically identified in one of the threats in a letter authored by [the petitioner], that the color of the toothbrush in his house could be discovered, that he had investigators from out of town that could come in and do all of this work, a threatening call was made to Mr. Massey's office which resulted in his secretary being reduced to tears because of the threats that were communicated over the telephone. All of this is in the record. This isn't any secret. And there was never any attempt to deny authorship of these letters.
>
> . . . .

It goes back farther than that. Mr. Larry Nance was physically intimidated and threatened sufficiently to cause him to want to get off of the case.

This case is replete with threats and intimidation, and [the petitioner] standing up and saying today that it never happened doesn't change history. And all that has happened, including the books that were found in his cell, tend to indicate that this is a case that should be viewed in a most serious light, that intimidation and threats and bullying tactics have been part of this case from day one.

And what I intend to do is to take every measure possible to reduce that sort of conduct as it may apply to witnesses who come in here to testify and jurors who volunteer their time to sit and serve on this jury. And I may well employ a numbering system for this case.

. . . .

And I guess the argument can be made that it would somehow increase the tension and raise the level of tension in the trial. I guess there are a lot of things that to one degree or another do that. I mean, any time you have a sequestered jury, as opposed to a nonsequestered jury, I guess arguably that would increase the tension and focus the jurors' attention on the case and send a message to them that

> this is a serious matter, that they should do this or that.
>
> . . . [B]ut that's just a part of the process. And if that's necessary, if that has to be done to maintain the safety and integrity of the system and the safety of the participants, then so be it. In my opinion . . . that would be appropriate.
>
> I can't, you know, getting back to the letter that [the petitioner] sent to Mr. Massey in which he mentioned the car that his daughter drove, I mean, Mr. Massey even indicated in that letter that wasn't even the car he drove. And how [the petitioner] found out about that car, I don't know, but he had some way of finding that out. And those are the types of things that lead me to believe that this is the type of case, given the charges involved, the facts involved, and the lengthy history of intimidation and threats that exist in this case in the record, that this may well be the type of case that some sort of numbering system would be appropriate for.
>
> And I think it would benefit everyone involved in allowing the jurors to feel freer to respond and freer to stay on the case and to listen to the facts of the case and render–and focus on the facts of the case and render a fair and impartial decision.

Accordingly, we conclude the record supports the determination of the post-conviction court

> that appellate counsel were not deficient by not raising as an issue on appeal the trial court's use of an anonymous jury.

Carruthers, 2007 WL 4355481, at *48-51 (alterations in original).

Carruthers argues that the Supreme Court in Taylor v. Kentucky, 436 U.S. 478, 485 (1978), recognized that the Sixth and Fourteenth Amendments establish a fundamental right that

> one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduces as proof at trial.

(ECF No. 129 at 252.) He asserts that the fundamental right takes on additional importance when the State seeks the death penalty. (Id.) He argues that the Supreme Court requires "close judicial scrutiny" of any measures having the potential of "casting suspicion's shadow on the accused." (Id.) He cites United States v. Talley, 164 F.3d 989, 1001-1002 (6th Cir. 1999), for the level of scrutiny required before a trial court can empanel an anonymous jury. (Id.) Carruthers asserts that there was no hearing and no evidence on factors that would support a determination that an anonymous jury was necessary. (Id.) He contends that Judge Dailey "did nothing other than issue a knee-jerk fiat" and failed to engage in any scrutiny in empaneling an anonymous jury. (Id. at 253.)

There is no Supreme Court case setting out the criteria for empaneling an anonymous jury and, as such, there is no Supreme Court precedent directly

addressing that issue. See Miller v. Lafler, No. 2:10-CV-14955, 2011 WL 4062410, at *2 (E.D. Mich. Sept. 13, 2011) (denying habeas relief because "[t]he United States Supreme Court has never held that jurors must be referred to by their name and not by number during the jury selection process."), rev'd on other grounds, Miller v. Lafler, 505 F. App'x 452 (6th Cir. 2012).[36]

Further, there is no constitutional right to a public jury, but only a Sixth Amendment right to "a public trial by an impartial jury." United States v. Lawson, 535 F.3d 434, 440-41 (6th Cir. 2008). In Lawson, the Sixth Circuit noted:

> There may be instances in which an anonymous jury is empaneled in such a way as to jeopardize constitutional rights – such as the right to a presumption of innocence – but an anonymous jury is not a constitutional violation in and of itself.

Id. at 441. A trial court "may empanel an anonymous jury in any case in which the interest of justice so require" and within its sound discretion. United States v. Warman, 578 F.3d 320, 343 (6th Cir. 2009). The Fourth Circuit in United States v. Dinkins, 691 F.3d 358, 372 (4th Cir. 2012), held that "[a]n anonymous jury is warranted only when there is strong reason to conclude that the jury needs protection from interference or harm, or that the integrity of the jury's function will be compromised if the jury does not remain anonymous." See United States v. Candelario-

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[36] Despite Carruthers's reliance on Taylor, that case did not involve an anonymous jury, but whether a trial court's failure to give a jury instruction on the presumption of innocence resulted in a violation of the right to fair trial. Taylor, 436 U.S. at 479.

Santana, 909 F. Supp. 2d 68, 76 (D.P.R. 2012) (an anonymous jury may be necessary to enable the jury to perform its fact finding function and to ensure juror protection); Wren v. Fabian, No. 07-4353 (JNE/JSM), 2008 WL 4933950, at *7 (D. Minn. Nov. 14, 2008) (denying habeas relief related to anonymous jury claims where jurors remained anonymous "to ensure their safety and impartiality: (1) a potential trial witness had been assaulted, (2) retaliation was the alleged motive for the crime, and thus the jurors might have reason to fear retaliation against themselves, and (3) there was some 'potential gang affiliation evidence,' which could suggest a need for juror anonymity."). The trial court must ensure that the defendant retains his right to an unbiased jury by conducting voir dire designed to uncover bias as to issues in the case and the defendant and provide the jury a neutral, nonprejudicial reason for requiring the jury to be anonymous. Talley, 164 F.3d at 1001-1002.

In the instant case, there was substantial evidence of threats of violence associated with the case. The trial court permitted a lengthy voir dire and allowed the parties to question the jury extensively. See Carruthers, 2007 WL 4355481, at *50. The court gave instructions on the presumption of innocence, reasonable doubt, and that the indictment did not constitute evidence. Id. Nothing in the record demonstrates that the use of the anonymous jury violated Carruthers's clearly established constitutional rights.

The Tennessee Court of Criminal Appeals' decision is not contrary to, or an unreasonable application of clearly established Supreme Court precedent. See Hanks v. Palmer, No. 1:08cv192, 2008 WL 2923425, at

*10 (W.D. Mich. July 25, 2008) (denying habeas where no clearly established Supreme Court ruling).

In the context of Carruthers's ineffective assistance of appellate counsel claim (Claim 39), he argues that the Tennessee Court of Criminal Appeals' findings were based on false and misleading facts, presumably an unreasonable determination of facts based on the evidence presented. (See ECF No. 129 at 227.) He contends that the court "emphasized that Judge Dailey had sufficient reasons for empaneling such a jury," that attorney Larry Nance was "physically intimidated and threatened sufficiently to cause him to want to get off the case," and "that one of the petitioner's codefendants had been found hanged in his cell prior to trial." (Id.) See Carruthers v. State, 2007 WL 4355481, at *50. Carruthers argues that Nance was never threatened and did not seek to get off the case. (ECF No. 129 at 96-99, 227-28.) He further asserts that the record contains no evidence that Jonathan Montgomery's tragic death was anything other than a suicide. (Id. at 99-101, 228.)

The Tennessee Court of Criminal Appeals finding that Jonathan Montgomery "had been found hanged in his cell prior to trial" is an undisputed fact. See Carruthers, 2007 WL 4355481, at *50. The court does not state that Montgomery was murdered or infer otherwise.

With regard to Nance, Carruthers filed a pro se motion for substitution of counsel. (ECF No. 55-1 at PageID 1158-60.) An order substituting Coleman Garrett as counsel was signed by Nance and filed on December 9, 1994. (Id. at PageID 1162; see ECF No. 56-7 at PageID 10887.) At the post-conviction hearing, Nance testified that the court had a bench conference,

and he was relieved as counsel without explanation. (ECF No. 56-7 at PageID 10883.) Nance testified that Carruthers refused his visits. (Id. at PageID 10902.) Carruthers did not threaten Nance, and Nance did not fear him. (Id.)

In a hearing on February 20, 1996, the trial court addressed Carruthers's motion for appointment of counsel and specifically noted the history of Carruthers's issues with counsel:

> Soon after the initial arraignment the complaints began. The letters started flying, letters to the Board of Professional Responsibility, letters to me, letters to the attorneys, letters to The Commercial Appeal, letters to anybody and everybody. But those types of letters and complaints are not uncommon coming from defendants awaiting trial in the jail. . . .
>
> . . . Those letters soon escalated to physical-personal threats against Mr. Larry Nance. Physical threats that grew to the point where Mr. Larry Nance did not feel comfortable or safe, personally safe, in continuing to represent Mr. Tony Carruthers; and in deference to his concern for his own personal safety, and his concerns were conveyed to me, and certain specific incidents, threatening incidents were conveyed to me that I took to be true.
>
> I know Mr. Larry Nance to be a man of great integrity. He has tried many cases in here. I've known him for many years, and I know him to be a man of great integrity, and I took his statements to be true with regard to

> the incidents that gave rise to his own personal safety if he were to continue representing Mr. Tony Carruthers. And, accordingly, I relieved him from continuing to represent Mr. Carruthers.

(ECF No. 55-6 at PageID 4389-4390.)

The Tennessee Court of Criminal Appeals stated, "Nance admitted that 'some enmity' had developed between him and Carruthers" and that "communication between the two of [them] broke down fairly early in the representation." Carruthers, 2007 WL 4355481, at *10, 26 (alteration in original). The court noted that the record does not reflect that a hearing was held on the motion for substitution of counsel and cited Judge Dailey's comments in a subsequent hearing that Nance was allowed to withdraw because of "personal physical threats" and because he did not "feel comfortable or safe, personally safe, in continuing to represent Mr. Tony Carruthers." Id. at *11. The court noted other references to Nance being threatened, intimidated, or hassled sufficiently to cause him to want to withdraw from the case. Id. at *50, 52. The Tennessee Court of Criminal Appeals did not cite Nance's testimony about not being threatened or fearful of Carruthers.

The state-court record does not state what occurred at the bench conference. Dailey's recitation of events at hearings during the trial is closer in time and more reliable than Nance's testimony nearly ten years later. The state court's factual determination is presumed to be correct absent clear and convincing evidence to the contrary and will not be overturned unless objectively unreasonable in light of the evidence presented. See Ayers, 623 F.3d at 308.

The Court finds that it was not objectively unreasonable for the Tennessee Court of Criminal Appeals to rely on Dailey's recitations about the circumstances surrounding Nance's withdrawal. Carruthers did not directly question Nance about the judge's statements or present clear and convincing evidence contrary to those statements. Further, Nance's withdrawal was not the sole, nor the determinative factor in the trial court's choice to use an anonymous jury. The Tennessee Court of Criminal Appeals relied on a series of events surrounding the trial that supported the empaneling of an anonymous jury including the threats and intimidation on Massey, his staff, and family, but also the information on wire-tapping, explosives, and surveillance methods found in Carruthers's cell. See Carruthers, 2007 WL 4355481, at *50-52.

The Tennessee Court of Criminal Appeals' decision is not contrary to or an unreasonable application of clearly established Supreme Court precedent or based on an unreasonable determination of facts in light of the evidence presented. Claim 11 is without merit and is, therefore, DENIED.

### K. Excessive Security (Claim 12, Amended Petition ¶¶ 324-28)

Carruthers alleges that his Sixth, Eighth, and Fourteenth Amendment rights were violated by the excessive security measures for his trial. (ECF No. 21 at 86-87.) He alleges that the trial court never held a hearing on the need for security or the least restrictive means to address the court's concerns. (Id. at 87.) He asserts that the security measures, coupled with the jurors' unexplained anonymity, made impermissible factors unavoidable and prejudiced the trial. (Id.)

### 1. Procedural Default

Respondent argues that the claim was not presented in the Tennessee state courts and is procedurally defaulted. (ECF No. 114-1 at 19-20.) He argues that Carruthers did not object to the security at trial or raise the issue on appeal. (Id.) Respondent asserts that, although Carruthers presented a claim in the state post-conviction proceedings for ineffective assistance of appellate counsel for failing to challenge the security measures at trial, Carruthers did not challenge the security measures themselves or show that they were excessive. (Id.; ECF No. 149 at 20.) Respondent contends that because Carruthers has not established that his counsel were ineffective for failing to present the claim, he cannot establish cause for the failure to exhaust the claim. (ECF No. 149 at 20.) Respondent further argues that to the extent Carruthers's argument is based on the assertion that the trial court's security decisions were based on improper ex parte information, that claim was not alleged in the petition, not exhausted in the state court, and procedurally defaulted. (Id. at 20-21.)

Carruthers argues that he did object to the security measures at trial, pointing out motions to determine the regulation of courtroom security[37] and several instances where security was raised as an issue at hearings.[38] (ECF No. 129 at 234.) He argues that in the

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[37] (See ECF No. 55-1 at PageID 1487-88, 1504-1505.) The trial court denied the motions. (Id. at PageID 1514.)

[38] (See ECF No. 55-4 at PageID 3186-87 (Judge Dailey states that "we will have appropriate security measures in place . . . designed to not prejudice your client in any way."); ECF No. 55-6 at

post-conviction proceedings, he presented proof that: (1) experienced courtroom observers could not remember a trial where there were more security officers in the courtroom; (2) jurors were aware that, in addition to uniformed officers, the courtroom held armed plain clothes officers; (3) there were armed uniformed officers on each side of Judge Dailey; (4) there was at least one plain clothes officer armed with a machine gun that was, at times, visible; and (5) SWAT officers guarded the jury's sequestered quarters. (ECF No. 129 at 234-235.) Carruthers contends that these assertions were presented through his post-conviction appellate brief in the context of his ineffective-assistance-of-counsel claim, that his claim was fairly presented in the Tennessee courts, and not procedurally defaulted. (Id. at 235 & n.74.) He asserts ineffective assistance of counsel as cause for any procedural default. (ECF No. 129 at 247-48, 253-54.)

The Tennessee Court of Criminal Appeals addressed the excessive security claim in the context of Carruthers's ineffective-assistance-of-appellate-counsel claim. See Carruthers, 2007 WL 4355481, at *51-53. The court found support for the trial court's measures and determined that appellate counsel were not deficient for not raising the security measures as an issue on appeal. Id. at *53. Because the state court addressed the merits of the underlying excessive-security claim in the context of the ineffective-assistance-of-appellate-counsel claim, the claim was fairly

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PageID 4630-36 (Carruthers brings up security, specifically restraints and crime scene tape around the courtroom); ECF No. 55-7 at PageID 4672-74 (the court notes that Carruthers raised the issue of security previously); id. at PageID 5460 ("I don't think I can get a fair trial with . . . all the security.").)

presented and exhausted in the state courts. Summary judgment based on procedural default is DENIED for Claim 12.

**2. Merits**

The Tennessee Court of Criminal Appeals stated:

> d. Excessive Security
>
> The petitioner next contends that appellate counsel were ineffective for failing to challenge the excessive security measures used at his trial, which included the use of S.W.A.T. team officers, additional deputies, plain clothes officers, a metal detector, and crime scene tape outside the courtroom. In Holbrook v. Flynn, 475 U.S. 560, 568-69, 106 S. Ct. 1340, 1345-46, 89 L. Ed. 2d 525 (1986), which the petitioner cites in support of this claim, the United States Supreme Court concluded that "the conspicuous, or at least noticeable, deployment of security personnel in a courtroom during trial" is not an inherently prejudicial practice. The Court noted that jurors may well either infer that the security personnel are present "to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence," or simply accept them as "elements of an impressive drama." Id. at 569, 106 S. Ct. at 1346. The Court held that when a courtroom security arrangement is challenged as inherently prejudicial, the question becomes whether there is "an unacceptable risk . . . of impermissible factors coming into

play." Id. at 570, 106 S. Ct. at 1346-47. The Court explained:

> We do not minimize the threat that a roomful of uniformed and armed policemen might pose to a defendant's chances of receiving a fair trial. But we simply cannot find an unacceptable risk of prejudice in the spectacle of four such officers quietly sitting in the first row of a courtroom's spectator section. Even had the jurors been aware that the deployment of troopers was not common practice in Rhode Island, we cannot believe that the use of the four troopers tended to brand respondent in their eyes "with an unmistakable mark of guilt." Four troopers are unlikely to have been taken as a sign of anything other than a normal official concern for the safety and order of the proceedings. Indeed, any juror who for some other reason believed defendants particularly dangerous might well have wondered why there were only four armed troopers for the six defendants.

Id. at 571, 106 S. Ct. at 1347 (citations and footnote omitted).

Here, the trial court articulated sound reasons for employing additional security personnel in the courtroom:

> [W]hile it would be nice to not have to worry about any security, while it would be nice to go to the airport and not have to go through a metal detector, and

come here and not have to go through [a] metal detector, and not have to worry about security, unfortunately, that's not the world we live in, and this case-certainly, if there ever was a case that cried out for security, this would be the case. It's–it is full of instances in which threats have been made, a co-defendant was found hanged in his jail cell. These are facts in the record.

One attorney was threatened so repeatedly and so genuinely by [the petitioner] that he–well, Mr. Nance, the first attorney, was threatened and hassled by individuals sufficiently to cause him to get off the case and Mr. Massey . . . was threatened so repeatedly and so genuinely by [the petitioner] as to cause him to get off the case even after I insisted that Mr. Massey stay on the case.

The Court of Criminal Appeals reviewed the record and determined that the threats were so genuine and so real and so immediate that they reversed me and ordered him off. And then I determined that, well, he should stay on as elbow counsel and the Court of Criminal Appeals reviewed it again and said, no, no, there [sic] threats are in fact genuine and real. He needs off the case.

And then we have, of course, the three books that were found in [the petitioner's] cell involving tailing people and tapping telephones and explosives and

> weapons and things of that sort. I mean, the case is full of reference after reference to violence, threats, intimidation, bullying tactics, and I am determined that the jurors that come over here, two weeks from today, will not be exposed to any sort of misconduct or bullying tactics or intimidation or threats. And as a consequence, I'm going to take whatever measures are needed to make sure that they are well protected and well insulated. We'll try to be discreet[.]

The record fully supports the trial court's finding that additional security was warranted under the circumstances in this case. Furthermore, testimony presented at the evidentiary hearing suggests that the trial court was at least partially successful in its attempt to be discreet in the use of additional security personnel. Although John Billings testified that the security in the courtroom was "intimidating" and "frightening," counsel for Montgomery testified that security was heavier than usual but that he saw nothing about the security detail that would have drawn the jurors' attention. Juror 121 testified that the courtroom atmosphere was "intense" with S.W.A.T. team members present but said that it did not affect his decision-making. Finally, Juror 127 was unable to recall any unusual amount of security at the trial.

Accordingly, we conclude the record supports the determination of the post-conviction court that appellate counsel were not deficient by

> not raising as an issue on appeal the trial court's use of additional security measures.

Carruthers, 2007 WL 4355481, at *51-53 (alterations in original).

Carruthers argues that Judge Dailey fabricated and embellished facts in the "legend of Larry Nance" on which the Tennessee Court of Criminal Appeals relied to determine the excessive security issue, that the findings about Nance are wrong, and that the decisions resting on them are based on an unreasonable determination of fact. (ECF No. 129 at 96-99.) Like with the anonymous-jury claim, the court's decision was based on more than the trial court's statements about Nance. Further, the Tennessee Court of Criminal Appeals' decision was not based on an unreasonable determination of facts related to Nance.

Carruthers describes the security measures at trial, as including:

- uniformed Special Weapons and Tactics officers, armed with small rifles and pistols;
- armed uniformed officers stationed at Dailey's side;
- armed plainclothes officers throughout the courtroom; and
- a plainclothes officer armed with an Uzi submachine gun.

(ECF No. 129 at 253; see also ECF No. 56-7 at PageID 10839-10842, 10982-10984, 11126, 11147-11148.) Although Carruthers argues that his constitutional rights were violated (ECF No. 129 at 254), he does not assert whether he contends that the state court's

decision was contrary to or an unreasonable application of Supreme Court precedent.

In Holbrook v. Flynn, 475 U.S. 560, 568-72 (1986), the Supreme Court held that a prisoner was not denied his constitutional right to a fair trial when the customary courtroom security force was supplemented with four uniformed state troopers sitting in the first row of the spectator section of the courtroom. The Court stated:

> All a federal court may do . . . is look at the scene presented to jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial; if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over . . . .

475 U.S. at 572. The Court did not find the presence of armed guards at trial to be particularly troubling or prejudicial:

> the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable. Jurors may just as easily believe that the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence. Indeed, it is entirely possible that jurors will not infer anything at all from the presence of the guards. If they are placed at some distance from the accused, security officers may well be perceived more as elements of an impressive drama than as reminders of

> the defendant's special status. Our society has become inured to the presence of armed guards in most public places; they are doubtless taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm.

Holbrook, 475 U.S. at 569.

The Tennessee Court of Criminal Appeals applied the correct Supreme Court precedent in Holbrook. Carruthers, 2007 WL 4355481, at *51. The court looked at the scene presented to the jurors, noting that "the trial court was at least partially successful in its attempt to be discreet in the use of additional security personnel." Id. at *53. Co-defendant's counsel testified that there was nothing about the security that would have drawn the juror's attention. Id. Juror 121 noticed the security but was not prejudiced by it. Id. Juror 127 did not recall any unusual amount of security. Id. Carruthers has not demonstrated prejudice from the security measures in place at his trial. See United States v. Elder, 90 F.3d 1110, 1131 (6th Cir. 1996) (denying relief where defendants failed to show any inherent or actual prejudice from the security measures at trial); see also Wilkens v. Lafler, 487 F. App'x 983, 990-91 (6th Cir. 2012) (denying relief where defendant failed to show prejudice from the presence of uniformed corrections guards around defendant and discarded shackles in the jury box); Sutton v. Bell, 645 F.3d 752, 756 (6th Cir. 2011) (denying relief where there were "legitimate security concerns involved in trying three inmates for violently murdering a fourth inmate, where the defendants were not wearing upper-body restraints and six other inmates were testifying as witnesses"). The Tennessee Court of Criminal Appeals'

decision that the excessive-security claim lacked merit was not contrary to or an unreasonable application of Supreme Court precedent or based on an unreasonable determination of fact. Claim 12 is without merit and, therefore, DENIED.

### L. Withheld Exculpatory Evidence (Claim 13, Amended Petition ¶¶ 329-41) and False Testimony (Claim 14, Amended Petition ¶¶ 342-64)

In Claim 13, Carruthers alleges that, contrary to the State's pre-trial assertions, it withheld the following evidence:

- in exchange for Jimmy Lee Maze's testimony against, and/or information about Carruthers, the prosecution would assist Maze in his attempt to receive probation and in securing employment (ECF No. 21 at 87-88);
- in exchange for Charles Ray Smith's testimony against, and/or information about Carruthers, the prosecution would assist Smith in obtaining a favorable resolution on pending criminal charges (id. at 88);
- in exchange for Alfredo Shaw's testimony against, and/or information about Carruthers, the prosecution would assist Shaw in obtaining a favorable resolution on pending criminal charges and/or arrange a monetary payment (id. at 89);
- Alfredo Shaw's testimony was false, and he had acted as an informant (id. at 89-90);
- agents for a powerful drug cartel had killed Marcellos Anderson, Fred Tucker, and Delois Anderson because Marcellos Anderson had been

involved in taking cocaine and money from the cartel (id. at 90); and

- when Marcellos Anderson, Fred Tucker, and Delois Anderson were placed in the freshly dug grave, all three were dead (id. at 90-91).

In Claim 14, Carruthers alleges that the prosecution knew about the following false testimony presented at trial:

- Maze's testimony that he received nothing from the State in exchange for his testimony (ECF No. 21 at 91);
- Charles Smith's testimony that: (1) he overheard Carruthers and James Montgomery talking about robbing Marcellos Anderson and his drug distribution associate Andre Johnson; and (2) while Smith was working at a cemetery with Carruthers, Carruthers told Smith that putting a murder victim in an open grave would be a good way to dispose of the body, opining that "if you ain't got no body, you don't have a case" (id. at 92);
- Alfredo Shaw's testimony that: (1) while he received favorable treatment from the State on the conditions of his incarceration, it was not because of Shaw's involvement in the Carruthers trial; (2) Shaw had a conversation with Carruthers in the county jail; (3) Shaw had a conversation with Carruthers on the telephone; and (4) Carruthers told Shaw about the murders (id. at 92-93);[39]

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[39] Carruthers alleges that the Memphis Police Department ("MPD") knew Carruthers did not kill the victims, and that the Assistant District Attorney and the MPD knew that Shaw had

- Benton West's testimony that when Marcellos Anderson and Fred Tucker were brought to Nakeita Shaw's home, she told West that she believed they were being kidnapped (id. at 93-94); and
- Dr. O.C. Smith's testimony that the three victims were alive when they were buried. (Id. at 94).

Carruthers alleges that the false testimony prejudiced him because there is a reasonable probability that at least one juror would have voted not guilty and/or against the death sentence. (Id. at 91-94.)

Respondent argues that, during the post-conviction proceedings, Carruthers only alleged claims about: (1) the false grand jury testimony of Alfredo Shaw; (2) the false testimony of O.C. Smith, Charles Hines, and Jimmy Maze; and (3) withheld evidence of deals made with Charles Smith and Maze. (ECF No. 114-1 at 20.) See Carruthers, 2007 WL 4355481, at *55-57. Respondent argues that the theories of Carruthers's claim that were not previously presented are procedurally defaulted. (Id.) He contends that the Tennessee Court of Criminal Appeals found no factual support for the exhausted claims, and no evidence that the State was aware of false testimony. (Id. at 20-21.) He contends that the Tennessee Court of Criminal Appeals' decision is neither contrary to nor an unreasonable application of clearly established federal law and was based on a reasonable determination of facts, and that the Brady claims are without merit. (Id. at 21.) He further notes that this Court has already dismissed the claim related to Alfredo Shaw and found that his

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been an informant for years for multiple law enforcement agencies and had testified falsely in the prosecutions of a number of Shelby County deputies. (ECF No. 21 at 93.)

testimony was not material due to "overwhelming" evidence against Carruthers. (Id.) He asserts that, even with the depositions of Charles Smith and the former district attorney, Carruthers has not presented any evidence of a deal in exchange for Smith's testimony. (Id.)

In response to the Motion for summary judgment, Carruthers argues that the State knew Maze's and Shaw's testimony was false and that genuine issues of facts exist about whether the state withheld evidence about deals in exchange for the testimony of Charles Smith, Shaw, and Johnson.[40] (ECF No. 129 at 183-191.) Carruthers argues that the State withheld evidence that the victims were dead and/or unconscious and presented the false testimony of Dr. O.C. Smith that the victims were buried alive. (Id. at 191-192.) Carruthers asserts that there is a reasonable probability that the withheld evidence affected the jury's verdict and its imposition of the death sentence. (Id. at 193-197.)

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[40] Carruthers admits that his claim that the state withheld evidence that it promised to help Johnson on pending criminal charges in return for his testimony is a new claim first asserted in his Response to the Motion for summary judgment. (ECF No. 129 at 189 n.65.) Rule 2(c) of the Habeas Rules states that a petition must "specify all the grounds for relief available to the petitioner" and "state the facts supporting each ground." See McFarland v. Scott, 512 U.S. 849, 860 (1994) ("[T]he habeas petition, unlike a complaint, must allege the factual underpinning of the petitioner's claims."). Carruthers did not plead facts to support this claim. Accordingly, this claim is DENIED.

### 1. Procedural Default

Carruthers asserts ineffective assistance of post-conviction counsel as cause for any procedural default. (Id. at 203-205, 207-209.) The Court has determined that, under Martinez, ineffective assistance of post-conviction counsel does not establish cause for the procedural default of Carruthers's Brady and false-testimony claims. (ECF No. 192 at 27-29.)[41]

Carruthers asserts prosecutorial misconduct and misrepresentations as cause for any procedural default of the withheld-evidence and false-testimony claims. (Id. at 199-202.) He further asserts that his lack of discovery rights in the state proceedings creates cause for the default. (Id. at 202-203.)

"Cause and prejudice" in the context of the procedural default of an alleged Brady claim "parallel[s] two of the three components of the alleged Brady violation itself." Banks v. Dretke, 540 U.S. 668, 691 (2004) (quoting Strickler v. Greene, 527 U.S. 263, 282 (1999)). A petitioner shows "cause" when the petitioner fails to develop the facts in state court because of suppression of the evidence. Banks, 540 U.S. at 691. A petitioner shows "prejudice" by establishing that the evidence was "material" for Brady purposes. Id.; see also

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[41] Carruthers attempts to avoid the conclusion that ineffective assistance of post-conviction counsel cannot be cause for procedural default based on the Sixth Amendment by asserting a due-process claim for deprivation of a recognized property right to "a competent attorney" in a post-conviction proceeding. (ECF No. 129 at 205-207.) See Ballentine v. Quarterman, No. 2:03-CV-00039, 2008 WL 862992, at *4-5 (N.D. Tex. Mar. 31, 2008) (rejecting assertion that deprivation of a constitutionally protected property right to legal service was cause for failure to exhaust a claim).

Johnson v. Folino, 671 F. Supp. 2d 658, 668 (E.D. Pa. 2009) ("[I]f the government wrongfully suppresses evidence, then an external factor prevented a petitioner's compliance with state procedure, and if the withheld evidence was material to a petitioner's trial, then barring a petition on procedural grounds would create prejudice."), rev'd on other grounds, 705 F.3d 117 (3d Cir. 2013). Because prosecutorial misconduct associated with withholding evidence or suborning perjury from a government witness can create cause and prejudice for the failure to exhaust these claims, the Court will review Claims 13 and 14 on the merits. Summary judgment based on the procedural default of Claims 13 and 14 is, therefore, DENIED.

**2. Merits**

The Tennessee Court of Criminal Appeals stated:

> B. Prosecutorial Misconduct
>
> The petitioner next contends that the prosecution engaged in numerous acts of misconduct which cumulatively deprived him of his right to a fair trial. Specifically, he complains that the prosecution suppressed evidence of the deals it had made with prosecution witnesses, misrepresented the evidence, and knowingly presented perjured testimony to the grand jury. The State responds by arguing that the claims that the prosecution elicited false testimony or presented perjured testimony to the grand jury have previously been determined by our supreme court on direct appeal; the claim that the prosecution misrepresented evidence has been waived for failure to raise it on direct appeal; and the claim that

the prosecution suppressed evidence is without merit.

1. Alfredo Shaw's Grand Jury Testimony

The petitioner contends that the State had at least constructive knowledge that Shaw's testimony to the grand jury was false. He bases this claim on the fact that Shaw testified that the petitioner implicated himself in the crimes during a conversation that occurred while the men were in the legal room of the Shelby County Jail. According to the petitioner, the jail records indicate that he and Shaw were never together in the legal room of the jail during the relevant time period, a fact which could have been easily ascertained by the prosecutor.

The State may not present false testimony and has an affirmative duty to correct false testimony presented by State's witnesses. State v. Spurlock, 874 S.W.2d 602, 617 (Tenn. Crim. App. 1993). However, nothing in the record suggests that the prosecutor knew that Shaw's testimony was false at the time he presented his testimony to the grand jury. In its direct appeal opinion, our supreme court noted that Shaw's testimony at trial was consistent with his initial statement to police and with his testimony before the grand jury. Carruthers, 35 S.W.3d at 529, 532. We conclude, therefore, that the petitioner is not entitled to relief on the basis of this claim.

2. Misrepresentation of Evidence

The petitioner next contends that the State misrepresented evidence at trial by asking various questions of Jimmy Maze, Chris Hines, and Dr. O.C. Smith that were improper and prejudicial because there was no factual basis to support the questions posed. The State responds that these claims are waived for failure to raise them on direct appeal or present any evidence in support of these claims. We agree with the State. This court has previously held that "issues [of prosecutorial misconduct] are more properly the subject of a direct appeal and are not properly issues for post-conviction relief." John C. Johnson v. State, No. M2004-02675-CCA-R3-CO, 2006 WL 721300, at *19 (Tenn. Crim. App., at Nashville, Mar. 22, 2006), perm. to appeal denied (Tenn. Aug. 20, 2007). Regardless, we conclude that the petitioner is not entitled to relief on the basis of this claim.

The petitioner bases his claim that the prosecutor misrepresented evidence on testimony elicited from three witnesses: Jimmy Maze, Chris Hines, and Dr. O.C. Smith. He first contends that the prosecutor misrepresented evidence by eliciting testimony from Maze that he had seen the petitioner with three antifreeze jugs on New Year's Eve, 1993, and that the petitioner had told him that the jugs were filled with gasoline. The petitioner argues that the necessary implication of this testimony was that the petitioner later used these jugs of gasoline to burn the Jeep Cherokee found in DeSoto County, Mississippi, which

was "improper and extremely prejudicial, as there was no factual basis to support the theory that the gasoline allegedly contained in the antifreeze jugs was used to start the vehicle fire." The petitioner also asserts that the prosecutor improperly asked Maze a question that implied that Maze had been threatened at the jail by the petitioner and his codefendant.

. . . .

Finally, the petitioner contends that the prosecutor's conduct in eliciting testimony from Dr. O.C. Smith that the victims were buried alive was without factual underpinning and prejudicial in the extreme. He asserts that the proof at the evidentiary hearing established that there was no basis in the autopsy reports for Dr. Smith's conclusion that the victims were buried alive.

"It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw." State v. Goltz, 111 S.W.3d 1, 6 (Tenn. Crim. App. 2003). In determining whether statements made by the prosecutor constitute reversible error, it is necessary to determine whether the statements were improper and, if so, whether the impropriety affected the verdict. State v. Sutton, 562 S.W.2d 820, 823 (Tenn. 1978); Harrington v. State, 215 Tenn. 338, 385 S.W.2d 758, 759 (1965). We are guided by such factors as the intent of the prosecutor in light of the facts and circumstances of the case, the strength or weakness

> of the evidence, the curative measures, if any, undertaken by the trial court in response to the conduct, and the cumulative effect of the conduct. Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976).
>
> Based on our review, we cannot conclude that the prosecutor knowingly misrepresented the evidence in its questioning of these witnesses. Even if we presumed that the questioning was improper, we would conclude that it was harmless beyond a reasonable doubt. Given the rest of the evidence presented by the State and the three additional aggravating circumstances found by the jury, none of the questioned testimony, including Dr. Smith's testimony that the three victims were buried alive, would have changed the verdict of guilt or the sentence of death. Accordingly, we conclude that the petitioner is not entitled to relief on the basis of his claim that the prosecutor misrepresented the evidence.

Carruthers, 2007 WL 4355481, at *54-56.

Under Brady, "due process requires the prosecution to turn over evidence favorable to the accused and material to his guilt or punishment." Connick v. Thompson, 131 S. Ct. 1350, 1370 (2011) (Ginsburg, J., dissenting). Impeachment evidence falls within the Brady rule. United States v. Bagley, 473 U.S. 667, 676 (1985); see also Connick, 131 S. Ct. at 1381 ("[I]mpeachment evidence is Brady material prosecutors are obligated to disclose.") (Ginsburg, J., dissenting). To establish that a Brady violation undermined a conviction, a petitioner must show "(1) the evidence at issue is favorable to the accused, either because it is

exculpatory, or because it is impeaching; (2) the [s]tate suppressed the evidence, either willfully or inadvertently; and (3) prejudice . . . ensued." Skinner v. Switzer, 131 S. Ct. 1289, 1300 (2011) (second alteration in original) (quoting Strickler, 527 U.S. at 281-82) (internal quotation marks omitted). Further, "'[t]he government is free to reward witnesses for their cooperation with favorable treatment in pending criminal cases without disclosing to the defendant its intention to do so, provided that it does not promise anything to the witness prior to the testimony.'" Akrawi v. Booker, 572 F.3d 252, 263 (6th Cir. 2009) (quoting Bell v. Bell, 512 F.3d 223, 234 (6th Cir. 2008) (en banc)); Melville v. United States, 457 F. App'x 522, 527 (6th Cir. 2012).

To determine whether "withheld information was material and therefore prejudicial," a reviewing court considers the withheld information "in light of the evidence available for trial that supports the petitioner's conviction." Jells v. Mitchell, 538 F.3d 478, 502 (6th Cir. 2008). "[E]vidence is 'material' within the meaning of Brady when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." Cone v. Bell, 556 U.S. 449, 469-470 (2009). The withheld information does not have to result "ultimately in the defendant's acquittal." Kyles v. Whitley, 514 U.S. 419, 434 (1995). Favorable evidence is material if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Cone, 556 U.S. at 470 (quoting Kyles, 514 U.S. at 435). The Court must consider the effect of the suppressed evidence "collectively." Cone, 556 U.S. at 473-474 (quoting Kyles, 514 U.S. at 436). If materiality is

established, harmless-error inquiry does not apply. Kyles, 514 U.S. at 435.

Similarly, a conviction obtained by the knowing use of perjured testimony must be set aside if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . ." Giglio v. United States, 405 U.S. 150, 154 (1972) (internal quotation marks omitted); see also United States v. Agurs, 427 U.S. 97, 103 (1976) (same); Wogenstahl v. Mitchell, 668 F.3d 307, 323 (6th Cir. 2012) (same).[42] A false-testimony claim is cognizable on habeas review because the "'deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice.'" Abdus-Samad v. Bell, 420 F.3d 614, 625 (6th Cir. 2005) (quoting Giglio, 405 U.S. at 153). To prevail, Carruthers must show (1) that the prosecution presented false testimony; (2) that the prosecution knew the testimony was false; and (3) that the testimony was material. Akrawi, 572 F.3d at 265; Rosencrantz v. Lafler, 568 F.3d 577, 583-84 (6th Cir. 2009). The subject testimony must be "indisputably false" rather than "merely misleading." Akrawi, 572 F.3d at 265; see also Coe v. Bell, 161 F.3d 320, 343 (6th Cir. 1998) ("'The burden is on the defendant[] to show that the testimony was actually perjured, and mere inconsistences in testimony by government witnesses do not establish knowing use of

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[42] A Brady violation can arise from the prosecution's knowing use at trial of perjured testimony. Kyles, 514 U.S. at 433 (citing Agurs, 427 U.S. at 103-104); Agurs, 427 U.S. at 103-104 (the knowing use of perjured testimony is one of three situations where Brady applies).

false testimony.'" (quoting United States v. Lochmondy, 890 F.2d 817, 822 (6th Cir. 1989))).

### a. Alfredo Shaw

Respondent argues that Carruthers's claim related to Alfredo Shaw was dismissed, stating that Shaw's testimony was not material due to the "overwhelming" evidence against Carruthers. (ECF No. 149 at 21.) The Court denied the fraud-on-the-court claim related to Alfredo Shaw's grand jury testimony. (ECF No. 70 at 18.)[43] Carruthers's habeas false-testimony claims related to Shaw are based on his trial testimony and have not been dismissed by the Court. (See ECF No. 21 at 92-93.)[44]

#### 1. False Testimony

Carruthers argues that Shaw's false grand jury testimony that Shaw and Carruthers spoke about the murders in the Shelby County Jail's legal room was repeated at trial. (ECF No. 129 at 190.) He contends that the State knew Shaw's testimony was false

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[43] The Court rejected Carruthers's discovery requests related to Shaw because Carruthers "can not likely demonstrate that any withheld evidence prejudiced his case to the point it undermines confidence in the verdict." (ECF No. 77 at 7-8.) This Court has also acknowledged that Shaw's credibility has been an issue for both Carruthers and the prosecution, even prior to the trial. (See ECF No. 70 at 15-16.) The preliminary assertion that Carruthers is not likely to demonstrate prejudice was based on argument in the discovery stage and does not foreclose the Court's review of Carruthers's false-testimony claim related to Shaw.

[44] The Tennessee Court of Criminal Appeals addressed Shaw's grand jury testimony and noted the consistency in Shaw's testimony before the grand jury and at trial. Carruthers, 2007 WL 4355481, at *55.

because it had documents demonstrating that Carruthers and Shaw were never in the legal room at the same time and remained silent during Shaw's testimony at trial. (Id. at 190-191.) Carruthers asserts that the Tennessee Court of Criminal Appeals' determination that "nothing in the record suggests that the prosecutor knew that Shaw's testimony was false" is an unreasonable determination of fact. (Id. at 197-198.) Carruthers contends that, in a May 1995 hearing, his defense counsel specifically discussed the fact that jail records established that Carruthers and Shaw were never in the legal room at the same time. (Id. at 198; see ECF No. 55-4 at PageID 3241-3245.)

Prior to Shaw testifying, the trial court stated on the record its concerns about his testimony:

> You're aware of the fact that certainly this – you have every right to testify, and no one is trying to stop you from testifying. I do want to advise you, however, before you testify that based on what has been said in court, in court proceedings, what has been implied in court proceedings, what has been suggested through various media outlets, it has given me reason to believe that you might come into court today and state on the record under oath that you had lied on previous occasions when testifying in this court and before the grand jury. . . .
>
> All right. Now, wait a minute. Wait a minute. I need to advise you, you will be under oath today, of course. You are under oath now, and if you are to testify today you will be under oath.

> You need to be aware of the fact that if you state today that you in fact lied under oath before the Shelby County Grand Jury when you testified before the grand jury and if you and if you – and/or if you in fact lied under oath when you came into this courtroom a year or so ago and gave a deposition, that may well constitute, that admission may well constitute the basis for an indictment for aggravated perjury, which is a felony.

(ECF No. 55-9 at PageID 6931-6932.) Shaw was allowed to consult with his attorney before taking the stand; his attorney expressed that Shaw's prior testimony was true, but Shaw was "scared to death" because Carruthers delivered a threat "as to the life and limb" of Shaw and his family. (Id. at PageID 6933-6934, 6952-6953, 6957.)

The prosecution asserted that, because it refused to aid Shaw with his continued arrests, he "called the media and began this program of recantation or attempted recantation." (Id. at PageID 6935-6936.) The prosecution noted that Shaw's behavior in constantly getting arrested and seeking aid from them was the reason why they announced in open court that they would not use him at trial. (Id. at PageID 6935-6936.) The decision was not because they did not believe his prior testimony was true, but because they could not "give him carte blanc to go out and get arrested." (Id. at PageID 6936-6937.)

Prior to Shaw testifying, Carruthers was aware of what Shaw's testimony would be and that Shaw went to the media and recanted because of threats Shaw claims Carruthers made. (Id. at PageID 6957-6958.) At trial, Shaw testified about the information he

reported to the police about the murders. (Id. at PageID 7001-7005, 7008-7027.)[45] After giving the police statement, Shaw was taken to another facility. (Id. at PageID 7029.) Shaw was released from jail about eight months later because he had cancer and was receiving treatments. (Id. at PageID 7029-31.) He testified that after he gave the police his statement, he had a court date about probation; his pending cases were postponed, and he was allowed to go home. (Id. at PageID 7044.) Carruthers asked Shaw if there were any promises made for his deposition, his grand jury testimony, or his statement. (Id. at PageID 7045.) Shaw said that no promises were made. (Id.) He stated, "the reasons for all this publicizing that's going on concerning myself and Mr. Harris[46]" was because Shaw was "stuck between a rock and a hard place," and Shaw's life and his family's lives were in danger. (Id. at PageID 7045-46)

Carruthers's investigator came to see Shaw and told him that he had been stricken from the witness list. (Id. at PageID 7051.) Shaw testified:

> And that was the whole plan, for me to come in here and say that Mr. Harris planned this, you know what I mean, coerced me into this and gave police reports and everything. This

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[45] Shaw's statement to the police is attached as an exhibit in response to the Motion for summary judgment. (ECF No. 133-17.) Carruthers went over Shaw's grand jury testimony at trial (see ECF No. 55-9 at PageID 7032-33), re-emphasizing points with the jury that he now contends were lies.

[46] The reference is to Assistant Attorney General Phillip Gerald ("Jerry") Harris, one of the prosecutors on Carruthers's case.

> was the plan, you know what I mean. My life was threatened, either I do that or I don't.

(Id.) Shaw testified that it was Carruthers's plan. (Id. at PageID 7052.) Shaw testified that he received threats from Carruthers and a deputy jailer after his name was stricken from the prosecution's witness list; that his testimony before the grand jury and at his deposition was true; and that he "would rather take a perjury charge than to lose my life or lose someone in my family's life." (Id. at PageID 7048, 7051-63.)

Carruthers argues that § 2254(d) does not preclude relief because the Tennessee Court of Criminal Appeals made an unreasonable fact determination when it opined that "nothing in the record suggests that the prosecutor knew that Shaw's testimony was false . . . ." (ECF No. 129 at 197-198.) See Carruthers, 2007 WL 4355481, at *55. The issue of whether Shaw was actually in the legal room had been raised in prior hearings. Carruthers, however, did not establish at trial or on the record that Shaw was not in the legal room with him. Testimony at trial indicated that the jail records for the law library were not always complete or accurate (see ECF No. 55-9 at PageID 7169-71, 7190-91) and that Shaw would have had the opportunity to interact with Carruthers in jail during the time that Shaw was not housed in protective custody. Carruthers, 35 S.W.3d at 529-30. The prosecution continued to express that they believed Shaw was telling the truth. Carruthers has not presented clear and convincing evidence to the contrary. He has not demonstrated that the Tennessee Court of Criminal Appeals' decision was based on an unreasonable determination of the facts based on the evidence presented.

