IN THE CRIMINAL COURT FOR MORGAN COUNTY, TENNESSEE

NICHOLAS TODD SUTTON, Petitioner	)	
	)	No. 7555
v.	)	(CAPITAL CASE)
	)	(POST-CONVICTION)
STATE OF TENNESSEE, Respondent.	)	(REOPENED)

ORDER

I. Introduction

On June 8, 2016, Petitioner, Nicholas Todd Sutton, filed a motion to reopen his petition for post-conviction relief pursuant to Tenn. Code Ann. § 40-30-117(a)(1) claiming he was entitled to relief based upon new rules of law as announced in (1) Justice Breyer's dissent in Glossip v. Gross, 576 U.S. ___, 135 S. Ct. 2726 (2015), (2) the majority opinion in Obergefell v. Hodges, 576 U.S. ___, 135 S. Ct. 2584 (2015), and (3) the majority opinion in Johnson v. United States, 576 U.S. ____, 135 S. Ct. 2251 (2015). The State filed its response on September 15, 2016, seeking summary denial of the motion to reopen. After reviewing the motion and the relevant authorities, this Court DENIED the Motion to Reopen as to the claims under Glossip and Obergefell, and GRANTED the Motion to Reopen as to the Johnson claim.

Petitioner then filed an Amended Petition for Post-Conviction Relief on February

2, 2017, and the State filed its response to the Amended Petition on July 27, 2017.[1] The amended petition raises the claim pursuant to Johnson as well as several other claims. This Court has reviewed all pleadings, records, and applicable law in preparation of this order to address all the claims in the February 2017 Amended Petition as required by statute. See Tenn. Code Ann. § 40-30-106.

II. Procedural History

Trial

In 1986, Petitioner was convicted of the January 15, 1985, first degree murder of Carl Estep. At the time of the offense, Petitioner, his codefendants,[2] and the victim were all inmates at the Morgan County Regional Correctional Facility. Estep was stabbed, in his cell, thirty-eight times in the chest and neck and nine of the wounds were potentially fatal. State v. Sutton, 761 S.W.2d 763 (Tenn. 1988). Two homemade knives were found near his body and a third was found under his lamp. Id. The jury found the following aggravating circumstances beyond a reasonable doubt in sentencing Petitioner to death for the murder:

> (1) The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person;
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> (2) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of the mind; and
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> (3) The murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement.

See Tenn. Code Ann. § 39-2-203(i)(2), (5), and (8) (1982).

[1] Petitioner also filed a Petition for writ of error coram nobis on February 2, 2017, to which the State filed its response July 20, 2017. The petition for writ of error coram nobis is addressed by separate order.

[2] One co-defendant was found not guilty and another was found guilty and received a life sentence.

On appeal, the Tennessee Supreme Court affirmed both his conviction and sentence. State v. Sutton, 761 S.W.2d 763 (Tenn. 1988), cert. denied, 497 U.S.1031 (1990).

Post-Conviction

Petitioner subsequently filed his first petition for post-conviction relief on December 14, 1990, and amended it on January 2, 1992. Following a hearing held from October 9, 1996, to October 14, 1996, the petition was denied by the trial court's order on October 23, 1996.[3] The trial court's denial was affirmed on appeal. Nicholas Todd Sutton v. State, 1999 WL 423005 (Tenn. Crim. App. June 25, 1999), perm. app. denied, (Tenn. Dec, 20, 1999), cert. denied, 530 U.S. 1216 (2000).

Federal Habeas Corpus Proceedings

Petitioner filed an unsuccessful petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, and the trial court's denial of relief was affirmed on appeal. Sutton v. Bell, 645 F.3d 752 (6th Cir. 2011), cert. denied, 132 S. Ct. 1917 (2012).

III. Motion to Reopen/Post-Conviction Standards

The Tennessee Supreme Court has summarized the statutes governing motions to reopen:

[3] Judge William Inman was appointed In November of 1994 to hear the petition but granted the Petitioner's motion to recuse in March 1996. Judge Gary R. Wade was then appointed to hear the petition. After five days of hearing in October 1996, the post-conviction court denied relief on October 23, 1996.

Under the provisions of the Post-Conviction Procedure Act, a petitioner "must petition for post-conviction relief ... within one (1) year of the final action of the highest state appellate court to which an appeal is taken ... ." Tenn. Code Ann. § 40-30-202(a). Moreover, the Act "contemplates the filing of only one (1) petition for post-conviction relief." Tenn. Code Ann. § 40-30-202(c). After a post-conviction proceeding has been completed and relief has been denied, ... a petitioner may move to reopen only "under the limited circumstances set out in 40-30-217." Id. These limited circumstances include the following:

> (1) The claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. Such motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States Supreme Court establishing a constitutional right that was not recognized as existing at the time of trial; or
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> (2) The claim in the motion is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or
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> (3) The claim in the motion seeks relief from a sentence that was enhanced because of a previous conviction and such conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the motion must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid; and
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> (4) It appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.

