No. 19-_____

IN THE

Supreme Court of the United States

CHRISTA GAIL PIKE,

Petitioner,

v.

GLORIA GROSS,
WARDEN,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

The questions presented are:

1. Whether a defendant who asserts that trial counsel failed to present key evidence is precluded from showing prejudice under *Strickland* v. *Washington*, 466 U.S. 668 (1984), unless the evidence omitted at trial differs substantially in subject matter from the evidence actually presented.

2. Whether the Eighth and Fourteenth Amendments prohibit condemning to death a defendant who was eighteen years old at the time of the offense.

PARTIES TO THE PROCEEDING

Petitioner Christa Gail Pike was the petitioner below.

Respondent Gloria Gross, Warden, was the respondent below.

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

Pike v. *Gross*, No. 16-5854 (6th Cir. Aug. 22, 2019), *rehearing en banc denied* (Sept. 26, 2019)

Pike v. *Freeman*, No. 1:12-CV-35 (E.D. Tenn. Mar. 11, 2016)

Pike v. *State*, No. E2009-00016-CCA-R3-PD (Tenn. Crim. App. Apr. 25, 2011), *application for permission to appeal denied* (Nov. 15, 2011)

Pike v. *State*, No. E2003-00766-SC-R11-PD (Tenn. May 12, 2005)

Pike v. *State*, No. E2002-00766-CCA-R3-PD (Tenn. Crim. App. July 15, 2004)

Pike v. *State*, No. 68280 (Knox Cty. Crim. Ct.)

State v. *Pike*, No. 03S01-9712-CR-00147 (Tenn. Oct. 5, 1998), *rehearing denied* (Nov. 23 1998)

State v. *Pike*, No. 03C01-9611-CR-00408 (Tenn. Crim. App. Nov. 26, 1997)

State v. *Pike*, No. 58183A (Knox Cty. Crim. Ct.)

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Petitioner Christa Gail Pike respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals affirming the district court's denial of habeas corpus relief (Pet. App. 1a) is published at 936 F.3d 372. The court of appeals' orders denying rehearing en banc (Pet. App. 257a) and granting in part a certificate of appealability (Pet. App. 254a) are unpublished. The district court's opinion denying a petition for habeas corpus (Pet. App. 28a), the Tennessee Court of Criminal Appeals' order affirming the denial of post-conviction relief (Pet. App. 108a), and the Tennessee Supreme Court's decision denying review of that order (Pet. App. 107a) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 2019. Pet. App. 1a. The court of appeals denied rehearing en banc on September 26, 2019. Pet. App. 257a. On December 17, 2019, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including February 24, 2020. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant statutory provision, 28 U.S.C. 2254, is reproduced in the appendix to this petition, Pet. App. 261a, as are the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution, Pet. App. 258a.

INTRODUCTION

In this capital case, the Sixth Circuit held that a defendant claiming that her counsel ineffectively failed to present key evidence to the jury at her trial cannot show that the omission of the evidence was prejudicial under *Strickland* v. *Washington*, 466 U.S. 668 (1984), unless the evidence omitted at trial differs substantially in subject matter from the evidence actually presented. That holding cannot be reconciled with the decisions of a number of other circuits, which recognize that such an omission can be prejudicial if the omitted evidence relates to the same subject matter as the evidence that was presented, but is different in quality because it is more detailed, more expansive, or more compelling. Indeed, the issue is now the subject of a 4-3 split among the circuits. And the Sixth Circuit's decision is wrong. A juror hearing graphic evidence of a particular mitigating circumstance—such as the horrific childhood experienced by petitioner in this case—may reasonably reach a different conclusion as to the appropriate penalty than a juror who has heard only meager or highly general evidence involving the same or similar topics. See *Brewer* v. *Quarterman*, 550 U.S. 286, 289 (2007) (in a death-penalty case, sentencing jury must be able to give "reasoned moral response" to "defendant's mitigating evidence") (citation omitted). This Court's review is warranted to bring clarity to the law in this critically important area. See *Martinez* v. *Ryan*, 566 U.S. 1, 12 (2012) ("The right to the effective assistance of counsel at trial is a bedrock principle in our justice system.").

The Sixth Circuit's decision is also wrong in another respect that warrants this Court's review: it approves imposition of the death penalty on an offender who was only 18 years old at the time of the offense. All of the reasons set forth by this Court in *Roper* v. *Simmons*,

543 U.S. 551 (2005), for deeming 17-year-olds ineligible for the death penalty under the Constitution apply equally to 18-year-olds, who have immature and undeveloped brains and who therefore have "lesser blameworthiness" for their acts than an older offender would. Pet. App. 23a (Stranch, J., concurring). This case presents the issue starkly, since petitioner's 17-year-old co-defendant avoided the death penalty while she did not. This Court should make clear that *Roper* extends to defendants like petitioner, who is the youngest woman condemned to die in the United States since this Court decided *Furman* v. *Georgia*, 408 U.S. 238 (1972), and one of only a few defendants sentenced to death each year for offenses committed as an 18-year-old.

STATEMENT OF THE CASE

1. Despite learning that Pike had a childhood rife with trauma, counsel at her trial for first-degree murder failed to pursue any of the mitigation witnesses recommended by the court-appointed psychologist, Dr. Diana McCoy, deciding instead to call Dr. McCoy alone as a witness to present Pike's entire mitigation case. Then, on the night before the trial's penalty phase, counsel inexplicably decided not to call Dr. McCoy after all. In her place, counsel called three of Pike's relatives who happened to attend court the following day—two of whom bore responsibility for, and therefore had an incentive to minimize, Pike's wretched upbringing. The outcome of counsel's impromptu mitigation presentation was predictable. Having heard only a vague account of "a dysfunctional family," Dkt. No. 8-11, at 3135, No. 12-CV-00035 (E.D. Tenn. 2016) (Dkt. No.)—even though far stronger mitigation evidence was available—the jury sentenced Pike to death by electrocution.

2. Before her arrest at age eighteen, Pike had a horrific childhood. Born with brain damage, she endured abuse, neglect, multiple violent rapes, and mental illness.

a. Christa Pike was born to two alcoholics, Carissa and Glenn. Dkt. No. 9-9, at 4912; Dkt. No. 11-3, at 7490. While pregnant, Carissa continued drinking alcohol, causing brain damage *in utero* to Pike's frontal lobe, the region in the brain that controls executive functioning and behavioral regulation. Dkt. No. 9-8, at 4772-4773, 4778-4779; Dkt. No. 10-4, at 6788-89, 6793. Pike's brain damage is so severe that—unlike most damage of a similar nature—it is visible on an MRI. Dkt. No. 9-8, at 4774-4775. A well-respected neurologist and clinical psychiatrist confirmed Pike's brain damage at her post-conviction hearing. Dkt. No. 9-8, at 4778-4779; Dkt. No. 10-4, at 6788-6789. Such brain damage increases the likelihood of developing bipolar disorder, as Pike ultimately did. Dkt. No. 10-4, at 6788-6789.

b. Pike's mother, Carissa, was seriously troubled. She suffered from depression, attempted suicide when Pike was three years old, and drank heavily throughout Pike's childhood. Dkt. No. 11-3, at 7536; Dkt. No. 9-9, at 4912. She preoccupied herself with partying and her latest suitor, leaving her children with only whatever "was left." Dkt. No. 9-7, at 4702-03. Loath to care for Pike, Carissa left her with relatives whenever she became inconvenient, including for almost all of the first three years of her life. Dkt. No. 9-7, 4696-4698; Dkt. No. 11-3, at 7489, 7497; Dkt. No. 9-7, at 4698, 4708-10; Dkt. No. 9-9, at 4901-4902; Dkt. No. 11-2, at 7343-7344. In perhaps the cruelest episode, Carissa sent Pike away when she was eight years old,

after Carissa's fourth husband indicated he "didn't like children." Dkt. No. 9-7, at 4696-4697.[1]

Carissa's romantic partners visited further neglect and abuse on Pike. Her fourth husband whipped Pike and her sister regularly with a leather strap on a wooden handle. Dkt. No. 11-3, at 7499. Carissa's subsequent boyfriend, Steve Kyaw, beat Pike with a belt, sometimes awaking her in the dead of night to do so. *Id.* at 7485. Other times, he twisted Pike's nipples and "fe[lt] her up" while wrestling with her. *Id.* at 7484-7485; see Dkt. No. 11-2, at 7343. Kyaw's abuse persisted until he was charged for punching Pike in the nose, after which child protective services ordered him not to be alone with Pike. Dkt. No. 9-11, at 5107-5108.

The relatives with whom Carissa left Pike provided no refuge. Pike has scars on her back from her father's whippings, which he meted out five or six times in a single day at least once. Dkt. No. 11-2, at 7344. Beyond that, Glenn generally ignored his daughter. Dkt. 11-3, at 7490. Pike's maternal grandmother, meanwhile, resented caring for Pike "because it took away some of that alcohol time"; she physically and verbally abused Pike before dying of alcoholic hepatitis. Dkt. No. 9-7, at 4698, 4708-4710; Dkt. No. 9-9, at 4901-4902.

The only relative who exerted a positive influence was Pike's paternal grandmother, who died when Pike was twelve. Dkt. No. 11-3, at 7488, 7499. Watching

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[1] Pike's familial instability upended her education as well. Constantly relocating, Pike never spent more than a few years—at most—at the same school. Dkt. No. 9-24, at 6325, 6360, 6462. Pike failed third grade and seventh grade, and she did not complete any formal schooling beyond ninth grade. Dkt. No. 9-25, at 6462; Dkt. No. 11-3, at 7532.

her grandmother gradually succumb to cancer devastated Pike; she felt she had lost "the only person who really loved her." *Ibid.* Afterward, her sister remarked, Pike "virtually had to raise [herself]." Dkt. No. 11-2, at 7336, 7343.

c. When Pike was a pre-teen, a neighbor pushed her into a weed patch, where he held her down and raped her while she screamed. Dkt. No. 9-8, at 4787-4788; Dkt. No. 11-3, at 7515. After reporting the incident the next day to a classmate and a teacher's aide, Pike identified the perpetrator from a lineup. *Ibid.* He was indicted and ultimately pleaded no contest to a reduced offense. Dkt. No. 12-5, at 8736-8738. Yet Carissa refused to believe that Pike had been attacked, causing Pike to attempt suicide. Dkt. No. 12-2, at 8315; Dkt. No. 11-4, at 7693, 7696.

At seventeen, Pike was raped again by a stranger she encountered while walking down the street at night. Dkt. No. 11-3, at 7515. She tried to run, but the man dragged her away, causing her to hit her head on a rock, before pulling her up a hill by her hair and shirt. *Ibid.* While raping her, the stranger continued to hit Pike's head against a rock, held his hand over her mouth, and cursed at her. *Ibid.* After a car approached, he fled. *Ibid.* Pike ran to a friend's home, where the police were called. *Ibid.* Hospital records confirm the rape. Dkt. No. 12-7, at 8759-8770.

d. Records from Pike's childhood reveal that Pike suffered from severe sleep deprivation, frenetic behavior, impulsivity, and feelings of invincibility, all of which indicate early-onset bipolar disorder. Dkt. No. 10-4, at 6774-6779, 6814. After reviewing those records and interviewing Pike several times, Dr. William Kenner, a clinical psychologist, testified at Pike's post-

conviction hearing that she suffers from bipolar II disorder, disassociation, and post-traumatic stress disorder. Each of those conditions, he explained, can flow from complex trauma in childhood. *Ibid.*; Dkt. No. 10-5, at 6854, 6881, 6891-6895.

Individuals with bipolar II disorder, like Pike, suffer episodes of hypomania, typified by racing thoughts and sleep deprivation, which produce "extremely poor judgment." Dkt. No. 10-4, at 6799, 6804. In unstructured environments, let alone abusive or neglectful ones, people with bipolar disorder seem "out of control." Dkt. No. 10-5, at 6889, 6916. For Pike, that poor executive functioning was worsened by organic brain damage and PTSD. *Id.* at 6889.

e. Abused, neglected, and mentally ill, Pike was vulnerable to bad influences. At seventeen, she became enthralled by a severely disturbed former psychiatric patient. After Carissa and her fifth husband kicked that boyfriend out of their house, Pike followed him onto the streets, living homeless for months. Dkt. No. 11-3, at 7505-7506. Such "very intense attachments," Dr. Kenner testified, can occur in people who "missed out on early parenting experiences." Dkt. No. 10-5, at 6892.

Pike's relationship with her codefendant in this case, Tadaryl Shipp, fit the same pattern. Dkt. No. 10-5, at 6911. Pike met Tadaryl at a program for disaffected youth in which the other participants created a dangerous environment. Dkt. No. 9-12, at 5219; Dkt. No. 9-13, at 5339. She considered Tadaryl her protector and the first person to care about her well-being since her grandmother's death—and she therefore ob-

sessed about pleasing him, even though he was a violent gang member who slapped her. Dkt. No. 9-12, at 5221; Dkt. No. 9-15, at 5533-5537, 5545.

f. Despite her extraordinarily difficult circumstances, Pike displayed positive attributes. An attorney who interacted with Pike when she was sent off to training school as a young teenager described her as "a sweet, bright, and inquisitive girl." Dkt. No. 9-11, at 5107, 5117-5118. And several other adults recognized that Pike's childhood misbehavior resulted from her tumultuous childhood and her mother's neglect. Dkt. No. 11-2, at 7336-7337. A psychologist told Dr. McCoy that Pike "was really a pretty scared little kid" who "project[ed] this tough girl image because of how scared she really was." Dkt. No. 9-25, at 6374.

3. a. In January 1995, eighteen-year-old Pike, seventeen-year-old Shipp, and nineteen-year-old Shadolla Peterson were charged in the Criminal Court for Knox County, Tennessee with the murder of another participant in the youth program, Colleen Slemmer. Dkt. No. 8-8, at 2761. The three defendants invited Slemmer with them to a secluded area, where her throat was cut multiple times and her head was struck with a large piece of asphalt. Dkt. No. 8-2, at 2232-2236, 2288-2291, 2321.

b. William Talman, who had never tried a death-penalty case, was appointed as lead trial counsel for Pike.[2] Dkt. No. 9-19, at 5909. As the presiding judge later acknowledged, "we all knew Talman had his own

[2] The trial court appointed Julie Rice as Talman's co-counsel just 55 days before Pike's trial, after Rice agreed not to seek a continuance. Dkt. No. 11-2, at 7325-7326. Rice had been practicing law for only three years and had never handled anything more serious than a non-violent felony. Dkt. No. 9-17, at 5677-5681.

problems." Dkt. No. 10-7, at 1083. Around that time, Talman was under investigation by several law enforcement agencies for overbilling the state's Indigent Defense Fund—a Class B felony. See Dkt. No. 11-2, at 7257; Dkt. No. 12-3, at 8441. The investigation, which attracted widespread local news coverage, revealed that Talman repeatedly billed over 24 hours per day and apparently manipulated time entries to avoid detection. *Id.* at 8455; see Dkt. No. 11-2, at 7268-7275. Talman eventually pleaded guilty to two ethics charges, and the Tennessee Supreme Court imposed an approximately one-year suspended revocation of Talman's license. Dkt. No. 12-3, at 8487.

Before trial, the court-appointed psychologist, Dr. McCoy, interviewed witnesses about Pike's upbringing and located corroborating records, compiling what would eventually become a three-volume social history of Pike's wretched childhood. Dkt. No. 9-24, at 6295-6296, 6322, 6330, 6341. Based on that investigation, Dr. McCoy—who was part of the defense team—provided Talman with recommendations for potential witnesses and mitigation themes. Dkt. No. 9-24, at 6300; see Dkt. No. 11-2, at 7336. But even though he recognized that the penalty phase was likely to be the most important part of Pike's case, Dkt. No. 9-20, at 5982, Talman did not prepare to call any of the potential witnesses that Dr. McCoy had recommended. Dkt. No. 9-25, at 6388. Instead, he intended to present only Dr. McCoy's testimony. *Ibid.*

c. During the guilt phase of Pike's trial, Talman called Dr. Eric Engum, a clinical psychologist who opined that Pike had not acted deliberately or with premeditation. Dkt. No. 8-7, at 2722, 2738. As a guilt-phase witness, Dr. Engum's testimony was very nar-

row: although he diagnosed Pike with borderline personality disorder, he did not discuss Pike's childhood, much less explain how it could have induced her mental illness. *Id.* at 2744-2745. On cross-examination, he conceded that his opinion derived entirely from Pike's statements about the offense and the psychological tests he conducted. *Id.* at 2772. Although he was not a neurologist and did not review any neuroimaging, Dr. Engum testified that his own tests "unequivocally showed that she did not suffer any signs of brain damage." *Id.* at 2738.

After hearing the evidence, the jury convicted Pike of first-degree murder and conspiracy to commit murder in the first degree. Dkt. No. 8-10, at 3027-3028.

d. When the guilt phase of the trial was complete, the trial court convened a conference with counsel at which Talman produced all three volumes of Dr. McCoy's social history to the prosecution. See Dkt. No. 8-10, at 3029-30. Later that day, Talman told Dr. McCoy that when the prosecutor objected to the late disclosure, he had falsely represented that she had provided her social history only a day earlier, and he implored her to corroborate his lie. Dkt. No. 9-25, at 6412-6413. Put to this "terrible dilemma," Dr. McCoy refused to lie under oath. *Ibid.* Talman also expressed alarm that the prosecutor had objected to Dr. McCoy's report as "all hearsay," even after Dr. McCoy assured him that she "testif[ies] about hearsay often." *Ibid.*

After speaking to Dr. McCoy, Talman decided not to call her as a witness at the penalty phase of Pike's trial, which was scheduled to begin the very next day—even though he had long planned for her to be the sole witness. Dkt. No. 9-25, at 6415-6416. Talman later

offered several "*post hoc* rationalization[s]" for his failure to call Dr. McCoy, *Wiggins* v. *Smith*, 539 U.S. 510, 526-527 (2003), which do not accord with the facts. For instance, Talman claimed that Dr. McCoy suddenly retreated from Dr. Engum's diagnosis of borderline personality diagnosis. Dkt. No. 9-20, at 6010. That account conflicted with contemporaneous records in which Dr. McCoy identified borderline personality disorder as a key mitigation theme. Dkt. No. 11-2, at 7340.

e. After jettisoning the only witness the night before the penalty phase, Talman did not seek a continuance. Dkt. No. 8-10, at 3035. Instead, with minimal preparation the morning the penalty phase began, he called as witnesses three of Pike's relatives who were present in court that day: her mother, father, and aunt. Dkt. No. 9-20, at 6416. Opening statements in the penalty phase and Pike's entire mitigation case took only two hours and 15 minutes, much of which the prosecution spent cross-examining Pike's relatives. Dkt. No. 8-10, at 3035; Dkt. No. 8-11, at 3112.

Not surprisingly, Pike's counsel struggled to elicit testimony. In response to the prosecution's repeated objections, the court had to instruct counsel about the basics of examining witnesses. *E.g.*, Dkt. No. 8-10, at 3050 ("more specific questions * * * might help"); *id.* at 3053 ("You can't lead"); *id.* at 3058 ("You need to connect these problems directly to Ms. Pike."); Dkt. No. 8-10, at 3081 ("Could you lay a foundation for that?"). And the trial court cut off entirely certain areas of inquiry, such as substance abuse and lack of maternal bonding, because Pike's relatives lacked the requisite expertise. Dkt. No. 8-10, at 3050, 3058.

The halting testimony presented a woefully incomplete portrait of Pike's background. The jury did hear, in general terms, about her parents' neglect and rejection of Pike. Pet. App. 14a-17a. But there was no evidence at all during the mitigation phase about the two rapes suffered by Pike (which were corroborated by contemporaneous records), her brain damage and history of mental illness, the abuse Pike's relatives and her mother's boyfriends and husbands inflicted on her, the complete disruption of Pike's education, Pike's extreme dependence on unstable and violent men, or her redeeming qualities. Dkt. No. 8-10, at 3049; Dkt. No. 8-11, at 3111. Without an expert, Pike's counsel could not connect Pike's brain damage, mental illness, or childhood trauma to Pike's subsequent conduct. Dkt. No. 9-24, at 6308. And Pike's father and mother tended to downplay Pike's childhood trauma, for which they bore responsibility. Dkt. No. 8-11, at 3083; Dkt. No. 11-2, at 7338-7344.

Worse still, much of the testimony misportrayed Pike's childhood. The testimony of Pike's father was misleading in several respects. While cross-examining him, the prosecution raised "an allegation" that Pike had sexually abused her infant half-sister. Dkt. No. 8-11, at 3087. Pike's father did not meaningfully rebut that allegation. *Ibid.* But the post-conviction court later found, consistent with Dr. McCoy's thorough investigation, that "there is no proof in the record that Ms. Pike was in any way abusive to any children in her family, or otherwise." Dkt. No. 9-5, at 4413. Pike's father also described himself as a "disciplinarian," suggesting that he provided Pike much-needed structure, when in fact he regularly beat Pike and otherwise ignored her. Dkt. No. 8-11, at 3083.

The testimony from Pike's mother was similarly unhelpful and incomplete. During her cross-examination, the prosecution asked about an incident in which Pike had chased Carissa's boyfriend Kyaw with a knife. Dkt. No. 8-11, at 3102-3103. The prosecution implied, without contradiction from Carissa, that Pike had acted without provocation. *Ibid.* But the jury never learned that Kyaw regularly assaulted Pike, including on that particular occasion. Dkt. No. 9-11, at 5076-5077. As a childhood friend testified at Pike's post-conviction hearing, Pike grabbed a knife only after Kyaw had attacked her, and she then ran out of the house "panicked" with the knife while also struggling to adjust her pants. *Id.* at 5077.

Defense counsel's argument to the jury during the penalty phase did not mention Pike's mental illness or inform the jury that her age qualified as a statutory mitigating circumstance. Tenn. Code § 39-13-204(j)(7); see Dkt. No. 8-10, at 3042-3046; Dkt. No. 8-11, at 3128-3133.[3] Instead, counsel confusingly urged the jury to impose a lesser sentence so that she would not become "fam[ous]" as a result of a death sentence. Dkt. No. 8-10, at 3045-46.

f. Offered a superficial and, at times, misleading account of Pike's childhood, the jury sentenced Pike to death. Dkt. No 8-11, at 3155. Had she been slightly

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[3] Under Tennessee law, to impose the death penalty a jury must unanimously find beyond a reasonable doubt at least one statutory aggravating factor and that any aggravating factors outweigh all mitigating circumstances. Tenn. Code § 39-13-204(g). In addition to considering statutory mitigating circumstances, a the jury must consider "any aspect of a defendant's character or record * * * that the defendant proffers as a basis for a sentence less than death." *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978); see Tenn. Code § 39-13-204(j)(9).

younger at the time of the crime, like her codefendant, Pike would have been ineligible for the death penalty.

4. In June 1999, Pike filed a timely pro se petition for post-conviction review in state court, bringing claims for ineffective assistance of counsel. Dkt. No. 9-1, at 3781-3788; see *Strickland* v. *Washington*, 466 U.S. 668, 688, 694 (1984) (to prove ineffective assistance, defendant must show that trial lawyer's performance fell below an "objective standard of reasonableness" and that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"). After counsel was appointed, she supplemented her petition to include claims that her death sentence contravened the Eighth and Fourteenth Amendments. See, *e.g.*, Dkt. No. 9-3, at 4100 (citing, *inter alia*, *Roper* v. *Simmons*, 543 U.S. 551 (2005)).

The state court held several evidentiary hearings between January 2007 and April 2008—and Pike's mitigation case finally emerged. More than 30 witnesses—including several medical experts—testified, and they set forth the detailed facts about Pike's upbringing and medical history that are described above. See pp. 4-8, *supra*; Dkt. Nos. 9-10.

Nevertheless, the Tennessee trial court denied relief, and the Tennessee Court of Criminal Appeals affirmed. Pet. App. 108a. The appellate court concluded that relief was unwarranted because Talman's conduct did not give rise to prejudice within the meaning of *Strickland*. Pet. App. 91a-92a. The court deemed Talman's initial decision not to call any of the recommended witnesses "understandable" because "lay witnesses * * * could not explain the petitioner's behavior." Pet. App. 214a (quoting trial court). The court

did not explain how Dr. McCoy could have discussed Pike's childhood without foundational testimony from lay witnesses or why Talman could not have called both lay and expert witnesses. And as for Talman's decision not to call Dr. McCoy, the court posited that "this could easily be explained as a misunderstanding." Pet. App. 215a. The court did not explain how a "misunderstanding" without further inquiry could justify abandoning the sole witness prepared to testify at the penalty phase. Nor did the court address the evidence that Talman's decision was based not on a misunderstanding but on a desire to cover up his own mistakes.

The state appellate court also stated that Pike was "essentially precluded from establishing prejudice" because the trial court had asserted that "the mitigation evidence which was omitted would not have outweighed the aggravating factors." Pet. App. 216a. The only evidence the appellate court mentioned was Talman's dubious opinion that "he was not sure" additional witnesses would have produced a different outcome. *Ibid.*

Finally, the state appellate court addressed Pike's Eighth Amendment claim on the merits and rejected it. The court simply asserted that "this court has not been able to discern that there is a national consensus" against executing 18- to 20-year-olds. Pet. App. 246a.

5. a. After exhausting state-court remedies, Pike filed a timely federal petition for writ of habeas corpus in 2012. Dkt. No. 23, at 10307. The district court denied habeas relief. Dkt. No. 94.

b. Having granted a certificate of appealability on whether Pike received ineffective assistance during the penalty phase of her trial, the Sixth Circuit denied

habeas relief for lack of *Strickland* prejudice. Pet. App. 21a.

The court of appeals acknowledged that "[c]ounsel's failure to either present mitigating evidence at sentencing * * * or discover all reasonably available mitigating evidence * * * can support a finding of ineffective assistance." Pet. App. 12a. And the court likewise acknowledged that the kind of childhood trauma Pike experienced is "relevant" and "powerful" mitigating evidence. Pet. App. 16a (noting cases involving "verbal and physical parental abuse, inappropriate parental discipline, * * * behavioral disorders, * * * early childhood privation * * * , an alcoholic and absentee mother," and "physical abuse").

The court of appeals held, however, that a petitioner cannot show prejudice from counsel's failure to present evidence unless the omitted evidence "differ[s] in a substantial way—in strength *and* subject matter—from the evidence actually presented." Pet. App. 12a (emphasis added) (quoting *Clark* v. *Mitchell*, 425 F.3d 270, 286 (6th Cir. 2005)). In other words, the court stated that Pike could not establish prejudice unless she could show that, as compared to the evidence the jury heard at the penalty phase of the criminal trial, the omitted evidence was both substantially stronger *and* concerned a substantially different subject matter. *Ibid.*; see *ibid.* ("the failure to present additional mitigating evidence that is 'merely cumulative' of that already presented does not rise to the level of a constitutional violation") (citation omitted).

Applying that rule (which the Tennessee courts had not), the Sixth Circuit concluded that Pike could not demonstrate a reasonable probability that the result of the penalty proceeding would have been different

had the omitted evidence been presented. Pet. App. 20a-21a. Because the jury had heard the "general content" of Pike's social history through three lay witnesses, the Sixth Circuit stated, Pike could not show that Talman's failure to call Dr. McCoy prejudiced her. Pet. App. 14a-17a. The court thought that the testimony that "Pike's childhood and upbringing were very difficult," Pet. App. 16a, erased any "reasonable probability that at least one juror," *Wiggins* v. *Smith*, 539 U.S. 510, 537 (2003), would have been swayed by omitted evidence about the horrific specifics of those difficulties. The court also discounted counsel's failure to present any evidence or argument about Pike's organic brain damage or mental illness during the penalty phase. In the court's view, it sufficed that the jury had heard some limited testimony during the guilt phase about Dr. Engum's borderline personality disorder diagnosis. Pet. App. 18a-19a. Finally, although no one testified about Pike's redeeming attributes at trial, the Sixth Circuit considered that gap in the evidence to be immaterial, particularly in light of what it described as the aggravating circumstances of the crime. *Id.* at 19a (citing *Clark*, 425 F.3d at 286).

Judge Stranch concurred. She expressed the view that, because Pike was 18 years old at the time of the crime, the death sentence "likely" violates the Eighth Amendment under this Court's "precedent focusing on the lesser blameworthiness and greater prospect for reform that is characteristic of youth." Pet. App. 23a-26a (citing *Roper* v. *Simmons*, 543 U.S. 551 (2005), *Miller* v. *Alabama*, 567 U.S. 460 (2012), and *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016)). Just like children under age 18, Judge Stranch observed, 18- to 20-year-olds exhibit a "lack of maturity and an underde-

veloped sense of responsibility," a greater susceptibility to influence, and an unformed character. *Id.* at 24a-26a. Indeed, Judge Stranch observed, it is precisely because of those characteristics that society has set the age of majority at 21 in many circumstances. *Id.* at 26a. But Judge Stranch "reluctantly" concurred in the denial of habeas relief on the ground that this Court has "not extended *Roper* to 18-year-olds." *Id.* at 27a.

REASONS FOR GRANTING THE PETITION

The circuits are deeply divided about how to assess whether evidence that trial counsel failed to present at trial is merely cumulative of the evidence that was actually presented. The court of appeals in this case entrenched that division of authority, applying a rigid rule that forecloses the possibility of a *Strickland* prejudice determination when the omitted evidence and the presented evidence cover substantially the same subject matter. In the process, that court withheld relief from a death-penalty petitioner who plainly received ineffective assistance at the penalty phase of her trial. This Court's review is warranted to resolve that conflict among the circuits. Moreover, this case presents an opportunity for this Court to consider whether to extend its decision in *Roper* v. *Simmons*, 543 U.S. 551 (2005), to offenders who were only 18 years old—and therefore not meaningfully distinct from the 17-year-olds that *Roper* deemed death-ineligible—at the time of their offenses.

I. This Court Should Resolve A Deep Conflict Among The Courts Of Appeals Regarding When Omitted Mitigation Evidence Is Cumulative Of Evidence Presented At Trial

A. The Decision Below Conflicts With Decisions Of Other Courts Of Appeals

The Sixth Circuit's test for assessing prejudice under *Strickland* places that court on the majority side of a meaningful and entrenched 4-3 circuit split. In the Sixth Circuit, if mitigation evidence that trial counsel improperly failed to present during the penalty phase of a capital case concerns the same subject matter as evidence actually presented to the jury during that phase, the omitted evidence is necessarily cumulative and cannot establish prejudice. Under the Sixth Circuit's test, that is true regardless of whether the omitted evidence is of higher quality—for instance, more detailed, more extensive, or more likely to sway a jury—than the penalty-phase evidence that the jury actually heard. The Fifth, Eighth, and Eleventh Circuits have adopted the same rule. But the Third, Seventh, and Ninth Circuits have taken the opposite approach, holding that omitted mitigation evidence, even where it concerns the same subject matter as penalty-phase evidence, is not cumulative if it is of greater quality—and that counsel's failure to present that evidence therefore can establish prejudice.

Given that split in authority, defendants with similar ineffective assistance of counsel claims will get different results based solely on a happenstance of geography. This Court's review is manifestly warranted.

1. In the decision below, the Sixth Circuit held that mitigation evidence that trial counsel failed to present to the jury is per se cumulative if it does not "differ in

a substantial way—in strength *and subject matter*—from the evidence actually presented at sentencing." Pet. App. 12a (emphasis added; citation omitted); see, *e.g.*, *Hill* v. *Mitchell*, 400 F.3d 308, 319 (6th Cir. 2005). While acknowledging that the mitigation evidence ultimately set forth at the post-conviction hearing was more "in-depth" than—and even inconsistent with—the evidence presented during the penalty phase, the Sixth Circuit nevertheless concluded that the evidence the jury never had an opportunity to consider was merely cumulative, on the ground that the jury had "heard largely the same" general "narrative" of a "difficult" childhood that the omitted evidence supported. Pet. App. 16a. According to the Sixth Circuit, then, so long as "the evidence counsel presented to the jury encompassed the *types* of mitigating evidence the Supreme Court has found valuable in other cases," any additional evidence of the same type (regardless of its greater quality) is necessarily cumulative. *Id.* (emphasis added).

The Eleventh Circuit has adopted the same approach to post-conviction mitigation evidence in capital cases. Relying on Sixth Circuit precedent, that court holds that "evidence presented in postconviction proceedings is 'cumulative' or 'largely cumulative' to or 'duplicative' of that presented at trial when it tells a more detailed version of the same story told at trial or provides more or better examples or amplifies the themes presented to the jury." *Tanzi* v. *Sec'y, Fla. Dep't of Corr.*, 772 F.3d 644, 660 (11th Cir. 2014) (quoting *Holsey* v. *Warden*, 694 F.3d 1230, 1260-1261 (11th Cir. 2012)); see *Holsey*, 694 F.3d at 1263 (holding that the postconviction evidence was cumulative because it "concerned the same 'subject matter [as] the evidence actually presented at sentencing'" (quoting *Beuke* v.

Houk, 537 F.3d 618, 645 (6th Cir. 2008) (alteration in *Holsey*)).[4]

The Fifth Circuit has similarly held "that [post-conviction] evidence 'of the same genre as that presented to the jury at trial' could not outweigh the state's 'overwhelming' evidence of future dangerousness." *Busby* v. *Davis*, 925 F.3d 699, 726 (5th Cir. 2019) (quoting *Newbury* v. *Stephens*, 756 F.3d 850, 873 (5th Cir. 2014)). In *Busby* v. *Davis*, because some evidence of the defendant's "unstable childhood" was presented during the penalty phase, the Fifth Circuit concluded that far more powerful evidence presented in post-conviction proceedings, which also concerned the defendant's troubled upbringing, was cumulative. *Ibid.*; see *Trevino* v. *Davis*, 861 F.3d 545, 550 (5th Cir. 2017) (holding that expert opinion and diagnosis of fetal alcohol spectrum disorder (FASD) presented during post-conviction proceedings was cumulative of penalty-phase evidence, because "trial counsel presented a mitigation witness, [defendant's] aunt, who covered his mother's alcohol problems").

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[4] The Eleventh Circuit has cited this Court's decisions in *Cullen* v. *Pinholster*, 563 U.S. 170 (2011), and *Wong* v. *Belmontes*, 558 U.S. 15 (2009), in support of its approach. But those decisions do not resolve, or even directly address, the question presented here. In *Pinholster*, this Court observed that on the particular facts of that case "the additional evidence Pinholster presented in his state habeas proceedings" would not "have changed the jury's verdict" because it was either "largely duplicat[ive]" of the evidence presented at trial or had questionable mitigating force. *Id.* at 200. The Court did not set forth or address any rule governing which evidence should be considered cumulative. The same is true of *Wong*. See 558 U.S. at 23-24.

The Eighth Circuit has embraced the same rule, holding that post-conviction evidence is cumulative of penalty-phase evidence if both touch on the same topic, regardless of disparity in quality or strength. In *Anderson* v. *Kelley*, 938 F.3d 949 (8th Cir. 2019), the Eighth Circuit held that expert diagnoses of post-traumatic stress disorder (PTSD) and FASD were cumulative of penalty-phase evidence, even though the PTSD and FASD diagnoses were presented for the first time in post-conviction proceedings. *Id.* at 958. Because trial counsel presented some evidence relevant to PTSD and FASD, the Eighth Circuit concluded that the post-conviction medical diagnoses, despite constituting far more compelling evidence, were merely cumulative and could not support a prejudice determination. *Ibid.* ("We agree with the district court that [defendant's] counsel may have 'missed the label * * * but they told the story.'").

2. The Third, Seventh, and Ninth Circuits have adopted exactly the opposite approach. In those circuits, omitted evidence is not cumulative if it is of greater quality than penalty-phase evidence, regardless of whether both concern the same subject matter.

The Third Circuit has squarely held that omitted "evidence of 'an entirely different weight and quality'" is not cumulative, "even where that evidence supports the same mitigating factor pursued at trial." *Abdul-Salaam* v. *Sec'y of Pennsylvania Dep't of Corr.*, 895 F.3d 254, 269 (3d Cir. 2018) (quoting *Jermyn* v. *Horn*, 266 F.3d 257, 310 (3d Cir. 2001)). Put another way, in the Third Circuit omitted evidence is not cumulative of evidence presented during the penalty phase, even where both concern the same subject matter, if the omitted evidence is "upgraded dramatically in quality

and quantity" compared to the penalty-phase evidence. *Ibid.* (quoting *Bond* v. *Beard*, 539 F.3d 256, 291 (3d Cir. 2008)). For instance, in *Abdul-Salaam*, the Third Circuit explained that "extensive and detailed" evidence concerning the defendant's troubled upbringing that was presented for the first time in post-conviction proceedings presented "a far stronger mitigation case" than the "minimal" evidence of his troubled upbringing that the jury heard at trial. *Id.* at 272. Because "the un-presented family member testimony 'was of a totally different quality' than the 'meager evidence' that had been 'presented on that issue' at trial," the Third Circuit concluded that the post-conviction evidence was not cumulative and that the defendant was entitled to habeas relief. *Id.* at 270 (quoting *Jermyn*, 266 F.3d at 286).

The Seventh Circuit adopted the same rule in *Griffin* v. *Pierce*, 622 F.3d 831 (7th Cir. 2010). In that case, the presentence report, which was presented at trial, addressed the defendant's troubled, disadvantaged childhood to some degree. *Id.* at 845. But trial counsel never presented evidence fleshing out defendant's "father's alcoholism and abusiveness, [his] mother's absences from the home, * * * the circumstances of his mother's death," his mental health diagnoses, his suicide attempts, and his "good acts." *Id.* at 844-845. The Seventh Circuit held that the more detailed and compelling omitted evidence concerning the defendant's abusive childhood was not cumulative. *Id.* at 845 ("*Some* information about [defendant's] personal history was in the report, but the report was an incomplete and at times inaccurate reflection of [defendant's] tragic personal history."). The fact that the post-conviction and penalty-phase evidence dealt with the

same subject matter made no difference to the result. *Ibid.*

Similarly, in *Pruitt* v. *Neal*, 788 F.3d 248 (7th Cir. 2015), trial counsel presented expert mental-health testimony, including a diagnosis of schizotypal personality disorder, to the jury during the penalty phase. *Id.* at 273. The Seventh Circuit nevertheless concluded that omitted mental-health evidence, which included a diagnosis of schizophrenia, was not cumulative, because the post-conviction testimony was stronger mitigation evidence that might have made a difference to the jury. *Id.* at 273-275 (explaining that the post-conviction and penalty-phase testimony was not simply a "battle of the experts"); see *Stevens* v. *McBride*, 489 F.3d 883, 897-898 (7th Cir. 2007) (acknowledging that expert mental-health testimony was presented during the penalty phase, but concluding that "[c]ompetent evidence of [defendant's] mental illness would have strengthened the general mitigation evidence presented by defense counsel concerning [defendant's] difficult background by focusing the jury on the concrete results of years of abuse").

The Ninth Circuit took the same approach in *Kayer* v. *Ryan*, 923 F.3d 692 (9th Cir. 2019), holding that detailed expert testimony concerning the defendant's history of mental illness and substance abuse, which was never presented at the penalty phase of trial, was not cumulative of penalty-phase evidence that addressed the same subject matter. See *id.* at 718. In reaching that conclusion, the Ninth Circuit explained that the "minimal" penalty-phase evidence was "speculative" compared to the concrete expert testimony: "[i]nstead of being cumulative, the evidence presented to the [post-conviction relief] court of [defendant's] mental impairment established for the first time its

very existence." *Ibid;* see *White* v. *Ryan*, 895 F.3d 641, 672 (9th Cir. 2018) (holding that, although the trial court considered aspects of defendant's troubled upbringing, the "graphic description of [his] childhood" presented post-conviction was not cumulative); *Stankewitz* v. *Wong*, 698 F.3d 1163, 1166 (9th Cir. 2012) (concluding that detailed post-conviction evidence illustrating the defendant's "deprived and abusive upbringing, potential mental illness, [and] long history of drug use" was not cumulative of "meager" evidence concerning the same topics presented during the penalty phase).

3. Had the instant case arisen in one of those three circuits, the result would have been different, because the omitted evidence here—which was significantly stronger and more compelling than the meager evidence that trial counsel presented—would not have been deemed per se cumulative. The difference in approaches is especially well illustrated by the Third Circuit's decision in *Abdul-Salaam*, which involves a contrast between the omitted and presented evidence that is highly reminiscent of this case, and in which the court of appeals granted the defendant habeas relief instead of holding that no prejudice could be established.

The 4-3 circuit conflict on when evidence is cumulative for purposes of a prejudice analysis is entrenched and consequential, and it warrants this Court's review. The resolution of an issue of federal law should never depend on an accident of geography—and the need to avoid that kind of geographical disparity is perhaps greatest of all when the issue involves the ultimate sanction of the death penalty.

B. The Decision Below Is Wrong.

The Sixth Circuit's draconian approach to the question of when evidence is cumulative for purposes of the *Strickland* prejudice inquiry is incorrect.

1. To show *Strickland* prejudice, Pike needed only to show "a reasonable probability that at least one juror would" have spared her life had counsel performed competently. *Wiggins* v. *Smith*, 539 U.S. 510, 537 (2003); see Tenn. Code § 39-13-204(f)(2). This Court has explained that determining whether such a "reasonable probability" exists entails a "probing and fact-specific analysis" of all mitigating evidence. *Sears* v. *Upton*, 561 U.S. 945, 955-956 (2010) (per curiam).

The Court has consistently rejected attempts to "truncate[]" that prejudice injury through simplistic rules of thumb. 561 U.S. at 955. For instance, in *Sears*, this Court rejected a state court's rule that a petitioner cannot show prejudice unless counsel presented "little or no mitigation evidence" at trial. *Id.* at 954-955. The Court explained that "[w]e certainly have never held that counsel's effort to present *some* mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant." *Id.* at 955; see, *e.g.*, *Williams* v. *Taylor*, 529 U.S. 362, 398 (2000) (petitioner can show prejudice even if omitted mitigation evidence "does not undermine or rebut the prosecution's death-eligibility case").

The detail and quality of the forsaken mitigation evidence can make all the difference in such a prejudice analysis. A conclusory assertion that a defendant "has had a difficult life" or "has other handicaps that weren't apparent" has little or no prospect of persuading a juror to spare a petitioner's life. See *Porter* v.

McCollum, 558 U.S. 30, 32 (2009); *Wiggins*, 539 U.S. at 536. But "extensive" and "graphic[]" evidence about a petitioner's mental defects or background "adds up to a mitigation case that bears no relation to [a] few naked pleas for mercy." *Rompilla* v. *Beard*, 545 U.S. 374, 393 (2005); *Williams*, 529 U.S. at 395 (recognizing prejudice where counsel failed to uncover "extensive records graphically describing * * * nightmarish childhood"); *Wiggins*, 539 U.S. at 518 (observing that evidence within counsel's possession "was neither as detailed nor as graphic" as evidence that counsel failed to uncover). That conclusion accords with prevailing professional standards. See, *e.g.*, *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* 11.8.6(D) (1989); see also *Wiggins*, 539 U.S. at 522, 524.

The Sixth Circuit's rigid rule requiring a petitioner to show that omitted mitigation evidence "differ[ed] in a substantial way—in strength and subject matter—from the evidence actually presented at sentencing," Pet. App. 16a (citation omitted), departs from those principles.[5] The point of the prejudice inquiry is to assess whether a jury reasonably could have reached a different conclusion in light of different evidence. If that different evidence covers the same subject matter as the evidence actually presented, but is meaningfully stronger in some way—more detailed, or more evocative, for instance—there is no reason to conclude that a jury could not have reacted differently to it.

2. The deficiencies in the Sixth Circuit's rule are illustrated by the anomalous results that rule produced

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[5] The Sixth Circuit first articulated the rule in *Hill* v. *Mitchell*, 400 F.3d 308 (6th Cir. 2005), by overgeneralizing from a string cite of cases resolving *Strickland* claims while overlooking others that did not fit neatly within its paradigm. *Id.* at 318-319.

in this case. Because counsel presented some general, ad hoc testimony at the penalty phase of trial about the "subject matter" of Pike's difficult childhood, the Sixth Circuit discounted much more compelling evidence about (*inter alia*) two contemporaneously reported rapes, beatings and abuse by Pike's father and her mother's husbands and boyfriends, brain damage and mental illness, and vulnerability to manipulation by violent men. That evidence would have been far more likely to sway a juror than the abbreviated, generalized, and at times inaccurate presentation that the jury actually heard.

For instance, the Sixth Circuit's mistaken approach to the prejudice inquiry led that court to deem powerful omitted evidence about PTSD, bipolar disorder, and especially organic brain damage to be "cumulative" as compared to limited guilt-phase testimony about borderline personality disorder. As other circuits have concluded, however, evidence of organic brain damage from birth is "substantively different from * * * other mental illnesses and behavioral issues because [it] could have established both cause and effect for [a defendant's] criminal acts[,] whereas * * * other mitigation evidence went more to effects on behavior." *Williams* v. *Stirling*, 914 F.3d 302, 315 (4th Cir. 2019). And, unlike a personality-disorder diagnosis, which the prosecution attacked as unverifiable, Dkt. No. 8-8, at 2775 ("[Y]ou can't take a[n] instrument and look at Ms. Pike and see that disorder."), organic brain damage is diagnosed through neuroimaging. The fact that both categories of evidence covered the same "subject matter" at a high level of generality therefore says nothing about whether there is a reasonable probability that a juror hearing the more compelling evidence might have reached a different result.

3. Deference under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) cannot salvage the Sixth Circuit's decision. Under AEDPA, as relevant here, "[a]n application for a writ of habeas corpus" filed by a state prisoner "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 * * * resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court. 28 U.S.C. 2254(d).

Here, however, the court of appeals did not examine the relevant state court's reasoning. Rather, the Sixth Circuit simply noted the Tennessee Court of Criminal Appeals' bottom-line "conclusion" that Pike suffered no prejudice, and then replaced the state court's equally—but differently—flawed analysis with the Sixth Circuit's own special rule on cumulativeness, which the Tennessee courts never mentioned or applied. See Pet. App. 17a, 20a-21a.