**2. Promise or Deal**

Carruthers argues that Shaw was a "professional snitch" with nine pending theft charges at the time he took the witness stand. (ECF No. 129 at 186.) The month after Carruthers's trial ended, Shaw pled guilty to all nine theft charges, which carried sentences in the range of one to twelve or three to fifteen years. (Id. at 187.) Carruthers argues that, at Shaw's plea hearing, the State recommended that Shaw receive an effective sentence of four years on all charges and that his sentences be suspended in favor of probation. (Id.; see also ECF No. 133-10 at PageID 17851-17853.) At the hearing to suspend Shaw's sentence on July 3, 1996, Judge Joe Brown notes that Shaw was given "some bond consideration because you were looked at as a potential witness in that Carruthers matter," and Shaw responded, "Yes, sir." (ECF No. 129 at 187; ECF No. 133-11 at PageID 17874.) Brown stated:

> you've been a snitch and you've been acting like you've got immunity to any kind of prosecution and you can do what you want to do cause you think you got information you can exchange with the State.

(ECF No. 133-11 at PageID 17875.) Brown stated, "[t]he Court would repeat that it appears the defendant has been a long term snitch and has gotten into the habit of feeling that he has basic immunity to suffering the ordinary consequences of criminal activity." (Id. at PageID 17885.) Nevertheless, Brown sentenced Shaw to four years' supervised probation, with intensive probation for the first year after his completion of strict confinement until April 3, 1997. (Id. at PageID 17885-17886.) Carruthers contends that there are genuine issues of fact about whether Shaw lied when

he testified that he was not receiving consideration for his testimony against Carruthers. (ECF No. 129 at 188.)

At trial, Shaw was not a government witness; Carruthers called Shaw to testify. (ECF No. 55-9 at PageID 6931.) Any deal or promise previously discussed with Shaw was clearly not in exchange for Shaw's testimony as a government witness. To the extent, Carruthers contends that Shaw was given bond consideration in exchange for his testimony, Shaw explained the circumstances surrounding his release at trial. The jury could weigh Shaw's credibility in considering his testimony. Carruthers has not demonstrated that Shaw was induced by a promise or deal from the government to testify falsely at Carruthers's trial.

**b. Jimmy Maze and Charles Smith**

The Tennessee Court of Criminal Appeals addressed Carruthers's argument that the State made deals with witnesses in exchange for their trial testimony and withheld evidence of those deals:

> 3. Withholding of Evidence of Deals Made with State Witnesses
>
> The petitioner contends that the State improperly withheld evidence of deals it made with prosecution witnesses in violation of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). Specifically, the petitioner asserts that the State failed to disclose deals made with witnesses Jimmy Maze and Charles Ray Smith in exchange for their testimony at trial.

The duty to disclose exculpatory evidence extends to all "favorable information" irrespective of whether the evidence is admissible at trial. State v. Robinson, 146 S.W.3d 469, 512 (Tenn. 2004); Johnson v. State, 38 S.W.3d 52, 56 (Tenn. 2001). The prosecution's duty to disclose Brady material also applies to evidence affecting the credibility of a government witness, including evidence of any agreement or promise of leniency given to the witness in exchange for favorable testimony against an accused. Johnson, 38 S.W.3d at 56. Although Brady does not require the State to investigate for the defendant, it does burden the prosecution with the responsibility of disclosing statements of witnesses favorable to the defense. State v. Reynolds, 671 S.W.2d 854, 856 (Tenn. Crim. App. 1984). However, this duty does not extend to information that the defense already possesses, or is able to obtain, or to information not in the possession or control of the prosecution or another governmental agency. State v. Marshall, 845 S.W.2d 228, 233 (Tenn. Crim. App. 1992).

Jimmy Maze testified that the prosecution had promised him that he would be "taken care of" if he testified. He said he understood this as a promise to protect him, since his life had been threatened. He further testified that the prosecutor told him after the trial that he would help him get probation for some pending charges. However, he did not know whether the prosecutor ever helped him or not. With respect to this claim, the post-

> conviction court determined that Maze's deposition testimony "[did] not support a finding that any promise was made related to his April 1996 testimony." The post-conviction court further found that the only evidence of any deal between the prosecution and Charles Ray Smith came from the testimony of Jimmy Maze, which the post-conviction court did not find credible.
>
> The record supports the findings and conclusions of the post-conviction court. Maze's deposition testimony does not support the petitioner's claim that the prosecution entered into an agreement with either Maze or Smith in exchange for their trial testimony. Moreover, we agree with the post-conviction court that even if the State failed to disclose "deals" it had made with Maze and Smith, the error would have been harmless. Both Maze and Smith were heavily impeached at trial by their long criminal records and the pending criminal proceedings against them.

Carruthers, 2007 WL 4355481, at *56-57.

**1. Jimmy Maze**

Carruthers asserts that Maze was arrested in January 1994 for reckless endangerment and theft. (ECF No. 129 at 183.) Carruthers submits Maze's declaration in support of his response to the Motion for summary judgment to assert that Maze led the prosecution to believe he had information about the murders and that Harris told Maze that if he testified, the State would: (1) not pursue a probation violation for Maze's new charges; and (2) help him get a favorable

disposition of the new charges. (Id.; ECF No. 133-2 at PageID 17738, ¶¶ 3, 4.)[47] Carruthers asserts Maze accepted the offer and, shortly thereafter, was released to community corrections and probation. (ECF No. 129 at 183; ECF No. 133-2 at PageID 17738, ¶ 5.) Carruthers contends that Maze was arrested again and, while in jail, the prosecution met with him and "went over the testimony he was to give at the trial." (ECF No. 129 at 183.)[48] Carruthers asserts that the State helped Maze with a favorable disposition for the subsequent charges. (Id.) Carruthers argues that codefendant's counsel "smelled a rat" and cites Maze's trial testimony about whether promises were made. (Id. at 184-85.) Carruthers asserts that the State knew Maze's testimony was false. (Id. at 185.)

Respondent argues that the only support for the claim that the prosecution made a deal with Maze is Maze's testimony in the postconviction proceedings, which the Tennessee Court of Criminal Appeals did not find credible. (ECF No. 149 at 22.) See Carruthers, 2007 WL 4355481, at *57.[49] In the habeas proceedings, there is also no evidence except from Maze to establish that a promise or deal was made. Because the claim

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[47] The declaration is not dated, but it differs from a prior affidavit submitted by Maze in the post-conviction proceedings. (See ECF No. 87-7 at PageID 14555-14556.)

[48] The declaration actually states that Harris "met with me to discuss my testimony" and does not imply that Maze was coached to testify in a certain manner. (See ECF No. 133-2 at PageID 17738, ¶ 7.)

[49] This Court previously stated that Maze's post-conviction deposition testimony does not establish that the prosecution failed to disclose a deal made in consideration for his testimony. (See ECF No. 99 at 18.)

was exhausted in state court, Maze's declaration submitted in response to the motion for summary judgment is barred from consideration under Pinholster and § 2254(d)(2).

State-court deference applies to the fact-finder's ability to adjudge a witness's demeanor and credibility. See Combs v. Coyle, 205 F.3d 269, 277 (6th Cir. 2000). Carruthers has not presented clear and convincing evidence that would rebut the presumption that the state court's determination was correct. See Pritchett v. Pitcher, 117 F.3d 959, 964 (6th Cir. 1997) (state court's assessment of the relative credibility of a police officer was entitled to a presumption of correctness); see also Kinsel v. Cain, 647 F.3d 265, 270 (5th Cir. 2011) ("[C]redibility determinations in particular are entitled to a strong presumption of correctness."). Petitioner's claim as it relates to Maze is without merit.

**2. Charles Smith**

Smith was arrested on charges of being a felon in possession of a firearm on February 26, 1994. (ECF No. 133-3.) Smith was indicted on May 12, 1994, on the gun charge. (ECF No. 129-15.) Don Strother, former assistant district attorney and then legal counsel to the Shelby County Sheriff, was involved in Charles Smith's indictment, and Carruthers implies that demonstrates that a deal was made for Smith's testimony. (ECF No. 129 at 70.) Smith hired attorney Howard Wagerman to "help (him) out the best he could." (Id. at 185; see also ECF No. 133-4[50] at PageID 17768.)

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[50] Excerpts from Smith's deposition were also filed by Respondent. (See ECF No. 114-2.)

On May 19, 1994, Wagerman sent a letter to Jerry Harris stating that Smith had violated parole, and that Wagerman "would greatly appreciate it if you could send a letter addressed to the Parole Board . . . indicating the mitigation which you and I both feel exist [sic] in this case." (ECF No. 133-5 at PageID 17834.) Wagerman further states,

> I would greatly appreciate it if your letter would confirm the circumstances surrounding the Homicides that occurred, and the threats that were made to Charles during this time frame. I would also appreciate it if you could advise in this letter that you are holding the matter under advisement so to speak with an eye toward making a mitigated misdemeanor offense offer of some form or fashion after the Homicides have been disposed of.

(Id.)

On May 25, 1994, Harris wrote,

> Please advise the Parole Board that I agree with you in stating that there is mitigation in this case. While I feel that it is not our duty to try to usurp the powers of the Parole Board, I think we should bring facts to their attention that we feel are pertinent to this decision.
>
> There is no question that Charles Smith aided Officers Wilkinson and Robeson in their investigation of the triple homicide that has come to be known as the Cemetery Homicides. There is also no question that Mr. Smith properly felt that his life was in danger. Mr. Smith has helped this investigation and has done so at great risk to himself. The

> defendants in this case were intent on killing several people to simply prove the point that they were capable of murder. Your client was definitely one of the targets.
>
> I feel we will probably reduce this case to a misdemeanor and have Mr. Smith pay a large fine once the case is indicted.

(ECF No. 133-6 at PageID 17836.) On July 8, 1994, despite the prior reference to the case being reduced to a misdemeanor, Smith pled guilty to a felony charge of felon in possession of a weapon and was assessed a $250 fine. (ECF No. 133-7 at PageID 17839.)

Carruthers contends that there is a genuine issue of material fact related to the claim that the state withheld evidence about a deal for Smith's testimony because, based on Tenn. Code Ann. §§ 39-17-1307(b)(2) and 40-35-111(b)(5), Smith should have received at least a one-year sentence. (ECF No. 129 at 185-86.)

Respondent argues that, despite extensive discovery, Carruthers has not uncovered evidence to support his Brady and prosecutorial misconduct claims. (ECF No. 114-1 at 21.) Respondent cites Harris's and Charles Smith's deposition testimony that no such deal occurred. (Id.; ECF No. 149 at 22.) Charles Smith testified that Wagerman tried to get Harris to help him, but there was nothing he could do; Smith did fifteen months for having the gun in violation of parole. (ECF No. 114-2 at PageID 15916-15917.) Smith stated that he testified "out of good faith because of what happened to my friends." (Id. at PageID 15917.) Smith talked about the threats he received and that Carruthers "faked at me like the whole court scene.

Members over there throwing gang signs. . . . I got stabbed and shot at and jumped." (Id. at PageID 15918-15919.)[51] Smith stated that, if Harris had helped with the probation violation, he would not have gone to jail. (Id. at PageID 15920, 15931.) Smith stated, "I'm telling you, man, they didn't help me with anything." (Id. at PageID 15922.) Smith stated,

> They don't make promises. They can't – they – they don't do that. I mean they can't promise you anything. So, if you're going to do something for them, you just got to hope that they do something for you, you know.

(Id. at PageID 15924.) When Smith was asked whether the prosecution suggested they would do something for him, he testified,

> No, sir. I didn't need them. I'm trying to tell you I wasn't in no trouble when I testified for them and – and I still got all these threats on my life.

(Id.)

Smith was being threatened for "snitching," and his lawyer convinced him to testify against Carruthers and Montgomery. (ECF No. 114-2 at PageID 15933-15934.) He denied talking to the Tri-State Defender or Mike Fleming about the case. (Id. at PageID 15936-15940.)

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[51] Smith admitted that Harris asked him to testify for Montgomery's second trial and he was put in the witness protection program. (ECF No. 114-2 at PageID 15919.) Smith received fifteen years on the federal gun charge when he got caught with another gun trying to protect himself again "'cause the threats started up again"; "Nobody helped me." (Id.)

> Harris denied that any deals were made:
>
> You don't make a deal with somebody, number one, because – before he testifies, because it's wrong.
>
> Number two, you don't do it because tactically it's stupid. . . .
>
> But in this case, nobody asked for a deal. That was the surprising thing about this case.

(ECF No. 114-3 at PageID 15944.) He testified that, with regard to the February 1994 offense, Smith was stopped for a traffic offense. (ECF No. 130-2 at PageID 16871.) The officers searched the car and found a weapon under the seat; Smith fled. (Id.) He stated that it was a "bogus case" because there was no probable cause to believe Smith had a weapon or was committing a felony. (Id. at PageID 16872.)

Harris denied talking to federal prosecutors and interfering with them about who they chose to charge. (Id. at PageID 16872-16873.) "We didn't call them, we did't [sic] talk to them about that. That was their deal. That was a no-no." (Id. at PageID 16873.)

Carruthers contends that the Tennessee Court of Criminal Appeals' decision about Jimmy Maze and Charles Smith applied the wrong standard and is contrary to and involves an unreasonable application of clearly established federal law. (ECF No. 129 at 212.) First, Carruthers argues that the court's determination that the State's failure to reveal any deal it had with Maze or Smith "would have been harmless" is contrary to Kyles, 514 U.S. at 435, which states that withheld evidence claims are not subject to harmless-error analysis, and the decision is therefore contrary to clearly established federal law. (Id. at 199.) Second,

he argues that the court's affirmation of the post-conviction court's ruling that the record "did not support a finding that any promise was made" is an unreasonable determination of fact in light of the record. (Id.) See Carruthers, 2007 WL 4355481, at *57.

Review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Pinholster, 131 S. Ct. at 1399. Both Carruthers and Respondent have presented information outside the record in their arguments. The Tennessee Court of Criminal Appeals only had evidence from Maze and found that "Maze's deposition testimony does not support the petitioner's claim that the prosecution entered into an agreement with either Maze or Smith in exchange for their trial testimony." Carruthers, 2007 WL 4355481, at *57. This factual finding is entitled to deference, see 28 U.S.C. § 2254(e). Carruthers has not presented clear and convincing evidence to rebut the presumption of correctness.

The Tennessee Court of Criminal Appeals asserted, as an aside, "we agree with the post-conviction court that even if the State failed to disclose 'deals' it had made with Maze and Smith, the error would have been harmless" because both Maze and Charles Smith were heavily impeached at trial with their long criminal records and pending charges. Carruthers, 2007 WL 4355481, at *57. This Court has upheld the Tennessee Court of Criminal Appeals' factual determination that no promise or deal was made. Carruthers's argument about materiality and harmless error does not provide a basis for relief. See Williams v. Coyle, 260 F.3d 684, 707-08 (6th Cir. 2001) (denying habeas relief where evidence of a deal was factually and legally suspicious and jury was aware of witness's

motivation for testifying in the hope of getting favorable treatment). The Tennessee Court of Criminal Appeals' decision about Maze and Charles Smith is not contrary to or an unreasonable application of clearly established Supreme Court precedent and is based on a reasonable determination of facts in light of the evidence presented.

### 3. Dr. O.C. Smith

Dr. Smith, the medical examiner, testified that the victims were alive when they were buried. Carruthers, 2007 WL 4355481, at *5. Prior to trial, Dr. Cleveland Blake, an expert hired for Carruthers, concluded, "All three of the victims having their lives snuffed out well before adequate time to place them and conceal their bodies in the bottom of the already prepared burial site before Daniel's casket and vault were placed in the ground some time on February the 25th." Id. at *23. Blake did not testify at trial. Id. at *43. In the post-conviction hearing, Blake testified that the first time he heard any suggestion that any of the victims had been buried alive was when he read Dr. O.C. Smith's trial testimony. Id. at *23. The Tennessee Court of Criminal Appeals summarized Blake's post-conviction testimony:

> Dr. Blake stated that it was possible that Delois Anderson had been buried alive but that she already had some previously inflicted wounds, "including a neck strangulation." Had he been called to testify at trial, he would have disagreed with Dr. Smith's conclusions that the two male victims had been buried alive. Furthermore, "because of the ligature issue," he would have disagreed that Delois

> Anderson was conscious at the time she was buried. When questioned by the post-conviction court about the discrepancy between his present testimony and the conclusions he had reached in his April 1, 1996, letter to the trial court, Dr. Blake explained that he had changed his opinion after learning details, such as the description of the grave and the placement of the bodies in the grave, which were not available to him at the time he rendered his April 1, 1996, opinion . . . .

Id.

In the post-conviction proceedings, Dr. George Nichols concluded that none of the victims were buried alive:

> Dr. Nichols testified that there was no evidence, in his opinion, "that any person was alive in the site in which their bodies were discovered." He further testified that there was "no proof of the best evidence of conscious activity of any victim while alive in the grave site." Specifically, he found no evidence of inhalation of dirt, mud, dust, or earth in the upper airways, mouth, or lungs of any of the victims, which would have indicated that the victims had breathed after being placed in the grave. On redirect examination, he reiterated that he found no evidence to show that "any of these three people were alive and breathing in that space. None."

Id. at *24.

Carruthers argues that the State withheld evidence that the victims were dead and/or unconscious

when they were buried and suborned O.C. Smith's false testimony that they were alive. (ECF No. 129 at 191-92.) Carruthers contends that every expert who has reviewed the evidence, including O.C. Smith, now recognizes that Smith's trial testimony was inaccurate. (Id. at 191.)

Carruthers relies on Smith's April 2007 affidavit (ECF No. 129-7) which was not presented in the state post-conviction proceedings. The affidavit states:

> I am the Medical Examiner and forensic pathologist responsible for the autopsies on the victims in Tony Carruthers' and James Montgomery's trial in which I testified to certain facts including, but not limited to, the fact that the victims were alive at the time of the burial. This opinion was formed on the basis of the facts that dirt was contained in the airway of one victim and the presence of active bleeding (as signs of life) in the multiple injuries of the other two victims. These injuries are gunshot wounds that would not have been immediately lethal, as well as blunt force injury patterns of the type expected from one person falling atop another, and further compressed by the overburden of the grave and its contents above. The bleeding patterns associated with these injuries were interpreted by me as signs of active bleeding and hence as signs of life.
>
> In that regard, and since that time I have continued to observe and be involved in like and similar circumstances and I have also researched the medical literature and found it devoid of any peer-reviewed scientific articles

> specifically referencing the effects of post-mortem pressures upon a corpse and its ability to mimic active bleeding as a sign of life. . . .
>
> Given the above, requiring evidence-based medicine and through an abundance of caution, I will no longer sustain an opinion, as I did in my original testimony, that to a reasonable degree of medical certainty, the victims were in fact alive at the time they were buried beneath the coffin. The absence of probative research on these issues, must by default, create the opportunity for an alternative hypothesis to explain the appearance of active bleeding as a sign of life, when in fact life is absent.

(ECF No. 129-7 at PageID 16363-16364.) Carruthers contends that any knowledge that Smith's testimony was false can be imputed to the State. (ECF No. 129 at 192.)

Respondent argues that Carruthers has not shown under Napue v. Illinois, 360 U.S. 264 (1959), that the prosecution knowingly presented false testimony. (ECF No. 149 at 23.) He contends that the only evidence Carruthers presents is that other medical experts have disagreed with Smith's testimony and that Smith is now unsure of the opinion he testified to at trial. (Id.) Respondent asserts that Smith's affidavit (ECF No. 129-7) is barred from consideration in these habeas proceedings by Pinholster. (ECF No. 149 at 23.) He further argues that the evidence is not material to the death sentence given the other aggravating factors involved. (Id.)

The Tennessee Court of Criminal Appeals did not address whether Smith's testimony was in fact false. The court found that, given the evidence presented and the additional aggravating circumstances, neither the guilty verdict nor the death sentence would have changed even if Smith's testimony were false. Carruthers, 2007 WL 4355781, at *56.

Carruthers has not established that Smith's testimony was false. Smith, Blake, and Nichols had differences of opinion as to whether the victims were buried alive. Although the Court finds Smith's affidavit to be barred for § 2254(d)(1) review under Pinholster, even that affidavit does not establish Carruthers's claim. Smith indicated that after he "continued to observe and be involved in like and similar circumstances," he could "no longer sustain his opinion" because of a lack of peer-reviewed scientific articles and the necessity of "evidence-based medicine" on the relevant subject. (See ECF No. 129-7 at PageID 16363-16364.) Smith's affidavit does not demonstrate that the testimony was either false or not Smith's opinion at the time when it was presented.

Further, there is no evidence to demonstrate that the prosecution knew about the falsehood or even the unreliability of Smith's testimony.[52] There is no Supreme Court precedent that allows imputing the knowledge of a state's expert witness on the prosecution. When a witness acts only in the capacity of an expert witness for the state and not as a fully functioning member of the prosecution team, the expert's

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[52] Blake's summary differed from Smith, and Carruthers could have cross-examined Smith based on Blake's report or called Blake as a witness to rebut Smith's testimony. He did neither.

knowledge should not be imputed to the prosecutors. Sutton v. Bell, No. 3:06-CV-388, 2011 WL 1225891, at *10 n.17 (E.D. Tenn. Mar. 30, 2011) (citing Avila v. Quarterman, 560 F.3d 299, 308-09 (5th Cir. 2009)); see also United States v. Stewart, 423 F.3d 273, 298-99 (2d Cir. 2006) (knowledge of false testimony cannot be imputed to the prosecution where the expert is acting only in that capacity and not as a "fully functioning member of the prosecution team").

The Tennessee Court of Criminal Appeals' determination that Carruthers was not entitled to relief because it could not "conclude that the prosecutor knowingly misrepresented evidence" related to O.C. Smith's testimony is not contrary to or an unreasonable application of clearly established Supreme Court precedent or based on an unreasonable determination of fact in light of the evidence presented. See Carruthers, 2007 WL 435581, at *56. The claim is without merit.

Carruthers did not present his claims that the State withheld evidence that agents for a powerful drug cartel executed the victims because Anderson had been involved in taking cocaine and money from the cartel or that Benton West testified falsely in the state courts. He has not demonstrated cause and prejudice for the procedural default of these claims or that a miscarriage of justice will result from the Court's failure to consider these claims. There is no evidence before the Court to establish either of these claims.

Carruthers presents a theory that he was precluded from presenting the defense (Claim 15) that Anderson was murdered by the Cali Drug Cartel because Andre Johnson and Marcellos Anderson were friends who were part of the Memphis distribution system, and Johnson was known for taking cocaine that

had been fronted to him and keeping the proceeds. (ECF No. 129 at 219.) He argues that these murders were similar to others committed by the cartel. (Id. at 220.) He provides no evidence, however, that the prosecution was aware of Marcellos Anderson having a direct tie to the Cali Drug Cartel or the cartel's involvement in Anderson's murder.

There is no evidence that Benton West's testimony that Nakeita Montgomery Shaw told him she thought Anderson and Tucker were being kidnapped (see ECF No. 55-8 at PageID 6048-6050) was false or that the prosecution knew it to be false. Carruthers did not cross-examine West. (Id. at PageID 6054.) Nothing in James Montgomery's counsel's cross-examination indicated that West's statement was false.[53]

Carruthers's false-testimony and withheld-evidence claims are without merit and/or procedurally defaulted. The Tennessee Court of Criminal Appeals' decision was not contrary to or an unreasonable application of clearly established Supreme Court precedent and was based on a reasonable determination of facts in light of the evidence presented. Claims 13 and 14 are, therefore, DENIED.

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[53] Nakeita Montgomery Shaw told police that Anderson's and Tucker's hands were tied (see ECF No. 55-8 at PageID 6015), indicating that they may have been held against their will. At trial, however, she denied that she ever saw anyone tied up in her house. (Id. at PageID 6016-6017.)

### M. Trial Court Precluded Presentation of Defense (Claim 15, Amended Petition ¶¶ 365-76)

Carruthers alleges that prior to trial, the defense sought information from the State that Marcellos Anderson was significantly involved in drug distribution and had "crossed a powerful drug cartel by taking from the cartel a large amount of cocaine and money." (ECF No. 21 at 95.) The State refused, and the defense requested that the trial court order the defense to provide this information. (Id.) The trial court denied the request, "reasoning that because two of the victims were found with their hands tied behind their backs the information that the defense sought was of no relevance." (Id.) Carruthers alleges that the trial court precluded him from asserting that he was innocent and that agents for a powerful drug cartel had executed the victims because of the stolen drugs and money, including precluding him from presenting the following evidence:

- Marcellos Anderson had been involved in an expensive drug deal with a Colombian drug cartel operating out of Houston, Texas, and during the deal Anderson had taken from the cartel a large amount of cocaine and money;
- Agents for a Colombian drug cartel had traveled from Houston to North Memphis looking for Marcellos Anderson and his associates;
- During Carruthers's incarceration, Delois Anderson's home was sprayed with bullets fired from a semi-automatic assault rifle;

- During Carruthers's incarceration, Andre Johnson's house was sprayed with bullets fired from a semi-automatic assault rifle; and
- During Carruthers's incarceration, Andre Tucker, the brother of Fred Tucker, was murdered.

(Id. at 95-96.) Carruthers alleges that he served Drug Enforcement Administration Agents Mark Chism and David McGriff with trial subpoenas to testify about their knowledge of Marcellos Anderson's involvement in drug distribution and with a Colombian cartel, but Judge Dailey quashed the subpoenas for failure to comply with the Code of Federal Regulations. (Id. at 96-97.) Carruthers alleges that he was denied his right to compulsory process and his due process rights. (Id. at 97.)

Respondent argues that Carruthers presented this claim as a state evidentiary law issue rather than a constitutional violation. (ECF No. 114-1 at 21.) He contends that the claim is procedurally defaulted. (Id.) To the extent the claim is deemed exhausted, Respondent argues that it is without merit. (Id. at 22.) He further asserts that the trial court allowed Carruthers to put on some proof of other suspects, just not proof that was hearsay or irrelevant and that state evidentiary rulings are not generally grounds for habeas relief. (ECF No. 149 at 24.)

The Tennessee Court of Criminal Appeals addressed Carruthers's argument about evidence related to other perpetrators:

> Both appellants argue the trial court limited their ability to establish that other people involved in the Memphis drug trade had motives to kill the victims in this case. Again, the

admissibility of evidence is within the sound discretion of the trial court, and this Court will not interfere with that discretion absent a clear showing of abuse. See State v. Howard, 926 S.W.2d 579, 585 (Tenn. Crim. App. 1996). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, Tenn. R. Evid. However, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Rule 403.

As is commonly recognized, an accused is entitled to present evidence implicating others in the crime. See Green v. State, 285 S.W. 554 (1926); Sawyers v. State, 83 Tenn. 694 (1885); State v. Spurlock, 874 S.W.2d 602, 612-13 (Tenn. Crim. App. 1993). Evidence in support of this third party defense, however, must conform to the general rules governing the admissibility of evidence. State v. McAlister, 751 S.W.2d 436, 439 (Tenn. Crim. App. 1987). The evidence must be the type that would be admissible against the third party if he or she were on trial, and the proof must be limited to facts inconsistent with the appellant's guilt. State v. Kilburn, 782 S.W.2d 199, 204-05 (Tenn. Crim. App. 1989). Accordingly, hearsay evidence implicating another individual would not be admissible.

> Having reviewed the record in light of the appellants' claims, we find that the trial court did not exclude any relevant admissible evidence tending to implicate others in the murders while exonerating the appellants. The jury was well aware that Marcellos Anderson was heavily involved in the drug trade in Memphis. The jury heard evidence about Anderson's drug dealings with Johnson and Adair. The jury heard that Anderson and Adair had previously been shot by others in drive-by shootings. They heard that Andre Tucker, the brother of one of the victims in this case, was subsequently killed after the appellants had been arrested on the present charges. As the state notes, this evidence clearly suggests that the killings in the drug world were still happening. The evidence the appellants refer to was either hearsay (testimony that Anderson was in debt to Colombian drug dealers) or cumulative and would have confused the issues and misled the jury (attacks on others involved in the Memphis drug trade). Again, the jury knew this case centered around activities in the drug world and they could reasonably have used their common knowledge to conclude that there were many players involved. The evidence in this case, however, pointed to the guilt of the appellants. This issue is without merit.

Carruthers, 1999 WL 1530153, at *40-41; see also Carruthers, 35 S.W.3d at 574-75.

Carruthers argues that the State has failed to meet its burden for summary judgment. (ECF No. 129

at 209, 211.) He contends that the Tennessee Court of Criminal Appeals' analysis, that he was not entitled to present evidence that others had a motive to kill and did kill the victims because: (1) the jury knew the killings were drug-related; (2) jurors could reasonably use "their common knowledge to conclude that there were many players involved"; (3) the "evidence . . . pointed to the guilt of the appellants"; and (4) hearsay evidence was inadmissible, was contrary to federal law. (Id. at 217-18.) See Carruthers, 35 S.W.3d at 575. He asserts that it is well-settled under Crane v. Kentucky, 476 U.S. 683, 690 (1986), that a defendant is constitutionally entitled to a "meaningful opportunity to present a complete defense." (Id. at 218.) He also states that, based on Holmes v. South Carolina, 547 U.S. 319 (2006), a state court cannot deny the opportunity to present proof that someone else committed a crime by concluding that exculpatory evidence should not be admitted because there was proof of the defendant's guilt. (Id.) Further, he asserts that hearsay rules do not categorically prohibit consideration of exculpatory evidence of someone else's guilt under Chambers v. Mississippi, 410 U.S. 284 (1973), and Green v. Georgia, 442 U.S. 95 (1979) (per curiam). (Id.)

On direct appeal, Carruthers argued that the trial court committed reversible error when it denied his motion to require the State to produce evidence of ongoing drug investigations involving the State's witnesses and denied a motion for Marcellos Anderson's prior convictions and criminal investigations involving Anderson. (ECF No. 56-6 at PageID 10234-10235.) In Carruthers's reply brief, he asserts that the State tacitly admitted that evidence of drug dealing by other actors and witnesses involved in the case is relevant,

and that the trial court's exclusion of this evidence "flies in the face of fundamental fairness, and denied Carruthers a legitimate opportunity to raise a valid defense." (Id. at PageID 10298.)

Carruthers's argument was based on Tennessee law. (Id. at PageID 10236-10238.) He does not rely on federal cases, and the state cases he cited did not employ federal constitutional analysis. See State v. Kilburn, 782 S.W.2d 199, 204 (Tenn. Crim. App. 1989) (a defendant is allowed to present proof tending to show that another had the opportunity and motive to commit the offense); see also Green v. State, 285 S.W. 554, 558 (Tenn. 1926) (the motives of the deceased are as much the subject of inquiry as those of the defendant). He does not phrase the claim in terms of constitutional law except to the extent he casually references "fundamental fairness" in his reply, nor does he allege facts well within the mainstream of constitutional law. Carruthers has not fairly presented a constitutional claim. See supra pp. 36-47; see also Duncan v. Henry, 513 U.S. 364 (1995) (per curiam) ("If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.").

The Court has determined that Martinez does not apply to establish cause for procedural default. (ECF No. 192 at 10, 27-29.) Carruthers has not otherwise demonstrated cause and prejudice or that a miscarriage of justice will result from the Court's failure to consider his claim. Claim 15 is procedurally defaulted. Summary judgment is, therefore, GRANTED.

The Court further finds that Carruthers's claim is without merit. Carruthers attempts to support his

theory of the murders by asserting that the murders occurred at a time that the Cali Drug Cartel was bringing thousands of kilos of cocaine into Memphis. (ECF No. 129 at 219.) He alleges that the cartel "fronted" cocaine to Memphis distribution systems and received payment after the sales. (Id.) When the cartel did not receive timely payment, it kidnapped, tortured, and killed the persons responsible, along with their family members. (Id.) Johnson and Marcellos Anderson were friends who were part of the Memphis distribution system. (Id.) Johnson had a reputation of taking cocaine that had been fronted to him and keeping the proceeds. (Id.) Carruthers asserts,

> it takes little imagination to connect the dots – Johnson and Marcellos Anderson received fronted cocaine from the Cartel, they sold it on the street, they kept the money, and the Cartel came for either its money or its pound of flesh. Not getting its money, the Cartel killed Marcellos, his mother, and Fred Tucker who was wrapped up in it with Marcellos. The similarities between another Memphis murder and the murders of the victims confirm this suspicion.
>
> During the period in which the victims were murdered, Chellis Thomas was part of a Memphis distribution system. By January 1995, Thomas owed the Cartel more than five million dollars for fronted cocaine. Authorities arrested Thomas and others for possession with intent to distribute three kilograms of cocaine, but released him on bond. After Thomas failed to appear for arraignment, police found his decomposing body in the trunk

> of a car. Thomas's hands had been bound behind his back, and a plastic bag had been taped over his head and neck.
>
> Just like Thomas, when authorities found the bodies of Marcellos Anderson, his mother, and Fred Tucker, their hands had been bound behind their back. Authorities found a knitted sock tied around the neck of one body, and injuries consistent with ligature strangulation on another, indicating that, just like Thomas, the victims had been suffocated.

(Id. at 219-20 (citations omitted); see ECF No. 133-12; ECF No. 133-21 at PageID 17994-17995; ECF No. 133-22.) Carruthers argues that that these similarities in conjunction with the facts of the murders entitled him to pursue a viable defense. (ECF No. 129 at 220.)

Under the Sixth Amendment Compulsory Process Clause, criminal defendants generally have the right to present "competent, reliable [exculpatory] evidence." Crane, 476 U.S. at 690-91 (state rule excluding evidence concerning means by which a voluntary confession was obtained violated Sixth Amendment); see also Chambers, 410 U.S. at 295-96 (application of state hearsay rule to bar testimony regarding third party's repeated confession of crime violated defendant's Sixth Amendment rights). The Supreme Court stated, "A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions," including the state's legitimate interest in "ensuring that reliable evidence is presented to the trier of fact in a criminal trial." United States v. Scheffer, 523 U.S. 303, 308-09 (1998). Evidentiary exclusions will not violate the constitution "so long as

they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" Id. at 308 (quoting Rock v. Arkansas, 483 U.S. 44, 56 (1987)). The Supreme Court cases undoing state-court convictions based on exclusion of evidence involve egregious situations; the Court has shown little interest in carrying the doctrine beyond egregious cases. See DiBenedetto v. Hall, 272 F.3d 1, 8 (1st Cir. 2001). Due process is violated and habeas relief warranted only if an evidentiary ruling is "so egregious that it results in a denial of fundamental fairness." Bugh v. Mitchell, 329 F.3d 496, 512 (6th Cir. 2003). There must be evidence that there is a connection between the perpetrators and the crime, not mere speculation. DiBenedetto, 272 F.3d at 8; see also Miller v. Brunsman, 599 F.3d 517, 526 (6th Cir. 2010) (the exclusion of the evidence on the ground that it failed to show a sufficient nexus between a third party and the murder is consistent with United States Supreme Court precedent). A combination of unreliability of the evidence, disparagement of the victims as bad people deserving of death, and the tangential nature of the evidence is sufficient to uphold a trial judge's decision against a constitutional challenge. DiBenedetto, 272 F.3d at 9.

In the instant case, Carruthers's theory is speculative and risked portraying victims Anderson and/or Tucker as bad men deserving of death. The jury was aware of Anderson's involvement in the drug trade and heard evidence from other witnesses about the violence related to the drug trade. Carruthers, 35 S.W.3d at 575. The inclusion of cumulative hearsay evidence would have confused the issues; the exclusion of this evidence does not violate Carruthers's

constitutional rights. Summary judgment is GRANTED. Claim 15 is without merit and, therefore, DENIED.

### N. Judicial Interference with Support Services (Claim 16, Amended Petition ¶¶ 377-96)

Carruthers alleges that he requested that the trial court authorize him to employ a forensic pathologist, and without Carruthers's knowledge or consent, Dr. Cleland Blake, the pathologist that was authorized, was told that he worked for the trial court. (ECF No. 21 at 97.) Carruthers alleges that, without his knowledge or consent, the trial court and the prosecution communicated with Blake and sent him materials to review in forming his opinion. (Id.) On April 1, 1996, Blake sent the trial court a letter stating that he believed that the victims died at some point prior to being placed in the freshly dug grave. (Id. at 97-98.) On April 19, 1996, during the trial, Blake wrote the trial court stating, "(m)y testimony . . . would most likely be of little value for (defendant Carruthers), perhaps serving only to assure that the District Attorney's side of the case is not trying to 'railroad' this man for his accused acts." (Id. at 98.) The court gave Carruthers the letter and told him that he had to decide that day whether he would call Blake as a witness, and if Carruthers decided to call him, Blake would have to testify "irrespective of any future events that would transpire." (Id.) Carruthers told the court that he would not know whether he would call Blake until after the State's witness, Dr. O.C. Smith, testified. (Id.) The trial court told Carruthers that it was maintaining its position. (Id.) Carruthers decided not to call Blake; as

a result, Smith's opinion that all three victims were buried alive went unchallenged. (Id.)

Carruthers also alleges that the trial court interfered with his use of investigator John Billings. (Id. at 99.) Carruthers complains that the trial court only allowed funding to be received in $1,000 increments based on the presentation of detailed invoices. (Id.) He contends that the trial court refused to authorize payment for certain of the investigator's activities and failed to securely maintain the invoices, resulting in the prosecution being able to review them. (Id.) He alleges that the trial court limited his ability to meet and confer with Billings prior to and during trial. (Id.)

**1. Procedural Default**

Respondent asserts that this claim was not presented in the Tennessee state courts and is procedurally defaulted. (ECF No. 114-1 at 23; ECF No. 149 at 25.) Carruthers asserts that this claim was fairly presented in the post-conviction proceedings. (ECF No. 129 at 237.) He cites his post-conviction appellate brief for the argument that Judge Dailey interfered with his ability to consult with the forensic pathologist and the due process arguments for allowing a defendant a fair opportunity to present a defense. (Id.; see also ECF No. 134-1 at PageID 18100-18106; ECF No. 134-2 at PageID 18260-18263.) He acknowledges that the merits of the claim as it relates to Blake were not presented independently, but in the context of an ineffective-assistance-of-counsel claim. (ECF No. 129 at 237-38 n.75.) Carruthers asserts that ineffective assistance of counsel provides cause for any prejudicial default of Claim 16 as it relates to Blake. (Id. at 247, 254-55.)

Carruthers has fairly presented his claim as it relates to Blake. The Tennessee Court of Criminal Appeals addressed the merits of this claim in the context of ineffective assistance of counsel. Carruthers, 2007 WL 4355481, at *41. Summary judgment based on procedural default is, therefore, DENIED.

Carruthers did not make a similar claim in his post-conviction appellate brief about Billings. Carruthers failed to exhaust his claim related to Billings in the state court. The Court has determined that Martinez does not establish cause and prejudice for the procedural default of Carruthers's claims as it relates to Billings. (ECF No. 192 at 10, 27-30.) Carruthers failed to otherwise demonstrate cause and prejudice or that a miscarriage of justice would result from the Court's failure to consider this claim. The issue of interference with support services as it relates to Billings is procedurally defaulted. Summary judgment is GRANTED, and Claim 16 as it relates to Billings is DENIED.

**2. Merits**

With regard to Blake, the Tennessee Court of Criminal Appeals stated:

a. Dr. Cleland Blake

> The petitioner first contends that he was unconstitutionally denied the benefit of an expert witness because the trial court appointed Dr. Blake, who communicated directly with the trial court instead of the petitioner. He also asserts that the trial court forced him to make an uninformed decision about whether to call Dr. Blake as a witness four days before he had heard the testimony of Dr. O.C. Smith.

The State argues that the petitioner was not denied the benefit of an expert witness and, as such, cannot establish either deficient performance or prejudice on the basis of appellate counsel's failure to raise this issue on appeal.

The petitioner complained during voir dire about the trial court's communications with Dr. Blake, asserting that by sending information from the prosecutor directly to Dr. Blake, the trial court had led Dr. Blake to, in the petitioner's eyes, believe that he was working for the trial court and the prosecution instead of for the petitioner. The trial court addressed these concerns:

> I contacted Dr. Blake, obviously, the record will reflect, at your request, to have an independent forensic pathologist review the determination made by the Shelby County Medical Examiner's Office, to see if he or she could come up with a more specific time of death for the three victims in this case.
>
> At Dr. Blake's request I needed some basic summary of facts so that he would have some context in which to review the findings of the medical examiner's office, and toward that end I asked [the prosecutor] to provide me with a general summary of what the State felt the facts were so that he, Dr. Blake, could have some factual context in which to conduct his analysis.

> There has never been any question in my mind on Dr. Blake's behalf with regard to the fact that he has been retained at taxpayers' expense by me on your behalf as an independent expert to review the findings of the Shelby County Medical Examiner's Office.
>
> . . . .
>
> You think that all he needed was what was in the file or what came from Dr. Francisco's office, but that's not what he thinks. He asked me to prepare him a factual summary of the case so he could operate . . . within some factual context.
>
> And so the record should reflect that all of this came from him. He asked for other information from Dr. Francisco's office, and again, on your behalf and on his behalf I told him to feel free to contact them. I mean, he is contacting a lot of people in an effort to reach this decision that you're seeking. And so he's, in trying to reach this independent decision that you're asking for, it's necessary for him to contact a lot of people to get the information needed to make an informed decision.

The post-conviction court determined that the petitioner's claims with respect to this issue were without merit:

> Petitioner now makes much of the role of the trial judge in relation to Dr. Blake and infers that his involvement

interfered with the petitioner's ability to prepare for trial and to rebut Dr. Smith.

The record shows considerable confusion about the role of Dr. Blake. Was he an "independent" expert (See T.R.E. 706) or a defense expert? . . . It was obvious that when Dr. Blake testified in the post-conviction case he was still unclear as to whether he was working for the court or for the [petitioner]. . . . While all this confusion may have resulted from an informality with normal procedures and role definitions it had no impact on the end result. Dr. Blake submitted a report and offered an opinion about the time and manner of the death of the victims, referenced above, and all that was available to the petitioner before trial.

Perhaps the actions of the trial judge were unusual, but this was an unusual situation and it appears that the trial judge was attempting to obtain an expert for the petitioner. As it turned out, Dr. Blake's findings were communicated to [the petitioner] and [the petitioner] made the decision not to call Dr. Blake. This now appears to have been a bad decision and may have deprived [the petitioner] of testimony which would have rebutted Dr. Smith. A criminal defendant who represents himself cannot complain about his bad judgments. See State v. Carruthers, 35 S.W.3d at 551. The Court would also note that at no time after Dr. Smith's

testimony did the petitioner request that Dr. Blake be called in rebuttal.

We conclude that the evidence does not preponderate against the findings and conclusions of the post-conviction court. At the petitioner's request, the trial court provided him with a qualified forensic pathologist to review the findings of the Shelby County Medical Examiner's office and to prepare an independent cause-and-time-of-death report. While the trial court initiated the contact with Dr. Blake and facilitated his access to needed information, the court made it clear to the petitioner that he and his investigator were free to contact Dr. Blake directly and that he could communicate directly with the petitioner if he wished. The trial court also made Dr. Blake's report and findings available to the petitioner several weeks prior to the start of the trial. Nowhere in the record is there any indication that the prosecution communicated directly with Dr. Blake. The petitioner was given the opportunity to call Dr. Blake as a witness at his trial but opted not to do so, apparently on the advice of one of his investigators.

The petitioner additionally complains that the trial court interfered in his relationship with Dr. Blake by "forcing" the petitioner to decide whether to call Dr. Blake as a witness when he had not yet had the benefit of Dr. Smith's surprise testimony that all three victims had been buried alive. We respectfully disagree. During a break in the trial, the trial court asked the petitioner to decide if he

wanted Dr. Blake as a witness, informing him that Dr. Blake had a tight schedule and needed time to make the necessary arrangements to attend the trial. The trial court told the petitioner that he would have Dr. Blake there if the petitioner wanted him, but, barring some "brand new, surprising, novel revelation" by Dr. Smith or any other medical expert called by the State, the court expected the petitioner to put Dr. Blake on the stand if he went to the trouble and expense of coming to Memphis for the trial:

> [Y]ou know generally what he [Dr. Smith] is going to testify to, generally what his findings are, generally what his conclusions are, generally what the videotape from the crime scene reveals, and so-and you have two or three communications, several communications from Dr. Blake, both sent to me and his direct communications with Mr. John Billings, Mr. Richard Billings, Mr. Les Arms, all of which should provide you with ample information to make your decision today as to whether you plan to put him on the stand or not.
>
> If you don't want to put him on the stand, I want to notify him today so that he can go on about his business and not worry about making arrangements to come to Memphis, Tennessee, next week.
>
> If you do want to put him on the stand, that's no problem. We will have him here.

> But if we get him all the way down here next week, then unless there is some dramatic last second surprise in the medical testimony presented by the State, I expect him to be put on the stand. I don't want . . . to play games with regard to getting him down here and then not putting him on the stand. That's my statement.

As noted by the post-conviction court, the petitioner never requested that Dr. Blake be called in rebuttal following Dr. Smith's testimony that all three victims were buried alive. Given the trial court's statement that it would allow the petitioner to change his mind about putting Dr. Blake on the stand should there be a dramatic last minute change in the State's medical evidence, we have no basis to conclude that the trial court would not have allowed the petitioner to call Dr. Blake in rebuttal had the petitioner made such a request. Additionally, the petitioner did not call Dr. Blake as a witness during the penalty stage of the trial, when his testimony that the two male victims were not buried alive and the female victim was probably unconscious at the time of her burial might have been relevant to refute the aggravating circumstance that the murders were especially heinous, atrocious, or cruel. We conclude, therefore, that the record supports the determination of the post-conviction court that the petitioner has not met his burden of showing that appellate counsel were deficient in not raising as

> an issue on appeal the trial court's alleged interference in the petitioner's relationship with Dr. Blake, or that the petitioner was prejudiced as a result of that alleged deficiency in representation.

Carruthers, 2007 WL 4355481, at *41-44.