(Citing Tenn. Code Ann. § 40-30-217(a)(1)-(4))(now Tenn. Code Ann. § 40-30-117(a)(1)-(4)). The statute further states:

> The statute of limitations shall not be tolled for any reason, including any tolling or saving provision otherwise available at law or equity. Time is of the essence of the right to file a petition for post-conviction relief or motion to reopen established by this chapter, and the one-year limitations period is an element of the right to file the action and is a condition upon its exercise. Except as specifically provided in subsections (b) and (c) [of section 102], the right to file a petition for post-conviction relief or a motion to reopen under this chapter shall be extinguished upon the

> expiration of the limitations period. Tenn. Code Ann. § 40-30-102(a).

Harris v. State, 102 S.W.3d 587, 590-91 (Tenn. 2003).

The post-conviction statutes further provide

> a new rule of constitutional criminal law is announced if the result is not dictated by precedent existing at the time the petitioner's conviction became final and application of the rule was susceptible to debate among reasonable minds. A new rule of constitutional criminal law shall not be applied retroactively in a post-conviction proceeding unless the new rule places primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or requires the observance of fairness safeguards that are implicit in the concept of ordered liberty.

Tenn. Code Ann. § 40-30-122.

Relief under the Post-Conviction Procedure Act is available when a petitioner's "conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Tenn. Code Ann. ' 40-30-103 (2014). "The petition must contain a clear and specific statement of all grounds upon which relief is sought, including full disclosure of the factual basis of those grounds." Tenn. Code Ann. ' 40-30-106(d). The court preliminarily reviews the petition to determine if any issues raised should be dismissed as either previously determined and/or waived. Tenn. Code Ann. ' 40-30-106(f)-(h). The procedural bars of previous determination and waiver are statutorily defined:

> (g) A ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented unless:
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> (1) The claim for relief is based upon a constitutional right not recognized as existing at the time of trial if either the federal or state constitution requires retroactive application of that right; or
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> (2) The failure to present the ground was the result of state action in violation of the federal or state constitution.
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> (h) A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing. A full and fair hearing has occurred where the petitioner is afforded the opportunity to call

> witnesses and otherwise present evidence, regardless of whether the petitioner actually introduced any evidence.

Tenn. Code Ann. ' 40-30-106(g) and (h); see Tenn. S. Ct. R. 28, Section 2(D) and (E). In a post-conviction proceeding, the petitioner has the burden of presenting his case and establishing the factual grounds alleged by clear and convincing evidence. Tenn. Code Ann. ' 40-30-110(f) and Tenn. S. Ct. R. 28, Section 8(D)(1); see also Davidson v. State, 453 S.W.3d 386, 392 (Tenn. 2014).

Here, Petitioner filed a motion to reopen on specific grounds which this Court granted and ordered the filing of an amended petition if necessary. In his February 2017 Amended Petition, Petitioner raised several claims not related to his Johnson v. United States claim raised in the motion to reopen.

Initially, this Court finds the additional claims raised in Claims II through V and VII through IX were not covered by the order granting the motion to reopen and are not permitted pursuant to Tenn. Code Ann. § 40-30-117. Although the order allowing an amended petition may have included general language, this Court did not intend to allow the petitioner to reopen his post-conviction proceedings other than as it related to the Johnson claim and any claims cognizable under Tenn. Code Ann. § 40-30-117. Therefore, Claims II through V and VII through IX are beyond the scope of the current proceedings. Claim VI was appropriately raised as a potential additional claim pursuant to Tenn. Code Ann. § 40-30-117. However, in an effort to address all issues, this Court will review these issues pursuant to Tenn. Code Ann. § 40-30-106.

IV. Analysis of Claim I: *Johnson* Claim

Petitioner argues in his Amended Petition for Post-Conviction Relief he is entitled

to relief pursuant to what he claims is a new rule announced in Johnson v. United States, 135 S. Ct. 2551 (2015). Specifically, Petitioner claims the language of the prior violent felony aggravating circumstance in Tennessee's capital sentencing statute, Tenn. Code Ann. § 39-2-203(i)(2)(1982), is unconstitutionally vague under Johnson.

Initially, when this Court ruled Petitioner had stated a "colorable claim" as to Johnson, there was no authority in Tennessee which addressed this issue. Since then, the Tennessee Court of Criminal Appeals has decided Donnie Johnson v. State, No. W2017-00848-CCA-R28—PD (Tenn. Crim. App. September 11, 2017), perm. app. denied, (Tenn. January 19, 2018). In Johnson, the court held

> In [*Johnson v. United States*], the Supreme Court held that the "residual clause" contained in the definition of a violent felony of the federal Armed Career Criminal Act of 1984 (ACCA) is unconstitutionally vague. *Johnson*, 135 S. Ct. at 2557. The ACCA increases the punishment of a defendant convicted of being a felon in possession of a firearm if he or she has three or more previous convictions for a violent felony. 18 U.S.C. § 924(e)(1). The ACCA defines "violent felony" as
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> > "any crime punishable by imprisonment for a term exceeding one year . . . that – (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."§924(e)(2)(B) (emphasis added).
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> The "otherwise involves conduct that presents a serious potential risk of physical injury to another" language is known as the ACCA's "residual clause." *Johnson*, 135 S. Ct. at 2556. The court observed that, "unlike the part of the definition of a violent felony that asks whether the crime 'has as an element the use ... of physical force,' the residual clause asks whether the crime 'involves conduct' that presents too much risk of physical injury." *Id.* at 2557. (emphasis in original). In making its ruling, the Supreme Court reasoned that the residual clause is unconstitutionally vague because it "leaves grave uncertainty about how to estimate the risk posed by a crime" and it "leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2557-58. In other words, "[d]eciding whether the residual clause covers a crime thus requires a court to picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury." *Id.* at 2557. That "task goes beyond deciding whether creation of risk is an element of the crime." *Id.* (emphasis added). As such, the majority declined the dissent's suggestion that looking at the particular facts underlying the prior violent felony could save the residual clause from vagueness. *Id.* at 2561-62.

