APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17-5488

LONNIE LEE OWENS,

Petitioner-Appellee,

v.

MIKE PARRIS, Warden,

Respondent-Appellant.

Appeal from the United States District Court
for the Eastern District of Tennessee at Winchester.
No. 4:14-cv-00018, Harry S. Mattice, Jr.,
District Judge.

Dated: July 30, 2019

OPINION

KETHLEDGE, Circuit Judge.

Lonnie Lee Owens covered his estranged wife's nose and mouth with duct tape, hogtied her arms and legs behind her back, and left her alone in a shed to die. A Tennessee jury convicted Owens of second-degree murder. The trial judge increased Owens's sentence based in part on the judge's finding that a sentencing enhancement was warranted for "exceptional cruelty." Owens now seeks federal habeas relief, arguing that the Sixth Amendment required the

jury, rather than the judge, to make that finding. The district court agreed and granted the writ. We hold that the state court's error was harmless, and reverse.

I.

Owens and his wife Heather separated in September 2002 and agreed to share custody of their two young children. Soon thereafter, Owens screamed at Heather that, if she took their children away from him, he would kill her. Owens also told one of his friends that he had made the same threat.

On May 17, 2003, Owens was at his house with the children while Heather was at work. Late that morning, Owens called Heather to ask when she would pick up the children, telling her that he had plans that evening. According to Owens, Heather hung up on him without saying when she planned to come over. Owens then called his girlfriend, Kara, and said that he was not sure when Heather would come to get the kids. Kara agreed not to go over to his house to avoid running into Heather. Around 3:00 p.m., Heather left work and drove her truck to Owens's house, where the children were napping and Owens was doing laundry. Owens says he was startled when a person appeared behind him and said "F-you." He swung at the person with all his strength. Only after he struck the person in the head, Owens claims, did he realize it was Heather.

Owens says he checked for Heather's pulse and thought she was dead. He bound her arms and legs with duct tape, hogtying her limbs together behind her back—all, according to Owens, to make it easier to move her dead body. He also wrapped tape around the bottom half of her head, covering her nose and

mouth—because, according to Owens, her face was turning gray and he did not want to look at her. Then he dragged Heather to a shed behind his house and left her inside.

Around 4:00 p.m., Owens drove Heather's truck to a nearby parking lot, abandoned it with her keys inside, and ran back to his house. (His movements were filmed by a video camera across the street from the parking lot.) Owens then made a series of phone calls. First, Owens called Kara to ask her to come over. Then he called a friend to say that Owens and Kara planned to attend the friend's party that evening. Finally, he called Heather's cell phone and left a voicemail, asking her whether she planned to pick up the kids and saying "I love you" and "[t]ake care."

Soon thereafter, Kara arrived at Owens's house. According to Kara, Owens was "pacing back and forth," "sweating," and "seemed to be nervous and upset." He told her that some of his friends had stolen Heather's truck as a joke, and he convinced Kara to help him to move the truck to another town. Then he and Kara went to the party. After they returned home, Owens asked Kara to watch the children while he went fishing. Instead, however, Owens drove Heather's body to a nearby lake and buried her in a shallow grave on an island, where the police found Heather's body more than two weeks later.

A Tennessee jury thereafter convicted Owens of second-degree murder. At the time of his sentencing, Tennessee law prescribed sentencing ranges based on the category of the offense and the defendant's prior convictions. *See* Tenn. Code Ann. § 40-35-112 (2004). Within these ranges, the law further prescribed

presumptive sentences from which the sentencing judge could depart only if the judge found certain aggravating or mitigating factors. *See id.* § 40-35-210(c) (2005).

Owens faced a minimum sentence of 15 years and a maximum of 25 years for his second-degree murder conviction. *See id.* §§ 39-13-210(c)(1), 40-35-112(a)(1) (2005). His presumptive sentence within that range was 20 years. *See id.* § 40-35-210(c) (2005). Over Owens's objection, the sentencing judge found that two enhancements applied, including one for "exceptional cruelty." *See id.* § 40-35-114(5) (2005). Those enhancements allowed the trial judge to increase Owens's sentence to 25 years. The Tennessee Court of Criminal Appeals thereafter affirmed the application of the exceptional-cruelty enhancement, but reversed the application of the other enhancement. *See State v. Owens*, No. M2005-00362-CCA-R3-CD, 2005 WL 2653973, at *8 (Tenn. Crim. App. Oct. 18, 2005). The court thus reduced Owens's sentence to 24 years.