As this Court has "affirmed * * * time and again," AEDPA deference attends "the specific reasons given by the state court." *Wilson* v. *Sellers*, 138 S. Ct. 1188, 1192 (2018); see *Panetti* v. *Quarterman*, 551 U.S. 930, 954 (2007) (if state court's reasons do not withstand scrutiny, federal court addresses the claim de novo). Because the Tennessee state court did not employ or endorse the Sixth Circuit's rigid test, Section 2254(d) does not apply to the Sixth Circuit's flawed analysis.[6]

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[6] Moreover, without the Sixth Circuit's flawed test as a barrier, Pike could satisfy the requirements of Section 2254(d). The Tennessee Court of Criminal Appeals "mischaracterized at best the appropriate rule" under *Strickland*, "ignored or overlooked" important mitigating evidence, and provided contradictory reasons

II. This Court's Review Is Warranted To Determine Whether The Death Penalty May Be Imposed On A Defendant Who Committed The Offense At Age 18

The Sixth Circuit's decision also warrants this Court's review for the reason set forth in Judge Stranch's concurrence: to determine whether imposition of the death penalty on a defendant who committed an offense at age 18 violates the Eighth and Fourteenth Amendments.[7] Pet. App. 26a (Stranch, J., concurring).

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for rejecting Pike's ineffective-assistance claim. *Williams*, 529 U.S. at 373 n.5, 397. Under those circumstances, Section 2254(d) poses no barrier to federal habeas relief. See *ibid.*; see also *Wiggins*, 539 U.S. at 526.

[7] While Judge Stranch felt constrained by Section 2254(d) to tolerate that "likely" constitutional violation, Pet. App. 26a-27a (Stranch, J., concurring), this Court would face no such constraint. Any constitutional ruling by this Court forbidding the imposition of the death penalty on 18-year-old offenders would qualify as a "substantive" rule that would be retroactive under *Teague* v. *Lane*, 489 U.S. 288 (1989). After reserving the question whether Section 2254(d) abrogates *Teague*'s exception for substantive rules, see *Greene* v. *Fisher*, 565 U.S. 34, 39 n.* (2011), this Court ruled in *Montgomery* v. *Louisiana*, 136 S. Ct. 718 (2016), that a state court must "give retroactive effect to a substantive constitutional right" because "state collateral review courts have no greater power than federal habeas courts to mandate that a prisoner continue to suffer punishment barred by the Constitution." *Id.* at 731-732. As the *Montgomery* dissent noted, that logic equally dictates that substantive rules should apply retroactively to habeas petitions subject to Section 2254(d). *Id.* at 741 (Scalia, J., dissenting).

Moreover, while the court of appeals did not grant a certificate of appealability on the Eighth Amendment issue, Judge Stranch addressed that issue, and in any event this Court has jurisdiction over the denial of the certificate. See *Ayestas* v. *Davis*, 138 S. Ct. 1080, 1089 n.1 (2018).

In *Roper* v. *Simmons*, 543 U.S. 551 (2005), this Court recognized that executing juvenile offenders—*i.e.*, those who had not reached age 18 when they committed their offenses—contravenes the Eighth and Fourteenth Amendments. See *id.* at 555-556, 578. Examining precedent and recent scientific advances, *Roper* identified three distinguishing features of youth: "[a] lack of maturity and an underdeveloped sense of responsibility," resulting in "impetuous and ill-considered actions and decisions"; vulnerability "to influence and to psychological damage"; and a mutable character. *Id.* at 569-570 (citations omitted). Those characteristics undercut the twin justifications for the death penalty: retribution and deterrence. Specifically, the Court explained, the death penalty does not exact a proportional retribution if an offender's "culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Id.* at 571. In addition, "[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." *Id.* at 572 (quoting *Thompson* v. *Oklahoma*, 487 U.S. 815, 837 (1988) (plurality opinion)).

In foreclosing the death penalty for juveniles, *Roper* did not by implication endorse its use for all offenders who have reached age 18. See, *e.g.*, *Cruz* v. *United States*, 2018 WL 1541898, at *15 (D. Conn. Mar. 29, 2018). And *Roper*'s logic extends to 18-year-olds, since "[r]ecent research in neuroscience and developmental psychology indicates that individuals between the ages of 18 and 21 share many of the[] same characteristics" identified in *Roper*. Pet. App. 25a (Stranch, J., concurring). Neuroimaging has revealed that the reward pathways of the brain develop early in adolescence,

while the prefrontal cortex, which plays a central role in higher cognitive abilities (such as cognitive control and behavioral regulation), gradually matures until the early twenties. See, *e.g.*, B.J. Casey et al., *The Adolescent Brain*, 28 Dev. Rev. 62, 64-65, 70 (2008); Elizabeth P. Shulman et al., *The Dual Systems Model: Review, Reappraisal, and Reaffirmation*, 17 Developmental Cognitive Neuroscience 103, 103, 111, 114 (2016) (collecting studies); Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101:21 Proceedings of the National Academy Of Science 8174, 8177 (2004). Consistent with that neuroimaging, 18- to 20-year-olds "show[] diminished cognitive control under both brief and prolonged negative emotional arousal relative to slightly older adults." Alexandra O. Cohen et al., *When Is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts*, 27 Psychol. Sci. 549, 559 (2016).

Those differences manifest in how society treats 18- to 20-year-olds—both generally and as criminal offenders. States and the federal government "recognize 21 as the age of majority in a number of contexts," including with respect to purchase of alcohol, purchase of firearms, and secure immigration status. Pet. App. 26a (Stranch, J., concurring). Indeed, "the age of majority at common law was 21, and it was not until the 1970s that States enacted legislation to lower the age of majority to 18." *Ibid.* (quoting *NRA* v. *ATF*, 700 F.3d 185, 201 (5th Cir. 2012)) (internal quotation marks omitted). Society increasingly eschews the death penalty for offenders in that age category as well. Since *Roper*, the number of 18- to 20-year-olds receiving death sentences per 100 homicides with known offenders has declined from approximately 0.8 to less than

0.2. See John H. Blume & Hannah Freedman et al., *Death by Numbers: Why Evolving Standards Compel Extending* Roper*'s Categorical Ban Against Executing Juveniles From 18 to 21*, at 21 (June 2, 2019) (forthcoming *Texas Law Review*), https://tinyurl.com/vo6y5hq; see also *Roper*, 543 U.S. at 567 (relying on "infrequency of * * * use" of death penalty against certain offenders). And the number of States sentencing at least one 18- to 20-year-old to death each year dropped from 12 in 2005 to 5 or below by 2013. Blume, *supra*, at 22.

There is thus no basis for distinguishing, as a constitutional matter, between a 17-year-old offender and an 18-year-old offender. Pet. App. 22a (Stranch, J., concurring). And the issue is an important one, not only for petitioner here but for all of the other defendants in the same situation. This Court should take up this case to make clear that 18-year-old offenders, like 17-year-old offenders, are not eligible for the death penalty.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 21, 2020

* Admitted in the District of Columbia and admission pending in California.

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16-5854

CHRISTA GAIL PIKE,
Petitioner-Appellant,

v.

GLORIA GROSS, WARDEN,
Respondent-Appellee.

Appeal from the United States District Court for the Eastern District of Tennessee at Chattanooga.
No. 1:12-cv-00035—Harry S. Mattice, Jr., District Judge.

Decided and Filed: August 22, 2019

Rehearing En Banc Denied September 26, 2019

Before: COOK, GRIFFIN, and STRANCH, Circuit Judges.

GRIFFIN, J., delivered the opinion of the court in which COOK and STRANCH, JJ., joined. STRANCH, J. (pp. 383–86), delivered a separate concurring opinion.

OPINION

GRIFFIN, Circuit Judge.

Petitioner Christa Gail Pike, a Tennessee death-row inmate, appeals the district court's denial of her petition for habeas corpus under 28 U.S.C. § 2254. Because we conclude that the state court's determination that she is unable to establish prejudice on her claims of ineffective assistance of counsel during the penalty phase of her capital trial

was not an unreasonable application of clearly established federal law, we affirm.

I.

A.

This case began with the horrific and brutal 1995 murder of Colleen Slemmer. Pike and Slemmer were both students at the Job Corps Center in Knoxville, Tennessee at the time. *State v. Pike*, 978 S.W.2d 904, 907–08 (Tenn. 1998). They had a strained relationship; Pike claimed that Slemmer "had been 'trying to get [her] boyfriend' and ... 'running her mouth' everywhere." *Id.* at 909. These bad feelings unfortunately resulted in the following events, as the Tennessee Supreme Court explained in a detailed opinion:

> [O]n January 11, 1995, [Pike], a student at the Job Corps Center in Knoxville, told her friend Kim Iloilo, who was also a student at the facility, that she intended to kill another student, Colleen Slemmer, because she "had just felt mean that day." The next day, January 12, 1995, at approximately 8:00 p.m., Iloilo observed Pike, along with Slemmer, and two other Job Corps students, Shadolla Peterson and Tadaryl Shipp, Pike's boyfriend, walking away from the Job Corps center toward 17th Street. At approximately 10:15 p.m., Iloilo observed Pike, Peterson, and Shipp return to the Center. Slemmer was not with them.
>
> Later that night, Pike went to Iloilo's room and told Iloilo that she had just

killed Slemmer and that she had brought back a piece of the victim's skull as a souvenir. Pike showed Iloilo the piece of skull and told her that she had cut the victim's throat six times, beaten her, and thrown asphalt at the victim's head. Pike told Iloilo that the victim had begged "them" to stop cutting and beating her, but Pike did not stop because the victim continued to talk. Pike told Iloilo that she had thrown a large piece of asphalt at the victim's head, and when it broke into smaller pieces, she had thrown those at the victim as well. Pike told Iloilo that a meat cleaver had been used to cut the victim's back and a box cutter had been used to cut her throat. Finally, Pike said that a pentagram had been carved onto the victim's forehead and chest. Iloilo said that Pike was dancing in a circle, smiling, and singing "la, la, la" while she related these details about the murder. When Iloilo saw Pike at breakfast the next morning she asked Pike what she had done with the piece of the victim's skull. Pike replied that it was in her pocket and then said, "And, yes, I'm eating breakfast with it."

During a class later that morning, Pike made a similar statement to Stephanie Wilson, another Job Corps student. Pike pointed to brown spots on her shoes and said, "that ain't mud on my shoes, that's blood." Pike then pulled a napkin from

> her pocket and showed Wilson a piece of bone which Pike said was a piece of Slemmer's skull. Pike also told Wilson that she had slashed Slemmer's throat six times and had beaten Slemmer in the head with a rock. Pike told Wilson that the victim's blood and brains had been pouring out and that she had picked up the piece of skull when she left the scene.

Id. at 907–08.

None of Pike's friends or colleagues reported the crime to the police, but a University of Tennessee Grounds Department employee nonetheless found Slemmer's body on January 13. *Id*. at 908. That employee later "testified that the body was so badly beaten that he had first mistaken it for the corpse of an animal," before realizing it was a human female when he saw the victim's clothes and her exposed breast. *Id*. The investigating police quickly discovered Pike's connection to the crime and interviewed her on January 14. *Id*. at 909. Pike waived her *Miranda* rights and gave a complete statement to the police about her involvement in the murder. As recounted by the Tennessee Supreme Court:

> Pike claimed that she had not planned to kill Slemmer, but she had instead planned only to fight Slemmer and let her know "to leave me the hell alone." However, Pike admitted that she had taken a box cutter and a miniature meat cleaver with her when she and the victim left the Job Corps Center. Pike said she had borrowed the miniature

meat cleaver, but refused to identify the person who had loaned it to her.

According to Pike, she asked Slemmer to accompany her to the Blockbuster Music Store, and as they were walking, Pike told Slemmer that she had a bag of "weed" hidden in Tyson Park. Though Pike refused to name the other parties involved in the incident, she said the group began walking toward the [University of Tennessee] campus. Upon arriving at the steam plant on [the University of Tennessee]'s agricultural campus, Pike and Slemmer exchanged words. Pike then began hitting Slemmer and banging Slemmer's head on her knee. Pike threw Slemmer to the ground and kicked her repeatedly. According to Pike, as she slammed Slemmer's head against the concrete, Slemmer repeatedly asked, "Why are you doing this to me?" When Slemmer threatened to report Pike so she would be terminated from the Job Corps program, Pike again repeatedly kicked Slemmer in the face and side. Slemmer lay on the ground and cried for a time and then tried to run away, but another person with Pike caught Slemmer and pushed her to the ground.

Pike and the other person, who Pike referred to as "he," held Slemmer down until she stopped struggling, then dragged her to another area where Pike cut Slemmer's stomach with the box

cutter. As Slemmer "screamed and screamed," Pike recounted how she began to hear voices telling her that she had to do something to prevent Slemmer from telling on her and sending her to prison for attempted murder.

At this point Pike said she was just looking at Slemmer and "just watching her bleed." When Slemmer rolled over, stood up and tried to run away again, Pike cut Slemmer's back, "the big long cut on her back." Pike said Slemmer repeatedly tried to get up and run. Pike recounted how Slemmer bargained for her life, begging Pike to talk to her and telling Pike that if she would just let her go, she would walk back to her home in Florida without returning to the Job Corps facility for her belongings. Pike told Slemmer to "shut up" because it "was harder to hurt somebody when they're talking to you." Pike said the more Slemmer talked, the more she kicked Slemmer in the face.

Slemmer asked Pike what she was going to do to her, at which point Pike thought she heard a noise. Pike left the scene to check out the surrounding area to make sure no one was around. When she returned, Pike began cutting Slemmer across the throat. When Slemmer continued to talk and beg for her life, Pike cut Slemmer's throat several other times. Pike said that

Slemmer continued to talk and tried to sit up even though her throat had been cut several times, and that Pike and the other person would push her back on the ground.

Slemmer attempted to run away again, and Pike threw a rock which hit Slemmer in the back of the head. Pike stated that "the other person" also hit Slemmer in the head with a rock. When Slemmer fell to the ground, Pike continued to hit her. Eventually Pike said she could hear Slemmer "breathing blood in and out," and she could see Slemmer "jerking," but Pike "kept hitting her and hitting her and hitting her." Pike eventually asked Slemmer, "Colleen, do you know who's doing this to you?" Slemmer's only response was groaning noises. At this point, Pike said she and the other person each grabbed one of Slemmer's feet and dragged her to an area near some trees, leaving her body on a pile of dirt and debris. They left Slemmer's clothing in the surrounding bushes. Pike said the episode lasted "for about thirty minutes to an hour." Pike admitted that she and the other person had forced the victim to remove her blouse and bra during the incident to keep Slemmer from running away. Pike also admitted that she had removed a rag from her hair and tied it around Slemmer's mouth at one point to prevent Slemmer from talking. Pike

> denied carving a pentagram in the victim's chest, but said that the other person had cut the victim on her chest.

Id. at 909–10.

B.

The state of Tennessee prosecuted Pike for Slemmer's murder. At trial, much of Pike's unsuccessful defense centered on her mental health. Dr. Eric Engum testified that he had examined Pike and, although she suffered from no symptoms of brain damage or insanity, she did suffer from "very severe borderline personality disorder" and exhibited signs of cannabis dependence and a depressive disorder. On this basis, Dr. Engum testified that, while there was no question Pike killed Slemmer, it was his opinion that she did not act with deliberation or premeditation and simply lost control, consistent with Pike's diagnosis of borderline personality disorder. Additionally, Dr. William Bernet, a forensic psychiatrist with a specialty in satanic rituals, testified that he reviewed Pike's statements and the medical/psychological reports prepared by the other professionals involved in the case, and concluded that though the crime had "satanic elements," it appeared more indicative of "an adolescent dabbling in Satanism." He also discussed the phenomenon of collective aggression, in which a group of people become emotionally aroused and "the end result is that they engage in some kind of violent, extremely violent activity." It was his opinion that Slemmer's murder was consistent with that phenomenon.

The jury convicted Pike of premeditated first-degree murder and conspiracy to commit first-degree murder under Tennessee law. The Tennessee trial

judge sentenced Pike to twenty-five years' imprisonment on the conspiracy conviction and held a sentencing hearing to allow the jury to determine whether to sentence Pike to death for the murder conviction. Pike's attorney, William Talman, originally intended to rely solely on the testimony of Dr. Diana McCoy, a mitigation expert hired by the defense. But shortly before the sentencing hearing, Talman switched his plan and called only Pike's aunt, father, and mother. All three testified about Pike's difficult childhood, and her exhibition of behavioral problems throughout her adolescence. Ultimately, the jury sentenced Pike to death by electrocution, finding that "[t]he murder was especially heinous, atrocious or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death," and "[t]he murder was committed for the purpose of avoiding, interfering with or preventing a lawful arrest or prosecution of the defendant or another." *See* Tenn. Code Ann. § 39–13–204(i)(5), (6) (listing aggravating circumstances a jury must find to sentence a person to death).

Pike appealed her convictions and sentences, but both the Tennessee Court of Criminal Appeals, *State v. Pike*, No. 03C01-CR-00408, 1997 WL 732511, at *1 (Tenn. Crim. App. 1997), and the Tennessee Supreme Court, *Pike*, 978 S.W.2d at 907, affirmed. Pike then filed a petition for postconviction relief in the state trial court. The postconviction court denied relief, concluding as relevant to this appeal that Pike's trial counsel was not ineffective for failing to present alternative expert testimony or additional lay testimony on compelling mitigation in her life history. The Tennessee Court of Criminal Appeals affirmed the denial of Pike's postconviction petition.

State, No. E2009-00016-CCA-R3-PD, 2011 WL 1544207, at *1 (Tenn. Crim. App. 2011). The Tennessee Supreme Court denied her application for permission to appeal, *id.*, and the United States Supreme Court denied certiorari, *Pike v. Tennessee*, 568 U.S. 827, 133 S.Ct. 103, 184 L.Ed.2d 47 (2012).

C.

This habeas petition followed. Pike argues that her trial counsel was ineffective during the penalty phase of trial for failing to present mitigating evidence he discovered during the investigation and for failing to discover other relevant and compelling mitigating evidence, among other reasons. The parties filed cross-motions for summary judgment, and the district court held a two-day evidentiary hearing on Pike's petition and the parties' motions. The district court granted respondent's motion for summary judgment and dismissed Pike's habeas petition. We granted her a limited certificate of appealability, restricted to whether she received ineffective assistance of counsel during the penalty phase of her trial.

II.

"In an appeal from the denial of habeas relief, we review the district court's legal conclusions de novo and its factual findings for clear error." *Scott v. Houk*, 760 F.3d 497, 503 (6th Cir. 2014). Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), we may only overturn a state conviction for an issue adjudicated on the merits if it (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "was based on an unreasonable

determination of the facts in light of the evidence presented" to the state court. 28 U.S.C. § 2254(d). A claim for habeas relief based on the "unreasonable application" prong must show more than that the state court's ruling was merely incorrect—"an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Harrington v. Richter*, 562 U.S. 86, 101, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (quoting *Williams v. Taylor*, 529 U.S. 362, 410, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). Indeed, "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Id.* (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004)). "This is a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011) (internal quotation marks and citations omitted).

III.

As in all cases alleging ineffective assistance of counsel, we turn to *Strickland v. Washington*'s two-part framework: a criminal defendant claiming ineffective assistance must prove that (1) counsel's performance was objectively unreasonable, and (2) the deficient performance actually prejudiced the defense. 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Because a party alleging that claim has the burden of proof on both prongs and her failure on either thwarts relief, we can address an ineffective-assistance claim in any order we choose.

See Smith v. Spisak, 558 U.S. 139, 151, 130 S.Ct. 676, 175 L.Ed.2d 595 (2010) (assuming deficient performance but denying relief for lack of prejudice).

In this case, "[w]e choose to focus on the prejudice prong of the *Strickland* test because it is easier to resolve, and there can be no finding of ineffective assistance of counsel without prejudice." *Phillips v. Bradshaw*, 607 F.3d 199, 216 (6th Cir. 2010) (citation omitted). Under *Strickland*'s prejudice prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694, 104 S.Ct. 2052. Put differently, Pike bears the burden of showing that a reasonable probability exists that, but for counsel's deficient performance, the jury would have selected a different sentence. *Wong v. Belmontes*, 558 U.S. 15, 19–20, 130 S.Ct. 383, 175 L.Ed.2d 328 (2009) (per curiam).

Counsel's failure to either present mitigating evidence at sentencing, *Williams*, 529 U.S. at 394–96, 120 S.Ct. 1495, or discover all reasonably available mitigating evidence, *Wiggins v. Smith*, 539 U.S. 510, 521–24, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), can support a finding of ineffective assistance. But "the failure to present additional mitigating evidence that is 'merely cumulative' of that already presented does not rise to the level of a constitutional violation." *Broom v. Mitchell*, 441 F.3d 392, 410 (6th Cir. 2006). "[T]he new evidence that a habeas petitioner presents must differ in a substantial way—in strength and subject matter—from the evidence actually presented at sentencing." *Clark v. Mitchell*, 425 F.3d 270, 286 (6th Cir. 2005) (quoting *Hill v. Mitchell*, 400 F.3d 308, 319 (6th Cir. 2005)); *see also Sears v. Upton*, 561 U.S.

945, 954, 130 S.Ct. 3259, 177 L.Ed.2d 1025 (2010) (per curiam) ("[T]here is no prejudice when the new mitigating evidence 'would barely have altered the sentencing profile presented' to the decisionmaker ....").

Pike's claim really presents two separate issues. First, she argues that her trial counsel was ineffective for failing to present the testimony of her mitigation expert, Dr. McCoy, at her sentencing hearing. Second, she contends that counsel was ineffective for failing to discover other compelling mitigation evidence, such as Pike's organic brain damage, bipolar disorder, post-traumatic stress disorder, and lay witnesses who could have provided a more-complete picture of Pike's humanity.

A.

Turning first to Dr. McCoy, it is unclear what substantially different mitigating evidence she would have offered by way of her testimony and the "social history" that she prepared of Pike. Dr. McCoy's social history provided an extensive examination of Pike's entire life and explained many of the life events and childhood difficulties that led her to the murder. For example, Dr. McCoy's report notes that "[i]t ha[d] been suggested that [the boyfriend of Pike's grandmother] may have sexually abused [Pike]" as a child, though other members of Pike's family, including her father, questioned the truthfulness of that accusation. The social history also noted that Pike's mother had a number of boyfriends and relationships in Pike's youth, with many of the men treating Pike in an abusive or sexually inappropriate manner. But, again, Pike's accusations were met with doubt and outright opposition by members of her

family. The social history also noted that Pike believed her paternal grandmother was the only person that ever loved her, was inconsolable for days after her grandmother's death, and actually attempted suicide for the first time after her grandmother passed away. In sum, the social history laid out an upbringing of substantial difficulty and strife.

While that "social history" document was certainly thorough, and we will assume for the sake of argument that Dr. McCoy would have been able to testify consistently with the evidence she accumulated and compiled therein, the jury already got much of the social history's general content during the penalty phase of the trial. Pike's mother, Carissa Hansen, testified that Pike spent much of her childhood with her paternal grandmother because neither Hansen nor her husband were ever really home. Hansen testified that she was a drug abuser and heavy drinker during Pike's childhood, which also contributed to Pike spending time with her grandmother. Hansen also testified that Pike first attempted suicide after her grandmother's death in 1988, but that Hansen had not gotten her much psychiatric or psychological help in the aftermath. At least once Hansen chose one of her husbands over Pike, sending Pike away when there was conflict between them. She also admitted to smoking marijuana both in front of and, on at least one occasion, with Pike during her teenage years. On cross-examination, Hansen testified that when Pike was twelve years old she threatened one of Hansen's boyfriends with a butcher knife and that Pike had been a troubled child for years. But Hansen did state that Pike's "troubles" were Hansen's fault, and she

blamed herself for Pike's behavior.

Pike's father, Glenn Pike, also testified on her behalf. Glenn admitted rejecting Pike during her childhood and telling her that she could no longer come to his home where he lived with a new wife and family. He testified that he had picked his new wife and children over Pike and sent her away when there was conflict between them. He testified that, another time, he kicked Pike out of his home for doing poorly in school. And yet another time Glenn "rejected" Pike and even signed adoption papers to allow her to be adopted, though this was shortly before her eighteenth birthday and an adoption never came to fruition.

Pike's aunt, Carrie Ross, also testified. Ross noted that Pike's care and upbringing fell mostly on the shoulders of her paternal grandmother and that the two were inseparable. She noted that Pike's childhood home was constantly filthy to the point that Pike, as a baby, would be "crawling around through piles of dog stool all over the house." Ross also testified that Pike "was not brought up by" her mother because her mother was never at home, instead always working or choosing to be "out partying." Ross noted that, on one occasion, Ross and Hansen were out at a bar when Hansen received a phone call that Pike, then a toddler, was experiencing severe seizures that eventually required hospitalization. While Ross thought they should return home to care for Pike, Hansen was unconcerned and wanted to remain at the bar. This was merely indicative of the constant relationship between Hansen and Pike—whenever Hansen had to act in either her own interest or Pike's, Hansen always put herself first. Ross also discussed the frequency with which Pike's extended

family all faced issues with substance abuse, as well as numerous family members who were either physically or verbally abusive to their children and grandchildren, including Pike.

All in all, the jury heard a clear story: Pike's childhood and upbringing were very difficult and, in some ways, explained how she became a person capable of such a brutal murder.

Pike now claims the jury should have received the more in-depth testimony on these points that Dr. McCoy could have provided, but she fails to adequately explain how Dr. McCoy's testimony would "differ in a substantial way—in strength and subject matter—from the evidence actually presented at sentencing." *Clark*, 425 F.3d at 286. Although she argues on appeal that the jury never heard that Pike's parents' inconsistency and lack of attention to her well-being caused her "out of control" behavior, that point was made multiple times at the penalty-phase hearing, with her mother even explicitly blaming herself for Pike's behavior. Thus, the evidence counsel presented to the jury encompassed the types of mitigating evidence the Supreme Court has found valuable in other cases. *See Sears*, 561 U.S. at 948, 130 S.Ct. 3259 (finding relevant mitigating evidence in verbal and physical parental abuse, inappropriate parental discipline, and behavioral disorders); *Wiggins*, 539 U.S. at 534–35, 123 S.Ct. 2527 (finding "powerful" mitigating evidence in the defendant's early childhood privation and abuse, an alcoholic and absentee mother, and the physical abuse the defendant experienced). And, because the jury heard largely the same narrative as Pike now presents, the Tennessee Court of Criminal Appeals' conclusion that Pike failed to establish prejudice from

Talman's decision not to call Dr. McCoy at the penalty-phase hearing, *Pike*, 2011 WL 1544207, at *51–52, was not an unreasonable application of federal law under AEDPA. 28 U.S.C. § 2254(d).

B.

Pike next challenges Talman's failure to investigate and discover other mitigating evidence. The first evidence Pike claims Talman failed to discover was her diagnoses of bipolar disorder, organic brain damage, and post-traumatic stress disorder (PTSD). She bases this argument on her post-sentencing examination by Dr. Jonathan Pincus, who determined that she actually suffered from organic brain damage, bipolar disorder and PTSD, rather than the borderline personality disorder Dr. Engum diagnosed. Her argument fails for multiple reasons.

First, "[a]bsent a showing that trial counsel reasonably believed that [the expert] was somehow incompetent or that additional testing should have occurred, simply introducing the contrary opinion of another mental health expert during habeas review is not sufficient to demonstrate the ineffectiveness of trial counsel." *Hill v. Mitchell*, 842 F.3d 910, 944 (6th Cir. 2016) (alterations in original) (quoting *McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741, 758 (6th Cir. 2013)). Here, Dr. Engum testified that his expert opinion, after numerous meetings with Pike and "fairly lengthy testing," was that she suffered from "very severe borderline personality disorder." And he specifically testified that he tested Pike for brain damage and his testing "unequivocally showed that she did not suffer any signs of brain damage." Dr. McCoy also testified at a postconviction hearing

that she concurred in Dr. Engum's medical assessment throughout her mitigation work on Pike's case. So Talman had two separate experts tell him that the correct diagnosis was borderline personality disorder. Even assuming, for the sake of argument, that Dr. Pincus's diagnoses of organic brain damage, bipolar disorder, and PTSD are *contrary* to Dr. Engum's diagnosis of borderline personality disorder, nothing in the record shows that Talman should have reasonably believed that additional testing was necessary. *See id.*

Furthermore, it is difficult to see how this alleged failure prejudiced Pike, when the jury considered Dr. Engum's testimony that Pike suffered from borderline personality disorder. Pike does not specifically argue that the particular medical differences between borderline personality disorder, bipolar disorder, PTSD, and organic brain damage would have influenced the jury in its decision to sentence her to death. Instead, Pike argues that the presentation of evidence of bipolar disorder and organic brain damage would have been relevant to prove to the jury that Pike's moral reasoning and impulse control were impaired—two deficits typically caused by both organic brain damage and bipolar disorder. But the jury heard Dr. Engum testify that Pike "did not act with deliberation, with premeditation, but instead, acted in a manner consistent with her diagnosis, borderline personality disorder, which meant that *she basically went out of control. She basically lost any sense of what she was doing*." (Emphasis added). In other words, the jury was already well aware of a medical expert's opinion that her moral reasoning and impulse control were not present during the murder of Colleen Slemmer.

We doubt that the substitution of bipolar disorder, PTSD, and organic brain damage for borderline personality disorder would have affected the jury's deliberations on this point. *See Clark*, 425 F.3d at 286; *Sears*, 561 U.S. at 954, 130 S.Ct. 3259.

Pike also argues that her trial counsel was ineffective for failing to present various other lay witnesses who could have testified about their relationships with Pike, what they thought of her, and how she had described her tumultuous childhood in conversations. For example, she argues that counsel should have presented the testimony of Marshall Muse, Pike's teacher, who would have testified that he saw "flashes [of] something special" in her. Or counsel should have called an acquaintance named Onas Perry, who could have testified about her late-night talks with Pike and how Pike had described a difficult childhood and home life. But, as noted above, Pike has not persuaded us that this other testimony would have been significantly different in strength or subject matter from the testimony of Pike's mother, father, and aunt. *Clark*, 425 F.3d at 286. In sum, none of the evidence Pike now points to substantially differs from the mitigation case that was presented to the jury.

C.

Finally, our conclusion is bolstered by the aggravating evidence before the jury. *See Bobby v. Van Hook*, 558 U.S. 4, 12–13, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009) (per curiam) (noting that the strength of the aggravating evidence against the defendant significantly diminished any effect additional mitigating evidence might have had). The jury heard evidence that Pike and her accomplices

lured the victim into a lethal trap before torturing and taunting the victim until they killed her. Pike left Slemmer's body so badly beaten that the person who discovered it thought it was the corpse of an animal before realizing it was a human body. *Pike*, 978 S.W.2d at 908. The jury also heard Pike's confession in which she admitted to slashing Slemmer's throat multiple times, throwing asphalt at her head, and even keeping a piece of her skull as a souvenir. *Id*. Tennessee law allows a jury to impose a death sentence when a "murder [i]s especially heinous, atrocious or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death," *see* Tenn. Code Ann. § 39–13–204(i)(5). This crime fits that description.[1]

It is true that "[t]he prejudice prong is satisfied if 'there is a reasonable probability that at least one juror would have struck a different balance.'" *Dickerson v. Bagley*, 453 F.3d 690, 699 (6th Cir. 2006) (quoting *Wiggins*, 539 U.S. at 537, 123 S.Ct. 2527), *abrogated in part on other grounds by Bobby*, 558 U.S. at 8–9, 130 S.Ct. 13. But a fairminded jurist could conclude that there is no such probability here, where Pike's desired evidence was mostly cumulative and insufficient to overcome the heinous nature of her crime. Even were the jury to hear everything that

[1] The jury also found that death was warranted because "[t]he murder was committed for the purpose of avoiding, interfering with or preventing a lawful arrest or prosecution of the defendant or another." *See* Tenn. Code Ann. § 39–13–204(i)(6). Presumably, the jury came to this conclusion based upon Pike's confession that she heard "voices telling her that she had to do something to prevent Slemmer from telling on her and sending her to prison for attempted murder." *Pike*, 978 S.W.2d at 909. Pike did not refute this evidence, and this serves as another basis for the death sentence.

Pike now wishes had been presented, a fairminded jurist could conclude that the sheer weight and degree of aggravation evidence before the jury outweighs the mitigation evidence raised on appeal. *Cf. Porter v. McCollum*, 558 U.S. 30, 41, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) (per curiam). Thus, the state court's conclusion that Pike could not establish *Strickland* prejudice, *Pike*, 2011 WL 1544207, at *51–52, was not an unreasonable application of federal law. *See Harrington*, 562 U.S. at 101–03, 131 S.Ct. 770. In short, because Pike fails to meet AEDPA's stringent requirements, *see* 28 U.S.C. § 2254(d), she is ineligible for habeas relief.

IV.

Because Petitioner cannot establish that the Tennessee Court of Criminal Appeals' adjudication of her claims of ineffective assistance of counsel was an unreasonable application of clearly established federal law, we affirm the judgment of the district court.

CONCURRENCE

JANE B. STRANCH, Circuit Judge, concurring.

I join the opinion in this case but write separately because it presents an issue with which our society must be concerned—whether 18-year-olds should be sentenced to death. Had she been 17 rather than 18 at the time of her crime, like her codefendant Tadaryl Shipp, Christa Pike would not be eligible for the death penalty.

The difficulty of this case is not just age; the gravest concern arises from the combination of Pike's youth and the nature of her crime. Capital cases involve heinous and inexplicable crimes, and Pike's case presents no exception. But in sentencing Pike to death, we rule out the possibility that her crime was a product of the immature mind of youth rather than fixed depravity. And we presume that she is incapable of reform even though the stories of other teenage killers, many of whom have been rehabilitated behind bars, reveal other possibilities.[1]

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[1] A few examples of teenagers initially sentenced to life in prison help explain the point.

Andrew Hundley was 15 years old when he killed a 14-year-old girl "whose body was found burned and badly beaten behind a grocery store." Grace Toohey, The Power of Second Chances: How this 37-year-old, Once in Prison, Is Now an LSU Grad, The Advocate, May 10, 2019, https://www.theadvocate.com/baton_rouge/news/crime_police/article_03c590ae-72a9-11e9-8d2b-4b78d19fcd5b.html. Now 37, Hundley helped found the Louisiana Parole Project and completed college coursework while in prison; he finished his bachelor's degree in sociology after being released on parole and plans to pursue a master's degree in criminology. *Id.*

Bosie Smith was 16 when he stabbed another youth to death after an argument. Ted Roelofs, *In Prison for Decades, One*

The judgment that she merits the most severe punishment is in tension with Supreme Court precedent focusing on the lesser blameworthiness and greater prospect for reform that is characteristic of youth.

In a series of cases starting with *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), the Supreme Court made clear that children are different from adults for purposes of the Eighth Amendment. First, in *Roper*, the Court held that the Eighth Amendment's "evolving standards of decency"

Juvenile Lifer's Quest for Redemption, Bridge Magazine, Aug. 26, 2016, https://www.mlive.com/politics/2016/08/in_prison_for_decades_one_juve.html. Once in prison, Smith took advantage of every rehabilitative program available to him, training Greyhounds so that they can be adopted by families and winning the warden's support for his release. *Id.*

When he was 16 years old, Kempis Songster stabbed another teenage runaway to death; after nearly three decades in prison, he "is training to be a yoga instructor, leading workshops in cultural awareness, studying philosophy and history .... He is doing everything, anything, really, to better himself, create a persona separate from his crime and crushing sentence. He wants to make amends." Amy S. Rosenberg, *Teen Killers, Prison Lifers, Given a Ray of Hope*, Philadelphia Inquirer, Feb. 7, 2016, https://www.inquirer.com/news/inq/teen-killers-prison-lifers-given-ray-hope-20160206.html.

Amaury Rosario was 17 when he, along with his codefendants, shot and killed four unarmed people during a robbery gone wrong. *United States v. Rosario*, 99-cr-533, 12-cv-3432, 2018 WL 3785095, at *2 (E.D.N.Y. Aug. 9, 2018). After two decades in prison, guards as well as inmates attested to his character and positive influence; moreover, mental-health experts working for both the defense and the prosecution at his resentencing agreed that "he had been rehabilitated and ... no longer poses a significant risk to the public." *Id.* at *4.

prohibit the imposition of death sentences on those who were under 18 at the time of their crimes. *Id.* at 561, 571, 125 S.Ct. 1183. Next, in *Graham v. Florida*, the Court concluded that juvenile offenders who commit non-homicide offenses could not constitutionally be sentenced to life without parole. 560 U.S. 48, 74–75, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). Then, in *Miller v. Alabama*, the Court determined that even juvenile homicide offenders could be sentenced to life without parole only after an individualized sentencing hearing and a finding that their crime was not the product of "unfortunate yet transient immaturity." 567 U.S. 460, 479–80, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). Finally, in *Montgomery v. Louisiana*, the Court held that *Miller* was retroactively applicable because it announced a new substantive rule—namely, "that sentencing a child to life without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption.'" —— U.S. ——, 136 S. Ct. 718, 734, 193 L.Ed.2d 599 (2016) (quoting *Miller*, 567 U.S. at 479–80, 132 S.Ct. 2455). Taken as a whole, these cases stand for the principle that "[b]ecause juveniles have diminished culpability and greater prospects for reform ..., 'they are less deserving of the most severe punishments.'" *Miller*, 567 U.S. at 471, 132 S.Ct. 2455 (quoting *Graham*, 560 U.S. at 68, 130 S.Ct. 2011).

This line of cases relied on three findings about the "significant gaps between juveniles and adults" that make children "constitutionally different from adults for purposes of sentencing." *Id.* "First, children have a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking. Second, children 'are more

vulnerable ... to negative influences and outside pressures' .... And third, a child's character is not as 'well formed' as an adult's ...." *Id.* (quoting *Roper*, 543 U.S. at 569–70, 125 S.Ct. 1183). These conclusions "rested not only on common sense ... but on science and social science as well." *Id.*; *see also id.* at 472 n.5, 132 S.Ct. 2455 ("The evidence presented to us in [*Miller*] indicates that the science and social science supporting *Roper*'s and *Graham*'s conclusions have become even stronger.").

Recent research in neuroscience and developmental psychology indicates that individuals between the ages of 18 and 21 share many of these same characteristics. Since *Roper* was decided, scientists have established that "biological and psychological development continues into the early twenties." Elizabeth S. Scott et al., *Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy*, 85 Fordham L. Rev. 641, 642 (2016). Brain-imaging studies "have shown continued regional development of the prefrontal cortex, implicated in judgment and self-control[,] beyond the teen years and into the twenties." Alexandra O. Cohen et al., *When Does a Juvenile Become an Adult?*, 88 Temp. L. Rev. 769, 783 & n.63 (2016) (collecting articles). Researchers have found that in "negative emotional situations," such as conditions of threat, young adults between the ages of 18 and 21 perform significantly worse than adults in their mid-20s—and more like those under 18. Alexandra O. Cohen et al., *When Is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Nonemotional Contexts*, 27 Psychol. Sci. 549, 559–60 (2016). "It is also well established that young adults, like teenagers, engage in risky behavior, such as ...

criminal activity, to a greater extent than older adults." Scott et al., *supra*, at 642. In short, empirical research has found that "[a]lthough eighteen to twenty-one-year-olds are in some ways similar to individuals in their midtwenties, in other ways, young adults are more like adolescents in their behavior, psychological functioning, and brain development." *Id.* at 646.

Reflecting a long-held societal understanding of this point, we already recognize 21 as the age of majority in a number of contexts. Individuals are required to be 21 to consume alcohol or marijuana (where legal), purchase tobacco in many jurisdictions, or to rent a car. Similarly, federal law prohibits licensed gun dealers from selling handguns and ammunition to those under 21, *see* 18 U.S.C. § 922(b)(1), (c)(1), while immigration law allows U.S. citizens to request immigrant visas for unmarried children under the age of 21, *see* 8 U.S.C. §§ 1101(b)(1), 1151(b)(2)(A)(i). In fact, 21 has traditionally marked the ascension to full adulthood: "[T]he term 'minor' or 'infant'—as those terms were historically understood—applied to persons under the age of 21 .... The age of majority at common law was 21, and it was not until the 1970s that States enacted legislation to lower the age of majority to 18." *NRA v. ATF*, 700 F.3d 185, 201 (5th Cir. 2012).

For these reasons, I believe that society's evolving standards of decency likely do not permit the execution of individuals who were under 21 at the time of their offense. But, because we review this case under the strictures of AEDPA, we may grant Pike relief only if the state court's adjudication of her case was either (1) contrary to or unreasonably applied Supreme Court precedent, or (2) "resulted in a

decision that was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d). And the Supreme Court has not extended *Roper* to 18-year-olds. I therefore reluctantly concur because I agree that the state court's decision denying Pike's postconviction petition did not unreasonably apply *Strickland*'s prejudice prong.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

No: 1:12-cv-35

CHRISTA GAIL PIKE, Petitioner,

v.

VICKI FREEMAN, WARDEN, Respondent.

Filed March 11, 2016

MEMORANDUM OPINION

HARRY S. MATTICE, JR., UNITED STATES DISTRICT JUDGE

This is a petition for the writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner Christa Gail Pike ("Petitioner") is a Tennessee death row inmate incarcerated in the Tennessee Prison for Women. The matter is now before the Court on Respondent's motion for summary judgment (Doc. 42), and Petitioner's cross motion for partial summary judgment (Doc. 45). Petitioner has filed a response to Respondent's motion and a reply to Respondent's response (Docs. 51, 56), and Respondent has filed a corresponding response and reply (Doc. 50, 55). Petitioner also filed a motion for an evidentiary hearing (Doc. 51), which this Court granted (Doc. 58), and a hearing was held on May 26th, 2015 and May 27th, 2015 (Doc. 81). For the reasons that follow, Petitioner's motion for partial summary judgment (Doc. 45) will be **DENIED**, and Respondent's motion for summary judgment (Doc. 42) will be **GRANTED**. The petition for habeas corpus relief will be **DENIED.**

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Respondent has provided the Court with copies of the relevant documents as to Petitioner's trial, direct appeal, and post-conviction proceedings (Docs. 7–13). Petitioner was convicted by a Knox County, Tennessee jury of conspiracy to commit the murder of Colleen Slemmer, and the first degree murder of Colleen Slemmer. Petitioner was sentenced to death for the murder charge, and a consecutive twenty-five year prison sentence for the conspiracy charge. Petitioner's conviction and sentence were affirmed on direct appeal by the Tennessee Court of Criminal Appeals ("TCCA") and the Tennessee Supreme Court ("TSC"). *State v. Pike*, 978 S.W.2d 904 (Tenn. 1998), *cert denied*, 526 U.S. 1147 (1999). The facts that led to the conviction of Petitioner are set forth in detail in the opinion of the TSC:

> The proof presented by the State at the guilt phase of the trial established that on January 11, 1995, the [Petitioner], Christa Gail Pike, a student at the Job Corps Center in Knoxville, told her friend Kim Iloilo, who was also a student at the facility, that she intended to kill another student, Colleen Slemmer, because she "had just felt mean that day." The next day, January 12, 1995, at approximately 8:00 p.m., Iloilo observed Pike, along with Slemmer, and two other Job Corps students, Shadolla Peterson and Tadaryl Shipp, Pike's boyfriend, walking away from the Job Corps center toward 17th Street. At approximately

10:15 p.m., Iloilo observed Pike, Peterson, and Shipp return to the Center. Slemmer was not with them.

Later that night, Pike went to Iloilo's room and told Iloilo that she had just killed Slemmer and that she had brought back a piece of the victim's skull as a souvenir. Pike showed Iloilo the piece of skull and told her that she had cut the victim's throat six times, beaten her, and thrown asphalt at the victim's head. Pike told Iloilo that the victim had begged "them" to stop cutting and beating her, but Pike did not stop because the victim continued to talk. Pike told Iloilo that she had thrown a large piece of asphalt at the victim's head, and when it broke into smaller pieces, she had thrown those at the victim as well. Pike told Iloilo that a meat cleaver had been used to cut the victim's back and a box cutter had been used to cut her throat. Finally, Pike said that a pentagram had been carved onto the victim's forehead and chest. Iloilo said that Pike was dancing in a circle, smiling, and singing "la, la, la" while she related these details about the murder. When Iloilo saw Pike at breakfast the next morning she asked Pike what she had done with the piece of the victim's skull. Pike replied that it was in her pocket and then said, "And yes, I'm eating breakfast with it."

During a class later that morning, Pike

made a similar statement to Stephanie Wilson, another Job Corps student. Pike pointed to brown spots on her shoes and said, "that ain't mud on my shoes, that's blood." Pike then pulled a napkin from her pocket and showed Wilson a piece of bone which Pike said was a piece of Slemmer's skull. Pike also told Wilson that she had slashed Slemmer's throat six times and had beaten Slemmer in the head with a rock. Pike told Wilson that the victim's blood and brains had been pouring out and that she had picked up the piece of skull when she left the scene.

Though neither Iloilo nor Wilson immediately reported Pike's statements to police, on the day after the murder, January 13, at approximately 8:05 a.m., an employee of the University of Tennessee Grounds Department, discovered Slemmer's semi-nude, slashed, and badly beaten body near the greenhouses on the agricultural campus. He testified that the body was so badly beaten that he had first mistaken it for the corpse of an animal. Upon closer inspection, he saw the victim's clothes and her nude breast and realized it was the body of a human female. He immediately notified law enforcement officials.

Officers from the Knoxville Police Department and the U.T. Police Department were summoned to the

scene. Officer John Terry Johnson testified at trial that the body he found was lying on debris and was nude from the waist up. Blood and dirt covered the body and remaining clothing. The victim's head had been bludgeoned. Multiple cuts and slashes appeared on her torso. Officer Johnson stated that he thought he was looking at the victim's face but he could not be sure because it was extremely mutilated. Johnson removed all civilians from the area and secured the scene surrounding the body.

As other officers arrived, they began securing the crime area. As officers discovered other areas of blood, articles of clothing, footprints, and broken foliage, the crime scene tripled in size, eventually encompassing an area 100 feet long by 60 feet wide. The crime scene was wet and muddy, and there was evidence of a scuffle, with trampled bushes, hand and knee prints in the mud, and drag marks. A large pool of blood was found about 30 feet from the victim's body.

The victim's body was actually lying face down on a pile of debris. When officers turned the body over, they discovered that the victim's throat had been slashed. A bloody rag was around her neck. Detective Donald R. Cook, of the U.T. Police Department, accompanied the body to the morgue. He observed the body after it had been

cleaned and noticed that a five pointed star in a circle, commonly known as a pentagram, had been carved onto the victim's chest.

Randy York, a criminal investigator with the Knoxville Police Department, began investigating this case on January 13, the day the victim's body was discovered. York separately interviewed the [Petitioner] and Shipp at the Knoxville Police Department on January 14th. Investigator York advised [Petitioner] Pike of her *Miranda* rights, but she chose to waive them and make a statement. Pike explained in detail how the killing had occurred. Pike's statement was tape-recorded and transcribed in some forty-six pages. Copies of the transcription were given to the jury, and the jurors were allowed to listen to the tape through individual headphones.