Appendix D

The Petitioner alleges that the *Johnson* decision created a new constitutional right that would provide an avenue of relief pursuant to Tennessee Code Annotated section 40-30-117(a)(1). We must first look at *Johnson* to determine if a new constitutional right was created. Tennessee Code Annotated section 40-30-122 addresses interpretation of a new rule of constitutional law stating in part:

> "For purposes of this part, a new rule of constitutional criminal law is announced if the result is not dictated by precedent existing at the time the petitioner's conviction became final and application of the rule was susceptible to debate among reasonable minds."

Further, the courts have determined that a "case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government [or] ... if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague v. Lane*, 109 S.Ct. 1060, 1070 (1989) (citations omitted); *see also Van Tran v. State*, 66 S.W.3d 790, 810-11 (Tenn. 2001). On its face, the *Johnson* decision does not appear to create a new constitutional right but only applies an existing constitutional test to a statute. When referencing *Johnson*, the United States Supreme Court described the reasoning for the decision as follows:

> "Last Term, this Court decided *Johnson v. United States*, 135 S. Ct. 2551 (2015). *Johnson* considered the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B)(ii). The Court held that provision void for vagueness."

Welch v. United States, 136 S. Ct. 1257, 1260–61 (2016) (emphasis added). The court further stated:

> "Less than three weeks later, this Court issued its decision in *Johnson* holding, as already noted, that the residual clause is void for vagueness."

Id. (emphasis added). The ruling of the *Welch* court reinforces the idea that no new constitutional right was created by the *Johnson* opinion. The "void for vagueness" doctrine was not a new creation of the *Johnson* court in that the due process provisions of the 5th and 14th amendments have been utilized many times prior to *Johnson* to determine that a statute is unconstitutionally vague. *City of Chicago v. Morales*, 119 S. Ct. 1849 (1999) (speculation as to meaning of statute not allowed); *Maynard v. Cartwright*, 108 S. Ct. 1853 (1988) (aggravating circumstance language held as unconstitutionally vague); *Kolender v. Lawson*, 103 S. Ct. 1855 (1983) (statute held to be unconstitutionally vague by requiring "credible and reliable" identification); *Colautti v. Franklin*, 99 S. Ct. 675 (1979) (statute vague due to required interpretation of "is viable" and "may be viable"); *Smith v. Goguen*, 94 S. Ct. 1242 (1974) (due process is denied where inherently vague statutory language permits selective law enforcement); *Grayned v. City of Rockford*, 92 S. Ct. 2294 (1972) (enactment is void for vagueness if its prohibitions are not clearly defined). As such, we cannot find that the United States Supreme Court established a new constitutional right through its ruling in *Johnson*.

Even if a new retroactively applicable constitutional right was created by the *Johnson* decision, such ruling would not offer relief to the Petitioner. The argument of the Petitioner is that one of the aggravating factors found by the jury

to sentence the Petitioner to death is vague and under the ruling espoused by the *Johnson* court would be unconstitutional. The statute referenced by the Petitioner has been amended since the time of his trial and conviction but at the time of trial stated: "The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person." Tenn. Code Ann. §39-13-204(i)(2)(1988). A comparison of the two clauses the ACCA and the pre-1989 (i)(2) provision reveals that application of the *Johnson* court ruling would not result in the finding that the pre-1989 (i)(2) provision is unconstitutionally vague.

The "residual clause" of the ACCA defines a violent felony as a felony that "otherwise involves conduct that presents a serious risk of physical injury to another" while the pre-1989 (i)(2) provision required that the felony "involve the use or threat of violence to the person." The vagueness of the ACCA provision arose out of the multitude of potential means for physical injury to arise from a crime. As set out in the *Johnson* opinion, the phrasing of the ACCA required the trier of fact to determine any number of outcomes of a crime that may result in injury. *Id.* at 2557-2558. The determination was not a fact based determination upon the actual crime for which the defendant was being tried but a determination that in the ordinary course of the listed crime could the risk of physical injury arise. *Id.* The reason for this interpretation of the ACCA was the prior ruling by the Supreme Court in *Taylor v. United States* requiring the court to use the "categorical approach" in applying the ACCA. *Id.* (*citing Taylor v. United States*, 110 S. Ct. 2143 (1990)). Under this "categorical approach", the court must assess "whether a crime qualifies as a violent felony 'in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.'" *Id.* (*citing Begay v. United States*, 128 S. Ct. 1581 (2008)). With these constraints, the ACCA, as written, required the trier of fact to imagine some far reaching machination to determine any number of possible outcomes not specifically related to the underlying felony.