Owens thereafter sought federal habeas relief, arguing among other things that his sentence was increased, in violation of the Sixth Amendment, based on facts found by the judge rather than the jury. The district court granted the writ. This appeal followed.

II.

We review the district court's decision de novo. *See Mendoza v. Berghuis*, 544 F.3d 650, 652 (6th Cir. 2008). The Tennessee Court of Criminal Appeals adjudicated Owens's Sixth Amendment claim on the merits, which means Owens must show that the court reached a decision that was "contrary to, or involved

an unreasonable application of" clearly established Supreme Court precedent. *See* 28 U.S.C. § 2254(d)(1).

A.

In the district court, the State did not even dispute that the state court had unreasonably applied Supreme Court precedent when the court rejected Owens's Sixth Amendment claim. Owens therefore says the State has forfeited its argument here that the state court's decision was not "unreasonable" as that term is used in § 2254(d)(1). Yet the district court decided that issue on the merits, which means the State can challenge that holding now. *See United States v. Clariot*, 655 F.3d 550, 556 (6th Cir. 2011).

So we turn to question whether the Tennessee Court of Criminal Appeals unreasonably applied Supreme Court precedent when it rejected Owens's Sixth Amendment claim. Two precedents are especially important here. The first is *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), where the Court held that, "[o]ther 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 a jury, and proved beyond a reasonable doubt." The second is *Blakely v. Washington*, 542 U.S. 296, 303 (2004), where the Court made clear that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (Emphasis in original.) Yet the Tennessee court regarded the statutory maximum for purposes of Owens's sentencing as the generic 25-year maximum for second-degree murder, rather than the 20-year maximum that the judge

could impose based solely on the facts reflected in the verdict or admitted in Owens's case. *See Owens*, 2005 WL 2653973, at *6 (citing *State v. Gomez*, 163 S.W.3d 632, 661 (Tenn. 2005)). That decision was inconsistent with *Blakely*'s plain terms. *Accord Portalatin v. Graham*, 624 F.3d 69, 83-84 (2nd Cir. 2010); *Butler v. Curry*, 528 F.3d 624, 636 (9th Cir. 2008).

Yet the state argues that the issue was not so clear-cut in Owens's case, because the judge's finding of "exceptional cruelty" merely permitted, rather than mandated, a sentence above 20 years. But in *Blakely* the sentencing judge had the same discretion not to impose a higher sentencing based on the judge's own factfinding. And in *Blakely* the Supreme Court specifically instructed that, "[w]hether the judicially determined facts *require* a sentence enhancement or merely *allow* it," a sentence violates the Sixth Amendment when "the verdict alone does not authorize the sentence." *Blakely*, 542 U.S. at 305 n.8 (emphasis in original). The Supreme Court could hardly have been clearer; and here the verdict alone did not authorize Owens's sentence. The Tennessee court's application (or refusal to apply) *Blakely* was therefore unreasonable.

B.

But Owens is entitled to habeas relief only if the state court's error was not harmless. *See Washington v. Recuenco*, 548 U.S. 212, 221-22 (2006). On habeas review, an error is harmful only if it had a "substantial and injurious effect" upon Owens's sentence, or if we have "grave doubt" as to whether the error had such an effect. *See O'Neal v. McAninch*, 513 U.S. 432, 435 (1995).

Owens states that, as to harmlessness, "[t]he only question is whether the jury would have found that Owens acted with exceptional cruelty if that question had been submitted to it." Br. at 36. We agree with that statement of the relevant question here. In *Washington v. Recuenco*, the Court observed that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." 548 U.S. at 220 (quoting *Apprendi*, 530 U.S. at 478). Thus, the Court held, "elements and sentencing factors must be treated the same for Sixth Amendment purposes." *Id.* In *Recuenco*, that equality of treatment meant that "[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error." *Id.* at 222. Here, that equality means that, for either "failure," we ask the same question to determine harmlessness: namely, "whether the jury would have returned the same verdict absent the error[.]" *Id.* at 221; *accord Butler*, 528 F.3d at 648.