In her statement, Pike said that she and Slemmer had been having problems for some time. Pike claimed to have awakened one night to find Slemmer standing over her with a box cutter. Pike told Investigator York that Slemmer had been "trying to get her boyfriend" and had been "running her mouth" everywhere. Pike said that Slemmer had deliberately provoked her because Slemmer realized that Pike would be terminated from the Job Corps program the next time she became

involved in a fight or similar incident.

Pike claimed that she had not planned to kill Slemmer, but she had instead planned only to fight Slemmer and let her know "to leave me the hell alone." However, Pike admitted that she had taken a box cutter and a miniature meat cleaver with her when she and the victim left the Job Corps Center. Pike said she had borrowed the miniature meat cleaver, but refused to identify the person who had loaned it to her.

According to Pike, she asked Slemmer to accompany her to the Blockbuster Music Store, and as they were walking, Pike told Slemmer that she had a bag of "weed" hidden in Tyson Park. Though Pike refused to name the other parties involved in the incident, she said the group began walking toward the U.T. Campus. Upon arriving at the steam plant on U.T.'s agricultural campus, Pike and Slemmer exchanged words. Pike then began hitting Slemmer and banging Slemmer's head on her knee. Pike threw Slemmer to the ground and kicked her repeatedly. According to Pike, as she slammed Slemmer's head against the concrete, Slemmer repeatedly asked, "Why are you doing this to me?" When Slemmer threated to report Pike so she would be terminated from the Job Corps program, Pike again repeatedly kicked Slemmer in the face and side. Slemmer lay on the ground

and cried for a time and then tried to run away, but another person with Pike caught Slemmer and pushed her to the ground.

Pike and the other person, who Pike referred to as "he," held Slemmer down until she stopped struggling, then dragged her to another area where Pike cut Slemmer's stomach with the box cutter. As Slemmer "screamed and screamed," Pike recounted how she began to hear voices telling her that she had to do something to prevent Slemmer from telling on her and sending her to prison for attempted murder.

At this point Pike said she was just looking at Slemmer and "just watching her bleed." When Slemmer rolled over, stood up and tried to run away again, Pike cut Slemmer's back, "the big long cut on her back." Pike said Slemmer repeatedly tried to get up and run. Pike recounted how Slemmer bargained for her life, begging Pike to talk to her and telling Pike that if she would just let her go, she would walk back to her home in Florida without returning to the Job Corps facility for her belongings. Pike told Slemmer to "shut up" because it "was harder to hurt somebody when they're talking to you." Pike said the more Slemmer talked, the more she kicked Slemmer in the face.

Slemmer asked Pike what she was going to do to her, at which point Pike thought she heard a noise. Pike left the scene to check out the surrounding area to make sure no one was around. When she returned, Pike began cutting Slemmer across the throat. When Slemmer continued to talk and beg for her life, Pike cut Slemmer's throat several other times. Pike said that Slemmer continued to talk and tried to sit up even though her throat had been cut several times, and that Pike and the other person would push her back on the ground.

Slemmer attempted to run away again, and Pike threw a rock which hit Slemmer in the back of the head. Pike stated that "the other person" also hit Slemmer in the head with a rock. When Slemmer fell to the ground, Pike continued to hit her. Eventually Pike said she could hear Slemmer "breathing blood in and out," and she could see Slemmer "jerking," but Pike "kept hitting her and hitting her and hitting her." Pike eventually asked Slemmer, "Colleen, do you know who's doing this to you?" Slemmer's only response was groaning noises. At this point, Pike said she and the other person each grabbed one of Slemmer's feet and dragged her to an area near some trees, leaving her body on a pile of dirt and debris. They left Slemmer's clothing in the

surrounding bushes. Pike said the episode lasted "for about thirty minutes to an hour." Pike admitted that she and the other person had forced the victim to remove her blouse and her bra during the incident to keep Slemmer from running away. Pike also admitted that she had removed a rag from her hair and tied it around Slemmer's mouth at one point to prevent Slemmer from talking. Pike denied carving a pentagram in the victim's chest, but said that the other person had cut the victim on her chest.

After disposing of Slemmer's body, Pike and the other person washed their hands and shoes in a mud puddle. They discarded the box cutter, and Pike returned the miniature meat cleaver to the person at the Job Corps from whom she had borrowed it. Pike never identified that individual. Pike told Investigator York that the bloodstained jeans she had worn during the incident were still in her room. She said they were covered in mud because she had rubbed the mud from the bottom of her shoes onto the jeans to conceal the blood. Pike also admitted to Investigator York that she had discarded two forms of identification belonging to the victim and the victim's black gloves in a trash can at a Texaco station on Cumberland Avenue. Pike gave Investigator York consent to search her room and then

accompanied him to the Job Corps center. From there Pike retraced her steps, describing what had occurred on the night of the killing. Investigator York testified that Pike eventually directed him to the exact location where the victim's body was found.

After Pike's statement was played for the jury, the state introduced pictures of Pike and Shipp taken at the Knoxville Police Department on the day the statement was given, January 14, 1995, two days after the murder. In the pictures, both Pike and Shipp were wearing pentagram necklaces.

Mark A. Waggoner, an officer with the Knoxville Police Department, testified that he had retrieved a pair of black gloves and two of Slemmer's I.D. cards from the Texaco station on Cumberland Avenue. These items were also made exhibits. Another officer, Lanny Janeway, used a chart to illustrate each of the locations where blood or evidence was found. Photographs of bloody chunks of asphalt, blood drippings on leaves, and pools of blood were introduced into evidence. The bloody piece of asphalt and the victim's bloody clothing were also introduced into evidence.

Special agent Raymond A. DePriest, a forensic scientist employed by the Tennessee Bureau of Investigation,

testified that he had received blood samples taken from the shoes and clothing of Pike and Shipp. Those items that he determined had human blood on them were sent to the DNA unit. Margaret Bush, an employee of the Tennessee Bureau of Investigation assigned to the DNA unit, testified that she had been unable to perform a DNA analysis on the blood taken from the shoes of Pike and Shipp, but she had determined that the blood samples taken from the clothing of both Pike and Shipp matched the DNA profile of the victim.

Dr. Sandra Elkins, the Knox County Medical Examiner, performed the autopsy on the victim, who was later identified by dental records as Colleen Slemmer, a nineteen-year-old Job Corps student. Dr. Elkins described the victim's body as covered with dirt and twigs. Slemmer was nude from the waist up clothed only with jeans, socks, and shoes. After removing the victim's clothing and cleaning the body, Dr. Elkins had attempted to catalog the slash and stab wounds on the victim's torso by assigning a letter of the alphabet. There were so many wounds that eventually Dr. Elkins decided to catalog only the most serious and major wounds. Dr. Elkins explained that to catalog every wound she would have been required to go through the

alphabet again, and stay in the morgue for "three days." Eventually, Dr. Elkins said she "basically threw up her hands and just said, [innumerable] more superficial slash wounds on the back, arms and chest." In addition, Dr. Elkins said the victim had purple contusions on her knees, indicating fresh bruising consistent with crawling, and defense wounds on her right arm.

Dr. Elkins described the major slash and stab wounds she had cataloged on the victim's back, arms, abdomen, and chest. She found a six inch gaping wound across the middle of the victim's neck which had penetrated the fat and muscles of the neck. In addition, Dr. Elkins had found ten other slash wounds on the victim's throat. Other slash wounds were on the victim's face, and Dr. Elkins observed what appeared to be a pentagram carved onto the victim's chest. Because the area around each wound was red in appearance, Dr. Elkins concluded that the victim's heart had been beating when the wounds were inflicted and she said the victim would not have been rendered unconscious by any of the stab or slash wounds.

Dr. Elkins determined that the victim's death was caused by blunt force injuries to the head. The victim had suffered multiple and extensive skull fractures. From the autopsy, Dr. Elkins

determined that the victim had sustained a minimum of four blows to her head; two to the left side of the head, one over the right eye, and one in the nose area. The right frontal area of the victim's skull had been fractured as had the bridge of her nose. However, the major wound, labeled as injury "W", involved most of the left side of the victim's head. Dr. Elkins said that this injury, caused by blunt force to the left side of the victim's head while the right side of the victim's head was against a firm surface, also had fractured the right side of the skull and imbedded a portion of the skull into the victim's brain. Dr. Elkins found small divots in the victim's skull containing black particles from an asphalt chunk which was later determined to have been used to administer the blows. Finally, Dr. Elkins testified that blood in the victim's sinus cavity indicated she had been alive and probably conscious when the injuries were inflicted.

During her testimony, Dr. Elkins utilized the victim's skull to describe the injuries. She testified that in order to determine the cause of death, it was necessary to remove the head of the victim and have the skull prepared by Dr. Murray Marks, a forensic anthropologist at the University of Tennessee. She explained that she had removed the top of the victim's skull in

order to remove the brain. Embedded inside the victim's brain as a result of the blunt force were portions of the victim's skull. Dr. Elkins removed those embedded pieces and forwarded them to Dr. Marks. Dr. Marks reconstructed the skull, fitting those loose portions into the left side area of the skull. However, those pieces had not completely filled one area on the left side of the victim's skull. Dr. Elkins then showed the jury a piece of skull that had been given to her shortly before the trial and demonstrated that it fit perfectly into the remaining area of the victim's skull. The piece of skull utilized by Dr. Elkins had been taken from the pocket of a jacket which witnesses identified as belonging to Pike.

Pike's jacket had been turned over to the law enforcement officials by Job Corps employees. Robert A. Pollock, orientation specialist at Knoxville Job Corps, testified that he had spoken with Pike on January 13, 1995, concerning a misplaced I.D. card. After Pike left his office, Pollock noticed a black leather jacket hanging on the chair where she had sat. The jacket had been hanging on the chair when Pollock locked the room at approximately 4:00 p.m. on January 13th, and it was still there when he returned at 7:30 a.m. on January 17th. Because he had heard over the weekend that Pike was a suspect in this murder

investigation, Pollock immediately turned the jacket over to the Job Corps' Safety and Security Captain, William Hudson. Hudson called the Knoxville Police Department and turned the jacket over to Officer Arthur Bohanan when he arrived a short time later.

Officer Bohanan identified the jacket, and it was introduced into evidence. He testified that he had discovered a small piece of bone in the inside pocket of the jacket and had immediately taken it to Dr. Marks at the University of Tennessee. Dr. Marks testified concerning the process by which the victim's skull had been prepared and again demonstrated that the bone fragment given to him by Officer Bohanan fit perfectly into the bone reconstruction of the skull of the victim.

Following the introduction into evidence of the victim's skull, numerous photographs, and items of the victim's clothing, the State rested its case-in-chief.

Dr. Eric Engum, a clinical psychologist, testified for the defense and stated that he had conducted a clinical interview and had administered a battery of tests to the [Petitioner]. Dr. Engum described Pike as an "extremely bright young woman." Dr. Engum explained that Pike "is excellent in problem solving, reasoning, analysis, ah, can pay

attention, sustains concentration, can sequence, ah, has excellent receptive and expressive language skills." Pike had a full scale IQ score of 111 which is in the 77th percentile and which was characterized as "remarkable" by Dr. Engum since she had only completed the ninth grade. According to Dr. Engum, the tests unequivocally showed that Pike had no symptoms of brain damage and that she was not insane. However, Dr. Engum concluded that the [Petitioner] suffers from a very severe borderline personality disorder and exhibits signs of cannabis (marijuana) dependence and inhalant abuse. He testified that the [Petitioner] is not so dysfunctional that she needs to be institutionalized, but instead opined that she has a multiplicity of problems in interpersonal relationships, in controlling her behavior, and in achieving vocational and academic goals.

During direct examination, Dr. Engum opined that the [Petitioner] had not acted with deliberation or premeditation in killing Slemmer. Instead, Dr. Engum said she had acted in a manner consistent with his diagnosis of borderline personality disorder; she had lost control. He explained that she had danced around when relating the murder to Iloilo because of the emotional release she experienced from

having assured through the killing of Slemmer that she could maintain her relationship with Shipp. When questioned about the piece of skull found in the [Petitioner's] coat, Dr. Engum explained that the [Petitioner] actually has no identity and the action of taking and displaying a piece of Slemmer's skull to her friends was the [Petitioner's] way of getting recognition, "no matter how distorted" the recognition.

On cross examination, Dr. Engum stated that there was no question that the [Petitioner] had killed Slemmer. He reiterated that his opinion that once the attack began, Pike had literally lost control. However, Dr. Engum admitted that Pike had deliberately enticed Slemmer to the park, carved a pentagram onto Slemmer's chest, bashed Slemmer's head against the concrete, and beaten Slemmer's head with the asphalt. Dr. Engum agreed that Pike's act of carrying weapons with her indicates deliberation. Finally, Dr. Engum conceded that Pike had time to calm down and consider her actions when she left Slemmer during the attack to investigate a noise and determine whether anyone else was in the area.

William Bernet, medical director of the psychiatric hospital at Vanderbilt University, testified that he had

reviewed the statements of the [Petitioner] and Kimberly Iloilo and the reports of Dr. Engum, Dr. Elkins, and Dr. Marks. He concluded that although there were satanic elements in this crime, the pattern was that of an adolescent dabbling in Satanism. He then described the phenomenon of collective aggression, whereby a group of people gather and become emotionally aroused and the end result is that they engage in some kind of violent behavior. On cross-examination, Dr. Bernet admitted that he had spoken neither with the [Petitioner] nor any of the other witnesses. Dr. Bernet admitted that he did not have enough information to offer an expert opinion as to whether Pike acted with intent or premeditation in killing the victim.

Based on this evidence offered during the guilt phase of the trial, the jury found Pike guilty of first degree murder and conspiracy to commit first degree murder.

In the sentencing phase of the trial, the State relied on the evidence presented at the guilt phase and presented no further proof. The defense, in mitigation, called Carrie Ross, Pike's aunt as a witness. Ross testified that the [Petitioner] had experienced no maternal bonding because she was premature and was raised by her paternal grandmother until she died in

1988. Ross said that Pike's family has a history of substance abuse and that Pike's maternal grandmother was an alcoholic who was verbally abusive to Pike. Following the death of Pike's paternal grandmother, Pike was shuffled between her mother and father. According to Ross, Pike's mother's home was very dirty. Pike's mother set no rules for her, and on the occasions that Pike had visited Ross, the [Petitioner] had behaved as a "little girl," playing Barbie and dress-up with her eleven-year-old cousin.

On cross examination, Ross admitted that she has previously described Pike as a pathological liar and that she had been afraid to allow Pike to associate with her own children. Ross also admitted that Pike had been out of control since she was twelve years old.

Glenn Pike, the [Petitioner's] father, testified that he had kicked the [Petitioner] out of his house twice, the last time in 1989. He admitted that he had signed adoption papers for the [Petitioner] prior to her eighteenth birthday. On cross-examination, he admitted that he had forced Pike to leave his home in 1989 because there had been an allegation that the [Petitioner] had sexually abused his two-year old daughter from his second marriage. According to her father, Pike had been disobedient, dishonest, and

manipulative when she had lived with him.

The [Petitioner's] mother, Carissa Hansen, a licensed practical nurse, testified that Pike had lived with her 95 percent of the time since her paternal grandmother's death. Hansen admitted that she had smoked marijuana with the [Petitioner] in order to "establish a friendship." Hansen related that the [Petitioner] had attempted suicide by taking an overdose shortly after the death of her paternal grandmother. Hansen also testified that one of her boyfriends had whipped Pike with a belt. Hansen had the boyfriend arrested.

On cross-examination, Hansen admitted that Pike's behavior had been problematic for years. The [Petitioner] had begun growing marijuana in pots in her home at age nine. After threatening to run away from home and live on the street, Pike had been allowed to have a live-in boyfriend at age fourteen. Hansen admitted that Pike had wielded a "butcher-knife" against the boyfriend, who had been arrested for whipping her. Hansen also said Pike had lied to her and stolen from her on numerous occasions and had quit high school. Hansen conceded that Pike had been out of control since she was eight years old. Following Hansen's testimony, the defense rested its case.

In rebuttal, the State presented the testimony of Harold James Underwood, Jr., a University of Tennessee police officer who was assigned to secure the crime scene on January 13, 1995. Underwood testified that the [Petitioner] came to the scene with three to five other females between four and five p.m[.] that day. Pike asked Underwood why the area had been marked off and questioned him concerning the identity of the victim and whether or not the police had any suspects. None of the other females spoke during the fifteen minutes the group was there. Underwood said Pike appeared amused and giggled and moved around. Underwood noticed Pike was wearing an unusual necklace in the shape of a pentagram. After learning at roll call on January 14, 1995, that the victim of the murder had a pentagram carved on her chest, he reported Pike's strange behavior and unusual necklace to his superior officers.

Based on the proof submitted at the sentencing hearing, the jury found the existence of the following two aggravating circumstances beyond a reasonable doubt: (1) "the murder was especially heinous, atrocious or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death," and (2) "the murder was committed for the purpose of avoiding,

> interfering with or preventing a lawful arrest or prosecution of the defendant or another." In addition, the jury found that the State had proven that the aggravating circumstances outweighed any mitigating circumstances beyond a reasonable doubt. As a result, the jury sentenced the [Petitioner] to death by electrocution. The trial court entered a judgment in accordance with the jury's verdict and the Court of Criminal Appeals affirmed.

Pike, 978 S.W.2d at 907–14. (internal citations omitted).

After reviewing the record and considering Petitioner's claims on appeal, The TSC found that the evidence supported the conviction and sentence, and affirmed the TCCA's decision. *Id*. at 914. Petitioner next field a petition for post-conviction relief, which was denied after an evidentiary hearing. The TCCA affirmed the denial of post-conviction relief, *Pike v. State*, No. E2009-00016-CCA-R3-PD, 2011 WL 1544207 (Tenn. Crim. App. Apr. 25, 2011), and the TSC denied Petitioner's application for permission to appeal. Petitioner then filed the pending motion for federal habeas corpus relief.

II. STANDARD OF REVIEW

Respondent argues that one of Petitioner's claims is procedurally defaulted. As to the remaining claims, Respondent argues that she is entitled to judgment as a matter of law based on the findings of the Tennessee Courts. Petitioner conversely argues that she is entitled to summary judgment on many of her claims because the state courts' decisions were

unreasonable.[1]

A. Procedural Default

Procedural default is an extension of the exhaustion doctrine. A federal court cannot grant a state prisoner's petition for a writ of habeas corpus unless the petitioner has exhausted his available state court remedies. 28 U.S.C. § 2254. This rule has been interpreted by the Supreme Court as one of total of exhaustion. *Rose v. Lundy*, 455 U.S. 509 (1982). Thus, each and every claim set forth in the federal habeas corpus petition must have been presented to the state appellate court. *Picard v. Connor*, 404 U.S. 270 (1971); *see also Pillette v. Foltz*, 824 F.2d 494, 496 (6th Cir. 1987) (stating that exhaustion "generally entails fairly presenting the legal and factual substance of every claim to all levels of state court review."). Furthermore, the substance of the claim must have been presented as a federal constitutional claim. *Gray v. Netherland*, 518 U.S. 152, 162–63 (1996).

Here, Petitioner has exhausted her state remedies because there is no other procedure under Tennessee law for her to present her claims challenging her convictions and sentence. *See* Tenn. Code Ann. 40-30-102(a). It is well established that a criminal defendant who fails to comply with state procedural rules which require the timely presentation of constitutional claims waives the right to federal habeas corpus review of those claims "absent a showing of cause for the non-compliance and some showing of actual prejudice resulting from the alleged

[1] Petitioner did not seek summary judgment on two of her claims; instead, Petitioner requested an evidentiary hearing on these claims, which the Court granted [Docs. 51, 58].

constitutional violation." *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977); *accord Engle v. Isaac*, 456 U.S. 107, 129 (1982) ("We reaffirm, therefore, that any prisoner bringing a constitutional claim to the federal courthouse after a state procedural default must demonstrate cause and actual prejudice before obtaining relief.")

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the procedural default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991).

"When a state-law default prevents the state court from reaching the merits of a federal claim, that claim can ordinarily not be reviewed in federal court." *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991). Therefore, to excuse her procedural default, Petitioner must first demonstrate cause for her failure to present an issue to the state courts. "[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

B. § 2254(d): State Court Findings

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), the jurisdiction of a federal court to consider and grant habeas corpus relief to prisoners is significantly limited." Pursuant to 28 U.S.C. § 2254(d), as amended by AEDPA, a state petitioner may not obtain federal habeas corpus relief with respect to a claim that was adjudicated on the merits in a state court proceeding unless the state court decision: (1) was contrary to, or involved an unreasonable application of, clearly established federal law; or (2) was not reasonably supported by the evidence presented to the state court. In addition, findings of fact by a state court are presumed correct, and a petitioner may rebut this presumption of correctness only by clear and convincing evidence. 28 U.S.C. § 2254(e).

A state court decision is "contrary to" Supreme Court precedent "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). A state court decision "involves an unreasonable application of clearly established federal law" only where "the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409. A federal habeas court may not find a state adjudication to be unreasonable "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411.

A state petitioner seeking federal habeas relief must meet a very high bar under the standard set by AEDPA. "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2001)). "[A] habeas court must determine what arguments or theories supported or ... could have supported the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme Court]." *Id.* at 102. The Supreme Court acknowledges that this is a very high standard. "If this standard is difficult to meet, that is because it was meant to be." *Id.*; *see also Renico v. Lett*, 130 S. Ct. 1855, 1866 (2010) ("AEDPA prevents defendants—and federal courts—from using federal habeas corpus review as a vehicle to second-guess the reasonable decisions of state courts."); *Peak v. Webb*, 673 F.3d 465, 472 (6th Cir. 2012) (citing *Richter*, 562 U.S. at 101–02) ("[T]he Supreme Court has very recently made abundantly clear that the review granted by AEDPA is even more constricted than AEDPA's plain language already suggests.").

C. Motion for Summary Judgment

It is well established that a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure is applicable to habeas corpus proceedings and allows the court to assess the need for an evidentiary hearing on the merits of the habeas petition. *See Blackledge v. Allison*, 431 U.S. 63, 80–81 (1977). Rule 56(a) provides that "[t]he 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." The moving party bears the burden of establishing that no genuine issues of material fact exits. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 n.2 (1986); *Moore v. Phillip Morris Cos.*, 8 F.3d 335, 339 (6th Cir. 1993). All facts and inferences to be drawn therefrom must be viewed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Burchett v. Kiefer*, 301 F.3d 937, 924 (6th Cir. 2002). "When reviewing cross-motions for summary judgment, [the Court] must evaluate each motion on its own merits and view all facts and inferences in the light most favorable to the nonmoving party." *Westfield Ins. Co. v. Tech Dry, Inc.*, 336 F.3d 503, 506 (6th Cir. 2003).

Once the moving party presents evidence sufficient to support a motion for summary judgment, the non-moving party is not entitled to a trial merely on the basis of allegations. The non-moving party must present some significant probative evidence to support its position. *White v. Turfway Park Racing Ass'n*, 909 F.2d 941, 943–44 (6th Cir. 1990), *overruled on other grounds by Eyerman v. Mary Kay Cosmetics, Inc.*, 967 F.2d 213, 217 n.4 (6th Cir. 1992); *Gregg v. Allen-Bradley Co.*, 801 F.2d 859, 861 (6th Cir. 1986).

Summary judgment should not be disfavored and may be an appropriate avenue for the "just, speedy and inexpensive determination" of an action. *Celotex Corp.*, 477 U.S. at 327. The moving party is entitled to judgment as a matter of law "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case,

and on which that party will bear the burden of proof at trial." *Id*. at 322.

III. EVIDENTIARY HEARING

The Court held an evidentiary hearing on May 26th, 2015 and May 27th, 2015 (Doc. 81). The hearing was restricted to evidence concerning Petitioner's claims of ineffective assistance of counsel based on a possible conflict of interest stemming from the investigation into lead counsel's billings to the Indigent Defense Fund, and trial counsel's procurement of media rights to Petitioner's story (Doc. 58). During the hearing, the Court stated that it had yet to determine whether Petitioner has cleared the limitations to receiving new evidence under 28 U.S.C. § 2254(d); however, out of the abundance of caution and because of the highly extraordinary nature of the punishment involved, the Court decided to hold the hearing and determine later if the evidence received would be considered or not (Doc. 84 p. 6).

A federal habeas petition containing claims that have been adjudicated on the merits in state proceedings must meet the § 2254(d) restriction which prohibits relief unless the adjudication of that claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, or 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). In *Cullen v. Pinholster*, 563 U.S. 170 (2011), the Supreme Court, while reinforcing that the district court still retains the discretion to grant an evidentiary hearing, held that "[i]f a claim has been adjudicated on the merits

by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court." *Id*. at 185. "[T]his means that when the state-court record 'precludes habeas relief' under the limitations of § 2254(d), a district court is 'not required to hold an evidentiary hearing.'" *Id*. at 183 (quoting *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007)). As it applies to this case, until Petitioner has overcome the § 2254(d) limitation, the Court is not required to consider any "new" evidence introduced at the evidentiary hearing.

After a thorough review of the state record, the facts, and Supreme Court precedent applicable to counts two and six of Petitioner's petition, the Court finds that the state court's adjudication of those claims did not involve an unreasonable determination of the facts in light of the evidence before the court. The Court also notes that in any event, the evidence presented at the evidentiary hearing did not differ in any significant way from what was presented to the state court with regard to these claims.[2] A more in-depth analysis of these claims will be presented in turn with Petitioner's other claims for relief.

IV. CLAIMS FOR RELIEF

The Court will consider Petitioner's claims for relief in the order she has presented them in her petition for a writ of habeas corpus, and in light of the pending motions for summary judgment.

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[2] The Court finds Petitioner's allegations regarding inconsistencies in William Talman's testimony before the state post-conviction court and before this Court at the May, 2015 evidentiary hearing to be irrelevant and immaterial to the issues before the court on this petition.

A. Petitioner's attorneys were constitutionally ineffective during the penalty phase of her capital trial and her rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution were violated.

Petitioner alleges that her trial counsel were ineffective during the penalty phase of her trial, and that this ineffectiveness led to her eventual death sentence. Particularly, Petitioner claims that counsel failed to uncover and present a wealth of mitigating evidence, and made last-minute decisions that negatively affected the quality of their penalty phase arguments.

1. *Applicable Law*

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." In *Strickland v. Washington*, the Supreme Court established a two-part standard for evaluating claims of ineffective assistance of counsel. 466 U.S. 668 (1984). To bring a successful claim of ineffective assistance of counsel,

> [f]irst, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's

> errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687.

Under the first part of the *Strickland* test, the appropriate measure of attorney performance is "reasonableness under prevailing professional norms." *Id*. at 688. A defendant asserting a claim of ineffective assistance of counsel must "identify the acts or omissions of counsel that are alleged to not have been the result of reasonable professional judgment." *Id*. at 690. The evaluation of the objective reasonableness of counsel's performance must be made "from counsel's perspective at the time of the alleged error and in light of all the circumstances, and the standard of review is highly deferential." *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986). It is strongly presumed that counsel's conduct was within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689.

A finding of serious attorney incompetence will not justify setting aside a conviction or sentence, however, absent prejudice to the defendant so as to render the conviction or sentence unreliable. *Id*. at 691–92. The question with prejudice is whether counsel's performance "was so manifestly ineffective that defeat was snatched from the hands of probable victory." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992). Here, Petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Moss v. United States*, 232 F.3d 445, 454 (6th Cir. 2003) (quoting *Strickland*, 466 U.S. at 694) (internal quotation marks omitted).

"A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Moss*, 323 F.3d at 454–55. Counsel is constitutionally ineffective only if a performance below professional standards caused the defendant to lose what he "otherwise would have won." *Morrow*, 977 F.2d at 229. The focus here, however, should not be solely on outcome determination:

> [A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him.

Lockhart v. Fretwell, 506 U.S. 364, 369–70 (1993).

2. *Discussion*

Petitioner challenged the effectiveness of her trial counsel during the penalty phase, arguing to the TCCA that the penalty phase verdict was less an appropriate response to the facts than an indictment of the performance of defense counsel. *Pike*, 2011 WL 1544207, at *49. The TCCA, applying *Strickland*, concluded that Petitioner had not met her burden of proving deficient performance or prejudice. *Id.* at *49–60. Accordingly, the task before the Court is to determine whether the state court's application of *Strickland* to the facts of Petitioner's case was unreasonable, in light of Petitioner's claims of ineffective assistance of counsel at the penalty phase of her trial.

a. Failure to present mitigating evidence uncovered during investigation.

Petitioner first alleges that trial counsel's abrupt decision to change their penalty phase plans, and not call their mitigation specialist, Dr. McCoy, led them to present a very limited case for mitigation and abandon the compelling mitigation evidence that had already been discovered.

Failure to present mitigating evidence at sentencing generally constitutes ineffective assistance of counsel. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 393 (2000) ("[I]t is undisputed that Williams had a right—indeed, a constitutionally protected right—to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer."); *Skaggs v. Parker*, 235 F.3d 261, 269 (6th Cir. 2000) ("We find that Skaggs's counsel acted below an objective standard of reasonableness at sentencing, essentially providing no legitimate mitigating evidence on Skaggs's behalf, and that this failure severely undermines our confidence in the just outcome of this proceeding."); *Austin v. Bell*, 126 F.3d 843, 848 (6th Cir. 1997) (holding that the failure of trial counsel "to investigate and present any mitigating evidence during the sentencing phase so undermined the adversarial process that Austin's death sentence was not reliable.").

The state did not present any evidence during the penalty phase of Petitioner's trial; rather, they chose to rest on the evidence that had been presented during the guilt phase (Addendum No. 2, Doc. 25, Vol. 25, pp. 2481–83). Petitioner's evidence consisted

of the testimony of her aunt, her mother, and her father. Petitioner's aunt, Carrie Ross, testified that Petitioner did not have a relationship with her mother right from birth, and was primarily raised by her paternal grandmother until her grandmother's death in 1988 (*Id*. at 2487; Addendum No. 2, Doc. 26, Vol. 26, pp. 2503–05). Ms. Ross also testified that Petitioner's mother did not enact any disciplinary rules with Petitioner, and that she always put her personal interests ahead of Petitioner's (Addendum No. 2, Doc. 25, Vol. 25, pp. 2499–2500). Petitioner's father, Glenn Pike, testified that he was not around a lot, and that he had a long-distance relationship with Petitioner (Addendum No. 2, Doc. 26, Vol. 26, pp. 2512–13). Mr. Pike also testified that on more than one occasion, he effectively rejected Petitioner, once telling her she was no longer welcome in his home, another time sending her back to live with her mother, and signing papers for her to be adopted at one point (*Id*. at 2513–16).

Finally, Petitioner's mother, Carissa Hansen, testified that Petitioner spent majority of her childhood with her paternal grandmother and first attempted suicide after her grandmother's death in 1988 (*Id*. at 2526, 2528–29). Ms. Hansen also testified that on one occasion she chose her new husband over Petitioner, and sent Petitioner off to live with her father because Petitioner did not get along with the new husband (*Id*. at 2525). Ms. Hansen also admitted to smoking marijuana with Petitioner, in an attempt to get closer to her and be her friend, and also to allowing Petitioner's boyfriend to move into her home when Petitioner was fourteen years old (*Id*. at 2527, 2537).

After Petitioner's mother testified, the Petitioner

rested her case. The state then called a rebuttal witness, Harold Underwood, a police officer with the University of Tennessee, to testify to Petitioner's demeanor on the day following the murder. Officer Underwood testified that Petitioner came to the crime scene with between three and five other girls and asked questions about who the victim was, and if any suspects had been identified (*Id*. at 2551–52). Officer Underwood also testified that Petitioner appeared amused, and was giggling and moving around (*Id*. at 2252).

In her petition, Petitioner alleges that her lead counsel initially intended to call Dr. McCoy as the only witness during the sentencing phase, planning for her to bring in all the evidence of Petitioner's background that she had uncovered, and tie it in with their medical expert, Dr. Engum's, diagnosis (Doc. 19, p. 49). However, after the guilty phase, lead counsel turned over Dr. McCoy's entire mitigation report to the prosecution in and *in camera* proceeding that was not put on the record, and subsequently decided not to call Dr. McCoy to testify during the penalty phase (*Id*. at 50). Petitioner alleges that as a result of this abrupt change in plans, the mitigation evidence prepared was not properly presented to the jury, the prosecution was able to use information from Dr. McCoy's report to impeach the lay witnesses on cross examination, and counsel's planned mitigation plan completely unraveled (*Id*.). Petitioner further alleges that none of the reasons provided by counsel for their decision to abandon their mitigation plan at the last minute was supported by the record (*Id*. at 51).

Dr. McCoy testified at the post-conviction evidentiary hearing that her role as a mitigation expert was to "collect information, interview people,

get records and analyze all of this information in an effort to develop certain themes that the attorneys would present to a jury in sentencing[,] and also to identify lay witnesses who could come and talk to the jury and show them the human side of [Petitioner] and familiarize them with her history and basically help them see that life would be an option for her" (Addendum No. 5, Doc. 18, Vol. 6B, p. 621). Dr. McCoy also testified that it would have been detrimental to Petitioner's case to only have family members and lay witnesses testify to Petitioner's background, without any testimony from an expert about how it connects to Petitioner's psycho pathology (*Id*. at 638–39).

Petitioner's trial co-counsel, Julie Martin Rice, testified during the post-conviction evidentiary hearing that their decision not to call Dr. McCoy during the penalty phase of Petitioner's trial was based on several theories that were floating around, but that she was not sure which one precipitated the ultimate decision (Addendum No. 5, Doc. 12, Vol. 1, p. 77). Ms. Rice testified that at some point, Dr. McCoy said she could not support part of Dr. Engum's testimony or report (*Id*.); that they had discovered Dr. McCoy was dating the lead prosecutor on the case, and that she thought it to be an on-going relationship (*Id*.; Addendum 5, Doc. 13, Vol. 2, p. 197); that Dr. McCoy had also told her at some point that Petitioner was a liar, and that she did nothing but lie (Addendum No. 5, Doc. 13, Vol. 2, p. 113); and that on the morning the penalty phase was set to begin, the prosecutor had "stickified" Dr. McCoy's report (Addendum No. 5, Doc. 12, Vol. 1, p. 77).

Trial lead counsel, Bill Talman, also testified during Petitioner's post-conviction hearing. Mr.

Talman testified that the primary reason they decided not to call Dr. McCoy to testify at the sentencing phase of Petitioner's trial was because she would not corroborate Dr. Engum's testimony (Addendum No. 5, Doc. 15, Vol. 4, p. 348). Mr. Talman also testified that after he received Dr. McCoy's report, he was already teetering with whether he wanted to use it or not because of all the negative things the report contained about Petitioner's history (*Id.* at 345). According to Mr. Talman, it became a question of weighing whether he wanted to have all of the negative things in Dr. McCoy's report come into the record over putting Dr. McCoy on the stand, when all she would testify to was that she spoke to a number of people (*Id.* at 348–49). Mr. Talman testified that he believed they could get substantially the same testimony in through the family members (*Id.* at 349). Mr. Talman admitted that the decision not to call Dr. McCoy as a witness was "one of those last minute decisions that ... you just [make]," and that the decision was, to the best of his knowledge, made the morning right before the penalty phase began while they were in "one of those little huddles outside during a break" (*Id.* at 351–52).

In addition, Mr. Talman testified that another reason he was hesitant to call Dr. McCoy as a witness was because they had found out shortly before trial that she was involved in a romantic relationship with William Crabtree, the lead prosecutor on Petitioner's case (*Id.* at 352). According to Mr. Talman, when he asked Dr. McCoy why she had not initially disclosed the relationship, she told him that she did not think that it made a difference, and that she knew that he would not have retained her as an expert witness on the case if she had revealed the relationship to him

(*Id*. at 352; Addendum No. 5, Doc. 16, Vol. 5, pp. 444–45). Mr. Talman stated that he did not call attention to the issue when he first found out because he never doubted Dr. McCoy's work or Mr. Crabtree's integrity, that Dr. McCoy assured him that she had never talked to Mr. Crabtree about the case, and that they had already spent a lot of money on Dr. McCoy's work at that point (Addendum No. 5, Doc. 15, Vol. 4, p. 355). Even further, Mr. Talman testified that he was angered by Dr. McCoy's actions during jury selection when she appeared on local television stations talking about jury selection, although not specifically about the facts of Petitioner's case (*Id*. at 357). Mr. Talman also testified that he did not recall ever asking Dr. McCoy to lie about the date he received her report, and that he could not ever imagine asking a witness to lie (Addendum No. 5, Doc. 16, Vol. 5, p. 440).

With respect to the claim that trial counsel failed to present the mitigating evidence they had in their possession, the TCCA agreed with the finding of the trial court that Petitioner failed to establish ineffective assistance of counsel. The trial court accredited lead counsel's testimony that he did not call Dr. McCoy because she could not corroborate Dr. Engum's report, and also that he felt uncomfortable with the use of Dr. McCoy's materials, as they contained a lot of information which he did not want the jury to hear. The TCCA also agreed with the finding of the trial court that Petitioner could not prove prejudice because the mitigation evidence which was omitted would not have outweighed the aggravating factors. *Pike v. State*, 2011 WL 1544207, at *52.

The Sixth Circuit has found ineffective assistance

of counsel in cases where counsel wholly failed to present any mitigation evidence at trial. *See, e.g., Glenn v. Tate*, 71 F.3d 1204, 1207 (6th Cir. 1995) (finding that trial counsel rendered deficient performance where "the jury was given virtually no information on [defendant's] history, character, background and organic brain damage—at least no information of a sort calculated to raise reasonable doubt as to whether [he] ought to be put to death."); *Austin v. Bell*, 126 F.3d 843, 849 (6th Cir. 1997) (finding ineffective assistance where counsel did not present any mitigating evidence because he did not think that it would do any good).

These cases, however, are sufficiently distinguishable from Petitioner's case. At the outset, trial counsel did not fail to present any evidence in mitigation. Rather, counsel chose to use testimony from Petitioner's family members in support of mitigation, in place of their original plan to call Dr. McCoy. While the Court notes that counsel admitted that the decision to forgo Dr. McCoy's testimony was a last-minute decision and may not have been the best choice, the Court is counseled by *Strickland*'s direction to focus on counsel's perspective at the time. *See Strickland*, 466 U.S. at 689. As such, the Court cannot find that the TCCA's conclusion that counsel's decision was a tactical one is an unreasonable determination of the facts. Even further, the record supports the TCCA's finding that much of the evidence that Dr. McCoy would have provided was presented in some form in either the guilt phase or through the family members in the sentencing phase. *Pike*, 2011 WL 1544207, at *51–52.

Furthermore, the Court cannot find that the state court's conclusion that Petitioner could not establish

prejudice is an unreasonable determination. Under *Strickland*, a petitioner challenging a death sentence must show that there is a reasonable probability that, absent the errors, the jury would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death. *Strickland*, 466 U.S. at 695. A petitioner cannot establish prejudice by claiming his counsel failed to present cumulative mitigation evidence—that is, evidence that was already presented to the jury. *See Beuke v. Houk*, 537 F.3d 618, 645 (6th Cir. 2008) (citing *Broom v. Mitchell*, 441 F.3d 392, 410 (6th Cir. 2006)). As previously noted, most of the evidence that Petitioner claims was not presented by counsel was presented in some form during either the guilt or penalty phase, perhaps just not in as comprehensive a way as Petitioner contends it should have been. Regardless, Petitioner cannot meet her burden of showing prejudice.

Accordingly, the court finds that the state court's decision that Petitioner has failed to demonstrate ineffective assistance of counsel for failure to present mitigating evidence was neither contrary to, nor did it involve an unreasonable application of, federal law.

b. Failure to discover relevant and compelling mitigation evidence.

Petitioner next alleges that trial counsel were ineffective for failing to investigate, discover, and present evidence of Petitioner's organic brain damage and its effects, along with evidence that Petitioner suffers from bipolar disorder and post-traumatic stress disorder (Doc. 19). Petitioner also claims that trial counsel failed to interview many witnesses from her background that would have provided mitigating

evidence of her positive traits, and witnesses from the Job Corps program that would have testified to the dangerous and violent atmosphere there (Doc. 19).

As previously stated, "failure to investigate possible mitigating factors and failure to present mitigating evidence at sentencing *can* constitute ineffective assistance of counsel under the Sixth Amendment." *Coleman v. Mitchell*, 244 F.3d 533, 545 (6th Cir. 2001). Dr. Pincus, a neurologist, testified as an expert at Petitioner's post-conviction evidentiary hearing. Dr. Pincus testified that Petitioner suffers from brain damage and that essentially, "her frontal lobes aren't put together properly" (Addendum No. 5, Doc. 3, Vol. 3, p. 243). According to Dr. Pincus, an important function of the frontal lobe is moral and ethical standards, "the ability to say, 'No, don't say that; no, don't do that' to yourself" (*Id*.). As such, Dr. Pincus surmised that Petitioner was under the influence of a mental disease and defect that prevented her from being able to consider what she was doing, and was unable to prevent herself from giving in to the impulse to kill (*Id*. at 278). Dr. Pincus further testified that while Dr. Engum performed all the right tests for the frontal lobe, the type of frontal lobe damage that Petitioner suffers is not visible on those tests (*Id*. at 285). Dr. Pincus testified that Dr. Engum's error was concluding that there was no brain damage based merely on the tests performed, and that trial counsel, in his opinion, had a duty to seek further opinions to put together a credible defense (*Id*. at 283–84).

Dr. William Kenner, a specialist in psychiatry, child psychiatry, and psychoanalysis, also testified on Petitioner's behalf. According to Dr. Kenner, there was significant data at the time of Petitioner's trial to

suggest early onset bipolar disorder (Addendum No. 5, Doc. 24, Vol. 1, p. 35). Dr. Kenner testified that there was also data to help the jury understand the impact of early layered trauma on Petitioner's development, as well as Petitioner's congenital brain abnormality (*Id*.). Dr. Kenner also testified that there was data suggestive of dissociative symptoms that was available to a psychiatrist back in 1995 and 1996 (*Id*. at 37–38). Dr. Kenner opined that the structure of Petitioner's defense team at trial was odd because all the lines of communication were to lead counsel, but there was little to no "cross talk," especially among the experts (*Id*. at 30). According to Dr. Kenner, this caused problems for Petitioner's defense because it limited the psychiatrist, Dr. Bernet, from testifying to the depth and extent of his knowledge (*Id*. at 31).

Based on the testimonies of Drs. Pincus and Kenner, as well as testimony from several lay witnesses from Petitioner's background and the Job Corps program, Petitioner alleges that trial counsel should have conducted further investigations into Petitioner's mental health and presented such mitigation evidence to the jury, and trial counsel should have investigated the lay witnesses and presented their testimony. In reaching its decision to deny relief on this claim, the TCCA agreed with the post-conviction trial court that trial counsel was not required to question the diagnosis reached by the multiple experts he retained to examine Petitioner. *Pike*, 2011 WL 1544207, at *54.

Sixth Circuit jurisprudence has "distinguished between counsel's *complete* failure to conduct a mitigation investigation, where we are likely to find deficient performance, and counsel's failure to

conduct an *adequate* investigation, where the presumption of reasonable performance is more difficult to overcome." *Beuke v. Houk*, 537 F.3d 618, 643 (6th Cir. 2008).

> The cases where [the Sixth Circuit] has granted the writ for failure of counsel to investigate potential mitigating evidence have been limited to those situations in which defense counsel have *totally* failed to conduct such an investigation. In contrast, if a habeas claim does not involve a failure to investigate but, rather, petitioner's dissatisfaction with the *degree* of his attorney's investigation, the presumption of reasonableness imposed by *Strickland* will be hard to overcome.

Id. (quoting *Campbell v. Coyle*, 260 F.3d 531, 552 (6th Cir. 2001)).

Petitioner's trial counsel did not *totally* fail to conduct a mitigation investigation. The record indicates the opposite is the case-trial counsel engaged the services of three different expert witnesses to assist the defense in different ways. Dr. Engum, particularly, evaluated Petitioner and at no time did he recommend that counsel retain any additional expert for further testing. Dr. McCoy also testified that it was her belief that if any additional testing was required, Dr. Engum would make the call. This Court cannot now fault counsel for relying on the diagnosis and advice of the expert he retained to evaluate Petitioner. Furthermore, as the TCCA noted, even Drs. Pincus and Kenner agreed that the diagnosis reached by Dr. Engum was reasonable

based on the tests he performed and that bipolar disorder was often mistaken for borderline personality disorder. The TCCA also noted that "[w]hile the actual diagnosis is somewhat varied, the essential facts, i.e., the concession to premeditation, are very similar." *Pike*, 2011 WL 1544207, at *54. The record also indicates that trial counsel interviewed a number people from Petitioner's background, even travelling to North Carolina to investigate and interview witnesses (Addendum No. 5, Doc. 15, Vol. 4, pp. 339–40). Petitioner has not presented any evidence to overcome the strong presumption that counsel's decision not to call any of these lay witnesses was anything other than a strategic decision. *See Strickland*, 466 U.S. at 689.

As such, the Court cannot find that Petitioner has demonstrated ineffective assistance of counsel for failure to investigate mitigating evidence. The decision of the TCCA was neither contrary to, nor did it involve an unreasonable application of federal law, and Petitioner is not entitled to relief on this claim.

c. Disclosure of protected work product to the prosecution

Petitioner's next claim of ineffective assistance of counsel alleges that her trial counsel were ineffective for turning over all three volumes of Dr. McCoy's work product, without ensuring that the record reflected the possible issuance of a court order requiring disclosure and ensuring that the material turned over did not include privileged attorney work product (Doc. 19, p. 61). Petitioner argues that she was prejudiced by trial counsel's failure to protect this privileged information because the prosecution used information from Dr. McCoy's report to cross-

examine the witnesses that testified during the penalty phase of her trial (*Id*. at 62).

In considering this claim, the TCCA found that Petitioner had not carried her burden of proof establishing either deficient performance or prejudice. *Pike*, 2011 WL 1544207, at *55. Particularly, the TCCA found that the essence of Petitioner's claim was that the record did not establish that the trial court ordered trial counsel to turn over the reports to the prosecution. *Id*. However, the TCCA held that its interpretation of the facts did not support Petitioner's theory; rather, the record seemed to indicate that the trial court did in fact order disclosure. *Id*. Furthermore, the TCCA found that Petitioner failed to prove prejudice because even the trial prosecutor could not recall whether his cross-examination of Petitioner's witnesses during the penalty phase was based on evidence he obtained from Dr. McCoy's reports, or whether they were obtained independently. *Id*. Additionally, the TCCA found that Petitioner did not establish that the result of her trial would have been different absent the testimony elicited by the prosecution. *Id*.