Carruthers relies on the fundamental right to present a defense to establish a constitutional violation under the Sixth Amendment's Compulsory Process Clause. He cites Ake v. Oklahoma, 470 U.S. 68, 76-77 (1965), for the proposition that when a state fails to ensure that an indigent defendant has access to the raw materials needed to build an effective defense, the proceeding is fundamentally unfair. (ECF No. 129 at 255.)[54] He cites Washington v. Texas, 388 U.S. 14, 19 (1967), for the proposition that when a state meddles with the work the expert performs or the ability of the defendant to use the expert, the state interferes with the defendant's right to present his defense. (Id.) Carruthers asserts that the trial court interfered with the use of his expert in the following manner:

- prevented Blake from visiting Carruthers;
- established that Judge Dailey would be in charge of transmitting information to Blake for review;
- indicated to Blake that he was working for the court and should submit his report to the court;

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[54] Ake addresses the right to a competent psychiatrist to conduct an appropriate examination of an indigent defendant on issues relevant to the defense, to present testimony, and to assist in preparing cross-examination of the state's psychiatric witnesses. 470 U.S. at 82-83.

- sent Blake a letter from the prosecution along with Dr. O.C. Smith's autopsy reports;
- told Blake that his only job was to determine the accuracy of Dr. Smith's time of death estimate; and
- authorized Blake to talk with attorneys prosecuting Carruthers.

(Id. at 255-56.) Carruthers contends that Blake never spoke with him about anything. (Id. at 256.)

Carruthers has not cited any Supreme Court precedent extending the principles of Ake to the use of a forensic pathologist.[55] The Supreme Court specifically declined to extend the principles of Ake to non-psychiatric experts. See Caldwell v. Mississippi, 472 U.S. 320, 323 n.1 (1985); see also Johnson v. Oklahoma, 484 U.S. 878, 880 (1987) (Marshall, J., dissenting) ("[I]n [Caldwell], we reserved the equally important questions whether and when an indigent defendant is entitled to nonpsychiatric expert assistance. This case demonstrates the pressing need to consider and resolve those questions."); Babick v. Berghuis, 620 F.3d 571, 579 (6th Cir. 2010) (Sixth Circuit precedent is unclear about the right to a state-paid nonpsychiatric expert witness).

Carruthers's reliance on Washington is misplaced. In Washington, the Supreme Court found that

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[55] Carruthers cites Terry v. Rees, 985 F.2d 283, 284 (6th Cir. 1993) (per curiam), where the Sixth Circuit determined that the defendant was deprived of the opportunity to present an effective defense when he was denied an independent pathologist to challenge the government's position as to the victim's cause of death. In Terry, the court completely denied the request for an expert. Id. at 283.

a Texas statute violated the defendant's right to compulsory process by "arbitrarily den[ying] him the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." Washington, 388 U.S. at 23. There is no indication that Blake was ever prevented from testifying. See Johnson v. Bell, 525 F.3d 466, 480-81 (6th Cir. 2008) (Washington is not applicable where the witness was not prevented from testifying). Further Carruthers has not cited any Supreme Court precedent addressing a similar factual scenario where the judge coordinated expert services for a pro se defendant who was incarcerated.

A defendant has the right to present his own witnesses free from government action designed to discourage those witnesses from testifying. United States v. Emuegbunam, 268 F.3d 377, 400 (6th Cir. 2001). "[G]overnmental conduct must amount to a substantial interference with a witness's free and unhampered determination to testify before we will find a violation of due process or the Sixth Amendment." Id. at 400. Judicial action aimed at discouraging defense witnesses from testifying deprives a defendant of the right to present his own witnesses. See Webb v. Texas, 409 U.S. 95, 97-98 (1972) (per curiam) (judge who singled out sole defense witness for lengthy admonition on dangers of perjury, implied that he expected witness to lie, and assured witness that if he did lie, he would be prosecuted and probably convicted for perjury drove the witness off the stand and deprived the petitioner of due process).

Carruthers makes multiple allegations to demonstrate the judge's interference with his expert. He

misrepresents, however, Judge Dailey's comments about Blake testifying at trial. The Tennessee Court of Criminal Appeals correctly outlined the trial court's concern with Blake's schedule and the time and expense related to his travel. (See ECF No. 55-8 at PageID 6058-6061.) The trial court also expressed that it was willing to reconsider whether Blake should be called if there were a surprise in the State's testimony:

> If, for example, Dr. O.C. Smith, or any other medical expert that the State might call, comes up with some brand new, surprising, novel revelation that causes you to change your defense strategy at the 11th hour . . . that's fine. If you can articulate that sort of last second change, that is fine.

(Id. at PageID 6059-6060.)

Carruthers misrepresents Judge Dailey's comments when he asserts that Blake was prevented from visiting him and that the court would be in charge of transmitting information to Blake.

> THE COURT: Hold on, Mr. Carruthers. I need to mention to you I have located a forensic pathologist in the state of Tennessee who I deem to be a fully capable and competent forensic pathologist. And he is in Morristown, Tennessee. And I intend to forward him the coroner's report – the medical examiner's report – autopsy – autopsy report in this case for his review – for his opinion with regard to his ability to come up with a more specific time of death, which is the narrow question that was posed through your ex parte motion.

MR. CARRUTHERS: My question is: For me to prepare my defense, it is possible that I meet with this forensic pathologist to show him basically what I know about the case – again, all the stuff that I have – all the information that I have concerning the case and to see possibly could he find out the things that I need that can prove – I mean also seeing where the video of the crime scene that we just received two years later, and it shows that the an [sic] – Dr. Barry Sims – I guess he's an anthropologist from the University of Tennessee. He was dusting one of the victims off, and if you notice on the tape, her leg was still shaking like – it still had a little life in it to show that, I mean, that these people were possibly just killed instead of –

THE COURT: You're welcome to send all that to – package it up and send it to him and let him review it, along with a cover letter pointing out these matters that concern you about the video and the autopsy and the autopsy report. And he can – and he's a man who has rendered many second opinions.

MR. CARRUTHERS: So basically you're saying that he's working for the state. He's not working for me.

THE COURT: No.

MR. CARRUTHERS: So he don't come down here and contact me. I can't contact him. I can't be informed of his findings.

THE COURT: That's not [at] all what I said. I don't know where you heard that –

. . . .

THE COURT: He's not working for the state. You can contact him. You're welcome to send it.

MR. CARRUTHERS: Can he come see me?

THE COURT: No, not at this time. I'm going to send him all the materials. You can send him all the materials that you have.

MR. CARRUTHERS: Can I see the material that you're going to send him?

THE COURT: Sure.

. . . .

THE COURT: It's basically going to be the autopsy and the autopsy report.

(ECF No. 55-3 at PageID 2314-2316.) The trial court initially denied Carruthers's request to have Blake visit him, but there is no evidence that a subsequent request was made. Further, the trial court made it clear that Carruthers could send Blake the information he thought was needed to obtain Blake's opinion.

Carruthers also complains that the judge limited Blake's opinion to a determination of the accuracy of Dr. Smith's time-of-death estimate. The colloquy above, however, indicates that Carruthers's ex parte motion was limited to a determination of the issue of time of death. Carruthers has not pointed to any motion or request in the record related to a request for Blake to address the issue of whether the victims were buried alive or any other issue.

In Tinsley v. Million, 399 F.3d 796, 807 (6th Cir. 2005), the Sixth Circuit determined that counsel's choice not to hire a blood-splatter expert when provided with sufficient funds does not constitute a violation of due process rights. Similarly, Carruthers's choice not to call Blake as a witness did not amount to a violation of his constitutional rights. Carruthers was granted an expert, paid for by the state, from whom he obtained an opinion prior to trial, and was given the opportunity to present the expert's testimony at trial. No clearly established constitutional right was violated. Claim 16, as it relates to Blake, is without merit and is, therefore, DENIED.

### O. Admission of Specified Evidence (Claim 17, Amended Petition ¶¶ 397-412)

Carruthers alleges that the trial court allowed Jimmy Maze to testify to the following information that was "irrelevant and prejudicial":

- that Carruthers wrote him letters in which Carruthers referenced an unspecified plan that would garner Carruthers a large sum of money and read the letters to the jury; and
- that on December 31, 1993, he saw Carruthers carrying containers filled with gasoline.

(ECF No. 21 at 99-100.)

Carruthers alleges that the trial court allowed Chris Hines to testify about the following information that was "irrelevant, unreliable, and prejudicial":

- that Jonathan Montgomery told Hines that he (Jonathan) had stolen money and killed someone; and

- about his opinion of what James Montgomery meant when he told Hines that a gun he offered Hines "had blood on it."

(Id. at 100.)

Carruthers alleges that the court admitted evidence that was "unnecessary and prejudicial" in the form of:

- a videotape of the crime scene, which included images of the victims' bodies; and
- photographs of the crime scene, which included images of the victims' bodies.

(Id.) He alleges that the trial court allowed unreliable and prejudicial testimony: (1) from Benton West that Nakeita Montgomery Shaw said she thought Marcellos Anderson and Fred Tucker were being kidnapped and she hoped nothing would happen to them; (2) from Nakeita Montgomery Shaw about a statement she gave to Milwaukee police that she saw Marcellos Anderson and Fred Tucker with their hands tied behind their backs when they were leaving her home; (3) from Terrell Adair that he participated in a conversation with Charles Ray Smith, Marcellos Anderson, and Andre Johnson about personal safety; and (4) from Andre Johnson that he told Terrell Adair and Marcellos Anderson not to ride in a car with James Montgomery and Carruthers because they were out to rob and kill Adair and Marcellos Anderson. (Id. at 100-01.) Carruthers contends that the admission of this evidence deprived him of a fair trial and sentencing hearing. (Id. at 101.)

Respondent argues that "an overwhelming majority of the theories in this claim" were not presented to the state courts and are procedurally defaulted. (ECF

No. 114-1 at 23.)[56] Respondent contends that the only claims presented in the state court were related to the admission of statements made by Jonathan Montgomery before his death, the admission of a letter Carruthers wrote to Maze, and the admission of photographs and videotapes. (Id.) Respondent asserts, however, that these claims were presented as a matter of state evidentiary law rather than as a constitutional violation and are procedurally defaulted. (Id.) Although Carruthers raised claims in the state court related to the admission into evidence of the letters written to Maze and Jonathan Montgomery's confession to Hines that he had stolen money and killed someone, these claims were based on state evidentiary rulings and were not fairly presented as constitutional claims. See Carruthers, 35 S.W.3d at 555-57, 574. (See ECF No. 56-6 at PageID 10229-10234.)

Carruthers argues that Claim 17 as it relates to the photographs and videotape was fairly presented in the state courts. (ECF No. 129 at 238.) He cites his appellate brief and argues, based on Gardner v. Florida, 430 U.S. 349, 356-58 (1977), and Woodson v. North Carolina, 428 U.S. 280 (1976), that the introduction of this evidence "transgressed the heightened standard of care" for capital cases. (Id.; see also ECF No. 56-6 at PageID 10244-10249.) Neither Gardner nor Woodson address the issue before the Court. "It is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the 'substance' of

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[56] James Montgomery raised claims about the testimony of Benton West, Nakeita Shaw, Terrell Adair, and Andre Johnson before the Tennessee Court of Criminal Appeals. See Carruthers, 1999 WL 1530153, at *54-56.

such a claim to a state court." Gray, 518 U.S. at 163. The claim was not fairly presented in the state courts.

Carruthers argues that ineffective assistance of counsel establishes cause for prejudicial default because Claim 17 is arguably meritorious and counsel's failure to raise it constitutes deficient performance. (ECF No. 129 at 247-48, 257-58.) He contends that a habeas petitioner is entitled to relief when a state evidentiary error renders the proceeding fundamentally unfair. (Id. at 257.) Carruthers has not exhausted an ineffective-assistance-of-counsel claim related to the admission of this specified evidence and, therefore, cannot establish cause for the failure to exhaust these claims. Carruthers has not demonstrated that a miscarriage of justice will result from the Court's failure to consider these claims.

Summary judgment based on procedural default is GRANTED. Claim 17 is, therefore, DENIED.

### P. Confrontation Clause (Claim 18, Amended Petition ¶¶ 413-17)

Carruthers alleges that the following testimony was admitted without confrontation, not subjected to cross-examination, and violated his rights to confrontation, due process under the Sixth and Fourteenth Amendments, and cruel and unusual punishment under the Eighth Amendment: (1) Benton West's testimony about Nakeita Montgomery Shaw's statements; (2) Jimmy Maze's and Chris Hines's testimony about Jonathan Montgomery's statements; and (3) Andre Johnson's testimony about Charles Smith's statements. (ECF No. 21 at 101-02.) Respondent argues that this claim was not presented in the state courts and is procedurally defaulted. (ECF No. 114-1 at 24;

ECF No. 149 at 25.) Carruthers argues that ineffective assistance of counsel establishes cause for prejudicial default because the claim is arguably meritorious and counsel's failure to raise it constitutes deficient performance. (ECF No. 129 at 247-248, 259.) Carruthers relies on Ohio v. Roberts, 448 U.S. 56 (1980),[57] to allow the admission of absent witnesses' testimonial statements based on a judicial determination of reliability. (Id. at 273.) He contends that Judge Dailey made no determination of reliability before allowing the admission of Jimmy Maze's and Chris Hines's testimony related to Jonathan Montgomery's statements in violation of the Sixth Amendment's Confrontation Clause. (Id.) Carruthers does not address the merits of his other allegations.

Carruthers has not exhausted an ineffective-assistance-of-counsel claim related to the admission of this testimony and cannot establish cause for the failure to exhaust these claims. He was not represented by counsel at trial and, therefore, any ineffective-assistance-of-counsel claim would be without merit and would not establish cause to overcome procedural default. Further, the Court has ruled that Martinez does not establish cause for Carruthers's claims as it relates to Andre Johnson's testimony. (ECF No. 192 at 10, 27-30.) Carruthers has not demonstrated that a miscarriage of justice will result from the Court's failure to consider this claim. Claim 18 is procedurally defaulted. Summary judgment is GRANTED, and Claim 18 is DENIED.

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[57] Roberts was abrograted by Crawford v. Washington, 541 U.S. 36 (2004).

### Q. Nakeita Shaw's Competence as a Witness (Claim 19, Amended Petition ¶¶ 418-21)

Carruthers alleges that, on or around January 10, 1996, the trial court became aware that Nakeita Montgomery Shaw had been admitted to a mental hospital for treatment of a debilitating mental illness. (ECF No. 21 at 103.) The State called Shaw as a witness and the trial court did not determine whether she was competent to testify. (Id.)

Respondent argues that the Tennessee Court of Criminal Appeals determined that Carruthers waived this claim because he did not object to the witness's testimony at trial or impeach her through cross-examination. (ECF No. 114-1 at 24.) See Carruthers, 1999 WL 1530153, at *42. Respondent contends that the claim was not fully and fairly presented for review, was not presented to the state courts under a theory of constitutional law, and is procedurally defaulted. (ECF No. 114-1 at 24.)

Carruthers argues that the claim was fairly presented as a federal claim in the state courts. (ECF No. 129 at 238-39.) He argues that he relied on the federal case Gardner, 430 U.S. at 358, for the proposition that "any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion," invoking the heightened standard for capital cases under the Eighth and Fourteenth Amendments. (Id.) He further asserts that he asserted a claim in terms that call to mind the specific right guaranteed by the federal constitution. (Id. at 240.) Despite Carruthers's reference to Gardner to fend off procedural default, he cites the Federal Rules of Evidence as the federal precedent on which he relies for the merits of his claim. (Id. at 220-21.)

None of the state cases that Carruthers relied on employed a federal constitutional analysis. Although Carruthers cited Gardner for a general proposition related to capital cases, Gardner does not address the issue of the competency of witnesses. Therefore, Carruthers cannot be said to have relied upon a federal case employing constitutional analysis relevant to the issue, phrased the claim in terms of constitutional law or the denial of a specific constitutional right, or alleged facts well within the mainstream of constitutional law. Additionally, the Tennessee Court of Criminal Appeals' determination was based on state law and did not employ a constitutional analysis. See Carruthers, 35 S.W.3d at 575-76. Carruthers has not fairly presented the habeas claim. Carruthers has not demonstrated cause and prejudice for his failure to exhaust this claim or that a miscarriage of justice would result from the Court's failure to consider the claim. Claim 19 is, therefore, procedurally defaulted.

Carruthers argues that this claim is not subject to the strictures of § 2254(d) because the Tennessee Court of Criminal Appeals' decision is contrary to clearly established federal law under Fed. R. Evid. 104(a), which requires the trial court to determine the qualification of a person to be a witness. (ECF No. 129 at 213, 220.) He contends that although Fed. R. Evid. 601 presumes that a witness is competent to testify, "judges have the power, and in appropriate instances, the duty, to hold a hearing to determine whether a witness should not be allowed to testify because a mental defect has rendered him incapable of testifying competently." (Id. at 220-21.)

Habeas relief is granted for a violation of constitutional rights. Carruthers has not pointed to any

Supreme Court case that requires courts to question witnesses, other than the defendant, to determine competence. See Moreland v. Bradshaw, 635 F. Supp. 2d 680, 752 (S.D. Ohio 2009) (denying habeas relief where no Supreme Court precedent established that a criminal defendant was entitled to a psychological examination of a presumptively competent witness). A judge's power under the Federal Rules of Evidence to determine a witness's competence does not create a clearly established constitutional right, especially considering that the federal rules do not apply in a state-court proceeding. Additionally, there is nothing in the record to demonstrate that Shaw's depression made her incompetent to testify.

Claim 19 is procedurally defaulted and without merit. Summary judgment is GRANTED. Accordingly, Claim 19 is DENIED.

### R. Judicial Bias (Claim 20, Amended Petition ¶¶ 422-42 )

Carruthers alleges that early in the case, he wrote letters to the trial court "blaming the court for not doing its job, for racism, and for discrimination." (ECF No. 21 at 103.) He alleges that the trial court held in camera meetings with defense counsel to discuss his letters, counsel's complaints about him, and his counsel's defense of their inaction. (Id. at 103-04.) Carruthers alleges that the trial court effectively adopted the adversarial position of appointed counsel and that the Court did not hold evidentiary hearings about his conduct and his right to counsel. (Id. at 104.) He asserts that the trial judge announced that it would throw away Carruthers's letters and direct the clerk not to open them, in effect destroying part of the

record. (Id.) Carruthers asserts that after the trial court directed him to proceed pro se, it was "indifferent to the difficulties, harassment and obstacles in the Shelby County Jail, stating these problems were of his own making." (Id. at 105.) He contends that the trial court interfered with the defense team's performance of its duties, believed he was a physical threat to the judge and his children, and became "embroiled in a running, bitter controversy." (Id. at 105-06.) Carruthers contends that, under these circumstances, there is a substantial likelihood of bias or an appearance of bias and, based on the facts, the bias of the trial court is clear. (Id. at 106.)

Respondent argues that the claim was not presented in the Tennessee courts for review and is procedurally defaulted. (ECF No. 114-1 at 24; ECF No. 149 at 26.) Carruthers admits that the "judicial bias" claim was not presented in the Tennessee courts, but he contends that the Tennessee courts considered the merits of the claim irrespective of any failure to raise it. (ECF No. 129 at 51-52, 109, 239-240.) He argues that the claim cannot be forfeited or defaulted. (Id. at 51-52, 108-13.) Carruthers argues cause and prejudice for any default: (1) in light of recently disclosed evidence of ongoing off-the-record conversations and investigations that establish Judge Dailey's bias; (2) the general rule is that cause need not be shown because parties are permitted to assume that state trial judges act properly; and (3) judicial bias is structural error. (Id. at 52.) Carruthers contends that he establishes cause because:

- Judge Dailey did not report off-the-record discussions;
- material information was not in the record;

- material conversations and information were concealed;
- the record was misrepresented as being complete; and
- material facts were not discovered or revealed until Carruthers's habeas petition was filed.

(Id. at 112.) He further asserts that his convictions and death sentence are wholly unreliable and constitute a miscarriage of justice because his trial "was one in form only." (Id. at 114.)

Judicial bias claims are subject to procedural default. See Alley v. Bell, 307 F.3d 380, 388 (6th Cir. 2002); see also Towery v. Schriro, 641 F.3d 300, 312 (9th Cir. 2010); Stoutamire v. Morgan, No. 4:10 CV 2657, 2011 WL 6934809, at *13 (N.D. Ohio Oct. 5, 2011) (procedurally barring judicial bias claim from federal habeas review).[58] Carruthers contends that the Tennessee Court of Criminal Appeals addressed this issue on direct appeal when it considered whether, as a result of self-representation, Carruthers was not treated fairly and concluded that Dailey did not deny Carruthers a fair and impartial trial. (ECF No. 129 at 109, 239-40.) See Carruthers, 1999 WL 1530153, at *32-33. Carruthers asserts that the court considered this issue because determining whether a defendant received fair treatment at an impartial trial is the very question courts resolve when considering a claim of judicial bias. (Id. at 240.)

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[58] Judicial bias is a "structural defect." See Coley v. Bagley, 706 F.3d 741, 750 (6th Cir. 2013). That does not, however, prevent a determination of procedural default.

The Tennessee Court of Criminal Appeals did not address a judicial-bias claim. The court addressed the forfeiture of the right to counsel, and the judicial bias claim is exhausted only to the extent that the state court addressed whether the judge was biased in its treatment of Carruthers as it relates to him proceeding pro se. As such, the issue is encompassed in Claim 8, see supra pp. 73-87, which the Court denied on the merits. Carruthers's other judicial-bias concerns were not exhausted in the state court. The Court has determined that Martinez does not establish cause and prejudice for Carruthers's judicial-bias claims. (ECF No. 192 at 10, 27-30.) He has not otherwise demonstrated cause and prejudice or that a miscarriage of justice would result from the Court's failure to consider the claim, and these allegations are procedurally defaulted. Summary judgment based on procedural default is partially GRANTED. Claim 20 is DENIED because the allegations are either procedurally defaulted or without merit.

### S. Improper Closing Argument (Claim 21, Amended Petition ¶¶ 443-44)

Carruthers alleges that the prosecutor's remarks during closing arguments violated Carruthers's Sixth, Eighth, and Fourteenth Amendment rights. (ECF No. 21 at 106.) He alleges that, at the guilt stage, the prosecutor stated that:

- Carruthers was "a conniver, manipulator, stalker, deceiver, and a liar who was attempting to manipulate the jury;"
- the jurors needed to avoid falling prey to "mind games;"
- Carruthers's witnesses were not credible;

- Carruthers was trying to manipulate the media;
- Carruthers effectuated a "second part" of a plan that was referenced in a letter he had written to Jimmy Maze; and
- the jury had a responsibility to the victims' families.

(Id. at 106-07.)

Carruthers alleges that, at the sentencing stage, the prosecutor:

- referenced that one of the Bible's Ten Commandments is "Thou shall not commit murder" instead of "thou shall not kill;"
- expressed his pride in witnesses who were family members of the victims because they did not cry or make speeches and they trusted the jury to do the right thing; and
- commented that the prosecution chose not to solicit additional available testimony from the victims' families about the impact the killings has had on them.

(Id. at 107.)

Respondent argues that the Tennessee Court of Criminal Appeals found that these claims were waived at trial because Carruthers failed to contemporaneously object to the statements. (ECF No. 114-1 at 24-25.) He asserts that this independent and adequate state ground bars these statements from federal review, and the claim is procedurally defaulted because it was not fully and fairly presented in the state courts. (Id. at 25.) Respondent notes that the Tennessee Court of Criminal Appeals also addressed the merits of the claim, and its decision is neither contrary to nor an

unreasonable application of clearly established federal law as determined by the United States Supreme Court and was based on a reasonable determination of facts in light of the evidence presented. (Id.; ECF No. 149 at 28.)

Carruthers argues that the Tennessee Court of Criminal Appeals' decision does not contain a plain statement about waiver that can support a federal default determination. (ECF No. 129 at 243.) He points out that, while the court determined that Carruthers waived his challenges, it also stated that it would "nonetheless" review the merits, making the claim available for habeas review on the merits under Harris v. Reed, 489 U.S. 255 (1989), and Levine v. Torvik, 986 F.2d 1506 (6th Cir. 1993). (Id. at 243-45.)

Carruthers argues that this claim is not subject to the strictures of § 2254(d) because the state court's decision was contrary to clearly established federal law. (ECF No. 129 at 211-13, 221-22.) He asserts that, on direct appeal, the Tennessee Court of Criminal Appeals did not apply governing federal principles to assess entitlement to relief based on constitutional arguments about whether the proceedings were unfair and did not make its required determination under Darden v. Wainwright, 477 U.S. 168 (1986), of whether the "misconduct was 'harmless beyond a reasonable doubt' under the constitutional harmless-error standard of Chapman v. California, 386 U.S. 18 (1967)." (Id. at 221-22.) He contends that the court reviewed the claim under a state-court "reversible error" standard and denied a new trial or sentencing because the "'improper comments by the prosecutors did not affect the verdict to the prejudice' of Tony Carruthers." (Id. at 222.) Carruthers argues that the state court's decision failed to

provide the higher standard of "harmless beyond a reasonable doubt" from Supreme Court precedent in Darden and Chapman. (Id.)

The Tennessee Court of Criminal Appeals stated:

> Prosecutorial Misconduct
>
> Both appellants claim the prosecutors made improper arguments during both phases of the trial which require a remand for a new trial.
>
> As is commonly recognized, closing arguments are an important tool for the parties during the trial process. Consequently, the attorneys are usually given wide latitude in the scope of their arguments, see State v. Bigbee, 885 S.W.2d 797, 809 (Tenn. 1994), and trial judges, in turn, are accorded wide discretion in their control of those arguments, see State v. Zirkle, 910 S.W.2d 874, 888 (Tenn. Crim. App. 1995). Such scope and discretion, however, is not completely unfettered. Argument must be temperate, based upon the evidence introduced at trial, relevant to the issues being tried, and not otherwise improper under the facts or law. Coker v. State, 911 S.W.2d 357, 368 (Tenn. Crim. App. 1995). The test for determining whether the prosecuting attorney committed reversible misconduct in the argument is "whether the improper conduct could have affected the verdict to the prejudice of the defendant." Harrington v. State, 385 S.W.2d 758, 759 (Tenn. 1965). The following factors have been recognized to aid the Court in this determination: 1) the conduct

complained of, viewed in light of the facts and circumstances of the case; 2) the curative measures undertaken by the court and the prosecutor; 3) the intent of the prosecutor in making the improper statement; 4) the cumulative effect of the improper conduct and any other errors in the record; and 5) the relative strength or weakness of the case. State v. Bigbee, 885 S.W.2d 797, 809 (Tenn. 1994); State v. Buck, 670 S.W.2d 600, 609 (Tenn. 1984).

Initially, Carruthers claims that because he was representing himself the trial court should have taken a more active role in guarding against prosecutorial misconduct during argument. As we noted earlier, there are certain perils a defendant faces when representing himself at trial. Knowing when to object during argument obviously is one of those perils. While the trial court can intervene sua sponte and take curative measures when the argument becomes blatantly improper, see, e.g., State v. Cauthern, 967 S.W.2d 726, 737 (Tenn. 1998), the trial court must exercise its discretion and should not exert too much control over the arguments. The judge does not serve as a pro se defendant's counselor during trial. The judge should intervene only when requested or when the judge deems proper in the interest of justice.

Carruthers refers to several instances of allegedly improper argument that occurred during the guilt phase of the trial. He claims the prosecutor improperly characterized him

as a conniver and liar and accused him of manipulating the jury. Evidence was introduced that Carruthers was the mastermind behind these crimes, and therefore, any reference by the state in this regard was not improper. However, the prosecutor may not comment unfavorably upon the defendant's pro se representation of himself or the presentation of his case. See Coker v. State, 911 S.W.2d 357, 368 (Tenn. Crim. App. 1995). Nor should a prosecutor express his or her personal opinion about the credibility of witnesses, unless the comments are grounded upon evidence in the record. See State v. West, 767 S.W.2d 387, 394 (Tenn. 1989). Moreover, a prosecutor is strictly prohibited from commenting on the defendant's decision not to testify. Coker, 911 S.W.2d at 368. This would include his decision not to present any proof. However, a prosecutor's statement that proof is unrefuted or uncontradicted is not an improper comment upon a defendant's failure to testify. State v. Thomas, 818 S.W.2d 350, 364 (Tenn. Crim. App. 1991); State v. Coury, 697 S.W.2d 373, 378 (Tenn. Crim. App. 1985). The prosecutor should also refrain from calling the defendant derogatory names. State v. Cauthern, 967 S.W.2d 726, 737 (Tenn. 1998).

In this case, it was improper for the prosecutor to call the appellant names, such as a liar. However, we do not find improper the comments telling the jury to watch out for "pitfalls" and "mind games" and not to succumb to a "guilt trip." The prosecutor was simply

making reference to the strength of the state's proof. Also, the prosecutor should not have insinuated that Carruthers was trying to manipulate the jury or comment that Carruthers did not call any credible witnesses on his behalf. Contrary to Carruthers' claim, however, we do not believe these comments improperly referred to Carruthers' failure to testify. Similarly, Carruthers complains about the prosecutor's statements that Carruthers was trying to manipulate the media. However, Alfredo Shaw testified about this. Moreover, the state is permitted to argue reasonable inferences from the evidence in the record. Coker, 911 S.W.2d at 368. The state's argument in this respect was not improper. Carruthers also claims the state's reference to the "second part" of Carruthers' master plan mentioned in the letters he wrote to Maze was improper. Since this was brought up by the evidence, we do not think this comment was improper. Carruthers also claims the prosecutor's statement to the jury that they have a responsibility to the victims' family improperly appealed to the emotions and sympathies of the jury. See State v. Bigbee, 885 S.W.2d 797, 809 (Tenn. 1994). We agree. Finally, Carruthers contends the prosecutor's comment that there is a "gap" in the evidence was improper. Carruthers claims this was an improper inference on his failure to testify. We disagree. The state's case was based on circumstantial evidence and the prosecutor's comment in this respect merely informed the jury that not all the pieces to the puzzle were presented at trial.

Both appellants complain about certain comments made by the prosecutor during argument at the penalty phase of trial. Both appellants take issue with the prosecutor's mention of the ten commandments in the Bible. Just recently, in State v. Middlebrooks, 995 S.W.2d 550, 559 (Tenn. 1999), our Supreme Court made the following comment regarding this type of argument:

> We have condemned Biblical and scriptural references in a prosecutor's closing argument so frequently that it is difficult not to conclude that the remarks in this case were made either with blatant disregard for our decisions or a level of astonishing ignorance of the state of law in this regard.

This argument by the prosecutor was obviously improper under the decisions of our Supreme Court.

Both appellants also contend that the state made improper victim impact argument. Victim impact evidence and argument during sentencing are not prohibited by the constitution or statute. See State v. Nesbit, 978 S.W.2d 872 (Tenn. 1998). However, the argument must be relevant to the specific harm to the victim's family, Middlebrooks, 995 S.W.2d at 558, and must be limited to "information designed to show those unique characteristics which provide a brief glimpse into the life of the individual who has been killed, the contemporaneous and prospective circumstances surrounding the individual's death, and how

those circumstances financially, emotionally, psychologically or physically impacted upon members of the victim's family." Nesbit, 978 S.W.2d at 891 (footnote omitted). The "victim's family members' characterization and opinion about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment." Id. at 888 n.8. Again, the prosecutor cannot simply appeal to the emotions and sympathies of the jury while invoking victim impact argument. Id. at 891 (citing State v. Bigbee, 885 S.W.2d 797 (Tenn. 1994)). We agree with the appellants that the prosecutor improperly commented that the family members who testified did not cry and had remained quiet during trial. Also improper was the comment that the families "trust in you [the jury]." The family members could have testified that they missed the victims (emotional impact of victim's death), and the comment by the prosecutor that they chose not to solicit this testimony was not improper.

. . . .

We find that the appellants have waived any challenge regarding the majority of the comments about which they complain because they failed to voice a contemporaneous objection. T.R.A.P. 36(a); see also State v. Little, 854 S.W.2d 643, 651 (Tenn. Crim. App. 1992). Nonetheless, we have reviewed the entire arguments of all parties, and considering the factors listed above, we find that the relatively few improper comments by the prosecutors did not affect the verdict to the prejudice

> of the appellants. This issue is without merit. However, we remind counsel of the warnings recently related by our Supreme Court in State v. Middlebrooks, 995 S.W.2d 550, 561 (Tenn. 1999):
>
> > Those who interpret these cases as precedent for the view that improper closing argument and misconduct of this nature will be held harmless error in all cases do so at their own professional peril and at the risk that the misconduct, even if it does not prejudicially affect the verdict, may be deemed to be prejudicial to the judicial process as a whole and therefore require a new trial or sentencing hearing.
>
> Carruthers, 1999 WL 1530153, at *47-49.

Carruthers asserts that the Tennessee Court of Criminal Appeals recognized the prosecutor's "numerous improper arguments" about Carruthers being a "conniver" and "liar," appealing to the sympathy of the jury by arguing about the jury's "responsibility to the victims," and reference to the Ten Commandments. (ECF No. 129 at 260-61.) He contends that the arguments that the jury should convict Carruthers because he had "no proof" unconstitutionally penalized him for choosing not to testify and did not hold the prosecution to its burden. (Id. at 261.) He asserts that the prosecution's personal attacks and the injections of emotions into the jury's decision made the trial fundamentally unfair. (Id.)

The relevant question is whether the prosecutors' comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process."

Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). The appropriate standard of review is "the narrow one of due process, and not the broad exercise of supervisory power." Darden, 477 U.S. at 181 (quoting Donnelly, 416 U.S. at 642).[59]

Carruthers contends that the prosecution, by arguing that he had put on "no proof," unconstitutionally penalized him for choosing not to testify, and cites Doyle v. Ohio, 426 U.S. 610 (1976), in support of his argument. (ECF No. 129 at 261.) Carruthers did not specifically allege that the prosecutor's statement that Carruthers put on "no proof" violated his constitutional rights. Pursuant to Habeas Rule 2(c), that claim will not be considered.

Carruthers made similar arguments related to the prosecutor's comments on the credibility of his witnesses, "pitfalls," "mind games," not to succumb to a "guilt trip," and that there was a "gap" in the evidence. See Carruthers, 1999 WL 1530153, at *48. The Tennessee Court of Criminal Appeals did not believe that

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[59] The Sixth Circuit has applied a "two-step analysis to determine whether prosecutorial misconduct, including vouching, warrants habeas relief that asks: (1) whether the prosecutor's conduct was improper, and, if so, (2) whether the misconduct was flagrant." Wilson v. Bell, 368 F. App'x 627, 633 (6th Cir. 2010); Bates v. Bell, 402 F.3d 635, 641 (6th Cir. 2005). To determine whether an improper comment was sufficiently flagrant to warrant reversal, the Sixth Circuit has enumerated the following four factors for consideration: "(1) whether the conduct and remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the conduct or remarks were isolated or extensive; (3) whether the remarks were deliberately or accidentally made; and (4) whether the evidence against the defendant was strong." Macias v. Makowski, 291 F.3d 447, 452 (6th Cir. 2002) (internal quotation marks omitted).

these comments referred to Carruthers's failure to testify and did not require corresponding relief. Id. In Brecht, the Supreme Court stated that "we think Doyle error fits squarely into the category of constitutional violations which we have characterized as trial error" and is, therefore, subject to a harmless error analysis. 507 U.S. at 629 (internal quotation marks omitted). In Wogenstahl v. Mitchell, 668 F.3d 307, 331 (6th Cir. 2012), the Sixth Circuit held that while, "'[i]n general, it is improper for a prosecuting attorney in a criminal case to state his personal opinion concerning the credibility of witnesses or the guilt of the defendant,'" the prosecution's comments in the closing argument that the defendant was a liar, based on reasonable inferences from the evidence adduced at trial, are not improper and failed to prejudice the defendant.

Also relevant to Carruthers's claims is the Sixth Circuit's holding in Bedford v. Collins, 567 F.3d 225, 234 (6th Cir. 2009) (citations omitted), that "[n]othing prevents the government from appealing to the jurors' sense of justice or from connecting the point to the victims in the case." The prosecutor's expressions of pride in the victims' family members and that he would not solicit additional testimony from the victims' families were not improper or so flagrant as to render the trial fundamentally unfair.

The prosecution's closing argument, taken as a whole, does not make Carruthers's trial fundamentally unfair. The evidence was not misstated or manipulated. The Tennessee Court of Criminal Appeals' decision is not contrary to or an unreasonable application of clearly established Supreme Court precedent and is based on a reasonable determination of facts. Claim 21

is without merit. Summary judgment is GRANTED and Claim 21 is, therefore, DENIED.

### T. Jury Instructions (Claim 22, Amended Petition ¶¶ 445-46, & Claim 23, Amended Petition ¶¶ 447-48)

In Claim 22, Carruthers alleges that, in the guilt phase, the trial court provided unconstitutional jury instructions on "reasonable doubt," presumptions about witness testimony, intent, premeditation, and the elements of the offenses. (ECF No. 21 at 108-09.) In Claim23, Carruthers alleges that, at sentencing, the trial court gave unconstitutional jury instructions on finding aggravating circumstances beyond a reasonable doubt and the "heinous, atrocious, or cruel" aggravating circumstance. (Id. at 109-10.)

Respondent argues that the claims were not presented to the Tennessee state courts for review and are procedurally defaulted. (ECF No. 114-1 at 25-26; ECF No. 149 at 28.) Carruthers argues ineffective assistance of counsel as cause for the prejudicial default because the claims are arguably meritorious and counsel's failure to raise them constitutes deficient performance. (ECF No. 129 at 247-48, 261-70.)

Carruthers argues that, pursuant to Tenn. Code Ann. § 39-13-206(c), the Tennessee Supreme Court considered the merits of Claim 23 because it raised the possibility that his death sentence was arbitrary, excessive, or disproportionate. (Id. at 242.) He contends that the court expressly acknowledged that it performed this review, stating:

> In accordance with the mandate of Tenn. Code Ann. § 39-13-206(c) and the principles adopted in prior decisions, we have

> considered the entire record and conclude that the sentences of death imposed for Carruthers' three convictions of first degree murder were not imposed arbitrarily, that the evidence supports the jury's findings of the statutory aggravating circumstances, that the evidence supports the jury's finding that the aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt, and that the sentence is not excessive or disproportionate.

(Id. at 256.) Carruthers, 35 S.W.3d at 571-72.

The federal courts have rejected implicit-review theories based on the statutorily-mandated review that the Tennessee Supreme Court conducts pursuant to Tennessee Code Annotated § 39-13-206(c)(1) in capital cases. See, e.g., Miller v. Bell, 655 F. Supp. 2d 838, 869 (E.D. Tenn. 2009). The proposition that a claim has been exhausted because the Tennessee Supreme Court has to review significant errors is "too broad, as it would eliminate the entire doctrine of procedural bar in Tennessee in capital cases." Coe v. Bell, 161 F.3d at 336. In Zagorski, the Sixth Circuit rejected a petitioner's implicit-review argument that his claim was not procedurally defaulted because the Tennessee Supreme Court reviewed the record for "all possible claims" and found no reversible error. Zagorski v. Bell, 326 F. App'x 336, 342 (6th Cir. 2009), cert. denied, 559 U.S. 1068 (2010). The Sixth Circuit held that the record was examined for all issues raised and that those not presented remained defaulted. Id. The Sixth Circuit's acceptance of implicit-review theories has been limited to Eighth Amendment vagueness challenges. Webb v. Mitchell, 586 F.3d 383, 400 (6th Cir. 2009),

cert. denied sub nom. Webb v. Bobby, 559 U.S. 1076 (2010). Carruthers has only alleged an Eighth Amendment vagueness challenge related to the "heinous, atrocious, or cruel" ("HAC") aggravating circumstance during the sentencing phase. (See ECF No. 21 at 109-10, ¶ 448.2.) The Court rejects the implicit-review argument to demonstrate exhaustion for all the jury instructions except the claim related to the HAC jury instruction.[60] The remaining jury instruction claims were not exhausted in the state court.

As to the remaining unexhausted jury-instruction claims, Carruthers did not exhaust ineffective-assistance-of-counsel-claims related to these jury instructions in the state court. The Court has determined that Martinez does not establish cause and prejudice for these claims. (ECF No. 192 at 10, 27-30.) Carruthers has not otherwise demonstrated cause and prejudice. Carruthers has not demonstrated that a miscarriage of justice would result from the Court's failure to address these claims. Claims 22 and 23, with the exception of the Eighth Amendment vagueness aspects of the HAC jury instruction claim, are procedurally defaulted. Accordingly, summary judgment based on procedural default is GRANTED IN PART and DENIED IN PART as it relates to the HAC jury instruction.

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[60] Montgomery argued before the Tennessee Court of Criminal Appeals that the HAC jury instruction was improper because the court used the phrase "in that" instead of "and" the murder is especially heinous, atrocious, or cruel. See Carruthers, 1999 WL 1530153, at *57. Carruthers did not present this argument in the state court. Further, Montgomery's argument, which the state court rejected, differs from that presented in the habeas petition.

In Claim 23, Amended Petition ¶ 448.2, Carruthers alleges that the jury instruction on the statutory HAC aggravating circumstance was unconstitutionally vague,

> where "heinous" was defined as "grossly wicked or reprehensible, abominable, odious, vile," where "atrocious" was defined as "extremely evil or cruel, monstrous, exceptionally bad, abominable," and "cruel" was defined as "disposed to inflict pain or suffering, causing suffering, painful."

(ECF No. 21 at 109-10; see ECF No. 55-3 at PageID 2228-2229.[61]) He contends that because the jury found this aggravating circumstance based upon these vague definitions, the death sentence is unconstitutional. (ECF No. 129 at 270.)

The Eighth Amendment requires that a state's capital sentencing scheme "channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death." Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (footnotes and internal quotation marks omitted). A state's definition of aggravating circumstances must be sufficiently specific to avoid the arbitrary and capricious infliction of the death penalty.

In Godfrey, the United States Supreme Court determined that the aggravating circumstance that the offense "was outrageously or wantonly vile, horrible or

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[61] The jury charge was reported but not transcribed. (See ECF No. 55-9 at PageID 7625.)

inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim" was unconstitutionally vague. Id. at 422, 432-33.[62] The trial court's instructions to the jury did not elaborate on this aggravating circumstance and the jury recited that a death sentence was imposed because the murder was "outrageously or wantonly vile, horrible or inhuman." Id. at 426, 428-29. The Supreme Court, in reaching its decision that the jury's finding was not sufficiently specific, said:

> There is nothing in these few words [outrageously or wantonly vile, horrible and inhuman], standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of § (b)(7)'s terms.

Id. at 428-29; see also Maynard v. Cartwright, 486 U.S. 356, 359, 361-64 (1988) (a statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty).

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[62] Previously, the Supreme Court held that this statutory aggravating circumstance was not unconstitutional on its face. See Gregg v. Georgia, 428 U.S. 153, 201-07 (1976).

The Supreme Court held that a state satisfies the constitutional requirement that it limit sentencing discretion by adopting a constitutionally narrow construction of a facially vague aggravating circumstance, and by applying that construction to the facts of a particular case. Richmond v. Lewis, 506 U.S. 40, 46-47 (1992). In Bell v. Cone, 543 U.S. 447, 447-48 (2005) (per curiam), the Supreme Court addressed the question of whether the narrowing construction that the Tennessee Supreme Court applied was unconstitutionally vague. The Supreme Court concluded that the aggravating circumstance, as construed by the Tennessee Supreme Court, ensured that there was a "'principled basis' for distinguishing between those cases in which the death penalty was assessed and those cases in which it was not." Id. at 459. The Court held that the narrowing construction applied by the Tennessee Supreme Court satisfied constitutional demands. Id. at 459-60.

The Tennessee Supreme Court adopted a narrowing construction of the statutory HAC aggravating circumstance in State v. Williams, 690 S.W.2d at 517, 529-30 (Tenn. 1985). The trial court in Carruthers's case appropriately instructed the jury, using the definitions of "heinous," "atrocious," and "cruel" enunciated in Williams. The Sixth Circuit has found that the Williams narrowing construction is the same as that declared constitutional by the Supreme Court in Cone. See Payne v. Bell, 418 F.3d 644, 659-60 (6th Cir. 2005), cert. denied, 548 U.S. 908 (2006); see also Cauthern v. Colson, 736 F.3d 465, 488-89 (6th Cir. 2013) ("What law does exist with respect to Tennessee's HAC aggravator clearly supports the conclusion that the statute, with the limiting instructions given, is constitutional,

and the difference in language between the two versions of the statute was irrelevant to the determination."); Hall v. Bell, No. 2:06-CV-56, 2010 WL 908933, at *27-29 (E.D. Tenn. Mar. 12, 2010) (finding no ineffective assistance for failing to challenge the HAC aggravating circumstance); Sutton v. Bell, 645 F.3d 752, 760 (6th Cir. 2011) (same). Because the narrowing construction applied by the Tennessee Supreme Court provides specific and detailed guidance and makes the process of imposing a sentence of death subject to rational review, the claim that the HAC aggravating circumstance is unconstitutional is without merit.

The allegations in Claims 22 and 23 are either procedurally defaulted or without merit and, therefore, are DENIED.

### U. Extraneous, Improper Influences on the Verdict (Claim 24, Amended Petition ¶¶ 449-52)

Carruthers alleges that, during jury deliberations, one juror brought a Bible into the jury room and read it to his fellow jurors to convince them to convict Carruthers and sentence him to death. (ECF No. 21 at 110.) He also alleges that the trial court subjected the jurors to such oppressive sequestration conditions that, by the time deliberations "began[,] individual jurors agreed to vote with the majority who favored conviction and death simply to get out of the courthouse." (Id. at 111.) Respondent argues that the claim was not presented to the Tennessee state courts for review and is procedurally defaulted. (ECF No. 114-1 at 25-26; ECF No. 149 at 28.)

Carruthers did not exhaust his claim in the state courts and does not address this claim in response to

the Motion for summary judgment. Carruthers has not demonstrated cause and prejudice for the procedural default or that a miscarriage of justice would result from the Court's failure to address this claim. Claim 24 is procedurally defaulted. Summary judgment is GRANTED and Claim 24 is, accordingly, DENIED.