The pre-1989 (i)(2) provision differs from the ACCA in its specificity that the prior felonies involve the use or threat of violence to a person and the governance of how the prior crime is to be interpreted. Unlike the ACCA, which had been limited in interpretation by *Begay* and *Taylor*, there was no such limitation requiring the "ordinary case" interpretation of the prior felony portion of the (i)(2) aggravator at the time of the trial of the Petitioner. The Tennessee Supreme Court had previously taken up the issue of how to determine if the prior felony involved violence to a person pursuant to the (i)(2) provision as then written. *See State v. Moore*, 614 S.W.2d 348 (Tenn. 1981). The instruction given from the Tennessee Supreme Court in *Moore* distinguishes itself from the stated unconstitutional weakness in *Johnson* in that the *Moore* court required a determination of the existence of violence to a person to be made on the facts of the actual crime charged. *Id.* at 351. *Moore* centered its determination around prior crimes of arson and burglary, both of which the court found could be crimes that did or did not involve violence to the person depending upon the facts of the specific case. *Id.* With *Moore* as guidance for the application of the "use or threat of violence" language of the pre-1989 (i)(2) provision, the vagueness shortcoming of the ACCA as found in *Johnson* would not apply. *Moore* did not limit determination of the pre-1989 (i)(2) provision to an "ordinary case" of the prior felony but required the court to look at the specific acts of the prior felony to determine if the use or threat of violence to a person was present. As such, the ruling of the Supreme Court in *Johnson* would have no effect upon the pre-1989 version of Tennessee

> Code Annotated section 39-13-204(i)(2) and the post-conviction court did not abuse its discretion in denying the Petitioner's motion.

In Andre Benson v. State, 2018 WL 486000 (Tenn. Crim. App. January 19, 2018), the Court discussed the post-conviction process and stated as follows:

> A colorable claim is a claim that, "if taken as true, in the light most favorable to petitioner, would entitle petitioner to relief under the Post-Conviction Procedure Act." *Arnold v. State*, 143 S.W.3d 784, 786 (Tenn. 2004)(quoting Tenn. Sup. Ct. R. 28, § 2(H)). A post-conviction court may also dismiss the petition later in the process but still prior to a hearing, after reviewing the petition, the State's response, and the records and files associated with the petition, on the basis that a petitioner is conclusively not entitled to relief. T.C.A. § 40-30-109(a).

Here, this Court initially granted the motion to reopen to determine if Johnson was applicable to the Tennessee capital sentencing statutes. As previously stated, the appellate courts have now addressed this issue and determined Johnson does not entitle a petitioner to relief on the claims raised here. Accordingly, this Court finds this issue is appropriate for disposition without a hearing as Petitioner is not entitled to relief based upon Johnson.

V. Analysis of Non-*Johnson* Claims Raised: Claims II through IX

Claim II

In Claim II, Petitioner asserts his conviction and death sentences should be vacated because he was visibly shackled and handcuffed during his capital trial and sentencing. Specifically he states:

> [His] rights to due process, an impartial jury and freedom from cruel and unusual punishment were violated when he was forced to appear before the jury wearing visible shackles and handcuffs. There was no showing that shackling and handcuffing were justified by an essential state interest, alternatives were not

> explored, and steps were not taken to minimize the prejudicial effect of the restraints. Petitioner's conviction and death sentence must be vacated because the appearance of Mr. Sutton in chains was inherently prejudicial, undermined his constitutional rights, eroded the presumption of innocence, and tipped the scales in favor of conviction and the imposition of a death sentence.

Amended Petition, page 24-25. Petitioner has submitted several affidavits of trial jurors from October of 2016 in support of his claim. In addition, Petitioner claims counsel was ineffective in failing to interview the jurors prior to the motion for new trial.

These issues, however, have been previously determined on direct appeal, in his original post-conviction proceedings, and in his federal habeas proceedings. The Tennessee Court of Criminal Appeals held as follows:

> Next, the petitioner contends that the post-conviction court erred in concluding that the issue of excessive security in the courtroom was previously determined, waived, or without merit. In his post-conviction petition, the petitioner claimed that the state used the extraordinary courtroom security as a prop, that he was denied a fair trial as a result of the excessive courtroom security, that the trial court failed to regulate the excessive courtroom security, and that defense counsel was ineffective in failing to limit the excessive security, object to its use as a prop, or properly present the issue in the motion for new trial and on direct appeal.
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> Regarding this issue, Charles E. Jones, now warden at MCRCF, testified that he was in charge of courtroom security during the petitioner's trial. According to Jones, the goal was to provide security during the trial and to ensure that inmates were transported in a timely manner, however, there was no written plan or order. Uniformed officers armed with shotguns were stationed at each corner of the courthouse. Two officers with a hand held metal detector were stationed outside the door to the courtroom. Inside the courtroom, officers were stationed at each door. Three more officers were stationed in the front row directly behind the defendants. One officer was positioned to backup the three officers by the defendants, one was next to the jury, and two were in the balcony. Some of the officers were in uniform, and all the officers were armed with the exception of the three officers directly behind the defendants. One street by the courthouse was blocked off, and the officers used it for parking and unloading inmates.
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> Judge Eugene Eblen, who presided over the trial, testified that the officers in the courtroom were not overly conspicuous. Considering that there were three inmates on trial and that many of the witnesses were also inmates, Judge Eblen believed that the security was appropriate.
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> Contrary to this testimony, Fox, counsel for co-defendant Street, testified that the courthouse was an "armed fortress." Charles Burchett, who attended the trial and testified on behalf of the petitioner at the sentencing hearing, testified that he was amazed at the number of armed officers.