Petitioner now argues that the TCCA's decision was unreasonable because the issue was not whether trial counsel was required to comply with the orders of the court (Doc. 46, p. 80). Rather, Petitioner contends that counsel was required to make a reasonable argument that discovery was to be conducted according to procedural rules, and further ensure that an appropriate objection was on the record and preserved for appellate review (*Id*.). According to Petitioner, under the Tennessee Rules of Evidence, Dr. McCoy's mitigation report and social history was not discoverable until and unless she

testified, and even if she did testify, only upon an order from the court after the court had reviewed the reports (*Id*. at 78).

On post-conviction, trial counsel testified that he did not recall the exact details of how Dr. McCoy's reports were turned over the to the Prosecution, but that he did remember the in-chambers conference where he turned over the reports (Addendum No. 5, Doc. 15, Vol. 4, p. 374). According to Mr. Talman, he believed that they had a discussion about whether the prosecution was entitled to the reports, and also believed that he was ordered to turn them over to the state, although he equivocated, stating that he could be wrong (*Id*. at 374–75). Lead prosecutor in Petitioner's trial, William Crabtree, also testified that he did not recall what objections may have been made during the in-chambers conference where trial counsel turned over Dr. McCoy's reports, but that he thought that the prosecution should have been entitled to them under reciprocal discovery (Addendum No. 5, Doc. 14, Vol. 3, pp. 238–40).

As previously noted, § 2254(d) is a very difficult standard to meet; the Supreme Court has found that it "stops just short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Combined with the highly deferential standard of *Strickland*, the burden is even more formidable. Based on the Court's review of the record, the Court cannot find that the TCCA's decision was an unreasonable determination of the facts. The record is certainly unclear as to what exactly happened during the in-chambers conference, and it is not within the Court's province to speculate as to what may or may not have happened. While trial

counsel testified that in retrospect he should have ensured that there was a court reporter present in chambers and that he should not have turned over the entirety of Dr. McCoy's report, *Strickland* counsels that every effort should be made to assess counsel's performance "from counsel's perspective at the time," and not in hindsight. 466 U.S. at 689. Both trial counsel and the prosecutor thought, at the time, that Dr. McCoy's reports should have been discoverable. While this belief might have been erroneous, the Court must note that "*Strickland* does not guarantee perfect representation, only a 'reasonably competent attorney.'" *Richter*, 562 U.S. at 110 (quoting *Strickland*, 466 U.S. at 687).

For these reasons, the Court finds that Petitioner is not entitled to relief on this issue because the TCCA's decision was neither an unreasonable application of federal law, nor was it an unreasonable determination of the facts in light of the record before the court.

d. Failure to present effective penalty phase arguments to the jury

Petitioner's next ineffective assistance of counsel claim alleges that trial counsel failed to present effective penalty phase arguments because counsel never argued to the jury to spare Petitioner because of her youth, nor did they discuss any of the mental health evidence presented by Dr. Engum (Doc. 46, p. 81). Petitioner also argues that counsel was ineffective for failing to mention Petitioner's mental illness or her history of abuse and neglect (*Id.*). The TCCA found that this claim had been waived because Petitioner failed to present it to the post-conviction trial court. *Pike*, 2011 WL 1544207, at *56. Petitioner

now argues that the TCCA's review of the post-conviction trial court record was erroneous because the claim that counsel was ineffective for failing to mention mental health evidence during their penalty phase closing argument was actually presented, and in the alternative, that Petitioner is entitled to review of this claim under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

Under the procedural default doctrine, a federal court cannot grant a state prisoner's petition for habeas relief unless each and every claim set forth in the habeas petition has been fairly presented to the state courts. *Satterlee v. Wolfenbarger*, 453 F.3d 362, 365 (6th Cir. 2006) (citing *Baldwin v. Reese*, 541 U.S. 27, 29 (2004)). The petitioner must present the same claim under the same theory presented to the state courts. *Wagner v. Smith*, 581 F.3d 410, 418 (6th Cir. 2009). Based on its review of the record, the Court cannot find that this claim was fairly presented to the state post-conviction trial court. While Petitioner alluded to counsel's failure to present the jury with evidence of her mental illness, the remainder of the facts asserted under this claim were not presented to the state court under the theory for which Petitioner now seeks relief. As such, the claim is procedurally defaulted.

To overcome a procedural default, a petitioner must show cause and actual prejudice to excuse the failure to present the claim in state court. *See Gray v. Netherland*, 518 U.S. 152, 162 (1996). In *Martinez*, the Supreme Court created a "narrow exception" to the general rule of *Coleman v. Thompson* that a habeas petitioner cannot use ineffective assistance of collateral review counsel as cause to excuse a procedural default. 501 U.S. 722, 756–57 (1991). The

Sixth Circuit, in *Sutton v. Carpenter*, 745 F.3d 787, 795–96 (6th Cir. 2014), held that *Martinez*, as expanded by *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013), applies in Tennessee. *Martinez* permits a petitioner to establish cause to excuse a procedural default of an ineffective assistance of trial counsel claim by showing that he received ineffective assistance by post-conviction counsel. *See Martinez v. Ryan*, 132 S. Ct. 1309, 1320 (2012). This holding, however, does not dispense with the "actual prejudice" requirement established by the Supreme Court in *Coleman*. 501 U.S. at 750. To successfully establish cause and prejudice under *Martinez*, a petitioner must show a substantial underlying claim of ineffective assistance of trial counsel. *See Trevino*, 133 S. Ct. at 1918; *Martinez*, 132 S. Ct. at 1318–19.

As part of showing a substantial claim of ineffective assistance of counsel, the petitioner must prove prejudice under *Strickland*. *See McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741, 752 (6th Cir. 2013) ("To be successful under *Trevino*, [petitioner] must show a 'substantial' claim of ineffective assistance, and this requirement applies as well to the prejudice portion of the ineffective assistance claim." (internal citations omitted)). Under *Strickland*, a petitioner can prove prejudice by showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). The "actual prejudice" requirement of *Coleman* and the prejudice requirement of *Strickland* overlap such that

> in many habeas cases seeking to overcome procedural default under *Martinez*, it will be more efficient for

> the reviewing court to consider in the first instance whether the alleged underlying ineffective assistance of counsel was "substantial" enough to satisfy the "actual prejudice" prong of *Coleman*. If not, because the "cause and prejudice" standard is conjunctive rather than disjunctive, the reviewing court would have no need consider whether the petitioner has established cause to overcome the procedural default, in the form of ineffective assistance of post-conviction counsel.

Thorne v. Hollway, No. 3:14-CV-0695, 2014 WL 4411680, at *23 (M.D. Tenn. Sept. 8, 2014)

Petitioner claims that her trial counsel was ineffective in their penalty phase arguments (Doc. 19). Petitioner points to counsel's statements during his penalty phase opening statement that

> Ms. Pike has a personality that she derives and gains her self-esteem, her self-worth from those around her. If you sentence her to life in prison I would suggest that what you do, that you turn her into just any other inmate doing a life sentence for first degree murder. If, on the other hand, by turning her into any other inmate serving a life sentence that what you take from her is her notoriety. You take her fame. She will be just another inmate serving a life sentence. And we suggest that if you impose a sentence of death, or life without the possibility of parole, you

> will thrust her into a spot light, a national spot light, and I would suggest that you consider these points.

(Addendum No. 2, Doc. 25, Vol. 25, pp. 2480–81). Petitioner argues that this argument conceded that Petitioner was deserving of the worst punishment they could imagine (Doc. 19). Even further, Petitioner argues that trial counsel failed to emphasize statutory mitigating factors like youth, and her mental illness in their argument.

Counsel's statements here, when taken in isolation, may not appear to be the most appealing arguments counsel could have made; however, these statements must be viewed in the context of counsel's entire argument. *See Moore v. Mitchell*, 708 F.3d 760, 790 (6th Cir. 2013) (citing *United States v. Lostia*, 20 F. App'x 501, 502 (6th Cir. 2001)). Based on the review of counsel's entire opening statement, as well as co-counsel's closing argument, the Court cannot find that each statement was not a part of the constitutionally protected strategy that counsel chose to adopt. Counsel alluded to the availability of statutory mitigating circumstances by reference to the state's argument that mentioned Petitioner's youth as a mitigating factor. Furthermore, co-counsel, in her closing argument, emphasized that the jury were entitled take into account everything they had heard in both the guilt phase and sentencing phase in reaching their decision to not sentence Petitioner to death (Addendum No. 2, Doc. 26, Vol. 26, p. 2564).

While Petitioner may not believe that counsel's arguments were as stirring, eloquent, or comprehensive as they could have been, the decision

on how to present the available evidence in their arguments was a matter of trial strategy which this Court will not second guess. As such, the Court finds that Petitioner's claim that counsel failed to present effective penalty phase arguments is not "substantial" for the purposes of *Martinez*.

e. Failure to conduct meaningful *voir dire* of potential jurors

Petitioner's final claim of ineffective assistance of counsel alleges that trial counsel failed to rehabilitate or object to the dismissal of potential juror Rutherford, whose *voir dire* showed that he was qualified to serve (Doc. 19). Petitioner also claims that counsel was ineffective for failing to tell potential jurors that her youth was a statutory mitigating factor, and failed to *voir dire* jurors on other prospective mitigation themes, such as mental illness and mental health experts, in order to strike jurors who could not consider certain mitigation evidence (Doc. 19). Applying the standards for jury qualification espoused by the Supreme Court in *Witherspoon v. Illinois*, 391 U.S. 510 (1968) and *Wainwright v. Witt*, 469 U.S. 412 (1985), the TCCA considered and rejected this claim.

> The Petitioner argues that [the] colloquy indicates only that "Mr. Rutherford made clear that he could consider the death penalty for a mature defendant, but that he had reservations in light of the Petitioner's youth." We disagree with Petitioner's analysis and her reliance on the statement made in *Morgan v. Illinois*. As previously stated, the Supreme Court in *Morgan* stated

that "a juror who *in no case* would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and must be removed for cause." [*Morgan v. Illinois*, 504 U.S. 719, 728 (1992)]. According to the Petitioner, that statement stands for the proposition that if a potential juror could possibly impose the death penalty in some case, just not the instant case, then he should not be stricken for cause an impartial juror. We clearly disagree with that interpretation entirely and conclude that the statement should only be taken as reiteration of the standard previously stated in *Wainwright* and *Adams* that a potential juror must have impartiality in the case he or she is presently involved in.

A reading of the colloquy which occurred with Mr. Rutherford made clear that he could not impose the death penalty under any circumstances because of the Petitioner's age in this case. As such, the statements made by Mr. Rutherford indicate that his views would prevent or substantially impair his performance of his duties as a juror in accordance with his instructions and his oath. As such, we agree that he was appropriately struck for cause, and no objection by trial counsel was warranted. While we do agree that the statements do not necessarily indicate an unconditional bias against capital

> punishment entirely, as noted, that is not the required standard.

Pike, 2011 WL 1544207, at *58. The Court agrees entirely with the TCCA's exhaustive and comprehensive review of this issue.

With respect to Petitioner's claim that trial counsel failed to question the potential jurors about any possible bias related to mental illness, psychologists, and mental health experts, the TCCA found that Petitioner failed to present any evidence that any juror harbored bias or prejudice on these grounds. *Id.* at *59. The decision by the TCCA was neither contrary to, nor did it involve an unreasonable application of, federal law. Petitioner is not entitled to relief on this claim.

B. Petitioner was deprived of the right to unconflicted counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

Petitioner's second claim for relief alleges that she was denied the right to unconflicted counsel because her trial counsel were burdened by a two conflicts—i.e., Mr. Talman's legal and ethical troubles caused by his overbilling practices, and the release of media rights that counsel procured from Petitioner authorizing counsel to use or sell Petitioner's story for pecuniary gain.

1. *Applicable Law*

As a general rule, claims of ineffective assistance of counsel under the Sixth Amendment are governed by *Strickland*, and a petitioner must prove deficient performance and prejudice in order to bring a successful claim. 466 U.S. at 687. When dealing with

ineffective assistance due to a conflict of interest, "to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 466 U.S. 335, 348 (1980). "A defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." *Id*. at 349–50. However, "until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim or ineffective assistance." *Id*. at 350. Absent this showing, the *Strickland* standard applies. *See Stewart v. Wolfenbarger*, 468 F.3d 338, 351 (6th Cir. 2006).

2. *Discussion*

Petitioner argued on state post-conviction appeal to the TCCA that her lead trial counsel was conflicted between his fear of being prosecuted by the state—which likely involved the district attorney's office prosecuting her case—and his representation of Petitioner. *Pike*, 2011 WL 1544207, at *46. Petitioner further argued that counsel's agreement to profit from Petitioner's story presented a conflict of interest because it signified that counsel was motivated by monetary gain throughout their representation of Petitioner. *Id*. at *48. The TCCA, applying the *Strickland* and *Cuyler* standards, concluded that Petitioner did not meet her burden of showing that an actual conflict of interest which adversely affected her representation existed, and that Petitioner could not prove prejudice. *Id*. at *48–49.

a. Conflict from investigation into counsel's billing practices to the Indigent Defense Fund.

Petitioner's first claim of conflict of interest arises from Mr. Talman's involvement in an overbilling investigation by the State of Tennessee. According to Petitioner, counsel still faced the possibility of ethical and criminal charges during the period in which he represented her. Petitioner points to evidence that counsel abandoned his pans to call Dr. McCoy as the sole mitigation witness at the last minute as an indication that counsel's alleged conflict adversely affected her representation. Petitioner argues, based on Dr. McCoy's testimony that counsel asked her to lie about when she turned in her mitigation reports after the prosecutor complained about receiving the large three-volume report so late in the proceeding, that counsel was operating under his fear of further angering the prosecution. Petitioner further claims that all the explanations counsel offered for his decision not to call Dr. McCoy are implausible. In dismissing this claim, the TCCA found that Petitioner failed to offer more than mere speculation as to the reason behind counsel's actions and, as such, did not meet her burden of establishing that an active conflict of interest existed.

The record indicates that between 1993 and 1994, Mr. Talman learned that the state of Tennessee Comptroller's Office was conducting an audit of the indigent defense system for lawyers that had possibly overbilled the fund (Addendum No. 5, Doc. 14, Vol. 3 p. 256). After determining that he might be one of the attorneys implicated in the investigation, Mr. Talman

self-reported to the Board of Professional Responsibility and conducted an internal audit (*Id.* at 257). Mr. Talman subsequently repaid approximately $67,000 to the indigent defense fund shortly before he was appointed as counsel in Petitioner's case (*Id.* at 259, 61). The record further indicates that the complaint from Mr. Talman's self-reporting was still pending before the Board of Professional Responsibility during the time he represented Petitioner, and was not fully resolved until the day after the Tennessee Supreme Court affirmed Petitioner's conviction and sentence, when Mr. Talman's license was suspended for eleven months and twenty-nine days (*Id.* at 263–64); *Pike*, 2011 WL 1544207, at *45. Mr. Talman testified that as far as he was concerned, the matter was closed and completed before he accepted the appointment to Petitioner's case (*Id.* at 263). According to Mr. Talman, he had begun receiving appointments in other cases and the state had resumed paying him in his other cases (*Id.*). Mr. Talman also testified that he did not believe the investigation affected his representation of Petitioner (*Id.*).

A petitioner claiming ineffective assistance of counsel due to a conflict of interest must prove that counsel was actually burdened by a conflict which adversely affected the lawyer's performance. *Cuyler*, 446 U.S. at 348. In the absence of this, the petitioner must prove deficient performance and prejudice under *Strickland*. The TCCA found that prior to Mr. Talman's appointment, the trial court inquired into the status of the investigation and learned that it had been concluded, and that Mr. Talman remained licensed and in good standing. *Pike*, 2011 WL 1544207, at *47. The TCCA also credited the post-

conviction court's finding that Mr. Talman deemed the matter concluded prior to his appointment to Petitioner's case. *Id*.

The Court cannot find that this decision was contrary to, or an unreasonable application of, federal law. Petitioner points to the prosecution's anger at receiving Dr. McCoy's mitigation reports just before the penalty phase began as causing Mr. Talman to fear further angering the prosecution or the court and placing his interest ahead of Petitioners (Doc. 19 p. 68). While it is unclear to the Court why Dr. McCoy's reports, which would arguably have been rendered unnecessary by a not-guilty verdict, would have been discoverable to the prosecution before the close of the guilt phase, the Court cannot find that the TCCA's decision that Petitioner's allegations are mere speculation was unreasonable in light of the record before it. Furthermore, Petitioner appears to argue that regardless of counsel's belief that the overbilling investigation was concluded, the truth is that there remained the possibility of criminal and ethical charges. Petitioner's burden under *Cuyler* requires a showing that counsel was burdened by an actual conflict of interest. It does not follow that Mr. Talman could have been burdened by the possibility of criminal and ethical charges if he genuinely believed that the matter had been concluded as the TCCA found.

Because Petitioner has failed to show that her trial counsel was burdened by an actual conflict of interest stemming from the State of Tennessee's investigation into his billing practices, Petitioner must prove deficient performance and prejudice under *Strickland*. *See Stewart*, 468 F.3d at 381. The Court has previously found that state court's decision

that Petitioner failed to demonstrate ineffective assistance of counsel for failure to present mitigating evidence was not unreasonable. Petitioner is not entitled to relief.

b. Conflict from counsel's procurement of a release of media rights from Petitioner

Petitioner's second claim of conflict of interest alleges that counsel was conflicted by their interest in monetary gain from selling Petitioner's story, based on the waiver releasing all media rights to her story signed by Petitioner (Doc. 19 p. 69). Petitioner argues that the adverse effect to her representation is evidenced by counsel's failure to seek a continuance of Petitioner's trial date after lead counsel had only been on the case for ten months, and co-counsel for less than two months (*Id*. at 70). Petitioner further argues that this failure to seek a continuance aligns with counsel's pecuniary interest in having a rapid trial so as to capitalize on Petitioner's story while it was still publicly relevant (*Id*. at 71). The TCCA dismissed this claim, agreeing with the state that because the release at issue was not signed until after Petitioner had been found guilty and sentenced, it was unreasonable to suggest that Petitioner had been adversely affected by the post-trial agreement. *Pike*, 2011 WL 1544207, at *49. The TCCA also found that although a conflict of interest existed during counsel's of Petitioner on appeal, Petitioner failed to show either an adverse effect or prejudice. *Id*.

Mr. Talman testified during the sate post-conviction hearing that at some point after the trial, he discussed with Petitioner's aunt, Carrie Ross, the possibility of writing a book on Petitioner's case; however, nothing was ever done about it (Addendum

No. 5, Doc. 16, Vol. 5, p. 410). According to Mr. Talman, in a follow-up from his discussion with Ms. Ross, they obtained the media release from Petitioner (*Id*. at 141). Mr. Talman testified that his intent was to show that there was a whole other side of Petitioner that people did not really get to see (*Id*. at 411). Ms. Rice also testified that the intention behind obtaining the release from Petitioner was not particularly for pecuniary gain; rather, they believed that the public aspects of Petitioner's trial could have been useful in the future as a teaching tool (Addendum No. 5, Doc. 13, Vol. 2, p. 159). Ms. Rice further testified that the purpose of the agreement was to make sure that things were clear and that Petitioner understood that if a story about the trial was eventually told, no attorney-client privileged information would be used, just public information (*Id*. at 159–60).

As previously noted, *Cuyler* requires a petitioner to show that an actual conflict of interest adversely affected his lawyer's performance. 446 U.S. at 348. The Supreme Court has held that "the mere possibility of a conflict is insufficient to impugn a criminal conviction." *Id*. at 350. Like the TCCA, the Court cannot find that Petitioner has carried her burden of proving that an actual conflict of interest affected her trial counsel's performance. As an initial matter, the TCCA's decision that it is improbable that a media release agreement signed after the completion of Petitioner's trial and sentencing could somehow have affected counsel's decisions during the trial is not an unreasonable determination of the facts. Any suggestion from Petitioner that the potential pecuniary benefit counsel could get from re-telling her story affected the adequacy of counsel's

representation is merely speculative and such a "possibility" is not sufficient to meet the constitutional standard under *Cuyler*. In the absence of proving a conflict of interest under *Culyer*, the Court also agrees with the TCCA that Petitioner cannot show prejudice to meet her burden of proving ineffective assistance of counsel under *Strickland*. Because the TCCA did not incorrectly apply federal law, nor unreasonably determine the facts from the record before it, Petitioner is not entitled to habeas relief on this claim.

C. Petitioner's attorneys were constitutionally ineffective during the guilt/innocence phase of her capital trial for failing to present evidence that Petitioner did not form the requisite *mens rea* for first-degree murder, and her rights under the Sixth, Eight, and Fourteenth Amendments to the United States Constitution were violated.

Petitioner's next claim for relief alleges that trial counsel were ineffective for failing to present an effective case to undermine the state's proof of deliberate and premediated murder. Petitioner argues that this was as a result of two fundamental errors—to wit, failure to make appropriate use of expert witnesses, and failure to discover relevant lay testimony.

1. *Applicable Law*

As previously stated, the Supreme Court has set forth the test required to bring a successful ineffective assistance of counsel claim in *Strickland v. Washington*, 466 U.S. 668 (1984). A petitioner claiming ineffective assistance of counsel under the

Sixth Amendment must show that counsel's performance was deficient, and that this deficient performance prejudiced the defense. *Id.* at 687.[3]

2. *Discussion*

Petitioner challenged her trial counsel's effectiveness during the guilt phase of her trial to the TCCA, arguing that counsel presented scant evidence of her mental state during the crime only through Dr. Engum, and that his testimony was insufficiently substantiated. According to Petitioner, had trial counsel presented lay witness testimony, as well as provided Dr. Engum with Petitioner's social history, his testimony would have carried more weight with the jury. Petitioner also argued that counsel was ineffective for presenting Dr. Bernet as a witness because his testimony offered no apparent benefit to the defense. *Pike*, 2011 WL 1544207, at *61. In dismissing this claim, the TCCA found that Petitioner failed to carry her burden of establishing entitlement to relief. *Id.* Particularly, the TCCA held that Petitioner's argument that the jury would have credited Dr. Engum's testimony if it was supported by lay testimony was mere supposition, and was "not sufficient to substantiate a claim for post-conviction relief," because Petitioner "failed to argue how any specific lay witness would have sufficiently substantiated the testimony in order to improve its weight before the jury." *Id.*

Under *Strickland*, a petitioner claiming ineffective assistance of counsel must show both deficient performance and prejudice. 466 U.S. at 687–88. "Counsel is constitutionally ineffective only if

[3] *See supra* Part III.A.1.

performance below professional standards caused the defendant to lose what he otherwise would have won." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992). To show prejudice, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Strickland*, 466 U.S. at 693 (internal citations omitted). Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 394. "A reasonable probability is something more than a 'conceivable effect' on the verdict but 'a probability to undermine confidence in the outcome.'" *Payne v. Warden, Lebanon Corr. Inst.*, 543 F. App'x 435, 489 (6th Cir. 2013) (citing *Strickland*, 466 U.S. at 693).

The TCCA held that Petitioner failed to show that she suffered prejudice because there was no evidence that supporting Dr. Engum's testimony with lay witnesses would have carried more sway with the jury. This decision is neither contrary to, nor an unreasonable application of, federal law. This is not a case where Petitioner's conviction was only weakly supported by the record; rather, in light of the compelling evidence supporting Petitioner's conviction in the record, the state court did not violate clearly established federal law in rejecting Petitioner's ineffective assistance claim for lack of prejudice. Because Petitioner has failed to show prejudice under *Strickland*, the Court need not reach the issue of deficient performance. *See Strickland*,

466 U.S. at 697 (concluding that since both the prejudice and performance prongs must be met, if a petitioner cannot satisfy one prong, the other need not be examined). Petitioner is not entitled to relief on this claim.

D. Imposition of the death penalty on Petitioner violates the Eighth Amendment to the U.S. Constitution because Petitioner is an immature, mentally ill, and brain-damaged eighteen-year old.

In her next claim for relief, Petitioner contends that *Roper v. Simmons*, 543 U.S. 551 (2005) and *Atkins v. Virginia*, 536 U.S. 304 (2002) support a categorical bar to the death penalty for immature, mentally ill, and brain-damaged eighteen year olds (Doc. 19). Petitioner argues that immature, mentally ill, and brain-damaged eighteen year olds face the same culpability limitations that the Supreme Court has found to plague minor and mentally retarded defendants and, as such, the same exemption should be extended to them.

In addressing and dismissing this claim, the TCCA engaged in an extensive examination of applicable Supreme Court precedent, including *Roper* and *Atkins*. *See Pike*, 2011 WL 1544207, at *62–68. The TCCA found that Petitioner failed to persuade the court that a new national consensus exists to extend the holding of *Roper* to persons over the age of eighteen, or that there is a consensus in state legislation supporting a categorical exclusion for the mentally ill. *Id*. at *67–68. In conclusion, the TCCA stated:

> While this court appreciates the novelty of the Petitioner's argument,

> practicality precludes its acceptance. The court can envision a multitude of specifically created exemptions based upon the unique circumstances of an individual defendant. These particular circumstances were not what was envisioned as being encompassed within a categorical bar. Rather, this specific grouping of traits is captured within the individualized sentencing mandate of the capital sentencing scheme.

Id. at *68.

As previously outlined, a federal court may not grant habeas relief under § 2254(d) unless the petitioner shows that the "state court's decision was contrary to federal law then clearly established in the holdings of [the Supreme Court]; or that it involved an unreasonable application of such law; or that it was based on an unreasonable determination of the facts in light of the record before the state court." *Harrington v. Richter*, 562 U.S. 86, 100 (2011) (internal citations and quotation marks omitted). This standard is highly deferential and difficult to meet. *Id*. at 102. Having found that the TCCA identified the proper governing Supreme Court precedent, the Court must determine whether the TCCA's decision was an unreasonable application of the law, or an unreasonable determination of the facts. The proper inquiry here is not whether the state court's decision was merely erroneous or incorrect, but whether it was "objectively unreasonable." *Lordi v. Ishee*, 384 F.3d 189, 195 (6th Cir. 2004) (citing *Middleton v. McNeil*, 541 U.S. 433 (2004)).

While a state court's unreasonable refusal to extend a legal principle from Supreme Court precedent to a new context may be considered an unreasonable application of § 2254(d), *see Williams v. Taylor*, 529 U.S. 3632, 407 (2000), that is not the case here. The TCCA engaged in a thorough analysis of the law and the facts in the record before it. Its decision was neither an unreasonable application of the law, nor was it an unreasonable determination of the facts. Petitioner is, therefore, not entitled to relief on this claim.

E. Trial court's dismissal of a qualified juror denied Petitioner of her right to trial by a fair jury.

Petitioner's next claim alleges that her right to a fair jury was violated because the trial court dismissed potential juror Rutherford for cause even though he was qualified to serve (Doc. 19). Petitioner's claim here is based on the same facts under which she alleged ineffective assistance of counsel for trial counsel's failure to object to Juror Rutherford's dismissal. According to Petitioner, Juror Rutherford never said that he would be unable to follow instructions and conscientiously follow the law, and that the trial court never told Juror Rutherford that Petitioner's youth was a statutory mitigating factor (*Id.*). Furthermore, Petitioner argues that Juror Rutherford's hesitation to impose the death penalty here was constitutionally permissible because he could accord as much weight as he desired to Petitioner's age and immaturity as mitigating factors (*Id.*).

The TCCA addressed this claim together with Petitioner's claim for ineffective assistance of counsel

for failure to conduct a meaningful *voir dire* of potential jurors. Analyzing *Witherspoon* and *Wainwright*, the TCCA found that Juror Rutherford was properly excused for cause. In *Witherspoon v. Illinois*, the Supreme Court held that a state cannot strike a potential juror merely because that juror has a conscientious or religious opposition to capital punishment, or all who opposed it on principle, if that juror could, nevertheless, consider the punishment. 391 U.S. 510, 520–23 (1968). In *Wainwright v. Witt*, the Court clarified its holding in *Witherspoon*, and stated that the "standard is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." 469 U.S. 412, 424 (1985) (internal quotation marks omitted). The Court further stated that "the quest is for jurors who will conscientiously apply the law and find the facts. That is what an 'impartial' jury consists of, and we do not think, simply because a defendant is being trying for a capital crime, that he is entitled to a legal presumption or standard that allows juror to be seated who quite likely will be biased in his favor." *Id*. at 423.

During the *voir dire* of Juror Rutherford, the trial court explained to him that he would be instructed as to the factors he may consider, which may include age, and that he would be instructed on the mitigating and aggravating circumstances (Addendum No. 2, Doc. 16, Vol. 16, p. 1511). The court then asked him if the one issue of Petitioner's age would keep him from following the court's instructions (*Id*.). In follow up, the state asked if he absolutely could not return a sentence of death solely because of Petitioner's age, and he answered that he

did not think he could (*Id.* at 1512). In an attempt to clarify his stance, Petitioner's trial counsel asked juror Rutherford if regardless of any aggravating circumstance that was proven in this case, he would still not be able to vote for the death penalty (*Id.* at 1514). Juror Rutherford answered that he did not think he could (*Id.*).

Based on the standard set forth in *Wainwright*, the TCCA did not unreasonably determine the facts based on the record before it. While Juror Rutherford did not express a hesitation to impose the death penalty in every single case, he implied on more than one occasion that he could not follow the court's instructions to weigh the aggravating circumstances against the mitigating circumstances to reach a decision on the applicability of the death penalty in this case. In certain cases, "it does not make sense to require simply that a juror not 'automatically' vote against the death penalty; whether or not a venireman *might* vote for death under certain *personal* standards, the State still may properly challenge that venireman if he refuses to follow the statutory scheme." *Wainwright*, 469 U.S. at 422. As the Court previously found with respect to Petitioner's ineffective assistance of counsel claim, the TCCA's decision was not an unreasonable application of clearly established law; therefore, Petitioner is not entitled to relief on this claim.

F. Appointment of counsel with active conflict of interest known to trial court violated Petitioner's Sixth Amendment right to counsel.

Next, Petitioner alleges that the state court's appointment of Mr. Talman, knowing that he had a

high risk of a conflict of interest, constitutes a structural error and requires that her conviction and sentence be set aside (Doc. 19 p. 84). Petitioner appears to argue that the TCCA, by finding that no conflict of interest existed because of Petitioner's failure to show prejudice, failed to address the structural nature of the claim (*Id*. at 85). Petitioner further argues that although this claim has not been procedurally defaulted, there is no state court decision to defer to, and the Court must address it *de novo* (*Id*.).

Petitioner is correct that where a petitioner has demonstrated that an actual conflict of interest exists, that petitioner need not demonstrate prejudice because the conflict itself demonstrates a denial of the right to have ineffective assistance of counsel. *Glasser v. United States*, 315 U.S. 60, 72 (1942). However, Petitioner incorrectly states that the TCCA dismissed her claim based solely on her failure to show prejudice. In its opinion, the TCCA clearly credited the post-conviction court's finding that the proof did not establish an actual conflict of interest which adversely affected lead counsel's performance. *Pike*, 2011 WL 1544207, at *47. The TCCA went on to state that "Petitioner offers only speculation as the reason for 'counsel's penalty phase collapse.' This speculation as to what might have been the reason for the decisions made is not sufficient [to] meet her burden of establishing that a conflict excused." *Id*. at *48. It is clear from the TCCA's opinion that it directly addressed the merits of Petitioner's structural claim by finding that no actual conflict of interest existed.

As the Court has previously found, this decision is not contrary to or an unreasonable application of

clearly established federal law, and was reasonably supported by the evidence presented to the state court. Petitioner is not entitled to habeas relief on this claim.

G. Allowing television and photographic coverage of the pretrial proceedings violated Petitioner's rights to due process under the Fourteenth Amendment to the U.S. Constitution.

Petitioner next argues that her due process rights were violated because the trial court allowed television and photographic coverage of the pretrial proceedings in her case (Doc. 19). According to Petitioner, this extensive pretrial publicity, which continued throughout the trial, made jury selection extremely difficult and resulted in a jury panel that was already familiar with the facts of the case as reported by the media (*Id.*). Petitioner presented this claim to the TCCA and the TSC on direct appeal.

Petitioner now argues that the TSC failed to engage in a fact-specific analysis of the effect of continuing media coverage in her trial, and that to the extent that it did, its analysis was unreasonable (*Id.*). The TSC found that Petitioner failed to point to any portion of the record or offer specific evidence indicating how witness testimony was affected or the proceedings disrupted, that Petitioner did not explain how media coverage of the crime would have been less intense had cameras been excluded from the courtroom, and that there was generally no indication from the transcripts that the media coverage itself was disruptive or that any disruptive events occurred during the proceedings. *Pike*, 978 S.W.2d at 917. Citing to *Chandler v. Florida*, 449 U.S. 560, 581–82

(1981), the TSC concluded that Petitioner failed to show either that the media coverage of the pretrial and trial proceedings impaired the jurors' ability to decide the case on the evidence alone, or adversely impacted one or more of the trial participants. *Pike*, 978 S.W.2d at 917.

In *Chandler*, the Supreme Court refused to promulgate a *per se* constitutional ban on photographic or broadcast coverage of criminal trials, finding that "[a]n absolute ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matter." 449 U.S. at 575. Rather, the Court held that a defendant must show that media coverage compromised the ability of the jury to judge him fairly, or in the alternative, that the "broadcast coverage of his particular case had an adverse impact on the trial participants sufficient to constitute a denial of due process." *Id*. at 581.

As the state court noted, Petitioner has not pointed to any evidence that leads the Court to infer that the media coverage had an adverse impact on her trial. "To demonstrate prejudice in a specific case, a defendant must show something more than juror awareness that the trial is such as to attract the attention of broadcasters." *Id*. Petitioner has not done so here. Petitioner further argues that the state court's reliance on *Chandler* is misguided because the Supreme Court limited its holding in that case to the authority of the Florida Supreme Court to promulgate the rule allowing media coverage of judicial proceedings, and did not examine the

application of such a rule to specific facts (Doc. 19). While the Supreme Court noted its limitation with exercising supervisory jurisdiction over state courts, *Chandler*, 449 U.S. at 570, the Court did not limit its holding to the extent Petitioner contends it did. Rather, the Court set out the standard for determining whether a petitioner has shown prejudice from media presence during pretrial and trial proceedings, which the state court correctly applied in Petitioner's case. The TSC decision was not an unreasonable application of clearly established federal law; as such, Petitioner is not entitled to relief on this claim.

H. Trial court's denial of Petitioner's motion for a change of venue denied Petitioner of her right to a fair and impartial jury.

Petitioner's eighth ground for habeas relief asserts that the trial court erred by failing to grant her motion for a change of venue (Doc. 19). Petitioner argues that the extensive pretrial publicity generated in her case exposed an overwhelming majority of the prospective jurors to detailed information about the case, and that *voir dire* indicated that many of the jurors remembered specific details (*Id.*). Petitioner presented this claim on direct appeal to the TCCA and TSC. Although the TSC did not specifically address the claim, it expressly adopted the findings of the TCCA. *Pike*, 978 S.W.2d at 923. The TCCA, citing to *Irwin v. Dowd*, 366 U.S. 717 (1961), found that every juror who admitted to familiarity with the case said that he or she could disregard the reports and make an impartial decision. *Pike*, 978 S.W.2d at 924. The TCCA also found that Petitioner had failed to cite any specific response from any seated juror that was troublesome. *Id.*

The decision of the state court was neither contrary to, nor did it involve an unreasonable application of, federal law. In *Irwin*, the Supreme Court found that because of the "pattern of deep and bitter prejudice shown to be present throughout the community," very little weight could be given to each juror's declaration to remain impartial. *Irwin*, 366 U.S. at 727–28. Regardless, the Court acknowledged that in general,

> [i]t is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irwin, 366 U.S. at 722.

The TCCA found that all potential jurors who said they could not disregard the reports were excused for cause. The Court cannot find that this decision was

an unreasonable determination of the facts based on the record before the TCCA. While Petitioner alleges that several potential jurors remembered specific facts about her case, she has not shown the "actual existence of such an opinion in the mind of [a] juror as will raise the presumption of partiality." *Id*. at 723. As such, Petitioner is not entitled to relief on this claim.

I. The new law concerning the number of peremptory challenges awarded to the State constituted an *ex post facto* change in violation of Petitioner's right to a fair and impartial jury.

Petitioner next argues that her right to an impartial jury was violated because the trial court applied a new law that gave the prosecution the same number of peremptory challenges as the defense. According to Petitioner, because this law was not in effect at the time the crime was committed, its application to her case constituted an *ex post facto* violation. The TCCA addressed this claim on direct appeal and found that there was no *ex post facto* violation, because the law was a procedural change and did not affect Petitioner's substantial rights.

In *Dobbert v. Florida*, the Supreme Court held that "[e]ven though it may work to the disadvantage of a defendant, a procedural change is not ex post facto." 432 U.S. 282, 293 (1977); *see also Miller v. Florida*, 482 U.S. 423, 433 (1987), *abrogated on other grounds by Peugh v. United States*, 133 S. Ct. 2072 (2013) ("[N]o *ex post facto* violation occurs if the change in the law is merely procedural and does not increase the punishment, nor change the ingredients of the offence or the ultimate facts necessary to

establish guilt."). Applying *Dobbert*, the TCCA found that the trial court merely applied a procedural rule that had been amended after the commission of the crimes in question. *Pike*, 378 S.W.2d at 926.

The law giving the prosecution the same number of peremptory strikes as the defense was a procedural rule that merely implicated the number of jurors the prosecution could strike without cause. The law did not effect a change in the quantum of punishment attached to Petitioner's crime. The Court finds that the TCCA's decision denying this claim was neither contrary to, nor was it an unreasonable application of clearly established law.

J. The Tennessee death penalty scheme violates the Eighth Amendment to the United States Constitution.

1. *Tennessee's death penalty scheme fails to meaningfully narrow the class of death eligible defendants.*

2. *The death penalty is imposed capriciously and arbitrarily under the Tennessee statute*

3. *Execution by Tennessee's protocol for lethal injection would violate Petitioner's rights under the Eighth and Fourteenth Amendments*

4. *The death sentence is unconstitutional because it infringes on Petitioner's fundamental right to life, and imposition of the death penalty is not necessary to promote any compelling state interest.*

5. *The indictment returned by the Grand Jury was unconstitutional*

Petitioner contends that Tennessee's death penalty scheme is unconstitutional for the foregoing

reasons. However, she has failed to cite any authority holding the Tennessee Death Penalty Act unconstitutional and the Court notes that the Sixth Circuit has held that Tennessee's death penalty statute is constitutional. *Workman v. Bell*, 178 F.3d 759, 778 (6th Cir. 1998); *see also Blystone v. Pennsylvania*, 494 U.S. 299, 305 (1990) (holding that the Eighth Amendment is satisfied by a scheme that mandates a death penalty if a jury finds one aggravating circumstance and no mitigating ones or none that outweigh it).

The TCCA rejected Petitioner's allegations that the death penalty scheme is unconstitutional, finding that the TSC has repeatedly upheld Tennessee's proportionality review as meeting constitutional standards, that Tennessee's lethal injection protocol is consistent with contemporary standards of decency, and that the United States Constitution does not require the state to charge aggravating factors to be relied upon in the indictment. *Pike*, 2011 WL 1544207, at * 69–70. This decision is not contrary to clearly established law; Petitioner is not entitled to relief on this claim.

K. The cumulative effect of all the errors which occurred during Petitioner's trial constituted a denial of her due process rights.

Petitioner's final claim alleges that the cumulative effect of the errors that occurred during her trial demonstrates a fundamental denial of due process of law. This claim lacks merit.

The Supreme Court has not held that a district court may look to the cumulative effects of trial courts in deciding whether to grant habeas corpus

relief. *See Williams v. Anderson*, 460 F.3d 789, 816 (6th Cir. 2006) ("[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. No matter how misguided this case law may be it binds us."); *Moore v. Parker*, 425 F.3d 250, 256 (6th Cir. 2005) ("[W]e have held that, post-AEDPA, not even constitutional errors that would not individually support habeas relief can be cumulated to support habeas relief."); *Scott v. Elo*, 302 F.3d 598, 607 (6th Cir. 2002) ("The Supreme Court has not held that constitutional claims that would not individually support habeas relief may be cumulated in order to support relief."); *Lorraine v. Coyle*, 291 F.3d 416, 447 (6th Cir. 2002) ("The Supreme Court has not held that distinct constitutional claims can be cumulated to grant habeas relief."). As such, Petitioner is not entitled to relief on this claim.

V. CONCLUSION

For the reasons stated above, the Court finds that Petitioner is not entitled to relief under 28 U.S.C. § 2254 and her motion for partial summary judgment (Doc. 45) will be **DENIED**. Respondent's motion for summary judgment (Doc. 42) will be **GRANTED**, and the petition for a writ of habeas corpus (Doc. 19) will be **DENIED**.

VI. CERTIFICATE OF APPEALABILITY

The Court must consider whether to issue a Certificate of Appealability ("COA"), should Petitioner file a notice of appeal. Under 28 U.S.C. § 2253(a) and (c), a petitioner may appeal a final order in a habeas proceeding only if he is issued a COA, and a COA may only be issued where a petitioner has made a showing of the denial of a constitutional

right. *See* 28 U.S.C. § 2253(c)(2). Where a claim has been dismissed on the merits, a substantial showing is made if reasonable jurists could conclude that the issues raised are adequate to deserve further review. *See Miller-El v. Cockrell*, 537 U.S. 322, 327, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a claim has been dismissed on procedural grounds, a substantial showing is demonstrated when it is shown that reasonable jurists would debate whether a valid claim has been stated and whether the court's procedural ruling is correct. *Slack*, 529 U.S. at 484.

After reviewing each of Petitioner's claims, the Court finds that reasonable jurists could not conclude that Petitioner's claims are adequate to deserve further review, nor would reasonable jurists debate the correctness of the Court's procedural ruling. As such, because Petitioner has failed to make a substantial showing of the denial of a constitutional right, a COA will not issue.

A SEPARATE JUDGMENT ORDER WILL ISSUE.

APPENDIX C

SUPREME COURT OF TENNESSEE

SUPREME COURT DISCRETIONARY APPEALS

Grants & Denials List

Monday, November 21, 2011

* * *

DENIALS

Style/ Appeal Number	County Trial Judge Trial Court No.	Appellate Judge Judgment	Nature of Appeal	Action

* * *

Christa Gail Pike v. State of Tennessee E2009-00016-SC-R11-PD	Knox County Criminal Court Judge Mary Beth Leibowitz No. 68280	Williams, J., Affirmed	Rule 11	**Denied** - Application of Christa Gail Pike **(Order filed 11-15-2011)**

* * *

APPENDIX D

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT KNOXVILLE
(HEARD AT JACKSON)

No: E2009–00016–CCA–R3–PD

CHRISTA GAIL PIKE,

v.

STATE OF TENNESSEE.

April 25, 2011

Application for Permission to Appeal Denied by Supreme Court

November 15, 2011.

Direct Appeal from the Criminal Court for Knox County, No. 68280 Mary; Beth Leibowitz, Judge.

JOHN EVERETT WILLIAMS, delivered the opinion of the Court, in which NORMA McGEE OGLE and ALAN E. GLENN, JJ., joined.

OPINION

JOHN EVERETT WILLIAMS

The Petitioner, Christa Gail Pike, appeals as of right the judgment of the Knox County Criminal Court denying her petition for post-conviction relief. A Knox County jury found the Petitioner guilty of premeditated first degree murder and conspiracy to commit first degree murder. The jury further found two statutory aggravating circumstances: (1) "[t]he murder was especially heinous, atrocious or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death"; and (2) "[t]he murder was committed for the purpose of avoiding, interfering with or preventing a lawful

arrest or prosecution of the defendant or another." T.C.A. § 39–13–204(i)(5), (6) (2006). The jury further found that these two aggravating circumstances outweighed mitigating circumstances beyond a reasonable doubt. The jury then sentenced the Petitioner to death. The Petitioner's conviction and sentence were affirmed on direct appeal by the Tennessee Supreme Court. *State v. Pike,* 978 S.W.2d 904 (Tenn.1998), *cert. denied,* 526 U.S. 1147, 119 S.Ct. 2025, 143 L.Ed.2d 1036 (1999). On June 3, 1999, the Petitioner timely filed a *pro se* petition for post-conviction relief. In 2001, the Petitioner advised the trial court that she desired to withdraw her post-conviction petition. In 2002, the lower court dismissed the petition for post-conviction relief. The Petitioner then sought to reinstate her post-conviction petition. Litigation ensued, after which the Tennessee Supreme Court ultimately determined that the motion to vacate the dismissal order should be granted and remanded the matter to the lower court to reinstate the Petitioner's post-conviction petition. *Pike v. State,* 164 S.W.3d 257 (Tenn.2005). Evidentiary hearings were conducted in January 2007, July 2007, and August 2008. On December 10, 2008, the post-conviction court entered an order denying the Petitioner post-conviction relief. On appeal to this court, the Petitioner presents a number of claims that can be characterized in the following categories: (1) the post-conviction court should have recused itself; (2) the Petitioner's trial and appellate counsel were ineffective; (3) the Petitioner is ineligible for the death penalty; and (4) the death penalty is unconstitutional. Following a thorough review of the record and the applicable law, we affirm the judgment of the post-conviction court.