That question is the dispositive one, we hold, even though in two other cases we asked whether the sentencing judge would have imposed the same sentence absent the *Blakely* error. But in the first of those cases, we simply rejected on its terms the Warden's argument that the sentencing judge would have "undoubtedly impose[d] the same sentence on remand." *Villagarcia v. Warden*, 599 F.3d 529, 537 (6th Cir. 2010). We notably did not address the antecedent question whether the Warden had asked the right question in the first place. And in the second case our discussion of what the sentencing judge

might have done on remand was plainly dictum—because the "State did not argue harmless error before the district court and did not argue it in [its] briefing [on] appeal[,]" and thus had "waived" the issue. *Lovins v. Parker*, 712 F.3d 283, 303-04 (6th Cir. 2013). Moreover, the question whether the court would have imposed the same sentence on remand is itself incoherent in cases where—as here—the court's factfinding *liberated* the court to impose the sentence that the court in fact imposed, rather than mandated that sentence. What is missing in all these cases—as to elements and sentencing factors alike—is a jury finding, not a judicial one. Hence the question as to harmlessness is whether the jury would have made the necessary finding had the jury been asked to make it.

Under Tennessee law at the time of Owens's trial, the sentencing factor at issue—namely, an enhancement for "exceptional cruelty"—required a finding that the defendant inflicted "pain or suffering for its own sake or from the gratification derived therefrom," and not simply "pain and suffering inflicted as the means of accomplishing the crime charged." Tenn. Code Ann. § 40-35-114(5); *State v. Arnett*, 49 S.W.3d 250, 258 (Tenn. 2001). On this record, whether Owens's jury would have made that finding depends on whether they thought Heather was still alive when Owens duct-taped her mouth and nose—leaving her eyes uncovered—and then dragged her to the shed and left her there. Owens's testimony, as described above, was that Heather suddenly materialized behind him, that he punched her without realizing whom he was punching, and that she died more or less immediately after the punch. Owens

further testified that he hogtied Heather not to restrain her, but (inexplicably, one might say) to move her body more easily; and that he duct-taped her airways not to suffocate her, but to cover her face, which distressed him because it was turning gray—a sensitivity notably absent the remainder of that day, as he moved Heather's truck, left her a voicemail (as she lay dead or dying in the shed), partied with Kara, and buried Heather in a shallow grave, among other activities. The State's theory, in contrast, was more simple: that Heather had suffocated from the duct tape that Owens placed over her nose and mouth.

The judgment we need to make here is whether there is any substantial likelihood that the jury believed Owens's testimony—in which case his actions after the punch presumably were not cruel because Heather was no longer alive to suffer from them. For the moment we set to one side what seems to us the patently fantastic nature of Owens's testimony. What plagues Owens's theory from the start, rather, is that the jury did in fact convict him of second-degree murder. And that means the jury found that Owens killed Heather knowingly. *See* Tenn. Code Ann. § 39-13-210(a)(1); *State v. Ducker*, 27 S.W.3d 889, 896 (Tenn. 2000). Thus, for the jury to have believed Owens's testimony *and* to have convicted him nonetheless of second-degree murder, the jury must have thought that, when Owens punched Heather (without knowing who she was, no less), he was reasonably certain that the punch would kill her. Nothing in the record or in common sense supports that hypothesis. Moreover, the State's medical examiner testified that Heather's body bore no signs of blunt force trauma, and that her cause of death was

asphyxiation. Add in the other fantastic aspects of Owens's testimony, and one doubts that any sentient juror would have believed any of it. Suffice it to say that we are confident that the jury rejected Owens's account of the murder and accepted the State's.

But that leaves the question whether the jury, if asked, would have found that Owens acted with exceptional cruelty. The duct-taping cannot support that finding, because it was "the means of accomplishing the crime charged." *Arnett*, 49 S.W.3d at 258. But other circumstances strongly support a finding of exceptional cruelty. Owens did not simply suffocate Heather; he left her alone in a shed, struggling to breathe with her limbs bound behind her back and her children nearby in the house. Those actions amount to "psychological abuse or torture," which supports a finding of exceptional cruelty. *See id.* Moreover, Owens's actions after duct-taping Heather and leaving her to die—*e.g.*, partying with his girlfriend and later burying Heather's body in a shallow grave—reflect his "calculated indifference toward [her] suffering," which likewise supports the necessary finding. *See State v. Reid*, 91 S.W.3d 247, 311 (Tenn. 2002).

We have little doubt that, if asked, the jury would have made the requisite finding. The *Blakely* error was therefore harmless.

The district court's judgment is reversed, and the case is remanded with instructions to deny the petition.