On the general issue of courtroom security, the post-conviction court made these findings:

> Even if the issue had not been previously determined or waived, the proof at the evidentiary hearing simply did not establish this as a ground for relief. Obviously courtroom security is necessary when three prison inmates are on trial. All of the key witnesses were inmates as well. The environment at the trial, due to all this, was certainly not ideal. Nonetheless, the trial court took measures to reduce any prejudicial effect. The defendants wore certain clothes, their hands were free, and measures were taken to hide from the jury the shackles on their feet. Moreover, Morgan County, with two state prison facilities in 1986, is more likely than other counties to be desensitized to a possibly coercive atmosphere.

Before introducing the homemade knives into evidence, General Harvey placed them on the defense table so that defense counsel would have an opportunity to examine the knives. This was done even though defense counsel had been instructed to only use felt tip pens, not pencils, so that the defendants could not use the pencils as weapons in taking hostages. Appman testified that he reacted by jerking away from the table because he was afraid of becoming a hostage. According to Appman, it was a tense moment in the courtroom. Being startled, Appman did not make a motion for a mistrial or raise the issue at that time.

Judge Eblen testified that it is common practice for lawyers to approach opposing counsel and present an exhibit before it is introduced into evidence. When the prosecutor placed the homemade knives on the defense table, Judge Eblen saw Appman jump, and he heard an officer pull a gun, although he did not see any guns drawn. According to Judge Eblen, the courtroom quickly quieted down, and the jury seemed to get a "smile" out of the incident. Judge Eblen believed that he told the prosecutor not to do it again.

The post-conviction court accredited the testimony of Judge Eblen on this issue: Moreover, Judge Eblen testified that this was really "not a big event in Morgan County" and that the "officers were not overly conspicuous." While Judge Eblen expressed some concern about the incident wherein an assistant district attorney general placed several knives at the table occupied by the defendants and their counsel, John Appman reacted with some surprise. The record demonstrates, however, that there were curative instructions. It was Judge Eblen's opinion that the incident did not affect the results of the trial. This court accredits that account.

Regarding the placing of knives on defense table, the post-conviction court properly held that the issue has been previously determined. T.C.A. § 40-30-112(a) (1990). In fact, Jones was called to testify about the courtroom security at the hearing on the motions for new trial. Jones, who was in charge of courtroom security, testified that there were ten to fourteen guards in the courtroom, some of whom were in civilian clothes. While some of the guards had pistols, no one in the courtroom had a shotgun. When the knives were placed on the table, the officers in the courtroom reached for their guns, however, no pistols were drawn. On direct appeal, the Supreme Court ruled:

> The defendant also alleges prosecutorial misconduct by the Assistant District Attorney General. A knife, identified by State's witness James Worthington as a weapon found in Estep's cell after the murder, was placed on the defense table for inspection by counsel before passing it to the jury. Seeing the knife within reach of the defendants, a number of the correctional officers in the courtroom responded by reaching for their weapons. Defendant insists that the reactions by the guards prejudiced him and deprived him of the "physical indicia of innocence." After the incident, the court instructed the State to have defense counsel examine the weapons at the State's table. The jury knew that the defendants were inmates and it probably came as no surprise to the jurors that they would be closely watched and guarded. The record reflects that only one such incident occurred. We do not find that this incident could have so prejudiced the defendant as to deny him a fair trial. We find no reversible error.
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> *State v. Sutton,* 761 S.W.2d 763, 769.
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> Furthermore, as held by the post-conviction court, all other claims regarding excessive security in the courtroom were waived by the petitioner's failure to raise them previously. T.C.A. § 40-30-112(b)(1) (1990). Finally, the petitioner has failed to meet his burden to show ineffective assistance of counsel regarding this issue. As stated earlier, on appeal from the denial of post-conviction relief, the findings of fact and conclusions of law made by the trial court are given the weight of a jury verdict, and this Court is bound by those findings unless the evidence contained in the record preponderates otherwise. *Butler v. State,* 789 S.W.2d 898, 899. Questions concerning the credibility of witnesses and weight and value to be given their testimony are for resolution by the trial court. *Black v. State,* 794 S.W.2d 752, 755.
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> In the present case, the post-conviction court accredited the testimony of Judge Eblen regarding whether the security was excessive or prejudicial at the petitioner's trial. Having reviewed the record, we do not find that the evidence preponderates against this finding, and thus, the petitioner has failed to establish prejudice. *Strickland v. Washington,* 466 U.S. 668, 693, 104 S. Ct. 2052, 2067, 80 L.Ed.2d 674. This issue is without merit.

Nicholas Todd Sutton v. State, 1999 WL 423005 (Tenn. Crim. App. June 25, 1999), perm. app. denied, (Tenn. Dec, 20, 1999), cert. denied, 530 U.S. 1216 (2000). See also Sutton v. Bell, 645 F.3d 752, 756-57 (6th Cir. 2011), cert. denied, 132 S. Ct. 1917 (2012). The fact that current counsel has obtained affidavits in 2016 from jurors who have been available since the trial does not change the opinion of this Court that this issue is previously determined and/or waived and is not appropriate to address through

a motion to reopen proceeding.