Facts Underlying the Petitioner's Convictions

The following facts are excerpted from our supreme court's opinion affirming the Petitioner's conviction and sentence:

> The proof presented by the State at the guilt phase of the trial established that on January 11, 1995, the [Petitioner], Christa Gail Pike, a student at the Job Corps Center in Knoxville, told her friend Kim Iloilo, who was also a student at the facility, that she intended to kill another student, Colleen Slemmer, because she "had just felt mean that day." The next day, January 12, 1995, at approximately 8:00 p.m., Iloilo observed [the Petitioner], along with Slemmer, and two other Job Corps students, Shadolla Peterson and Tadaryl Shipp, [the Petitioner's] boyfriend, walking away from the Job Corps center toward 17th Street. At approximately 10:15 p.m ., Iloilo observed [the Petitioner], Peterson, and Shipp return to the Center. Slemmer was not with them.
>
> Later that night, [the Petitioner] went to Iloilo's room and told Iloilo that she had just killed Slemmer and that she had brought back a piece of the victim's skull as a souvenir. [The Petitioner] showed Iloilo the piece of skull and told her that she had cut the victim's throat six times, beaten her, and thrown asphalt at the victim's head. [The Petitioner] told Iloilo that the victim

had begged "them" to stop cutting and beating her, but [the Petitioner] did not stop because the victim continued to talk. [The Petitioner] told Iloilo that she had thrown a large piece of asphalt at the victim's head, and when it broke into smaller pieces, she had thrown those at the victim as well. [The Petitioner] told Iloilo that a meat cleaver had been used to cut the victim's back and a box cutter had been used to cut her throat. Finally, [the Petitioner] said that a pentagram had been carved onto the victim's forehead and chest. Iloilo said that [the Petitioner] was dancing in a circle, smiling, and singing "la, la, la" while she related these details about the murder. When Iloilo saw [the Petitioner] at breakfast the next morning, she asked [the Petitioner] what she had done with the piece of the victim's skull. [The Petitioner] replied that it was in her pocket and then said, "And, yes, I'm eating breakfast with it."

During a class later that morning, [the Petitioner] made a similar statement to Stephanie Wilson, another Job Corps student. [The Petitioner] pointed to brown spots on her shoes and said, "that ain't mud on my shoes, that's blood." [The Petitioner] then pulled a napkin from her pocket and showed Wilson a piece of bone which [the Petitioner] said was a piece of Slemmer's skull. [The Petitioner] also told Wilson that she had slashed Slemmer's throat six times and

had beaten Slemmer in the head with a rock. [The Petitioner] told Wilson that the victim's blood and brains had been pouring out and that she had picked up the piece of skull when she left the scene.

Though neither Iloilo nor Wilson immediately reported [the Petitioner's] statements to police, on the day after the murder, January 13, at approximately 8:05 a.m., an employee of the University of Tennessee Grounds Department, discovered Slemmer's semi-nude, slashed, and badly beaten body near the greenhouses on the agricultural campus. He testified that the body was so badly beaten that he had first mistaken it for the corpse of an animal. Upon closer inspection, he saw the victim's clothes and her nude breast and realized it was the body of a human female. He immediately notified law enforcement officials.

Officers from the Knoxville Police Department and the U.T. Police Department were summoned to the scene. Officer John Terry Johnson testified at trial that the body he found was lying on debris and was nude from the waist up. Blood and dirt covered the body and remaining clothing. The victim's head had been bludgeoned. Multiple cuts and slashes appeared on her torso. Officer Johnson stated that he thought he was looking at the victim's face but he could not be sure because it

was extremely mutilated. Johnson removed all civilians from the area and secured the scene surrounding the body.

As other officers arrived, they began securing the crime area. As officers discovered other areas of blood, articles of clothing, footprints, and broken foliage, the crime scene tripled in size, eventually encompassing an area 100 feet long by 60 feet wide. The crime scene was wet and muddy, and there was evidence of a scuffle, with trampled bushes, hand and knee prints in the mud, and drag marks. A large pool of blood was found about 30 feet from the victim's body.

The victim's body was actually lying face down on a pile of debris. When officers turned the body over, they discovered that the victim's throat had been slashed. A bloody rag was around her neck. Detective Donald R. Cook, of the U.T. Police Department, accompanied the body to the morgue. He observed the body after it had been cleaned and noticed that a five pointed star in a circle, commonly known as a pentagram, had been carved onto the victim's chest.

Randy York, a criminal investigator with the Knoxville Police Department, began investigating this case on January 13, the day the victim's body was discovered. York separately interviewed the defendant and Shipp at the Knoxville Police Department on

January 14th. Investigator York advised [the Petitioner] of her *Miranda* rights, but she chose to waive them and make a statement. [The Petitioner] explained in detail how the killing had occurred. [The Petitioner's] statement was tape-recorded and transcribed in some forty-six pages. Copies of the transcription were given to the jury, and the jurors were allowed to listen to the tape through individual headphones.

In her statement, [the Petitioner] said that she and Slemmer had been having problems for some time. [The Petitioner] claimed to have awakened one night to find Slemmer standing over her with a box cutter. [The Petitioner] told Investigator York that Slemmer had been "trying to get [her] boyfriend" and had been "running her mouth" everywhere. [The Petitioner] said that Slemmer had deliberately provoked her because Slemmer realized that [the Petitioner] would be terminated from the Job Corps program the next time she became involved in a fight or similar incident.

[The Petitioner] claimed that she had not planned to kill Slemmer, but she had instead planned only to fight Slemmer and let her know "to leave me the hell alone." However, [the Petitioner] admitted that she had taken a box cutter and a miniature meat cleaver with her when she and the victim left the Job Corps Center. [The

Petitioner] said she had borrowed the miniature meat cleaver, but refused to identify the person who had loaned it to her.

According to [the Petitioner], she asked Slemmer to accompany her to the Blockbuster Music Store, and as they were walking, [the Petitioner] told Slemmer that she had a bag of "weed" hidden in Tyson Park. Though [the Petitioner] refused to name the other parties involved in the incident, she said the group began walking toward the U.T. campus. Upon arriving at the steam plant on U.T.'s agricultural campus, [the Petitioner] and Slemmer exchanged words. [The Petitioner] then began hitting Slemmer and banging Slemmer's head on her knee. [The Petitioner] threw Slemmer to the ground and kicked her repeatedly. According to [the Petitioner], as she slammed Slemmer's head against the concrete, Slemmer repeatedly asked, "Why are you doing this to me?" When Slemmer threatened to report [the Petitioner] so she would be terminated from the Job Corps program, [the Petitioner] again repeatedly kicked Slemmer in the face and side. Slemmer lay on the ground and cried for a time and then tried to run away, but another person with [the Petitioner] caught Slemmer and pushed her to the ground.

[The Petitioner] and the other person, who [the Petitioner] referred to as "he,"

held Slemmer down until she stopped struggling, then dragged her to another area where [the Petitioner] cut Slemmer's stomach with the box cutter. As Slemmer "screamed and screamed," [the Petitioner] recounted how she began to hear voices telling her that she had to do something to prevent Slemmer from telling on her and sending her to prison for attempted murder.

At this point [the Petitioner] said she was just looking at Slemmer and "just watching her bleed." When Slemmer rolled over, stood up and tried to run away again, [the Petitioner] cut Slemmer's back, "the big long cut on her back." [The Petitioner] said Slemmer repeatedly tried to get up and run. [The Petitioner] recounted how Slemmer bargained for her life, begging [the Petitioner] to talk to her and telling [the Petitioner] that if she would just let her go, she would walk back to her home in Florida without returning to the Job Corps facility for her belongings. [The Petitioner] told Slemmer to "shut up" because it "was harder to hurt somebody when they're talking to you." [The Petitioner] said the more Slemmer talked, the more she kicked Slemmer in the face.

Slemmer asked [the Petitioner] what she was going to do to her, at which point [the Petitioner] thought she heard a noise. [The Petitioner] left the scene to

check out the surrounding area to make sure no one was around. When she returned, [the Petitioner] began cutting Slemmer across the throat. When Slemmer continued to talk and beg for her life, [the Petitioner] cut Slemmer's throat several other times. [The Petitioner] said that Slemmer continued to talk and tried to sit up even though her throat had been cut several times, and that [the Petitioner] and the other person would push her back on the ground.

Slemmer attempted to run away again, and [the Petitioner] threw a rock which hit Slemmer in the back of the head. [The Petitioner] stated that "the other person" also hit Slemmer in the head with a rock. When Slemmer fell to the ground, [the Petitioner] continued to hit her. Eventually [the Petitioner] said she could hear Slemmer "breathing blood in and out," and she could see Slemmer "jerking," but [the Petitioner] "kept hitting her and hitting her and hitting her." [The Petitioner] eventually asked Slemmer, "Colleen, do you know who's doing this to you?" Slemmer's only response was groaning noises. At this point, [the Petitioner] said she and the other person each grabbed one of Slemmer's feet and dragged her to an area near some trees, leaving her body on a pile of dirt and debris. They left Slemmer's clothing in the surrounding bushes. [The Petitioner] said the

episode lasted "for about thirty minutes to an hour." [The Petitioner] admitted that she and the other person had forced the victim to remove her blouse and bra during the incident to keep Slemmer from running away. [The Petitioner] also admitted that she had removed a rag from her hair and tied it around Slemmer's mouth at one point to prevent Slemmer from talking. [The Petitioner] denied carving a pentagram in the victim's chest but said that the other person had cut the victim on her chest.

After disposing of Slemmer's body, [the Petitioner] and the other person washed their hands and shoes in a mud puddle. They discarded the box cutter, and [the Petitioner] returned the miniature meat cleaver to the person at Job Corps from whom she had borrowed it. [The Petitioner] never identified that individual. [The Petitioner] told Investigator York that the bloodstained jeans she had worn during the incident were still in her room. She said they were covered in mud because she had rubbed the mud from the bottom of her shoes onto the jeans to conceal the blood. [The Petitioner] also admitted to Investigator York that she had discarded two forms of identification belonging to the victim and the victim's black gloves in a trash can at a Texaco station on Cumberland Avenue. [The Petitioner] gave Investigator York

consent to search her room and then accompanied him to the Job Corps Center. From there [the Petitioner] retraced her steps, describing what had occurred on the night of the killing. Investigator York testified that [the Petitioner] eventually directed him to the exact location where the victim's body was found.

After [the Petitioner's] statement was played for the jury, the State introduced pictures of [the Petitioner] and Shipp taken at the Knoxville Police Department on the day the statement was given, January 14, 1995, two days after the murder. In the pictures, both [the Petitioner] and Shipp were wearing pentagram necklaces.

Mark A. Waggoner, an officer with the Knoxville Police Department, testified that he had retrieved a pair of black gloves and two of Slemmer's I.D. cards from the Texaco station on Cumberland Avenue. These items were also made exhibits. Another officer, Lanny Janeway, used a chart to illustrate each of the locations where blood or evidence was found. Photographs of bloody chunks of asphalt, blood drippings on leaves, and pools of blood were introduced into evidence. The bloody piece of asphalt and the victim's bloody clothing were also introduced into evidence.

Special Agent Raymond A. DePriest, a forensic scientist employed by the

Tennessee Bureau of Investigation, testified that he had received blood samples taken from the shoes and clothing of [the Petitioner] and Shipp. Those items that he determined had human blood on them were sent to the DNA unit. Margaret Bush, an employee of the Tennessee Bureau of Investigation assigned to the DNA unit, testified that she had been unable to perform a DNA analysis on the blood taken from the shoes of [the Petitioner] and Shipp, but she had determined that the blood samples taken from the clothing of both [the Petitioner] and Shipp matched the DNA profile of the victim.

Dr. Sandra Elkins, the Knox County Medical Examiner, performed the autopsy on the victim, who was later identified by dental records as Colleen Slemmer, a nineteen-year-old Job Corps student. Dr. Elkins described the victim's body as covered with dirt and twigs. Slemmer was nude from the waist up [and] clothed only with jeans, socks, and shoes. After removing the victim's clothing and cleaning the body, Dr. Elkins had attempted to catalog the slash and stab wounds on the victim's torso by assigning a letter of the alphabet. There were so many wounds that eventually Dr. Elkins decided to catalog only the most serious and major wounds. Dr. Elkins explained that to catalog every wound she would have

been required to go through the alphabet again, and stay in the morgue for "three days." Eventually, Dr. Elkins said she "basically threw up [her] hands and just said, enumerable [sic] more superficial slash wounds on the back, arms and chest." In addition, Dr. Elkins said the victim had purple contusions on her knees, indicating fresh bruising consistent with crawling, and defensive wounds on her right arm.

Dr. Elkins described the major slash and stab wounds she had cataloged on the victim's back, arms, abdomen, and chest. She found a six-inch gaping wound across the middle of the victim's neck which had penetrated the fat and muscles of the neck. In addition, Dr. Elkins had found ten other slash wounds on the victim's throat. Other slash wounds were on the victim's face, and Dr. Elkins observed what appeared to be a pentagram carved onto the victim's chest. Because the area around each wound was red in appearance, Dr. Elkins concluded that the victim's heart had been beating when the wounds were inflicted, and she said the victim would not have been rendered unconscious by any of the stab or slash wounds.

Dr. Elkins determined that the victim's death was caused by blunt force injuries to the head. The victim had suffered multiple and extensive skull fractures. From the autopsy, Dr. Elkins

determined that the victim had sustained a minimum of four blows to her head; two to the left side of the head, one over the right eye, and one in the nose area. The right frontal area of the victim's skull had been fractured as had the bridge of her nose. However, the major wound, labeled as injury "W", involved most of the left side of the victim's head. Dr. Elkins said that this injury, caused by blunt force to the left side of the victim's head while the right side of the victim's head was against a firm surface, also had fractured the right side of the skull and imbedded a portion of the skull into the victim's brain. Dr. Elkins found small divots in the victim's skull containing black particles from an asphalt chunk which was later determined to have been used to administer the blows. Finally, Dr. Elkins testified that blood in the victim's sinus cavity indicated she had been alive and probably conscious when the injuries were inflicted.

During her testimony, Dr. Elkins utilized the victim's skull to describe the injuries. She testified that in order to determine the cause of death, it was necessary to remove the head of the victim and have the skull prepared by Dr. Murray Marks, a forensic anthropologist at the University of Tennessee. She explained that she had removed the top of the victim's skull in order to remove the brain. Embedded

inside the victim's brain as a result of the blunt force were portions of the victim's skull. Dr. Elkins removed those embedded pieces and forwarded them to Dr. Marks. Dr. Marks reconstructed the skull, fitting those loose portions into the left side area of the skull. However, those pieces had not completely filled one area on the left side of the victim's skull. Dr. Elkins then showed the jury a piece of skull that had been given to her shortly before the trial and demonstrated that it fit perfectly into the remaining area of the victim's skull. The piece of skull utilized by Dr. Elkins had been taken from the pocket of a jacket which witnesses identified as belonging to [the Petitioner].

[The Petitioner's] jacket had been turned over to law enforcement officials by Job Corps employees. Robert A. Pollock, orientation specialist at Knoxville Job Corps, testified that he had spoken with [the Petitioner] on January 13, 1995, concerning a misplaced I.D. card. After [the Petitioner] left his office, Pollock noticed a black leather jacket hanging on the chair where she had sat. The jacket had been hanging on the chair when Pollock locked the room at approximately 4:00 p.m. on January 13th, and it was still there when he returned at 7:30 a.m. on January 17th. Because he had heard over the weekend that [the Petitioner] was a suspect in this murder

investigation, Pollock immediately turned the jacket over to the Job Corps' Safety and Security Captain, William Hudson. Hudson called the Knoxville Police Department and turned the jacket over to Officer Arthur Bohanan when he arrived a short time later.

Officer Bohanan identified the jacket, and it was introduced into evidence. He testified that he had discovered a small piece of bone in the inside pocket of the jacket and had immediately taken it to Dr. Marks at the University of Tennessee. Dr. Marks testified concerning the process by which the victim's skull had been prepared and again demonstrated that the bone fragment given to him by Officer Bohanan fit perfectly into the bone reconstruction of the skull of the victim.

Following the introduction into evidence of the victim's skull, numerous photographs, and items of the victim's clothing, the State rested its case-in-chief.

Dr. Eric Engum, a clinical psychologist, testified for the defense and stated that he had conducted a clinical interview and had administered a battery of tests to the [Petitioner]. Dr. Engum described [the Petitioner] as an "extremely bright young woman." Dr. Engum explained that [the Petitioner] "is excellent in problem solving, reasoning, analysis, ah, can pay attention, sustains concentration, can sequence, ah, has

excellent receptive and expressive language skills." [The Petitioner] had a full scale IQ score of 111 which is in the 77th percentile and which was characterized as "remarkable" by Dr. Engum since she had only completed the ninth grade. According to Dr. Engum, the tests unequivocally showed that [the Petitioner] had no symptoms of brain damage and that she was not insane. However, Dr. Engum concluded that the [Petitioner] suffers from a very severe borderline personality disorder and exhibits signs of cannabis (marijuana) dependence and inhalant abuse. He testified that the [Petitioner] is not so dysfunctional that she needs to be institutionalized, but instead opined that she has a multiplicity of problems in interpersonal relationships, in controlling her behavior, and in achieving vocational and academic goals.

During direct examination, Dr. Engum opined that the [Petitioner] had not acted with deliberation or premeditation in killing Slemmer. Instead Dr. Engum said she had acted in a manner consistent with his diagnosis of borderline personality disorder; she had lost control. He explained that she had danced around when relating the murder to Iloilo because of the emotional release she experienced from having assured through the killing of Slemmer that she could maintain her

relationship with Shipp. When questioned about the piece of skull found in the [Petitioner's]coat, Dr. Engum explained that the [Petitioner] actually has no identity and the action of taking and displaying a piece of Slemmer's skull to her friends was the [Petitioner's] way of getting recognition, "no matter how distorted" the recognition.

On cross-examination, Dr. Engum stated that there was no question that the [Petitioner] had killed Slemmer. He reiterated that in his opinion that once the attack began, [the Petitioner] had literally lost control. However, Dr. Engum admitted that [the Petitioner] had deliberately enticed Slemmer to the park, carved a pentagram onto Slemmer's chest, bashed Slemmer's head against the concrete, and beaten Slemmer's head with the asphalt. Dr. Engum agreed that [the Petitioner's] act of carrying weapons with her indicates deliberation. Finally, Dr. Engum conceded that [the Petitioner] had time to calm down and consider her actions when she left Slemmer during the attack to investigate a noise and determine whether anyone else was in the area.

William Bernet, medical director of the psychiatric hospital at Vanderbilt University, testified that he had reviewed the statements of the [Petitioner] and Kimberly Iloilo and the

reports of Dr Engum, Dr. Elkins, and Dr. Marks. He concluded that although there were satanic elements in this crime, the pattern was that of an adolescent dabbling in Satanism. He then described the phenomenon of collective aggression, whereby a group of people gather and become emotionally aroused and the end result is that they engage in some kind of violent behavior. On cross-examination, Dr. Bernet admitted that he had spoken neither with the [Petitioner] nor any of the other witnesses. Dr. Bernet admitted that he did not have enough information to offer an expert opinion as to whether [the Petitioner] acted with intent or premeditation in killing the victim.

Based on this evidence offered during the guilt phase of the trial, the jury found [the Petitioner] guilty of first degree murder and conspiracy to commit first degree murder.

In the sentencing phase of the trial, the State relied on the evidence presented at the guilt phase and presented no further proof. The defense, in mitigation, called Carrie Ross, [the Petitioner's] aunt as a witness. Ross testified that the [Petitioner] had experienced no maternal bonding because she was premature and was raised by her paternal grandmother until she died in 1988. Ross said that [the Petitioner's] family has a history of

substance abuse and that [the Petitioner's] maternal grandmother was an alcoholic who was verbally abusive to [the Petitioner]. Following the death of [the Petitioner's] paternal grandmother, [the Petitioner] was shuffled between her mother and father. According to Ross, [the Petitioner's] mother's home was very dirty. [The Petitioner's] mother set no rules for her, and on the occasions that [the Petitioner] had visited Ross, the [Petitioner] had behaved as a "little girl," playing Barbie and dress-up with her eleven-year-old cousin.

On cross-examination, Ross admitted that she had previously described [the Petitioner] as a pathological liar and that she had been afraid to allow [the Petitioner] to associate with her own children. Ross also admitted that [the Petitioner] had been out of control since she was twelve years old.

Glenn Pike, the [Petitioner's] father, testified that he had kicked the [Petitioner] out of his house twice, the last time in 1989. He admitted that he had signed adoption papers for the [Petitioner] prior to her eighteenth birthday. On cross-examination, he admitted that he had forced [the Petitioner] to leave his home in 1989 because there had been an allegation that the [Petitioner] had sexually abused his two-year-old daughter from his second marriage. According to her

father, [the Petitioner] had been disobedient, dishonest, and manipulative when she had lived with him.

The [Petitioner's] mother, Carissa Hansen, a licensed practical nurse, testified that [the Petitioner] had lived with her 95 percent of the time since her paternal grandmother's death. Hansen admitted that she had smoked marijuana with the [Petitioner] in order to "establish a friendship." Hansen related that the [Petitioner] had attempted suicide by taking an overdose shortly after the death of her paternal grandmother. Hansen also testified that one of her boyfriends had whipped [the Petitioner] with a belt. Hansen had the boyfriend arrested.

On cross-examination, Hansen admitted that [the Petitioner's] behavior had been problematic for years. The [Petitioner] had begun growing marijuana in pots in her home at age nine. After threatening to run away from home and live on the street, [the Petitioner] had been allowed to have a live-in boyfriend at age fourteen. Hansen admitted that [the Petitioner] had wielded a "butcherknife" against the boyfriend, who had been arrested for whipping her. Hansen also said [the Petitioner] had lied to her and stolen from her on numerous occasions and had quit high school. Hansen conceded that [the Petitioner] had been out of control since she was eight years

old. Following Hansen's testimony, the defense rested its case.

In rebuttal, the State presented the testimony of Harold James Underwood, Jr., a University of Tennessee police officer who was assigned to secure the crime scene on January 13, 1995. Underwood testified that the [Petitioner] came to the scene with three to five other females between four and five p.m. that day. [The Petitioner] asked Underwood why the area had been marked off and questioned him concerning the identity of the victim and whether or not the police had any suspects. None of the other females spoke during the fifteen minutes the group was there. Underwood said [the Petitioner] appeared amused and giggled and moved around. Underwood noticed that [the Petitioner] was wearing an unusual necklace in the shape of a pentagram. After learning at roll call on January 14, 1995, that the victim of the murder had a pentagram carved on her chest, he reported [the Petitioner's] strange behavior and unusual necklace to his superior officers.

Based on the proof submitted at the sentencing hearing, the jury found the existence of the following two aggravating circumstances beyond a reasonable doubt: (1) "[t]he murder was especially heinous, atrocious or cruel in that it involved torture or serious

> physical abuse beyond that necessary to produce death;" and (2) "[t]he murder was committed for the purpose of avoiding, interfering with or preventing a lawful arrest or prosecution of the defendant or another." T.C.A. § 39–13–204(i)(5) and (6) (1997 Repl .). In addition, the jury found that the State had proven that the aggravating circumstances outweighed any mitigating circumstances beyond a reasonable doubt. As a result, the jury sentenced the [Petitioner] to death by electrocution. The trial court entered a judgment in accordance with the jury's verdict and the Court of Criminal Appeals affirmed.

Pike, 978 S.W.2d at 907–14.

Proof at the Post–Conviction Evidentiary Hearing

At the post-conviction hearing, the Petitioner presented numerous witnesses in support of her case. First, Carissa Henson, the mother of the Petitioner, testified that, at the time of the Petitioner's arrest, Ms. Henson had been living in Cedar Grove, North Carolina. She stated that lead counsel represented the Petitioner and that she had spoken with him on the telephone and had met with him in Knoxville. Ms. Henson recalled meeting with lead counsel on only two occasions prior to trial, having one meeting in Knoxville and one meeting in Raleigh, North Carolina. However, Ms. Henson testified that she also spoke with Dr. Diana McCoy and Barry Rice, members of the defense team. Further, she explained that she had lunch with lead counsel and the other members of the defense team during the trial.

Ms. Henson testified that, during the guilt phase of the trial, she was the only family member present. However, during the penalty phase, Ms. Henson's husband, Gerard Hensen; the Petitioner's biological father, Glenn Pike; and the Petitioner's aunt, Carrie Ross, were also present. Ms. Henson, Glenn Pike, and Carrie Ross testified during the penalty phase. Ms. Henson testified that she did not learn that she was going to testify until the second week of the trial. She stated that she was advised that "they were going to make the family look bad because that would help [the Petitioner's] case." Ms. Henson explained, "[Lead counsel and co-counsel] told us to make it look as bad as we could, to exaggerate anything bad that was wrong with our family because the jury would—the jury would look at [the Petitioner] and think, 'The poor girl, she grew up in a family like this; no wonder she turned out the way she did.' So that's what we did."

Ms. Henson testified that she married Glenn Pike in 1975, and that the Petitioner was born in March 1976. Ms. Henson stated that the Petitioner had an older half-sister, Alicia. She testified she and Glenn Pike were married for two years, were divorced for a year, and then were remarried for two more years. The family lived in Beckley, West Virginia.

Ms. Henson, a licensed practical nurse, explained that, while pregnant with the Petitioner, she worked the evening shift on a psychiatric unit. One evening, an alcoholic was admitted with delirium tremens. The patient "threw [Ms. Henson] through some double swinging doors and [she] landed on a supply cart...." Ms. Henson began leaking amniotic fluid after this incident and was not permitted to work. Ms. Henson testified that the Petitioner was born prematurely via Caesarean section. She was born

with a condition known as hyaline membrane disease where the lungs are not fully developed and had bilateral hip dysplasias, which occurs when the hip sockets are not fully formed. The Petitioner was taken to Charleston Area Medical Center neonatal intensive care unit where she remained hospitalized for two weeks.

In 1982, Ms. Henson moved to North Carolina but returned to West Virginia for two years to assist her ailing mother. After Ms. Henson's mother died in 1985, she moved back to North Carolina. Ms. Henson explained that her move was due to her marriage to Danny Thompson.

Ms. Henson testified that "during their growing-up years," the Petitioner and her half-sister, Alicia, spent a lot of time with their grandmother. She explained that when they moved to North Carolina, both girls were "really unhappy" and that both girls "ended up going back to West Virginia." The Petitioner moved back to North Carolina when she was in the fourth or fifth grade.

Ms. Henson testified that her oldest daughter, Alicia, got pregnant when she was fifteen years old. After the baby was born, Alicia and her fiance, Bryan Hammond, moved to North Carolina and lived with Ms. Henson. Alicia, her baby, and Hammond lived in Ms. Henson's home for two years. Ms. Henson testified that she was separated from Danny Thompson during this time period.

Ms. Henson testified that she had a relationship with Steve Kyaw when the Petitioner was twelve years old. She stated that the Petitioner never got along with Steve Kyaw. On one occasion, they went to court because Steve Kyaw "punched" the Petitioner. Ms. Henson denied knowledge of any other incidents

of abuse by any of the Petitioner's other stepfathers.

Ms. Henson later married Gerard Henson. After this marriage, Ms. Henson learned that the Petitioner was pregnant. Ms. Henson testified that she also learned that the Petitioner was using cocaine. Ms. Henson told the Petitioner that, if she had the baby, she would have to get a job. Ms. Henson testified that the Petitioner had an abortion. She stated that did not know the identity of the baby's father. Ms. Henson also testified that she had smoked marijuana with the Petitioner and her friends on occasion when the Petitioner was seventeen years old. Ms. Henson denied that the Petitioner was pregnant at this time and denied that she encouraged the use of marijuana to develop the Petitioner's appetite.

Ms. Henson testified that, when the Petitioner was in the third grade, the Petitioner took an overdose of Tylenol. The Petitioner was placed in outpatient psychiatric treatment, and Ms. Henson was advised that the Petitioner was "depressed." The psychiatrist prescribed medicine that "made [the Petitioner] feel worse instead of better so she didn't take them." The therapist agreed to allow the Petitioner to discontinue the medication and eventually discharged her from treatment. However, Ms. Henson added that "over the course of the years, we saw therapists, psychologists after that."

Ms. Henson testified that the Petitioner reported being raped after school one day. This incident occurred during the same time period as the Petitioner's suicide attempt. Ms. Henson stated that, after being informed by the school about this incident, she did not observe anything unusual about the Petitioner. Ms. Henson recalled that Claude Davis was arrested for the incident, but the

Petitioner was not able to identify him in the lineup so he was not charged. Ms. Henson also testified that the Petitioner reported being sexually molested when she sixteen years old. Ms. Henson stated that the Petitioner said she was walking to the store when a man grabbed her, pulled her into the woods, and sexually molested her. Ms. Henson could not recall whether this incident involved penetration.

Ms. Henson testified that the Petitioner held various jobs, including positions at Waffle House and a steak house. She stated that the Petitioner dated a homeless young man, Brian Wilson, who lived at the Henson residence for a period of time. Ms. Henson stated that Brian Wilson did not live with them long because he was unable to obtain employment and was very sloppy. Ms. Henson and her husband made him leave. When Brian Wilson moved out of their home, the Petitioner moved out as well. The Petitioner and Brian Wilson rented a trailer together.

Ms. Henson testified that the Petitioner repeatedly ran away from school and home and that the Petitioner skipped school habitually. Ms. Henson testified that the Petitioner lived in a group facility on two different occasions. When the Petitioner was in the tenth grade, she was sent to Swannoa, a juvenile facility, for "about a year." After her return from Swannoa, the Petitioner became interested in the Job Corp Program. The Petitioner advised her mother and stepfather that the Job Corp Program would enable her to get her GED and would train her to be a nursing assistant. Ms. Henson and her husband decided to allow the Petitioner to participate in the Job Corp Program, and the Petitioner arrived there during the fall of 1994.

Ms. Henson testified that she visited the Petitioner at the Job Corp Program, meeting several

of the Petitioner's friends and touring the school and the dormitory. Ms. Henson described the dormitories as "dirty."

> There was graffiti painted on the walls. There was blood on the walls, and [the Petitioner] told me that there had been a boy stabbed in the bathroom like the weekend before, I think, and the blood was still there. And that's when we tried to talk [the Petitioner] into coming home with us, but she wanted to stay.

Ms. Henson reported that, when the Petitioner was home for Christmas, she told her that a girl had been threatening her. The Petitioner told Ms. Henson that this girl would be "hovering over her bed at night with a knife or something threatening her." The Petitioner also told Ms. Henson that Tadaryl Shipp was her friend and would protect her. Ms. Henson testified that the Petitioner was not afraid to go back to the Job Corp Program.

On cross-examination, Ms. Henson did not deny that the Petitioner's life had been traumatic. She did deny, however, that there was an incident in which the Petitioner alleged that she had been sexually abused and that Ms. Henson had observed the blood on the Petitioner's person. Ms. Henson testified that her father, Chris Fotos, owned a meat packing plant and that the petitioner would have seen animals being slaughtered and processed.

Ms. Henson related an incident during which a man named Kenny Clyde telephoned her and told her that he was going to rape her. Ms. Henson's husband searched for him but could not find him. The Petitioner and a friend found him in the McDonald's parking lot and "beat him up with a stick." Ms.

Henson did not dispute that the Petitioner was "always in some sort of trouble." She also characterized the Petitioner as "having had a bad temper." Ms. Henson described their home as a "continuous battle zone." She added that the Petitioner was notorious for lying. Regarding the incident with Steve Kyaw, Ms. Henson admitted that the Petitioner had chased Steve Kyaw with a butter knife. Ms. Henson related that the Petitioner's friend, Breanna, moved in with them for a period of time. Ms. Henson stated that Breanna, who came from an abusive home, and the Petitioner argued about something and that the Petitioner "beat Breanna up and pushed her down the stairs." After this altercation, Breanna moved out of their home.

Ms. Henson reported that the Petitioner brought some crystals home with her on her Christmas break from the Job Corp Program. The Petitioner told her that Tadaryl Shipp "could make the clouds move and make the sky open up" with the crystals. Ms. Henson could not recall making a previous statement affirming that the Petitioner had told her that she was involved in a WICCA group. Ms. Henson admitted that she was aware that the Petitioner had a tattoo of the devil on her chest; however, she described the tattoo as a "cute little cartoon" and not as a wicked devil.

Gerard Henson, the Petitioner's stepfather, testified that he married Carissa Henson in 1992. Mr. Henson testified that entering the Job Corp Program was the Petitioner's idea. Mr. Henson and his wife visited the Petitioner at the Job Corp, but he was not permitted to enter the dormitory because he was a male. Mr. Henson described the Petitioner as "open and friendly." Mr. Henson stated that he did not testify at the Petitioner's trial.

Mr. Henson denied making statements that the Petitioner was out of control or that the Petitioner had pushed her friend Breanna down the stairs. He admitted that he made a statement that the Petitioner liked the attention she received as a result of her behavior.

Carrie Ross, the Petitioner's aunt, stated that she testified at the Petitioner's 1996 trial. At that time, Ms. Ross was employed as an intensive care unit nurse. She was currently certified in neonatal intensive care. Ms. Ross testified that, at the time of the Petitioner's birth, she worked in the pathology department as a histology technician and had not yet attended nursing school. In 1990, Ms. Ross earned her bachelor of science degree in nursing. When questioned about the circumstances of the Petitioner's birth, Ms. Ross stated that the Petitioner was born via caesarean section and had respiratory arrest. The Petitioner was moved to a neonatal intensive care unit at a different hospital where she was placed on a ventilator for three to four days.

Ms. Ross testified that lead counsel visited her at work to ask her for background information on the Petitioner. Ms. Ross also met with Dr. McCoy a few months before trial. Ms. Ross stated that she was not subpoenaed as a witness but that "[lead counsel and cocounsel] suggested sort of that I be here."

Ms. Ross stated that she grew up in Beckley, West Virginia, and confirmed that her parents were Chris and Zola Fotos. She further confirmed that she had an aunt named Norma Privett. Ms. Ross stated that Norma Privett had often babysat her and her sister, Carissa Henson. Ms. Ross described Norma Privett as "abusive." She explained:

She was always very nice to us when my

> mother was around. But as soon as she was left to babysit us, she would do things that ... she would pull me around by the hair ... literally, drag me through the house by my hair and very abusive personality, yes.

Ms. Ross testified that Norma Privett also babysat the Petitioner and her sister, Alicia. Eventually, Norma Privett stopped babysitting the Petitioner because Privett "was very abusive" and because Ms. Ross informed her sister of the abuse she suffered as a child.

Chris Fotos, the father of Ms. Ross and Ms. Henson, owned a butcher shop and slaughter house. Ms. Ross and her sister spent a lot of time at their father's business, and this was not considered unusual. Ms. Ross testified that her father was addicted to Talwin for a long period of time. She stated that, while on the Talwin, her father "had no concept of who he was, where he was. He was just out of touch with reality." Ms. Ross related that he once pulled a gun on her. She related that, if someone "crossed" her father, "he would sort of bluster and threaten to kill them." Ms. Ross also related that her father was investigated by the Internal Revenue Service. Related to that investigation, her father took a gun into a federal courtroom and told the judge that he had the gun "to unseat him."

Ms. Ross testified that her mother was an alcoholic. She explained that her mother was very loving and nurturing toward Alicia. However, her mother resented having the Petitioner at her home. Ms. Ross explained that Alicia was the first grandchild and that, when the Petitioner was born, her mother's alcoholism was getting worse and she was drinking more. She explained that her mother

was angry at Carissa for becoming pregnant with the Petitioner.

Ms. Ross testified that her sister, Carissa Henson, also threatened to harm people. She related that her sister would tell others that "she was going to whip their—butt." Ms. Ross explained that it was the accepted "cultural thing" that violence would solve "everything," "[t]he Hatfields and McCoys." Ms. Ross related that, when they were teenagers, she and her sister would sneak into bars, smoke marijuana, skip school, and "do whatever we could find to do, drugs, alcohol, whatever." Ms. Ross stated that she would now describe her sister as an alcoholic. She also described her sister as "very immature and irresponsible." Ms. Ross testified that she raised Alicia during the time that her sister was married to Danny Thompson because he did not like children. However, Ms. Ross stated that she could not afford to raise both Alicia and the Petitioner. Ms. Ross commented that "[Carissa's] children were never [Carissa's] first priority." She explained that her sister put "men" first and that Carissa Henson had been married five times.

Ms. Ross testified that "there was always a problem with [the Petitioner], because [the Petitioner] didn't seem to understand when you would tell her things." Ms. Ross stated that the Petitioner was a very difficult child to watch. She stated that the Petitioner "never could understand what the word 'no' meant." Ms. Ross testified that the Petitioner "had a very flat affect," explaining that "she showed little or no emotion." Ms. Ross recalled an incident when the Petitioner was in the first grade and drew a picture of a penis. Ms. Ross related that the Petitioner's teacher reported that the Petitioner had been drawing pornographic pictures in class and

that there was a recommendation that the Petitioner see a counselor.

Ms. Ross testified that the entire family thought that the Petitioner's joining the Job Corp Program was a good way for her to straighten out her life. However, Ms. Ross stated that, during the Petitioner's trip home for Christmas, the Petitioner indicated to her that she was afraid to return to the Job Corp Program. The Petitioner remarked, "Well, I want everybody to be proud of me, but people get hurt there." Ms. Ross stated that the Petitioner's family would not have approved of the Petitioner's relationship with Tadaryl Shipp because he was African–American.

Dr. Jonathan Henry Pincus, an expert in neurology, testified that he was retained to examine the Petitioner in March 2001. Dr. Pincus reviewed her history and data, which was given to him. Dr. Pincus identified the components of his examination as: (1) the Petitioner's history; (2) a physical neurological examination; (3) neuropsychological testing; (4) tests of brain functions including an EEG; and (5) tests of the brain's structure, including an MRI. Dr. Pincus also conducted a physical examination of the Petitioner. Dr. Pincus reported that the physical examination was normal, "but there were certain abnormalities that I think can only be characterized as minor." Specifically, Dr. Pincus stated that "there was generalized hyperreflexia, that is to say her deep tendon reflexes were too active." He also noted that "[t]here was spooning of her outstretched hands," explaining that "her fingers extended at the metacarpal phalangeal joint in that manner." He noted that this was a "sign that there is something not quite right about the basal ganglia ... which are gray matter masses at the center of the

brain that influence movement and to some degree thinking." The Petitioner also could not hold her fingers still. Dr. Pincus remarked that this also signaled that the basal ganglia were not working properly. Dr. Pincus testified that "there was a positive nuchocephalic reflex." He explained that this meant that "there is an interruption of fibers that are coming from the motor area—supplementary motor areas of the brain stem, possibly at the level of the basal ganglia...." Based on these observations, Dr. Pincus concluded that "there was subcortical dysfunction involving the basal ganglia and possibly the thalamus." Dr. Pincus further noted that the MRI "showed an abnormality that was just lateral to the ventricle in the frontal lobe." Dr. Pincus stated that "my physical examination with its minor abnormalities, the MRI, and the EEG are all pointing to the same place."

Dr. Pincus testified that the MRI revealed a small heterotopia. He explained that the brain is formed during fetal development. A heterotopia is caused by clumps of gray matter being located in the wrong part of the brain. He attributed the heterotopia to "some maternal factor. The mother was exposed to radiation or she was ill ." He stated that the most common cause of the heterotopia was a mother's exposure to alcohol. Dr. Pincus testified that mental retardation and epilepsy are associated with a heterotopia. Dr. Pincus related that this affected the frontal lobes and explained that a person could have an IQ of 120 or 130 and be a "social imbecile" due to frontal lobe disease. He stated that the Petitioner's "frontal lobes [are not] put together properly." Dr. Pincus related that it was significant that the Petitioner's heterotopia was visible on the MRI because most are invisible. He stated that an important feature of the

frontal lobes is "moral and ethical standards." He explained that "human beings are not born with an ethical and moral sense." "[You are] born with a capacity to develop one, but they must be exposed to the right influences in order for that to happen."

Dr. Pincus stated that the Petitioner had previously been diagnosed with epilepsy but that she no longer had epilepsy. He added that "people outgrow epilepsy." He explained that, at birth, the brain is almost completely unmyelinated. Myelin is a fatty substance that insulates nerves. He stated that the last part of the brain to become myelinated is the frontal lobe and that does not happen fully until a person's early twenties. Dr. Pincus related that an MRI was done on April 2, 2001, and the EEG was done when the Petitioner was fourteen months old. He stated that based on his assessment, the Petitioner had a damaged brain. Dr. Pincus testified that the fact that Dr. Engum had previously found that there was no brain damage did not negate or contradict his findings. He explained that the area in which the Petitioner's heretopia was located was "notoriously difficult to test."

Dr. Pincus stated that a common finding in his examination of convicted murderers is the "big triumvirate of brain damage, history of abuse, and presence of mental illness." Dr. Pincus stated that the Petitioner had a history of abuse. He explained that the Petitioner self-reported abuse, that there were scars present on her body, and that verification was made through interviews with the Petitioner's family members. Dr. Pincus also reported that the Petitioner had been raped by a neighbor. The incident involved the neighbor inserting sticks into her vagina and having his dog lick her genitals. The Petitioner reported the incident to her sister and mother, but

neither believed her. Dr. Pincus stated that the Petitioner reported "boxes of pornography, sadistic pornography" in the home. She reported incidents of "wrestling" with her mother's boyfriend when she was thirteen or fourteen years old. Dr. Pincus stated that the Petitioner's mother acknowledged that there were pornographic videotapes but explained that "[a]ll men have those." The Petitioner reported an incident where her mother's boyfriend "twist[ed] her nipples painfully," and, in response, the Petitioner "twist[ed] his scrotum...." The Petitioner's mother denied that this happened. According to the Petitioner, this same boyfriend "slugged [the Petitioner] in full view of her neighbor." Criminal charges were filed as a result of this incident but were later dropped as a result of a negotiation that the boyfriend would move out of the home. Dr. Pincus stated that the Petitioner reported yet another rape when she was seventeen. The Petitioner reported that Kenny Clyde began stalking her and later sexually assaulted her. The Petitioner searched for Kenny Clyde and beat him with a stick. Dr. Pincus noted that this incident should have been a red flag that the Petitioner could not control herself. Dr. Pincus related that this incident was a sign that the Petitioner's frontal lobes were not working.

Dr. Pincus stated that he found evidence to confirm Dr. Kenner's diagnosis of bipolar disorder. Specifically, he stated:

> [T]here's spending. She was working at one point two full-time jobs and a part-time job, and what did she spend money on? Candles, trinkets, shoes. She didn't have food! She would go days without eating. She would see other people eating. Sometimes the mother's

boyfriend would come in with food and eat it with the mother and not give it to her. She had no appetite. That's what happens during periods of mania.

She would go for two or three or four days without sleeping or sleeping [ninety] minutes here and [ninety] minutes there, sleeping on the ground, sleeping on the street. And it didn't bother her. Didn't wash ... she used drugs; she used alcohol. Those are signs of bipolar. She had periods of lots of sexual activity, and then long periods when she would be depressed of none, where she couldn't get out of bed for [fourteen to eighteen] hours a day and just would sit there.

She lost a lot of school time because of depression.... Her weight fluctuated. She's been from 92 to 170.... That kind of weight fluctuation occurs in people with bipolar disorder.

....

And she has periods when she can't get out of bed, and she can't move, and she's [fourteen to eighteen] hours a day in bed. And she's feeling crying, and she wants—is suicidal, two suicide attempts by over dosage. And a family history ... it is a hereditary disease, bipolar illness.

Oh my God, that family history on the mother's side is spectacular! Maternal grandfather ... was addicted to Talwin by injection.... The [grand]mother ... was no great shakes either. She was an

> alcoholic who grew marijuana, died of cirrhosis of the liver.
>
> And there's a maternal great aunt, Norma, who attempted murder.... [A]nd there was a great aunt, Geraldine, who God spoke to. Maternal great ... great aunt, Nola, who went to a mental hospital.

Dr. Pincus stated that the Petitioner's sister, Alicia, was not brain damaged, although she suffered through the abuse. He stated that one of the components was not enough to be dangerous. He explained that if you put these things together, *i.e.,* the abuse, the brain damage, and the mental illness, you have a dangerous person.

Next, Dr. Pincus discussed the events preceding January 12, 1995. He explained that the Petitioner had not slept well for the three days prior to the 12th. The Petitioner was in an "excited period" and was very irritable and angry. The victim had reportedly been calling the Petitioner and saying that the Petitioner was a whore and a slut. Dr. Pincus stated that it was intolerable for the Petitioner to hear these words. Dr. Pincus opined that the Petitioner did not start out wanting to kill the victim. In his view, the Petitioner "lost control of herself and she did want to kill her and did do it." Dr. Pincus concluded that:

> [the Petitioner] was ... under the influence of a mental disease and defect that prevented her from being able to consider what she was doing, and to prevent herself from giving in to this impulse of killing.

He stated that the origin of the mental disease occurred in utero and that the bipolar illness was

hereditary. Finally, he stated that the Petitioner could not control the abuse. Dr. Pincus stated that evidence of all three of these factors: abuse, mental illness, and brain damage, were present in 1995.

On cross-examination, Dr. Pincus conceded that Dr. Eric Engum testified at the Petitioner's trial that there was no brain damage to the Petitioner. Dr. Engum had been retained by trial counsel. Dr. Pincus stated that Dr. Engum's diagnosis was wrong and that he had failed to obtain an MRI. Dr. Pincus stated that the trial attorneys may have been incompetent but that Dr. Engum was "just wrong."

Alicia Wills, the Petitioner's half-sister, testified that she and the Petitioner have the same mother but different fathers. When the Petitioner was born, Ms. Wills began spending more time with her grandmother and grandfather. She explained that she was raised by her maternal grandmother, Zola Fotos. Ms. Wills loved her grandmother and knew that her grandmother loved her. She explained, however, that her grandmother physically disciplined the Petitioner. Ms. Wills also testified that her grandmother "drank every day," stating that she would start the day with whiskey in the morning. However, Ms. Wills explained that she was never aware that her grandmother was drunk. Ms. Wills stated that her grandmother's death impacted her tremendously. Ms. Wills explained that she felt that no one else cared for her the way her grandmother did. Ms. Wills stated that, at this point in her life, she started getting into fights and started using drugs. Ms. Wills testified that she was twelve or thirteen years old when her grandmother died.

Ms. Wills described her Grandfather Fotos as "fun." She stated that he would give the Petitioner and her candy and that he spoiled them. She denied

any allegation that Grandfather Fotos mistreated the Petitioner. She conceded that he was a butcher and owned a slaughter house and that they visited the slaughter house. Ms. Willis stated that she did not feel that she had any emotional scars from witnessing the animal processing.

Ms. Wills testified that her mother announced one day that she was marrying Danny Thompson and that they were all moving to North Carolina. Ms. Willis stated that her new stepfather was "mean to us." She denied that he ever physically harmed her but stated that he would get fast food and eat it in front of them without offering them any. Ms. Wills stated that she was angry at her mother for "shack[ing] up with" this man and for pushing her own children to the side. Ms. Wills was also angry about the move to North Carolina, where she felt that she did not fit in. Ms. Wills testified that she "became completely depressed and extremely angry ." Ms. Wills stated that her mother placed her own pleasures and happiness before that of her children.