### V. Juror 121 (Claim 25, Amended Petition ¶¶ 453-54, and Claim 27, Amended Petition ¶¶ 459-61)

Carruthers alleges that Juror 121 led him to believe that no reason disqualified him from serving as a juror, but Juror 121 was his mother's neighbor and harbored ill feelings toward the Carruthers family. (ECF No. 21 at 110.) In Claim 27, he alleges that the trial court, after being provided information about Juror 121's misconduct, failed to hold a hearing on information that Juror 121 misled Carruthers to believe that there was no reason for the juror to be disqualified. (Id. at 111-12.)

Respondent argues that these claims were not presented to the Tennessee state courts for review and are procedurally defaulted. (ECF No. 114-1 at 25-26; ECF No. 149 at 28.) Carruthers does not address Claim 25 in response to the Motion for summary judgment. Carruthers argues ineffective assistance of counsel as cause for the prejudicial default of Claim 27 because the claim is arguably meritorious and counsel's failure to raise it constitutes deficient performance, and that the claim was fairly presented in the state courts and addressed on the merits. (ECF No. 129 at 242-43, 247-48, 271-73.)

The Tennessee Court of Criminal Appeals addressed Juror 121's post-conviction testimony:

> A member of the petitioner's anonymous jury, who was identified at trial by the number 121, testified that he was living at 2031 Pamela Drive in the Frayser community of Shelby County at the time he served on the petitioner's jury. He recalled that someone had run over his mailbox during the summer of 1992 but did not recall having reported the incident to the police or making a complaint to the police about a neighborhood party. He testified that he later learned that an elderly man from his church, who could not drive very well, had accidentally run into his mailbox. He said he did not remember recognizing any of the courtroom spectators as one of his neighbors and, although someone had mentioned that the petitioner's mother was present in the courtroom, he was never sure "which one she was."

Carruthers, 2007 WL 4355481, at *25. Juror 127, the jury foreperson, recalled that Juror 121 said he thought he recognized Carruthers's mother as living down the street from him. Id. at *33.

Jane and Terrance Carruthers, Tony Carruthers's mother and brother, testified about Juror 121:

> Jane Carruthers, the petitioner's mother, testified that in 1990 she purchased a home at 2013 Pamela Drive in the Frayser community, located two doors from the residence of Juror 121, where she lived until 1997. She stated that she was one of the first African-Americans to move into the predominantly white neighborhood and, as a result, felt intimidated. She was "nice and cordial to [her]

neighbors but . . . kept to [her]self." She testified that Juror 121 was unfriendly and would not answer her when she greeted him. In addition, he once accused her son, Terrance, of knocking over his mailbox. Ms. Carruthers also recalled that when she was hosting a welcome home party on the street to celebrate the petitioner's release from prison, someone in the neighborhood complained to the police.

Ms. Carruthers testified that she was not permitted to attend the jury selection process but was present every day of the petitioner's April 1996 trial. She said she recognized Juror 121 on the first day of trial and relayed the information to Patsy Weber, the jury specialist appointed to assist the petitioner, who told her that she would pass the information along to the judge. Ms. Carruthers testified that the trial judge mentioned the fact that Juror 121 was her neighbor at some point during the trial. However, she could not recall any of the particulars.

Terrance Roger Carruthers, the petitioner's brother, testified that he lived with his mother at 2013 Pamela Drive from 1990 until 1993 and first became familiar with Juror 121 when that juror called the police and accused him of running over his mailbox. He said that when the petitioner was released from prison in August 1993, his mother held a neighborhood fish fry that was attended by almost every resident on their street with the exception of Juror 121. During that event, someone called and complained to the police that the

> party was disturbing the peace. Because Juror 121 came out of his house when the police arrived, the witness believed that he was the person who had lodged the complaint.

Id. at *25.

Carruthers raised an ineffective-assistance-of-appellate-counsel claim about Juror 121 in the post-conviction appellate proceedings. Carruthers, 2007 WL 4355481, at *41, 44-48. The Tennessee Court of Criminal Appeals stated:

> b. Juror 121
>
> The petitioner next contends that appellate counsel should have raised as an issue on appeal the trial court's failure to inquire into the alleged bias of Juror 121. The petitioner argues that the trial court's failure to inquire into Juror 121's alleged bias was per se prejudicial and, in the alternative, that an unrebutted presumption of prejudice arose when Juror 121's potential bias was disclosed. The State responds that the petitioner cannot show that appellate counsel were deficient for failing to raise the issue or that their failure to raise the issue changed the outcome of the trial.
>
> During the trial, as we have set out, the petitioner's mother informed Patsy Weber, the jury consultant appointed to assist the petitioner, that she had recognized Juror 121 as her neighbor. Weber, in turn, advised the trial court, which made no response until approximately two days later, after closing argument was completed. At that point, the trial court

held a bench conference, attended by the petitioner, and stated the following:

> But before I dismiss the alternates I want to just let you know, not that it has necessarily raised any concern on my part, but since the jurors were anonymous, listed only by number, I got a phone call from Patsy Weber, who is the jury consultant for [the petitioner], and she told me that she got a call from [the petitioner's] mother indicating that one of the jurors apparently lives down the street from her. It's a man on the jury. And in her opinion, she doesn't know him personally. She's said hi to him before. He moved onto that street after [the petitioner] was off in custody, and so he would not have had a reason to see [the petitioner] on that street. He may or may not know who she is. She is not sure.

The trial court told the parties that the court had not heard anything from the juror "indicating that he knows her or realizes that she lives on the same street or anything of that sort." One of the prosecutors then expressed his opinion that the juror should not be voir dired on the subject since he had never indicated he knew the petitioner's mother and to question him about the relationship would only serve to draw his attention to the matter. The trial court agreed:

> THE COURT: Right. I don't have any reason to suspect that he has knowledge of this situation or that he has in any way

> been compromised as a juror. I just wanted to put it on the record so that you-all would know that I received this phone call.

At that point, one of codefendant Montgomery's counsel expressed his concern that a potential problem might arise at the penalty phase should the petitioner call his mother as a witness:

> [CODEFENDANT'S COUNSEL]: My only concern, Judge, is if we end up in stage two and [the petitioner] should call his mother to the stand to testify, then where does that put us? That's the only question. By then the alternate will be gone, and then what? That's the only concern that I would have.
>
> THE COURT: Well, that's a valid point, although based on what Ms. Weber told me, and my only observation on that is, based on what she said, [the petitioner's] mother indicated that they didn't know each other personally and . . . he may not even recognize her. They have waved from time to time. But she told Ms. Weber, these are Ms. Weber's exact words, that, "The neighbors on that street are not close, they don't socialize or fraternize or get together, and so it's not a friendship or any relationship of that sort."
>
> So I think it's a valid point you raised. I don't think it is. I'm still not concerned enough to go further with it. So I just wanted–

> [THE STATE]: I think they have all taken an oath to judge the case on law and evidence, and it would be akin to one of those situations where most of the parties and jurors are at least acquainted with one another.
>
> [THE STATE]: When did Ms. Weber bring this up?
>
> THE COURT: She brought it up a couple of days ago, but in any event.
>
> [THE STATE]: Well, he hasn't mentioned anything.
>
> THE COURT: No, no one has.
>
> [THE STATE]: Let's just go forward.
>
> THE COURT: All right. Okay. Bring in the jury, please.

None of the parties requested to voir dire the juror about the issue, and none raised any further objections to the juror's continued presence on the jury. During the penalty phase of the trial, however, counsel for Montgomery informed the trial court that they had just learned that Juror 121 lived only two doors down from Ms. Carruthers and thus were moving for a mistrial. The trial court denied their request based on the fact that no evidence had been presented to suggest that Juror 121 was prejudiced against the petitioner or his family.

Citing Ricketts v. Carter, 918 S.W.2d 419 (Tenn. 1996), the petitioner first argues that the trial court had an affirmative duty to voir

dire Juror 121 about his relationship with the petitioner's family regardless of whether voir dire was requested by the parties. The State responds that the trial court was under no affirmative duty to conduct an independent voir dire of the juror because, unlike the situation in Ricketts, there was nothing in the information presented to the trial court that raised any question of the juror's impartiality.

. . . .

We agree with the State that Ricketts is inapposite to the case at bar. The information imparted to the trial court by Ms. Weber, that the petitioner's mother had recognized Juror 121 as her neighbor but did not know if he recognized her, was not enough to raise a question as to the impartiality of Juror 121. The record is clear that, at that time, there were no allegations that Juror 121 disliked the petitioner's mother or had called the police to complain about various activities of the petitioner's family members. Without more, the trial court was under no affirmative duty to independently voir dire the juror.

The petitioner also contends that the information that Juror 121 lived on the same street as the petitioner's mother raised a presumption of prejudice which was not rebutted by the State. Again, we disagree.

Challenges to juror qualifications generally fall into two categories: propter defectum or propter affectum. Carruthers v. State, 145 S.W.3d 85, 94 (Tenn. Crim. App. 2003).

General disqualifications such as alienage, family relationship, or statutory mandate are classified as propter defectum, "on account of defect," and must be challenged before the return of a jury verdict. Id. (citing State v. Akins, 867 S.W.2d 350, 355 (Tenn. Crim. App. 1993)). However, an objection based upon bias, prejudice, or partiality is classified as propter affectum, "on account of prejudice," and may be made after the jury verdict is returned. Id. (citing Akins, 867 S.W.2d at 355). "Where a juror is not legally disqualified or there is no inherent prejudice, the burden is on the Defendant to show that a juror is in some way biased or prejudiced." State v. Caughron, 855 S.W.2d 526, 539 (Tenn. 1993) (citing Bowman v. State, 598 S.W.2d 809, 812 (Tenn. Crim. App. 1980)).

In Akins, this court addressed the issue of a juror's failure to disclose information reflecting potential bias or partiality and stated as follows:

> We hold that when a juror's response to relevant, direct voir dire questioning, whether put to that juror in particular or to the venire in general, does not fully and fairly inform counsel of the matters which reflect on a potential juror's possible bias, a presumption of bias arises. While that presumption may be rebutted by an absence of actual prejudice, the court must view the totality of the circumstances, and not merely the juror's self-serving claim of lack of partiality, to

> determine whether the presumption is overcome.

867 S.W.2d at 357. The court also stated that the "integrity of the voir dire process depends upon the venire's free and full response to questions posed by counsel. When jurors fail to disclose relevant . . . information, counsel are hampered in the jury selection process. As a result, the defendant's right to trial by a fair and impartial jury is significantly impaired." Id. This presumption of bias, however, may be dispelled by an absence of actual favor or partiality by the jury. Id. at 355. The petitioner bears the burden of providing a prima facie case of bias or partiality. Id.

Even without a showing of actual bias, a juror's failure to truthfully answer questions about the juror's association with a party, a witness, or one of the attorneys may raise a presumption of bias. In Tennessee Farmers Mutual Ins. Co. v. Greer, 682 S.W.2d 920, 923 (Tenn. Ct. App. 1984), the potential jurors were asked on voir dire if they or any members of their families knew or were related to any of six named witnesses. No potential juror gave an audible answer to the question. During the course of the trial, the chancellor became aware that one of the jurors was familiar with a witness because her son worked with him, but the chancellor did not inform the attorneys of this fact. On appeal, the court of appeals noted that deliberate withholding of information amounts to false swearing and raises a presumption of bias and partiality.

Id. at 924. The appellate court concluded that the trial court committed reversible error by not informing the attorneys about the juror's relationship to the witness and by failing to take whatever action was necessary to insure a fair and impartial jury. Id.

In this case, by contrast, there was no allegation that Juror 121 failed to disclose any association with the petitioner's family during voir dire or that any question was asked that should have triggered such a response from him. Indeed, the petitioner's mother testified that she was not even present during voir dire. Furthermore, there was no proof that Juror 121 knew or recognized the petitioner. The trial court relayed the information regarding Ms. Carruthers' identification of Juror 121 as a neighbor to all the parties, including the petitioner, during the bench conference prior to jury deliberation. The petitioner neither requested to voir dire Juror 121 nor raised any objection to his continued presence on the jury.

During the post-conviction hearing, Juror 121 denied knowing Ms. Carruthers. Arguably, this testimony was impeached by Juror 127, who stated that Juror 121 told her during the trial that he thought he recognized the petitioner's mother. Juror 127 testified, however, that Juror 121 did not say anything negative about the petitioner's mother and never indicated that he knew the petitioner. While the petitioner's family made numerous allegations that Juror 121 had accused them of

> wrongdoing in the neighborhood, Juror 121 testified that he could not recall having ever called the police to complain about either a neighborhood party or someone's having run over his mailbox during the summer of 1992. Juror 121, in fact, testified that he later learned that an elderly member of his church had accidentally hit the mailbox while driving down his street. In sum, the proof did not establish that Juror 121 knew the petitioner or was biased against him or his family. The fact that a juror knows a family member of a defendant fails, by itself, to establish bias or partiality. As this court has recognized in a similar case, "Tennessee courts have routinely refused relief in post-verdict propter affectum challenges in cases where there was a casual relationship not disclosed during voir dire or the record failed to reveal an inherently prejudicial relationship or a false answer." State v. Joseph Angel Silva, III, No. M2003-03063-CCA-R3-CD, 2005 WL 1252621, at *6 (Tenn. Crim. App. May 25, 2005), perm. to appeal denied (Tenn. Oct. 17, 2005) (citations omitted). We conclude, therefore, that the record supports the determination of the post-conviction court that the petitioner has not met his burden of showing that appellate counsel were ineffective in not raising this issue on appeal.

Carruthers, 2007 WL 4355481, at *44-48.

The Tennessee Court of Criminal Appeals addressed the merits of Claims 25 and 27 in the context of the ineffective-assistance-of-appellate-counsel

claim. Therefore, the claim is exhausted. Summary judgment based on procedural default is DENIED.

The Court must now review the claim based on the merits. Carruthers argues that Judge Dailey abdicated his affirmative duty to voir dire Juror 121, denying Carruthers of the right to an impartial jury under Irvin v. Dowd, 366 U.S. 717, 722 (1981). (ECF No. 129 at 229, 271.) He asserts that, under United States v. Rigsby, 45 F.3d 120, 124-25 (6th Cir. 1995), and United States v. Corrado, 227 F.3d 528, 536 (6th Cir. 2000), there is a duty to investigate credible allegations of bias to ensure that constitutional rights are not violated, even when a defendant does not expressly request a hearing at trial. (Id. at 229-230, 271.) Carruthers argues that the close proximity of Juror 121 to Carruthers's family "presents a breeding ground for potential bias." (Id. at 230.) He asserts that when the juror is not impartial or indifferent under Remmer v. United States, 347 U.S. 227, 229-30 (1954), the trial court must hold a hearing. (Id. at 271.) Respondent asserts that the state court's determination of the ineffective-assistance-of-appellate-counsel claim related to Juror 121, which encompasses this claim, is neither contrary to nor an unreasonable application of clearly established federal law and based on a reasonable determination of facts. (ECF No. 149 at 31.)

Remmer addresses "private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury." 347 U.S. at 229. Further, juror impartiality does not require ignorance of the facts and issues involved. See Irvin, 366 U.S. at 722. There is no evidence of communication, contact, or tampering with Juror 121, and no evidence of juror bias. The Tennessee Court of

Criminal Appeals' determination is not contrary to or an unreasonable application of clearly established Supreme Court precedent and is based on a reasonable determination of facts. Summary judgment is GRANTED. Claims 25 and 27 are without merit and, accordingly, DENIED.

### W. Jurors 120 and 127 (Claim 26, Amended Petition ¶¶ 455-58)

Carruthers alleges that Jurors 120 and 127 were related to each other and to prosecutor Harris. (ECF No. 21 at 111.) Carruthers asserts that the jurors were harassed and pressured into withholding from Carruthers that they are related to Harris and committed misconduct by misleading Carruthers into believing that there was no reason to disqualify them. (Id.)

Respondent argues that this claim was not presented to the Tennessee state courts and is procedurally defaulted. (ECF No. 114-1 at 25-26.) Carruthers asserts ineffective assistance of counsel as cause for the failure to exhaust this claim. (ECF No. 129 at 247-248, 271.) Carruthers does not address his claims related to jurors 120 and 127[63] specifically; he merely states that the trial court was required to hold a Remmer hearing. (Id. at 271.) Carruthers did not have counsel at trial, and he did not exhaust an ineffective-assistance-of-counsel claim related to this issue. Ineffective assistance of counsel cannot establish cause for the failure to exhaust this claim. Carruthers has not demonstrated cause and prejudice or that a

[63] Juror 127 testified in the post-conviction proceedings about security at trial and about Juror 121. Carruthers, 2007 WL 4355481, at *33, 48. Juror 127 did not testify about being related to Harris. (ECF No. 56-7 at PageID 11247-11254.)

miscarriage of justice would result from the Court's failure to consider the claim. Claim 26 is procedurally defaulted. Summary judgment is GRANTED. Claim 26 is, therefore, DENIED.

### X. Unconstitutional Exclusion of Persons from the Courtroom (Claim 28, Amended Petition ¶¶ 462-74)

Carruthers alleges that the trial court denied him an open and public trial when it excluded certain persons from the courtroom. (ECF No. 21 at 112.) During voir dire, because of limited space, no one but potential jurors were permitted in the courtroom until the jury was selected. (Id.) Carruthers alleges that the court gave no notice, did not allow an opportunity to comment, or propose or suggest alternatives, and did not conduct a hearing on the closing of the courtroom. (Id.) Carruthers alleges that his mother and other family members were completely excluded from the jury selection process. (Id. at 112-13.) He asserts that the trial court limited his access to his investigator and jury consultant during voir dire. (Id. at 113.) He alleges that the sentencing on his non-capital offenses occurred at Riverbend Maximum Security Institution and was not open to the public or convenient for the citizens of Memphis, including his family and friends. (Id.) He complains about ex parte meetings held in chambers prior to trial without a record. (Id.) He asserts that the denial of his Sixth Amendment right to counsel was punitive, and as such the use of in camera, ex parte proceedings also violated his Sixth Amendment right to a public trial. (Id. at 113-14.)

Respondent argues that these claims were not presented to the Tennessee state courts for review and

are procedurally defaulted. (ECF No. 114-1 at 25-26; ECF No. 149 at 28.) Carruthers argues ineffective assistance of counsel as cause for the prejudicial default of Claim 28 because the claim is arguably meritorious and counsel's failure to raise it constitutes deficient performance. (ECF No. 129 at 247-48, 271-72.) He asserts that the Supreme Court in In re Oliver, 333 U.S. 257, 273 (1948), made it clear that the right to a public trial extends to defendants prosecuted in state courts. (Id. at 271.) Relying on Waller v. Georgia, 467 U.S. 39, 45 (1984), he argues that a trial court may close its courtroom during a criminal proceeding "only upon articulating an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." (Id. at 271-72.) Carruthers contends that Judge Dailey identified no interest that overrode his right to a public trial and, through Judge Dailey's choice to hold proceedings against Carruthers out of the public's presence, violated his Sixth Amendment rights. (Id. at 272.)

Carruthers did not exhaust this claim or the related ineffective-assistance-of-counsel claim upon which he relies to establish cause in the state courts, see supra p. 31. The Court has determined that Martinez does not establish cause and prejudice for ht procedural default. (ECF No. 192 at 10, 27-30.) Carruthers has not otherwise established cause and prejudice or demonstrated that a miscarriage of justice would result from the Court's failure to address this claim.[64] Claim 28 is procedurally defaulted. Summary

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[64] The Court notes that, prior to Presley v. Georgia, 558 U.S. 209 (2010), there was no clearly established Supreme Court

judgment is GRANTED and Claim 28 is, therefore, DENIED.

### Y. Sentencing in Carruthers's Absence (Claim 29, Amended Petition ¶¶ 475-78)

Carruthers alleges that, on May 29, 1996, the trial court held a sentencing hearing, heard evidence and argument on the convictions for especially aggravated kidnapping and especially aggravated robbery, and imposed a forty-year sentence for each conviction in his absence. (ECF No. 21 at 114.) Carruthers asserts that this claim is not subject to the strictures of 28 U.S.C. § 2254(d). (ECF No. 129 at 209, 211.) He argues that he had an "unqualified" due process right to be present at his non-capital sentencing proceeding that cannot be waived absent a showing of knowing, voluntary, and intelligent waiver of the right to be present. (Id. at 223.) He contends that the Tennessee Supreme Court denied relief on this claim without meeting the exacting standard for waiver, but based on hearsay statements from the prison warden that Carruthers did not want to attend. (Id.) Carruthers's actual concerns were about being restrained at the hearing. (Id.) He argues that the Tennessee Supreme Court's decision was an unreasonable application of Snyder v. Massachusetts, 291 U.S. 97, 105-06, 108 (1934), overruled in part by Malloy v. Hogan, 378 U.S. 1 (1964); United States v. Gagnon, 470 U.S. 522 (1985) (per curiam); and Johnson v. Zerbst, 304 U.S. 458, 464 (1938). (Id.)

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precedent concerning partial courtroom closures. See Sowell v. Sheets, No. 2:09-CV-1089, 2011 WL 4914911, at *17 (S.D. Ohio Oct. 14, 2011). Therefore, there was no Supreme Court precedent in place to guide the trial court in its ruling.

The Tennessee Supreme Court stated:

Sentencing: Non-Capital Offenses

Citing state and federal constitutional provisions and Tennessee Rule of Criminal Procedure 43, Carruthers next contends that his right to be present at a crucial stage of his criminal proceeding was violated when the trial judge conducted the sentencing hearing on his convictions for especially aggravated robbery and especially aggravated kidnapping in his absence. The State responds that Carruthers waived his right to be present because he was voluntarily absent from the sentencing hearing. We agree.

The record reflects that immediately after the sentencing verdict was rendered on the capital offenses, the trial judge announced that the sentencing hearing for the non-capital offenses would be held on May 20, 1996. Carruthers was present when this announcement was made. The trial judge was prepared to proceed with the sentencing hearing on that date. Because of a misunderstanding about which law enforcement agency was responsible for transporting the defendants from the prison facility outside of Nashville to Memphis, neither Carruthers nor Montgomery were present in court. The hearing was rescheduled for May 28, 1996, but the trial judge announced that day that because of security concerns the hearing would be held the next day, May 29, 1996, at the Riverbend Maximum Security Institution in Nashville where Carruthers and Montgomery were

incarcerated. The defendants were not present in court when this announcement was made, and the record does not indicate that the defendants were personally notified of the change in date and location of the sentencing hearing. Counsel for Montgomery and the attorneys appointed to represent Carruthers on the new trial motion and on appeal previously had been advised at a meeting in chambers of the trial court's decision to hold the hearing at Riverbend.

When the trial judge convened the hearing at Riverbend the next day, Carruthers and Montgomery refused to attend or participate although they were present in a holding room approximately twenty to thirty feet from the hearing room. Warden Ricky Bell informed the trial court that defendant Carruthers was refusing to participate. Counsel informed the trial judge that despite a lengthy conference in which he had been advised to appear Montgomery also was refusing to appear, purportedly because of the presence of media personnel. The trial judge recessed the hearing to allow counsel to confer with Montgomery and to allow Warden Bell to confer with Carruthers and to inform him that the restraints would be removed if he decided to participate in the sentencing hearing.

When the hearing resumed, Warden Bell announced that Carruthers understood his restraints would be removed, but he was still refusing to attend or participate in the hearing. Carruthers had provided no explanation for

his refusal. Counsel for Montgomery reported that he also was still refusing to attend or participate and that he was objecting to the hearing because it was not being held in a public place. Warden Bell was sworn and testified about his conversation with Carruthers, including Carruthers' refusal to attend despite assurances that his restraints would be removed. Following Warden Bell's testimony, the trial judge observed that he had two options:

> to drag them out here against their will, kicking and screaming, and strap them down to a chair and force them to sit here. Or allow them to remain in the holding room and go forward with the proceedings in their absence. And I think that the wiser course, the more prudent course, the course that the law would suggest be taken is the latter. We are going to proceed in their absence, since they have both voluntarily elected to absent themselves from these proceedings. If an individual were allowed to delay or disrupt proceedings simply by stating that he did not want to be present, then the entire judicial system would grind to a halt very quickly.

Noting that "a full and complete" sentencing hearing had already been held in conjunction with the murder convictions and that any additional witnesses would likely be "cumulative witnesses to what has already been testified to at the first sentencing hearing," the

trial judge decided to proceed with the sentencing hearing.

The State called one witness, an employee of the Shelby County Criminal Court Clerk's Office, who testified that Carruthers had pled guilty to two counts of aggravated assault in 1990 and had been sentenced to ten years and five years on those convictions. The State also relied upon the evidence adduced at both the guilt and sentencing phases of trial and the pre-sentence report prepared as to each defendant.

Following the State's proof, the trial court once again took a recess to allow counsel to confer with Montgomery to determine if he had decided to participate in the hearing and to enable Warden Bell to speak with Carruthers and advise him that he could testify if he so desired.

. . . .

Warden Bell returned after what was his third conversation with Carruthers and again advised the trial judge that he still was refusing to attend or participate in the hearing. Following argument, the trial judge imposed a forty-year sentence on each of the four convictions for each defendant and ordered that two of the sentences for especially aggravated kidnapping run concurrent to the other sentences and to the death penalty, with all other sentences running consecutive to each other and to the death penalty.

Initially we acknowledge that the right of a criminal defendant to be present at all critical stages of a criminal proceeding derives from several sources, including both the federal and state constitutions. See United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 1484, 84 L. Ed. 2d 486 (1985) ("The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, . . . but we have recognized that this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him."); State v. Muse, 967 S.W.2d 764, 766 (Tenn. 1998) ("Article I, § 9 of the Tennessee Constitution provides that 'the accused hath the right to be heard by himself and his counsel.' The 'right to be heard by himself' requires the presence of the defendant during the entire trial.").

In addition to constitutional protection, the right of a criminal defendant to be present at critical stages of a criminal proceeding also is protected by Tennessee Rule of Criminal Procedure 43(a), which provides:

> Unless excused by the court upon defendant's motion, the defendant shall be present at arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(Emphasis added.)

Like many other constitutional and statutory rights, however, the right to be present may be waived by a criminal defendant. See Muse, 967 S.W.2d at 764. Voluntary absence after the trial has commenced or disruptive in-court behavior may constitute waiver of the right to be present. Id. at 767. With respect to waiver by voluntary absence, Tenn. R. Crim. P. 43(b) provides in relevant part:

> (b)The further progress of the trial to and including the return of the verdict and imposition of sentence shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present:
>
> > (1) voluntarily is absent after the trial has commenced (whether or not he or she has been informed by the court of the obligation to remain during the trial). . . .
> >
> > (2) . . . If a trial proceeds in the voluntary absence of the defendant . . . he or she must be represented in court by competent counsel. . . .

Construing subsection (b) only seven years after Rule 43 was adopted, the Court of Criminal Appeals explained that

> [a]n accused who has notice of the time and place of the trial and of his right to attend, and who nonetheless voluntarily absents himself, will be deemed to have waived his right to be present.

> [T]he court should indulge every reasonable presumption against a waiver. Counsel should be given a reasonable opportunity to locate his client, and there should be affirmative evidence that the accused was informed of his trial date. We think it is wise to take special precautions when a defendant fails to appear on the date set for trial and to require a high standard of proof that the defendant knew his trial date and that his absence is voluntary. Trial in his absence is not favored, and proceeding with trial only to find later that defendant did not know his trial date or did not voluntarily absent himself would run counter to the purposes expressed in [Tenn. R. Crim. P.] 2. Mere absence at the time the case is called for trial is insufficient to show a waiver of the right to be present.

State v. Kirk, 699 S.W.2d 814, 819 (Tenn. Crim. App. 1985); see also Muse, 967 S.W.2d at 767 (quoting and approving of this analysis from Kirk). Applying this analysis, the Court of Criminal Appeals in Kirk concluded that the defendant had waived his right to be present when he escaped from custody after he had appeared in court and had been advised of the date on which his trial would begin. See Kirk, 699 S.W.2d at 819.

Two years ago in Muse this Court applied the Kirk analysis in a case in which the defendant did not appear for jury selection proceedings because he was not aware that the trial judge

had rescheduled the proceedings at the request of defense counsel. Concluding that Muse had been deprived of his right to be present at jury selection and that the deprivation constituted prejudice to the judicial process, this Court reversed his conviction and remanded for a new trial. See Muse, 967 S.W.2d at 768.

For purposes of this appeal, we have accepted Carruthers' contention that he had both a constitutional right to be present and a right to be present under Tenn. R. Crim. P. 43(a), and we have concluded that Carruthers waived those rights. Carruthers was aware a sentencing hearing would be held, and he was present when the hearing initially was scheduled. While the hearing did not occur on the date originally scheduled, the hearing was held on May 29, a delay of only nine days. The record does not reflect exactly when Carruthers became aware that the hearing would be held at Riverbend on May 29, but there is no doubt that he was aware a hearing was about to be held when he was in the holding area near the public hearing room.

This is not a case where waiver was presumed from Carruthers' mere absence at the time the sentencing hearing convened. The trial judge made every effort to persuade Carruthers to attend the hearing. On three separate occasions, the trial judge instructed Warden Bell to confer with Carruthers and attempt to persuade him to appear. On each of those occasions, the record reflects that

Warden Bell assured Carruthers his restraints would be removed and emphasized his right to make a statement at the hearing. Under these circumstances, we have no hesitation in concluding that Carruthers waived his right to be present at sentencing.

Finally, pointing to Tenn. R. Crim. P. 43(b)(2), which provides that "[i]f a trial proceeds in the voluntary absence of the defendant, . . . he or she must be represented in court by competent counsel," the defendant argues that even if he waived his right to be present, he is entitled to a new sentencing hearing because the trial judge did not appoint competent counsel to represent him.

Without question, the scenario that arose in this case is uncommon. In most instances, a voluntarily absent criminal defendant will already be represented by counsel and therefore will continue to be represented by counsel in proceedings that occur in his or her absence. Here, because the defendant had forfeited his right to counsel, there was no attorney present to represent him in the sentencing hearing.

In our view, the decision of whether or not to appoint counsel to represent a voluntarily absent defendant who previously has forfeited his right to counsel should be determined by the trial court on a case-by-case basis. The trial court is most familiar with the case and is in the best position to determine if an attorney should be appointed. Appellate courts should defer to the trial court's decision on this issue unless the record demonstrates a

> clear abuse of discretion. Cf. Small, 988 S.W.2d at 674.
>
> The trial judge concluded that appointment of counsel was unnecessary. The proof presented by the State was, as the trial judge found, largely cumulative to the proof already presented at the sentencing hearing on the murder convictions. There is nothing in the record to suggest that Carruthers had intended to offer any additional proof at the sentencing hearing. Even on appeal, Carruthers' attorneys have not pointed to proof that would have been presented had Carruthers been present or represented by counsel at the hearing. They simply assert that "the trial judge presumed that Carruthers would have offered the same proof" as that offered at the capital sentencing hearing and state, "[w]hether or not this is true, we will never know." Given the circumstances of this case, we conclude that the trial court did not abuse its discretion in failing to appoint counsel to represent Carruthers when he was voluntarily absent from the sentencing hearing.

Carruthers, 35 S.W.3d at 565-69.

Respondent argues that the record reflects that Carruthers refused to attend the sentencing hearing and waived his right to be present. (ECF No. 114-1 at 26.) Respondent asserts that the Tennessee Supreme Court's determination of this issue is not contrary to or an unreasonable application of clearly established Supreme Court precedent and is based on a reasonable determination of facts in light of the evidence presented. (Id.)

A defendant, even in situations where the defendant is not actually confronting witnesses or presenting evidence, has a due process right "to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." Snyder, 291 U.S. at 105-06. A defendant is guaranteed the right to be present in a criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure. Kentucky v. Stiner, 482 U.S. 730, 745 (1987). The right to be present at all stages of criminal trial is not absolute and subject to waiver. See Gray v. Moore, 520 F.3d 616, 622 (6th Cir. 2008) (the right is not absolute when a defendant engages in speech and conduct that is noisy, disorderly or disruptive); see also Gagnon, 470 U.S. at 528 (a defendant's failure to invoke his right to be present at a hearing he knows is taking place constitutes waiver of the right). A trial court may find a defendant's absence to be voluntary and an effective waiver of his right to be present even without a showing that the defendant knew or had been expressly warned by the trial court that the trial would continue in his absence. Taylor v. United States, 414 U.S. 17, 19-20 (1973) (per curiam); see Diaz v. United States, 223 U.S. 442, 455 (1912) (A criminal defendant's voluntary absence from a trial on a non-capital offense constitutes a waiver of his right to be present). A colloquy on the record is not required to establish a knowing waiver of defendant's right to be present during critical stages of trial. United States v. Riddle, 249 F.3d 529, 534-35 (6th Cir. 2001).

In the instant case, Carruthers was present and waiting just outside the courtroom. His refusal to appear, even if it was because he did not want to wear

restraints, constitutes waiver. See Amaya-Ruiz v. Stewart, 121 F.3d 486, 495-96 (9th Cir. 1997) (defendant's complaints and refusal to be shackled in courtroom for a capital sentencing hearing constituted waiver of the right to be present). The Tennessee Supreme Court cited the correct Supreme Court precedent in Gagnon. Carruthers, 35 S.W.3d at 567. The Tennessee Supreme Court's decision was not contrary to or an unreasonable application of clearly established Supreme Court precedent or based on an unreasonable determination of fact in light of the evidence presented. Claim 29 is without merit. Summary judgment is GRANTED and Claim 29 is, accordingly, DENIED.

### Z. Improper Judicial Fact-Finding in Sentencing (Claim 30, Amended Petition ¶¶ 479-84)

Carruthers alleges that the trial court's findings of fact violated his Sixth and Fourteenth Amendment rights. (ECF No. 21 at 114.) He alleges that the trial court found the following enhancement factors to sentence him to forty years on each of the non-capital convictions:

- a previous history of criminal behavior;
- a victim was treated with exceptional cruelty;
- the crime involved a high degree of risk to human life;
- Carruthers had previously been convicted of a violent felony;
- he committed the crime while on parole; and
- he exhibited no remorse.

(Id. at 114-15.) Carruthers alleges that the court's finding that he was a dangerous offender with an extensive criminal history caused it to run the sentences consecutively. (Id. at 115.)

Respondent argues that the claim is procedurally defaulted and without merit because it is not cognizable on collateral review due to its non-retroactivity. (ECF No. 114-1 at 26.) See Humphress v. United States, 398 F.3d 855 (6th Cir. 2005). Carruthers asserts that procedural default does not entitle Respondent to summary judgment because he fails to carry his burden and does not explain the basis for his belief that the claim is procedurally defaulted. (ECF No. 129 at 230.) In reply, Respondent asserts that the claim was not raised to the Tennessee Court of Criminal Appeals and the opportunity to do so has passed. (ECF No. 140 at 29.)

Carruthers did not exhaust his claim in the state courts. The Court has determined that Martinez does not establish cause and prejudice for procedural default. (ECF No. 192 at 11, 27-30.) Carruthers has not otherwise demonstrated cause and prejudice for the procedural default or that a miscarriage of justice would result from the Court's failure to address this claim. Claim 30 is procedurally defaulted. Summary judgment is GRANTED and Claim 30 is, therefore, DENIED.[65]

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[65] The Court finds it unnecessary to address the merits of Carruthers's Apprendi/Blakely argument, including the non-retroactivity argument (see ECF No. 129 at 274-75) because the claim is procedurally defaulted.

**AA. Insufficient Evidence (Claim 31, Amended Petition ¶¶ 485-86)**

Carruthers asserts that no rational trier of fact, viewing the evidence in the light most favorable to the State, would have found beyond a reasonable doubt that he was guilty of the crimes charged. (ECF No. 21 at 116.) The Tennessee Supreme Court stated:

> Carruthers argues that the witnesses against him were not credible and that the State relied too heavily on the testimony of convicted felons. . . .
>
> The proper inquiry for an appellate court determining the sufficiency of evidence to support a conviction, is whether, considering the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999). "A guilty verdict by the jury, approved by the trial court, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the prosecution's theory." State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Questions about the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this Court does not reweigh or reevaluate the evidence. Id. Nor may this Court substitute its inferences drawn from circumstantial evidence for those drawn by the trier of fact. See Liakas v. State, 199

Tenn. 298, 305, 286 S.W.2d 856, 859 (1956). The standard for appellate review is the same whether the conviction is based upon direct or circumstantial evidence. See State v. Vann, 976 S.W.2d 93, 111 (Tenn. 1998). A conviction may be based entirely on circumstantial evidence where the facts are "so clearly interwoven and connected that the finger of guilt is pointed unerringly at the Defendant and the Defendant alone." State v. Smith, 868 S.W.2d 561, 569 (Tenn. 1993) (quoting State v. Duncan, 698 S.W.2d 63, 67 (Tenn. 1985)). A verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, and on appeal the defendant has the burden of illustrating why the evidence is insufficient to support the verdict rendered by the jury. Id.; see also State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). In contrast, the State on appeal is entitled to the strongest legitimate view of the trial evidence and all reasonable and legitimate inferences which may be drawn from the evidence. See Hall, 8 S.W.3d at 599; Bland, 958 S.W.2d at 659.

At the time this offense was committed, first degree murder was defined as an "intentional, premeditated and deliberate killing of another." Tenn. Code Ann. § 39-13-202(a)(1)(1991). "Intentional" is defined as the "conscious objective or desire to engage in the conduct or cause the result." Tenn. Code Ann. § 39-11-106(a)(18) (1991). Premeditation, on the other hand, requires "the exercise of reflection and judgment." Tenn. Code Ann.

§ 39-13-201(b)(2) (1991). Finally, deliberation requires proof of a "cool purpose" that includes some period of reflection during which the mind is free from passion and excitement. See Tenn. Code Ann. § 39-13-201(b)(1) (1991).

The elements of premeditation and deliberation are questions of fact to be resolved by the jury. See Bland, 958 S.W.2d at 660. These elements may be established by proof of the circumstances surrounding the killing. Id.; see also State v. Brown, 836 S.W.2d 530, 539 (Tenn. 1992). As we stated in Bland, there are several factors which tend to support the existence of these elements including: the use of a deadly weapon upon an unarmed victim; the particular cruelty of the killing; declarations by the defendant of an intent to kill; evidence of procurement of a weapon; preparations before the killing for concealment of the crime; and calmness immediately after the killing. See State v. Pike, 978 S.W.2d 904, 914 (Tenn. 1998); Bland, 958 S.W.2d at 660; Brown, 836 S.W.2d at 541-42; State v. West, 844 S.W.2d 144, 148 (Tenn. 1992).

Having reviewed the proof in the light most favorable to the State, as we are required to do, we agree with the Court of Criminal Appeals that the evidence is legally sufficient to support the jury's verdicts as to each defendant. The trial proof has been thoroughly and fully summarized. With respect to Carruthers' challenges to the State's witnesses, suffice it to say that, through cross-examination, the jury was made aware that some of

> the witnesses had prior felony records, that some of the witnesses admitted to past drug dealing, and that some of the witnesses had given inconsistent statements to the police regarding the events of February 24 and 25, 1994. However, the jury resolved these issues of credibility in favor of the State, and an appellate court may not reconsider the jury's credibility assessments. . . . In our view, the evidence is legally sufficient.

Carruthers, 35 S.W.3d at 557-58.

Respondent asserts that the Tennessee Supreme Court's decision is not contrary to or an unreasonable application of the clearly established Supreme Court precedent and is based on a reasonable determination of the facts in light of the evidence presented. (ECF No. 114-1 at 26.) He further asserts that to the extent Carruthers has presented new facts in his petition that he relies on, those facts are defaulted. (Id. at 26-27; ECF No. 149 at 129-30.)

Carruthers asserts that this claim is not subject to the strictures of 28 U.S.C. § 2254(d) and that Respondent is not entitled to summary judgment. (ECF No. 129 at 209-10, 213, 223-25.) He asserts that there was no physical evidence connecting him to the murders or establishing by inference or circumstance any of the elements of Tenn. Code Ann. § 39-13-302. (Id. at 224-25.) The witnesses had not seen the deaths and could not address Carruthers's direct involvement. (Id. at 225.) Carruthers argues that the witnesses consisted of

> a parade of people who provided some small bits of information with little apparent

> relationship to Mr. Carruthers, along with a number of big-time drug dealers who themselves were potentially involved in the case in some way, and informants who appeared out of nowhere to add a piece here, a piece there, to a theory crafted by the prosecution.

(Id.) He contends that a "rational juror . . . would have had more questions and doubts than answers." (Id.)

In Jackson v. Virginia, 443 U.S. 307, 324 (1979), the Supreme Court held that, "in a challenge to a state criminal conviction brought under 28 U.S.C. § 2254 — if the settled procedural prerequisites for such a claim have otherwise been satisfied — the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." This standard requires a federal district court to examine the evidence in the light most favorable to the State. Id. at 326 ("[A] federal habeas corpus court faced with a record of conflicting facts that supports conflicting inferences must presume — even if it does not affirmatively appear in the record — that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution."). A reviewing court does not reweigh the evidence or redetermine the credibility of the witnesses whose demeanor has been observed by the trial court. Marshall v. Lonberger, 459 U.S. 422, 434 (1983); see also Gall v. Parker, 231 F.3d 265, 286 (6th Cir. 2000) (an assessment of the credibility of witnesses is generally beyond the scope of federal habeas review of sufficiency of evidence claims); Avery v. Prelesnik, 548 F.3d 434, 439 (6th Cir. 2008) (stating that the Constitution leaves it to the jury to evaluate the credibility of witnesses in

deciding a criminal defendant's guilt or innocence). The fact-finder weighs the probative value of the evidence and resolves any conflicts in testimony. Neal v. Morris, 972 F.2d 675, 679 (6th Cir. 1992). The mere existence of sufficient evidence to convict defeats a petitioner's claim. Matthews v. Abramajtys, 319 F.3d 780, 788-89 (6th Cir. 2003).

It is unclear whether Carruthers contends that the decision of the Tennessee Supreme Court was contrary to, or an unreasonable application of, clearly established federal law, 28 U.S.C. § 2254(d)(1), or whether it was based on an unreasonable determination of the facts in light of the evidence presented in the state-court proceeding, 28 U.S.C. § 2254(d)(2). The Tennessee Supreme Court cited and applied the Supreme Court's decision in Jackson. Carruthers, 35 S.W.3d at 557. The decision of the Tennessee Supreme Court is not contrary to Jackson.[66] Carruthers appears to argue that the Tennessee Supreme Court made an unreasonable application of Jackson in his comments that a rational juror would have had "more questions and doubts than answers." (See ECF No. 129 at 225.) Carruthers's argument about the credibility of witnesses does not support habeas relief as this is an issue for the fact-finder. Carruthers's argument about

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[66] The Supreme Court has emphasized the narrow scope of the "contrary to" clause, explaining that "a run-of-the-mill state-court decision applying the correct legal rule from our cases to the facts of a prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." Williams, 529 U.S. at 406; see also id. at 407 ("If a federal habeas court can, under the 'contrary to' clause, issue the writ whenever it concludes that the state court's application of clearly established federal law was incorrect, the 'unreasonable application' clause becomes a nullity.").

the lack of physical evidence connecting him to the murders does not support his habeas claim. United States v. Evans, 883 F.2d 496, 501-02 (6th Cir. 1989); United States v. Magallanez, 408 F.3d 672, 681 (10th Cir. 2005); see also Rafferty v. Hudson, No. 5:08CV1973, 2009 WL 2151832, at *28 (N.D. Ohio July 14, 2009) ("[B]ald assertions that the state lacked physical evidence and relied upon non-credible witnesses are insufficient to meet [the petitioner's] burden of establishing that the appellate court's ruling was contrary to or involved an unreasonable application of clearly established Federal law."). Carruthers has not satisfied his burden of demonstrating that the state court's resolution of this issue is objectively unreasonable, rather than merely incorrect. Carruthers has not demonstrated that the state court made an unreasonable determination of fact. Claim 31 is without merit. Summary judgment is GRANTED and Claim 31 is, therefore, DENIED.

**AB. Constitutionality of the Death Penalty (Claim 32, Amended Petition ¶¶ 487-91)**

Carruthers alleges that he has a fundamental right to life and that the State, by offering him a sentence less than death and by offering Montgomery a sentence less than death and accepting that sentence in a plea offer, demonstrated that a means less restrictive than a death sentence exists to effectuate its interest in punishing the defendants for the victims' death. (ECF No. 21 at 116.) Carruthers contends that the State unconstitutionally burdened his trial right when it sought a death sentence because he chose to go to trial. (Id.)

Respondent argues that the Tennessee Court of Criminal Appeals rejected Carruthers's argument and the United States Supreme Court has repeatedly rejected this argument. (ECF No. 114-1 at 27.) Respondent contends that the Tennessee Court of Criminal Appeals' decision is not contrary to nor an unreasonable application of clearly established Supreme Court precedent and was based on a reasonable determination of facts, and is without merit. (Id.)

Carruthers asserts that his claims are not subject to the strictures of 28 U.S.C. § 2254(d) and that Respondent has failed to satisfy his burden for summary judgment. (ECF No. 129 at 209-11, 225-27.) He contends that the Tennessee courts failed to engage his individual arguments, cited three cases, and summarily denied relief. (Id. at 225.) He argues that the Tennessee Supreme Court's rulings are contrary to clearly established federal law. (Id.) He relies on Justice Blackmun's dissent from the denial of certiorari in Callins v. Collins, 510 U.S. 1141, 1144 (1994), for the proposition that federal law has held that "the requirement that the death penalty be imposed 'fairly, and with reasonable consistency or not at all,' has proven impossible to implement in practice." (Id. at 225-26.) He contends that, contrary to Collins, Tenn. Code Ann. § 40-23-114 is an unconstitutional delegation of legislative authority because it allows for inconsistency and unconstitutionally leaves the decision of death by electrocution or by lethal injection to the defendant. (Id. at 226.)