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

No. 4:14-cv-18-HSM-SKL

LONNIE LEE OWENS,
Petitioner,
v.
HENRY STEWARD,
Respondent.

Dated: Mar. 29, 2017

MEMORANDUM & ORDER

Acting pro se, Lonnie Lee Owens, ("Petitioner"), brings this petition for a writ of habeas corpus under 28 U.S.C. § 2254, challenging his 2005 judgment of conviction in Franklin County, Tennessee Circuit Court. [Doc. 1 at 1]. A jury convicted Petitioner of second-degree murder, theft of over $10,000.00, and abuse of corpse, and he is serving a sentence of 24 years. [*Id.* at 1-2]. Warden Henry Steward has filed an answer in opposition to the petition [Doc. 9], Petitioner has replied to the answer [Doc. 16], and this case is now ripe for disposition.

I. PROCEDURAL HISTORY

On December 3, 2004, Petitioner was convicted by a jury in the Circuit Court of Franklin County, Tennessee on charges of second-degree murder, abuse

of a corpse, and theft over $10,000.00. [Doc. 10-1 at 100-02]. On February 1, 2005, pursuant to the Tennessee Criminal Sentencing Reform Act of 1989, the trial court sentenced Petitioner to twenty-five years for the murder conviction, one year for abuse of corpse, and four years for the theft; these sentences were ordered to be served consecutively, for a total term of thirty years' imprisonment. [Docs. 10-2, 10-3].

Through counsel, Petitioner filed a direct appeal, challenging only his sentences. [*See* Doc. 4]. On October 18, 2005, the Tennessee Court of Criminal Appeals ("TCCA") granted Petitioner's appeal in part, reducing his sentence for the second-degree murder conviction to twenty-four years and reversing the trial court's order that the sentences be run consecutively, rather than concurrently. [Doc. 10-7]. On March 27, 2006, the Tennessee Supreme Court denied Petitioner's request for permission to appeal the decision of the TCCA. [Docs. 10-8, 10-9].

On November 3, 2006, Petitioner initiated his pro se petition for post-conviction relief, pursuant to Tenn. Code Ann. § 40-30-101, *et seq*., in the Circuit Court for Franklin County, Tennessee, and subsequently filed three amended petitions. [Doc. 10-10 at 14-51, 101-02, 130-51; Doc. 10-11 at 106-11]. An evidentiary hearing was held on August 1, 2011, and the court denied the petition on October 6, 2011. [Doc. 10-11 at 139-68; *see* Docs. 10-12 through 10-14]. On April 4, 2013, the TCCA affirmed the denial of the petition, and, on October 16, 2013, the Tennessee Supreme Court denied Petitioner's request for permission to appeal. [Docs. 10-11 at 170; Docs. 10- 28 through 10-30].

On March 4, 2014, Petitioner filed his instant petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in this Court. [Doc. 1]. The parties agree that the petition was timely filed and that Petitioner has properly exhausted all of the claims raised therein. [Doc. 9 at 2-3; Doc. 16 at 3].

II. DISCUSSION

Pursuant to Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), state prisoners may seek federal habeas corpus relief on the ground that they are being held in custody in violation of the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254; *Reed v. Farley*, 512 U.S. 339, 347 (1994). However, Congress has mandated that federal courts review state court adjudications on the merits of such claims using a "highly deferential" standard of review. *See, e.g.*, *Harrington v. Richter*, 562 U.S. 86, 105 (2011). Under this deferential standard, this Court may not grant habeas relief to a state prisoner unless the state court's decision on the merits of his claims "(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." 28 U.S.C. § 2254(d).

"Clearly established federal law," for the purposes of § 2254(d)(1), refers to rulings of the United States Supreme Court in place at the time of "the last state-court adjudication on the merits." *Greene v. Fisher*, 132 S. Ct. 38, 44 (2011); *Lockyer v. Andrade*, 538 U.S.

63, 71-72 (2003) (defining clearly established federal law as "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision"). A decision is "contrary to" clearly established federal law 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] on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). A state-court decision unreasonably applies clearly established federal law if "the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.*

The standards set forth in the AEDPA are "intentionally difficult to meet." *Woods*, 135 S. Ct. at 1376 (quoting *White*, 134 S. Ct. at 1702); *see also Harrington*, 131 S. Ct. at 786 ("If [§ 2254(d)] is difficult to meet, that is because it was meant to be."). Ultimately, however, the AEDPA's highly deferential standard requires this Court to give the rulings of the state courts "the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)).