Ms. Wills also testified regarding her parents' marriage. She stated that, during the marriage, her father would lose his temper and hit her mother. However, she explained that "[her mother] was running around having affairs with men while she was supposed to be at church...." Ms. Wills also described her mother as an alcoholic. She stated that "parties were a big part of our life" and that her mother let her take "sips of her beer." On one occasion when Ms. Wills was in the second grade, her mother packed her lunch for school and included a beer. She stated that she could not recall ever sitting on her mother's lap or getting a hug from her mother. Ms. Wills testified that her mother's treatment of the Petitioner was probably similar, although she

described their relationship as closer than her own with her mother. She described the relationship between the Petitioner and her mother as more of a friendship than a mother-daughter relationship. She added that she "always felt like [she] was the mother...." Ms. Wills testified that she never saw the Petitioner's father, Glenn Pike, physically discipline her.

Ms. Wills testified that, when she was in the fifth grade, she and the Petitioner went to the mall and spent all of the child support money Glenn Pike had given to the Petitioner to give to her mother. She stated that, during the shopping spree, she had shoplifted one pair of earrings. Ms. Wills stated that the Petitioner, who was approximately six years old, had shoplifted at least twenty pieces of jewelry. Ms. Wills further testified that the Petitioner read horror stories, like Stephen King, when she was very young.

Ms. Wills stated that she liked to watch her mother and her friends get ready to go out to parties. She stated that this appealed to her because she looked forward to living a similar lifestyle. Ms. Wills admitted that she started smoking marijuana when she was twelve years old. Ms. Wills became pregnant at age fifteen and stopped smoking marijuana until she was seventeen.

Ms. Wills described the Petitioner as having a big heart and stated that the Petitioner "loves people." She added that the Petitioner had dreams of becoming a nurse. Ms. Wills testified that the Petitioner was "very messy" and would sometimes have a "blank look." Ms. Wills stated that, in retrospect, she could see that "there were things that were not normal about [the Petitioner]." Specifically, she acknowledged that the Petitioner would have episodes of sudden rage. Ms. Wills testified that the

Petitioner loved Ms. Wills' son Keith and would act like his mother. Ms. Wills was unaware of any allegations that the Petitioner had abused her son. Ms. Wills stated that the Petitioner always wanted to give Keith a bath but that she was not comfortable with the Petitioner giving her son a bath. Ms. Wills testified that any statement that Dr. McCoy had made regarding allegations of the Petitioner's sexual abuse of Keith were untrue and unfounded.

Ms. Wills testified that she was aware that the Petitioner was "drawing dirty pictures at school at a very young age." However, she stated that she had no knowledge as to whether the Petitioner had been sexually abused. Ms. Wills stated that she did not believe the Petitioner's accusations that a man had raped her.

Ms. Wills denied any allegation that she had abused the Petitioner. Ms. Wills specifically denied that she intentionally burned her sister with a curling iron. She explained that the girls were playing beauty shop when she accidentally burned the Petitioner with the curling iron. She further explained that the curling iron incident occurred when the Petitioner was three or four years old. Ms. Wills also denied slamming the Petitioner's fingers in a door. Ms. Wills denied holding the Petitioner down and scraping the bottom of her foot with an electric plug.

Ms. Wills testified that she was not subpoenaed by either the State or the defense team for the Petitioner's trial. She indicated that she had anticipated being called as a witness because the Petitioner was her sister. Ms. Wills testified that, in her opinion, the Petitioner "never had a [fair] shake from the day she was born." Ms. Wills stated that, at the time of the trial, she was living in Dallas, Texas,

and that she currently had "a great life." She owned her own business and had been married for twelve years. She stated that she had "peace inside."

Emil Glenn Pike, the Petitioner's father, stated that he testified during the 1996 penalty phase of the Petitioner's trial. He testified that he had been interviewed by Dr. Diana McCoy prior to his testimony. Mr. Pike stated that he was born and raised in Beckley, West Virginia. He related that his father had worked as coal miner and a plumber and that his mother was a housewife. He testified that his parents disciplined him by using a switch or a belt. As a result of this discipline, Mr. Pike "swore to never ... put a switch to my children." Mr. Pike testified that his father died when he was thirteen years old. After his father's death, the family moved to Indiana to find work. Mr. Pike testified that, in 1966, he was drafted and sent to Vietnam, where he contracted hepatitis and was wounded. Mr. Pike re-enlisted in the service in 1973, because he could not find a job in West Virginia. Mr. Pike testified that, during his time in Vietnam, he was exposed to agent orange. He was provided information that his exposure may cause birth defects in children, specifically, spina bifida.

Mr. Pike testified that in 1974, he married Joanne Lily. After their divorce, he married the Petitioner's mother in 1975. He stated that his social life with the Petitioner's mother involved drinking alcohol. Mr. Pike testified that the Petitioner's mother got pregnant soon after their marriage. After his discharge from the service, he returned to Beckley, West Virginia, and opened a motorcross race track on the family farm. Mr. Pike recalled the day the Petitioner was born. He stated that the Petitioner's mother had a caesarean section and that the

Petitioner had hyaline membrane disease and was taken to a hospital in Charleston.

Mr. Pike reported that he began working road construction and was often away from home. When he learned that the Petitioner's mother was seeing other men during this time, the couple divorced. However, after the Petitioner's mother attempted suicide, the couple remarried. Afterward, the Petitioner's mother resumed her previous ways of partying, and the couple grew apart.

Mr. Pike related that his mother would often babysit the Petitioner. According to Mr. Pike, his mother loved the Petitioner and spent a lot of time with her. He testified, however, that his wife's mother did not appear to like either him or the Petitioner. He presumed that his mother-in-law felt that he was of a lower social class.

Mr. Pike stated that he would use either his hand or a belt to discipline the Petitioner. At most, he struck her with the belt three or four times in the same day. Mr. Pike denied that he ever made the Petitioner remove her clothing for the spankings and stated that any scars on the Petitioner's back were not the result of any spankings he gave her. He recalled that, after the Petitioner's mother married Danny Thompson, she contacted him regarding the Petitioner's behavior. The Petitioner's mother informed Mr. Pike that she was having disciplinary problems with the Petitioner and asked that he try to take care of her. He stated that the Petitioner would come live with him for a while, but then he would start having problems with the Petitioner and she would be returned to her mother.

Mr. Pike testified that he later married Kathleen Almond and that they had two children together. He

confirmed that there had been an allegation that the Petitioner had sexually abused his younger daughter. Mr. Pike stated that his wife had told the therapist she was seeing that his younger daughter had reported that the Petitioner had "licked her" and had pointed "towards her belly or towards her genitals and said, 'There?'." The therapist told Mr. Pike's wife that the Petitioner was not to be around the younger daughter. The Petitioner denied any wrongdoing, and Mr. Pike stated that he had never observed any inappropriate behavior between the Petitioner and his other children. He stated that he did not believe the Petitioner had molested his younger daughter.

Mr. Pike stated that he was aware that the Petitioner spent time at a juvenile facility in North Carolina. He further stated that he did not visit her during her time at that facility. Mr. Pike testified that he was not aware that the Petitioner was entering the Job Corp Program until after she had already entered the program.

Mr. Pike denied that he had previously described the Petitioner as a manipulator but conceded that he had described her as a liar. He also admitted that on one occasion, the Petitioner had forged her teacher's name.

Faye Johnson Guy testified that she was a neighbor of the Petitioner's family and that she also worked with the Petitioner's mother. Ms. Guy testified that she frequently spent time with the Petitioner and her family on a social basis and observed that the Petitioner's mother, Carissa, abused alcohol. Ms. Guy related that Carissa was married to Danny Thompson when they first met. She stated that she met Danny Thompson only once or twice and that he was drunk and appeared violent on those occasions. After Carissa left Danny

Thompson, she moved close to Ms. Guy. Ms. Guy stated that Carissa began seeing other men shortly after she separated from Danny Thompson. She stated that Carissa was involved with a married man. Ms. Guy also confirmed that Carissa dated a man named Steve Kyaw and that shortly after she began seeing him, Kyaw moved into her home.

Ms. Guy testified that she often included the Petitioner in her family's outings because the Petitioner was often left home alone. She stated that the Petitioner told her that she had access to pornographic movies that belonged to either her mother or to Steve Kyaw. Ms. Guy had also observed the Petitioner watch horror movies with her mother, Carissa. Ms. Guy stated that she had told Carissa that she felt that it was inappropriate for the Petitioner to be watching these horror movies. Ms. Guy recalled that Carissa just laughed and stated that the Petitioner enjoyed these movies and had been watching them since she was two or three years old. Ms. Guy testified that the Petitioner and Carissa had more of a friend relationship than a mother-daughter relationship. She stated that Carissa would discuss inappropriate things with the Petitioner, e.g., sex with her boyfriends.

Ms. Guy testified that both the Petitioner and Carissa participated in her wedding. She recalled that, at the rehearsal dinner, Carissa was caught having sexual intercourse in the bathroom with Ms. Guy's future brother-in-law. Ms. Guy testified that, later that same evening, she again caught Carissa having sexual intercourse with her future brother-in-law, who was married. Ms. Guy stated that she and Carissa were friends with Ann Marie Hansen and her husband, Gerard. Ann Marie Hansen worked with Ms. Guy and Carissa. Carissa had an affair with

Gerard Hansen. He eventually left his wife and moved in with Carissa. They later married. After this event, Ms. Guy began to sever her relationship with Carissa.

Ms. Guy testified that the Petitioner had mood swings. The Petitioner would be happy and cheerful and could quickly become sad and depressed. Ms. Guy initially thought that the mood swings were due to hormones. Ms. Guy later recognized the signs of bipolar disorder. She explained that her mother was bipolar and that the Petitioner's symptoms reminded her of her mother. Ms. Guy also testified that, in her opinion, the Petitioner's sister, Alicia, seemed to pick on the Petitioner.

Ms. Guy testified that she had met Carissa's father, Chris Fotos. She stated that Chris Fotos "scared me a bit," was very prejudiced against African–Americans, and often talked about violence.

Orlando Powell testified that he was formerly the manager of a Pizza Hut in Durham, North Carolina, where the Petitioner would come with her friends. He explained that "she grew towards me and the more she grew towards me, I just grew towards her." Mr. Powell explained that their relationship eventually became a romantic one. He stated that the Petitioner was with him most of the time. Mr. Powell met the Petitioner's mother, and he stated that he could tell there was not much of a relationship between the Petitioner and her mother.

Mr. Powell described the Petitioner as "a little fire ball." He stated that she had a temper. Mr. Powell testified that the Petitioner's temper would just erupt and that he "want[ed] to save [the Petitioner] because jail is not a place for her at this time." He also described her as being "wired" or full of energy. Mr.

Powell stated that he knew the Petitioner smoked marijuana and drank alcohol. Mr. Powell stated that their relationship lasted a year to a year and a half. Mr. Powell stated that they were still dating when she made the decision to enter the Job Corp Program. He explained that, during her Christmas break from Job Corp, he tried to make her stay in North Carolina. Mr. Powell stated the Petitioner was never violent toward him; however, he did observe the Petitioner become violent toward others. Mr. Powell stated that no one from the Petitioner's defense team contacted him prior to her trial and that no one contacted him until 2000.

Carol Goehring testified that she first met the Petitioner when they were in the seventh grade. Ms. Goehring stated that she and the Petitioner became friends and that she had occasion to visit the Petitioner in her home. Ms. Goehring stated that Steve Kyaw was living with the Petitioner's mother at the time. During one visit, Steve Kyaw began yelling at the Petitioner. The Petitioner told Ms. Goehring to "go out back...." Ms. Goehring saw Steve Kyaw "nudge [the Petitioner] to the room." She then saw the Petitioner running from the room. Ms. Goehring heard bumping and yelling, and she then saw the Petitioner with "a knife in her hand and her face was all red and she was trying to adjust her pants." Ms. Goehring described the Petitioner as "very panicked." Ms. Goehring called her mother to come get her and the Petitioner. After this incident, Ms. Goehring was no longer permitted to visit the Petitioner's home. Ms. Goehring stated that, a month later, the Petitioner's mother moved and that she left Steve Kyaw. Ms. Goehring described the Petitioner as a very loyal person. She stated that the Petitioner was "very happy," "very energetic."

Jamie Robinson testified that the Petitioner's ex-boyfriend, Brian Wilson, and her ex-boyfriend, Jeffrey Crank, were best friends. Ms. Robinson stated that the four of them ended up living on the streets for a while. Ms. Robinson explained that, in her situation, her parents did not approve of Jeffrey Crank and gave her an ultimatum. Ms. Robinson stated that the four of them would sleep in hospitals and hotels and would run the streets a lot of nights, just walking. She explained that Brian Wilson and Jeffrey Crank would often sell their plasma to get money for a hotel room. She recalled that there were times when they had nothing to eat except ketchup and hot sauce from packets.

Ms. Robinson stated that she spent the night at the Petitioner's home on one occasion, but she could not recall meeting the Petitioner's mother. She stated that, in her opinion, the Petitioner and her stepfather did not get along. Ms. Robinson observed that the Petitioner's parents had no food in the house. She also observed that the Petitioner did not have sheets on her bed. This same evening, the Petitioner and Ms. Robinson snuck Jeffrey Crank into the home, and the Petitioner's parents never knew he was there.

Ms. Robinson recalled an incident where she and the Petitioner shoplifted some shirts for Jeff Crank and Brian Wilson. The Petitioner told Ms. Robinson to run and took off running herself. Ms. Robinson stated that she did not run. Ms. Robinson was not arrested, but the Petitioner was arrested and placed in a police car. Ms. Robinson recalled that the Petitioner was laughing after she was caught. Ms. Robinson also recalled an incident where the security officers at the mall called their parents because they had been at the mall "a very long time." Ms. Robinson stated that the officers were on the telephone with

her mother for a very long time. She stated that her mother asked the officers about Ms. Robinson's condition. Ms. Robinson related that the officers were only on the telephone with the Petitioner's mother for "two seconds."

Ms. Robinson related that the Petitioner "seemed to be okay with the way things were for her...." Ms. Robinson stated that she could not have dealt with the situation the way the Petitioner did. Ms. Robinson learned that the Petitioner had been raped. Ms. Robinson stated that the Petitioner "never showed any emotion." She did, however, acknowledge that the Petitioner and Brian Wilson fought a lot. Ms. Robinson recalled an incident where the Petitioner and a new boyfriend "beat Brian up pretty badly, and I remember [the Petitioner] throwing a beer bottle at him." This incident occurred after the Petitioner and Brian Wilson had ended their relationship and the four of them were no longer hanging around one another. Ms. Robinson stated that she was never contacted by the Petitioner's defense team.

Kerry Sherrill testified that she was a treatment worker for the Child Protective Services Unit of Orange County, North Carolina and that she was assigned the Petitioner's case following an allegation of child abuse and neglect. Ms. Sherrill testified that she observed that the Petitioner, who was in middle school at the time, was a "bright and warm young woman, easy to get along with, [and] enjoyed the attention of adults." Ms. Sherrill related that the initial allegation involved the Petitioner's mother's boyfriend, Steve Kyaw, and a report of inappropriate discipline. She reported that "the plan was to keep [the Petitioner] safe when she was in the home and if Steve [was] going to be present in the home." Ms. Sherrill reported that the Petitioner was eventually

placed at Shaeffer House, due to the Petitioner's truancy and running away. She also reported that it appeared that the Petitioner's mother was "not doing what she needed to meet [the Petitioner's] needs." Ms. Sherrill testified that, while at Shaeffer House, the Petitioner wrote a letter to her friend, Brandy, expressing that "she was very unhappy with her life and had made a plan to commit suicide...." The Petitioner enumerated her reasons for wanting to kill herself, including the assertion that she had been raped by Claude Davis. Ms. Sherrill stated that the Petitioner's case was closed after Steve Kyaw moved out of the family home.

Peggy Hamlett testified that she is a counselor with the North Carolina Department of Juvenile Justice. Ms. Hamlett testified that the Petitioner was initially charged with a felony breaking and entering and larceny of a community center during which the Petitioner stole some candy. As a result of this incident, the Petitioner was adjudicated delinquent and was placed under Ms. Hamlett's supervision. Ms. Hamlett stated that the Petitioner's probation was later revoked and that she was sent to a juvenile detention center. Ms. Hamlett explained that the Petitioner's initial term in the facility would have been six months. However, the Petitioner was at the facility for more than a year because she kept receiving infractions. Ms. Hamlett testified that the Petitioner's juvenile records would have been destroyed when she reached the age of eighteen.

Ms. Hamlett described the Petitioner as a "smart girl" with "a lot of potential." She also stated that the Petitioner was "out of control." Ms. Hamlett stated that the Petitioner was drinking and "huffing" and, perhaps, doing other drugs. Ms. Hamlett described "huffing" as when one would "huff the fumes that

come from an aerosol can ... and get high." She stated that huffing was very dangerous. Ms. Hamlett also stated that the Petitioner was not an aggressive person.

Ms. Hamlett testified that she was contacted by the Petitioner's counsel and by Dr. McCoy prior to the Petitioner's trial. However, she stated that she was not asked to attend the Petitioner's trial.

Debby Howell Burchfield was employed at the Juvenile Evaluation Center in Swannoa in the 1990s. Ms. Burchfield explained that the Juvenile Evaluation Center was a state training school for youths who had been committed by the courts due to delinquent behavior. She stated that she was the Petitioner's social worker. Ms. Burchfield explained that her office was in the living quarters for the girls, so she had direct contact with them every day. Ms. Burchfield testified that the Petitioner remained confined at Swannoa from November 1991 until March 1993. She stated that this was a longer period of time than usual but was because the Petitioner was unable to maintain or achieve the level of points necessary to be released. Ms. Burchfield described the Petitioner's actions as "sabotaging" herself.

Ms. Burchfield testified that, while at Swannoa, a juvenile could have one visit per week. She stated that the Petitioner was at Swannoa for about fifteen months; thus, she was eligible for sixty visits during that time period. The Petitioner received only eight visits during this time.

Ms. Burchfield testified that the Petitioner related that she never felt close to either of her parents. She stated that the Petitioner felt that she had been emotionally abused by her father and that her mother was not a real parent to her. Ms. Burchfield

testified that there were incidents in which the Petitioner engaged in self-mutilation and tattooing of her body. She stated that the Petitioner had also reported being a victim of abuse by her older sister. She admitted that she had previously indicated to post-conviction counsel's investigator that the Petitioner "was known to have dabbled with devil worship. She would draw pictures and talk about that, and she also dressed in gothic." Ms. Burchfield also admitted that it was important for the Petitioner to get her way but explained that this was common in adolescents. Ms. Burchfield testified that, upon her release from Swannoa, the Petitioner planned to enroll at Almance Technical College to study nursing. The staff at Swannoa attempted to assist the Petitioner in reaching her goals. Ms. Burchfield noted that the Petitioner had completed the GED program and that the staff assisted in preparing her application to the Job Corp Program.

Ms. Burchfield testified that, in 1996, she was contacted by a psychiatrist involved in the Petitioner's case. She stated that records were sent to the psychiatrist by her office.

Kristina Hargis, a social worker with the North Carolina Department of Juvenile Justice, testified that she was assigned to the Swannoa Youth Development Center as a house parent and counselor. She stated that she was with the juveniles eight hours a day. She added that she spent one hour a week with the Petitioner individually, talking about her feelings and problems. Ms. Hargis stated that she was not contacted by the Petitioner's trial attorneys.

Ms. Hargis described the Petitioner as "struggling" and "depressed." She stated that the Petitioner was upset that she got into trouble. She opined that the Petitioner could not understand why

she was doing the things to get herself in trouble. Ms. Hargis confirmed that the Petitioner was at Swannoa longer than she needed to be because she continued to get into trouble. She surmised that the Petitioner was intentionally sabotaging herself in order not to be released.

Ms. Hargis explained that Swannoa's student body was both male and female. She stated that there were 180 males and 45 females. Ms. Hargis stated that the juveniles had to do chores and attend school and treatment programs. The juveniles also had structured recreation programs. Ms. Hargis opined that there was little free time.

Frederic Marshall Muse testified that he was employed as a teacher at Swannoa during the 1990s and that the Petitioner was assigned to his class. Mr. Muse testified that the Petitioner was initially defiant in his class. However, when she learned who was in charge, her attitude changed, and she began to work. Mr. Muse recommended the Petitioner for various teacher aid positions. He stated that the Petitioner became a teacher's aide and remained in that position for the duration of her stay. He explained that the Petitioner had the "run of the campus" when she was running errands for the teacher. He described the Petitioner as being respectful. Mr. Muse remarked that he and the Petitioner developed a respectful relationship, and he described the Petitioner as having "a delightful sense of humor."

Mr. Muse stated that he could not recall telling the post-conviction investigator that the Petitioner "seemed to have two faces." He explained that the Petitioner had one of the higher intellects at Swannoa. He explained that the Petitioner could feign getting along and being happy when, in reality,

she was not. Mr. Muse stated that he was not contacted by the Petitioner's trial team.

Andrew Drace was in the Job Corp with the Petitioner. He arrived at the center in October 1994, and was enrolled in the certified nursing assistant program. He stated that Swannoa was small and that "everyone knew everybody." Mr. Drace described the Job Corp Program as a "pretty rough, violent place." He stated that there were gangs and people who picked on other people. He stated that gang members would come into students' rooms, place sheets over them, and beat them up, mainly because they were white. There were less than ten white male students at the center. He stated that Tadaryl Shipp was one of the gang members and that he was "in fear of him on a daily basis." He stated that, on one occasion, Tadaryl Shipp attempted to throw him from a bridge near the center. Mr. Drace explained that, out of fear for their own safety, many students hid in their rooms.

Mr. Drace testified that on the morning of January 12, 1995, he saw Colleen Slimmer, and she asked whether he had seen Tadaryl Shipp. This was the last time that Mr. Drace saw Ms. Slemmer. The next day, Mr. Drace and his friend Anthony purchased some liquor and were walking along Cumberland Avenue when they ran into the Petitioner. Mr. Drace stated that the Petitioner started drinking with them. He stated that the Petitioner drank two plastic fountain cups of Mad Dog 20/20. He stated that the Petitioner was definitely intoxicated when she left but had indicated that she wanted to drink some more.

After the murder of Ms. Slemmer, the center was placed on lockdown, and no one was permitted to leave. The students stopped going to their classes.

Mr. Drace reported that he lost his job at Wendy's. He stated that they were all questioned. Mr. Drace later contacted the Petitioner's attorneys but observed that the Petitioner's attorney "didn't seem to care."

Mr. Drace testified that after the murder, the Job Corp Center closed and the students were "shipped" to Gulfport, Mississippi. He stated that he did not complete the program in Mississippi. He explained that he left because he was told that he would have to restart the entire program. He added that the group from Knoxville had the stigma of being "evil, terrible people."

Onas Perry was employed at the Juvenile Evaluation Center in Swannoa, North Carolina, in the 1990s. She stated that she supervised sixteen girls, including the Petitioner. Ms. Perry testified that the Petitioner would stay up at night and help clean. The Petitioner would also want to talk about her family problems. The Petitioner related that she wanted a better relationship with her mother and wished that her mother loved her more. Ms. Perry testified that the Petitioner reported verbal, physical, and sexual abuse. Ms. Perry stated that she believed the Petitioner's reports. Ms. Perry related that, in her opinion, the Petitioner sabotaged herself to be able to stay at Swannoa.

Ms. Perry testified that she had observed the Petitioner "in the hobby room doing some Satanic stuff I guess" with some of the other girls. Ms. Perry related that she noticed the light go off in the hobby room and that when she went to see what was going on, she observed the girls sitting down, holding hands, and chanting. She did not understand what they were chanting. Ms. Perry also observed a pentagram on a piece of paper. Ms. Perry stated that

she believed that the Petitioner "was just searching, experimenting or trying to find out who she was...." Ms. Perry stated that the Petitioner had different moods that were not normal. She explained that "[s]ometimes [the Petitioner] would be calm, and sometimes she would just be like just kind of out of control...."

William Joseph Mode testified that, in the fall of 1994, he was employed as an instructor at Job Corp on Rutledge Pike. Mr. Mode taught cultural awareness, reading, AODA (a class on drugs and alcohol), and parenting. Mr. Mode recalled that Colleen Slemmer was "a very sweet young lady." Mr. Mode testified that, although he was under the impression that the Job Corp students did not have violent criminal backgrounds, this impression was contradicted by the actions of the students. He described incidents of being slapped and hit by students. He also recalled an incident where a student threatened to kill him.

Mr. Mode testified that Tadaryl Shipp often came to class high, hung over, or drunk, when he came at all. He described Tadaryl Shipp as disrespectful. He stated that there was little discipline by the Job Corp supervisors. He stated that, from what he had heard from the students, the Job Corp dormitories were unsafe. Mr. Mode stated that he knew Shadolla Peterson and the Petitioner and that he knew about the "devil worshiping business."

Jacqueline Olebe was employed at Knoxville Job Corp as a health instructor in 1994 and 1995. She described the Petitioner as a non-violent student who completed her course requirements. She noted that the Petitioner often slept in her classes but that she participated when she was awake. Ms. Olebe stated that the Petitioner was smart and wanted to be a

nurse. She also testified that she came into contact with the Petitioner through her position on the Drug Abuse Panel and was aware that the Petitioner used marijuana and alcohol. She also acknowledged a conversation she had with the Petitioner regarding voodoo in which the petitioner told her that it worked.

Ms. Olebe testified that Mr. Shipp rarely attended her classes but when he did he was loud and disrespectful. She described the victim as very respectful and skilled. Finally, she stated that she was not contacted by anyone regarding the Petitioner until after the conviction.

Next to testify was Kim Rhodes, a fellow student in the Job Corp Program, who testified for the State at trial. Ms. Rhodes described the environment at the Job Corp as "scary," with a great deal of animosity between different groups. She also related that there was a lot of drug use at the Center.

Ms. Rhodes testified that she had a great relationship with the Petitioner and that she felt safe with her. She stated that both felt like they did not fit in with others. She specifically testified that she never saw the Petitioner act violent. She testified that she was shocked when the Petitioner made the statement to her that the victim had been killed. She also stated that after giving her statement in the case, she was informed by the State's attorney that she would not be allowed to see the Petitioner. She said that she missed her friend.

The next witness to testify was Judge Matthew Martin from North Carolina. Prior to becoming a judge, he represented the Petitioner, who was a juvenile at the time, on multiple occasions. Judge Martin testified that he felt that sending the

Petitioner to training school was a mistake and that he had, in fact, found an alternative which he recommended to the sentencing judge. He felt that the Petitioner would have benefitted more from another type of service. Judge Martin testified that he believed the Petitioner was an abused child and that he was not surprised to learn that she was diagnosed with bipolar disorder. Finally, Judge Martin testified that after the Petitioner was charged in this case, he contacted trial counsel and supplied them with his file.

Next, Tadaryl Shipp, the Petitioner's co-defendant and former boyfriend, was called to testify. He began his testimony by acknowledging his membership in the Gangster Disciples, as well as the membership of the third co-defendant Peterson. He testified that the Petitioner was not a member of the gang. Shipp also acknowledged his romantic involvement with the Petitioner and described her as his best friend. He stated that the Petitioner was a caring person but that she was "edgy" and had mood swings. Shipp testified that during her moods, she often hit him for no apparent reason. He testified that the Petitioner was like two different people depending on whether she was agitated or calm. He estimated that the mood swings could last from two to three minutes up to an hour. During these periods, the Petitioner just went into a rage. Shipp further indicated that the Petitioner was particularly agitated just prior to the murder.

Shipp testified that the Petitioner took the relationship more seriously than he did, and he acknowledged that he was seeing other girls at the time. He stated that he did not believe the Petitioner had been aware of that fact. He also testified that the Petitioner continued to write him three to four letters

per week after the offense occurred.

Shipp acknowledged that he was the one who carved the pentagram on the victim's chest and stated that he did so because he felt like it. He acknowledged that this varied from his original statement to police that the Petitioner brought the weapons and helped carve the pentagram. Shipp further testified that he was unable to recall whose idea it had been to take the victim to the scene, although he acknowledged that he had previously indicated in a statement to police that it was the Petitioner's idea. Shipp stated, however, that he was intoxicated when he gave the statement and that the police were harassing him. Finally, Shipp testified that he would have testified for the Petitioner at trial if he had been asked, even if it conflicted with his own attorney's advice.

Tyrone Comfort also testified and stated he was at the Job Corp Center with the Petitioner and that she was one of his best friends. He indicated that the Petitioner would sometimes be "overly happy" and then suddenly very sad. He described one incident when he observed her in the hall crying, screaming, and pulling out her hair. Mr. Comfort indicated that he did not know Shipp well, but he did not like the way that Shipp treated the Petitioner. He testified that he heard the Petitioner and Shipp argue on multiple occasions, and he recalled seeing bruises and marks on the Petitioner at times. He indicated that Shipp was the one controlling the relationship, even going so far as to threaten Mr. Comfort.

The next two witnesses to testify, DeAndrea Gates and Amanda Robertson, were both former girlfriends of Shipp. Both indicated that he was abusive to them, as well as manipulative and controlling. Ms. Gates indicated that she believed that Shipp preyed on

women he could control. She further indicated that she was not contacted by the Petitioner's defense team. Ms. Robertson said that she was not contacted until 1995 or 1996.

Jermaine Bishop, another former student at the Job Corp, indicated that, at the time of the hearing, he was incarcerated for especially aggravated kidnapping and especially aggravated robbery. He testified that met Shipp in the program and described him as "weird." Mr. Bishop testified that he was aware that the Petitioner and Shipp were dating, and he felt that Shipp was in control of the relationship. He further testified that the Petitioner and Shipp fought often.

Co-counsel was the next witness, and she stated that she had been licensed to practice law since 1992, and that she had been appointed to the Petitioner's case on January 23, 1996. At the time, her practice consisted primarily of criminal cases. She also indicated that she had previously served as an assistance public defender and had handled felony and misdemeanor trials. Co-counsel acknowledged that the Petitioner's case was her first murder case. She indicated that her primary role in the case was research and the drafting of motions. She also stated that she was responsible for preparing voir dire, conducting some cross-examination in the guilt phase, and handling the family witnesses in the penalty phase.

Co-counsel testified that she was appointed to replace prior co-counsel and that much of the groundwork had already been done when she was appointed. She indicated that her initial thoughts upon reviewing the case were that it might be possible to prove second degree murder based upon "the frenzy" at the murder scene combined with the

Petitioner's mental health issues. However, she noted that she saw sentencing as the critical phase and, from the beginning, began analyzing what proof would be needed.

Co-counsel stated that Dr. McCoy had been retained as the mitigation expert prior to co-counsel's own appointment. She met with Dr. McCoy and lead counsel in March and reviewed the materials which had been prepared by Dr. McCoy. Co-counsel further indicated that she presumed these materials were also shared with Dr. Engum, who had produced a diagnosis of severe borderline personality disorder.

Co-counsel testified that, in the penalty phase, the goal was to establish that the Petitioner came from a dysfunctional family with a history of drug and alcohol abuse. In hope of establishing this, the initial strategy was to call Dr. McCoy and to introduce her report. However, at the "ninth hour," a decision was made against having Dr. McCoy testify in the penalty phase. Co-counsel indicated that this decision was made because of several problems which arose with Dr. McCoy, namely her relationship with the prosecutor in the case and her statement that she was not in agreement with Dr. Engum's report. Despite the decision against calling Dr. McCoy, the defense team unsuccessfully attempted to get her report admitted into evidence, as well as the charts which had been prepared. Co-counsel acknowledged that only three witnesses were called to testify and stated that it might have been more helpful to the case to call other lay witnesses. However, by the time the decision was made not to use Dr. McCoy, it was too late. Co-counsel said that she attempted to present their mitigation theme as well as she could using the lay witnesses but acknowledged that they had no expert "to connect the dots." However, she

stated that she attempted to do so in her closing argument.

Co-counsel testified that she was aware that much of the material contained in the report by Dr. McCoy, including the incidents of the Petitioner's prior violence, were a "two-edged sword." She stated that they felt the defense had to be careful about the type of mitigation evidence which was presented because some of the proof "could hurt them as much as it helped." She stated that they were faced with "a horrible case with horrible facts and someone that confessed *ad nauseam* and kept confessing over and over and over in letters that she was passing out."

Co-counsel acknowledged that they had filed a "don't ask/don't tell" motion regarding the death penalty issue with the jury. According to her, the strategy was to get one person on the jury who was totally opposed to the death penalty. She acknowledged that this decision involved the risk of getting twelve jurors who were all in favor of the death penalty. She also acknowledged that Dr. McCoy's entire report was given to the prosecution despite the fact that it contained information which would have been privileged, especially in light of the decision not to call Dr. McCoy to the stand. She further acknowledged that the prosecution's cross-examination of the witnesses, utilizing information contained in the report, was damaging to their case. However, she also testified that the decision not to call Dr. McCoy resulted in the State not being able to use many other damaging facts which were contained in the report. Co-counsel also testified that she could not recall why there was no objection made to the inconsistent theories utilized by the State based upon the charge of conspiracy and then the application of the aggravating factor that the killing was done, in

part, to avoid arrest.

On cross-examination, co-counsel stated that she was aware of lead counsel's overbilling issues but did not discuss it with him. She testified that she did not think the issue affected lead-counsel's representation of the Petitioner and described him as very zealous. Co-counsel acknowledged that she and lead counsel had the Petitioner sign a release which would allow them to profit from the Petitioner's story. However, she explained that the document only referred to public aspects, not information protected by the attorney/client privilege. She testified that the main purpose of the document was to protect the Petitioner's rights and eliminate any ethical concerns. Co-counsel specifically testified that the release in no way affected any trial strategy or decision.

Co-counsel reiterated that the goal in the guilt phase was to try to convince the jury to convict the Petitioner of second degree murder based upon the frenzy of the scene and the controlling nature of the Petitioner's relationship with Shipp. However, she acknowledged that some witnesses, as well as the Petitioner's own statement, undercut the theory that Shipp had committed most of the acts during the murder. In addition, co-counsel stated that some aspects of Dr. McCoy's report also undermined this theory.

Co-counsel testified that she had met with the Post–Conviction Defender's Office on one occasion in 1999 and had given them her entire file. She indicated that, despite requests to do so, she had not met with them again as she believed that everything had been covered.

Next, the Petitioner called William Crabtree to

testify. General Crabtree testified that he had been employed as a District Attorney General for more than thirty years and had been the lead prosecutor in the Petitioner's trial. He also indicated that knew Dr. Diana McCoy, the mitigation expert employed by the defense team, and had dated her for a period of time. General Crabtree indicated that the relationship had occurred prior to the Petitioner's trial and that he and Dr. McCoy were not involved at all during the trial. Further, General Crabtree testified that he was not aware that Dr. McCoy was employed in the Petitioner's case until he received her notebooks and report during the penalty phase of the Petitioner's trial. He also indicated that he was not happy to get the large report so late in the proceeding. He was unable to recall what information was contained in the report or if he found specific information in it that he used to cross-examine the Petitioner's witnesses.

General Crabtree testified that he saw no reason to withdraw as the prosecutor because of his previous relationship with Dr. McCoy. He indicated that he did not see that a conflict of interest was created. He testified that he had prosecuted several other cases in which Dr. McCoy was involved. He indicated that only in one instance did he withdraw and that was because he had generally discussed the facts of that case with her prior to learning of her involvement.

Next, the Petitioner's lead counsel at trial testified that he had been practicing law in Knoxville since 1986. He indicated that his practice was exclusively criminal defense at the time and that, prior to his appointment in the Petitioner's case, he had handled several murders cases but had not previously handled a capital case.

In 1993 or 1994, lead counsel learned from an article in the newspaper that the Comptroller's Office

was conducting an audit of the indigent defense system and that he would likely be one of the attorneys involved in the audit. As a result, he conducted a "self-audit" and discovered that, in certain instances, he had billed more than twenty-four hours in a day. He self-reported to the Board of Professional Responsibility on the advice of counsel. In April of 1995, one month prior to his appointment in the Petitioner's case, he had to repay approximately $67,000 to the fund. Prior to repayment, he had refrained from taking any appointments and withdrew from some cases to avoid an appearance of impropriety. Lead counsel testified that he was not concerned that the investigation would affect his representation of the Petitioner because he had been "cleared to practice law" at the time of the appointment. Despite the fact that his name had been in the newspaper, he was not concerned about the issue affecting potential jurors during voir dire. At the time of the appointment, the only complaint pending was the disciplinary complaint, which he had self-reported. That issue was not resolved until 1998, and lead counsel never received an active suspension nor was his practice interrupted.

Lead counsel testified that he had several murder cases prior to his involvement in the Petitioner's case. He estimated he had taken a dozen or more felony cases to jury trial. He could not recall whether he had called an expert witness to testify in those trials, but he did indicate that he often used investigators, pathologists, and psychologists. He also stated that, at some point prior to trial, he contacted the Capital Case Resource Center.

Lead counsel testified that early in his representation, he engaged Dr. Engum to do

psychological testing on the Petitioner. He met with Dr. Engum on several occasions to discuss the findings. In the late summer or early fall of 1995, lead counsel also engaged the services of Dr. Diana McCoy as a mitigation specialist and indicated that he communicated with Dr. McCoy frequently. According to lead counsel, his strategy was that he and Dr. Engum would concentrate on the guilt phase where he knew they would "take a beating" and then Dr. McCoy would "come out and save the day" in the penalty phase. Lead counsel indicated that he looked at the social history as a tool to be used in the penalty phase because he wanted Dr. McCoy to take the social history and tie it back to Dr. Engum's report. However, he specifically recalled at least one meeting during trial preparation when both doctors were present.

Lead counsel also employed the services of Dr. Bernet, a psychiatrist, in the case, but he was not a "member of the team." He was hired solely for the purpose of giving background on the Satanic aspect of the case. He was to testify that the murder was not a ritualistic killing and that the Petitioner had just been a "kid dabbling in Satanism." Mr. Talman did not ask Dr. Bernet to conduct an evaluation.

Lead counsel indicated that co-counsel was appointed after previous co-counsel requested to withdraw. Lead counsel had not previously worked with co-counsel, but he was aware that she had previously handled criminal cases while with the Public Defender's Office. He indicated that he was aware that co-counsel had never been involved in a capital case, but he stated that he was not aware that she had never been involved in a murder case. Lead counsel testified that co-counsel handled the penalty phase of the case because he thought it might be

better with a female attorney. Nonetheless, he stated that he was lead counsel and was involved personally in both phases of the trial.

Lead counsel indicated that he was aware that the case was complex. While the Petitioner was very cooperative, it was not a "who done it." The Petitioner had confessed to a "grizzly murder," and lead counsel indicated that going into trial, he was fairly certain that there would be a penalty phase. Therefore, in his mind, sentencing issues were the most important, and he would have considered it a victory if the Petitioner did not receive death. Lead counsel acknowledged that, in hindsight, there were things he wished he had done differently. While not specifically recalling a discussion with Dr. McCoy of which witnesses to call, he assumed that he did discuss this with her. Lead counsel also indicated that he was not dissatisfied with Dr. McCoy's work.

Lead counsel testified that during the guilt phase of the proceeding, he tried to attack the elements of intent and premeditation. The defense team attempted to "soften [the Petitioner] as best we could, make her a person." Lead counsel indicated that he spent a great deal of time investigating the case, even traveling to North Carolina to interview family and friends of the Petitioner.

According to lead counsel, the strategy of using Dr. McCoy during the penalty phase to give an overview of the Petitioner's life remained in place throughout the trial. He also indicated that he had planned to call the Petitioner's parents and aunt as witnesses. At the time, he believed that was a sufficient number of witnesses. Despite his intent to use Dr. McCoy as a witness, lead counsel made clear that there were certain things contained in her report that he had concerns about being admitted into

evidence. According to lead counsel, the decision not to call Dr. McCoy was based on multiple reasons, with the primary reason being that she would not corroborate Dr. Engum's report because she did not personally conduct an evaluation of the Petitioner. He testified that, until that moment after the penalty phase when he spoke with Dr. McCoy about this, he had believed that the two doctors were in agreement.

Lead counsel also indicated that he was uncomfortable with Dr. McCoy's relationship with General Crabtree, although he did not doubt Dr. McCoy's integrity. Lead counsel testified that he had been aware of the relationship which, according to Dr. McCoy, had involved some anger and jealousy. The final decision not to use Dr. McCoy was a last minute decision, which lead counsel acknowledged "could" have been wrong. He testified that he wished that he had called additional witness, but he did not know if it would have made a difference in the outcome. Lead counsel could not recall exactly when the decision was made to proceed with only three witnesses.

Lead counsel was unable to recall when he received a copy of Dr. McCoy's final report, although Dr. McCoy's billing records indicate that the report was bound on March 20, after jury selection in the trial. Lead counsel testified that he did not recall reviewing the entire report before trial, but he stated that he had seen prior drafts. Lead counsel did recall an in-camera hearing during which he gave Dr. McCoy's report to the State. He recalled that General Crabtree was unhappy with the timing as it only gave the State one night to review the report prior to the opening of the penalty phase. He acknowledged that he turned over the final report, as well as the notes of interviews and other information contained in Dr.

McCoy's folder, because he was still planned to use Dr. McCoy at that point. Lead counsel stated that, in retrospect, he probably should have just given the report only, as he did not plan to use the other supporting documents. At the time, he believed they were not protected under the privilege.

Lead counsel testified that he made no challenge to the State using inconsistent theories with regard to the conspiracy conviction as opposed to the aggravator that the murder was done to avoid arrest. While at the time he did not see those as inconsistent theories, he now does.

Lead counsel further testified that, during voir dire, the publicity of the case was extensive and that almost all of the potential jurors had heard something about the case. Lead counsel acknowledged that his line of questioning may have reinforced the information the jurors had seen in the news. He also acknowledged the risk in pursuing the strategy of the "don't ask don't tell" with regard to death qualifying the jury. Lead counsel could not recall if he asked questions to "life qualify" the jury.

Lead counsel also testified that, after the case, he talked with the Petitioner's aunt, Carrie Ross, about the possibility of writing a book. However, nothing ever became of the idea. He specifically testified that he never profited from the Petitioner's story, although he acknowledged that a document had been signed by the Petitioner which would have allowed him to do so.

Lead counsel indicated that the State had offered the Petitioner a guilty plea deal to life without the possibility of parole. The Petitioner did not accept the offer because "she did not want to grow old in jail." During his testimony, lead counsel indicated that he

probably should have pushed the Petitioner harder to accept the deal.

Lead counsel testified that he did not recall asking Dr. McCoy to lie. He did recall receiving an angry letter from her after trial alleging that he was responsible for her not being hired to work on another capital case.

Lead counsel acknowledged that the Petitioner did not receive a "perfect defense." He said that, in retrospect, there were things which could have been done differently. However, given the sheer brutality of case, he was unable to say that doing anything different would have resulted in a different outcome.

On cross-examination, lead counsel again addressed the overbilling issue and stated that he had considered the matter closed prior to his appointment in the Petitioner's case. A settlement had been reached, and he had paid it. The State was again paying him for appointments, and the Tennessee Supreme Court had appointed him in another case prior to his taking the Petitioner's case. There was no issue of criminal liability pending at the time. Furthermore, lead counsel testified that he had discussed the matter with the Petitioner, and she was not bothered by it. Lead counsel stated that the billing issue had no affect on his performance or zealousness in his representation of the Petitioner.

Lead counsel also testified to the reasoning behind the decision not to seek a continuance because of the short time that co-counsel had been on the case. He stated that a great deal of work had been done prior to her appointment and that co-counsel worked hard and felt prepared. Moreover, the decision was affected by their hope that the State would be unable to locate key witnesses against the Petitioner. Lead

counsel also testified that he saw no specific legal reason to file a motion to suppress the statement given by the Petitioner. He also reiterated that the timing of Dr. McCoy's report had no bearing on the decision not to call her as a witness. Lead counsel stated that he felt that the damaging information in Dr. McCoy's report was too prejudicial to present to the jury if Dr. McCoy was not going to support Dr. Engum's diagnosis. Lead counsel acknowledged that the decision to give the State the report did allow some damaging information to be used on cross-examination; however, by not calling Dr. McCoy, other damaging evidence was kept out.

Lead counsel indicated that neither Dr. Engum nor Dr. McCoy suggested involving another mental health professional in the case. Lead counsel acknowledged that, looking back, retaining the services of a psychiatrist might have been beneficial.

Following lead counsel's testimony, Carrie Ross, the Petitioner's aunt, was recalled to the stand. She indicated that, while she was in Knoxville for the trial, lead counsel had discussed with her the possibility of a book deal about the case. According to Ms. Ross, lead counsel also made the statement to her that there was no way the Petitioner would avoid receiving the death penalty but that he was leaving room for appeal or "leaving holes in the case."

Ms. Ross again reiterated the violent nature and various abuses of the Petitioner's parents and grandparents. She testified again as to the environment in which the Petitioner had grown up in, indicating violence was a way of life. She also indicated that in her opinion, the questions she was asked during the penalty phase of the trial did not allow her to convey the person the Petitioner really was.

The next witness to take the stand was Dr. Diana McCoy, the mitigation expert employed to handle the Petitioner's case at trial. She testified that her role in the case was to collect information by interviewing people and reviewing records and to analyze that information in order to develop themes for the attorneys to present in the penalty phase. She also testified that it was her responsibility to assist in choosing additional lay witnesses who would show the jury the Petitioner's human side during the penalty phase. However, she testified that, in this case, her job did not involve forming a diagnosis for any conditions from which the Petitioner might suffer. She indicated that she was retained by lead counsel in this case.

Dr. McCoy indicated that she recalled only one meeting between the entire defense team. She stated that most of her interaction was with lead counsel, with the record indicating at least fourteen face-to-face meetings and more than forty telephone conversations. She testified that they worked together a great deal and had good interaction. She indicated that she was specifically told to prepare a report, not an opinion, in the case. She testified that she provided the final bound version of her report to the attorneys on March 24, 1996, although she had previously gone over the material contained in the report with the attorneys. She stated that lead counsel was as familiar with the materials as she.

Dr. McCoy testified that she met with the Petitioner on nine occasions prior to trial in order to build a rapport with the Petitioner so that she might gain the entire truth of the Petitioner's life. She indicated that she was aware of Dr. Engum's diagnosis of borderline personality disorder and that she was in agreement with that diagnosis. Dr. McCoy

testified that she reviewed her report with lead counsel and co-counsel on March 15, and that they had previously discussed who should be called to testify as lay witnesses. At this meeting, Dr. McCoy indicated to them that the final report would soon be done. According to Dr. McCoy, lead counsel indicated that there was no hurry, as he planned to wait till the last possible minute to give the report to the prosecution.