Carruthers did not allege in his habeas petition that Tenn. Code Ann. § 40-23-114 was an unconstitutional delegation of legislative authority. Pursuant to

Habeas Rule 2(c), the Court will not consider this claim.[67]

The specific argument asserted in Claim 32 is not apparent on the state-court record and appears not to be exhausted. Nevertheless, Carruthers is not entitled to relief on the merits of the claim. The State is not required to demonstrate that it has a compelling state interest that cannot be satisfied by less restrictive means. In Gregg, the Supreme Court stated,

> while we have an obligation to insure the Constitutional bounds are not overreached, we may not act as judges as we might as legislators.
>
> . . . .
>
> Therefore, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

Gregg, 428 U.S. 153, 174-175. Claims that the state's death penalty scheme encourage capital defendants to plead guilty and impose an impermissible risk of death on defendants who choose to exercise their right to trial have been rejected as without merit. See, e.g.,

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[67] Carruthers raised this issue on direct appeal. (See ECF No. 56-6 at PageID 10271-10272.) See Johnson v. Bell, 457 F. Supp. 2d 839, 840-43 (M.D. Tenn. 2006) (rejecting challenges to Tenn. Code Ann. § 40-23-114's election of methods for execution).

Williams v. Bagley, 380 F.3d 932, 966 (6th Cir. 2004); see also Greer v. Mitchell, 264 F.3d 663, 690-92 (6th Cir. 2001) (denying petitioner's claim that the death penalty was neither the least restrictive punishment nor an effective means of deterrence); Whitaker v. Quarterman, 200 F. App'x 351, 356-58 (5th Cir. 2006) (prosecutors are not prevented from exercising discretion to offer the possibility of a lesser sentence in exchange for a guilty plea, even in cases involving the death penalty). Claim 32 is without merit and is, accordingly, DENIED.[68]

### AC. Actual Innocence (Claim 33, Amended Petition ¶¶ 492-94, and Claim 36, Amended Petition ¶¶ 490-91)

Carruthers alleges that his convictions and death sentence are based on false, misleading testimony. (ECF No. 21 at 116-17.) He argues that, had appointed counsel investigated the case and had he not been compelled to represent himself before an anonymous jury in a courtroom "resembling an armed fortress," there is a reasonable probability that no juror would have found him guilty beyond a reasonable doubt. (Id. at 117.) He asserts that he is actually innocent of all crimes for which he was charged, convicted, and sentenced. (Id. at 117, 122.)

Respondent argues that these claims were not presented to the state courts for review and are procedurally defaulted. (ECF No. 114-1 at 27-28.) In response to the Motion for summary judgment,

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[68] Summary judgment is GRANTED because Respondent is entitled to judgment as a matter of law; Respondent's argument, however, was not relevant to the claims presented.

Carruthers does not address Claims 33 and 36 except to say that these claims are tied to a colorable showing of actual innocence. (ECF No. 129 at 274.) In the context of Carruthers's argument that his post-conviction counsel's deficient performance prejudiced him, he asserts that he has made a colorable showing of actual innocence. (ECF No. 129 at 207.) He argues that: (1) there was no physical evidence; (2) the latent fingerprint evidence was negative; (3) the DNA testing of biological samples did not match him and indicated the presence of an unknown male suspect; (4) Charles Smith and Alfredo Shaw testified falsely; and (5) James Montgomery said Carruthers "didn't have anything to do with the murder and was not involved." (Id. at 208.)

Carruthers did not exhaust his claims in the state courts. He has not shown cause and prejudice to excuse the procedural default of his claim. He has attempted to make a colorable showing of actual innocence. Even if he was able to show that the claim was entitled to review, however, he is not entitled to relief on an independent claim of actual innocence. "A claim of actual innocence is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Herrera v. Collins, 506 U.S. 390, 404 (1993); Muntaser v. Bradshaw, 429 F. App'x 515, 521 (6th Cir. 2011) ("[A]n actual innocence claim operates only to excuse a procedural default so that a petitioner may bring an independent constitutional challenge"). The actual-innocence exception is very narrow in scope and requires proof of factual innocence, not just legal insufficiency. Bouseley v. United States, 523 U.S. 614, 623 (1998)

("It is important to note . . . that 'actual innocence' means factual innocence, not mere legal insufficiency."). The Herrera Court noted that "a truly persuasive demonstration of 'actual innocence' made after a trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." Herrera, 506 U.S. at 417; Wright v. Stegall, 247 F. App'x 709, 711-12 (6th Cir. 2007). The threshold showing for such a right would "necessarily be extraordinarily high." Wright, 247 F. App'x at 712 (Batchelder, J., concurring) (internal quotation marks omitted).[69] The Supreme Court declined to decide whether freestanding innocence claims in death penalty cases are possible. House v. Bell, 547 U.S. 518, 554-55 (2006). The Sixth Circuit has held that a free-standing claim on the grounds of actual innocence is not cognizable. See Muntaser, 429 F. App'x at 521. Claims 33 and 36 are procedurally defaulted. Summary judgment is GRANTED based on the procedural default. The claims are also without merit and are, therefore, DENIED.

### AD. Arbitrary Death Penalty (Claim 34, Amended Petition ¶¶ 495-96)

Carruthers alleges that it is arbitrary that he has been sentenced to death while Montgomery received a sentence less than death, is currently eligible for parole, and will be released from prison no later than January 19, 2020. (ECF No. 21 at 117.) Carruthers alleges that a death sentence is arbitrary when no

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[69] Carruthers's habeas claim of insufficiency of the evidence failed, see supra pp. 224-29, another indicator of his inability to prove factual innocence.

rational basis exists to explain why it falls on one person and not on another who is equally or more culpable. (ECF No. 129 at 273.) He asserts that the State tried he and Montgomery together and considered its case against Montgomery stronger than the case against him. (Id.) Considering these realities, Carruthers argues that it is arbitrary that Montgomery received a term of years, and he received the death sentence. (Id.)

Respondent argues that his claim was not presented to the state courts for review and is procedurally defaulted. (ECF No. 114-1 at 27-28.) Respondent contends that Carruthers had the opportunity to present this claim after his co-defendant's death sentence was vacated on direct appeal, but he failed to do so. (ECF No. 149 at 30.) Respondent also notes the inherent difficulty of re-trying Montgomery's case years after the initial trial. (Id. at 30-31.)

Carruthers argues that, pursuant to Tenn. Code Ann. § 39-13-206(c), the Tennessee Supreme Court considered the merits of Claim 34 on the face of the record because it raised the possibility that his death sentence is arbitrary, excessive, or disproportionate. (ECF No. 129 at 241-42.) Carruthers's implicit-review argument has been denied, supra pp. 196-97. Carruthers has not demonstrated cause and prejudice or that a miscarriage of justice would result from the Court's failure to review this claim. Claim 34 is procedurally defaulted. Summary judgment is GRANTED and Claim 34 is, therefore, DENIED.

### AE. International Law (Claim 35, Amended Petition ¶¶ 497-98[70])

Carruthers alleges that he possesses rights under international law, including the right to life; to be free from racial, gender, and economic discrimination; not to be sentenced to death; not to be executed by electrocution or lethal injection; to a fair and impartial trial; to be presumed innocent; to detailed notice of the charges against him; to adequate time and resources to obtain witnesses to prepare his defense; to be free from coercion; to refrain from testifying against himself; to be free from detention while awaiting trial; to be tried without undue delay; to be free from arbitrary searches and arbitrary detention; and to have his detention reviewed by a court without undue delay. (ECF No. 21 at 117-22.)

Respondent argues that this claim was not presented to the state courts for review and is procedurally defaulted. (ECF No. 114-1 at 27-28.) Carruthers does not address this argument in response to the Motion for summary judgment.

Carruthers failed to exhaust this claim in the state courts and failed to demonstrate cause and prejudice or that a miscarriage of justice would occur if the Court failed to consider this claim. Claim 35 is procedurally defaulted. Summary judgment is GRANTED.

The Court further notes that the Sixth Circuit has rejected claims of a violation of constitutional rights

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[70] In the amended petition, the paragraph numbering is incorrect starting on page 120. The Court will discontinue its reference to paragraph numbers in the amended petition from this point forward.

based on international law, stating, "Courts that have considered the question of whether international law bars capital punishment in the United States have uniformly concluded that it does not." Buell v. Mitchell, 274 F.3d 337, 376 (6th Cir. 2001); see also Coleman v. Mitchell, 268 F.3d 417, 443 (6th Cir. 2001) (merits review of Petitioner's claims that the death sentence violates international treaties and customary international law would not have afforded petitioner habeas relief). Claim 35 is also without merit and is, therefore, DENIED.

**AF. Incompetent to Be Executed (Claim 37)**

Carruthers alleges that, at the time of any execution, he will not comprehend the punishment he is about to receive or the reason for it. (ECF No. 21 at 122.) Respondent argues that this claim was not presented to the state courts for review and is procedurally defaulted. (ECF No. 114-1 at 27-28.)

Carruthers does not address this claim in response to the Motion for summary judgment. In the context of his argument about competence to stand trial, however, he cites Billiot v. Epps, 671 F. Supp. 2d 840, 876 (S.D. Miss. 2009), which held that a petitioner who had anosognosia, the same condition that Carruthers's counsel asserts Carruthers has,[71] was incompetent to be executed. (ECF No. 129 at 163, 174.)

In Panetti v. Quarterman, 551 U.S. 930, 947 (2007), the Supreme Court held that a petitioner's

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[71] See Report of Bhushan S. Agharkar, M.D., noting that Carruthers denies that he is mentally ill and "has no insight whatsoever into his paranoid delusional beliefs and irritability." (ECF No. 130-8 at PageID 17026, 17032.)

claim of incompetency to be executed because of his mental condition, based on Ford v. Wainwright, 477 U.S. 399 (1986), is not a claim that must be brought in an initial habeas petition on pain of being treated as a second or successive petition. Tompkins v. Sect'y, Dept. of Corr., 557 F.3d 1257, 1259 (11th Cir. 2009) (per curiam). The setting of an execution date, which causes a Ford incompetency claim to become ripe, has not occurred in this case. Panetti, 551 U.S. at 942-43. Carruthers's claim is not ripe for review and is, accordingly, DENIED.[72]

### AG. Death by Lethal Injection and Electrocution (Claim 38)

Carruthers alleges that the ultimate risk in lethal injection is that the inmate would remain conscious to experience suffocation and cardiac arrest at several stages based on Tennessee's protocol for administering the lethal injection. (ECF No. 21 at 122-28.) He alleges that the electric chair at RMSI does not function properly, and after RMSI technical personnel made modifications to the chair in 1996, the company responsible for the initial installation of the chair informed the RMSI associate warden that the modifications "raised the specter of a 'brain dead vegetable at

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[72] The claim was not exhausted in the state courts. Procedural default, however, would not be appropriate because the petitioner's condition at the time of execution is what is relevant to this claim. Therefore, summary judgment based on procedural default is DENIED for this claim.

the conclusion of the execution procedure'" and that the chair was an "instrument of torture." (Id. at 128.)[73]

Carruthers did not exhaust this claim in the state courts, and has not asserted cause and prejudice or that a miscarriage of justice would result from the Court's failure to consider this claim. Claim 38 is procedurally defaulted. Summary judgment is GRANTED.

Carruthers's claim also lacks merit. There is no Supreme Court decision holding that electrocution constitutes cruel and unusual punishment. To the contrary, the Supreme Court held, in In re Kemmler, 136 U.S. 436, 444-49 (1890), that death by electrocution does not deprive the petitioner of due process of law. The Sixth Circuit has also rejected Carruthers's argument. See Williams v. Bagley, 380 F.3d 932, 965 (6th Cir. 2004) (noting that the Sixth Circuit "has upheld the constitutionality of electrocution as a method of execution."); Buell v. Mitchell, 274 F.3d 337, 370 (6th Cir. 2001) ("Electrocution has yet to be found cruel and unusual punishment by any American court. We decline to be the first." (citation omitted)). Additionally, execution by lethal injection has not been deemed to constitute cruel and unusual punishment, despite concerns about lethal injection execution protocols. See, e.g., Harbison v. Little, 571 F.3d 531, 539 (6th Cir. 2009) (vacating a decision finding that the Tennessee lethal injection protocol violated the Eighth Amendment); see also Irick v. Ray, 628 F.3d 787, 789 (6th Cir.

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[73] Tennessee enacted a law providing that the method for carrying out all death sentences for offenses committed before January 1, 1999, shall be lethal injection, unless the person to be executed signs a written waiver electing death by electrocution. See Tenn. Code Ann. § 40-23-114(a)-(b) (2000).

2010) (denying § 1983 claim challenging Tennessee's lethal injection protocol as time-barred).

Claim 38 is procedurally defaulted and without merit; Claim 38 is, accordingly, DENIED.

### AH. Ineffective Assistance of Counsel on Direct Appeal (Claim 39)

Carruthers alleges that appointed counsel failed to:

- challenge the trial court's actions, which interfered with and destroyed Carruthers's ability to employ an independent forensic pathologist;
- challenge the propriety of Juror 121 serving on the jury that convicted Carruthers of the crimes charged and sentenced him to death;
- challenge the propriety of the trial court's decision to have an anonymous jury decide whether Carruthers was guilty of the crimes charged and determine his sentences for the first-degree murder convictions;
- challenge the propriety of the trial court's decision to authorize, condone, and implement the security measures taken for Carruthers's trial;
- challenge the trial court's failure to give Carruthers's jury an instruction for the consideration of Carruthers's alibi defense that he was in the company of Adolpho James when the incident occurred and neither James nor Carruthers were anywhere near the crime scene at the time; and
- failed to raise on appeal any and all claims raised in the habeas amended petition.

(ECF No. 21 at 128-30.)

Respondent argues that the Tennessee Court of Criminal Appeals rejected these claims, and its decision is not contrary to or an unreasonable application of Supreme Court precedent or based on an unreasonable determination of facts in light of the evidence presented. (ECF No. 114-1 at 28.)

The Tennessee Court of Criminal Appeals stated:

> 3. Ineffective Assistance of Appellate Counsel
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> The petitioner next contends that appellate counsel were ineffective for failing to raise several meritorious issues on appeal. Specifically, the petitioner complains that:
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> 1. Appellate counsel's failure to challenge the trial court's interference with the petitioner's relationship with Dr. Cleland Blake as a violation of due process principles constituted ineffective assistance of counsel.
>
> 2. Appellate counsel's failure to challenge the trial court's failure to conduct an inquiry in response to information received regarding Juror 121 constituted ineffective assistance of counsel.
>
> 3. Appellate counsel's failure to challenge the impanelment of an anonymous jury as a matter of constitutional and statutory law constituted ineffective assistance of counsel.
>
> 4. Appellate counsel's failure to raise an issue regarding the extraordinary and excessive security measures implemented

during the trial constituted ineffective assistance of counsel.

5. Appellate counsel's failure to challenge the trial court's failure to give an alibi instruction constituted ineffective assistance of counsel.

The same principles apply in determining the effectiveness of both trial and appellate counsel. Campbell v. State, 904 S.W.2d 594, 596 (Tenn. 1995). A petitioner alleging ineffective assistance of appellate counsel must prove both that (1) appellate counsel were objectively unreasonable in failing to raise a particular issue on appeal, and (2) absent counsel's deficient performance, there was a reasonable probability that the petitioner's appeal would have been successful before the state's highest court. See, e.g., Smith v. Robbins, 528 U.S. 259, 285, 120 S. Ct. 746, 764, 145 L. Ed. 2d 756 (2000); Aparicio v. Artuz, 269 F.3d 78, 95 (2d Cir. 2001); Mayo v. Henderson, 13 F.3d 528, 533-34 (2d Cir. 1994). To show that counsel was deficient for failing to raise an issue on direct appeal, the reviewing court must determine the merits of the issue. Carpenter v. State, 126 S.W.3d 879, 887 (Tenn. 2004) (citing Kimmelman v. Morrison, 477 U.S. 365, 375, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986)). Obviously, if an issue has no merit or is weak, then appellate counsel's performance will not be deficient if counsel fails to raise it. Id. Likewise, unless the omitted issue has some merit, the petitioner suffers no prejudice from appellate counsel's failure to

> raise the issue on appeal. Id. When an omitted issue is without merit, the petitioner cannot prevail on an ineffective assistance of counsel claim. Carpenter, 126 S.W.3d at 888 (citing United States v. Dixon, 1 F.3d 1080, 1083 (10th Cir. 1993)).

Carruthers, 2007 WL 4355481, at *40-41.

A criminal defendant is entitled to the effective assistance of counsel on direct appeal. Evitts v. Lucey, 469 U.S. 387, 395-96 (1985). Claims of ineffective assistance of appellate counsel are evaluated using the Strickland standards. Smith v. Robbins, 528 U.S. 259, 285-86 (2000) (failure to file a merits brief); see also Smith v. Murray, 477 U.S. 527, 535-36 (1986) (failure to raise issue on appeal). The failure to raise a nonfrivolous issue on appeal does not constitute per se ineffective assistance of counsel, because "[t]his process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." Murray, 477 U.S. at 536 (internal quotation marks omitted). Thus, to establish that appellate counsel was ineffective in failing to raise an issue, a prisoner

> must first show that his counsel was objectively unreasonable in failing to find arguable issues to appeal — that is, that counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them. If [the prisoner] succeeds in such a showing, he then has the burden of demonstrating prejudice. That is, he must show a reasonable probability that, but for his counsel's

> unreasonable failure to file a merits brief, he would have prevailed on his appeal.

Robbins, 528 U.S. at 285 (internal citation omitted).[74] The Tennessee Court of Criminal Appeals' decision is not contrary to clearly established Supreme Court precedent.

The Court has previously cited the Tennessee Court of Criminal Appeals' arguments related to an anonymous jury, supra pp. 105-17; excessive security, supra pp. 117-25; forensic pathologist Dr. Cleland Blake, supra pp. 165-75; and Juror 121, supra pp. 202-

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[74] The Sixth Circuit has articulated a nonexclusive list of factors to consider when assessing claims of ineffective assistance of appellate counsel:

1. Were the omitted issues significant and obvious?
2. Was there arguably contrary authority on the omitted issues?
3. Were the omitted issues clearly stronger than those presented?
4. Were the omitted issues objected to at trial?
5. Were the trial court's rulings subject to deference on appeal?
6. Did appellate counsel testify in a collateral proceeding as to his appeal strategy and, if so, were the justifications reasonable?
7. What was the appellate counsel's level of experience and expertise?
8. Did the petitioner and appellate counsel meet and go over possible issues?
9. Is there evidence that counsel reviewed all the facts?
10. Were the omitted issues dealt with in other assignments of error?
11. Was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt?

Franklin v. Anderson, 434 F.3d 412, 428-29 (6th Cir. 2006) (citing Mapes v. Coyle, 171 F.3d 408, 427-28 (6th Cir. 1999)).

11, and determined that these arguments are without merit.

The Court must now address Carruthers's claim related to the alibi instruction. The Tennessee Court of Criminal Appeals stated:

> e. Alibi Instruction
>
> Lastly, the petitioner contends that appellate counsel were ineffective for not raising as an issue the fact that the trial court did not give an alibi instruction to the jury. The State responds that the proof did not warrant an alibi instruction and that appellate counsel were therefore not ineffective for failing to raise the issue on appeal. We agree that counsel were not deficient in this regard.
>
> A trial court has the affirmative duty to instruct the jury on every issue raised by the proof, including the defendant's theory of defense, and specifically including alibi. See Poe v. State, 212 Tenn. 413, 416, 370 S.W.2d 488, 489 (1963). The trial court must instruct the jury on the defense of alibi when it is "fairly raised" by the evidence, see Manning v. State, 500 S.W.2d 913, 915 (Tenn. 1973), regardless of whether the defendant requests the instruction. See Poe, 370 S.W.2d at 491. Proof of an alibi sufficient to require an instruction exists where (1) the defendant's claim that he was not at the scene of the crime is corroborated by other credible witnesses; (2) the victim has been unable to identify the defendant; or (3) the proof against the defendant is wholly circumstantial. Manning, 500 S.W.2d

at 916. The failure to charge the jury with the defense of alibi when it has been fairly raised by credible evidence is reversible error. Moffitt v. State, 29 S.W.3d 51, 57 (Tenn. Crim. App. 1999).

The post-conviction court determined that this claim was without merit because the testimony upon which it relied for alibi evidence was "vague[ ] at best":

> The petitioner next argues that appellate counsel should have raised the issue of the failure of the trial judge to give the alibi instruction in light of the testimony of Aldolpho James. Mr. James' testimony is summarized by the Supreme Court as follows:
>
> > Another witness, Aldolpho Antonio James testified that he and [the petitioner] had been visiting a friend between the hours of 1:00 a.m. and 2:00 a.m. the day before these homicides were first reported on the news. This testimony was offered to provide at least a partial alibi for [the petitioner] for the early morning hours of February 25, 1994. However, on cross-examination, James admitted that he did not know the exact date he and [the petitioner] had been together.
>
> Carruthers, 35 S.W.3d at 528. . . . This Court is of the opinion that the appellate court would not have found the failure to give an alibi instruction (which was not

> requested by the defense) reversible error. Mr. James' testimony was vague, at best, and even if it could be determined to have referenced the date of the crime it was only a "partial alibi."

The petitioner argues that the post-conviction court erroneously relied upon the summary of James's testimony in our supreme court's direct appeal opinion instead of turning to the trial transcript itself, which reveals that James testified that the petitioner was already at the friend's house when James arrived between 1:00 and 2:00 in the morning. The petitioner asserts that this testimony established a "partial alibi" that was "materially more substantial than the [post-conviction] court necessarily viewed it by simply reciting the quotation from the Supreme Court's opinion." The State responds that James's vague testimony merely established that James had seen the petitioner at some point during the time of the victims' disappearance.

We agree with the State that James's testimony that he had seen the petitioner in the early morning hours of the day before he first heard news reports about the victims' murders was not sufficient to warrant an alibi instruction. James testified that he arrived at a friend's house at about 1:35 or 1:45 a.m. to find the petitioner already there. He further testified that at about the same time that he arrived, someone else arrived to take the petitioner home. James was unable to recall the month or even the day of the week that these

> events transpired. As the State points out, this testimony merely established that "James saw [the] petitioner for only a few minutes on an undetermined night sometime before James heard the news about the victims' disappearance." We conclude, therefore, that the petitioner has failed to meet his burden of establishing that appellate counsel were deficient for failing to raise this issue on appeal or that he suffered any prejudice as a result of the issue not being raised.

Carruthers, 2007 WL 4355481, at *53-54 (alterations in original).

Carruthers argues that the record plainly shows that the testimony of Aldolpho James was exculpatory and sufficiently precise to raise a question about Judge Dailey's failure to give a proper charge. (ECF No. 129 at 229.) James testified that at about 1:00 or 2:00 in the morning on the day before he saw on the news that Marcellos Anderson was missing:

> I don't know what day it was. I can't remember what day it was, but only thing I can recall I seen you that night on the circle, on Pauline Circle. And I come in the house, you was sitting on the couch, and then a ride pulled up about that time and blowed [sic] the horn, told, "Tell Tony come on because I'm fixing to take him home. He's going home."

(ECF No. 55-9 at PageID 7214-7215.) On cross-examination, James clarified that he was uncertain of what night of the week, what day of the month, or even what month he saw Carruthers. (Id. at PageID 7218-7219.)

In challenging a trial court's refusal to give an accurate instruction on the defendant's theory of the case, such as an alibi, the defendant bears the burden of introducing evidence to support the defense beyond mere speculation. United States v. Brown, No. 97-1618, 2000 WL 876382, at *10 (6th Cir. June 20, 2000); see also Johnson v. Baker, No. 93-4057, 1994 WL 487343, at *2 (6th Cir. Sept. 8, 1994) (per curiam) (any error in the trial court was harmless under Brecht because Johnson failed to establish a complete alibi). Carruthers has failed to meet that burden. The Tennessee Court of Criminal Appeals' determination that he is not entitled to relief is not contrary to or an unreasonable application of Supreme Court precedent and is not based on an unreasonable determination of fact.

These claims are without merit and appellate counsel's failure to assert these claims does not establish ineffective assistance.

Carruthers also asserts that the failure to raise on appeal any and all claims raised in his amended habeas petition denied him the right to effective assistance of appellate counsel. (ECF No. 21 at 130.) This issue was not exhausted in the state court. To the extent Carruthers claims that ineffective assistance of postconviction counsel provides cause for the failure to exhaust this claim, the argument fails. (See ECF No. 192 at 11, 27-30.) Petitioner has not demonstrated cause and prejudice or that a miscarriage of justice will result from the Court's refusal to consider this claim.

Summary judgment is GRANTED; the allegations in Claim 39 are without merit or procedurally defaulted and, therefore, DENIED.

### AI. Cumulative Effect of Constitutional Errors (Claim 40)

Carruthers alleges that to the extent the Court finds two or more constitutional errors that are individually harmless, the cumulative effect of those errors render Carruthers's conviction and/or death sentence unconstitutional. (ECF No. 21 at 131.) Respondent argues that the final claim is procedurally defaulted and does not state a cognizable claim for federal habeas relief. (ECF No. 114-1 at 28.) The Sixth Circuit has held that, "post-AEDPA, not even constitutional errors that would not individually support habeas relief can be cumulated to support habeas relief." Hoffner v. Bradshaw, 622 F.3d 487, 513 (6th Cir. 2010) (quoting Moore v. Parker, 425 F.3d 250, 256 (6th Cir. 2005)), cert. denied, 131 S. Ct. 2117 (2011); see also Cross v. Stovall, 238 F. App'x 32, 41 (6th Cir. 2007) ("[T]he law of this Circuit is that cumulative error claims are not cognizable on habeas because the Supreme Court has not spoken on this issue." (alteration in original) (quoting Williams v. Anderson, 460 F.3d 789, 816 (6th Cir. 2006))). Summary judgment is GRANTED. Claim 40 is DENIED.

## VII. CONCLUSION

Summary judgment based on procedural default is GRANTED for Claims 2, 3, 4, 5, 6, 7, 9, 15, 16 as to the claim about John Billings, 17, 18, 19, 20, 22, 23 except for the HAC jury instruction, 24, 26, 28, 30, 33, 34, 35, 36, 37, and 38.

Summary judgment based on the merits is GRANTED for Claims 5, 7, 8, 10, 15, 19, 21, 29, 31, 32, 39, and 40.

Summary judgment is DENIED for Claims 11, 12, 13, 14, 16 as it relates to Cleland Blake, 20, 25, 27, 32, 37, and 38.

The Court has also determined that Carruthers is not entitled to habeas relief on the merits of Claims 3, 4, 7, 11, 12, 13, 14, 16 as it relates to Cleland Blake, 19, 20 as it relates to the decision for Carruthers to proceed pro se, 23 as it relates to the HAC jury instruction, 25, 27, 33, 35, 36, 37, and 38.

Carruthers's petition is DENIED in its entirety, as all of his claims are either procedurally defaulted or without merit. The petition is DISMISSED WITH PREJUDICE. Judgment shall be entered for Respondent.

## VIII. APPEAL RIGHTS

There is no absolute entitlement to appeal a district court's denial of a § 2254 petition. Miller-El v. Cockrell, 537 U.S. 322, 335 (2003); Bradley v. Birkett, 156 F. App'x 771, 772 (6th Cir. 2005) (per curiam). The Court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to a § 2254 petitioner. Habeas Rule 11(a). A petitioner may not take an appeal unless a circuit or district judge issues a COA. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b)(1).

A COA may issue only if the petitioner has made a substantial showing of the denial of a constitutional right, and the COA must indicate the specific issue or issues that satisfy the required showing. 28 U.S.C. §§ 2253(c)(2)-(3). A "substantial showing" is made when the petitioner demonstrates that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further."

Miller-El, 537 U.S. at 336 (internal quotation marks omitted); see also Henley v. Bell, 308 F. App'x 989, 990 (6th Cir. 2009) (per curiam) (same). A COA does not require a showing that the appeal will succeed. Miller-El, 537 U.S. at 337; Caldwell v. Lewis, 414 F. App'x 809, 814-15 (6th Cir. 2011). Courts should not issue a COA as a matter of course. Bradley, 156 F. App'x at 773.

In this case, there can be no question that the claims in this petition are without merit. Because any appeal by Petitioner on the issues raised in this petition does not deserve attention, the Court DENIES a certificate of appealability.

For the same reasons the Court denies a certificate of appealability, the Court determines that any appeal would not be taken in good faith. It is therefore CERTIFIED, pursuant to Fed. R. App. P. 24(a), that any appeal in this matter would not be taken in good faith, and leave to appeal in forma pauperis is DENIED.[75]

**IT IS SO ORDERED**, this 31st day of March, 2014.

/s/ Jon P. McCalla
JON P. McCALLA
U.S. DISTRICT COURT JUDGE

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[75] If Petitioner files a notice of appeal, he must pay the full $505 appellate filing fee or file a motion to proceed in forma pauperis and supporting affidavit in the United States Court of Appeals for the Sixth Circuit within thirty (30) days of the date of entry of this Order. See Fed. R. App. P. 24(a)(5).

**APPENDIX C**

SUPREME COURT OF TENNESSEE
AT JACKSON

No. W1997-00097-SC-DDT-DD

Appeal from the Court of Criminal Appeals
Criminal Court for Shelby County, Nos. 94-02797-99
and 95-1128-29, Joseph B. Dailey, Judge

STATE OF TENNESSEE

*v.*

TONY V. CARRUTHERS & JAMES MONTGOMERY

Filed December 11, 2000
October 3, 2000 Session at Nashville

Tony Carruthers and James Montgomery were each convicted of three counts of first degree premeditated murder and were sentenced to death on each conviction. The Court of Criminal Appeals affirmed the convictions and sentences of both Carruthers and Montgomery. Thereafter, the cases were docketed in this Court. After carefully reviewing the record and the relevant legal authorities, we conclude that none of the errors raised by Tony Carruthers require reversal, that the evidence is sufficient to support the jury's findings of the aggravating circumstances, and that the sentences of death are not excessive or disproportionate considering the circumstances of the crimes and the defendant. With respect to James Montgomery, we conclude that the trial court erred in denying him a severance and that the error resulted in Montgomery being deprived of a fair trial. Accordingly, we reverse Montgomery's convictions and sentences and remand for a new trial.

Tenn. Code Ann. § 39-13-206(a)(1) Automatic Appeal; Judgment of the Court of Criminal Appeals Affirmed with respect to Tony V. Carruthers; Judgment of the Court of Criminal Appeals Reversed with respect to James Montgomery and Case Remanded for a New Trial

FRANK F. DROWOTA, III, J., delivered the opinion of the court, in which E. RILEY ANDERSON, C.J., JANICE M. HOLDER, and WILLIAM M. BARKER, JJ., joined. ADOLPHO A. BIRCH, JR., J., filed a concurring/dissenting opinion.

* * *

## OPINION

The defendants, Tony V. Carruthers and James Montgomery, were each convicted of first degree murder for killing Marcellos "Cello" Anderson, his mother Delois Anderson, and Frederick Tucker in Memphis in February of 1994.[1] All of the victims disappeared on the night of February 24, 1994. On March 3, 1994, their bodies were found buried together in a pit that had been dug beneath a casket in a grave in a Memphis cemetery.[2]

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[1] They were also each convicted of three counts of especially aggravated kidnapping and one count of especially aggravated robbery of Marcellos Anderson.

[2] James Montgomery's younger brother Jonathan Montgomery was also charged on all counts involved in this case. However, several months prior to trial, Jonathan Montgomery was found hanged in his c ell in the Shelby County jail.

**The Guilt Phase**

The proof introduced at the guilt phase of the trial showed that one of the victims, Marcellos Anderson, was heavily involved in the drug trade, along with two other men, Andre "Baby Brother" Johnson and Terrell Adair.[3] Anderson wore expensive jewelry, including a large diamond ring, carried large sums of money on his person, and kept a considerable amount of cash in the attic of the home of his mother, victim Delois Anderson. When his body was discovered, Anderson was not wearing any jewelry and did not have any cash on his person. Anderson was acquainted with both defendants, and he considered Carruthers to be a trustworthy friend. The proof showed that Anderson's trust was misplaced.

In the summer of 1993 Jimmy Lee Maze, Jr., a convicted felon, received two letters from Carruthers, who was then in prison on an unrelated conviction. In the letters, Carruthers referred to "a master plan" that was "a winner." Carruthers wrote of his intention to "make those streets pay me" and announced, "everything I do from now on will be well organized and extremely violent." Later, in the fall of 1993, while incarcerated at the Mark Luttrell Reception Center in Memphis awaiting his release, Carruthers was assigned to a work detail at a local cemetery, the West Tennessee Veterans' Cemetery. At one point, as he helped bury a body, Carruthers remarked to fellow inmate Charles Ray Smith "that would be a good way, you know, to bury somebody, if you're going to kill

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[3] Neither Delois Anderson nor Frederick Tucker were involved in the drug trade.

them. . . . [I]f you ain't got no body, you don't have a case."

Smith also testified that he overheard Carruthers and Montgomery, who also was incarcerated at the Reception Center, talking about Marcellos Anderson after Anderson had driven Carruthers back to the Reception Center from a furlough. According to Smith, when Montgomery asked Carruthers about Anderson, Carruthers told him that both Anderson and "Baby Brother" Johnson dealt drugs and had a lot of money. Carruthers said he and Montgomery could "rob" and "get" Anderson and Johnson once they were released from prison.

When Carruthers was released from the Department of Correction on November 15, 1993, he left the Reception Center with Anderson. Carruthers accompanied Anderson to Andre Johnson's house, and received a gift of $200 cash from Anderson, Johnson, and Terrell Adair, who was present at Johnson's house.

One month later, on December 15, 1993, Smith was released from the Department of Correction. Upon his release, Smith warned Anderson and Johnson of Carruthers' and Montgomery's plans to "get them." According to Smith and Johnson, Anderson did not take the warning or the defendants' threats seriously.

In mid-December 1993, Maze, his brother and Carruthers were riding around Memphis together. They came upon Terrell Adair's red Jeep on the street in front of Delois Anderson's home where a drive-by shooting had just occurred. Adair had been injured in the shooting and was in the hospital. Jonathan "Lulu" Montgomery, James Montgomery's brother, was at the scene of the shooting, and he joined Carruthers in the

back seat of Maze's car. According to Maze, Carruthers remarked to Jonathan that, "it would be the best time to kidnap Marcellos," and Jonathan asked, "which one Baby Brother or Marcellos?" Carruthers then nudged Montgomery with his elbow and said "it" was going to take place after James Montgomery was released from prison. About two weeks later, on December 31, Maze saw Carruthers loading three antifreeze containers into a car, and Carruthers indicated to Maze that the containers were filled with gasoline.

On January 11, 1994, James Montgomery was released from prison. After his release, Montgomery told "Baby Brother" Johnson that he, not Johnson, was in charge of the neighborhood. Montgomery said, "It was my neighborhood before I left, and now I'm back and its my neighborhood again." Montgomery asked Johnson if he wanted to "go to war about this neighborhood." When Johnson said, "no," Montgomery replied "You feeling now like I'm about to blow your motherf-----g brains out" and "you all need to get in line around here or we're going to war about this." Near the end of January or the first of February 1994, Johnson and Adair saw the defendants sitting together in an older model grey car down the street from Johnson's mother's home. It was late at night, between 11 p.m. and 1 a.m. When the defendants approached Johnson and Adair, Montgomery asked why they thought he was trying to harm them. Montgomery told them, "Look, I told you, we ain't got no problem with nobody in this neighborhood. We already got our man staked out. If we wanted some trouble or something, we got you right now. We'd kill your whole family." Confirming Montgomery's statement, Carruthers told them, "We already got our man staked out. You all right. If it's any problem, we'll

deal with it later." Montgomery explained that he intended to take the "man's" money and drugs, and said, "if the police didn't have no body, they wouldn't have no case."

On February 23, 1994, Marcellos Anderson borrowed a white Jeep Cherokee from his cousin, Michael Harris. Around 4:30 on the afternoon of February 24, 1994, witnesses saw Marcellos Anderson and Frederick Tucker riding in the Jeep Cherokee along with James and Jonathan Montgomery. About 5 p.m. that day, James and Jonathan Montgomery and Anderson and Tucker arrived in the Jeep Cherokee at the house of Nakeita Shaw, the Montgomery brothers' cousin. Nakeita Shaw, her four children, and Benton West, also her cousin, were present at the house when they arrived.

The four men entered the house and went downstairs to the basement. A short time later, James Montgomery came back upstairs and asked Nakeita Shaw if she could leave for a while so he could "take care of some business." Nakeita Shaw told West that she thought "they" were being kidnapped, and then she left the house with West and her children. West agreed to care for Nakeita Shaw's children while she attended a meeting.

When Nakeita Shaw returned home after the meeting, she saw only Carruthers and James Montgomery. Montgomery asked her to go pick up her children and to "stay gone a little longer." Nakeita Shaw returned home with her children before 10 p.m. The Jeep Cherokee was gone, but James Montgomery and Carruthers were still present at her home. Montgomery told Nakeita Shaw to put her children to bed upstairs and remain there until he told her he was

leaving. Sometime later, Montgomery called out to Nakeita Shaw that he was leaving. She returned downstairs and saw James Montgomery, Carruthers, and the two victims, Anderson and Tucker, leave in the Jeep Cherokee. Prior to trial, Nakeita Shaw told the police that Anderson's and Tucker's hands were tied behind their backs when they left her house. While she admitted making this statement, she testified at trial that the statement was false and that she had not seen Anderson's and Tucker's hands tied when they left her home.[4]

In the meantime, around 8 p.m. on February 24, Laventhia Briggs telephoned her aunt, victim Delois Anderson. When someone picked up the telephone but said nothing, Briggs hung up. Briggs called "a couple of more times" but received no answer. Briggs was living with Delois Anderson at the time and arrived at her aunt's home around 9:00 p.m. Although Delois Anderson was not home, her purse, car, and keys were there. Food left in Anderson's bedroom indicated that she had been interrupted while eating. Briggs went to bed, assuming her aunt would return home soon. A coworker, whom Delois Anderson had driven home around 7:15 p.m., was the last person to have seen her alive.

Chris Hines, who had known the defendants since junior high school, testified that around 8:45 p.m. on

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[4] Nakeita Shaw had also told the police before trial that she had been afraid for her life and that James Montgomery had threatened her after the investigation of this case began, stating that if he had to die for something he did not do, then "all of us needed to die." At trial, on cross-examination, she denied being afraid of James Montgomery and said it was her involvement in this case that frightened her.

February 24, 1994, Jonathan Montgomery "beeped" him. Jonathan said, "Man, a n----r got them folks." When Hines asked, "What folks?" Jonathan replied, "Cello and them" and said something about stealing $200,000. Jonathan then indicated that he could not talk more on the telephone and arranged to meet Hines in person. Jonathan arrived at Hines' home at about 9:00 p.m. and told him, "Man, we got them folks out at the cemetery on Elvis Presley, and we got $200,000. Man, a n----r had to kill them folks." At that point, James Montgomery "beeped in" and talked with Jonathan. When the telephone call ended, Jonathan asked Hines to drive him to the cemetery. Hines refused, but he allowed Jonathan to borrow his car, which Jonathan promised to return in an hour. When the car was not returned, Hines called James Montgomery's cellular telephone at around 11 p.m. James told Hines that he did not know where Jonathan was, that Jonathan did not have a driver's license, and that the car should be returned by 4 a.m. because Jonathan was supposed to drive James to his girlfriend's house.

The Jeep Cherokee that Anderson had borrowed was found in Mississippi on February 25 around 2:40 a.m. It had been destroyed by fire. About 3:30 a.m., after he was informed of the vehicle fire by law enforcement officials, Harris telephoned Delois Anderson's home, and Laventhia Briggs then discovered that neither her aunt Delois nor her cousin Marcellos had returned home. Briggs filed a missing person report with the police later that day.

The Montgomery brothers and Carruthers did not return Hines' car until approximately 8:30 a.m. on February 25. The car was very muddy. Hines drove James Montgomery and Carruthers to Montgomery's

mother's home and then drove away with Jonathan Montgomery. That morning Jonathan, whom Hines described as acting "paranoid" and "nervous," repeatedly told Hines that "they had to kill some people." About two hours later, James Montgomery and Carruthers came to Hines' home looking for Jonathan. Hines advised Carruthers and James Montgomery that he was celebrating his birthday, and he asked James Montgomery to give him a birthday present. James agreed to give Hines twenty dollars after he picked up his paycheck, and James also agreed to have Hines' car washed immediately as a birthday present.

Hines, the Montgomery brothers, and Carruthers drove to a carwash, and James Montgomery paid an unidentified elderly man to clean the car. The man cleaned the interior of the car and the trunk of the car. Neither Carruthers nor James Montgomery supervised the cleaning of the car. After Jonathan Montgomery abruptly left the carwash, Carruthers and James Montgomery asked Hines what Jonathan had told him, but Hines did not tell them. Several days later James Montgomery came to Hines' home and offered Hines an AK-47 assault rifle because Montgomery said he had "heard that Hines was into it with some people on the street." James Montgomery told Hines the rifle had "blood on it." Hines testified that he interpreted this statement to mean that someone had been shot with the weapon.

On March 3, 1994, about one week after a missing person report was filed on Delois and Marcellos Anderson, Jonathan Montgomery directed Detective Jack Ruby of the Memphis Police Department to the grave of Dorothy Daniels at the Rose Hill Cemetery on Elvis

Presley Boulevard.[5] Daniels' grave was located six plots away from the grave site of the Montgomery brothers' cousin. Daniels had been buried on February 25, 1994. Pursuant to a court order, Daniels' casket was disinterred, and the authorities discovered the bodies of the three victims buried beneath the casket under several inches of dirt and a single piece of plywood.

An employee of the cemetery testified that a pressed wood box or vault had been placed in Daniels' grave during working hours on February 24 and that it would have taken at least two people to remove the box. Daniels' casket had been placed in the grave inside the box on February 25, and, according to Dr. Hugh Edward Berryman, one of the forensic anthropologists who assisted in the removal of the bodies from the crime scene, there was no evidence to suggest that Daniels' casket had been disturbed after she was buried. Thus, it can be inferred that the bodies of the three victims were placed in the grave and covered with dirt and a piece of plywood prior to the casket being placed in the grave.

Dr. O. C. Smith, who helped remove the bodies from the grave and who performed autopsies on the victims, testified that, when found, the body of Delois Anderson was lying at the bottom of the grave and the

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[5] Although the jury did not hear proof about why Jonathan Montgomery directed Detective Ruby to the grave, the record of pre-trial and jury-out hearings reflects that the investigation had focused upon the Montgomery brothers because they were seen with two of the victims around 5:00 p.m. on the day of the murders. When the police questioned Jonathan Montgomery, he gave conflicting statements, but eventually directed Detective Ruby to the grave where the bodies were buried.

bodies of the two male victims were lying on top of her. The hands of all three victims were bound behind their backs. Frederick Tucker's feet were also bound and his neck showed signs of bruising caused by a ligature. A red sock was found around Delois Anderson's neck. Marcellos Anderson was not wearing any jewelry. Dr. Smith testified that Delois Anderson died from asphyxia caused by several factors: the position of her head against her body, dirt in her mouth and nose, and trauma from weight on her body. Frederick Tucker had received a gunshot wound to his chest, which would not have been fatal had he received medical care. He had also suffered injuries from blunt trauma to his abdomen and head resulting in broken ribs, a fractured skull, and a ruptured liver. Dr. Smith opined that Tucker was shot and placed in the grave, where the force of compression from being buried produced the other injuries and, along with the gunshot wound, caused his death. According to Dr. Smith, Marcellos Anderson had been shot three times: a contact wound to his forehead that was not severe and two shots to his neck, one of which was also not serious. However, the gunshot causing the other neck wound had entered Anderson's windpipe and severed his spinal cord, paralyzing him from the neck down. This wound was not instantaneously fatal. Anderson had also suffered blunt trauma to his abdomen from compression forces. Dr. Smith opined that each victim was alive when buried.

Defendant James Montgomery presented no proof. Carruthers, acting pro se, called several witnesses to rebut the testimony offered by the State, primarily by attacking the credibility of the State's witnesses.

A health administrator at the Mark Luttrell Reception Center testified that, because of an injury to his arm, Carruthers had been given a job change on October 6, 1993, and had not worked at the cemetery after that date. Another official at the Reception Center testified that Carruthers was not released on furlough after Montgomery arrived at the Reception Center on November 4, 1994. This proof was offered to impeach Smith's testimony that Montgomery and Carruthers discussed robbing and getting Marcellos Anderson after Anderson drove Carruthers back to the Reception Center following a furlough. An investigator appointed to assist Carruthers with his defense testified that he had interviewed Maze, who admitted he did not know anything about the "master plan" to which Carruthers referred in the letters until Carruthers was released from prison. On cross-examination, the investigator admitted that Maze said that when he was released from prison, Carruthers had explained that the master plan involved kidnapping Marcellos Anderson. Carruthers' brother and another witness testified that Jonathan Montgomery was not at the scene of the drive-by shooting involving Terrell Adair. This proof was offered to impeach Maze's testimony that Carruthers and Jonathan Montgomery discussed kidnapping Marcellos on the day that Terrell Adair was shot. Another witness, Aldolpho Antonio James testified that he and Carruthers had been visiting a friend between the hours of 1:00 a.m. and 2:00 a.m. the day before these homicides were first reported on the news. This testimony was offered to provide at least a partial alibi for Carruthers for the early morning hours of February 25, 1994. However, on cross-examination, James admitted that he did not

know the exact date he and Carruthers had been together.

Carruthers also called Alfredo Shaw as a witness. After seeing a television news report about these killings in March of 1994, Alfredo Shaw had telephoned CrimeStoppers and given a statement to the police implicating Carruthers. Alfredo Shaw later testified before the grand jury which eventually returned the indictments against Carruthers and Montgomery. Prior to trial, however, several press reports indicated that Alfredo Shaw had recanted his grand jury testimony, professed that the statement had been fabricated, and intended to formally recant his grand jury testimony when called as a witness for the defense. Therefore, when Carruthers called Alfredo Shaw to testify, the prosecution announced that if he took the stand and recanted his prior sworn testimony, he would be charged with and prosecuted for two counts of aggravated perjury. In light of the prosecution's announcement, the trial court summoned Alfredo Shaw's attorney and allowed Alfredo Shaw to confer privately with him. Following that private conference, Alfredo Shaw's attorney advised the trial court, defense counsel, including Carruthers, and the prosecution, that Alfredo Shaw intended to testify consistently with his prior statements and grand jury testimony and that any inconsistent statements Alfredo Shaw had made to the press were motivated by his fear of Carruthers and by threats he had received from him.