Claim III

In Claim III, Petitioner asserts his death sentence must be reversed because he was deprived of a fair and impartial jury and he received ineffective assistance of counsel during jury selection. Petitioner relies upon cases decided from 1919 to 1992 to support his claim that jurors were not properly death and life sentence qualified in Petitioner's trial. Petitioner has again submitted several juror affidavits from 2016 in support of his claim.

By Petitioner's own pleadings, this issue has been available, as were the trial jurors, since at least 1992 which is the date of the latest case law cited. Petitioner's hearing on his original post-conviction proceeding was not until 1996. This issue is clearly waived and is not appropriate to address through a motion to reopen proceeding.

Claim IV

In Claim IV, Petitioner asserts he received ineffective assistance of counsel in failing to develop and present mental health evidence establishing diminished capacity that would have negated premeditation and the heinous, atrocious and cruel aggravating circumstance. In Petitioner's amended petition, he asserts "There is a reasonable probability, had trial counsel conducted a minimally adequate investigation and uncovered the evidence identified in post-conviction, that one juror might have voted differently." The issue of mental health evidence both for trial and sentencing was addressed in Petitioner's original post-conviction proceedings. This issue is previously determined and/or waived as to any sub-issue not raised and is not appropriate to address through a motion to reopen proceeding.

Claim V

In Claim V, Petitioner asserts the State committed prejudicial prosecutorial misconduct which tainted the Jury's death verdict. Specifically, Petitioner asserts the State (1) used excessive courtroom and courthouse security as a prop to influence the jury's perception of Petitioner's level of danger, (2) placed murder weapons on the defense table within the reach of the defendants, triggering a response by armed officers present in the courtroom, and (3) argued Petitioner's future dangerousness at sentencing. Amended Petition, page 43. As discussed in Claim II, however, these issues have been previously determined on direct appeal, in his original post-conviction proceedings, and in his federal habeas proceedings. See Nicholas Todd Sutton v. State, 1999 WL 423005 (Tenn. Crim. App. June 25, 1999), perm. app. denied, (Tenn. Dec, 20, 1999), cert. denied, 530 U.S. 1216 (2000). See also Sutton v. Bell, 645 F.3d 752, 756-57 (6th Cir. 2011), cert. denied, 132 S. Ct. 1917 (2012). Again, this Court finds the fact that current counsel has obtained affidavits in 2016 from jurors who have been available since the trial does not change the opinion of this Court that this issue is previously determined and/or waived and is not appropriate to address through a motion to reopen proceeding.

Claim VI

In Claim VI, Petitioner asserts Hurst v. Florida, 136 S. Ct. 616 (2016), also announced a new constitutional right which was not recognized as existing at the time of trial and retroactive application of that right is required. In Hurst v. Florida, the United States Supreme Court held Florida's capital sentencing scheme violated Ring v. Arizona, 536 U.S. 584 (2002). Under the Florida law addressed in Hurst, a jury rendered an advisory verdict on capital sentencing, but the trial judge made the ultimate

factual determinations necessary to sentence a defendant to death. Hurst, 136 S. Ct. at 621-22. The Hurst Court held this procedure was invalid because it did "not require the jury to make the critical findings necessary to impose the death penalty" in violation of the Sixth Amendment. Id. at 622.

Here, Petitioner claims the "new constitutional rule" announced in Hurst applies to his case based upon the trial court's serving as thirteenth juror. In Hurst, the Court held as follows:

> The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...." This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. ——, ——, 133 S. Ct. 2151, 2156, 186 L.Ed.2d 314 (2013). In *Apprendi v. New Jersey,* 530 U.S. 466, 494, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), this Court held that any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" is an "element" that must be submitted to a jury. In the years since *Apprendi,* we have applied its rule to instances involving plea bargains, *Blakely v. Washington,* 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004), sentencing guidelines, *United States v. Booker,* 543 U.S. 220, 125 S. Ct. 738, 160 L.Ed.2d 621 (2005), criminal fines, *Southern Union Co. v. United States,* 567 U.S. ——, 132 S. Ct. 2344, 183 L.Ed.2d 318 (2012), mandatory minimums, *Alleyne,* 570 U.S., at ——, 133 S. Ct., at 2166 and, in *Ring,* 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556, capital punishment.
>
> In *Ring,* we concluded that Arizona's capital sentencing scheme violated *Apprendi*'s rule because the State allowed a judge to find the facts necessary to sentence a defendant to death. An Arizona jury had convicted Timothy Ring of felony murder. 536 U.S., at 591, 122 S. Ct. 2428. Under state law, "Ring could not be sentenced to death, the statutory maximum penalty for first-degree murder, unless further findings were made." *Id.,* at 592, 122 S. Ct. 2428. Specifically, a judge could sentence Ring to death only after independently finding at least one aggravating circumstance. *Id.,* at 592–593, 122 S. Ct. 2428. Ring's judge followed this procedure, found an aggravating circumstance, and sentenced Ring to death.
>
> The Court had little difficulty concluding that "'the required finding of an aggravated circumstance exposed Ring to a greater punishment than that authorized by the jury's guilty verdict.'" *Id.,* at 604, 122 S. Ct. 2428 (quoting *Apprendi,* 530 U.S., at 494, 120 S. Ct. 2348; alterations omitted). Had Ring's judge not engaged in any factfinding, Ring would have received a life sentence. *Ring,* 536 U.S., at 597, 122 S. Ct. 2428. Ring's death sentence therefore violated his right to have a jury find the facts behind his punishment.