She went on to note that, in her opinion, family members alone would not be able to sufficiently explain who the Petitioner was and why she had committed the crime. Dr. McCoy indicated that although she was not specifically informed, she assumed that these witnesses had been subpoenaed or that arrangements had been made for them to be at the trial. She testified that several of the professionals from Swannoa and Shaeffer, who had worked with the Petitioner and liked her, would have been greatly beneficial to call as witnesses. She also testified that Matthew Martin and the Petitioner's aunt would be good witnesses, but the Petitioner's mother would not make a positive witness for the defense. Dr. McCoy testified that, as of March 14, she was under the impression that several lay witnesses would be called to testify and that she would then testify in order to tie the diagnosis together.

Dr. McCoy indicated that her work developed into a three-volume social history. She testified that she was in agreement with the diagnosis of borderline personality disorder and never told either attorney that she disagreed with the diagnosis. As part of her testimony, Dr. McCoy explained some of the characteristics of borderline personality disorder, such as fear of abandonment, unstable relationships, mood swings, unstable self-image, and impulsivity.

Dr. McCoy had prepared various charts to show such things as substance abuse in the Petitioner's family, a family chart showing the large number of people in and out of the Petitioner's life, and the Petitioner's education history. She testified that all of these influences tied into the development of the Petitioner's borderline personality disorder, indicating that the Petitioner's fear of abandonment was the overriding concern. She also testified regarding the "tough girl image" which the Petitioner presented and opined that this was cultivated in order for the Petitioner to appear fearless when, in fact, she was just a "scared kid." Dr. McCoy also referenced the Petitioner's tendencies toward self-destruction, testifying with regard to specific instances in her history of self-sabotage and suicide attempts. She further testified regarding the unstable relationships experienced by the Petitioner and her drastic mood swings. Dr. McCoy discussed the Petitioner's acknowledged lying, which was usually done to make herself look better. She said this was an indication that the Petitioner was starved for attention, and she referenced the multiple witnesses who had indicated that if the Petitioner was ever shown attention, she would "talk and talk." Finally, Dr. McCoy discussed the poor parental role models which the Petitioner had while growing up. She indicated that the Petitioner grew up in an environment where drugs and alcohol were used, where sex was glamorized, where violence was seen as a solution to problems, and where no limits were set.

Next, Dr. McCoy discussed a March 24th meeting in which she was informed that she would be the only witness to testify during the penalty phase. She believed that the decision to rely strictly on her

testimony was a bad one. Dr. McCoy testified that, in her opinion, the mitigation evidence which she had gathered was relatively strong, but she felt that she could not convey that alone. According to her, it would take a number of people to "paint the whole picture." She also opined that it was important to show the early physical and emotional abuse with the true depth of the problems. She indicated that it was important to include the negative aspects of the Petitioner's life and that the jury would not be expecting her to be a "girl scout" if she had already been convicted of first degree murder.

Dr. McCoy also discussed the Petitioner's relationship with Shipp. She described the Petitioner as hungry for attention and very intense about the relationship, stating that it made her feel like somebody. She stated that the Petitioner basked in the glow of Shipp's attention. Dr. McCoy also opined that the Petitioner's prior rejections had led her to Shipp.

Dr. McCoy testified that she recommended that Dr. Bernet be used as an expert in regard to the Satanism aspect of the case. She testified that lead counsel had expressed some concern because of the reference to Satanism in the report from Swannoa. However, Dr. McCoy testified that she felt that it was fairly normal under the circumstances and that she saw the Petitioner as struggling with spirituality.

Dr. McCoy testified that she learned on Friday following the guilty verdict that she would not be called to testify. According to her, lead counsel, who was very upset, telephoned her after an in-camera conference with the trial court and the State. He informed her that the prosecutor had gone "ballastic" about receiving the mitigation report so late and that the prosecutor believed it was all hearsay. Dr. McCoy

testified that lead counsel then asked her to lie and say she had just given him the report the previous day, but she refused. Dr. McCoy testified that she asked lead counsel if he would like her to call Herb Moncier, a local attorney, to ask his opinion. When Dr. McCoy was unable to reach Mr. Moncier, lead counsel informed her that he would not have her testify in the case.

Despite being informed that she would not be called to testify, she met with lead counsel later that evening to discuss the options. Dr. McCoy stated that they talked for several hours and that lead counsel was upset, saying they will "probably post-convict me on this." After their discussion, the decision was made to call three witnesses to testify, those being the Petitioner's parents and her aunt. Dr. McCoy met with the witnesses the next morning to prepare them to testify. Dr. McCoy stated that it was extremely important to show the reasons the Petitioner had turned out the way she had. She stated that it was impossible to do so by calling only three family members. She described the mitigation presented as "punnie and pathetic."

Dr. McCoy also testified regarding a situation which arose post-trial. She indicated that she was contacted by the victim's attorneys, who were asking for a copy of her report. She telephoned lead counsel for advice, and he advised her against disclosing the report. He later sent her a letter in which he questioned her ethics, and Dr. McCoy sought the advice of counsel. In order to set the record straight, her attorney helped her draft a letter in response to lead counsel. Lead counsel then telephoned her and stated that he just wanted to drop the issue, as they had previously gotten along.

Dr. McCoy also testified that she had engaged in a

brief dating relationship with General Crabtree. She stated, however, that the relationship was over prior to her beginning to work on the Petitioner's case. She indicated that, early on in the case, she informed lead counsel of this fact, and he said he had no problem with it. When Dr. McCoy heard rumors that lead counsel and co-counsel were indicating she had withheld this information, leading to their decision not to call her as a witness, she contacted Herb Moncier. He advised her to let it go, as it would come out on post-conviction.

Although Dr. McCoy was not asked to prepare an opinion for the trial, she did prepare one for the post-conviction hearing. She used charts and graphs to support the borderline personality diagnosis. Her general conclusions were:

> (1) The Petitioner came from a highly dysfunctional family and that many of her subsequent developmental issues stemmed from this;
>
> (2) The Petitioner experienced multiple traumatic events during her childhood and adolescence, including rapes and physical abuse by multiple parties, which also contributed to the exacerbation of her psychiatric problems;
>
> (3) The Petitioner's parents did not sufficiently address and handle her emotional and psychological problems;
>
> (4) The Petitioner had multiple psychological problems including:
>
> (a) attachment issues which significantly contributed to her

dysfunctional relationships;

(b) an inability to maintain emotional control, particularly during periods of stress, and a reliance on others to help her maintain control;

(c) a constant need for attention;

(d) an assumption of a tough-girl image to compensate for her lack of self-esteem and self-respect; and

(e) a need to please others and a willingness to be influenced by others, regardless of the cost to herself.

(5) The Petitioner was experiencing great stress at the time of the homicide, which contributed to her participation.

Dr. McCoy stated that, at the time of the murder, the Petitioner felt that her identity, which she felt centered around Shipp, was slipping away. She also opined that because of the Petitioner's problems at the Job Corp and her problems with the victim, the Petitioner felt that she was losing her sense of self-esteem and identity. Because of the Petitioner's borderline personality disorder, she felt frantic and experienced irrational anger. Dr. McCoy referenced and discussed prior times in the Petitioner's life when she became extremely angry and stated that the Petitioner simply did not have the control of a normal person.

On cross-examination, Dr. McCoy acknowledged that, although she had previous capital case experience as a mitigation specialist, she had never testified in any of those trials. She reiterated that she was comfortable with Dr. Engum's diagnosis and again stated that it was not her responsibility to

reach a diagnosis in this case. She acknowledged that she did not necessarily look for things which would contradict Dr. Engum's conclusions. She also testified that because Dr. Engum was a neuropsychologist, she assumed that if a neurologist was needed, he would have made that suggestion.

Herb Moncier, a Knoxville attorney, testified that he spoke with Dr. McCoy about her relationship with General Crabtree after she sought his advice on whether it created a problem with her working on the Petitioner's case. He informed her that it should not be a problem but that she should inform lead counsel. Mr. Moncier also testified that sometime after the trial began, Dr. McCoy called him, upset, and informed him that Mr. Talman had asked her to say something that was untrue. Mr. Moncier advised her not to lie and that the issue would be raised in post-conviction. Mr. Moncier also testified that Knoxville had an excellent bar and that any number of attorneys would have happily assisted lead counsel if he had asked.

Gregory Isaacs, another local attorney, testified next. He stated that he had been involved in two capital cases and a number of homicide cases and that he had occasionally used Dr. McCoy. He testified that she was very competent and made a good witness. Mr. Isaacs also testified that he dealt with Dr. McCoy in a representative capacity following the Petitioner's trial. He testified that he assisted her in drafting a response to lead counsel's letter to Dr. McCoy questioning her ethics.

The final witness to testify was Dr. William Kenner, an expert in forensic psychiatry. He testified that he was appointed by the court in 2001 to conduct a competency evaluation of the Petitioner in order to see if she could waive her post-conviction appeals. In

performing his evaluation for the court, Dr. Kenner met with the Petitioner on five occasions and, afterward, an additional two times. He testified that he also reviewed extensive records, including medical records of some of the Petitioner's family members. He ultimately diagnosed the Petitioner as suffering from:

Axis I (active diagnosis)	Bipolar Disorder
	hypomanic recurrent
Axis II (personality disorder)	Borderline Personality Disorder
	Antisocial Personality Disorder
Axis III (active medical condition)	von Willibrand Disease
Alix IV (psychosocial stressors)	Problems with primary support group, social environment, incarceration
Axis V (global assessment)	15

Dr. Kenner testified that in his first meeting with the Petitioner, there were some suggestions of bipolar disorder, but it "didn't sort of knock me over" that way. He opined that the diagnosis requires multiple observations over time because people with bipolar disorder cycle. Dr. Kenner indicated that his second

meeting with the Petitioner was completely different and that it became clear that sleep deprivation affected her. In prison, it showed up as irritability. The Petitioner told Dr. Kenner that she did "stupid" stuff when she was not in prison.

In 2002, the Petitioner was prescribed Lithium, and her reaction to the drug was dramatic. According to Dr. Kenner, her major improvement after taking the drug is what would be expected from someone with bipolar disorder. Following another evaluation in 2002, he re-diagnosed the Petitioner and concluded that she did not suffer from borderline personality disorder as he had previously concluded but rather it was part of her bipolar spectrum disorder. He acknowledged that bipolar disorder is an illness which "doesn't have terribly clear borders." Dr. Kenner also concluded that the Petitioner was not antisocial. Dr. Kenner further acknowledged an ongoing debate in the mental health community as to whether borderline personality disorder is misdiagnosed bipolar disorder or whether there is, in fact, borderline personality disorder. He also indicated that new diagnoses are constantly emerging in this field.

According to Dr. Kenner, he felt that there was data available at the time of trial which could have been discovered if a competent physician had conducted an examination of the Petitioner. He specifically noted that there was significant data to suggest early onset bipolar disorder, based upon the Petitioner's history. He indicated that it was critical to explain this to the jury, tying it back into the Petitioner's personal history. He explained that this was so important because, at the time of the murder, the Petitioner was experiencing a two-to-four day cycle of sleep deprivation with increasing irritability,

which peaked at the time of the murder.

Dr. Kenner further testified that there were records available for raising the medical question of whether the Petitioner had brain damage, based upon her seizures, her abnormal test results, and the head injury she suffered as an adolescent. He suggested that medical testing, such as an MRI, should have been done on the Petitioner prior to a final diagnosis. Dr. Kenner acknowledged that, given the information the defense team possessed, borderline personality disorder was a reasonable diagnosis when the trial was held.

Dr. Kenner said that, in his opinion, the structure of the defense team was odd. He asserted that the lines of communication all went to lead counsel and that there appeared to be little expert information shared. He noted that Dr. Bernet never saw the Petitioner and that, from what he learned, Dr. Engum never reviewed Dr. McCoy's work. Dr. Kenner also noted that the fact that Mr. Talman attempted to solicit a medical opinion from Dr. Bernet, who had to then answer that he had not examined the Petitioner, made Dr. Bernet's entire theory seem more suspect to the jury.

After hearing the evidence presented, the post-conviction court, by written order, denied relief. The Petitioner has timely appealed.

Analysis

On appeal to this court, the Petitioner presents a number of claims that can be characterized in the following categories: (1) the post-conviction court should have recused itself; (2) the Petitioner's trial counsel were ineffective; (3) the Petitioner is ineligible for the death penalty; and (4) the death penalty is unconstitutional.

Standard of Review for Post–Conviction Cases

Post-conviction relief is only warranted when a petitioner establishes that his or her conviction is void or voidable because of an abridgement of a constitutional right. T.C.A § . 40–30–103. The petition challenging the Petitioner's convictions is governed by the 1995 Post–Conviction Act, which requires that allegations be proven by clear and convincing evidence. *See* T.C.A. § 40–30–110(f). Evidence is clear and convincing when there is no serious or substantial doubt about the accuracy of the conclusions drawn from the evidence. *Hicks v. State,* 983 S.W.2d 240, 245 (Tenn.Crim.App.1998).

Once the post-conviction court has ruled upon a petition, its findings of fact are conclusive on appeal unless the evidence in the record preponderates against them. *Wallace v. State,* 121 S.W.3d 652, 656 (Tenn.2003); *State v. Nichols,* 90 S.W.3d 576, 586 (Tenn.2002) (citing *State v. Burns,* 6 S.W.3d 453, 461 (Tenn.1999)). This court may not reweigh or reevaluate the evidence or substitute its inference for those drawn by the post-conviction court. *Nichols,* 90 S.W.3d at 586. Questions concerning the credibility of witnesses and the weight to be given their testimony are for resolution by the post-conviction court. *Id.* (citing *Henley v. State,* 960 S.W.2d 572, 579 (Tenn.1997), *reh'g denied,* (1998), *cert. denied,* 525 U.S. 830, 119 S.Ct. 82, 142 L.Ed.2d 64 (1998)). It is, therefore, the burden of the petitioner to show that the evidence preponderated against those findings. *Clenny v. State,* 576 S.W.2d 12, 14 (Tenn.Crim.App.1978).

Notwithstanding, determinations of whether counsel provided a petitioner constitutionally deficient assistance present mixed questions of law and fact. *Wallace,* 121 S.W.3d at 656; *Nichols,* 90

S.W.3d at 586. As such, the findings of fact are reviewed under a *de novo* standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. *See Fields v. State,* 40 S.W.3d 450, 458 (Tenn.2001) (citations omitted). In clarifying the standard, our supreme court explained that the standard for reviewing the factual findings of a trial court has always been in accordance with the requirements of the Tennessee Rules of Appellate Procedure, specifically Rule 13(d). *Id.* at 456.

I. Recusal of Post–Conviction Court

The Petitioner contends that the post-conviction court, who also served as the trial court, committed constitutional error by failing to recuse itself from the post-conviction proceedings. Specifically, the Petitioner asserts that "the post-conviction court was disqualified from deciding [the] Petitioner's post-conviction claim because [the court] had personal knowledge of material facts in dispute." The Petitioner further contends that "in light of [the Petitioner's] post-conviction claims [, namely the asserted conflict of interest of trial counsel,] a reasonable person would have considered the post-conviction court incapable of impartial adjudication of [the Petitioner's] post-conviction petition."

At a hearing held on February 26, 2007, the Petitioner's post-conviction counsel argued that the post-conviction court had a duty to recuse itself because the post-conviction court had appointed lead counsel to represent the Petitioner, knowing of counsel's potential conflict created by the overbilling issue. Counsel for the Petitioner further asserted that the post-conviction court should recuse itself because there was an appearance of impropriety regarding the court's presiding over matters involving trial

counsel and overbilling. Finally, counsel for the Petitioner argued that the court was a necessary witness at an unrecorded hearing in chambers after the return of the guilt phase verdict.

The post-conviction court made the following findings of fact and conclusions of law relative to the motion for recusal:

> ... it's discretionary ... with the statute. But a judge should hear their own petitions for post-conviction relief.... The reason why is because the judge knows better what happened in these cases than anybody else ... and can understand the issues better without having to go backwards and learn them.
>
> ...
>
> ....
>
> In this case I think it's pretty obvious that everyone in Knox County knew that [lead counsel] had problems with his billing. He also had been appointed ... by Judge Jenkins.... And he was a death-qualified attorney with an active law license without restrictions. He too was presumed innocent until proven guilty. As it turned out he was never prosecuted in this case.... And he kept his law license all the way through until you said there had been a suspension at some time later. But he did have a problem ... it was generally known in the courts in Knox County.
>
> Evidently, it was also generally known in the Supreme Court of Tennessee—...

the Supreme Court appointed him to represent Mr. Irick in what was a death case. And he represented [the Petitioner]....

Now, whether or not [lead counsel] had a cloud over him that so inhibited his ability to practice law that it affected [the Petitioner's] representation is an issue for post-conviction.... But I don't ... think that I had had or have now any interest in protecting my rulings, protecting myself that was placed above any interest to do justice in this case. So with respect to a mandatory disqualification, I don't think I'm obliged to be disqualified because I knew or ... we all knew that [lead counsel] had his own problems.

....

... And I don't think that there's any reason that I should recuse myself as a mandatory obligation based upon the Tennessee Constitution....

....

Having a lot of knowledge about this case doesn't make me less than impartial. And when I say me this isn't a personal ruling as we've discussed. This is a judicial ruling.

Now, as to whether or not there's an appearance of impropriety and, therefore, based upon the cannons I should recuse myself ... Miss Pike ... raised the issue of the appointment of

[lead counsel] as discretionary issue. And ... I understand why the issue was raised....[I]t's not a personal issue.... If I have opinions or knowledge and, obviously, ... I have more knowledge of this case than anyone else in this room is not a ground to recuse myself....

....

... So I don't think I have any interest in the outcome other than to get this post-conviction petition on the road....

....

I've been sitting here for seventeen years. I've been reversed. I've gone back and started again. In fact, I was reversed in Tadaryl Shipp's case as to sentencing.... [T]hat doesn't give me any reason not to do my job in this case. I have thought very hard the last couple of weeks—whether or not my involvement in this case has taken me to the level that I should recuse. I don't find that to be the case.

....

And that's what a post-conviction petition is. It asks the Court to go back and review everything and make sure that it was done properly, and if it wasn't it is the duty of the Court to review and to overturn a conviction. It's my obligation; that's my job. And I don't see a reason why—and if I don't do that job properly, somebody else is going to reverse it. So I don't see a reason to

recuse myself for that reason either.

On appeal, the Petitioner relates that her "foremost claim for post-conviction relief is that her trial counsel [, lead counsel,] was ineffective in light of a conflict of interest" created by his being under investigation by the Indigent Defense Fund and that he had disciplinary sanctions pending at the time of his representation of the Petitioner. She further relates that "as a result, it was in [lead counsel's] pecuniary and penological interest to avoid agitation of either the prosecutor or the trial court in the trial." Her argument with regard to the post-conviction court's recusal appears to center around the in-camera meeting held in the court's chambers, off the record, immediately preceding the penalty phase of the trial. The Petitioner contends that the events of that meeting substantiate a claim of conflict which mandates vacating her sentence based on her theory that lead counsel turned over the mitigation materials at that time to placate the State, a theory supported by the testimony of Dr. McCoy and two Knoxville attorneys. With regard to the present argument, the Petitioner contends that "what is critical is that the post-conviction court ... was a party to the unrecorded in camera meeting."

It is not disputed that the post-conviction court was qualified to preside over the post-conviction proceedings and, generally, adjudication of a post-conviction petition by the same court which presided over a petitioner's trial is both proper and expedient. *State v. Garrard,* 693 S.W.2d 921, 922 (Tenn.Crim.App.1985); T.C .A. § 40–30–105(b) (1995). Nor is recusal automatically required when a judge is called upon to review their own order. Additionally, our supreme court has held that prior knowledge of facts about a case is not sufficient, in and of itself, to

require disqualification. *State v. Paul Dennis Reid,* 213 S.W.3d 792, 815 (Tenn.2006). The Petitioner contends, however, that this case is distinguishable from the general because her claim "involves the court itself being instrumental in denying [the Petitioner] a fair trial," thus taking this claim "outside the normal presumption of impartiality that attaches to post-conviction adjudication by the same court that presided at trial."

The Petitioner centers her argument around statements made by the post-conviction court at the hearing in which she quashed the subpoena which had been issued to the court and denied the motion to recuse:

> I have no independent memory [of the meeting] other than that there was three volumes. I remember that there were volumes—and I'm not trying to testify; I'm just trying to—trying to make a ruling here—of mitigation materials. Those were turned over to the State as required after the verdict.
>
> The State had no—not enough time. And then—and I can't imagine why—why there would even be an issue about when [lead counsel] received those materials because they didn't go to the State anyway at that point. And maybe the State was arguing that they were entitled and I ordered them turned over.
>
> ....
>
> Again, for the purposes of your Motion for a Subpoena, a judge speaks through their rulings. So you can take those rulings and say, "Okay. These are the

> grounds for post-conviction petition." But you can't subpoena me to ask me what I thought or what I think or what I remember. I've told you as much as I can in order to make this case go forward.
>
> I remember that evening. I remember that verdict coming in. I remember us having a discussion, and I remember us discussing whether—when the State got its materials. And everything is spoken for through the transcript, I think. And if there isn't—and if there's anything else we're going to get it out of those transcripts that we have.

The Petitioner points to numerous alleged misstatements of law and a myriad of ways which these statements indicate the post-conviction court's knowledge of facts which would affect her decision on the merits of the Petitioner's claim. The Petitioner asserts that "because [the post-conviction court] presided over [the Petitioner's] post-conviction petition as post-conviction court, [the court] served as witness, judge, and jury" in violation of the Petitioner's constitutional right to confront witnesses.

We cannot agree with the Petitioner's contention that the post-conviction court should have recused itself based solely on the ground that the court was party to an in-camera meeting between the parties. The Petitioner puts forth mere allegations as to how this affected the court's impartiality with regard to deciding the conflict of interest claim. Nothing in the record supports the Petitioner's theory or supposition. The post-conviction court's comment in no way leads us to conclude that it was harboring under a veil of impartiality with regard to the decision. Nor are we

convinced that the court's mere presence at the meeting is a sufficient reason to force the court's disqualification. The Petitioner has failed in her burden of establishing this claim.

As a separate, yet related argument, the Petitioner contends that, based upon the recent holding in *Frazier v. State,* 303 S.W.3d 674 (Tenn.2010), the Petitioner's conviction and sentence must be set aside because the trial court failed to follow the requisite procedures if it is aware that counsel is operating in a conflict of interest. The Petitioner contends that the failure results in structural error. While we do not dispute the Petitioner's interpretation of the *Frazier* holding, we find her reliance upon it misplaced. The premise in *Frazier* requires that trial counsel be operating under a conflict of interest. As expressed *infra,* that is not the case before us.

II. Ineffective Assistance of Counsel

A. Standard of Review

The Sixth Amendment provides, in pertinent part, that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. This right to counsel is "so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment." *Gideon v. Wainwright,* 372 U.S. 335, 350, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (quoting *Betts v. Brady,* 316 U.S. 455, 465, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942)). Inherent in the right to counsel is the right to effective assistance of counsel. *Cuyler v. Sullivan,* 446 U.S. 335, 344, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); *McMann v. Richardson,* 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970);

see also Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland,* 466 U.S. at 686; *Combs v. Coyle,* 205 F.3d 269, 277 (6th Cir.2000). A two-prong test directs a court's evaluation of a claim of ineffectiveness:

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

Strickland, 466 U.S. at 687; *see also Combs,* 205 F.3d at 277.

The performance prong of the *Strickland* test requires a petitioner raising a claim of ineffectiveness to show that counsel's representation fell below an objective standard of reasonableness, or "outside the range of professionally competent assistance." *Strickland,* 466 U.S. at 690; *see also Kimmelman v. Morrison,* 477 U.S. 365, 386, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). "Judicial scrutiny of performance is highly deferential, and '[a] fair assessment of attorney performance requires that every effort be

made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Combs,* 205 F.3d at 278. Upon reviewing claims of ineffective assistance of counsel, the court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged actions 'might be considered sound trial strategy.' " *Strickland,* 466 U .S. at 689. Additionally, courts should defer to trial strategy or tactical choices if they are informed ones based upon adequate preparation. *Hellard v. State,* 629 S.W.2d 4, 9 (Tenn.1982). Finally, it is acknowledged that criminal defendants are not entitled to perfect representation, only constitutionally adequate representation. *Denton v. State,* 945 S.W.2d 793, 796 (Tenn.Crim.App.1996). In other words, "in considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.' " *Burger v. Kemp,* 483 U.S. 776, 794, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987). Notwithstanding, it is the duty of this court to "search for constitutional [deficiencies] with painstaking care" as this responsibility is "never more exacting than it is in a capital case." *Id.* at 785.

B. Denied Right to Unconflicted Counsel

The Petitioner contends that she received ineffective assistance of counsel because of two distinct conflicts of interests. Specifically, the Petitioner claims that lead counsel was hampered by actual conflicts of interest in that he:

1. stole from the indigent defense fund and lied to the court.

2. procured a release of media rights from the Petitioner.

The Petitioner asserts that these two distinct conflicts of interest rendered the representation received constitutionally inadequate. She further contends that no showing of prejudice is required with regard to these claims.

1. Defense Fund Investigation

The Petitioner's first contention of a conflict is based upon the Comptroller's investigation into lead counsel's prior billings to the indigent defense fund. There is no dispute in the facts that lead counsel was investigated for overbilling the Indigent Defense Fund and repaid more than $60,000 to the fund. Nor is it disputed that lead counsel self-reported to the Board of Professional Responsibility and that the claim remained unresolved at the time of trial. Eventually, as a result, the Tennessee Supreme Court suspended lead counsel's license for eleven months, twenty-nine days. The sanction, however, was not entered until November 24, 1998, one day after the supreme court affirmed the Petitioner's conviction and sentence. Neither lead counsel nor any other attorney involved in the fraudulent billing was prosecuted criminally for their actions.

The Petitioner's claim on appeal, although somewhat unclear, appears to be that lead counsel was conflicted between his representation of the Petitioner and his own fear of being prosecuted by the State. The argument centers around the in-camera meeting in which lead counsel turned over Dr. McCoy's report and, at least according to the testimony of Dr. McCoy, later asked her to lie about when the report was delivered to him because the State was "furious" at receiving the materials at the

late date. The Petitioner contends this resulted in lead counsel not calling Dr. McCoy, the key mitigation witness, allegedly because of his own fear of angering the court or the State. The Petitioner also contends that any testimony by lead counsel regarding other possible reasons as to why Dr. McCoy was not called was not credible and not supported by the testimony of other witnesses. The Petitioner asserts that "given this understanding of the facts, [lead counsel's] penalty phase decisions must be considered as products of a conflict of interest."

A conflict of interest does not, in and of itself, constitute ineffective assistance of counsel. In order to establish a violation of the Sixth Amendment, a [petitioner] who raises no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. *Cuyler v. Sullivan,* 446 U.S. 335, 348, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) (holding that the mere possibility of a conflict of interest is not enough to establish ineffective assistance of counsel where the defendant raised no objection to multiple representation at trial.) However, unless the petitioner establishes that counsel was burdened by an actual conflict of interest, he must prove both deficient performance and that he was prejudiced by the deficiency. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Prejudice is presumed only if the petitioner demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." *Cuyler,* 446 U.S. at 350. Until a petitioner shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim. *Id.*

Where an attorney is placed in a position of

divided loyalties between himself and his client, an actual conflict is created. *State v. Culbreath,* 30 S.W.3d 309. 315 (Tenn.2000). Among the class of potentially conflicting interests are the personal interests of defense counsel. *McCullough v. State,* 144 S.W.3d 382, 385 (Tenn.Crim.App.2003). Yet another recognized conflicting interest is preoccupation with fear of instigating prosecution for one's own misdeeds. *U.S. v. Montana,* 199 F.3d 947, 949 (7th Cir .1992).

First, as an aside, the Petitioner contends that the post-conviction court erred in finding the conflict claims waived. The court found that "[lead counsel] testified that he had informed [the Petitioner] of the issue and that she actually liked him more because of it. No issue was raised either pretrial or at trial." As such, the court found the issue waived but, nonetheless, ruled on the issue and found it to be without merit. Likewise, we also elect to review the issue, so it is not necessary to rule on the issue of waiver.

In denying relief on this claim, the post-conviction court found that the proof did not establish an actual conflict of interest which adversely affected lead counsel's performance. The court entered multiple findings of fact, upon which it based this conclusion. Prior to the lead counsel's appointment to the Petitioner's case, the trial court inquired into the status of the investigation and discovered that the reimbursement had been paid in full. The actual investigation had concluded prior to lead counsel's appointment as the Petitioner's attorney. Lead counsel had been appointed by the Tennessee Supreme Court in another matter in March 1995, two months prior to his appointment in this case. Lead counsel remained a licensed attorney, in good

standing, throughout the entire investigation. Lead counsel stated that he had deemed the matter concluded prior to his appointment in the Petitioner's case. Lead counsel further testified that he informed the Petitioner of the investigation and that she "seemed to like him more because of it."

The Petitioner has failed to provide any proof which preponderates against these findings. *See Henley v. State,* 960 S.W.2d at 579. The record simply fails to offer anything more than supposition that the overbilling issue affected lead counsel's representation of the Petitioner. All the evidence presented appears to support lead counsel's own testimony that the investigation was concluded and the matter settled prior to his appointment in this case. Lead counsel consistently testified that he considered the matter concluded prior to appointment in the case and that he never spoke with anyone in the district attorney's office regarding the matter. He further indicated that he never would have settled the matter civilly if there were potential criminal charges pending.

Moreover, the assertion that fear of prosecution led lead counsel to lie to the court at the in-camera meeting and then deciding not to call Dr. McCoy is mere supposition as the allegations rest on speculation and disputed testimony. Each witness who was present at the in-camera hearing testified that they were unable to recall what occurred in that meeting. Lead counsel testified that he had never asked Dr. McCoy to lie, and the court accredited this testimony. As noted, questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the trial court. *Henley,* 960 S.W.2d st 579. This court does not

reweigh such determinations. Lead counsel, along with co-counsel, testified that there were multiple reasons as to why the decision was made to not use Dr. McCoy as a witness, the primary one being that she could not corroborate the testimony of Dr. Engum. The post-conviction court also noted that the record did not support Dr. McCoy's testimony based upon a statement made on the record following the in-camera meeting in which lead counsel stated he had received the documentation from Dr. McCoy "earlier this week," not the day prior as Dr. McCoy indicated lead counsel wanted her to say.

The Petitioner offers only speculation as the reason for "counsel's penalty phase collapse." This speculation as to what might have been the reason for the decisions made is not sufficient meet her burden of establishing that a conflict existed.

2. Media Rights

Next, the Petitioner asserts that a conflict of interest existed based upon a release of media rights from the Petitioner to lead counsel and co-counsel regarding the Petitioner's story. It is not disputed that lead counsel spoke with the Petitioner's aunt, Carrie Ross, about authoring a book with her about the Petitioner's life and criminal prosecution. Moreover, on May 1, 1996, after the Petitioner was found guilty and sentenced to death but prior to direct appeal, she signed a release giving the attorneys permission to retell her story. The release was "limited to information which is public information, *e.g.,* evidence at trial and in my court file, and their own personal experiences while working on [the Petitioner's] behalf." The release further acknowledged that the attorneys may "eventually gain a pecuniary benefit from the retelling on [the Petitioner's] story."

Rule 1.8(a) of the Tennessee Rules of Professional Conduct, dictates that "[a] lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest *adverse to a client* " unless there is full disclosure, the client is given the opportunity to seek independent counsel, and the agreement is in writing and signed. Tenn. Sup.Ct. R. 8, RPC 1.8(d). Generally, an agreement by which a lawyer acquires literary or media rights concerning the *conduct of the representation* creates a conflict of interest between the attorney and the client. (emphasis added). *See Id.* If such conflict is proven, it is still necessary "for [the] petitioner to establish that the conflict of interest adversely affected his counsel's performance." *Mickens v. Taylor,* 525 U.S. at 174.

On appeal, the Petitioner contends that "[lead counsel]'s discussions with Ms. Ross make evident his interest in profiting from [the Petitioner's] story from the earliest stages of his representation of [the Petitioner]. Because counsel handled [the Petitioner's] direct appeal, counsel's conduct in obtaining a waiver also occurred in the course of [the Petitioner's] trial. This conduct also casts a shadow backwards across [the Petitioner's] trial, suggesting that defense counsel were motivated by monetary gain throughout." The Petitioner further contends that because she established a conflict, the required showing again is adverse effect rather than prejudice. Finally, she asserts that the adverse effect is shown by the Petitioner's failure to seek a continuance when effective representation of the Petitioner mandated delay for two reasons. According to the Petitioner, trial counsel's failure to seek a continuance is consistent with their pecuniary interest in selling the story, which was generating a great deal of media

attention at the time. Although contending that a showing of prejudice is not required, "the evidence of prejudice is immediately apparent; failure to gain a continuance resulted in poor preparation that undermined [the Petitioner's] defense in totality."

The State counters that trial counsel did not enter into such an agreement with the Petitioner prior to or during trial. The State acknowledges that lead counsel did, in fact, have a discussion with Ms. Ross regarding the writing of the Petitioner's story; however, Ms. Ross had no legal rights to the Petitioner's story. The State contends, and the post-conviction court found, that there is no evidence to indicate that trial counsels entered into any agreement with the Petitioner prior to or during the trial. The State further asserts that as the only release at issue in this case was signed by the Petitioner after she was found guilty and sentenced, although prior to the direct appeal, "it is irrational to suggest that the [Petitioner] was adversely affected by the conduct of the attorneys during trial as a result of this post-trial agreement." We agree with the State.

The Petitioner did not put on any evidence which preponderates against the post-conviction court's findings. A mere discussion of a book, which even Ms. Rose was somewhat unclear on the timing of, is not sufficient to establish the existence of a conflict of interest. As noted by the State, at the time the waiver was signed by the Petitioner, which is the only firm indication that trial counsel was considering pursuing a book deal, which as an aside never occurred, the trial and sentencing phases were completed. The Petitioner may not now rely on something which occurred after the trial to establish a conflict which affected counsel's performance

during the trial.

Though not specifically asserted by the Petitioner, with regard to counsel's representation of the Petitioner on appeal, we conclude that a possible conflict existed, as counsel continued the representation on direct appeal. However, contrary to the Petitioner's assertions, we conclude that a showing of prejudice is required in this case to establish ineffective assistance of counsel. Moreover, as did the post-conviction court, we conclude that no prejudice has been shown. Ms. Ross testified that the only reason presented to her for the book was so that others could see a different side of the Petitioner. Both attorneys denied any hopes of pecuniary gain. Co-counsel indicated that they had discussed doing a publication for a seminar on death penalty cases. Moreover, there is no indication from any party that anything was ever done to further the actual goal. After review, we conclude that the Petitioner has failed to show even adverse affect from these actions, let alone prejudice.

C. Penalty Phase Deficiencies

The Petitioner claims that trial counsel failed to function as effective counsel as guaranteed by both the Tennessee and United States Constitutions. The Petitioner asserts that "[t]he penalty phase verdict was less an appropriate response to the facts than an indictment of the performance of defense counsel." She asserts that her death sentence was the direct result of counsel's: (1) failure to present mitigation evidence in their actual possession; (2) failure to discover relevant mitigation evidence; (3) counsel's surrender of privileged information to the State; (4) counsel's failure to make effective opening and closing arguments; (5) counsel's failure to conduct effective *voir dire;* and (6) counsel's failure to object to

a legally inconsistent aggravator.

1. Failure to Present Mitigation Evidence in Counsel's Possession

At the post-conviction hearing, trial counsel conceded that he should have called many of the individuals interviewed by Dr. McCoy, including the juvenile detention workers and the Petitioner's friends from Job Corps. Trial counsel further acknowledged that he did not, in fact, subpoena any lay witnesses to testify, planning instead to use Dr. McCoy as the only witness, presenting the social history of the Petitioner and utilizing the charts and materials she had prepared to support her testimony. The Petitioner first contends that trial counsel's strategy to use Dr. McCoy as the sole witness to present the Petitioner's social history was ineffective assistance of counsel because a social history is more properly presented through multiple lay witnesses. She further argues, however, that the decision not to utilize the testimony of Dr. McCoy compounded the problem and was separately ineffective.

The Petitioner acknowledges that trial counsel provided four alternative reasons for the decision not to have Dr. McCoy testify, but she asserts that each justification is implausible. With regard to counsel's asserted reason not to have Dr. McCoy testify because she could not corroborate Dr. Engum's diagnosis, the Petitioner asserts the reason is simply untrue as Dr. McCoy testified otherwise and her prepared report supported the diagnosis. With regard to the asserted reason that Dr. McCoy's materials contained "double-edged" information, the Petitioner contends that: trial counsel should have already been aware of this information from discussions with Dr. McCoy; the negative information could have been presented in a way to strengthen the mental illness

diagnosis; and the decision to turn the materials over to the State allowed the information in anyway. With regard to trial counsel's third explanation for not calling Dr. McCoy, her relationship with General Crabtree, the Petitioner contends that trial counsel undermined his own justification by admitting his knowledge of the relationship months in advance. Finally, the Petitioner argues that the explanation that the decision was based in part on the fact that General Crabtree showed up that morning with the report covered in "yellow stickies" and appeared "loaded for bear" was not rational, as it was undisputed that the decision not to call Dr. McCoy was made the prior evening. The Petitioner argues that "[b]ecause each of counsel's proffered explanations fall flat, there is no reasonable strategic basis on which counsel could have decided to pull Dr. McCoy's testimony from the penalty phase."

When analyzing a claim of ineffective assistance as a result of failing to present mitigating evidence, the courts apply the three-pronged test set forth by our supreme court in *Goad v. State,* 938 S.W.2d 363, 371 (Tenn.1996):(1) the reviewing court must first analyze the nature and extent of the mitigating evidence that was available and not presented; (2) the court must then determine whether substantially similar mitigating evidence was presented to the jury during either the guilt phase or the sentencing phase of the proceedings; and (3) the court must consider whether there was such strong evidence of applicable aggravating factors that the mitigating evidence would not have affected the jury's determination. *Id.* at 371. In denying the Petitioner post-conviction relief on this issue, the post-conviction court properly analyzed the issue and supported its reasoning on the record.

First, the post-conviction court analyzed the mitigating evidence known to the defense team at the time of trial, specifically, Dr. McCoy's report. Afterward, the court found that the first *Goad* factor had not been satisfied. In reaching its decision, the court recognized that:

> Dr. McCoy testified concerning various themes of mitigation that she thought should have been presented to the jury during ... the trial. While this court finds that there may have been mitigating evidence that was not presented to the jury, this court has previously discussed counsel's decision to limit some mitigation and the negative aspect of some of that evidence.

Review of the record reveals that the court had indeed earlier discussed, and found reasonable, lead counsel's decisions regarding the available evidence in light of the negative aspects. Next, the court looked to the evidence and found that the information in Dr. McCoy's report was substantially similar to mitigation evidence which was presented during the guilt and penalty phases of the trial. Specifically, the court stated:

> Much of the evidence presented by the petitioner here was presented to the jury in one of the phases of trial, but this court notes that it was not to the extent that the petitioner now asserts that she thinks it should have been. Some of the witnesses would have been redundant while others would have included some very negative information about the petitioner.

Finally, the post-conviction court determined that there was "such strong evidence of applicable aggravating factors that the mitigating evidence would not have affected the jury's determination ." *See Goad,* 938 S.W.2d at 371. Additionally, the court made the following comments on the record.

> Considering all the circumstances and evidence, this court cannot fault counsel for having chosen not to use Dr. McCoy as a witness at the penalty phase of the petitioner's trial. [Lead counsel] was understandably uncomfortable with Dr. McCoy's statements and materials and while a different decision may seem best in hindsight, this court cannot judge counsel's decision with the situation with 20–20 hindsight and find fault merely because another choice may seem to be preferable today. Counsel's decision was not unreasonable.

The post-conviction court also noted in its order the problematic information that lay witnesses called to testify could put before the jury and noted that:

> With the potential for much of this plus other information to harm the petitioner's case in mitigation, counsel made a reasonable choice to try to limit what came before the jury and from whom. Counsel's original choice to have the information explained by an expert rather than lay witnesses who could not explain the petitioner's behavior was understandable. Once the exigent decision was made that Dr. McCoy would not testify, counsel strategically decided to have the petitioner's parents

> and aunt testify to bring out the petitioner's life history to be considered in combination with the information that had already been provided to the jury regarding her Borderline Personality Disorder.

Following review of the record, we cannot conclude that the Petitioner has put forth sufficient evidence to preponderate against the trial court's findings. The court made clear its findings on the record after applying the appropriate analysis, and we agree with the post-conviction court.

The post-conviction court, again specifically accrediting lead counsel's testimony, stated that he did not call Dr. McCoy because she told him that she could not corroborate Dr. Engum's report. As previously noted, it is not the province of this court to reweigh such determinations. Lead counsel also testified that he had never been completely comfortable with the use of Dr. McCoy's materials as they contained a lot of material which he did not want the jury to hear. He explained that the decision was made to have Dr. McCoy testify, but some discomfort still remained with the decision. According to lead counsel, when he learned that Dr. McCoy would not corroborate the diagnosis, this was the final straw, and, when considered in combination with his original discomfort and other minor concerns, the decision was made. The court noted that while Dr. McCoy's testimony contradicted these statements, this could easily be explained as a misunderstanding between the two. With regard to lay witnesses who could possibly have been called, the court again, based on the testimony which was given, stated that the decision was a tactical one based on the negative nature of some of the

statements. The Petitioner has failed to carry her burden for relief.

Based upon the clear finding by the trial court that the mitigation evidence which was omitted would not have outweighed the aggravating factors, the Petitioner is essentially precluded from establishing prejudice. Even trial counsel himself, while admitting that in hind sight he wished he had called more mitigation witnesses, stated that he was not sure it would have made a difference based upon the horrible facts of the case. However, as noted by the post-conviction court, these decisions cannot be judged in hindsight.

2. Failure to Discover Relevant Mitigation Evidence

The Petitioner also finds fault with trial counsel for failing to discover critical mitigation evidence in this case. Specifically, she asserts that trial counsel failed to discover evidence of the Petitioner's brain damage and Bipolar Disorder. Additionally, she asserts that trial counsel failed to discover numerous lay witnesses who could have testified in her defense. She contends that trial counsel was in possession of numerous "red flags" that should have alerted counsel of the need to discover and present evidence of the alleged brain damage.

The Petitioner bases her argument with regard to brain damage and mental illness on the testimony of Drs. Pincus and Kenner. Dr. Pincus testified that the most significant indication of the Petitioner's brain damage was her history of seizures dating from infancy. Dr. Kenner testified that because of the abnormal EEG done when the Petitioner was fourteen months old, the history of seizures, and the traumatic head injury at age fourteen, "ample

evidence existed at the time of [the Petitioner's] trial to suggest the need for a neurological examination." Additionally, trial counsel was aware of lay witness testimony regarding the Petitioner's mother's alcoholism and the Petitioner's exposure in-utero, which can result in neurological impairment. The Petitioner asserts that, despite all this evidence which suggested brain damage, the defense team conducted no neurological investigation. As such, counsel failed to discover the Petitioner's neurological disabilities, namely, an abnormality in the brain that impairs her impulse control.

The Petitioner contends that the psychological evaluation conducted by Dr. Engum was not sufficient for two reasons. First, she contends it is insufficient because Dr. Engum is a neuropsychologist, and the type of brain damage suffered by the Petitioner does not show up in neuropsychological testing. Dr. Pincus testified that no evidence of brain damage could have been discovered by Dr. Engum because of the type of testing he utilized. The Petitioner does not contend that trial counsel should be held to a standard of neurological knowledge on par with Dr. Pincus, but argues that counsel should have known that: (1) the available evidence suggests physiological damage; and (2) Dr. Engum was not a medical doctor. "Competent counsel would have known that different areas of expertise are needed to conclude that there is no brain damage." The second reason the Petitioner contends that it was unreasonable for trial counsel to rely on Dr. Engum's opinion is that Dr. Engum provided no explanation for the myriad indications of brain damage. "Minimal diligence required a second opinion from a medical professional with a different specialty."

The Petitioner further asserts that the trial diagnosis of borderline personality disorder was incorrect. Rather, the proper diagnosis, as testified to at the post-conviction hearing, was bipolar disorder, as confirmed by her positive response to mood-stabilizing drugs. Additionally, she asserts that counsel failed to discover her post-traumatic stress disorder. The Petitioner contends this failure to discover the proper diagnosis was ineffective assistance because the diagnosis was readily discoverable at the time of trial. Dr. Kenner testified that reports of the Petitioner's family and friends of her behavior, the Petitioner's three suicide attempts, the Petitioner's belief that she was invincible, and her EEG at fourteen months of age were all indicators of bipolar disorder. Dr. Kenner acknowledged that there is a danger of misdiagnosing bipolar individuals as someone who has borderline personality disorder, and to achieve the correct diagnosis, repeated clinical interviews are necessary. He opined that Dr. Engum reached the wrong diagnosis because he met with the Petitioner only four times. The Petitioner further contends that Dr. Engum's diagnosis was wrong because he knew little about the Petitioner's life, a fact directly attributable to trial counsel because their team was structured so that their experts worked in isolation with respect to the others.

As a third assertion of failure to discover mitigation evidence, the Petitioner also asserts that trial counsel was in possession of numerous "red flags in the form of information obtained from prospective lay witnesses" that should have alerted counsel for the need to discover and present evidence of the alleged brain damage. She also faults counsel for failing to investigate witnesses who could testify to the Petitioner's family relationships and the

institutions in which the Petitioner spent a great portion of her life.