Despite this information, Carruthers called Alfredo Shaw as a witness and as his attorney advised, Shaw provided testimony consistent with his initial statement to the police and his grand jury testimony. Specifically, Alfredo Shaw testified that he had been

on a three-way call with Carruthers and either Terry or Jerry Durham, and during this call, Carruthers had asked him to participate in these murders, saying he had a "sweet plan" and that they would each earn $100,000 and a kilogram of cocaine. Following his arrest for these murders, Carruthers was incarcerated in the Shelby County Jail along with Alfredo Shaw, who was incarcerated on unrelated charges. Carruthers and Alfredo Shaw were in the law library when Carruthers told Alfredo Shaw that he and some other unidentified individuals went to Delois Anderson's house looking for Marcellos Anderson and his money. Marcellos was not there when they arrived, but Carruthers told Delois Anderson to call her son and tell him to come home, "it's something important." When Anderson arrived, the defendants forced Anderson, Tucker, who was with Anderson, and Delois Anderson into the jeep at gunpoint and drove them to Mississippi, where the defendants shot Marcellos Anderson and Tucker and burned the jeep. According to Alfredo Shaw, the defendants then drove all three victims back to Memphis in a stolen vehicle. Alfredo Shaw testified that, after they put Marcellos Anderson and Tucker into the grave, Delois Anderson started screaming and one of the defendants told her to "shut up" or she would die like her son and pushed her into the grave. Carruthers also told Alfredo Shaw that the bodies would never have been discovered if "the boy wouldn't have went and told them folks." Carruthers told Alfredo Shaw that he was not going to hire an attorney or post bond because the prosecution would then learn that the murders had been a "hit." Carruthers told Alfredo Shaw that Johnson also was supposed to have been "hit" and that Terry and Jerry Durham were the "main people behind having these

individuals killed." Carruthers said that the Durhams wanted revenge because Anderson and Johnson had previously stolen from them.

In response to questioning by Carruthers, Alfredo Shaw acknowledged that he had told the press that his statement to police and his grand jury testimony had been fabricated, but said he had done so because Carruthers had threatened him and his family. According to Alfredo Shaw, one of Carruthers' investigators had arranged for a news reporter to speak with him about recanting his grand jury testimony.

As impeachment of his own witness, Carruthers called both Jerry and Terry Durham, twin brothers, as witnesses. The Durhams denied knowing Alfredo Shaw and said they had never been party to a three-way telephone call involving Alfredo Shaw and Carruthers. Carruthers also called attorney AC Wharton who testified that he was initially retained by Carruthers' mother to represent her son on these murder charges, but was required to withdraw because of a conflict of interest. This testimony was offered to impeach Alfredo Shaw's statement that Carruthers had said he was not going to hire an attorney or post bond. Finally, Carruthers called an administrative assistant from the Shelby County jail who testified that jail records, indicated that Alfredo Shaw was not in the law library at the same time as Carruthers in either February or March of 1994. According to jail records, Alfredo Shaw was in protective custody for much of that time and, as a result, would have been escorted at all times by a guard. However, on cross-examination, this witness admitted that the jail records regarding the law library were not always complete or accurate and that Alfredo Shaw had been housed outside of protect-

ive custody from mid-March to early April 1994 which would have afforded him the opportunity to interact with Carruthers. The record reflects that Alfredo Shaw came forward and provided a statement to police on March 27, 1994 and that the indictments were returned on March 29, 1994.

Based upon this proof, the jury found each defendant guilty beyond a reasonable doubt of three counts of first degree murder, three counts of especially aggravated kidnapping, and one count of especially aggravated robbery.

**The Sentencing Phase**

The trial proceeded to the sentencing phase. The State relied upon the proof presented during the guilt phase of the trial and also introduced evidence to show that Carruthers had been previously convicted of aggravated assault and that James Montgomery had two previous convictions for robbery with a deadly weapon and one conviction for assault with intent to commit robbery with a deadly weapon. The proof showed that Montgomery was only seventeen years old at the time he committed these previous offenses and that all of these previous convictions arose from a single criminal episode.

The State also recalled Dr. Smith who testified that none of the victims died instantaneously and that all suffered as a result of their separate injuries and being buried alive. Although Anderson was paralyzed below his chest, Dr. Smith testified that he would have felt some of the effects of the trauma to his airway and particularly his windpipe, which is according to Dr. Smith, a very painful injury. According to Dr. Smith, the bullet wound to Anderson's head would not have

been fatal had he received proper medical attention and would not necessarily have caused unconsciousness. In addition, Anderson would have been able to breathe after the spinal cord wound, but the wound would have bled into his airway and his lungs, making breathing very difficult. Dr. Smith said that Anderson literally would have been "drowning on his own blood."

With respect to Frederick Tucker, Dr. Smith testified that the gunshot wound to his chest fractured two ribs and pierced his lung, but would not have been fatal had he obtained medical treatment. Because the wound bled into Tucker's lungs and abdominal cavity, Dr. Smith testified that Tucker also was "breathing blood" and "starving for oxygen." Tucker also had multiple internal injuries, according to Dr. Smith, that resulted from some weight being placed on his body. However, Dr. Smith opined that neither the weight of Anderson's body alone, nor the weight of Anderson's body combined with the plywood and dirt would have produced the extensive internal injuries sustained by Tucker and that some additional weight or force had been applied to his body.

Dr. Smith testified that Delois Anderson also had sustained several injuries, including a scalp tear on the back of her head inflicted two to six hours before her death, an injury to her forehead consistent with her position in the grave, and injuries to her neck consistent with manual strangulation. None of these injuries would have caused death had she been afforded medical treatment. Dr. Smith testified that Delois Anderson died from asphyxia caused by the position of her head against her body, dirt in her mouth and nose, and trauma from weight on her body.

As mitigating evidence Montgomery presented the testimony of his cousin, Nakeita Shaw, that she and Montgomery had a close relationship during their childhood and teenage years, that they had attended elementary school together, that Montgomery had been her "brother" and "protector," and that they had continued their close relationship as adults. Nakeita Shaw said that Montgomery has other siblings, including a thirty-year-old sister, a twenty-six-year-old brother, and a fourteen-year-old brother. Nakeita Shaw said that she still loves Montgomery very much, and she asked the jury to spare his life. Montgomery's aunt, Mattie Calhoun, also testified on his behalf. Calhoun said that Montgomery was an average student, that he had a very poor relationship with his father, that another man had helped to rear Montgomery when his father abandoned him at age five or six, and that this individual had died in 1986. Calhoun told the jury that the prosecution had the "wrong people" and begged the jury to spare Montgomery's life. Lastly, Montgomery testified on his own behalf about how he and his brothers and sisters were raised by his mother in Memphis and about how he last saw his father, who was still alive, when he was five years old. He testified that he had spent slightly over nine years in the penitentiary for previous convictions, that he had a job when he was released in January 1994, and that at the time of these crimes his ten-year-old son was living with him. Montgomery proclaimed his innocence and asked the jury to spare his life.

Carruthers presented the testimony of Bishop Richard L. Fiddler, who had been involved in prison ministry for twenty years and had visited Carruthers while he was incarcerated awaiting trial. Fiddler

believed that Carruthers was honest and straightforward, was "a person of quality and worth," and was very upset about the victims' deaths. According to Fiddler, Carruthers viewed the trial as his opportunity to be vindicated. Fiddler asked the jury to spare Carruthers' life. Carruthers' sister, Tonya Yvette Miller, a counselor at the Shelby County adult offender center, testified that their mother raised four children on her own in one of the worst housing projects in Memphis and that, as the oldest son, Carruthers was the "man of the household." Miller admitted that her brother had fallen into bad company and had a hot temper but testified that he never planned to do anything wrong but acted out of "anguish and anger." She also stated that her brother had been raised to tell the truth. Miller told the jury that if she believed her brother had committed these crimes she would be the first person to say that he deserved the death penalty, but Miller said that Carruthers was innocent and that, therefore, he "does not deserve the death sentence." Testifying on his own behalf, Carruthers asserted that he was innocent of the crimes and did not deserve to die. He said he would not have killed his friend because he "wasn't raised like that."

**Jury Findings**

Based on this proof, the jury found the following aggravating circumstances as to each defendant on each of the three murder convictions: (1) "[t]he defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person;" (2) "[t]he murder was especially heinous, atrocious or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death;"

(3) "[t]he murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aircraft piracy; or unlawful throwing, placing or discharging of a destructive device or bomb;" (4) "[t]he defendant committed mass murder, which is defined as the murder of three (3) or more persons within the state of Tennessee within a period of forty-eight (48) months, and perpetrated in a similar fashion in a common scheme or plan." Tenn. Code Ann. § 39-13-204(2), (5), (7), and (12) (Supp. 1994).[6] Finding that these aggravating circumstances outweighed mitigating circumstances beyond a reasonable doubt, the jury imposed the death sentence as to each defendant for each of the three murder convictions.[7]

## Appellate Review

On direct appeal to the Court of Criminal Appeals, the defendants challenged both their convictions of first degree murder and their death sentences, raising

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[6] Two of these aggravating circumstances have been slightly amended since this case was tried. See Tenn. Code Ann. § 39-13-204(i)(7) and (12) (1999 Supp.).

[7] Each of the defendants was sentenced as a multiple, Range II offender to forty (40) years on each of the three convictions of especially aggravated kidnapping and on the especially aggravated robbery conviction. The trial judge ordered that two of the sentences for especially aggravated kidnapping run concurrent to the death penalty with all other sentences running consecutive to the death penalty.

numerous claims of error. After fully considering the defendants' claims, the Court of Criminal Appeals affirmed the convictions and sentences. Pursuant to statute,[8] the case was thereafter docketed in this Court.

The defendants raised numerous issues in this Court, and after carefully examining the entire record and the law, including the thorough opinion of the Court of Criminal Appeals and the briefs of the defendants and the State, this Court entered an order setting the cause for oral argument and designating ten issues for oral argument. See Tenn. S. Ct. R. 12.[9]

After carefully and fully reviewing the record, the briefs of counsel, and the relevant legal authority, we conclude that none of the assigned errors require reversal of defendant Carruthers' convictions or sentences. Moreover, with respect to defendant Carruthers, we have determined that the evidence supports the jury's findings as to aggravating and mitigating circumstances, that the sentences of death were

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[8] "Whenever the death penalty is imposed for first degree murder and when the judgment has become final in the trial court, the defendant shall have the right of direct appeal from the trial court to the Court of Criminal Appeals. The affirmance of the conviction and the sentence of death shall be automatically reviewed by the Tennessee Supreme Court. Upon the affirmance by the Court of Criminal Appeals, the clerk shall docket the case in the Supreme Court and the case shall proceed in accordance with the Tennessee Rules of Appellate Procedure." Tenn. Code Ann. § 39-13-206(a)(1).

[9] Tennessee Supreme Court Rule 12 provides in pertinent part as follows: "Prior to the setting of oral argument, the Court shall review the record and briefs and consider all errors assigned. The Court may enter an order designating those issues it wishes addressed at oral argument."

not imposed in an arbitrary fashion, and that the sentences of death are not excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crimes and the defendant. Accordingly, defendant Carruthers' convictions for first degree murder and sentences of death are affirmed.

However, we also have determined that defendant Montgomery should have been granted a severance and that the failure to grant a severance in this case resulted in prejudicial error requiring a new trial. Accordingly, we reverse Montgomery's convictions and sentences and remand his case for a new trial.

## Analysis
## Dismissal of the Murder Indictments

Defendant Carruthers first contends that the indictments should have been dismissed because they were based upon what he terms "the admittedly questionable" testimony of Alfredo Shaw before the grand jury. Carruthers also argues that he was entitled to a transcript of the grand jury proceedings. We disagree.

It has long been the rule in this State that the sufficiency and legality of the evidence considered by the grand jury is not subject to judicial review.[10] Where an indictment is valid on its face, it is sufficient to require

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[10] Recently in State v. Culbreath, __ S.W.3d __ (Tenn. 2000), we held that dismissal of an indictment is appropriate where a prosecutor's use of a private attorney who received substantial compensation from a private, special interest group created a conflict of interest and an appearance of impropriety and violated the defendants' right to due process under the Tennessee Constitution. Carruthers does not allege prosecutorial misconduct, and the record in this case would not support such an allegation.

a trial of the charge on the merits to determine the guilt or innocence of the accused, regardless of the sufficiency or legality of the evidence considered by the grand jury.[11]

As the United States Supreme Court recognized in Costello v. United States, 350 U.S. 359, 361, 76 S. Ct. 406, 408 100 L.Ed. 397 (1956):

> If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The results of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary

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[11] See Burton v. State, 214 Tenn. 9, 15-18, 377 S.W.2d 900, 902-904 (1964) (refusing to dismiss an indictment that was based upon inadmissible hear say); State v. Dixon, 880 S.W.2d 696, 700 (Tenn. Crim. App. 1992) (refusing to dismiss an indictment that was based on evidence that had been suppressed under the Fourth Amendment); State v. Gonzales, 638 S.W.2d 841, 844-45 (Tenn. Crim. App. 1982) (refusing to dismiss an indictment that was based upon unsworn testimony to the grand jury); State v. Grady, 619 S.W.2d 139, 140 (Tenn. Crim. App. 1979) (refusing to dismiss an indictment that was based upon inadmissible hearsay testimony); State v. Northcutt, 568 S.W.2d 636, 639 (Tenn. Crim. App. 1978) (refusing to dismiss an indictment because of a question asked of a witness by the foreman of the grand jury); Gammon v. State, 506 S.W.2d 188, 190 (Tenn. Crim. App. 1973) (refusing to dismiss an indictment that was based upon inadmissible hearsay testimony); Casey v. State, 491 S.W.2d 90, 91 (Tenn. Crim. App. 1972) (same); State v. Marks, 464 S.W.2d 326, 327 (Tenn. Crim. App. 1970) (same); Parton v. State, 455 S.W.2d 645, 648 (Tenn. Crim. App. 1970) (same).

> trial to determine the competency and adequacy of the evidence before the grand jury.

See also Burton, 214 Tenn. at 16, 377 S.W.2d at 903 (quoting Costello with approval). We decline to adopt such a rule. Carruthers' claim that the indictments must be dismissed because Alfredo Shaw's testimony before the grand jury was not trustworthy is without merit.[12] This matter is not subject to judicial review.

Also without merit is Carruthers' claim that he was entitled to a transcript of the grand jury proceedings. With certain limited exceptions that do not apply in this case general law mandates that grand jury proceedings remain secret. See Tenn. R. Crim. P. 6(k)(1) (stating that such proceedings are secret); Tenn. R. Crim. P. 6(k)(2) (allowing disclosure of grand jury proceedings to ascertain if the testimony of a witness before the grand jury is consistent with the testimony of the witness at trial and allowing disclosure of grand jury testimony of any witness charged with perjury); Tenn. R. Crim. P. 16(a)(3) (requiring the state to provide as discovery to the defendant any "recorded testimony of the defendant before a grand jury which relates to the offense charged"); cf. Tiller v. State, 600 S.W.2d 709, 712 (Tenn. 1980) (discussing the secrecy requirement that applies to grand jury proceedings).[13]

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[12] The record reflects, however, that Alfredo Shaw's testimony at trial when called as a witness by defendant Carruthers apparently was consistent with his testimony before the grand jury.

[13] It appears from the record that Carruthers was provided with a copy of the transcription of Shaw's testimony before the grand jury. Carruthers had left one copy in his cell on the day Shaw testified and was given another copy by the prosecutor

**Forfeiture of Counsel**

We begin our analysis of this issue by summarizing the events that culminated in Carruthers being required to represent himself at trial. As previously stated, these crimes occurred on February 24 or 25, 1994. Carruthers' family initially retained AC Wharton, Jr., to represent him. Wharton was allowed to withdraw on March 19, 1994, because of a conflict of interest. On May 31, 1994, the trial court appointed Larry Nance to represent Carruthers. The State filed a notice of intent to seek the death penalty on July 8, 1994. At a hearing held on July 15, 1994, the trial court scheduled a pre-trial motions hearing for September 30, 1994 and set the case for trial on February 20, 1995. Carruthers was present at this hearing and asked the trial court, "I'd like to know why this is being dragged out like this. I asked Mr. Nance if we can go forward with a motion of discovery and he's asking for a reset. And I'd like to know why." Nance informed the court that he was planning to visit the prosecutor's office later in the week to review the discoverable materials and evidence. The trial judge then advised Carruthers in pertinent part as follows:

> [G]iven the fact that the trial isn't until February, we're setting the next Court date in September for the arguing of motions. Between now and September, your attorney and the attorneys representing your two co-defendants can get with the prosecutors and can

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immediately prior to Shaw's testimony. In addition, the trial court mentioned "the testimony in front of the grand jury" when he was discussing the "three or four different statements" Carruthers was using during his direct examination of Alfredo Shaw.

> obtain their discovery. They're all excellent attorneys. And they'll all do that. And once they've obtained the discovery, they'll meet with their clients and they'll file appropriate motions, which will be heard on September 30th, which will still be well in advance of the trial date, which will give everyone ample time to then evaluate the case, after the motions have been heard and ruled on. So given the fact that we can't get a three-defendant capital case that's still in the arraignment stage to trial any earlier than February, there's plenty of time for your attorneys to meet with the prosecutors, get the discovery, meet with the clients, file motions, argue motions. Just because he hadn't done it yesterday, because you want him to have it done yesterday, doesn't mean that he's not working on your case diligently and properly. He'll have everything done well in advance of the next Court date. And so, you know, he may not do it the very moment you want it done, but you're going to have to work with him on that because there's ample time for him to get it done.

On August 12, 1994, the trial court appointed Craig Morton to assist Nance.[14] When the pretrial

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[14] As the trial court predicted, the record reflects that both Nance and Morton filed numerous pre-trial motions on behalf of Carruthers, including motions for discovery, for investigative services, for a mental examination, to exclude certain evidence, for individual voir dire, for impeachment evidence, for a competency evaluation of prosecution witnesses, for another mental evalu-

motions hearing convened on September 30, 1994, all defense attorneys involved in the case requested a continuance until November 14, 1994 so that additional pre-trial motions could be filed. The trial judge agreed to continue the hearing and also indicated that, where appropriate, a pre-trial motion filed on behalf of one defendant would be applied to all defendants without a specific request.

Because the trial judge had received "an abundance of correspondence from both Mr. Montgomery and Mr. Carruthers expressing concern about the pretrial investigation that has been conducted by their attorneys," the defendants were brought into open court and advised of the continuance. The trial judge then asked the attorneys to "state, for the record, the work that they've done and the work they intend to continue doing on behalf of their client." Each team of defense lawyers reported to the trial judge on the work that had been completed and on the work they intended to complete in the following days.

In particular, Nance indicated that he had inspected a majority of the physical evidence, filed six or seven motions, issued subpoenas for approximately eight witnesses, interviewed several of the one-hundred witnesses listed by the State,[15] met with

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ation of Carruthers, to dismiss the indictments, to suppress statements of co-defendant Jonathan Montgomery, for a severance, for expert services, and a notice of an alibi defense.

[15] Although the witness list contained the names of one hundred people, the State previously had indicated that it had no intention of calling one hundred witnesses and was simply providing the name of every person that had been mentioned in the investigation as a means of giving the defense discovery.

Carruthers in lock-up at the courtroom on two separate occasions, met with Carruthers' family, and spent approximately twenty-five hours on the case. Nance admitted that "some enmity" had developed between him and Carruthers, but indicated that he believed the problem could be resolved.

Carruthers also was allowed to voice his complaints about his attorneys on the record, and his primary complaint was that his attorneys had not met with him as often as he had expected. After hearing the comments of both Nance and Carruthers, the trial judge concluded as follows:

> in my opinion, what has been done thus far in this case, given the fact that there are still six more weeks before the next motion date, and then a full three months beyond that before the trial date, is appropriate and well within the standards of proper representation.

On October 21, 1994, the trial court approved payment for investigative services for Carruthers and authorized competency evaluations for both defendants. Morton informed the trial court that the investigator, Arthur Anderson, had attempted twice to meet with Carruthers at the Shelby County jail and that Carruthers had refused to meet with him on both occasions.

On November 14, 1994, Carruthers filed his first motion for substitution of counsel. Four days later, on November 18, Morton asked the trial court to appoint a different investigator who would take a more aggressive approach. The trial court agreed to appoint a new investigator and continued the hearing date on the pre-trial motions until December 16, 1994. On Nov-

ember 23, 1994, Morton advised the trial court that he had retained the services of Premier Investigation.

Although the record does not reflect that a hearing was held, the trial court allowed Nance to withdraw from representing Carruthers on December 9, 1994.[16] According to statements made by the trial court at a later hearing, Nance was allowed to withdraw because of "personal physical threats" made by Carruthers that escalated to the point that Nance did not "feel comfortable or safe, personally safe, in continuing to represent Mr. Tony Carruthers."

Coleman Garrett was appointed to replace Nance and represent Carruthers along with Morton. The trial judge also authorized James Turner, a third attorney, to assist the defense as an investigator. Both counsel and Carruthers continued to file pre-trial motions. Some of these motions were heard on December 16, 1994, and another hearing was scheduled for January 30, 1995. On that date, Garrett and Morton appeared and presented argument on over seventeen motions. At this hearing, the trial judge agreed to reschedule the trial from February of 1995 to September 5, 1995. At a hearing on May 1, 1995, Garrett and Morton presented argument on several more pre-trial motions including a motion to dismiss the indictments, a motion to sever, and a request for expert services to analyze an audio-tape of Nakeita Shaw's statement. On May

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[16] We note, as did the Court of Criminal Appeals, that in addition to his motion for substitution of counsel, Carruthers filed many pro se motions throughout the time he was represented by Nance and Morton. Many of the pro se filings are similar or identical to the motions filed by counsel for Carruthers or by counsel for co-defendant James Montgomery.

5, investigator/attorney James Turner was allowed to withdraw because he was a solo practitioner and could not maintain his practice and effectively perform the investigation needed on the case. However, the trial court appointed another attorney, Glenn Wright, to act as investigator. On June 2, 1995, Garrett again argued that the indictments should be dismissed due to Shaw's allegedly false testimony before the grand jury.

On June 23, 1995, Garrett, Morton, and Wright sought and were granted permission to withdraw by the trial court. The record reflects that Carruthers also filed a motion for substitution of counsel. At a hearing on July 27, 1995, the trial court appointed William Massey and Harry Sayle to represent Carruthers. During this hearing, the trial judge commented as follows:

> All right. I understand that these three defendants are on trial for their lives and that these are the most serious of charges and that they are all concerned that they are well represented and properly represented, and it's everyone's desire to see to it that they are well represented and properly represented. And toward that end, efforts are being made that they are represented by attorneys that have enough experience to handle this type of case and by attorneys that can establish a rapport with their clients that would allow them to represent their clients well.
>
> We have gone through several attorneys now in an effort to accommodate the defendants' requests in that regard, but at some point–and in my opinion, each of the attorneys and each of the investigators that has

represented these defendants that has been relieved have been eminently qualified to do the job, but I have allowed them to be relieved for one reason or another.

I want the record to be perfectly clear at this point because of some suggestions that have already been raised by some of the correspondence that I have received from Mr. Carruthers, and all of it, by the way, will be made a part of the record. But Mr. Carruthers has suggested, in his correspondence, that some of the previous attorneys have been relieved because they weren't capable or competent to do the job. And that is, in my opinion, at least–my humble opinion as the judge in this case–absolutely and totally an inaccurate statement. The attorneys that have been relieved thus far have been fully capable and fully competent and had been doing an outstanding job, but for a variety of reasons, I've allowed them to withdraw from the case.

* * * *

Mr. Carruthers has raised, through his correspondence, and apparently through direct communication with his previous attorneys, certain matters that are pretty outrageous suggestions, but because of the nature of the matters that he's raised, the attorneys that represented him previously felt that an irreparable breach had occurred between their ability–between Mr. Carruthers and themselves–effecting their ability to continue to represent them. And at some point–and that could well have been the point, but it

wasn't. But at some point these matters that are raised by the defendants cannot continue to be used to get new counsel because it gets to be a point where they're–it's already well beyond that point, but, obviously, at some point, gets to the point where they're manipulating the system and getting what they want–Mr. Carruthers, sit still, please, or you can sit back there–gets to the point where they're manipulating the system and getting trial dates and representation that they want and are calling the shots. That's another matter that's been raised by Mr. Carruthers in some of his correspondence, that he wants his attorneys to know that he's the man calling the shots in this case, and he's the man to look to.

Well, of course, again, it's a free country, and he can say whatever he wants, and he can think whatever he wants, but as far as I'm concerned–and this applies to all three defendants and any defendants that come through this court that are represented by counsel–and this gets back to what Mr. McLin alluded to earlier–the attorneys are calling the shots in this case. They are trying the case except for certain areas where the defendant has the exclusive and final say, such as areas of whether he wants to testify or not and that sort of thing. The attorneys are in here representing these clients and will do so to the best of their ability. They are the ones who have been to law school. They are the ones that have been through trial many times before,

and they're the ones that are here for a reason, and that reason is to represent these individuals. And, so you know, if there's a conflict between the attorney and client with regard to how to proceed in the case, you all resolve it as best you can, but ultimately the attorney is trying the case. And, you know, we don't pull people in off the sidewalk to try these cases, and the reason we don't is because of certain things that they need to learn and certain experiences they need to have professionally before they're prepared to try these cases. So they're here for that reason and for that purpose.

* * * *

So that gets me to the reason for our being here. Because of the matters raised by Mr. Carruthers, I have granted the request of his previous two attorneys and investigator reluctantly because, in my opinion, they were doing an outstanding job of representing Mr. Carruthers and his interests.

* * * *

Because of the most recent rash of allegations raised by Mr. Carruthers in his many letters that he's sent me–I assume he's sent copies of the letters to his counsel and to others, but I've certainly got them, and they will be made a part of the record. And because of the types of things he alleged in those letters and the position that it put his previous attorneys in, and their very, very strong feelings about not continuing to represent Mr.

Carruthers under those circumstances, I have reluctantly agreed to let them withdraw.

And in an effort again to get attorneys who I'm satisfied have the experience and the willingness to handle a case of this seriousness, I have approached and am inclined to appoint Mr. Harry Sayle, who is out of town this week and couldn't be here today but who indicated he would be willing to take the case on, and Mr. Bill Massey, to represent Mr. Carruthers.

* * * *

And as I have stated, I'm running out of patience with regard to these different issues–and I use that word advisedly–being raised by the clients with regard to any objections they have with regard to their attorneys. And as far as I'm concerned, these are the attorneys that will represent these men at trial. It's going to have to be one gigantic conflict–one gigantic and real proven, demonstrated conflict before any of these men will be relieved from representation in this case. There will be no more perceived conflicts, no more unfounded, wild allegations raised through correspondence, no more dissatisfaction with how my attorney is handling my case for anybody to be relieved in this case.

These are the attorneys, gentlemen. You either work with them or don't. It's up to you. But they're the men that are going to be representing you at trial.

(Emphasis added.) Consistent with prior practice, the trial court approved an initial $1000 expenditure for investigative services for Carruthers' newly appointed defense team and conditioned further funding upon a specific showing of necessity by the investigator. Massey indicated that he preferred to use his own investigator rather than an attorney; therefore, Arthur Anderson, who previously had been employed on the case, was retained.

The trial court approved additional funding for investigative services on August 11, August 31, and again on September 27, 1995. Also, due to his recent appointment to the case, Massey requested and was afforded a trial continuance until January 8, 1996. Like previous counsel, Massey and Sayle filed many pre-trial motions on behalf of Carruthers. By November 17, 1995, Massey informed the trial court that all necessary and appropriate pre-trial motions had been filed.

However, about a month later, on December 19, 1995, Massey filed a motion requesting permission to withdraw as counsel. As grounds for the motion, Massey stated that his relationship with Carruthers had "deteriorated to such a serious degree that [counsel] can not provide effective assistance as required by state and federal law. . . . Counsel's professional judgment cannot be exercised solely for the benefit of Defendant, as counsel fears for his safety and those around him." Attached to the motion were several letters Carruthers had sent to Massey, both at his home and at his office in late November and early December of 1995. In the letters, Carruthers accused Massey of

lying,[17] and of being on drugs,[18] threatened counsel,[19] and expressed overall dissatisfaction with counsel's handling of the case.[20] Massey made the following statements to the trial court at the hearing on his motion to withdraw:

> I would just say that in 15 years of practicing law, I have never ever made a motion of this nature. I have never–I've never found it difficult to advocate on behalf of a case. I wouldn't find it difficult to advocate on behalf of this case. I do at this point, however, find it very difficult to advocate on behalf of Mr. Carruthers. And that is simply because he's made it that way. If I were receiving letters that merely stated I was incompetent and that I wasn't handling his case right, and those type of letters–we all get those time to time–I don't mind those. Those don't bother me. When I have letters that come to me that are threatening, when I have telephone calls that come to my office that are threatening the safety of me and my staff and those around me, I have real problems with that. It's gotten so bad,

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[17] For example, in a letter dated November 22, 1995, Carruthers said: "You have violated the code of ethics by lying to me and my co-defendant James Montgomery . . . ."

[18] In a letter dated December 15, 1995, Carruthers said, "I don't know if you are on that COCAINE again but don't let the drug alter you [sic] ability to see the truth and no [sic] the truth."

[19] In a letter dated December 7, 1995, Carruthers said, "All I tell you is to do you [sic] want to do, and I'll do what I HAVE TO DO! Point blank!"

[20] In a letter dated December 5, 1995, Carruthers said, "You have violated several ethic codes with your style and tactics."

your Honor, that my secretary is having nightmares. The last call Mr. Carruthers made is Exhibit E to this verified motion. She called me in absolute tears crying uncontrollably, hysterically crying over his antics. That's the same way he's been doing me. I just haven't broken down and started crying about it. But I do have very, very strong, such strong personal reservations as I have never experienced before as an advocate. Your honor, in advocating cases, particularly capital cases, I find the first thing I have to do to be persuasive is to believe. I have to believe and I have to feel. Because if I don't believe and I don't feel and I'm not sincere, I cannot impart that to a jury. They see my insincerity. They see just words, a parrott-like proficiency as opposed to feeling. They don't act on that. They shut that out. That's been my experience. And I don't believe that that feeling, I know that I can't advocate. I've lost my will to advocate on this case. I don't have any doubt about that at this point. I don't have any doubt. I'll tell you as an officer of this court. I don't have any doubt that would be a major problem. And despite Mr. Carruthers threats and antics, I care for the integrity of the system. I care that his rights are protected even when he tries to destroy them himself and impair them. And I don't know what the Court's answer is. I know that the Court is in a very difficult position here. Obviously, it's very clear what the ploy is. It's very clear that we're never going to get to trial like this. And if we do, then there's going to be a record made for ineffective assis-

> tance of counsel. And they believe, Mr. Carruthers believes, that doing all of these things is going to make him a record as opposed to doing things from a legal standpoint in the courtroom. There are motions, objections at trial and through the proper avenues that the courts of appeals will recognize as a legal basis for a reversal. But we've gotten outside the legal area in this case and we've gone into the area of intimidation, threats.

(Emphasis added.) Despite Massey's argument, the trial judge denied Massey's motion, stating as follows:

> With regard to Mr. Massey's concerns, I certainly believe that everything Mr. Massey has stated in his motion is factually accurate and correct. I don't have any reason to doubt that his secretary received the phone call that she says she received in the memo she prepared, or that any of these other things transpired. But I do think and I do agree with Mr. Massey's characterization that these efforts by Mr. Carruthers are a part of an overall ploy on his part to delay the case forever until something happens that prevents it from being tried.
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> * * * *
>
> In my opinion, to try to make the record reflect as clearly and accurately as possible the fact that the system is doing everything it can to make sure that Mr. Carruthers is properly and thoroughly represented in this case. And Mr. Carruthers may step out to the back. He just was pointing to Mr. Massey

with some sort of threatening gesture. And he's going to sit in the back for the remainder of this hearing. Put him in the back room and keep him back there. Lock the door. Mr. Montgomery, you will join him in a minute if you choose to conduct yourself in that manner as well. The system has done all it can, in my opinion, to make sure that Mr. Tony Carruthers is well represented. And I've tried to be as patient as I can be in listening to the concerns of defense counsel and investigators in making sure that no conflict existed in the representation of either of these men. The specific reasons, the narrow specific reasons for the excusal of the previous attorneys and investigators differ a little bit from those complaints that Mr. Massey has raised today. And so when Mr. Massey says '[t]hat just because I'm the 4th or 5th attorney in line doesn't mean that I now have to be stuck, in effect, in representing him just because others have been relieved and the Court is anxious to get the case tried. My complaints are as valid as theirs were. And if they were relieved, then I should be relieved as well.' And I understand that position. But first of all I'll respond to that by saying their complaints were a little bit different, and I'm not going to go through them on the record now. The record is clear in those instances. One envelope is sealed with several letters that will reveal what those complaints were and the complaints from attorneys prior to that were a little bit different in nature. Not to minimize the seriousness of Mr. Massey's complaints, but

> those complaints were a little bit different. And so its not that he just happens to be the 5th attorney in line, and he's the one that is going to quote, get stuck, representing Mr. Carruthers. Their complaints were a little bit different. And factually there are some distinctions that can be drawn between the complaints that they had and the complaints that you've voiced.

(Emphasis added.) The trial court also emphasized that Carruthers' ploy had become more apparent over the course of the proceedings.

> With the very first set of attorneys I tried to give Mr. Carruthers the benefit of the doubt and excused them for reasons similar to yours, but a little bit different. With the second set of attorneys I tried to give Mr. Carruthers the benefit of the doubt and excuse them for reasons similar to yours, but a little bit different. Now that we're in the third set of attorneys , the ploy is much more apparent than it was with the first set of attorneys. Although, it was somewhat apparent to any of us who have been in these courts for many, many years as we all have been. Not wanting to jump to any conclusions or not give him the benefit of the doubt, the first and second sets of attorneys were excused. <u>But now that we're into the third set of attorneys the ploy is much more apparent and, therefore, I'm much less receptive to these sorts of arguments than I was a year ago when the first set of attorneys came in wanting to be relieved.</u>

(Emphasis added.)

Finally, in response to counsel's comment that Carruthers should just go "pro se," the trial court concluded that it should refuse "to force a man to go pro se in a capital case if he doesn't want" and observed that Carruthers had never asserted his right of self-representation. Although Massey's motion to withdraw was denied, the trial judge granted his request for additional funds for further investigation and for hiring a mitigation specialist.

On January 2, 1996, six days before the trial was scheduled to begin, Massey renewed his motion to withdraw. Massey informed the trial court that he had continued to receive threatening letters at his home and was concerned for his daughter's safety because Carruthers had described the car she drove. Massey indicated that he cared more about Carruthers' right to a fair trial than did Carruthers himself, but given the recent and ongoing threats, Massey declared, "I don't want to represent this man. I can't represent him. I won't represent him."

At this hearing, the prosecution took the position that Massey should not be allowed to withdraw because the defendant was simply manipulating the system in an attempt to delay his trial. The State pointed out that the case had been pending for almost two years and each time a trial date drew near Carruthers would increase his letters and efforts to alienate his attorneys either through written or verbal personal attacks or threats. The State urged the trial court to deny the motion to withdraw and proceed to trial:

> [I]f a defendant, Your Honor, can threaten the system, if he can manipulate the system by threats, by letters, I'm not sure if that's what the makers of the constitution meant when

> they sat in Philadelphia and they said, look, let's let every defendant have a fair trial. Let's let him have a lawyer. Let's let a jury be over here. Let's let him have a judge; that's fair. Let's let no man be accused of a crime, will not go to trial, unless he receives a fair trial. Let no man be convicted–but the framers of the constitution, Your Honor, had not met Tony Carruthers.

After considering the comments of counsel, the trial judge briefly recounted the history of the case and again emphasized that, in his opinion, all of the attorneys appointed for the defendant, including Massey and Sayle, were excellent trial lawyers who had fully performed their duties with regard to Carruthers' defense, including filing all relevant motions and thoroughly pursing the investigation of the case. The trial court then ruled on Massey's motion to withdraw, stating as follows:

> Now, this is the way that the case is going to proceed on Monday. Mr. Massey is still on the case. He still represents Mr. Carruthers. If between now and Monday Mr. Carruthers chooses to discuss with Mr. Massey the case and to cooperate with Mr. Massey in his preparation of the defense in this case, then I'll look to Mr. Massey to go forward in representing Mr. Carruthers. There have been disputes and conflicts between attorney and client before. This is not the first time that there has been a problem between attorney and client, and these types of problems can be repaired oftentimes. And differences can be patched up, and attorneys can go forward. And I would

hope that that would be the case in this case. And I would hope that Mr. Carruthers would between now and Monday, work with Mr. Massey and Mr. Sayle in preparation for a trial. If Mr. Carruthers elects not to, however, he will go forward representing himself. This was raised on the 19th when Mr. Massey filed his motion to withdraw and we first heard it. At that time, I rejected the idea. I was reluctant to because I've never required an individual to go forward representing himself when he has not requested that. And I don't like that idea, but I've given a lot of thought to that suggestion since the 19th. For the record, Mr. Massey called me shortly after our hearing on the 19th when he received some letters in the mail from Mr. Carruthers that dealt further–that he felt further undermined his ability to represent him. And I just want that on the record so there is no misunderstanding about that. But since the 19th, and after the phone call from Mr. Massey that I received, after the hearing on the 19th, and after his request today, I've given it a lot of thought to what options were left, what options are still available in this case. And in my judgment, the only option that is still available if Mr. Carruthers chooses not to work with Mr. Massey and Mr. Sayle in going forward with this case next Monday, is for him to represent himself. And I'll provide him with a copy of the rules of Tennessee procedure, the rules of evidence. And he can sit at counsel table and voir dire the jury, and question witnesses, and give an opening statement, as any lawyer

would, and he would be required to comply with all the rules as any lawyer would, if he chooses to go forward on his own. If he chooses to say nothing, then that's his prerogative, and – But that's what the situation will be next Monday, Mr. Carruthers. And the choice is yours. Again, the choice is yours. You have for the third time around an outstanding attorney representing you. And he's here, and he'll be available. If you choose to avail yourself of his services, he will represent you on Monday. If you choose not to, you can go forward representing yourself. If you go forward representing yourself, I will require Mr. Massey and Mr. Sayle to be available as elbow counsel so that at any recess or overnight, you can seek advice from them, and they can confer with you and advise you in any way that they deem appropriate. So if you elect not to have him represent you and you go forward representing yourself, they'll be in the courtroom observing, and they'll be available to offer advice and counsel to you at any recess, lunch break, overnight break. One of those two scenarios will occur next Monday. And again, it's up to Mr. Carruthers because we've been through this now for many, many months and at this point in time, the case needs to go forward. There is no other reason for the case to be reset, no proof problems from one side or the other, no witness problems from one side or the other. The case is now set for the third time for trial. There is no extrinsic reason for an additional continuance. And–so Mr. Carruthers is going to have

> to decide in which manner he wishes to proceed on Monday, but the case will go forward on Monday. And I'll hear back from Mr. Massey Monday morning with regard to whether he has been able to confer with his client and what the progress of that has been, and whether he feels that the progress has been such that it would allow him to go forward in representing Mr. Carruthers.

(Emphasis added.)

The record reflects that at a hearing held the next day, January 3, 1996, Carruthers was "glaring" at Massey while "gritting his jaw."[21] Upon observing Carruthers' conduct, the trial court once again cautioned the defendant as follows:

> And again, as I did yesterday, I want to remind Mr. Carruthers that if it is his decision not to proceed with Mr. Massey and to proceed pro se–just a minute. I'll let you speak in a moment–then he needs to understand that he will be held to the same standard that attorneys are held to during a trial. Rules of evidence, rules of procedure will apply. And he will need to familiarize himself as best he can with those procedures and those rules between now and trial date because in proceeding pro se, he will certainly be held to that same standard. Obviously, he realizes the charges that are pending and the potential for the imposition of the death penalty involved

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[21] The trial judge stated that "since [Carruthers] has been brought in the courtroom, he has in fact been glaring at Mr. Massey non-stop."

> in this case. We've had numerous hearings and motions over the past fifteen or eighteen months, and all of those matters should be very apparent to Mr. Carruthers at this point in time.

Responding to the trial court's admonition, Carruthers said he did not want Massey representing him because Massey was on cocaine.

Following this hearing, Massey filed an application for extraordinary appeal[22] in the Court of Criminal Appeals challenging the trial court's ruling that he remain on the case either as counsel or as advisory counsel. In an order dated January 8, 1996, the Court of Criminal Appeals held that Massey should be allowed to immediately withdraw from further representation, stating:

> This Court is of the opinion that the attorney-client relationship which may have previously existed, has deteriorated until such a relationship does not exist between Carruthers and Mr. Massey. Also the circumstances of this case make it impossible for Mr. Massey to ethically represent Mr. Carruthers. Carruthers has proclaimed that he will do bodily harm to Massey. He has in essence and in fact threatened Massey with death. Carruthers, who has a history of violent conduct, is apparently a member of a gang. All of his correspondence to Massey carries a drawing of a lidless eye that watches from the top of a pyramid. Moreover, Massey's family is filled

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[22] See Tenn. R. App. P. 10.

with fear and anxiety due to the threats made to Massey; and Massey's secretary, who has had dealings with Carruthers by telephone, likewise has fear and anxiety based upon her conversations with Carruthers and the threats made against Massey. Given these circumstances, Mr. Massey had no alternative but to seek permission to withdraw as counsel. He is supported in this endeavor by the Disciplinary Counsel for the Tennessee Supreme Court Office, which advised Massey that he was ethically required to withdraw as counsel, and, if the motion was denied he was required to seek relief in the appellate courts.

* * * *

Given these facts and circumstances as well as the relevant provisions of the Code of Professional Conduct, which governs the conduct of lawyers in the State of Tennessee, Mr. Massey was entitled to be relieved as counsel of record for Mr. Carruthers. If there ever was an amicable attorney-client relationship, it was eradicated by Mr. Carruthers' conduct in writing the letters aforementioned and threatening to do bodily harm to Mr. Massey the first time he saw him. Today, Mr. Massey and Mr. Carruthers are at odds and their differences are irreconcilable. Furthermore, Mr. Massey, who emphatically denied any misconduct or addiction to drugs, must attempt to protect his family, secretary, and himself

> from physical harm as well as protect himself from further disciplinary complaints.[23]

(Emphasis added.)

The same day this order was filed, but before the trial judge had received the order, a hearing was held in the trial court. After learning that Massey had received seven more pieces of certified mail at his home since the hearing on January 2, and after being advised by Massey that the difficulties with Carruthers had not improved, the trial judge concluded that Carruthers,

> through his actions, through his accusations, and letters, he has forced himself into a situation where I have no option but to require that he proceed pro se. And so in deference to your request, I will go forward with my previous statement and that is that you and Mr. Sayle will remain as elbow counsel. Mr. Carruthers will represent himself.

The trial court then reiterated, "[f]rom this point forward I'll give Mr. Carruthers the opportunity to speak on his own behalf at appropriate times. As I indicated to him last week, he will be expected to comply with all of the rules of procedure and evidence that an attorney would be required to comply with."

Upon hearing the trial court's ruling, Carruthers claimed that he had attempted to reconcile with Massey and complained that he was not qualified to represent himself. The trial judge responded:

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[23] The record reflects that Carruthers had filed a complaint against Massey with the Board of Professional Responsibility.

Well, those are the perils in going forward pro se. And in my judgment, Mr. Carruthers, as I've said on several occasions, and I don't intend to get back into a lengthy hearing on this issue at this time, but we've had two or three hearings already on this. In my judgment, and I understand you're stating now that you don't feel capable of going forward and representing yourself. But you need to understand that in my judgment you have created this problem for yourself. You are the author of your own predicament by, in my opinion, sabotaging the representation of you by four previous attorneys. These are now your fifth and sixth attorneys. In my judgment, because of actions that you've taken over the past 18 months, because of actions that you've taken, you are now in this situation. And so it may well be difficult for you to go forward in representing yourself, but this is the situation that you've created and you're going to have to do the best you can, because there is virtually no option left at this point. To reset it again, history would should would only – would be a futile effort, because at the eleventh hour with the seventh and eighth attorneys representing you, there would be some other effort, in my opinion, some other manipulation on your part that would then cause those attorneys to come in and want to get off your case. And then we'd reset it and appoint the ninth and tenth attorneys, and the eleventh and twelfth. And there'd be no end to it.

* * * *

And so we're going forward and you're going to represent yourself. I understand you're not an experienced attorney. I understand you may well have never gone through a voir dire process before. And that's unfortunate. I wish you had cooperated and gotten along with Mr. Nance a year and a half ago. He was an excellent attorney, has tried many, many cases in these courts, serious difficult cases and done an excellent job. I wish you had cooperated and gotten along with Coleman Garrett who, in my opinion, is one of the best trial attorneys in this entire state. He's tried many cases in this courtroom and defended individuals remarkably well. I wish you had cooperated and gotten along with Mr. Craig Morton and Mr. Glenn Wright, and Mr. Harry Sayle, and Mr. William Massey, because I think it would've been in your best interest to have done so. But it's been obvious that you have not. And so for that reason we're going forward.

* * * *

It's not easy to make this decision. It's not a decision that I made lightly or take lightly. But I tell you what, if the record isn't complete enough and replete enough with evidence of manipulative conduct and obstructionism, then I can't imagine ever there being a record for the appellate courts in Tennessee that would meet that criteria.

(Emphasis added.)

After the trial court ruled, Carruthers offered to waive any conflict, to allow Massey to continue representing him, to apologize to Massey, and to testify that the accusations he had made against Massey were untrue. The trial court refused, finding that Carruthers was merely using another tactic to delay the proceeding.