Appendix D

> The analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's. Like Arizona at the time of *Ring*, Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts. Fla. Stat. § 921.141(3). Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: "It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." *Walton v. Arizona*, 497 U.S. 639, 648, 110 S. Ct. 3047, 111 L.Ed.2d 511 (1990); accord, *State v. Steele*, 921 So.2d 538, 546 (Fla.2005) ("[T]he trial court alone must make detailed findings about the existence and weight of aggravating circumstances; it has no jury findings on which to rely").
>
> As with Timothy Ring, the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole. As with Ring, a judge increased Hurst's authorized punishment based on her own factfinding. In light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment.

136 S. Ct. at 621-22.

On this issue, Petitioner is asserting the Hurst issue falls within one of the specific grounds available for relief through a motion to reopen. Initially, this Court must consider whether Hurst announced a new rule of constitutional law which should be applied retroactively.

> A "case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government [or] ... if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague v. Lane*, 489 U.S. 288, 301 (1989) (citations omitted); *see also Van Tran v. State*, 66 S.W.3d 790, 810–11 (Tenn.2001). Courts addressing whether *Apprendi* sets forth a new rule have held that, in *Apprendi*, "the Supreme Court announced a new constitutional rule of criminal procedure by holding that 'other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt.' " *In re Clemmons*, 259 F.3d 489, 491 (6th Cir.2001) (quoting *Apprendi*, 530 U.S. at 491); *see also United States v. Sanders*, 247 F.3d 139, 147 (4th Cir.2001) (holding that "*Apprendi* is certainly a new rule of criminal procedure"); *United States v. Moss*, 252 F.3d 993, 997 (8th Cir.2001)(holding that "*Apprendi* is obviously a 'new rule' "). Because *Apprendi* sets forth a new constitutional rule of criminal procedure, the fundamental question becomes whether *Apprendi* applies retroactively to the petitioner's case.
>
> New rules of constitutional criminal procedure are generally not applied retroactively on collateral review. *Teague*, 489 U.S. at 310. However, this general rule is subject to two exceptions. *Id* . "First, a new rule should be applied

> retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.' " *Id.* at 307. Second, a new rule should be applied retroactively if it is a "watershed rule of criminal procedure, ... which implicates both the accuracy and fundamental fairness of criminal proceedings." *Moss*, 252 F.3d at 998 (citing *Teague*, 489 U.S. at 312). Clearly, the first exception is not applicable to the petitioner's claim, because the rule set forth in *Apprendi* "did not decriminalize any class of conduct or prohibit a certain category of punishment for a class of defendants." *McCoy v. United States*, 266 F.3d 1245, 1256 (11th Cir.2001). Furthermore, the great weight of authority holds that *Apprendi* is not the type of watershed rule of criminal procedure that qualifies for retroactive application under the second exception. *Dukes v. United States*, 255 F.3d 912, 913 (8th Cir.2001) (holding that "*Apprendi* presents a new rule of constitutional law that is not of 'watershed' magnitude and, consequently, petitioners may not raise *Apprendi* claims on collateral review"); *Sanders*, 247 F.3d at 151 (holding that "the new rule announced in *Apprendi* does not rise to the level of a watershed rule of criminal procedure which 'alters our understanding of the bedrock elements essential to the fairness of a proceeding' "); *McCoy*, 266 F.3d at 1257 (agreeing with the other circuits that "*Apprendi* is not sufficiently fundamental to fall within *Teague's* second exception"). Accordingly, we conclude that the new constitutional rule of criminal procedure announced in *Apprendi* does not apply retroactively on collateral review.

William Steve Greenup v. State, No. W2001–01764–CCA–R3–PC, 2002 WL 31246136 (Tenn.Crim.App., at Jackson, Oct. 2, 2002).

In Dennis Wade Suttles v. State, No. E2017-00840-CCA-R28-PD (Tenn. Crim. App. Order, September 18, 2017), perm. app. denied, (Tenn. January 18, 2018), the Tennessee Court of Criminal Appeals addressed claims related to Hurst, which included the thirteenth juror issue raised here by Petitioner. In Suttles, the court held the decision in Hurst did not announce a new constitutional rule requiring retrospective application.[4]

[4] In Suttles, the court went further and stated:

> We also observe that an application of *Hurst* to the petitioner's case would not result in relief. First, the Supreme Court excluded its holding in *Ring* from the twenty-nine states, one of which is Tennessee, whose capital sentencing schemes "commit sentencing decisions to juries." *Ring*, 122 U.S. at 608 n.6. Also, the Tennessee Supreme Court has specifically held that the legal determination of a trial judge concerning qualifying prior violent felonies for the (i)(2) aggravating circumstance "does not transgress the dictates of Apprendi and its progeny." *State v. Cole*, 155 S.W.3d 885, 902 (Tenn.), *cert denied*, 126 S. Ct. 47 (2005). We also find unpersuasive the petitioner's argument that the trial court's exercising its duty as thirteenth juror results in unconstitutional judicial fact-finding because the trial judge's assessment as thirteenth juror is a legal determination

This Court has carefully considered Petitioner's claims related to Hurst and the applicable law. This Hurst Court simply applied its previous holdings in Apprendi and Ring to Florida's capital-sentencing scheme. Thus, the Court did not announce a new rule of constitutional law, nor did it expand its holdings in Apprendi and Ring. Accordingly, this Court finds Petitioner is not entitled to relief on this issue.