In his instant petition, Petitioner has raised six grounds for relief pursuant to § 2254 which were adjudicated on the merits in state court. In Ground 1, he argues that the trial court improperly enhanced his sentence based on facts not determined by a jury, in violation of *Blakely v. Washington*, 542 U.S. 296 (2004), and that the resultant sentence thus violates

the Sixth Amendment to the U.S. Constitution. In Grounds 2 through 6, he asserts the following claims of ineffective assistance of counsel: (Ground 2) that counsel was ineffective in failing to challenge the sufficiency of the evidence supporting his convictions on direct appeal;[1] (Grounds 3 & 6) that counsel rendered ineffective assistance "when he pled the Petitioner guilty to the offense of [voluntary m]anslaughter, in the presence of the jury and without the consent of the Petitioner," precluding a jury charge for any lesser-included offense to voluntary manslaughter; (Ground 4) that counsel was ineffective in failing to object to "erroneous and prejudicial" statements in the pre-sentence report and in failing to include the trial transcript on appeal; and (Ground 5) that counsel was ineffective in failing to adequately

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[1] Although Petitioner states that he "had other non-frivilous [sic] claims he would have raised on appeal if given the opportunity," sufficiency of the evidence is the only such claim that he specifically identifies in his instant petition. [Doc. 16 at 18-23]. He cites *Rodriguez v. United States*, 395 U.S. 327, 330 (1969), as support for the proposition that "[i]t is not necessary or required that the Petitioner detail exactly what issues he would have raised on appeal." [*Id.*]. Petitioner's contention, however, is erroneous. Unlike the petitioner in *Rodriguez*, Petitioner was not deprived of an appeal entirely, nor was he actually or constructively denied the assistance of counsel altogether on appeal. *See, e.g.*, *Roe v. Flores-Ortega*, 528 U.S. 470, 482-83 (2000); *Smith v. Robbins*, 528 U.S. 259, 286 (2000). Thus, prejudice cannot be presumed, as it may be in the above-described circumstances, and Petitioner instead bears the burden of demonstrating that counsel's errors had an adverse effect on his defense. *See Roe*, 528 U.S. at 483-83. The Court cannot find that Petitioner suffered any prejudice as a result of counsel's failure to raise any issue on appeal that Petitioner has not identified.

cross-examine, impeach, or elicit favorable testimony from the medical examiner, Dr. Charles Harlan. [Doc. 1 at 6-13; Doc. 2 at 5-31].

The Court will first address Petitioner's claim that his sentence is unconstitutional, and then will consider his ineffective assistance of counsel claims in chronological order.[2]

A. Sentencing Claim

In his first claim, Petitioner contends that the trial court improperly enhanced his sentence by applying an enhancement factor for "extreme cruelty to the victim," pursuant to Tenn. Code Ann. § 40-35-114, based on judicial fact-finding. [Doc. 1 at 6-8; Doc. 2 at 5-9]. Petitioner then maintains that his sentence violated *Blakely v. Washington*, 542 U.S. 296 (2004), and that the Supreme Court confirmed that a sentence enhanced based on judicial fact-finding is unlawful in the subsequent case of *Cunningham v. California*, 549 U.S. 270 (2007). [Doc. 2 at 5-9]. Thus, he opposes his sentence as unconstitutional under clearly established federal law. [*Id.*].

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[2] Due to the voluminous nature of the record in this case, and the specific but varied nature of Petitioner's claims, the Court will not endeavor to provide a full factual background of the underlying proceedings. The Court will instead include the relevant facts in the discussion of each of Petitioner's claims. The Court notes for the record that Respondent has provided a statement of the evidence, setting forth the facts as found by the TCCA in Petitioner's direct appeal and appeal of the denial of his post-conviction petition. [Doc. 9 at 3-15]. In his reply brief, Petitioner agrees that the statement of evidence contained in Respondent's brief "is accurate and properly reflects … the case facts as summarized by the TCCA." [Doc. 16 at 3].

In response, Respondent argues only that *Blakely* errors are subject to harmless error analysis and that the harmless error standard is satisfied in this case. [Doc. 9 at 16-18]. Specifically, Respondent argues that "there is no question that the jury would have found that the petitioner treated the victim with exceptional cruelty during the commission of the offense" based on the facts presented at trial: that he struck the victim, bound her hands and feet, covered her mouth and nose with duct tape, all while the victim's children were in the house; that she "tried desperately to continue breathing but eventually suffocated to death"; and that he took her body to an island and buried it in a shallow grave. [*Id.* at 18].