The next day, January 9, 1996, the Court of Criminal Appeals entered an addendum to its previous order and allowed Massey to be completely relieved from further representation or participation in the case including providing assistance as "elbow counsel." However, Sayle continued on the case as elbow or standby counsel.

During voir dire two days later, January 11, 1996, the State requested a continuance of the trial due to the hospitalization of one of its material witnesses, Nakeita Shaw. The trial court granted the State's motion for a continuance and rescheduled the trial for April 15, 1996. At this point, in light of the continuance, Carruthers made an oral motion for appointment of new counsel.[24] The trial court denied the motion, stating:

> The ruling still stands. The system will not be held hostage by Tony Carruthers, and to go through another round of attorneys will be doing just that, because history suggests, as you've done in the past, that is if new attorneys were appointed and spent the time and investigated, the effort to get ready on this

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[24] One day earlier, when the State mentioned that it might possibly be requesting a continuance, Carruthers had adamantly objected to any continuance and stated he was ready to go to trial.

> case, then at the eleventh hour something would happen, some allegations would be made that would undermine their ability to represent you, they'd ask to withdraw, we'd be back in the same situation that we were in with Mr. Larry Nance, with Mr. Coleman Garrett, with Mr. Bill Massey, all three of whom are outstanding criminal defense attorneys. All three of whom were fully capable of representing you, and all three of whom had to be relieved because of your actions. And in my judgment, enough is enough. And because of your actions, these attorneys are no longer representing you and, therefore, you will be representing yourself. You have ample time to prepare. You have access to legal opinion from Mr. Sayle. You have the file. You have the rules. You have a jury consultant. You have an investigator. And this is the manner in which we're going forward.

On January 16, 1996, the trial court approved Carruthers' request for funds to obtain an investigator to assist him and authorized the investigator to contact the trial court directly if additional funds were needed. In February of 1996, Carruthers filed two more written motions for appointment of counsel which were again denied by the trial court for the same reasons set out above. In a hearing on February 20, 1996, the trial court considered Carruthers' pre-trial requests for funding for expert services, and, at this hearing, again recounted the events that culminated in Carruthers being required to represent himself. The trial court observed that "it will be apparent to anyone

who objectively views this situation that Carruthers is not being denied the right to counsel."

Throughout these pre-trial proceedings, the trial court treated Carruthers with respect, patiently listened to his arguments and requests, and afforded Carruthers and his investigator considerable latitude in scheduling and arguing motions, even though most of these motions were similar or identical to motions that had already been filed and argued by counsel who had previously represented Carruthers. When Carruthers requested *ex parte* hearings to seek funding for experts, the prosecution would voluntarily leave the court room. The trial judge granted Carruthers' request for funding to obtain a forensic pathologist, but denied his request for funding for an accident reconstructionist.

In February of 1996, the trial court allowed Sayle to withdraw as elbow counsel because Carruthers apparently had no confidence or trust in Sayle and because Carruthers was launching personal, verbal attacks upon Sayle. When Sayle moved for permission to withdraw as elbow counsel, he stated:

> He has expressed the feeling that I am not working for him and that I have not done anything for him, I'm not going to do anything for him. He suspects – he's made it clear that he suspects that I'm working with the state in some capacity. And frankly none of the advice I give him is followed, and I don't think there is any intention of following it. And frankly its just – and the abuse gets extremely personal. Personal villification over the last couple of meetings, and I see no basis for being able to continue.

Thereafter, Carruthers twice made oral motions for appointment of counsel, first on March 4, 1996, and then on April 15, 1996, the day jury selection began. Again, the trial court denied these motions and noted that this was not the first case in which Carruthers had employed such tactics.[25] Carruthers therefore represented himself at trial and sentencing, participating in voir dire, presenting opening statement, questioning witnesses on cross-examination, making objections, presenting witnesses in his defense, and presenting closing argument. After the jury returned its verdicts as to guilt and sentencing, the trial court appointed counsel to represent Carruthers on his motion for new trial and on appeal.

In the Court of Criminal Appeals, Carruthers, by and through counsel, first asserted that he had been denied due process when the trial court required him to represent himself at trial and sentencing in this capital case. The Court of Criminal Appeals rejected his claim and held that, under the circumstances of this case, the trial court was justified in requiring Carruthers to represent himself, reasoning as follows:

> We do not take lightly the result that a defendant has to proceed pro se in any trial, especially one involving a capital offense. Our judicial system could not survive if those accused of crimes were literally run over "roughshod." But while the individual must be protected by the system, the judicial system must

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[25] In an earlier aggravated assault case Carruthers had been appointed four attorneys before the case was finally tried. See Carruthers v. State, No. 02 C01-95 05-CR -00130 (Tenn. Crim. App., Jackson, April 17, 1996).

> also be protected from abuses by an individual. A person charged with criminal acts cannot be allowed to subvert the judicial system.

In this Court, counsel for Carruthers again contend that he was denied his right to due process when he was required to represent himself during the trial of this capital case. Counsel assert that Carruthers did not expressly waive his right to counsel, that any implicit waiver was invalid because the trial court did not advise Carruthers of the possibility of waiver or the dangers of self-representation, and that his conduct is not egregious enough to justify a finding of forfeiture. In response, the State argues that the Court of Criminal Appeals correctly found that Carruthers forfeited his right to counsel because Carruthers was using this right in order to manipulate the judicial system and delay the trial. In the alternative, the State argues that the record in this appeal supports a finding that Carruthers implicitly waived his right to counsel by his course of conduct and that the trial court's warnings to Carruthers were sufficient to inform him that he would be deemed to have waived his right to counsel if his conduct continued and of the dangers of self-representation.

Both the United States and Tennessee Constitutions guarantee an indigent criminal defendant the right to assistance of appointed counsel at trial. See U.S. Const. amend. VI; Tenn. Const. art. I, § 9; Martinez v. Court of Appeal of California, __ U.S. __, 120 S. Ct. 684, 686, 145 L.Ed.2d 597 (2000); Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799 (1963); State v. Small, 988 S.W.2d 671, 673 (Tenn. 1999); State v. Northington, 667 S.W.2d 57, 60 (Tenn. 1984); see also Tenn. R. Crim. P. 44(a). The right of an

accused to assistance of counsel, however, does not include the right to appointment of counsel of choice, or to special rapport, confidence, or even a meaningful relationship with appointed counsel. See Morris v. Slappy, 461 U. S. 1, 13-14, 103 S. Ct. 1610, 1617-18, 75 L.Ed.2d 610 (1983); United States v. Gallop, 838 F.2d 105, 107 (4th Cir. 1988); Siers v. Ryan, 773 F.2d 37, 44 (3d Cir. 1985); State v. Moody, 968 P.2d 578, 579 (Ariz. 1998); Snell v. State, 723 So.2d 105, 107 (Ala. Crim. App. 1998); Jones v. State, 449 So.2d 253, 258 (Fla. 1984); State v. Ryan, 444 N.W.2d 610, 625 (Neb. 1989). The essential aim of the Sixth Amendment is to guarantee an effective advocate, not counsel preferred by the defendant. See Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 1697. 100 L.Ed.2d 140 (1988).

Ordinarily, waiver of the right to counsel must be voluntary, knowing, and intelligent. See Johnson v. Zerbst, 304 U.S. 458, 464-65, 58 S. Ct. 1019, 1023, 82 L.Ed. 1461, 1466-67 (1938); Small, 988 S.W.2d at 673. Typically, such a waiver occurs only after the trial judge advises a defendant of the dangers and disadvantages of self-representation and determines that the defendant "knows what he is doing and his choice is made with eyes open." Adams v. United States ex rel. McCann, 317 U.S. 269, 279, 63 S. Ct. 236, 242, 87 L.Ed. 268 (1942); see also Small, 988 S.W.2d at 673; Northington, 667 S.W.2d at 61-62. Many courts, however, have recognized that the right to counsel is not a license to abuse the dignity of the court or to frustrate

orderly proceedings.[26] Accordingly, several courts have acknowledged that, like other constitutional rights,[27] the right to counsel can be implicitly waived or

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[26] See United States v. Flewitt, 874 F.2d 669, 674 (9th Cir. 1989) ("The right to self-representation is not a license to abuse the dignity of the courtroom."); Berry v. Lockhart, 873 F.2d 1168, 1171 (8th Cir. 1989) ("A defendant has no right to manipulate his right to counsel in order to delay or disrupt the trial."); Gallop, 838 F.2d at 108 ("[R]ight [to counsel] must not obstruct orderly judicial procedure and deprive courts of the exercise of their inherent power to control the administration of justice."); United States v. White, 529 F.2d 1390, 1393 (8th Cir. 1976) ("Of course, the right to counsel is a shield, not a sword. A defendant has no right to manipulate his right for the purpose of delaying and disrupting the trial."); Brooks v. State, 819 S.W.2d 288, 290 (Ark. Ct. App. 1991) ("[T]he constitutional right to counsel is a shield, not a sword, and . . . a defendant may not manipulate this right for the purpose of delaying the trial or playing 'cat-and-mouse' with the court."); Jones, 449 So.2d at 258 ("We consider it implicit . . . that the right to appointed counsel, like the obverse right to self-representation, is not a license to abuse the dignity of the court or to frustrate orderly proceedings. . . ."); State v. Green, 471 N.W.2d 402, 407 (Neb . 1991) (" A defend ant may not utilize his or her right to counsel to manipulate or obstruct the orderly procedure in the court or to interfere with the fair administration of justice."); State v. Montgomery, 530 S.E.2d 66, 69 (N.C. Ct. App. 2000) ("[A]n accused may lose his constitutional right to be represented by counsel of his choice when he perverts that right to a weapon for the purpose of obstructing and delaying his trial."); Painter v. State, 762 P.2d 990, 992 (Okla. Ct. Crim. App. 1992) ("The right to assistance of counsel may not be put to service as a means of delaying or trifling with the court."); United States v. Fowler, 605 F.2d 181, 183 (5th Cir. 1979) ("The right to assistance of counsel, cherished and fundamental though it be, may not be put to service as a means of delaying or trifling with the court."); Cf. Faretta v. California, 422 U.S. 806, 834 n.46, 95 S. Ct. 2525, 2541 n.46, 45 L.Ed.2d 562 (1975) ("The right of self-representation is not a license to abuse the dignity of the courtroom.").

forfeited if a defendant manipulates, abuses, or utilizes the right to delay or disrupt a trial. See United States v. Leggett, 162 F.3d 237, 249 (3rd Cir. 1998) (holding that defendant forfeited his right to counsel when he physically assaulted his attorney); United States v. Goldberg, 67 F.3d 1092, 1097-1101 (3rd Cir. 1995) (discussing the principles of implicit waiver by conduct and forfeiture, but concluding that defendant had not forfeited his right to counsel); United States v. McLeod, 53 F.3d 322, 326 (11th Cir. 1995) (holding that defendant forfeited his right to counsel by exhibiting abusive, threatening, and coercive conduct toward his attorney); United States v. Fazzini, 871 F.2d 635, 642 (7th Cir. 1989) (holding that defendant waived his right to counsel where, after being warned that he could lose the right if he failed to cooperate, defendant continued to refuse to cooperate with numerous court-appointed lawyers); United States v. Kelms, 827 F.2d 1319, 1322 (9th Cir. 1987) (holding that defendant implicitly waived the right to counsel where, to delay the trial, defendant refused to accept appointed counsel or hire his own attorney); United States v. Mitchell, 777 F.2d 248, 256-57 (5th Cir. 1985) (holding defendant waived his right to counsel when, in bad faith and for purpose of delay, he retained counsel known to have a conflict of interest and failed to retain other counsel); Richardson v. Lucas, 741 F.2d 753, 756 (5th Cir. 1984) (holding that defendant's refusal to allow any public defender, regardless of competence, to represent him constituted a waiver of the

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[27] See, e.g. Illinois v. Allen, 397 U.S. 337, 90 S. Ct. 1057, 25 L.Ed.2d 353 (1970) (holding that by persisting in disruptive conduct the accused lost his constitutional right to be present throughout the trial).

right to counsel); United States v. Moore, 706 F.2d 538, 540 (5th Cir. 1983) (holding that defendant's "persistent, unreasonable demand for dismissal of counsel and appointment of new counsel . . . is the functional equivalent of a knowing and voluntary waiver of counsel"); United States v. Leavitt, 608 F.2d 1290, 1292 (9th Cir. 1979); United States v. Travers, 996 F. Supp. 6, 17 (S.D. Fla. 1998) (finding forfeiture as a result of the defendant's "persistently abusive, threatening and coercive" dealings with his attorney and noting that the defendant had been repeatedly warned that his failure to cooperate could result in a finding of forfeiture); United States v. Jennings, 855 F. Supp. 1427, 1442 (M.D. Pa. 1994) (finding that defendant waived his right to counsel when he physically assaulted his attorney); Siniard v. State, 491 So.2d 1062, 1063-64 (Ala. Ct. Crim. App. 1986) (holding that defendant forfeited the right to counsel where he was allowed eight months and several continuances to retain counsel but failed to do so); Brooks, 819 S.W.2d at 290 (recognizing forfeiture, but concluding that forfeiture was not appropriate because the record did not show that the defendant used his right to manipulate the judicial system); Potter v. State, 547 A.2d 595, 602 (Del. 1988) (stating that a defendant's dilatory actions in retaining counsel can justify a forfeiture of the right to counsel); Jones, 449 So.2d at 256 (holding that defendant waived his right to counsel by persistently demanding counsel of his choice and refusing to cooperate with appointed counsel); Brickert v. State, 673 N.E.2d 493, 496 (Ind. Ct. App. 1997) (holding that defendant waived his right to counsel by engaging in conduct designed to frustrate the judicial process and avoid or delay a trial); People v. Sloane, 693 N.Y.S.2d 52, 53 (N.Y. App. Div. 1999) (holding that defendant forfeited his

right to counsel by his "persistent pattern of threatening, abusive, obstreperous, and uncooperative" behavior towards four successive appointed attorneys); People v. Gilchrist, 658 N.Y.S.2d 269 (N.Y. App. Div. 1997) (holding that defendant forfeited his right to counsel when he assaulted his fourth appointed attorney); Montgomery, 530 S.E.2d at 69 (holding that defendant forfeited his right to counsel when, over the course of fifteen months, he was twice appointed counsel and twice released his appointed counsel); Painter, 762 P.2d at 992 (holding that defendant waived his right to counsel when he failed to secure counsel or request appointed counsel so that he could delay his hearing); State v. Boykin, 478 S.E.2d 689, 690 (S.C. Ct. App. 1996) (recognizing that a defendant may implicitly waive the right to counsel by misconduct, but finding no implicit waiver because no warnings had been given the defendant); City of Tacoma v. Bishop, 920 P.2d 214, 218 (Wash. Ct. App. 1996) (recognizing forfeiture but concluding that the defendant's misconduct was not sufficiently egregious to support a finding of forfeiture); State v. Cummings, 546 N.W.2d 406, 418 (Wis. 1996) (holding that defendant had forfeited his right to counsel where he consistently refused to cooperate and constantly complained about counsel's performance to manipulate, disrupt, and delay the proceedings); see generally Wayne R. LaFave, et al., Criminal Procedure, § 11.3(c) (2nd ed. 1999) ("What these courts have held, in effect, is that the state's interest in maintaining an orderly trial schedule and the defendant's negligence, indifference, or possibly purposeful delaying tactic, combined to justify a forfeiture of defendant's right to counsel . . . .").

Some courts have attempted to distinguish the concepts of implicit waiver and forfeiture. See, e.g., Goldberg, 67 F.3d at 1099-1100; City of Tacoma, 920 P.2d at 218. These courts hold that an implicit waiver occurs when, after being warned by the court that counsel will be lost if dilatory, abusive, or uncooperative misconduct continues, a defendant persists in such behavior. Id. In contrast, forfeiture results regardless of the defendant's intent to relinquish the right and irrespective of the defendant's knowledge of the right. Id. Accordingly, where a defendant engages in extremely serious misconduct, a finding of forfeiture is appropriate even though the defendant was not warned of the potential consequences of his or her actions or the risks associated with self-representation. See Goldberg, 67 F.3d at 1102; City of Tacoma, 920 P.2d at 218.

However, many courts considering this issue do not distinguish between the two concepts and have used the terms implicit waiver and forfeiture interchangeably. See Goldberg, 67 F.3d at 1098; Cf. Freytag v. Commissioner of Internal Revenue Service, 501 U.S. 868, 895 n.2, 111 S. Ct. 2641, 2647 n.2, 115 L.Ed.2d 764 (1991) (Scalia, J., concurring in part and concurring in judgment) ("The Court uses the term 'waive' instead of 'forfeit.' The two are really not the same, although our cases have so often used them interchangeably that it may be too late to introduce precision. Waiver, the intentional relinquishment or abandonment of a known right or privilege, is merely one means by which a forfeiture may occur. Some rights may be forfeited by means short of waiver.") (internal citations and quotations omitted).

Although this Court has never considered the precise question presented in this appeal, when discussing a non-indigent defendant who fired his attorney in open court and thereafter repeatedly protested about going to trial without a lawyer, we recognized that even "[t]hough a defendant has a right to select his own counsel if he acts expeditiously to do so . . . he may not use this right to play a 'cat and mouse' game with the court . . . ." State v. Chadwick, 224 Tenn. 75, 79, 450 S.W.2d 568, 570 (1970); see also Glasgow v. State, 224 Tenn. 626, 461 S.W.2d 24 (1970); State v. Dubrock, 649 S.W.2d 602 (Tenn. Crim. App. 1983) (holding that non-indigent defendants waived the right to counsel because they refused to hire an attorney). The idea that the right to counsel may not be used to manipulate or toy with the judicial system applies equally to indigent and non-indigent defendants. Although an indigent criminal defendant has a constitutional right to appointed counsel, that right may not be used as a license to manipulate, delay, or disrupt a trial. See footnote 26 supra, citing cases. Accordingly, we conclude that an indigent criminal defendant may implicitly waive or forfeit the right to counsel by utilizing that right to manipulate, delay, or disrupt trial proceedings. We also hold that the distinction between these two concepts is slight and that the record in this case supports a finding of both implicit waiver and forfeiture.

When Garrett and Morton were allowed to withdraw and Massey and Sayle were appointed, the trial court advised Carruthers that Massey and Sayle would be the lawyers representing him at trial and that there would be no further withdrawal and new appointments absent a "gigantic conflict." Despite this

admonishment, Carruthers once again launched personal attacks and threats against Massey, threats that eventually extended to Massey's office staff and family members. When Massey renewed his motion to withdraw on January 2, 1996, the trial court specifically and clearly advised Carruthers that he had two choices – cooperate with Massey or represent himself. Carruthers also was advised that if he chose not to cooperate with Massey and to represent himself, he would be required to comply with all procedural rules as if he were an attorney. The trial court repeated his admonishment at a hearing on January 3, 1996. Despite the trial court's clear warnings, quoted fully earlier in this opinion, Carruthers persisted with his attitude of hostility toward Massey, as is evidenced both by his "glaring" at Massey during the hearings and by the letters Massey received after those hearings. In our view, Carruthers implicitly waived his right to counsel, because, after being warned by the trial court that he would lose his attorney if his misconduct continued, Carruthers persisted in his misconduct.

In so holding, we reject Carruthers' claim that the warnings given him by the trial court were not sufficient to support a finding of implied waiver. The cases upon which Carruthers relies in support of this claim are inapposite because they involve explicit, voluntary waiver cases. See United States v. McDowell, 814 F.2d 245, 251-52 (6th Cir. 1987); Crandell v. Bunnell, 25 F.3d 754 (9th Cir. 1994); United States v. Silkwood, 893 F.2d 245, 248-49 (10th Cir. 1989). We decline to hold that a trial court must provide extensive and detailed warnings when a defendant's conduct illustrates that he or she understands the right to counsel and is able to use it to manipulate the system. We

conclude that an implicit waiver may appropriately be found, where, as here, the record reflects that the trial court advises the defendant the right to counsel will be lost if the misconduct persists and generally explains the risks associated with self-representation. Cf. Kelm, 827 F.2d at 1322 (considering the record as a whole when determining the sufficiency of the trial court's advisements).

Even assuming the warnings given Carruthers were insufficient to support a finding of implicit waiver, however, we conclude that Carruthers' conduct was sufficiently egregious to support a finding that he forfeited his right to counsel. The circumstances culminating in the trial court's ruling have been fully summarized. Carruthers repeatedly and unreasonably demanded that his appointed counsel withdraw and that new counsel be appointed. Carruthers' demands escalated as his scheduled trial dates drew near. As the trial court recognized, the "ploy" to delay the trial became increasingly apparent with each new set of attorneys. In addition, Carruthers' conduct degenerated and his outrageous allegations and threats escalated markedly with each new set of attorneys. As the trial court emphasized, Carruthers was the author of his own predicament and sabotaged his relationship with each successive attorney with the obvious goal of delaying and disrupting the orderly trial of the case. Under these circumstances, the trial court was fully justified in concluding that Carruthers had forfeited his right to counsel. Indeed, in situations such as this one, a trial court has no other choice but to find that a defendant has forfeited the right to counsel; otherwise, an intelligent defendant "could theoretically go

through tens of court-appointed attorneys and delay his trial for years." Cummings, 546 N.W.2d at 419.

As did the trial court and the Court of Criminal Appeals, we have carefully considered the ramifications of holding that an indigent criminal defendant in a capital case has implicitly waived and forfeited his valuable right to counsel.[28] We are aware that both implicit waiver and forfeiture are extreme sanctions. However, Carruthers' conduct was extreme and egregious. The sanction is appropriate under the circumstances and commensurate with Carruthers' misconduct. We reiterate that a finding of forfeiture is appropriate only where a defendant egregiously manipulates the constitutional right to counsel so as to delay, disrupt, or prevent the orderly administration of justice. Where the record demonstrates such egregious manipulation a finding of forfeiture should be made and such a finding will be sustained, even if the defendant is charged with a capital offense. Persons charged with capital offenses should not be afforded greater latitude to manipulate and misuse valuable and treasured constitutional rights.

Carruthers also claims that he was denied due process because he was forced to choose between incompetent counsel and no counsel at all, and he

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[28] As the Court of Criminal Appeals noted, this appears to be the only capital case in the country in which a defendant has been held to have implicitly waived or forfeited the right to counsel and has been required to represent himself at trial and sentencing. Cf. Waterhouse v. State, 596 So.2d 1008, 1011-15 (Fla. 1992) (requiring the capital defendant to make a pro se argument at his capital re-sentencing hearing).

asserts that the trial judge should have held a hearing to determine the validity of his complaints about his attorneys.

We disagree. There is simply no evidence indicating that any one of the many attorneys appointed to represent Carruthers was ineffective.[29] In fact, the record fully supports the trial court's repeated findings that the attorneys were qualified, competent, and highly skilled trial lawyers. The record demonstrates that the trial court closely supervised the case, inquired about defense counsel's progress, allowed Carruthers to voice his concerns about counsel, and conscientiously reviewed and considered letters from Carruthers containing allegations about his attorneys. Based upon this information, the trial court repeatedly found the attorneys representing Carruthers to be competent. Most of Carruthers' complaints about his attorneys were outrageous personal attacks that had little or nothing to do with legal representation.

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[29] Our holding that this record does not support Carruthers' claim that he was forced to choose between ineffective counsel or no counsel at all does not preclude Carruthers from asserting ineffective assistance of counsel in a petition for post conviction relief. We have considered Carruthers' assertion of ineffective counsel in this appeal as a forfeiture argument, and we emphasize that claims of ineffective assistance of counsel generally are more appropriately raised in a petition for post conviction relief. See State v. Anderson, 835 S.W.2d 600, 606 (Tenn. Crim. App. 1992) ("Raising issues pertaining to the ineffective assistance of counsel for the first time in the appellate court is a practice fraught with peril."); cf. State v. Wilson, __ S.W.3d __ (Tenn. 2000) (holding that a constitutional challenge to the validity of a guilty plea should be raised and litigated in a petition for post-conviction relief rather than on direct appeal).

Indeed, these allegations were so outrageous that the letters were sealed at trial and remain a sealed exhibit to the record on appeal. Although we have reviewed the letters, it is not necessary to reveal the specific nature of the offensive and unfounded allegations.[30] Suffice it to say that, given the nature of the allegations and the trial court's close and careful supervision of the case, a formal hearing to determine counsel's competency was not necessary.

To the extent that Carruthers is alleging that his pro se representation was ineffective, we agree with the Court of Criminal Appeals' conclusion that when a defendant forfeits or waives the right to counsel, regardless of whether the waiver is explicit or implicit, he or she also forfeits or waives the right to effective assistance of counsel. See Small, 988 S.W.2d at 673; State v. Goodwin, 909 S.W.2d 35, 45 (Tenn. Crim. App. 1995); Cf. Faretta, 422 U.S. at 835 n.46, 95 S. Ct. at 2541 n.46 ("[W]hatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of effective assistance of counsel.").[31]

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[30] As previously stated, after the trial court ruled that Carruthers had forfeited his right to counsel, Carruthers offered to testify that the allegations he made about Massey were untrue.

[31] We note, however, that a defendant retains the right to complain of ineffective assistance with respect to any stage of the proceeding wherein he or she was represented by counsel. Cf. Daughtry v. State, 482 S.E.2d 532, 533 (Ga. Ct. App. 1997) (stating that a criminal defendant will not be heard to assert a claim of ineffective assistance of counsel with respect to any of the stages of the proceedings wherein he was counsel). Therefore, as

Carruthers also argues that his right to counsel was violated when the trial court allowed Sayle to withdraw as advisory counsel. We disagree. This Court recently held that "there is no constitutional right to the appointment of advisory counsel where a defendant has knowingly and intelligently waived the right to counsel." Small, 988 S.W.2d at 675. We also recognized in Small that trial courts have discretion to appoint advisory counsel, but emphasized that trial court decisions regarding appointment of advisory counsel will not be overturned on appeal absent a showing of abuse of discretion. Id. Carruthers has cited no authority that would require adoption of a different rule in this case.

After finding that Carruthers had implicitly waived or forfeited his right to appointed counsel, the trial court, consistent with preferred practice,[32] appointed advisory counsel. Sayle was allowed to withdraw because Carruthers leveled personal attacks against him. Given Carruthers' relationship with his five prior court-appointed attorneys, we conclude that the trial court did not abuse its discretion by permitting Sayle to withdraw. Indeed, the trial court's decision was entirely reasonable. Cf. Cummings, 546 N.W.2d at 419 (upholding the trial court's refusal to appoint standby counsel because the defendant had totally refused to cooperate with his previous court-appointed counsel). This issue is without merit.

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previously stated, our holding in this appeal does not preclude Carruthers from alleging in a post conviction petition ineffective assistance of counsel with respect to a stage of the proceeding wherein he was represented by counsel.

[32] Moore, 706 F.2d at 540.

Finally, Carruthers argues that the trial court did not treat him fairly because he was forced to represent himself. Carruthers recites an extensive list of over thirty episodes allegedly supporting his allegations that his trial was unfair and his treatment unequal. As the Court of Criminal Appeals found, most of the restrictions about which Carruthers complains resulted from his status as a pro se litigant and a prisoner subject to strict security measures. In fact, the record reflects that the trial court was much more lenient with Carruthers than with the other defense attorneys and went to great lengths to accommodate Carruthers' requests, even issuing subpoenas for witnesses during trial. The trial court also liberally approved funds for Carruthers to secure expert and investigative assistance. The trial court was not required to exempt Carruthers from complying with the rules of evidence and procedure or to allow Carruthers free reign in the courtroom. The record reveals that Carruthers was treated fairly by the trial court, and this issue is without merit.

**Denial of Montgomery's Motion for Severance**

Montgomery claims that the trial court erred by refusing to sever his case from that of Carruthers under Tenn. R. Crim. P. 14(c)(2).[33] Montgomery asked for

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[33] Subsection (c)(1) provides for severance where a co-defendant's out-of-court statement refers to the defendant but is not admissible against the defendant. Subsection (c)(2) provides in relevant part that:

> [t]he court, on motion of the state or on motion of the defendant other than under subdivision (c)(1), shall grant a severance of defendants if: (i)[b]efore trial . . . it is deemed appropriate to

a severance, before trial, during trial, and once again in his motion for new trial, arguing that the trial court's failure to grant a severance resulted in prejudicial error mandating a new trial.[34] In this Court, Montgomery claims he was unduly prejudiced by a joint trial because of the admission of certain statements made by Carruthers that would not have been admissible at a separate trial and because of the "grossly prejudicial fashion" in which Carruthers represented himself at trial. The State responds that the trial court appropriately denied Montgomery's requests for a severance and alternatively contends that any possible error in denying the request was harmless.

Whether a severance should be granted is a matter entrusted to the sound discretion of the trial court, and this Court will not interfere with the exercise of that discretion unless it results in clear prejudice to the defendant. See State v. Hutchison, 898 S.W.2d 161, 166 (Tenn. 1994); State v. Coleman, 619 S.W.2d 112, 116 (Tenn. 1981); Hunter v. State, 222 Tenn. 672,

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promote a fair determination of the guilt or innocence of one or more defendants; or (ii) [d]uring trial, with consent of the defendant to be severed, it is deemed necessary to achieve a fair determination of the guilt or innocence of one or more defendants.

[34] Montgomery first requested a severance on December 16, 1994, again on February 16, 1996, when it appeared Carruthers might be required to proceed pro se, on April 19, 1996 during the course of trial as a result of Carruthers' pro se representation, and again on April 24, 1996, immediately before Carruthers called Alfredo Shaw to testify as a witness, when it became clear in a jury-out hearing that Alfredo Shaw would testify consistently with his grand jury testimony and implicate Carruthers in the killings.

681, 440 S.W.2d 1, 6 (1969); State v. Burton, 751 S.W.2d 440, 447 (Tenn. Crim. App. 1988). In Woodruff v. State, 164 Tenn. 530, 538-39, 51 S.W.2d 843, 845 (1932), this Court noted that:

> The state, as well as the persons accused, is entitled to have its rights protected, and when several persons are charged jointly with a single crime, we think the state is entitled to have the fact of guilt determined and punishment assessed in a single trial, unless to do so would unfairly prejudice the rights of the defendants.

(Emphasis added.) Reversal is required only when the record demonstrates that "the defendant was clearly prejudiced to the point that the trial court's discretion ended and the granting of [a] severance became a judicial duty." Hunter, 222 Tenn. at 682, 440 S.W.2d at 6; see also Burton, 751 S.W.2d at 447.

No Tennessee court has previously considered the effect of one defendant's self-representation on a co-defendant's right to a severance. Several federal courts have held that, while "pregnant with the possibility of prejudice," a trial involving a pro se defendant and a represented co-defendant is not prejudicial per se. United States v. Veteto, 701 F.2d 136, 138-39 (11th Cir. 1983); see also Person v. Miller, 854 F.2d 656, 665 (4th Cir. 1988); United States v. Oglesby, 764 F.2d 1273, 1275-76 (7th Cir. 1985); United States v. Sacco, 563 F.2d 552, 555-56 (2nd Cir. 1977); State v. Canedo-Astorga, 903 P.2d 500, 504 (Wash. Ct. App. 1995). Rather than automatically granting a severance in such cases, these courts have suggested that certain precautionary measures be employed to minimize the possibility of prejudice, including

> appointing standby counsel, warning the pro se defendant that he will be held to the rules of law and evidence and that he should refrain from speaking in the first person in his comments on the evidence, and instructing the jury prior to the closing remarks, during summation and in final instructions, that nothing the lawyer said is evidence in this case. [T]he district judge should also make clear to the jury at the outset that anything the pro se defendant says in his 'lawyer role' is not evidence and should instruct the pro se defendant beforehand that he should both avoid reference to co-defendants in any opening statement or summation without prior permission of the court and refrain from commenting on matters not in evidence or solely within his personal knowledge or belief.

Veteto, 701 F.2d at 138-39; Oglesby, 764 F.2d at 1275; Sacco, 563 F.2d at 556-57; Canedo-Astorga, 903 P.2d at 506. These courts have emphasized that such precautionary measures are "suggestions, not requirements, for preventing the possibility of prejudice from ripening into actuality" in a trial involving a pro se defendant and a represented co-defendant. Veteto, 701 F.2d at 138. We agree that these precautionary measures should be employed when a pro se defendant and a represented codefendant are tried jointly. However, in rare cases, such as this one, even these protective measures will not be sufficient to prevent "the possibility of prejudice from ripening into actuality." Id.

Although the trial court required Carruthers to generally adhere to the rules of evidence and procedure and cautioned him about making statements to

the jury, these measures were not enough to prevent his pro se representation from prejudicing Montgomery's right to a fair trial. Indeed, despite the trial court's efforts, the record demonstrates that Montgomery was severely prejudiced by Carruthers' self-representation, specifically, his offensive mannerisms before the jury,[35] his questioning of witnesses that elicited incriminating evidence,[36] and most importantly, his calling Alfredo Shaw to testify as a witness. The prejudice to Montgomery was compounded when the State used and emphasized the incriminating evidence elicited by Carruthers during its closing argument.[37]

We do not agree with the State's assertion that any error is harmless because the trial court instructed the jury "that if evidence applied to one defendant they should only apply it to the one

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[35] The jury sent notes to the trial judge complaining about Carruthers "scratching or pulling around his groin when standing facing the jury. We find this very offensive," and later asking the trial judge why Carruthers "was constantly asking the same question over and over."

[36] For example, during cross-examination Carruthers asked Terrell Adair if he knew who had shot him and why he had been shot. Adair responded, "they say you did it." Again during cross-examination, Carruthers asked Andre Johnson, "Did you tell me that Reginald Burkes told you that somebody was trying to get you?" Johnson responded, "Yes sir. And I told you it was you, sir."

[37] For example, in its closing argument, the State reminded the jury that Carruthers had put on a seminar about drug dealing in Shelby County, highlighted Carruthers' cross-examination that elicited incriminating evidence, and emphasized that Carruthers had put on proof through Alfredo Shaw to show "what happened between 11:00 [p.m.] and 5:00 [a.m.]" the day the killings occurred.

defendant." As Montgomery points out, despite this general instruction, at no point did the trial court instruct the jury that any particular evidence applied only to one defendant and not the other. Even though Montgomery's name was not mentioned, Alfredo Shaw's testimony clearly indicated that others were involved with Carruthers in committing these crimes, and given the joint trial, the jury likely inferred that Montgomery was one of the others.[38]

We recognize that the prejudice resulting to Montgomery from being tried jointly with Carruthers did not become fully apparent until the trial had concluded. Only at the conclusion of the trial was it possible for the trial court to comprehend the full effect of Carruthers' self-representation upon Montgomery's right to a fair trial. We realize that the trial court properly attempted to accommodate the interest of judicial economy, the State's interest in having guilt determined and punishment assessed in a single trial, and the defendants' right to a fair trial. However, by the time this issue was raised in the motion for new trial, we believe that the record demonstrated that Montgomery "was clearly prejudiced to the point that the trial court's discretion ended and the granting of [a] severance became a judicial duty." Hunter, 222

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[38] Carruthers generically referred to others when describing the events to Alfredo Shaw. For example, Shaw testified that "Tony told me they went to Marcellos' mother's house, Delois, and told her – asked her where the money was." Again, Shaw testified that "they burned up the truck, burned Marcellos' truck up, to cover up the fingerprints up that was inside the truck. Tony Carruthers then stated that they drove the bodies back to Memphis. Marcellos and Tucker were I'm assuming dead."

Tenn. at 682, 440 S.W.2d at 6; see also Burton, 751 S.W.2d at 447. We therefore hold that Montgomery's right to a fair trial was prejudiced when he was denied a severance and was jointly tried with Carruthers.[39] Accordingly, we reverse Montgomery's convictions and sentences and remand for a new trial.[40]

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[39] Even though we have concluded that a severance should have been granted, we do not agree with Montgomery's assertions that much of the evidence admitted in the joint trial will be inadmissible in a separate trial. As more fully explained in the next section, hearsay statements are admissible under the co-conspirator exception even if the conspirators are separately tried, and where a conspiracy exists, even if Montgomery was not yet a member, he is deemed to have adopted the previous acts and declarations of his fellow conspirators. See Owens v. State, 84 Tenn. 1, 4 (1885) ("And everyone entering into a conspiracy is a party to every act which has before been done by the others, and to every act by the others afterward, in furtherance of the common design."); see also United States v. Brown, 943 F.2d 1246, 1255 (10th Cir. 1991); 23 C.J.S. 2d Criminal Law § 982 (1989).

[40] Because Montgomery's convictions are being reversed and his case remanded for a new trial, we need not address all his claims relating to erroneous admission and improper use of evidence because it is not likely these same alleged errors will reoccur. However, we emphasize that prior inconsistent statements of Nakeita Shaw, or any other witness, ordinarily are admissible only for purposes of impeachment and, unless the statement satisfies another hearsay exception, should not be admitted to prove the truth of the matter asserted. An instruction to the jury so limiting its consideration of any prior inconsistent statement ordinarily is appropriate. If the defense fails to object to admission of a prior inconsistent statement or fails to request a limiting instruction, the trial court should consider whether a *sua sponte* instruction is warranted to foreclose a reversal on appeal for plain error. See State v. Smith, 24 S.W.3d 274, 280 (Tenn. 2000).

**Admissibility of**
**Jonathan Montgomery's Statements**

Carruthers next complains that the trial court erred in allowing the State's witness Chris Hines to testify about the statements of Jonathan Montgomery. According to Carruthers, Hines' testimony about Jonathan's statements was inadmissible hearsay. The State argues that Hines' testimony was admissible under the co-conspirator hearsay exception. See Tenn. R. Evid. 803(1.2)(E).

Specifically, Carruthers complains about Hines' testimony relating the statements Jonathan made to him about these murders when Jonathan borrowed Hines' car the night of the murders and when Jonathan and Hines were at the carwash the morning after the murders. The Court of Criminal Appeals held that Jonathan's first statement to Hines fell within the co-conspirator exception because at the time Jonathan asked Hines to take him to the cemetery, one could infer that the victims had not been buried and Jonathan was needed to complete the robbery, kidnappings, and murders. The Court of Criminal Appeals also held that Jonathan Montgomery's statements to Hines the next morning while Hines' car was being washed were not in furtherance of the conspiracy but were more akin to "casual conversation" about past events and thus inadmissible. Since the second inadmissible statement was cumulative of the first admissible statement, the Court of Criminal Appeals found the error harmless. We agree.

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). Hearsay is not

admissible in evidence except as provided by exceptions in the Tennessee Rules of Evidence or other applicable law. See Tenn. R. Evid. 802. One of the exceptions to the hearsay rule is a statement of a co-conspirator. See Tenn. R. Evid. 803(1.2)(E). Under this exception, hearsay is admissible if it constitutes "a statement by a co-conspirator of a party during the course of and in furtherance of the conspiracy." Id.

A conspiracy is defined as a combination between two or more persons to do a criminal or unlawful act or a lawful act by criminal or unlawful means. See State v. Alley, 968 S.W.2d 314, 316 (Tenn. Crim. App. 1997); State v. Gaylor, 862 S.W.2d 546, 553 (Tenn. Crim. App. 1992); State v. Houston, 688 S.W.2d 838, 841 (Tenn. Crim. App. 1984); State v. Lequire, 634 S.W.2d 608, 612 (Tenn. Crim. App. 1981). To be admissible under the co-conspirator hearsay exception, a statement must be made "during the course of" a conspiracy. This means that the conspiracy must have been occurring or ongoing at the time the statement was made. See State v. Walker, 910 S.W.2d 381, 385 (Tenn. 1995); Gaylor, 862 S.W.2d at 554; Neil Cohen et al., Tennessee Law of Evidence § 803(1.2)(6) (3d ed. 1995). If the conspiracy had not begun or had already concluded when the statement was made, the statement will not be admissible under the co-conspirator exception. Id. The exception also requires that the statement be "in furtherance of" the conspiracy. In short, the statement must be one that will advance or aid the conspiracy in some way. See State v. Heflin, 15 S.W.3d 519, 523 (Tenn. Crim. App. 1999). This has long been the law in Tennessee. See Owens, 84 Tenn. at 4; Harrison v. Wisdom, 54 Tenn. 99, 107-08 (1872). Commentators have explained that:

> [a] statement may be in furtherance of the conspiracy in countless ways. Examples include statements designed to get the scheme started, develop plans, arrange for things to be done to accomplish the goal, update other conspirators on the progress, deal with arising problems, and provide information relevant to the project. While such statements are ordinarily made to other conspirators, Rule 803(1.2)(E) does not so require. Statements to third parties may qualify if in furtherance of the conspiracy.

Tennessee Law of Evidence, § 803(1.2). 6, p. 522. Where a conspiracy exists, "everyone entering into the conspiracy is a party to every act which has before been done by the others and to every act by the others afterward in furtherance of the common design." Owens, 84 Tenn. at 4.

Casual conversation between or among co-conspirators is not considered to be in furtherance of the conspiracy. See Hutchison, 898 S.W.2d at 170. In addition, where a conspirator is apprehended and "tells all to the police, it is unlikely the confession is admissible as a conspirator statement." Walker, 910 S.W.2d at 386. Under those circumstances, the statement "becomes only a narrative statement of past conduct between conspirators." Id.

Applying these principles, we agree that Hines' testimony about the statements Jonathan Montgomery made when asking to borrow Hines' car was properly admitted under the coconspirator hearsay exception. As previously stated, Hines testified that Jonathan Montgomery "beeped" him around 8:45 p.m. on February 24, 1994, and said, "Man, a n----r got them

folks." When Hines asked, "What folks?" Jonathan replied, "Cello and them" and said something about stealing $200,000. Jonathan indicated he could not talk more on the telephone and arranged to meet Hines in person. When Jonathan arrived at Hines' home around 9:00 p.m., Jonathan told Hines, "man, we got them folks out at the cemetery on Elvis Presley, and we got $200,000. Man a n----r had to kill them folks."[41] According to Hines, at this point James Montgomery "beeped in" and talked with Jonathan, and after this conversation, Jonathan asked Hines to drive him to the cemetery. Hines refused to drive Jonathan but allowed him to borrow his car.

The record does not support Carruthers' assertion that the conspiracy had ended by the time Jonathan Montgomery made these statements. In fact, Nakeita Shaw testified that she saw two of the victims, Marcellos Anderson and Frederick Tucker, leave her home alive around 10 p.m. with James Montgomery and Carruthers. In addition, the record demonstrates that Marcellos Anderson's Jeep Cherokee was burned much later at 2:40 a.m. in Mississippi. Clearly, the conspiracy had not ended when Jonathan Montgomery made these statements at around 8:45 to 9:30 p.m. In addition, the record reflects that the statements were made in furtherance of the conspiracy. Jonathan contacted Hines and made these statements to obtain transportation to the cemetery so he could assist his co-conspirators in completing the conspiracy. We therefore hold that the testimony of Chris Hines about the statements Jonathan Montgomery made to him on

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[41] Hines explained that Jonathan Montgomery "was saying – like if I was telling you, Man, I had to kill them folks."

the night of the murders, February 24, 1994, was properly admitted pursuant to the co-conspirator hearsay exception to the hearsay rule.

However, as the Court of Criminal Appeals held, the statements Jonathan Montgomery made to Hines at the car wash on the morning after the murders were not admissible under the coconspirator exception. As previously stated, Hines testified that Jonathan repeatedly told him at the car wash that "they had to kill some people." These statements were not made while the conspiracy was ongoing, nor were these statements in furtherance of the conspiracy. These statements are best described as a narrative "of past conduct between conspirators" and therefore were inadmissible. See Walker, 910 S.W.2d at 386. Nonetheless, we agree with the Court of Criminal Appeals that the erroneous admission of testimony about these statements is harmless error. This testimony is consistent with and merely cumulative of Hines' testimony about Jonathan's statements on the night of the murders which were properly admitted under the co-conspirator exception.

Finally, we also agree with the Court of Criminal Appeals that reversal is not required because the trial court refused to allow Carruthers to question Detective Ruby about the content of Jonathan Montgomery's statements to the police. This testimony clearly was not admissible under the co-conspirator hearsay exception. When a co-conspirator "tells all to the police, it is unlikely the confession is admissible as a conspirator statement." Walker, 910 S.W.2d at 386. Even assuming the statement would have been admissible under the hearsay exception for statements against

penal interest,[42] any error in excluding the evidence was harmless. The statements Jonathan Montgomery made to the police implicated Carruthers and would have been prejudicial to his defense. This claim is without merit.

**Sufficiency of the Evidence**

Both Carruthers and Montgomery challenge the sufficiency of the convicting evidence. Carruthers argues that the witnesses against him were not credible and that the State relied too heavily on the testimony of convicted felons. Montgomery complains that had he been tried separately, the circumstantial evidence admissible against him at a separate trial would have been insufficient.

The proper inquiry for an appellate court determining the sufficiency of evidence to support a conviction, is whether, considering the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999). "A guilty verdict by the jury, approved by the trial court, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the prosecution's theory." State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Questions about the credibility of

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[42] Since Jonathan placed himself at the scene of the murders, these statements might have been admissible as statements against penal interest. See Tenn. R. Evid. 804(3). We note, however, that the trial court was not asked to admit these statements under Rule 804(3) and therefore never considered its applicability.

witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this Court does not reweigh or reevaluate the evidence. Id. Nor may this Court substitute its inferences drawn from circumstantial evidence for those drawn by the trier of fact. See Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956). The standard for appellate review is the same whether the conviction is based upon direct or circumstantial evidence. See State v. Vann, 976 S.W.2d 93, 111 (Tenn. 1998). A conviction may be based entirely on circumstantial evidence where the facts are "so clearly interwoven and connected that the finger of guilt is pointed unerringly at the Defendant and the Defendant alone." State v. Smith, 868 S.W.2d 561, 569 (Tenn. 1993) (quoting State v. Duncan, 698 S.W.2d 63, 67 (Tenn. 1985)). A verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, and on appeal the defendant has the burden of illustrating why the evidence is insufficient to support the verdict rendered by the jury. Id.; see also State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). In contrast, the State on appeal is entitled to the strongest legitimate view of the trial evidence and all reasonable and legitimate inferences which may be drawn from the evidence. See Hall, 8 S.W.3d at 599; Bland, 958 S.W.2d at 659.