Claim VII

In Claim VII, Petitioner asserts the State's mistreatment of Petitioner while incarcerated prohibits the State from seeking his execution. He claims his participation in the murder of Carl Estep was a direct result of Post-Traumatic Stress Disorder caused or exacerbated by the constant threats to this life and overall unsafe inhumane conditions he suffered during his incarceration at both Brushy Mountain Prison and Morgan County Regional Correctional Facility. Petitioner claims executing him for a crime which was the result of such alleged cruel and inhumane treatment violates the 8th and 14th Amendments of the U.S. Constitution and Article I, Sections 8, 13, and 16 of the Tennessee Constitution. Again, this issue previously has been available to petitioner and is either previously determined and/or waived and is not appropriate to address through a motion to reopen proceeding.

Claim VIII

In Claim VIII, Petitioner asserts the death penalty is unconstitutional because the system is fundamentally "broken." However, as the Court and the parties are well aware, the constitutionality of capital punishment in the United States and in Tennessee

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concerning the weight of the evidence, not a factual determination. *See, generally, State v. Dankworth*, 919 S.W.2d 52 (Tenn. Crim. App.1995).

has been upheld on numerous occasions. Furthermore, this Court notes the Tennessee Supreme Court has addressed this issue previously in the direct appeal of a capital case:

> Mr. Hester contends that the current system of capital punishment in the State of Tennessee is fundamentally "broken." Accordingly, he invites this Court to begin dismantling the system by vacating his death sentence. Because this invitation reflects Mr. Hester's misunderstanding of the role of the courts, we respectfully decline.
>
> Tennessee's courts should never hesitate to perform their constitutionally assigned role as a check and balance on the actions of the other branches of government. However, in performing this responsibility, Tennessee's courts must maintain appropriate respect for the breathing room needed for a representative democracy to thrive. At the core of our representative democracy is the principle that the people are the ultimate sovereign. Therefore, the courts must give full effect to the will of the people, expressed through laws duly enacted by their elected representatives, subject only to the limitations imposed by the federal and state constitutions.
>
> The people, through their elected representatives, are primarily responsible for establishing the public policy of this State. The Constitution of Tennessee does not empower us to sit as "Platonic guardians" or as a super-legislature with the power to dismantle statutory systems because they do not meet our standards of desirable social policy. By accepting Mr. Hester's invitation to tear down Tennessee's system of capital punishment, we would be arrogating to ourselves power that is not ours to exercise. This we decline to do.

State v. Hester, 324 S.W.3d 1, 81 (Tenn. 2010) (footnote omitted). The Tennessee Supreme Court's prior review of this claim in Hester makes clear this issue is not a new constitutional issue which would be cognizable here.

Furthermore, the Tennessee Supreme Court continuously reviews the capital punishment system in light of evolving standards of decency. See, e.g., State v. Pruitt, 415 S.W.3d 210-12 (Tenn. 2013) (extensive analysis of proportionality review system in light of evolving standards of decency). Such analysis by the Tennessee Supreme Court helps ensure the death penalty in Tennessee does not become a broken system. Furthermore, as a trial court, this Court is bound by appellate court precedent. Any

assertion the capital punishment system is broken in this state must be addressed to the appellate courts and the General Assembly.

This Court finds this issue has been waived by not having been previously raised and is not appropriate to address through a motion to reopen proceeding.

Claim IX

Here, Petitioner claims he is entitled to relief based upon the cumulative error of all the issue raised here. This Court has found no issue which would even arguably warrant relief and also does not find his claim of cumulative error warrants any relief or is appropriate to address through a motion to reopen proceeding.

VI. Conclusion

For the reasons set forth above, this Court finds Petitioner has not stated a claim which warrants relief here. Accordingly, this matter is hereby DISMISSED.

IT IS SO ORDERED this the 10th day of April, 2018.

Jeffery H. Wicks
Criminal Court Judge

Appendix D

CERTIFICATE OF SERVICE

I, Pamela Keele B.C., Clerk, hereby certify that I have mailed a true and exact copy of same to Deborah Drew and Andrew Harris of the Office of the Post-Conviction Defender, 404 James Robertson Parkway Suite 1100, Nashville, TN 37219, and counsel of record for the State, District Attorney Russell Johnson and ADA Bob Edwards, this the 12th day of April, 2018.

Pamela Keele B.C.

Clerk

Appendix D

Pamela Keck
Morgan County Circuit Court Clerk
P. O. Box 324
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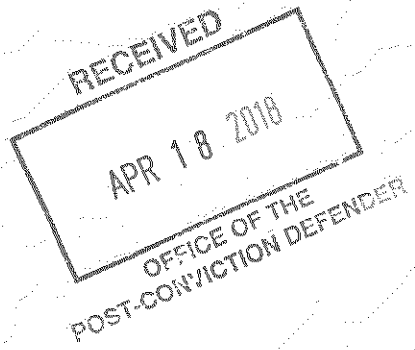

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