In Reply, Petitioner asserts that there is no question that the application of the enhancement factor in question violated *Blakely*, as the sentencing scheme under which he was enhanced "was subsequently rendered unconstitutional" by *Cunningham*. [Doc. 16 at 9, 16]. He notes that Respondent did not argue that no *Blakely* error occurred and maintains that he has therefore conceded that such a violation occurred. [*Id.* at 4, 6, 16]. He maintains that the harmless error analysis used by the Respondent does not apply in this case and that the Court must instead conduct an evidentiary hearing to assess whether the *Blakely* violation had a substantial and injurious effect. [*Id.* at 4-18].

1. *Blakely* Violation

The United States Supreme Court precedent relevant to the consideration of a claimed *Blakely* error begins in 2000 with *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In *Apprendi*, the Supreme Court held

that "[o]ther 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 a jury, and proved beyond a reasonable doubt"; otherwise, the sentence in question may run afoul of the Sixth Amendment right to trial by jury. *Id.* at 490-500.

Then, in 2004, the Supreme Court issued its decision in *Blakely v. Washington*, 542 U.S. 296 (2004), which "clarified that the definition of 'statutory maximum' for *Apprendi* purposes is not the high-end that a sentence may not exceed, but rather the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Lovins v. Parker*, 712 F.3d 283, 289 (6th Cir. 2013) (quoting *Blakely*, 542 U.S. at 303). In other words,

> [T]he relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, … and the judge exceeds his proper authority.

Blakely, 542 U.S. at 303-04 (internal citation and quotation marks omitted).

On January 12, 2005, the Supreme Court decided *United States v. Booker*, 543 U.S. 220, 243-44 (2005), which applied *Apprendi* and *Blakely* to the United States Sentencing Guidelines, declaring as

unconstitutional the provision that made the Guidelines mandatory, and reaffirmed that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."

It was against this legal landscape that Petitioner was sentenced, on February 1, 2005, for his state convictions for second-degree murder, abuse of corpse, and theft. Petitioner was classified as a Range I offender under Tennessee law, which subjected him to a minimum sentence of fifteen years and a maximum sentence of twenty-five years for the offense of second-degree murder; however, the presumptive sentence without the application of any enhancing or mitigating factors was twenty years. [Doc. 10-24 at 80; *see also* Doc. 10-7 at 6]. The court found one mitigating factor—that Petitioner did not have a prior criminal history. [Doc. 10-24 at 80]. However, the court also found two enhancement factors: that Petitioner treated the victim with "exceptional cruelty" during the commission of the offense, and that the personal injuries inflicted upon the victim were particularly great, noting

> I think we have an individual that based on the proof that was presented in the trial—at the trial was duct taped while alive, and was allowed to suffocate and die, and I think that, in fact, fits the statutory definition of both

> inflicting personal—personal injuries and exceptional cruelty[.]"

[*Id.* at 80-81]. The court concluded that there was "no comparison" of the enhancement and mitigating factors and sentenced Petitioner to a term of twenty-five years' imprisonment. [*Id.* at 81].

On April 15, 2005, shortly after Petitioner's sentencing, the Tennessee Supreme Court considered the applicability of *Blakely* to Tennessee's Criminal Sentencing Reform Act of 1989, Tenn. Code Ann. § 40-35-210, *et seq*. (2003). *State v. Gomez*, 163 S.W.3d 632 (Tenn. 2005) ("*Gomez I*"). The Tennessee Supreme Court noted that *Blakely* "[a]dmittedly … includes language which c[ould] be broadly construed to require" a finding that defendants' sentences were unconstitutional based on application of enhancement factors and imposition of maximum sentences predicated solely on judicial fact-finding. *Id.* at 649, 658. However, in light of *Booker*, it ultimately rejected a broad reading of *Blakely*, concluding that the relevant inquiry remained whether the Reform Act *mandated* the imposition of a sentence in excess of the presumptive sentence when a judge found an enhancement factor. *Id*. at 661 ("*Booker* explains that the mandatory increase of a sentence is the crucial issue which courts must consider in determining whether a particular sentencing scheme violates the Sixth Amendment."). Noting that the finding of an enhancement factor under the Reform Act did not mandate an increased sentence, the Tennessee Supreme Court ultimately concluded that Tennessee's sentencing scheme was not unconstitutional. *Id.*