In denying relief on this issue, the post-conviction court made the following findings:

> Counsel relied upon the experience of Dr. Engum to perform the appropriate testing. When Dr. Engum indicated that there were no signs of brain damage, counsel relied on this information. Dr. Engum did not testify here and there is no indication that he advised that other experts were needed. [Lead counsel] testified that he did not recall either Dr. Engum or Dr. McCoy suggesting that a psychiatrist needed to evaluate the petitioner. Dr. McCoy also testified that because Dr. Engum was a neurophsychologist that she would have assumed he would have been the person to make the call if a neurologist was needed. This court finds no deficiency in counsel for not instructing the defense experts in how to do their jobs in areas to which they are supposed to be experts or for not having questioned their opinions.
>
> The experts at all the proceedings opined that the petitioner acted without premeditation. Drs. Engum, Pincus, and Kenner all testified that the petitioner lost control. Dr. Pincus specifically testified, as did Dr. Engum, to the petitioner's premeditation and deliberation in planning the beating, taking weapons, getting to the park, carving a pentagram, and delivering

> blows to the victim. They both opined that the petitioner had not, however, premeditatedly and deliberately murder the victim. They opined, as did Dr. Kenner, that once the beating began, she lost control and could not stop. Drs. Pincus and Engum also agreed that while they did not think a cooling off period had occurred, there had been time for that to occur. Dr. Pincus also admitted that the fact that the petitioner had told someone the day before the murder that she was going to kill the victim and then did in fact kill the victim makes it appear premeditated. This court will not fault counsel because the specific diagnosis by different experts differed. Counsel appropriately relied upon the retained expert's opinion. As made clear by Dr. Kenner's own testimony, the area of mental health is constantly changing. Dr. Kenner even had included borderline personality disorder in his diagnoses and stated that it was a reasonable diagnosis at the time with what the defense had.

Following a thorough review, we must agree with the post-conviction court. Trial counsel was not an expert in the field of psychology or neurology, and, as conceded by the Petitioner, such expertise is not required. Lead counsel retained multiple experts to examine the Petitioner, and a diagnosis was reached. A defense attorney is not required to question a diagnosis put forth by a professional expert in the field. Lead counsel was asked at the post-conviction

hearing if any of the retained experts had recommended additional testing, and he answered in the negative. Lead counsel specifically stated that if such recommendation had been made, he would have pursued it. Moreover, the court concluded that "no relief is warranted based on the fact that the opinions of Drs. Pincus and Kenner differed somewhat from that of Dr. Engum." While the actual diagnosis is somewhat varied, the essential facts, *i.e.,* the concession to premeditation, are very similar. And, as further noted, the Petitioner's own expert conceded that the diagnosis reached by Dr. Engum was reasonable at the time. This issue was properly denied by the post-conviction court, and the Petitioner has failed to demonstrate that the evidence preponderates against the court's findings.

3. Disclosure of Protected Work Product to the Prosecution

The Petitioner next asserts that counsel's representation was ineffective because lead counsel turned three volumes of Dr. McCoy's work product over to the prosecutor immediately prior to the penalty phase. The Petitioner's argument first centers around whether counsel was ordered by the trial court to produce these documents. She asserts that because the record does not support the existence of a court order, then trial counsel was ineffective because he was not required to turn the documents over pursuant to Rules 16(b) and 26.2 of the Tennessee Rules of Criminal Procedure and Rule 705 of the Tennessee Rules of Evidence.

As noted by the State, the Petitioner's argument appears to rest solely on whether lead counsel was ordered by the court to turn over the documents. She notes the testimony of lead counsel during which he stated that he turned over the materials because "the

Court said we had to give them to him." However, the Petitioner states that later statements by lead counsel cast doubt upon the existence of such an order. Namely, she noted that lead counsel later stated that he "could be mistaken as to whether it was actually a ruling" by the court. She also references a statement in which lead counsel stated, "in retrospect, I probably would not have given the entire thing and made the Court specifically order me to do that." Moreover, the Petitioner points out that no written order appears in the record ordering production of Dr. McCoy's work.

We must agree with the State and conclude that the Petitioner has failed to carry her burden of establishing either deficient performance or prejudice. The Petitioner is not asserting that lead counsel is duty bound to comply with the orders of a court. The Petitioner's argument is merely that the record does not establish that such an order existed. We disagree, however, with the Petitioner's interpretation of the evidence presented. In fact, the only evidence presented is basically the testimony of lead counsel, which appears to indicate that he would have turned the material over only upon order of the court. While lead counsel did not specifically recall such an order, the record still seems to indicate that the court, during the in-camera hearing, did, in fact, order production. Nothing in the testimony of General Crabtree, the only other person present during the meeting other than the trial court, contradicts the testimony of lead counsel. On this record, we cannot conclude that the Petitioner has carried her burden of showing that counsel's performance fell below "the range of competence demanded of attorneys in criminal cases." *See Baxter v. Rose,* 523 S.W.2d at 936.

Additionally, the Petitioner has failed to prove that she was prejudiced by anything in the mitigation report that was turned over to the State. While some testimony was elicited at the post-conviction hearing with regard to the State utilizing some of the information contained therein in cross-examination of three witnesses who testified at the sentencing hearing, the Petitioner has not established that this affected the outcome of the trial or that a different result would have been reached absent the information. When questioned at the post-conviction hearing, General Crabtree was unable to recall what, if any, of the information he learned for the first time by reading the report, rather than it being information he was already in possession of from other sources. The Petitioner has simply failed to put forth any evidence which preponderates against the findings of the post-conviction court.

4. Failure to Present Effective Penalty Phase Arguments

Next, the Petitioner contends that trial counsels' penalty phase arguments highlighted and compounded counsels' poor preparation. With regard to the opening statement, the Petitioner asserts that lead counsel failed to highlight the Petitioner's age at the time of the crime and that counsel neglected to explain that the Petitioner had acted in concert with two violent gang members who shared significant culpability for the crime. Moreover, he failed to discuss any of the evidence discovered by Drs. Engum and McCoy or to even mention the Petitioner's mental illness or history of abuse and neglect. With regard to the co-counsel's penalty phase closing argument, the Petitioner contends that she, likewise, was "equally fault worthy" because she failed to allude to any of the mitigation themes of mental

illness, lack of significant prior criminal activity, that the murder was committed under extreme mental or emotional disturbance, or the Petitioner's youth at the time. The State contends that this issue is being raised for the first time on appeal and is, therefore, waived.

Like the State, we can find nothing in the record to support that these arguments have been previously presented as the argument was not raised in either the Petitioner's post-conviction petition or argued before the post-conviction court. While some questions were asked of lead counsel and co-counsel with regard to their strategy and thinking during closing, no argument was made before the post-conviction court. Moreover, we can find nowhere in the post-conviction court's order of denial addressing the issue. As such, we must agree with the State that these claims are waived for the purposes of appellate review. *See* T.C.A. § 40–30–106(g) (a ground for post-conviction relief is waived "if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented[.]"; *see also Workman v. State,* 868 S.W.2d 705, 709 (Tenn.Crim.App.1993).

5. Failure to Conduct Meaningful *Voir Dire*

The Petitioner next contends that trial counsel was ineffective in failing to conduct meaningful *voir dire.* Specifically, she contends that counsel was ineffective for failing to object to the striking of a juror who indicated that he could not return a death sentence solely based on the Petitioner's age at the time of trial. The Petitioner also argues that counsel was ineffective for failing to adequately *voir dire* prospective jurors regarding racial biases or "fears or

prejudices involving Satanism."

The United States Supreme court has examined the issue of capital juror selection in great detail and has refined it through several opinions. Tennessee courts have followed the Supreme Court's analysis. *See State v. Alley,* 776 S.W.2d 506, 518 (Tenn.1989), *cert. denied,* 493 U.S. 1036, 110 S.Ct. 758, 107 L.Ed.2d 775 (1989). The issue was first discussed at length in *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). At the time of trial in *Witherspoon,* Illinois juries had complete discretion as to when to impose the death penalty, and the jury assessed punishment at the same time it rendered its verdict as to guilt. *Adams v. Texas,* 448 U.S. 38, 43–44, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). By statute, Illinois allowed unlimited challenges for cause by the State to any juror who stated that he had conscientious scruples against capital punishment or that he was opposed to capital punishment. *Witherspoon,* 391 U.S. at 513. In the trial at issue in *Witherspoon,* forty-seven members of the venire were successfully challenged for cause under the statute. *Id.* at 514. The court held that the selection process violated the defendant's Sixth Amendment right to a fair and impartial jury because the jury eventually selected was not representative of the community. *Id.* at 518. The Court found that much of the constitutional harm occurred because many of the jurors were excluded without knowing whether they could put their beliefs aside and still follow the law. *Id.* at 519–20. The Court held that by its statute providing for such challenges, Illinois had crossed the line of neutrality; the State could not entrust the determination of whether a man should live or die to a "tribunal organized to determine a verdict of death." *Id.* at 521.

Later, the Court in *Wainwright v. Witt,* 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), clarified some of the confusion that had arisen from *Witherspoon* and some of its other prior decisions on the matter. *Wainwright* involved a Florida capital case where one juror expressed personal opposition to the death penalty and further stated that she felt her view would influence her decision on guilt or innocence. That juror had been dismissed for cause on the basis of *Witherspoon.* The United State Supreme Court reversed the Eleventh Circuit, finding that the juror had been properly dismissed for cause. *Id.* In correcting some of the misapprehensions of the Eleventh Circuit, the Court lamented that, despite *Witherspoon's* limited holding, courts had applied it too broadly. *Id.* at 420–21.

The Court explained that *Witherspoon* had to be understood within the context of the issues presented. Much had changed in the field of capital litigation since the time of *Witherspoon.* Juries no longer had unlimited discretion in imposing capital punishment. Furthermore, *Witherspoon* dealt with circumstances under which jurors *could not* be excluded, but did not explain when jurors could properly be excluded. *Id.* at 422. The Court explained that *Witherspoon* had to be understood in accordance with the traditional reasons for excluding jurors. As Justice Rehnquist noted, there is nothing talismanic about juror exclusions under *Witherspoon* merely because it involves capital sentencing juries. *Id.* at 423. *Witherspoon* was not grounded in the Eighth Amendment's prohibition against cruel and unusual punishment, but in the Sixth Amendment's right to a fair and impartial jury. *Id.* The key to the analysis is not what a juror believes about the death penalty, but whether, because of those beliefs, a potential juror

lacks impartiality. *Id.* at 423–24. Based on this understanding of its prior opinions, the Court announced that the standards for determining whether a juror could be properly excluded was whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. *Id.* at 424.

The *Wainwright* standard does not require that a juror's bias be proven with "unmistakable clarity" because determinations of juror bias cannot be reduced to question and answer sessions that obtain results in the manner of a catechism. *Id.* Accordingly, the parties attempting to select the jury, as well as the trial judge, must be intently attuned to the jurors' responses to determine potential bias. As the *Wainwright* court noted, even when the printed record may not be particularly clear, there will be situations where the trial judge is left with a definite impression that a prospective juror would be unable to faithfully and impartially apply the law. *Id.* at 425–26. For that reason, the Supreme Court demanded that deference be paid to the trial judge who sees and hears the potential jurors. *Id.* at 426. Thereafter, in *Morgan v. Illinois,* 504 U.S. 719, 728, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992), the Court reiterated the standard: "[I]t is clear from *Witt and Adams,* the progeny of *Witherspoon,* that a juror who in no case would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and must be removed for cause."

Applying these standards to the facts of this case, we must conclude that the trial court was acting entirely within its discretion when removing Prospective juror Mr. Rutherford for cause. The following exchange occurred on the record:

Trial Court: Ah, are you telling me that you don't know if you can [give the death penalty], or you think you can, or you think you can't, I need you to tell me how you feel.

Mr. Rutherford: I think it would make a big difference with her age whether or not, you know, she would get the death penalty or not.

...

General Crabtree: ... And, frankly, one mitigating factor that the Court could choose to charge you on, that you could consider, is the age factor.

Would that factor in and of itself alone make it difficult, or, in fact, impossible for you to weigh the aggravating circumstances against that?

Mr. Rutherford: I have problems just because of the death penalty.

General Crabtree: That's what we are talking about. I'm not talking about anything else now. I'm talking about the death penalty. Are you saying because of this individual's age you could not return a death penalty?

Mr. Rutherford: I, I don't think I could.

General Crabtree: ... So let's see if we can make it clear—as far as her, the sole factor of her age, that would be something that you could not do?

Mr. Rutherford: If I felt like, you know, someone that was more mature and

> stuff like that I wouldn't have a problem with that, but the immaturity is a problem—
>
> General Crabtree: I understand you are saying that because of her age that one factor would keep you from returning the death penalty, is that correct?
>
> Mr. Rutherford: I think so.

The Petitioner argues that this colloquy indicates only that "Mr. Rutherford made clear that he could consider the death penalty for a mature defendant, but that he had reservations in light of [the Petitioner's] youth." We disagree with the Petitioner's analysis and her reliance on the statement made in *Morgan v. Illinois*. As previously stated, the Supreme Court in *Morgan* stated that "a juror who *in no case* would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and must be removed for cause." *Morgan v. Illinois,* 504 U.S. at 728 (emphasis added). According to the Petitioner, that statement stands for the proposition that if a potential juror could possibly impose the death penalty in some case, just not the instant case, then he should not be stricken for cause an impartial juror. We clearly disagree with that interpretation entirely and conclude that the statement should only be taken as a reiteration of the standard previously stated in *Wainwright* and *Adams* that a potential juror must have impartiality in the case he or she is presently involved with.

A reading of the colloquy which occurred with Mr. Rutherford made clear that he could not impose the death penalty under any circumstances because of the Petitioner's age in this case. As such, the statements made by Mr. Rutherford indicate that his

views would prevent or substantially impair his performance of his duties as a juror in accordance with his instructions and his oath. As such, we agree that he was appropriately struck for cause, and no objection by trial counsel was warranted. While we do agree that the statements do not necessarily indicate an unconditional bias against capital punishment entirely, as noted, that is not the required standard.

The Petitioner also challenges Mr. Rutherford being struck for cause on grounds that a "juror is entitled to find that any one mitigating factor outweighs all aggravating evidence, and thus a juror could not have been disqualified" for stating he could not apply the death penalty because of age, *i.e.* the mitigating factor at issue. We agree with the State that this argument does not comport with the rationale in *Wainwright* that the focus of *voir dire* is to determine potential bias. Mr. Rutherford's remarks again clearly indicate that he was giving a definitive refusal in this case to impose the death penalty.

With regard to *voir dire,* the Petitioner further asserts that trial counsel were ineffective because they failed to tell the jury that the Petitioner's youth was a statutory mitigating factor; discuss and question the prospective jurors on the mitigation themes of mental illness, psychology, and mental health experts; and failed to question the prospective jurors with regard to their beliefs on interracial dating and Satanism. The Petitioner also contests counsels' failure to question the pool to ascertain their knowledge of the lead counsel's overbilling problem. However, we again must agree with the State, that the Petitioner has failed to put forth any evidence to show that any prospective juror harbored any bias or prejudice on these grounds or that anyone was improperly excluded in this regard. As such, the

Petitioner has simply failed to meet her burden of establishing ineffective assistance of counsel for the aforementioned lack of discussion during *voir dire*. As noted by the post-conviction court:

> The length and scope of voir dire is an individual decision made by counsel on a case by case basis. The attorneys voiced no dissatisfaction with the jury ultimately selected. Petitioner also failed any proof that any particular juror was ... not qualified.

The Petitioner has failed to put forth evidence which preponderates against the findings of the post-conviction court.

6. Failure to Object to Legally Inconsistent Aggravator

The Petitioner next asserts that counsel was ineffective for failing to object to the State's use of a legally inconsistent aggravating factor. Specifically, the Petitioner contends that her "simultaneous convictions of conspiracy and capital murder using the avoid-the-arrest aggravator violated [her] rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and [Article] I, [sections] 8, 9, and 16, of the Tennessee Constitution." The Petitioner argues that because her convictions for premeditated first-degree murder and conspiracy to commit such is predicated on her forming intent prior to the acts, it is "legally inconsistent" to also find that she committed murder to avoid arrest. The State asserts that this is mistaken.

The question of whether trial counsel was ineffective for failing to object to this alleged inconsistency depends upon whether the use of the

factor was, in fact, "legally inconsistent." In its order denying relief on this issue, the post-conviction court specifically found:

> While this court understands the petitioner's position, the evidence supported both the conspiracy charge as well as the factor that the petitioner committed the act to avoid arrest. By her own statement, the petitioner established proof of this factor. The law does not require that the petitioner's motive to avoid arrest be her sole motive. The evidence established that this motive was present at the time of the murder. Under these circumstances, clearly no prejudice has been established and the petitioner is not entitled to relief on this issue.

Following review of the record, we agree with the post-conviction court and conclude that nothing preponderates against these findings. To establish the applicability of the "avoid arrest" aggravating factor, the State is required to prove that the avoidance of prosecution or arrest was *one* of the purposes motivating the killing. *State v. Bush,* 942 S.W.2d 489, 504 (Tenn.1997); *State v. Smith,* 868 S.W.2d 561, 581 (Tenn.1993). Avoidance of arrest need not be the sole motive for the murder. *State v. Carter,* 714 S.W.2d 241, 250 (Tenn.1986).

The record sufficiently establishes the existence of two separate motives in this case at different times. Each is applicable based upon the evidence presented. Intent to commit the murder was established by telling a friend on the day prior that she was going to kill the victim, luring the victim to the remote area, coming armed with weapons used to

commit the murder, and attacking an unarmed victim with multiple weapons. Likewise, the conspiracy was supported by evidence of the petitioner leaving the Center with her two co-conspirators, the three accompanying the victim to the isolated area, and two of the three wearing pentagram necklaces. However, by her own admission, the Petitioner stated that during the murder she heard voices in her head telling her that she had to do something to keep the victim from going to the police. Thus, the "avoid arrest" aggravator is supported as one of the motives for the murder. Again, as noted *supra,* to use the aggravating factor does not require proof that it was the sole purpose for the killing. The Petitioner is not entitled to relief.

D. Guilt Phase Deficiencies

The Petitioner claims that trial counsel failed to function as effective counsel as guaranteed by both the Tennessee and United States Constitutions. In this regard, the Petitioner asserts that counsel denied her effective representation by breaching acceptable standards for capital representation at the guilt phase in that:

1. Trial counsel failed to present evidence to undermine a conviction of first degree murder.

2. Trial counsel failed to make effective arguments.

3. Trial counsel failed to make effective use of voir dire.

1. Failure to Present Evidence to Undermine the Elements

The Petitioner initially contends that the "killing of Ms. Slemmer was neither deliberate or

premeditated. As [the Petitioner] proved on post-conviction, ... the facts establish that [the Petitioner] participated in Ms. Slemmer's killing in the midst of a hypomanic, psychotic break." The Petitioner asserts that counsel "failed to present an effective case to undermine the State's proof of deliberate and premeditated murder" The Petitioner contends that counsel failed to make appropriate use of expert witnesses and failed to discover relevant lay witness testimony, "the same fundamental errors that plagued [her] representation in the penalty phase."

Specifically, the Petitioner contends that trial counsel presented "scant expert testimony with regard to [her] mental state surrounding the killing of Ms. Slemmer." The only expert proof presented was that of Dr. Engum, who testified that "she basically did not act with deliberation, with premeditation, but instead, acted in a manner consistent with her diagnosis, Borderline Personality Disorder, which meant that she basically went out of control." The Petitioner asserts that Dr. Engum's testimony was "sufficiently on point," but was "insufficiently substantiated," as it was dependent solely upon self-reports of the Petitioner. The State, therefore, was able to diminish the weight of Dr. Engum's testimony considerably on cross-examination by pointing out that the factual basis for his opinion was limited to statements made by the Petitioner herself.

The Petitioner also asserts that had trial counsel introduced the testimony of lay witnesses to substantiate Dr. Engum's conclusion, Dr. Engum's opinion would have carried more weight. Additionally, the Petitioner argues that trial counsel was ineffective for presenting the testimony of Dr. Bernet. Dr. Bernet was called on to testify that Ms.

Slemmer's killing was not a satanic ritual, but, rather, was consistent with a phenomenon called "collective aggression." The Petitioner asserts that Dr. Bernet's testimony offered no apparent benefit to the defense and was highly prejudicial in that it opened the door to a lengthy discussion of Satanism and the various details of the killing that bore satanic overtones.

Citing to no legal authority, the Petitioner has made the above contentions. Like the State and post-conviction court, we must conclude that she has failed to carry her burden of establishing her entitlement to relief. The Petitioner's main complaint with Dr. Engum's testimony, which she concedes was "sufficiently on point," was that it was not substantiated by lay witness testimony, which the Petitioner contends would have given it more weight before a jury. This is mere supposition. The Petitioner argues that lay witnesses interviewed by Dr. McCoy, as well as others, could have testified that the Petitioner had lost complete control in the past, nearly killing a man before she was held back. The Petitioner also asserts lay witnesses could have testified that the Petitioner was incapable of calming down on her own. Initially, we are somewhat unclear as to how these statements would have bolstered her defense, but, regardless, this argument is not sufficient to substantiate a claim for post-conviction relief. The Petitioner has failed to argue how any specific lay witness would have sufficiently substantiated the testimony in order to improve its weight before the jury, as much of the information was introduced through Dr. Engum. Absent such a showing, prejudice is not established.

We must also reject the Petitioner's complaint that calling Dr. Bernet to the stand was "a wasted

opportunity." Both lead counsel and Dr. McCoy stated that Dr. Bernet was not part of the defense team and was utilized in the case for one specific purpose. As previously noted, neither of the experts who were employed by the defense team recommended that another expert be retained. As such, we have previously concluded that trial counsel was not deficient for not having Dr. Bernet examine the Petitioner.

2. Failure to Make Effective Arguments

The Petitioner next asserts that she was deprived of her right to effective assistance of counsel based upon trial counsel's failure to make effective opening and closing arguments to the jury. Specifically, she contends that the arguments "failed to address the only significant issue concerning [the Petitioner's] guilt for first degree murder: whether evidence of mental illness negated the State's assertion that the killing of Ms. Slemmer was deliberate and premeditated." She contends that neither lead counsel nor co-counsel put forth sufficient argument to negate the Petitioner's ability to form intent.

As discussed in the previous section with regard to the arguments presented during the penalty phase, we must again find this issue waived as it was not raised in the petition or addressed by the post-conviction court. *See* T.C.A. § 40–30–106(g) (a ground for post-conviction relief is waived "if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented[.]"; *see also Workman v. State,* 868 S.W.2d 705, 709 (Tenn.Crim.App.1993).

3. Failure to Make Effective use of *Voir Dire*

Finally, the Petitioner contends that she was denied the effective assistance of counsel based upon trial counsel's failure to make effective use of *voir dire*. However, her entire argument in this regard in this section is that:

> [The Petitioner] has demonstrated above that defense counsel squandered *voir dire* as an opportunity to select a jury sensitive to issues of mental illness, and without prejudice against [the Petitioner] or her counsel. These same deficiencies were equally detrimental to [the Petitioner's] defense during the guilt/innocence phase.

As such, we conclude that the Petitioner has raised no additional arguments other than those which were raised in the section regarding penalty phase deficiencies. As we have concluded *supra* that trial counsel was not deficient in this regard, we conclude that no additional review is required here.

V. Petitioner is Ineligible for Death Penalty

The Petitioner asserts that, under the constitutional understanding of the requirements for a categorical bar to execution established by *Atkins v. Virginia* and *Roper v. Simmons,* an immature, mentally ill, brain damaged eighteen-year-old is not eligible for the death penalty. The Petitioner's support of her argument relies upon the general consensus that the death penalty must be reserved for "the worst of the worst." *Kansas v. Marsh,* 548 U.S. 163, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006) (Souter, J., dissenting) (citation omitted).

"Death is different." The penalty of death is qualitatively different from every other sentence, however long. *Woodson v. North Carolina,* 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). Because of the qualitative difference, there exists the corresponding need in capital cases for reliability in the determination that death is the appropriate punishment in a specific case. *Id.* at 305. In *Furman v. Georgia,* Justice Stewart expressed what has come to be the longstanding view of the United States Supreme Court:

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejections of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (Stewart, J., concurring). Justice Stewart concluded that "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Id.*

The "death is different" principle led to the Court's cases condemning the mandatory imposition of the death penalty. *See, e.g., Roberts v. Louisiana,* 431 U.S. 633, 97 S.Ct. 1993, 52 L.Ed.2d 637 (1977) (per curiam); *Woodson v. North Carolina,* 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion). The "death is different" principle also led to the recognition that the arbitrary imposition of the death penalty violates the Eighth Amendment. *See, e.g.,*

Zant v. Stephens, 462 U.S. 862, 874, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983); *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). The "death is different" principle established the guarantee of full consideration of mitigating evidence. *See, e.g., Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio,* 428 U.S. 586 (1978) (plurality opinion). *Lockett* and *Eddings* reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant. That is, the sentence imposed "should reflect a reasoned moral response to the [petitioner's] background, character, and crime rather than mere sympathy or emotion." *California v. Brown,* 479 U.S. 538, 545–46, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring).

The "death is different" principle also led the Court to carve out exemptions from eligibility for capital punishment. In this regard, a national consensus may develop which holds that an immutable characteristic of the defendant so affects his individual responsibility and moral guilt that it precludes finding his "consciousness [is] materially more 'depraved' than that of any person guilty of murder," as is required for capital punishment to be lawful. *See Godfrey v. Georgia,* 446 U.S. 420, 433, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). A group of offenders may be excluded from capital punishment under the Eighth Amendment only if a national consensus barring the execution of such offenders exists. The United States Supreme Court set out four indicia to consider in determining the existence of such a consensus: (1) legislation enacted by the country's legislatures, including whether there is a pattern of movement towards precluding the execution of members of a particular group; (2) the

decisions of sentencing juries, appellate courts, and governors about whether to execute defendants in that group; (3) where appropriate, other indicia of national and international opinion; and (4) the court's own judgment. *See Roper v. Simmons,* 543 U.S. 543 U.S. 551, 563–65, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). The United States Supreme Court has carved out exempted classes of persons from execution. *See, e.g., Roper,* 543 U.S. at 551 (2005) (execution of prisoners who were under eighteen years of age at time of crime barred by Eighth Amendment); *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (execution of mentally retarded persons unconstitutional); *Ford v. Wainwright,* 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986) (Eighth Amendment prohibits execution of insane persons). Because the "national consensus" is temporally situated, the list of exempted classes is not stagnant and must be revisited under standards that currently prevail.

The Petitioner now asks this Court to "carve out" another excepted class of persons exempted from the death penalty, *i.e.,* immature, mentally ill, brain damaged eighteen-year-olds. In support of her position, the Petitioner cites language in both opinions of the United States Supreme Court and the Tennessee Supreme Court to conclude that "only categorical exception to the death penalty can insure the protection against cruel and unusual punishment for certain groups of less culpable individuals." Appellant's brief at 113 (citing *Roper,* 543 U.S. at 572–73 (noting the shortcomings of mitigation evidence in circumstances of adolescent defendants); *Van Tran v. State,* 66 S.W.2d 790 (Tenn.2001) ("jury's consideration of mental retardation as a mitigating factor is by itself insufficient to address the concerns

protected under the Eighth Amendment or article I, § 16.")). The Petitioner further asserts that "[a]dolescents lack sufficient cognitive capacities to achieve the requisite degree of culpability for imposition of the death penalty." The Petitioner states that "[eighteen] is an arbitrary number." In support of her assertion, the Petitioner relies upon evidence that development of the frontal lobe of the brain continues into the early twenties.

The State responds that the Petitioner's issue is waived as a result of the failure to raise the issue on direct appeal. Alternatively, the State asserts that the arguments are without merit. The State contends that the United States Supreme Court rejected her argument that "execution of older adolescents must be categorically barred." The State further avers that, to the extent that the Petitioner asserts that she is incompetent to be executed, the claim is not yet ripe.

A. Execution of Older Adolescents

The Petitioner argues that "[t]here is ... a significant portion of individuals who lack the requisite brain development to be fully culpable for their crimes, and yet currently fall outside of the absolute bar to execution imposed by Tennessee and federal law." She maintains that "[t]hese older adolescents may have brains that are developmentally identical to or even less developed than individuals who are shielded because of a difference in birth date of a few years, months, or even days."

The Petitioner asserts that Tennessee has long recognized the special status of young people with regard to the death penalty. Specifically, the Petitioner cites to Tennessee's recognition of youth as a statutory mitigating factor,

Annotated section 39–13–204(j)(7), and to Tennessee's statutory exemption of the death penalty to persons under the age of eighteen, Tennessee Code Annotated section 37–1–134(a)(1). Additionally, the Petitioner makes the following statements:

- Tennessee has not executed anyone who was younger than twenty-three at the time of the offense (Coe, age 23; Alley, age 29; Workman, age 28; Holton, age 36; and Henley, age 31).

- Only 7.7% of Tennessee's present death-sentenced inmates were nineteen or under at the time of the crime.

- Twenty-nine of thirty-seven states with the death penalty made youth a statutory mitigating factor by 1989.

- In *Thompson v. Oklahoma,* 487 U.S. 815, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988), the United States Supreme Court concluded that it would violate the Eighth Amendment to execute an offender under the age of sixteen at the time of the offense.

- Capital Juror Project's South Carolina jury study suggests that jurors consider the youthfulness of a capital defendant to be "significantly mitigating." Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?,* 98 Colum. L.Rev. 1538, 1564 (1988).

- Science suggests that individuals lack the brain capacity of full culpability until they are in their early 20s.

In March 2005, the United States Supreme Court ruled that the death penalty for those who had committed their crimes at under eighteen years of

age was cruel and unusual punishment and, hence, barred by the United States Constitution. *See Roper v. Simmons,* 543 U.S. at 551. Prior to this 2005 decision, the nation's highest court had previously determined that "our standards of decency do not permit the execution of any offender under the age of [sixteen] at the time of the crime." *Id.* at 561 (citing *Thompson,* 487 U.S. at 815 (1988)). In *Thompson,* the Court stressed that "[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult." *Id.* at 835.

In 1989, the nation's highest court again addressed the issue of the execution of minors. In *Stanford v. Kentucky,* 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989), the Court referred to contemporary standards of decency in this country and concluded that the Eighth and Fourteenth Amendments did not proscribe the execution of juvenile offenders over fifteen but under eighteen. In so holding, the Court noted that twenty-two of the thirty-seven death penalty states permitted the death penalty for sixteen-year-old offenders, and, among these thirty-seven states, twenty-five permitted it for seventeen-year-old offenders. The Court concluded that there was no national consensus "sufficient to label a particular punishment cruel and unusual." *Id.* at 370–71.

At the time the Supreme Court was again presented with the issue of whether juveniles are exempt from the death penalty, thirty states had prohibited the juvenile death penalty, comprised of twelve that have rejected the death penalty altogether and eighteen that maintained it but, by express provision or judicial interpretation, excluded

juveniles from its reach. *Roper,* 543 U.S. at 564. The Court further acknowledged the declining use of the death penalty from crimes committed by juveniles. *Id.* at 565. The Court held that "[a] majority of States have rejected the imposition of the death penalty on juvenile offenders under [eighteen], and we now hold this is required by the Eighth Amendment ." *Id.* at 567. In so holding, the Court recognized:

> Three general differences between juveniles under [eighteen] and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to conform, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." ... It has been noted that "adolescents are overrepresented statistically in virtually every category of reckless behavior." ... In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under [eighteen] years of age from voting, serving on juries, or marrying without parental consent....
>
> The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer

> pressure. *Eddings,* ... at 115 ... ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage."). This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment....
>
> The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed....

Roper, 543 U.S. at 570 (internal citations omitted). The Court concluded that these three differences "render suspect any conclusion that a juvenile falls among the worst offenders." *Id.* The Court further determines that "neither retribution nor deterrence provide[d] adequate justification for imposing the death penalty on juvenile offenders." *Id.*

Next, the Court was faced with the determination of where to draw the line regarding the age at which a person remains a juvenile. Essentially, the same question is posed to this Court today. In this regard, the *Roper* Court wrote:

> Drawing the line at [eighteen] years of age is subject ... to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns [eighteen]. By the same token, some under [eighteen] have already attained a level of maturity some adults will never reach....

> [H]owever, a line must be drawn. The plurality opinion in *Thompson* drew the line at [sixteen]. In the intervening years, the *Thompson* plurality's conclusion ... has not been challenged. The logic of *Thompson* extends to those who are under [eighteen]. The age of [eighteen] is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

Roper, 543 U.S. at 574.

The Petitioner has failed to persuade this court that a new national consensus exists to extend the holding of *Roper* to persons over the age of [eighteen]. Furthermore, this court has not been able to discern that there is a national consensus to show that evolving standards of decency require a constitutional ban, under either the United States Constitution or the Constitution of the State of Tennessee, on executing persons who were between the ages of eighteen and the early twentys at the time of the offense. We decline to extend the holding of *Roper* to include such.

B. Execution of Mentally Ill

Both the federal courts and state courts have recognized that the mentally impaired require special protections in the capital arena. Mental illness may be raised to claim incompetency to stand trial and as an affirmative defense to guilt. Under *Ford v. Wainwright,* an individual must be mentally competent at the time of the execution. Moreover, the mentally retarded are systematically shielded from capital prosecution under *Atkins* and *Van Tran.* The

Petitioner asserts that "[t]his patchwork provides incomplete protection for the cognitively impaired."

In *Atkins,* the Supreme Court found that mentally retarded individuals suffer significant disadvantages during legal proceedings, which increase their risk of wrongful execution. The Court found that mentally retarded defendants are more susceptible to situations generating false confessions, are unable to provide meaningful assistance to their counsel, have difficulty testifying on their own behalf, and create an unwarranted impression of lack of remorse for their crimes. The Petitioner asserts that the cognitively impaired exhibit the same disadvantages exhibited by the mentally retarded and that they are slipping through the cracks. The Petitioner makes the following statements in support of extending an exemption against the death penalty to persons with mental illness:

- Twelve U.S. states are abolitionist, and a thirteenth, New York, has a *de facto* moratorium on the death penalty. These states are not using the death penalty against anyone, let alone people with mental illness.

- Twenty-five of the thirty-seven death penalty states, as well as the federal government, have as statutory mitigating factors for consideration by capital juries at sentencing either of: (1) the defendant's capacity to appreciate the wrongfulness of his or her conduct or to conform that conduct to the requirements of the law was impaired; or (2) the defendant was acting under extreme mental or emotional disturbance.

- In at least five states—Arizona, Florida, Mississippi, Ohio and Nevada—a number of inmates suffering from mental illness have been

removed from death row under proportionality review.

• Of the death penalty states which permit defendants to plead "guilty but mentally ill," only four have passed death sentences in GBMI cases.

• Two states have explicitly considered abolishing the death penalty for the severely mentally ill. Bills were presented in Illinois and North Carolina, but neither bill has been passed into law.

• Congress passed the Mentally Ill Offender Treatment and Crime Reduction Reauthorization and Improvement Act of 2008.

• The Capital Juror Project singled out a defendant's history of mental illness as the most powerful type of mitigation evidence after evidence of mental retardation.

• The ABA passed Resolution 122A rejecting capital punishment for the severely mentally ill and those with similar symptoms resulting from serious brain injury.

We do not dispute the concerns that deficiencies and limitations inherent in those who are mentally retarded may also be found in those who, while not mentally retarded, are considered mentally ill or cognitively impaired. The majority of states with capital statutes permit the jury to consider the [petitioner's] capacity to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of the law. However, there is no consensus in state legislation supporting a categorical exclusion for the mentally ill. In fact, federal and state courts have consistently declined to extend *Atkins* to the mentally ill. *See, e.g., Joshua v. Adams,*

231 Fed. Appx. 592, 593 (9th Cir.2007); *In re: Neville,* 440 F.3d 220, 221 (5th Cir.2006); *Lawrence v. State,* 969 So.2d 294 (Fla.2007); *State v. Ketterer,* 111 Ohio St.3d 70, 855 N.E.2d 48 (Ohio 2006); *Matheny v. State,* 833 N.E.2d 454 (Ind.2005). Accordingly, we decline to extend the *Atkins* bar to the death penalty to persons who are cognitively impaired or suffering from mental illness. Additionally, we acknowledge, as does the State, that should the Petitioner seek exemption from execution based upon a condition of insanity, such claim is not yet ripe for review.

C. Execution of Older Adolescents Who Are Cognitively Impaired

The Petitioner asserts that an exception to the death penalty should be created for older adolescents who suffer from mental illness. The Petitioner asserts that the combination of these factors rendered the Petitioner unable to control her emotions and actions due to mental illness and brain damage. While this court appreciates the unique circumstances of this Petitioner, this court declines to create a categorical bar to execution specifically for persons exhibiting these specific traits. Such factors are of the nature of those envisioned as mitigating factors. The Petitioner's request to create a categorical exemption is merely an attempt to gain a second chance at proportionality review. While this court appreciates the novelty of the Petitioner's argument, practicality precludes its acceptance. The court can envision a multitude of specifically created exemptions based upon the unique circumstances of an individual capital defendant. These particular circumstances were not what was envisioned as being encompassed within a categorical bar. Rather, this specific grouping of traits is captured within the individualized sentencing mandate of the capital

sentencing scheme. This is the purpose of the weighing of the mitigating and aggravating circumstances by the jury and by proportionality review by the courts of this state. Accordingly, we decline to create a specifically carved out exception for older adolescents who are cognitively impaired. The Petitioner is not entitled to relief on this ground.

VI. Constitutional Challenges

The Petitioner challenges the legality and constitutionality of capital punishment generally and of lethal injection specifically. She also challenges the structure of Tennessee's capital sentencing system. The Petitioner both seeks relief on these grounds and raises them to preserve the issues for future review.

A. Death Penalty Scheme is Unconstitutional

The Petitioner asserts that Tennessee fails to ensure a meaningful proportionality review as required by state and federal law. Our supreme court has repeatedly upheld the comparative proportionality review undertaken by the appellate courts in this state as meeting state constitutional standards. *State v. Kiser,* 284 S.W.3d 227, 294 (Tenn.2009); *State v. Vann,* 976 S.W.2d 93, 118 (Tenn.1998) (appendix); *State v. Keen,* 926 S.W.2d 727, 743–44 (Tenn.1994); *State v. Barber,* 753 S.W.2d 659, 663–68 (Tenn.1988); *State v. Coleman,* 619 S.W.2d 112, 115–16 (Tenn.1981).

The Petitioner also contends that unlimited discretion is vested in the prosecutor as to whether or not to seek the death penalty. This argument has also been rejected. *State v. Hines,* 919 S.W.2d 573, 582 (Tenn.1995). The Petitioner contends that the unlimited discretion of the thirty-one elected District Attorneys General violates principles set out in *Bush v. Gore,* 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388

(2000). This Court has previously considered and rejected this claim. *Tyrone Chalmers v. State,* No. W2006–00424–CCA–R3–PD (Tenn.Crim.App., at Jackson, June 25, 2008), *perm. app. denied* (Tenn. Dec. 22, 2008); *David Keen v. State,* No. W2004–02159–CCA–R3–PD (Tenn.Crim.App., at Jackson, June 5, 2006), *perm. app. denied* (Tenn. Oct. 30, 2006).

[B]. Lethal Injection Protocol is Unconstitutional

The Tennessee Supreme Court has considered this claim and determined that Tennessee's lethal injection protocol is consistent with contemporary standards of decency and with the overwhelming majority of lethal injection protocols used by other states and the federal government. *Abdur' Rahman v. Bredesen,* 181 S.W.3d 292, 306–07 (Tenn.2005). On April 16, 2008, the United States Supreme Court affirmed the use of the three-drug protocol used in Kentucky's lethal injection procedure. *Baze v. Rees,* 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008). Tennessee uses the same protocol as Kentucky. *Id.* (citing *Workman v. Bredesen,* 86 F.3d 896, 902 (6th Cir.2007)); *see also Harbison v. Little,* 571 F.3d 531 (6th Cir.2009), *cert. denied,* —— U.S. ——— (2010). The Petitioner is not entitled to relief on this issue.

C. Death Penalty Infringes upon Fundamental Right to Life

The Petitioner argues that the death sentence is unconstitutional because it infringes upon her fundamental right to life and because the death penalty is not necessary to promote any compelling Tennessee state interest. This complaint, that her death sentence must be reversed because it violates his fundamental right to life, is contrary to settled

precedent as reflected in *Cauthern v. State,* 145 S.W.3d 571, 629 (Tenn.Crim.App.2004) (citing *Nichols,* 90 S.W.3d at 604; *State v. Mann,* 959 S.W.2d 503, 536 (Tenn.1997) (Appendix); *State v. Bush,* 942 S.W.2d 489, 523 (Tenn.1997)). Accordingly, the Petitioner is not entitled to relief on this issue.

D. Indictment returned by Grand Jury is Unconstitutional.

The Petitioner asserts that the imposition of the death penalty violates due process of law because the indictment failed to set forth the aggravating circumstance. The courts of this state have rejected the Petitioner's argument. Our supreme court has held that "[n]either the United States Constitution nor the Tennessee Constitution requires that the State charge in the indictment the aggravating factors to be relied upon by the State during sentencing in a first degree murder prosecution." *State v. Dellinger,* 79 S.W.3d 458, 467 (Tenn.2002); *see also State v. Rice,* 184 S.W.3d 646, 686 (Tenn.2006); *State v. Holton,* 126 S.W.3d 845, 862–63 (Tenn.2004). In *Dellinger,* the court explained that the capital sentencing scheme in Tennessee is consistent with *Apprendi* because: (1) the holding in *Apprendi* applies only to enhancement factors used to impose a sentence above the statutory maximum; (2) the death penalty is within the statutory range of punishment prescribed for first degree murder by the Tennessee General Assembly; and (3) Tennessee's capital sentencing procedure requires both that a jury find statutory aggravating circumstances based upon proof beyond a reasonable doubt and that the aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt. *Dellinger,* 79 S.W.3d at 466–67. In *Holton,* the court addressed whether the holding in *Dellinger* was correct in light

of the United States Supreme Court's decision in *Ring*. The Tennessee Supreme Court held that "*Ring* does not stand for the broad proposition that aggravating circumstances must be charged in the indictment to satisfy constitutional standards.... Therefore, *Ring* provides no relief to the defendant and does not invalidate this Court's holding in *Dellinger*." *Holton,* 126 S.W.3d at 863 (citing *United States v. Bernard,* 299 F.3d 467, 488 (5th Cir .2002); *Porter v. Crosby,* 840 So.2d 981, 986 (Fla.2003); *Terrell v. State,* 276 Ga. 34, 572 S.E.2d 595, 602 (Ga.2002)); *see also State v. Carter,* 114 S.W.3d 895, 910 n. 4 (Tenn.2003) (applying *Dellinger* to reject a claim that *Ring* requires aggravating circumstances be included in the indictment). Accordingly, the Petitioner is not entitled to relief on this issue.

CONCLUSION

Based upon the foregoing, the judgment of the post-conviction court is affirmed.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16-5854

CHRISTA GAIL PIKE,
Petitioner-Appellant,

v.

GLORIA GROSS, WARDEN,
Respondent-Appellee.

[Filed: March 30, 2017]

Before: COOK, GRIFFIN, and STRANCH, Circuit Judges.

ORDER

Christa Pike, a Tennessee prisoner under sentence of death, appeals from a district court judgment dismissing her petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The case is now pending before this court for review of Pike's application for a certificate of appealability (COA).

In 1995, a Tennessee jury convicted Pike of first degree murder and conspiracy to commit first degree murder. The jury recommended that Pike be sentenced to death, and the trial court sentenced her accordingly. The court also sentenced her to twenty-five years of imprisonment for the conspiracy conviction. On direct appeal, the Tennessee Court of Criminal Appeals affirmed her convictions and sentences, *State v. Pike*, No. 03C01-9611-CR-00408, 1997 WL 732511 (Tenn. Crim. App. Nov. 26, 1997), as did the Tennessee Supreme Court. *State v. Pike*, 978 S.W.2d 904, 923 (Tenn. 1998).

Pike subsequently filed a petition for post-conviction relief. After conducting an evidentiary hearing, the trial court denied Pike's post-conviction petition. The Tennessee Court of Criminal Appeals affirmed the trial court's decision, *Pike v. State*, No. E2009-00016-CCA-R3-PD, 2011 WL 1544207 (Tenn. Crim. App. Apr. 25, 2011), and the Tennessee Supreme Court denied further review.

In 2012, Pike filed her § 2254 petition, raising eleven grounds for relief. The district court concluded that Pike's claims did not warrant habeas relief and dismissed the case. *Pike v. Freeman*, No. 1:12-CV-35, 2016 WL 1050717 (E.D. Tenn. Mar. 11, 2016). The district court also denied Pike a COA for all of the issues raised in her § 2254 petition.

Under 28 U.S.C. § 2253(c)(1)(B), we grant a COA for an issue raised in a § 2254 petition only if the petitioner has made a substantial showing that the denial of a federal constitutional right has occurred. A petitioner satisfies this standard by demonstrating that reasonable judges could disagree with the district court's resolution of her constitutional claims or that judges could conclude that the issues raised are adequate to deserve further review. *Miller-El v. Cockrell*, 537 U.S. 322, 327, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The petitioner is not required to show that the appeal will succeed in order to be granted a COA, and the court should not deny a COA merely because it believes that the petitioner fails to demonstrate an entitlement to relief. *Miller-El*, 537 U.S. at 337.

In her application for a COA, Pike seeks a COA for the following issues: (1) whether her counsel rendered ineffective assistance during the trial's

penalty phase; (2) whether her counsel rendered ineffective assistance during the trial's guilt phase; (3) whether the trial court improperly dismissed a juror for cause and whether counsel rendered ineffective assistance by not objecting to the dismissal; and (4) whether the Eighth Amendment prohibits the execution of an individual who was eighteen years of age at the time of the offense and suffered from mental health issues. In addition to arguing these four issues specifically, Pike generally requests a COA for the remaining claims from her habeas petition. However, since she mentions these remaining claims only in a perfunctory manner and provides no developed argumentation setting forth the reasons that they would merit a COA, she has waived consideration of those claims. *Bickerstaff v. Lucarelli*, 830 F.3d 388, 397 (6th Cir. 2016).

Upon review, we conclude that the following issue is adequate to deserve further review and we grant a COA for this claim: whether her counsel rendered ineffective assistance during the trial's penalty phase. However, Pike has not made a substantial showing of the denial of a federal constitutional right for any of the other issues from her COA application. Consequently, we deny a COA for those claims.

Accordingly, we **GRANT** in part and **DENY** in part Pike's application for a COA. The Clerk's Office shall issue a briefing schedule.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 16-5854

CHRISTA GAIL PIKE,
Petitioner-Appellant,

v.

GLORIA GROSS, WARDEN,
Respondent-Appellee.

[Filed: September 26, 2019]

Before: COOK, GRIFFIN, 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
Deborah S. Hunt, Clerk

APPENDIX G

CONSTITUTIONAL PROVISIONS

U.S. Const. amend VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend VIII provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend XIV provides:

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States,

shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX H

28 U.S.C. § 2254

State custody; remedies in Federal courts

Effective: April 24, 1996

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) 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 unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the

State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) 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 application 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.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an

applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.