At the time this offense was committed, first degree murder was defined as an "intentional, premeditated and deliberate killing of another." Tenn. Code

Ann. § 39-13-202(a)(1)(1991).[43] "Intentional" is defined as the "conscious objective or desire to engage in the conduct or cause the result." Tenn. Code Ann. § 39-11-106(a)(18) (1991). Premeditation, on the other hand, requires "the exercise of reflection and judgment." Tenn. Code Ann. § 39-13-201(b)(2) (1991). Finally, deliberation requires proof of a "cool purpose" that includes some period of reflection during which the mind is free from passion and excitement. See Tenn. Code Ann. § 39-13-201(b)(1) (1991).

The elements of premeditation and deliberation are questions of fact to be resolved by the jury. See Bland, 958 S.W.2d at 660. These elements may be established by proof of the circumstances surrounding the killing. Id.; see also State v. Brown, 836 S.W.2d 530, 539 (Tenn. 1992). As we stated in Bland, there are several factors which tend to support the existence of these elements including: the use of a deadly weapon upon an unarmed victim; the particular cruelty of the killing; declarations by the defendant of an intent to kill; evidence of procurement of a weapon; preparations before the killing for concealment of the crime; and calmness immediately after the killing. See State v. Pike, 978 S.W.2d 904, 914 (Tenn. 1998); Bland, 958 S.W.2d at 660; Brown, 836 S.W.2d at 541-42; State v. West, 844 S.W.2d 144, 148 (Tenn. 1992).

Having reviewed the proof in the light most favorable to the State, as we are required to do, we agree with the Court of Criminal Appeals that the evidence

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[43] The statute has since been amended and no longer re quires proof of deliberation. See Tenn. Code Ann. § 39-13-202(a)(1) (1999 Supp .) ("(a) First degree murder is: (1) [a] premeditated and intentional killing of another. . . .").

is legally sufficient to support the jury's verdicts as to each defendant. The trial proof has been thoroughly and fully summarized. With respect to Carruthers' challenges to the State's witnesses, suffice it to say that, through cross-examination, the jury was made aware that some of the witnesses had prior felony records, that some of the witnesses admitted to past drug dealing, and that some of the witnesses had given inconsistent statements to the police regarding the events of February 24 and 25, 1994. However, the jury resolved these issues of credibility in favor of the State, and an appellate court may not reconsider the jury's credibility assessments. Moreover, while we have already resolved the severance issue in favor of Montgomery, we reject his claim that the circumstantial evidence was legally insufficient. In our view, the evidence is legally sufficient. See Footnote 37, supra (discussing the applicability of the co-conspirator hearsay exception).

**Issuance of Gag Order**

Carruthers next argues that the trial court committed reversible error by issuing a "gag order" preventing him from speaking to the media.[44] The trial

[44] The trial court also issued a gag order preventing the media from publishing the names of certain prosecution witnesses, which was later modified to prevent the publication of only one prosecution witness. The Court of Criminal Appeals vacated this order, holding that it was a prior restraint in violation of the First Amendment to the United States Constitution. State v. Montgomery, 929 S.W.2d 409 (Tenn. Crim. App. 1996). The gag order prohibiting the attorneys and Carruthers from talking to the media, however, remained in place throughout trial.

court's order, issued about a month before the trial began, states:

> The Constitutions of the United States and the State of Tennessee guarantee defendants in all criminal cases due process of law and the right to a fair and impartial jury. It is the duty of the trial court to see that every defendant is afforded all his constitutional rights.
>
> In order to safeguard those rights, this Court is of the opinion that the following rule is necessary to constitutionally guarantee an orderly and fair trial by an impartial jury. Therefore, this Court orders the following:
>
> All lawyers participating in this case, including any defendants proceeding pro se, the assistants, staff, investigators, and employees of investigators are forbidden to take part in interviews for publicity and from making extra-judicial statements about this case from this date until such time as a verdict is returned in this case in open court.
>
> Because of the gravity of this case, because of the long history of concerns for the personal safety of attorneys, litigants and witnesses in this case, because of the potential danger – believed by this Court to be very real and very present – of undermining the integrity of the judicial system by "trying the case in the media" and of sullying the jury pool, this Court feels compelled to adopt this extraordinary pretrial measure.

Carruthers challenges this order as violating his right to a fair trial, guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 9 of the Tennessee Constitution. Carruthers is correct to rely upon the Sixth Amendment. We note, however, that the United States Supreme Court has stated that a "right to fair trial" claim also implicates the Fifth and Fourteenth Amendment Due Process Clauses. See, e.g., Strickland v. Washington, 466 U.S. 668, 684-85, 104 S. Ct. 2052, 2063, 80 LED.2d 674 (1984) ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment."). Nonetheless, numerous courts have referred simply to the Sixth Amendment right to a fair trial in this context, and we will do the same. See, e.g., In re Dow Jones & Co., Inc., 842 F.2d 603, 609 (2d Cir.), cert. denied, 488 U.S. 946, 109 S. Ct. 377, 102 L.Ed.2d 365 (1988); United States v. Ford, 830 F.2d 596, 600 (6th Cir. 1987).

Carruthers also raises First Amendment concerns, which is understandable given that gag orders exhibit the characteristics of prior restraints. See United States v. Brown, 218 F.3d 415, 424 (5th Cir. 2000). But see Dow Jones, 842 F.2d at 608 (noting a "substantial difference" between a restraint on the press and a restraint on trial participants). Yet the crux of Carruthers' argument on appeal is that his defense was inhibited because he could not respond to the media's coverage of the trial; he could do nothing to alter the jurors' preconceptions about the case gained from their exposure to news reports. Carruthers also argues that his inability to speak to the

press may have prevented potential witnesses from coming forward to his defense. Properly stated, then, his argument asserts that the gag order interfered with his right to a fair trial. To the extent Carruthers' brief raises a First Amendment claim, however, we find it moot. By its own terms, the trial court's order ceased to exist upon the return of the verdict, which occurred several years ago. Of course, since a gag order is by definition a restriction on speech, our review of Carruthers' Sixth Amendment claim demands consideration of First Amendment principles. As is clear from the case law, discussed below, the proper standard governing the validity of gag orders explicitly incorporates these principles, as do we in our analysis.

The Court of Criminal Appeals rejected Carruthers' arguments and upheld the gag order in its entirety. As noted in its opinion, the following circumstances were considered by the trial court as reasons for issuing the gag order: numerous threats to attorneys; the death of one of the codefendants; the highly-charged emotional climate of the trial (e.g., the courtroom was guarded by S.W.A.T. team members); the gunning down of a deputy jailer in his driveway, which the trial judge thought was related to the case; the fleeing of one witness after reading about the case in the newspaper; and the statements of two witnesses who had already testified that defendant Montgomery threatened to kill them if they talked about the case. Also, as the Court of Criminal Appeals noted, Alfredo Shaw testified that Carruthers threatened him and made arrangements to have a reporter interview him about recanting his story. Thus, the court held that the trial judge was properly concerned about the media's influence on the potential jury pool and the safety of

all involved in the trial. The court also held that the public was certainly aware of the trial from the media's coverage and that Carruthers' statements to the press would not likely have led to unknown witnesses coming forward.

We agree with the Court of Criminal Appeals' judgment that under these circumstances a gag order was proper. We hold however that under the constitutional standards discussed below, the scope of that order was too broad. Nevertheless, given the circumstances of this case, the error is harmless.

Numerous courts have recognized that the correct standard by which to evaluate the constitutionality of gag orders depends upon who is being restrained: the press or trial participants. See, e.g., Brown, 842 F.2d at 425; Dow Jones, 842 F.2d at 608. If the gag order is directed to the press, the constitutional standard is very stringent. See Montgomery, 929 S.W.2d at 414 (discussing Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 96 S. Ct. 2791, 49 L.Ed.2d 683 (1976)). Carruthers' appeal before this Court, however, concerns the trial court's gag order directed to him, a defendant, representing himself at trial.

As the United States Court of Appeals for the Fifth Circuit has recently determined, the federal circuit courts are split as to the correct constitutional standard governing gag orders on trial participants. See Brown, 218 F.3d at 425-28. For example, the Sixth Circuit has held that gag orders on trial participants must meet the exacting "clear and present danger" test for free speech cases enunciated in Near v. Minnesota, 283 U.S. 697, 51 S. Ct. 625, 75 L.Ed. 1357 (1931). See Ford, 830 F.2d at 598 ("We see no legitimate reasons for a lower standard for individuals [as

compared to the press]."). Accord Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 249 (7th Cir. 1975), cert. denied, 427 U.S. 912, 96 S. Ct. 3201, 49 L.Ed.2d 1204 (1976) (applying a "serious and imminent threat" test); Levine v. United States District Court, 764 F.2d 590, 595-96 (9th Cir. 1985), cert. denied, 476 U.S. 1158, 106 S. Ct. 2276, 90 L.Ed.2d 719 (1986) (same). In contrast, the Second, Fourth, and Tenth Circuits analyze the validity of gag orders on trial participants under the less stringent standard of whether the participant's comments present a "reasonable likelihood" of prejudicing a fair trial. See Dow Jones, 842 F.2d at 610; In re Russell, 726 F.2d 1007, 1010 (4th Cir.), cert. denied, 469 U.S. 837, 105 S. Ct. 134, 83 L.Ed.2d 74 (1984); United States v. Tijerina, 412 F.2d 661, 666-67 (10th Cir.), cert. denied, 396 U.S. 990, 90 S. Ct. 478, 24 L.Ed.2d 452 (1969). See also News-Journal Corp. v. Foxman, 939 F.2d 1499, 1512-15 (11th Cir. 1991) (discussing the case law authority for the less stringent standard). Without deciding whether to adopt the "reasonable likelihood" standard, the Fifth Circuit determined that the "clear and present danger" test was not required, and analyzed the case before it under a "substantial likelihood" test. See Brown, 218 F.3d at 427-28.

Although this Court has upheld restraints on trial participants, see State v. Hartman, 703 S.W.2d 106 (Tenn. 1985) (order restraining counsel from talking with the public or media about the facts of the case), we have never discussed the underlying constitutional issues. We therefore decide this issue based on our own interpretation of United States Supreme Court precedent and the Tennessee Constitution with

guidance from the federal circuit courts.[45] We note that the Court of Criminal Appeals' opinion emphasizes that "[t]he twist in this case, however, is that Carruthers was representing himself during trial." Although this fact is relevant in applying the constitutional standard to determine whether Carruthers' right to a fair trial was breached, our review of the case law indicates that the constitutional standard is the same regardless of which trial participant is restrained.

The Brown court's decision to follow a "substantial likelihood" test rather than the "clear and present danger" test rests on its interpretation of Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 S. Ct. 2720, 115 L.Ed.2d 888 (1991). The Brown court determined that Gentile rejected the clear and present danger test for trial participants and that Gentile is the Supreme Court's latest discussion of the issue. See Brown, 218 F.3d at 426-28 (noting that the cases endorsing the more stringent test predated Gentile). We agree with the Brown court's holding.

Gentile involved an attorney who held a press conference the day after his client was indicted on criminal charges. See Gentile, 501 U.S. at 1063-65, 111 S. Ct. at 2738-40 (discussing the facts). The attorney proclaimed his client's innocence, strongly suggested that a police detective was in fact the perpetrator, and

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[45] Though they are persuasive authority when interpreting the United States Constitution, this Court is not bound by decisions of the federal district and circuit courts. We are bound only by decisions of the United States Supreme Court. See Strouth v. State, 999 S.W.2d 759, 769 n.9 (Tenn. 1999); State v. McKay, 680 S.W.2d 447, 450 (Tenn. 1984).

stated that the alleged victims were not credible. Although the trial court "succeeded in empaneling a jury that had not been affected by the media coverage and [the client] was acquitted on all charges, the [Nevada] state bar disciplined [the attorney] for his statements." Id. at 1064, 111 S. Ct. at 2739. The Nevada Supreme Court upheld the state bar's disciplinary action, finding that the attorney "knew or reasonably should have known that his comments had a substantial likelihood of materially prejudicing the adjudication of his client's case." Id. at 1065, 111 S. Ct. at 2739. Although the Supreme Court reversed this judgment because it found the Nevada Supreme Court's construction of the disciplinary rule "void for vagueness," id. at 1048-51, 111 S. Ct. at 2731-32, a majority of the Court held that the "substantial likelihood of prejudice" test struck the proper constitutional balance between an attorney's First Amendment rights and the state's interest in fair trials. Id. at 1065-76, 111 S. Ct. at 2740-45.[46]

In so doing, the Court held that the stringent standard governing restraints on the press articulated in Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 96

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[46] In Zimmermann v. Board of Professional Responsibility, 764 S.W.2d 757 (Tenn. 1989) we upheld Disciplinary Rule 7-10 7(B) and (E), which govern extrajudicial statements made by attorneys in criminal cases, under the Tennessee and United States Constitutions. The Zimmerman holding was, in part, based on a decision of the New Jersey Supreme Court analyzing the balance between First Amendment rights and the need to ensure the fair administration of justice. Zimmermann, 764 S.W.2d at 761 (discussing In Re Rachmiel, 90 N.J. 646, 449 A.2d 505 (1982)). Both Zimmerman and In Re Rachmiel, however, were decided before Gentile. In light of Gentile, we have reconsidered the constitutional issues at stake under both the Tennessee and United States Constitutions.

S. Ct. 2791, 49 L.Ed.2d 683 (1976) should not apply to restraints on lawyers whose clients are parties to the proceeding. Id. at 1074, 111 S. Ct. at 2744. See also News-Journal Corp., 939 F.2d at 1512-13 (noting that the Supreme Court has suggested restricting trial participants as an *alternative* to a prior restraint on the media). The Court quoted with approval from Sheppard v. Maxwell, 384 U.S. 333, 86 S. Ct. 1507, 16 L.Ed.2d 600 (1966) in which the defendant's conviction was overturned because of prejudicial publicity that prevented him from receiving a fair trial:

> The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures. 384 U.S. at 363, 86 S. Ct. at 1522.

Id. at 1072, 111 S. Ct. at 2743.

As the Brown court held, however, see Brown, 218 F.3d at 426, the Court in Gentile did not conclude that the "substantial likelihood of prejudice" test was required; it held only that this test complies with the First Amendment. See Gentile, 501 U.S. at 1075, 111 S. Ct. at 2745 ("We agree with the majority of the States that [this standard] constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the

State's interest in fair trials."). Moreover, Gentile involved a restraint on an attorney's speech; in this case, Carruthers was a party as well as his own attorney. It is necessary, therefore, to decide whether the Gentile rationale applies to parties.

Although unnecessary to its holding, we find significant evidence in the Gentile opinion that the clear and present danger test is not required for gag orders restraining parties or other trial participants. The Court emphasized the distinction between "participants in the litigation and strangers to it" as recognized by an earlier case, Seattle Times Co. v. Rhinehart, 467 U.S. 20, 104 S. Ct. 2199, 81 L.Ed.2d 17 (1984). Id. at 1072-73, 111 S. Ct. at 2743-44. As characterized by the Gentile Court, the Court in Seattle Times "unanimously held that a newspaper, which was itself a defendant in a libel action, could be restrained from publishing material about the plaintiffs and their supporters to which it had gained access through court-ordered discovery." Id. at 1073, 111 S. Ct. at 2744. The Gentile Court then quoted from Seattle Times as follows: "[a]lthough litigants do not 'surrender their First Amendment rights at the courthouse door,' those rights may be subordinated to other interests that arise in this setting" (citation omitted); and further, "on several occasions [we have] approved restriction on the communications of trial participants where necessary to ensure a fair trial for a criminal defendant." Id. The Court also stated that "[f]ew, if any interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right." Id. at 1075, 111

S. Ct. at 2745 (citing Sheppard, 384 U.S. at 350-51, 86 S. Ct. at 1515-16).

We conclude that the concerns raised in Gentile and Sheppard are applicable regardless of whether a party or his or her attorney is being restrained. A prejudicial statement made to the press by an attorney is not somehow less prejudicial if made by a party. In short, what matters is *what* is being said and not *who* is saying it. See Brown, 218 F.3d at 428 ("As the district court pointed out, trial participants, like attorneys, are 'privy to a wealth of information that, if disclosed to the public, could readily jeopardize the fair trial rights of all parties.'"). If anything, as one court has reasoned, extrajudicial comments made by trial participants have the potential to be more harmful than comments made by attorneys:

> Gentile involved a state supreme court rule governing the conduct of members of the bar of that state, while we examine a state trial court's restrictive order entered in a particular case and directed to all trial participants. Because of their legal training, attorneys are knowledgeable regarding which extrajudicial communications are likely to be prejudicial. The other trial participants encompassed by the restrictive order in this case did not have such legal discernment and expertise. Given the public attention generated by this case, defendants, witnesses and law enforcement personnel were eager to talk with the press concerning their particular views. While attorneys can be governed by state supreme court or bar rules, other trial participants do

> not have these guidelines. News-Journal Corp., 939 F.2d at 1515 n.18.

Thus, we conclude that for purposes of the constitutional right to a fair trial, Gentile's rationale applies to all trial participants, meaning that the more stringent clear and present danger test is not required.

Having decided that the clear and present danger test is not constitutionally mandated, we must now decide which test to adopt: the "substantial likelihood of prejudice" test or, as some courts have employed, the "reasonable likelihood" test. As noted, Gentile held only that the substantial likelihood test was constitutional, not that it was required. See Brown, 218 F.3d at 426-28; News-Journal Corp., 939 F.2d at 1515 n.18. Nonetheless, we conclude under both the state and federal constitutions that the substantial likelihood test strikes a constitutionally permissible balance between the free speech rights of trial participants, the Sixth Amendment right of defendants to a fair trial, and the State's interest in a fair trial. Cf. Gentile, 501 U.S. at 1070, 111 S. Ct. at 2742. Accordingly, we hold that a trial court may constitutionally restrict extrajudicial comments by trial participants, including lawyers, parties, and witnesses, when the trial court determines that those comments pose a substantial likelihood of prejudicing a fair trial.

Under this constitutional standard, we hold that the trial court was justified in imposing a gag order on Carruthers. At trial, this case garnered a significant amount of media coverage, raising the concerns expressed in Sheppard. As Carruthers himself notes in his brief:

> This trial was charged with emotion from start to finish. There were allegations of gang affiliations and testimony of large scale narcotics dealings. The courtroom was guarded by S.W.A.T. team members and by Sheriff's deputies who were authorized to search those entering the courtroom. Representatives of news organizations were present daily to record the proceedings.

In addition to its concerns about media coverage, the trial court was presented with the problem of witness intimidation. The trial judge found that witnesses who had already testified stated that defendant Montgomery threatened to kill them if they talked. Moreover, Alfredo Shaw testified that Carruthers had threatened him and made arrangements to have a reporter interview him about recanting his story. Under these unusual circumstances, the trial court was justified in employing heightened measures to ensure that a proper jury could be found and to prevent Carruthers from manipulating the media so as to intimidate witnesses. The trial judge could not ignore these issues. Indeed, he had a constitutional duty under the state and federal constitutions to ensure a fair trial.

Before a gag order can be entered, however, the case law suggests that a trial court should consider reasonable alternative measures that would ensure a fair trial without restricting speech. In the context of restraints on the press, the United States Supreme Court has specifically held that a trial court should consider such measures. See Nebraska Press, 427 U.S. at 563-64, 96 S. Ct. at 2804-05. These measures include: a change of trial venue; postponement of the trial to allow public attention to subside; searching

questions of prospective jurors; and "emphatic" instructions to the jurors to decide the case on the evidence. Id. (discussing Sheppard, 384 U.S. at 357-62, 86 S. Ct. at 1519-22).

Although it is not clear whether the need to consider alternatives is also necessary in the context of restraints on trial participants, some federal circuit courts have assumed so, see, e.g., Brown, 218 F.3d at 430-31; Dow Jones, 842 F.2d at 611-12, and the trial judge considered several of the alternatives. The trial court found that neither a change of venue nor a continuance was practical because the case was several years old and one attempt to try the case had already been made. The court appropriately gave careful attention to voir dire and jury instructions, but determined that these alternatives alone were insufficient.

Given the extraordinary nature of this case, we hold that the trial court was entitled to make this judgment. We also note that in addition to and apart from the concerns about pretrial publicity interfering with the task of finding an unbiased jury, the trial court was concerned about witness intimidation and Carruthers' potential manipulation of the press. None of the alternatives mentioned in Nebraska Press and Sheppard would likely have alleviated these concerns. The trial court reasonably concluded that only a gag order would be effective. Finally, we note that the alternatives mentioned above are not free of cost to the judicial system. As the Gentile Court wrote:

> Even if a fair trial can ultimately be ensured through voir dire, change of venue, or some other device, these measures entail serious costs to the system. Extensive voir dire may not be able to filter out all of the effects of

> pretrial publicity, and with increasingly widespread media coverage of criminal trials, a change of venue may not suffice to undo the effects of statements such as those made by the petitioner. Gentile, 501 U.S. at 1075, 111 S. Ct. at 2745.

Having decided that the trial court did not err in issuing the gag order, the final issue to consider is the scope of the order. As discussed above, Carruthers' argument on appeal is properly construed as a "right to fair trial" claim rather than a First Amendment claim. Nevertheless, a gag order by definition restricts speech. In determining whether a gag order is appropriate, therefore, a court must be mindful that "[g]overnment may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." Ward v. Rock Against Racism, 491 U.S. 781, 799, 109 S. Ct. 2746, 2758, 105 L.Ed.2d 661 (1989); see also Procunier v. Martinez, 416 U.S. 396, 413, 94 S. Ct. 1800, 1811, 40 L.Ed.2d 224 (1974) (the limitation on speech "must be no greater than is necessary or essential to the protection of the particular governmental interest involved") (quoted in Brown, 218 F.3d at 429).

On its face, the trial court's order has no exceptions or limitations: it prohibits the defendants and their attorneys from making *any* comments to the press about the case. This gag order is considerably broader than any upheld in the cases discussed above. Gentile, though not a gag order case, involved a limitation on attorney speech which prohibited only statements "substantially likely to prejudice" the adjudication of the case. See Gentile, 501 U.S. at 1064, 111 S. Ct. at 2739. Brown involved an order which "left

available to the parties various avenues of expression, including assertions of innocence, general statements about the nature of an allegation or defense, and statements of matters of public record." Brown, 218 F.3d at 429-30. The order in Dow Jones was similar. See Dow Jones, 842 F.2d at 606.

Given the history of this trial, we certainly understand why the trial court crafted such a broad order. Indeed, in certain cases, as where a defendant takes advantage of a limited gag order or fails to comply with it, an order of such breadth may be justified. Nonetheless, we hold that initial gag orders on trial participants should ordinarily contain the exceptions found in the Brown order and allow trial participants to make general statements asserting innocence, commenting on the nature of an allegation or defense, and discussing matters of public record.

We find the trial court's failure to include these exceptions in the gag order was harmless error. We fail to see how limited statements made by Carruthers to the media about his innocence, allegations or defenses, or matters in the public record would have altered the result of the trial. We do not think that allowing Carruthers to make such statements would have furthered the goal of finding an impartial jury, nor do we think it probable that any new witnesses would have come forward. We also point out that these crimes occurred in 1994, and the gag order was issued only one month before trial in 1996. In the two years preceding issuance of the gag order, Carruthers had access to the media. The record shows both that he availed himself of that access and that the media responded by actively covering the trial and events leading up to the

trial. Under these circumstances, the error below was harmless.

**Sentencing: Non-Capital Offenses**

Citing state and federal constitutional provisions and Tennessee Rule of Criminal Procedure 43, Carruthers next contends that his right to be present at a crucial stage of his criminal proceeding was violated when the trial judge conducted the sentencing hearing on his convictions for especially aggravated robbery and especially aggravated kidnapping in his absence. The State responds that Carruthers waived his right to be present because he was voluntarily absent from the sentencing hearing. We agree.

The record reflects that immediately after the sentencing verdict was rendered on the capital offenses, the trial judge announced that the sentencing hearing for the non-capital offenses would be held on May 20, 1996. Carruthers was present when this announcement was made. The trial judge was prepared to proceed with the sentencing hearing on that date. Because of a misunderstanding about which law enforcement agency was responsible for transporting the defendants from the prison facility outside of Nashville to Memphis, neither Carruthers nor Montgomery were present in court. The hearing was rescheduled for May 28, 1996, but the trial judge announced that day that because of security concerns the hearing would be held the next day, May 29, 1996, at the Riverbend Maximum Security Institution in Nashville where

Carruthers and Montgomery were incarcerated.[47] The defendants were not present in court when this announcement was made, and the record does not indicate that the defendants were personally notified of the change in date and location of the sentencing hearing. Counsel for Montgomery and the attorneys appointed to represent Carruthers on the new trial motion and on appeal previously had been advised at a meeting in chambers of the trial court's decision to hold the hearing at Riverbend.

When the trial judge convened the hearing at Riverbend the next day, Carruthers and Montgomery refused to attend or participate although they were present in a holding room approximately twenty to thirty feet from the hearing room. Warden Ricky Bell informed the trial court that defendant Carruthers was refusing to participate. Counsel informed the trial judge that despite a lengthy conference in which he

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[47] As the Court of Criminal Appeals recognized, the trial judge had the discretion to conduct the sentencing hearing at Riverbend if security was a concern pursuant to Tenn. Code Ann. § 16-1-105 (1999 Supp.), which provides as follows:

> [i]f for <u>any cause</u>, in the opinion of the court deemed sufficient, it is impracticable or inconvenient for any court to hold its session at the courthouse, or place designated by law, it shall be lawful for the court to hold its session, or any part of its session, at any other room within the limits of the county seat, <u>or at any other room open to the public within an institution of the department of correction</u> or the department of children's services if the court deems it necessary, and all its proceedings at such place, whether in civil or criminal cases, are as valid as if done at the courthouse.

(Emphasis added .)

had been advised to appear Montgomery also was refusing to appear, purportedly because of the presence of media personnel. The trial judge recessed the hearing to allow counsel to confer with Montgomery and to allow Warden Bell to confer with Carruthers and to inform him that the restraints would be removed if he decided to participate in the sentencing hearing.

When the hearing resumed, Warden Bell announced that Carruthers understood his restraints would be removed, but he was still refusing to attend or participate in the hearing. Carruthers had provided no explanation for his refusal. Counsel for Montgomery reported that he also was still refusing to attend or participate and that he was objecting to the hearing because it was not being held in a public place.[48] Warden Bell was sworn and testified about his conversation with Carruthers, including Carruthers' refusal to attend despite assurances that his restraints would be removed. Following Warden Bell's testimony, the trial judge observed that he had two options:

> to drag them out here against their will, kicking and screaming, and strap them down to a chair and force them to sit here. Or allow them to remain in the holding room and go forward with the proceedings in their absence. And I think that the wiser course, the more prudent course, the course that the law would suggest be taken is the latter. We are going to proceed in their absence, since they have both voluntarily elected to absent themselves from these proceedings. If an

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[48] The record reflects that the public was not excluded from the hearing room at Riverbend.

> individual were allowed to delay or disrupt proceedings simply by stating that he did not want to be present, then the entire judicial system would grind to a halt very quickly.

Noting that "a full and complete" sentencing hearing had already been held in conjunction with the murder convictions and that any additional witnesses would likely be "cumulative witnesses to what has already been testified to at the first sentencing hearing," the trial judge decided to proceed with the sentencing hearing.

The State called one witness, an employee of the Shelby County Criminal Court Clerk's Office, who testified that Carruthers had pled guilty to two counts of aggravated assault in 1990 and had been sentenced to ten years and five years on those convictions. The State also relied upon the evidence adduced at both the guilt and sentencing phases of trial and the presentence report prepared as to each defendant.

Following the State's proof, the trial court once again took a recess to allow counsel to confer with Montgomery to determine if he had decided to participate in the hearing and to enable Warden Bell to speak with Carruthers and advise him that he could testify if he so desired.

Counsel returned and informed the trial judge that Montgomery was still refusing to participate or testify in the hearing. They also advised the trial court that they did not intend to present any proof and that no proof would have been presented had the hearing been held in Memphis. Warden Bell returned after what was his third conversation with Carruthers and again advised the trial judge that he still was refusing

to attend or participate in the hearing. Following argument, the trial judge imposed a forty-year sentence on each of the four convictions for each defendant and ordered that two of the sentences for especially aggravated kidnapping run concurrent to the other sentences and to the death penalty, with all other sentences running consecutive to each other and to the death penalty.

Initially we acknowledge that the right of a criminal defendant to be present at all critical stages of a criminal proceeding derives from several sources, including both the federal and state constitutions. See United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 1484, 84 L.Ed.2d 486 (1985) ("The constitutional right to presence is rooted to a large extent in the Confrontation Clause of the Sixth Amendment, . . . but we have recognized that this right is protected by the Due Process Clause in some situations where the defendant is not actually confronting witnesses or evidence against him."); State v. Muse, 967 S.W.2d 764, 766 (Tenn. 1998) ("Article I, § 9 of the Tennessee Constitution provides that 'the accused hath the right to be heard by himself and his counsel.' The 'right to be heard by himself' requires the presence of the defendant during the entire trial.").

In addition to constitutional protection, the right of a criminal defendant to be present at critical stages of a criminal proceeding also is protected by Tennessee Rule of Criminal Procedure 43(a), which provides:

> Unless excused by the court upon defendant's motion, the defendant shall be present at arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of

> sentence, except as otherwise provided by this rule.

(Emphasis added.)

Like many other constitutional and statutory rights, however, the right to be present may be waived by a criminal defendant. See Muse, 967 S.W.2d at 764. Voluntary absence after the trial has commenced or disruptive in-court behavior may constitute waiver of the right to be present. Id. at 767. With respect to waiver by voluntary absence, Tenn. R. Crim. P. 43(b) provides in relevant part:

> (b) The further progress of the trial to and including the return of the verdict and imposition of sentence shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present:
>
> > (1) voluntarily is absent after the trial has commenced (whether or not he or she has been informed by the court of the obligation to remain during the trial) . . . .
> >
> > (2) . . .If a trial proceeds in the voluntary absence of the defendant . . . he or she must be represented in court by competent counsel . . . .

Construing subsection (b) only seven years after Rule 43 was adopted, the Court of Criminal Appeals explained that

> [a]n accused who has notice of the time and place of the trial and of his right to attend, and who nonetheless voluntarily absents himself, will be deemed to have waived his right to be present.

> [T]he court should indulge every reasonable presumption against a waiver. Counsel should be given a reasonable opportunity to locate his client, and there should be affirmative evidence that the accused was informed of his trial date. We think it is wise to take special precautions when a defendant fails to appear on the date set for trial and to require a high standard of proof that the defendant knew his trial date and that his absence is voluntary. Trial in his absence is not favored, and proceeding with trial only to find later that defendant did not know his trial date or did not voluntarily absent himself would run counter to the purposes expressed in [Tenn. R. Crim. P.] 2. Mere absence at the time the case is called for trial is insufficient to show a waiver of the right to be present.

State v. Kirk, 699 S.W.2d 814, 819 (Tenn. Crim. App. 1985); see also Muse, 967 S.W.2d at 767 (quoting and approving of this analysis from Kirk). Applying this analysis, the Court of Criminal Appeals in Kirk concluded that the defendant had waived his right to be present when he escaped from custody after he had appeared in court and had been advised of the date on which his trial would begin. See Kirk, 699 S.W.2d at 819.

Two years ago in Muse this Court applied the Kirk analysis in a case in which the defendant did not appear for jury selection proceedings because he was not aware that the trial judge had rescheduled the proceedings at the request of defense counsel. Concluding that Muse had been deprived of his right to be present at jury selection and that the deprivation constituted

prejudice to the judicial process, this Court reversed his conviction and remanded for a new trial. See Muse, 967 S.W.2d at 768.

For purposes of this appeal, we have accepted Carruthers' contention that he had both a constitutional right to be present and a right to be present under Tenn. R. Crim. P. 43(a), and we have concluded that Carruthers waived those rights. Carruthers was aware a sentencing hearing would be held, and he was present when the hearing initially was scheduled. While the hearing did not occur on the date originally scheduled, the hearing was held on May 29, a delay of only nine days. The record does not reflect exactly when Carruthers became aware that the hearing would be held at Riverbend on May 29, but there is no doubt that he was aware a hearing was about to be held when he was in the holding area near the public hearing room.

This is not a case where waiver was presumed from Carruthers' mere absence at the time the sentencing hearing convened. The trial judge made every effort to persuade Carruthers to attend the hearing. On three separate occasions, the trial judge instructed Warden Bell to confer with Carruthers and attempt to persuade him to appear. On each of those occasions, the record reflects that Warden Bell assured Carruthers his restraints would be removed and emphasized his right to make a statement at the hearing.[49] Under these circumstances, we have no hesitation in

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[49] Contrary to Carruthers' assertions on appeal, Warden Bell gave sworn testimony about his conversations with Carruthers.

concluding that Carruthers waived his right to be present at sentencing.

Finally, pointing to Tenn. R. Crim. P. 43(b)(2), which provides that "[i]f a trial proceeds in the voluntary absence of the defendant, . . . he or she must be represented in court by competent counsel," the defendant argues that even if he waived his right to be present, he is entitled to a new sentencing hearing because the trial judge did not appoint competent counsel to represent him.

Without question, the scenario that arose in this case is uncommon. In most instances, a voluntarily absent criminal defendant will already be represented by counsel and therefore will continue to be represented by counsel in proceedings that occur in his or her absence. Here, because the defendant had forfeited his right to counsel, there was no attorney present to represent him in the sentencing hearing.

In our view, the decision of whether or not to appoint counsel to represent a voluntarily absent defendant who previously has forfeited his right to counsel should be determined by the trial court on a case-by-case basis. The trial court is most familiar with the case and is in the best position to determine if an attorney should be appointed. Appellate courts should defer to the trial court's decision on this issue unless the record demonstrates a clear abuse of discretion. Cf. Small, 988 S.W.2d at 674.

The trial judge concluded that appointment of counsel was unnecessary. The proof presented by the State was, as the trial judge found, largely cumulative to the proof already presented at the sentencing hearing on the murder convictions. There is nothing in the

record to suggest that Carruthers had intended to offer any additional proof at the sentencing hearing. Even on appeal, Carruthers' attorneys have not pointed to proof that would have been presented had Carruthers been present or represented by counsel at the hearing. They simply assert that "the trial judge presumed that Carruthers would have offered the same proof" as that offered at the capital sentencing hearing and state, "[w]hether or not this is true, we will never know." Given the circumstances of this case, we conclude that the trial court did not abuse its discretion in failing to appoint counsel to represent Carruthers when he was voluntarily absent from the sentencing hearing.

**Proportionality Review**[50]

Finally, we consider whether Carruthers' sentence of death is comparatively disproportionate considering the nature of the crime and the defendant.[51]

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[50] Because of the reversal and remand, we forego statutory review of the proportionality of the death sentences imposed against Montgomery. See State v. Bondurant, 4 S.W.3d 662, 675 (Tenn. 1 999); State v. Bigbee, 885 S.W.2d 797, 817 (Tenn. 1994).

[51] Initially we note that Carruthers has not challenged the proportionality of his death sentences or the sufficiency of the evidence supporting the aggravating circumstances. As a result, Carruthers has not briefed these issues. The Court of Criminal Appeals correctly pointed out that:

> the State and the defendant in each case must fully brief the issue by specifically identifying those similar cases relevant to the comparative proportionality inquiry. When addressing proportionality review, the briefs of the parties shall contain a section setting forth the nature and circumstances of the crimes that are claimed to be similar to that of which the defendant

We begin, as always, with the proposition that the sentence of death is proportional to the crime of first-degree murder. State v. Hall, 958 S.W.2d 679, 699 (Tenn. 1997). Comparative proportionality review of capital cases is designed to insure "rationality and consistency in the imposition of the death penalty." Bland, 958 S.W.2d at 665. A death sentence will be considered disproportionate if the case, taken as a whole, is "plainly lacking in circumstances consistent with those in similar cases in which the death penalty has previously been imposed." Id. However, a sentence of death is not disproportionate merely because the circumstances of the offense are similar to those of another offense for which the defendant has received a life sentence. State v. Smith, 993 S.W.2d 6, 17 (Tenn. 1999); State v. Blanton, 975 S.W.2d 269, 281 (Tenn. 1998); Bland, 958 S.W.2d at 665. Our role in conducting proportionality review is not to assure that a sentence "less than death was never imposed in a case with similar characteristics." Blanton, 975 S.W.2d at 281; Bland, 958 S.W.2d at 665. "'Since the proportionality requirement on review is intended to prevent caprice in the decision to inflict the [death] penalty, the isolated decision of a jury to afford mercy does not

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has been convicted, including the statutory aggravating circumstances found by the jury and the evidence of mitigating circumstances. In addition, the parties shall include in the section a discussion of the character and record of the defendants involved in the crimes, to the extent ascertainable from the Rule 12 reports, appellate court decisions, or records of the trials and sentencing hearings in those cases.

958 S.W.2d at 667 (footnote omitted). The Tennessee CD-Rom death penalty database, mention ed in Bland, 958 S.W.2d at 667 n.18, may be now obtained from the Administrative Office of the Courts.

render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice.'" Bland, 958 S.W.2d at 665 (quoting Gregg v. Georgia, 428 U. S. 153, 203, 96 S. Ct. 2909, 2939, 49 L.Ed.2d 859 (1976)). Instead, our duty in conducting proportionality review "is to assure that no aberrant death sentence is affirmed." Bland, 958 S.W.2d at 665.

In performing this duty, we do not utilize a mathematical formula or scientific grid. The test is not rigid. Id. To conduct proportionality review, we select from the pool of cases in which a capital sentencing hearing was actually conducted to determine whether the sentence should be life imprisonment, life imprisonment without the possibility of parole, or death. Bland, 958 S.W.2d at 666. "'[B]ecause the aim of proportionality review is to ascertain what other capital sentencing authorities have done with similar capital murder offenses, the only cases that could be deemed similar . . . are those in which imposition of the death penalty was properly before the sentencing authority for determination.'" Bland, 958 S.W.2d at 666 (quoting Tichnell v. State, 468 A.2d 1, 15-16 (Md. 1983)).[52] In

[52] The pool from which similar cases are drawn has increased substantially since the capital punishment statute was enacted in 1977. The first decision to comprehensively discuss comparative proportionality review was State v. Barber, 753 S.W.2d 659 (Tenn. 1988). However, this Court had conscientiously performed comparative proportionality in the fifty-seven capital cases preceding Barber. Not only had we considered those fifty-seven capital cases, we also had reviewed innumerable cases in which a sentence of life imprisonment had been imposed for first degree murder. Three years ago in Bland, this Court once again thoroughly explained both the role of comparative proportionality

choosing and comparing similar cases, we consider many variables, some of which include (1) the means of death; (2) the manner of death; (3) the motivation for the killing; (4) the place of death; (5) the similarity of the victim's circumstances, including age, physical and mental conditions, and the victims' treatment during the killing; (6) the absence or presence of premeditation; (7) the absence or presence of provocation; (8) the absence or presence of justification; and (9) the injury to and effects on nondecedent victims. Bland, 958 S.W.2d at 667. When reviewing the characteristics of the defendant, we consider: (1) any prior record or prior criminal activity; (2) age, race, and gender; (3) mental, emotional or physical condition; (4) involvement or role in the murder; (5) cooperation with authorities; (6) remorse; (7) knowledge of the helplessness of the victim; and (8) capacity for rehabilitation. Id.

Considering the circumstances of these murders in light of the relevant comparative factors, we note that the three victims were kidnapped, bound, shot, and buried alive, in a pit beneath another person's grave. The killings apparently were motivated by Carruthers' desire to rob Marcellos Anderson, a successful

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review and the method by which this review is performed in Tennessee. With the decision in Bland, this Court had reviewed one hundred and ten capital cases, again, in addition to the innumerable cases involving a sentence of life imprisonment or life imprisonment without the possibility of parole. The pool of capital cases had almost doubled in the nine years from Barber to Bland. Since Bland, this Court has reviewed approximately twenty more capital cases. If the size of the comparison pool was ever a concern, it is a concern no longer. The pool from which similar cases is drawn clearly is large enough to enable an effective comparative review,

and wealthy drug dealer. These murders were committed in a particularly cruel manner, and the proof indicates that the victims were maliciously mistreated before they were buried alive. The medical testimony indicated that the victims were bound and abused for sometime before being shot and buried alive. The murders clearly were premeditated, and there was no provocation or justification for the killings.

Carruthers, who was twenty-six-years old when these crimes were committed, had an extensive prior criminal record. There is no evidence that Carruthers was mentally or emotionally impaired at the time these crimes occurred, and the record reflects that Carruthers was instrumental in planning these killings and suggesting a location to bury the bodies. Carruthers did not cooperate with the authorities at all, nor has he shown any remorse for the killings. In addition, given his extensive criminal record, it is unlikely that Carruthers has a capacity for rehabilitation. Considering the nature of these crimes and the character of Carruthers, we conclude that these murders place Carruthers into the class of defendants for whom the death penalty is an appropriate punishment. Based upon our review, we conclude that the following cases in which the death penalty has been imposed have many similarities with this case. See State v. Farris Morris, __ S.W.3d__ (Tenn. 2000) (brutal killing of innocent family members occurred during a robbery to obtain drugs and the jury found similar aggravating circumstances); State v. Cribbs, 967 S.W.2d 773 (Tenn. 1998) (killing of woman in her home by a young male defendant who told others the killing was a "hit" and the jury found similar aggravating circumstances) State v. Burns, 979 S.W.2d 276 (Tenn. 1998) (killing of

other young males during a robbery by a young male defendant); State v. Smith, 868 S.W.2d 561 (Tenn. 1993) (brutal killing of three victims involving similar aggravating circumstances); State v. Jones, 789 S.W.2d 545 (Tenn. 1990) (brutal drug-related killing in which the victim was stabbed to death after being bound, gagged, and blindfolded with duct tape; similar aggravating circumstances); State v. Zagorski, 701 S.W.2d 808 (Tenn. 1985) (killing in a drug deal involving similar aggravating circumstances). Other similar death penalty cases are State v. Hutchison, 898 S.W.2d 161 (Tenn. 1994)(murder of victim to obtain life insurance proceeds as part of a conspiracy among a group of men); State v. Edward Leroy Harris, 839 S.W.2d 54 (Tenn. 1992) (double murder of hotel clerk and security guard during robbery involving multiple defendants and similar aggravating circumstances); State v. Groseclose and Rickman, 615 S.W2d 142 (Tenn. 1981) (murder resulted from an elaborate plan to kill the wife of one of the defendants in a particularly cruel way and involved two similar aggravating circumstances).[53]

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[53] Although lesser sentences have been imposed in some similar first degree murder cases, many of these sentences resulted from plea agreements and therefore are not relevant for purposes of comparative proportionality review. See, e.g. State v. Terrance B. Burnett, Lauderdale County No. 6484 (in an attack on a rival gang member, defendant and co-defendants killed a woman and child, and as the result of a plea, received a sentence of life without parole); State v. Michael Brian Cardenas, Chester County No. 99-001 (defendant and co-defendant persuaded victim to bring them narcotics, then kidnapped victim, shot victim in the face, and dumped the victim's car and body in the river, but received life sentence as a result of a plea agreement). In other similar

Review of the above cases, and many others, reveals that the death sentences imposed by the jury for Carruthers' first degree murder convictions are proportionate to the penalty imposed in similar cases.

In accordance with the mandate of Tenn. Code Ann. § 39-13-206(c) and the principles adopted in prior decisions, we have considered the entire record and conclude that the sentences of death imposed for Carruthers' three convictions of first degree murder were not imposed arbitrarily, that the evidence supports the jury's findings of the statutory aggravating circumstances, that the evidence supports the jury's finding that the aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt, and that the sentence is not excessive or disproportionate.

## Conclusion

With respect to Carruthers, we conclude that none of the alleged errors require reversal. Accordingly, we affirm Carruthers' convictions and sentences and

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cases, the jury imposed a sentence less than death. See, e.g. State v. Eric Chambers, Shelby County No. 97-03036-38 (defendant and three co-defendants kidnapped and murdered three victims after stealing drugs from them; state sought death penalty, but the jury imposed a sentence of life without the possibility of parole.); State v. Dewayne Jordan co-defendant of Eric Chambers, supra. (the State sought the death penalty, but the jury imposed a sentence of life without the possibility of parole); State v. Kevin Wilkins, Shelby County No. 97-13179 (defendant was the leader in a gang kidnapping, torture, and execution of victim. State sought death penalty, but the jury imposed a sentence of life without the possibility of parole.). However, a sentence of death is not disproportionate merely because the circumstances of the offense are similar to those of another offense for which the defendant has received a lesser sentence from a jury.

direct that the sentences of death be carried out as provided by law on the 11th day of April, 2001, unless otherwise ordered by this Court or proper authority.

With respect to Montgomery, we conclude that a severance should have been granted when he raised the issue in his motion for new trial and that the failure to grant a severance in this case resulted in prejudicial error requiring a new trial. Accordingly, we reverse Montgomery's convictions and remand for a new trial.

With respect to issues not addressed in this opinion, we affirm the decision of the Court of Criminal Appeals authored by Judge Thomas T. Woodall and joined by Presiding Judge Gary R. Wade and Judge Joseph M. Tipton. Relevant portions of that opinion are attached hereto as an appendix.

Costs of this appeal are taxed to the State.

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FRANK F. DROWOTA, III, JUSTICE

**APPENDIX D**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 14-5457

TONY VON CARRUTHERS,
*Petitioner-Appellant*,

*v*.

TONY MAYS, WARDEN,
*Respondent-Appellee*.

FILED June 26, 2018
DEBORAH S. HUNT, Clerk

BEFORE: COLE, Chief Judge; ROGERS and STRANCH, Circuit Judges.

**ORDER**

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.[*] No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/_____

Deborah S. Hunt, Clerk

[*] Judges Gibbons and Donald recused themselves from participation in this ruling.