Petitioner's direct appeal was decided by the TCCA on October 18, 2005. The court reversed the sentencing court's decision to run the sentences consecutively and to apply the personal injuries enhancement factor; accordingly, it lowered Petitioner's sentence to a term of twenty-four years.[3] [Doc. 10-7 at 6, 8-9]. However, the Court found no error with respect to the exceptional cruelty enhancement:

> Although we do not have any medical testimony about the victim's death in the record before us,[4] the trial court did make a finding for the record during the sentencing hearing that "this was a death by strangulation where the lady was duct taped." The Defendant admitted that he assaulted the victim in his house while their children were close by. The presentence report admitted into evidence at the sentencing hearing without objection sets forth in part that the Defendant
>
> > used duct tape to tape the victim's legs together and her hands behind her back. He then taped her face from the chin to just under her eyes covering her mouth and nose…. Dr. Charles Harlan noted in the autopsy report that … [h]e … found traces of

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[3] *State v. Owens*, 2005 WL 2653973 (Tenn. Ct. App. Oct. 18, 2005).

[4] It is undisputed that trial counsel did not submit a copy of the transcript from Petitioner's trial on direct appeal.

> duct tape in the victim's lung. Dr. Harlan concluded that the victim's death was caused by suffocation as a result of having her mouth and nose covered with duct tape.

The Defendant does not contest these facts but contends that the method by which he killed the victim did not involve abuse or torture and that this enhancement factor is therefore inapplicable.

The use of exceptional cruelty in the killing of the victim is not an element of second-degree murder and may therefore, where appropriate, be considered as an enhancement factor. *See State v. Gray*, 960 S.W.2d 598, 611 (Tenn. Crim. App. 1997). The proper application of this factor in a murder case requires evidence that denotes the infliction of pain or suffering for its own sake or from the gratification derived therefrom, and not merely the pain or suffering inflicted as the means of accomplishing the murder. *See* [*State v. Arnett*, 49 S.W.3d 250, 258 (Tenn. 2001)]. Our supreme court has recognized that this enhancement factor may be applicable where there is proof of extensive psychological abuse or torture. *See id.* at 259. For example, the application of this enhancement factor to an especially aggravated robbery conviction has been upheld where the defendant executed two persons by gunshots after having forced them onto the floor of a walk-in cooler. *See State v.*

Reid, 91 S.W.3d 247, app. 311 (Tenn. 2002) (finding that the defendant committed the especially aggravated robbery with exceptional cruelty because "[t]he anguish experienced by the victims at this point [in the cooler] while they awaited their execution is unfathomable"). In upholding the application of this enhancement factor in the *Reid* case, this Court also noted the defendant's "calculated indifference toward suffering." *Id.*

We think the facts support the application of this enhancement factor to the means by which the Defendant killed his estranged wife. The record before us indicates that the Defendant bound the victim's hands and feet and then covered her mouth and nose with duct tape. The Defendant committed these actions while the victim was in his house and while her children were mere feet away. [The Defendant testified during the sentencing hearing that the children were 30 to 40 feet away when he killed the victim]. The autopsy of the victim revealed traces of duct tape in one of the victim's lungs: indicating how desperately she tried to continue breathing. After the victim was dead, the Defendant took her body to an island in Tims Ford Lake and buried it in a shallow grave. He then returned to his house and had sex with his girlfriend. These facts indicate that this Defendant treated the victim with a calculated indifference to her suffering and that he achieved some form of gratification from

murdering his wife. These facts also establish that the victim tried desperately to continue breathing but eventually suffocated to death. We have no trouble concluding that the victim's suffering while she struggled to live was "unfathomable" and was the direct result of the method used by the Defendant to accomplish the killing.

As noted by Judge Scott, "If strangulation, with the victim vigorously fighting for another breath, is not exceptional cruelty, I don't know what is." *State v. Bobby Lee Knight*, No. 87-234-III, 1989 WL 24436, at *4 (Tenn. Crim. App., at Nashville, Mar. 21, 1989) (Scott, J., dissenting). The Defendant's assertion that the trial court erred in applying this enhancement factor to his conviction for second-degree murder is without merit.

The Defendant also argues that the trial court erred in applying enhancement factors to his sentence on the basis of the United States Supreme Court's decision in [*Blakely*]. The *Blakely* decision holds that the Sixth Amendment to the federal Constitution permits a defendant's sentence to be increased only if the enhancement factors relied upon by the judge are based on facts reflected in the jury verdict or admitted by the defendant. *See id.*, 124 S. Ct. at 2537. The only basis upon which enhancement is otherwise permitted is the defendant's previous criminal history: where the

> defendant has prior convictions, the trial court may enhance the defendant's sentence without an admission or jury finding. *See* [*Apprendi*]; *Blakely* at 2536. Subsequent to the Defendant's appeal of this case, the Tennessee Supreme Court considered the impact of *Blakely* on Tennessee's sentencing scheme and concluded that the Criminal Sentencing Reform Act of 1989, pursuant to which the Defendant was sentenced, does not violate a defendant's Sixth Amendment rights. *See State v. Gomez*, 163 S.W.3d 632, 661 (Tenn. 2005). Accordingly, the Defendant's argument on this basis has no merit.

[Doc. 10-7 at 5-10]. On March 27, 2006, the Tennessee Supreme Court denied Petitioner's application for review of his direct appeal. [Doc. 10-9; *see* Doc. 10-8].

Then, on January 22, 2007, the Supreme Court issued its opinion in *Cunningham v. California*, 549 U.S. 270 (2007), invalidating California's determinate sentencing law—a law virtually identical to Tennessee's Reform Act—in light of *Blakely*. In analyzing the law under *Apprendi*, *Blakely*, and *Booker*, the California Supreme Court concluded that, in "operation and effect," California's sentencing system "simply authorize[s] a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." *Id.* at 289 (discussing *People v. Black*, 113 P.3d 534 (Cal. 2005)). Similarly to the Tennessee Supreme Court in *Gomez I*, the California Supreme Court held

that, because the sentencing judge retained "ample discretion" with respect to sentencing, California's determinate sentencing law did not "diminish the traditional power of the jury," and as such, did not implicate any Sixth Amendment concerns. *Id.* at 289-90 (quoting *Black*, 113 P.3d at 544).

The Supreme Court, however, disagreed, stating, "[o]ur decisions … leave no room for such an examination." *Id.* at 291. The Court noted

> We cautioned in *Blakely* that broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions. If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied.

Id. at 290-91. It further rejected any comparison of California's sentencing law to the advisory federal system in *Booker*, noting that any discretion afforded to California's judge to deviate from the presumptive mid-range sentence was born from judicial fact-finding of aggravating factors, rather than from any discretion inherent in the sentencing statute itself. *Id.* at 292-93. The Court concluded that its "decisions from *Apprendi* to *Booker* point to the middle term specified by California's statutes, not the upper term, as the relevant statutory maximum," and that, because the sentencing law in question "authorize[d] the judge, not the jury, to find the facts permitting an

upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent." *Id.* at 293.

On February 20, 2007, the Supreme Court vacated *Gomez I*, and remanded to the Tennessee Supreme Court for consideration in light of *Cunningham*. *Gomez v. Tennessee*, 549 U.S. 1190 (2007). On remand, the Tennessee Supreme Court held that the Reform Act "violated the Sixth Amendment as interpreted by the Supreme Court in *Apprendi*, *Blakely*, and *Cunningham*." *State v. Gomez*, 239 S.W.3d 733, 740 (Tenn. 2007) ("*Gomez II*").

There is thus no question that, if Petitioner were sentenced today, the enhanced sentence that he received for his second-degree murder conviction would violate *Blakely*. On review of a § 2254 petition, the Court is not, however, tasked with determining whether a movant's conviction or sentence is unconstitutional based on the current state of the law; rather, it must determine whether state court's decision of the claim resulted in a decision that was contrary to or involved an objectively unreasonable application of clearly established federal law at the time the state court rendered its decision.

Even under this exacting standard, and giving the state court the benefit of the doubt—as this Court is required to do under § 2254(d)'s deferential standard—the Court finds that the state court's conclusion that Petitioner's sentence did not violate *Blakely* was contrary to clearly established federal law. In denying Petitioner's *Blakely* claim, the state court relied upon *Gomez I*'s holding that the Reform Act was not unconstitutional under *Blakely*; *Gomez I*

concluded that, in light of *Booker*, the Reform Act could not offend the Sixth Amendment because it did not *require* the sentencing judge to increase a sentence upon finding an enhancement factor. This analysis, however, essentially ignored the primary holding of *Blakely*:

> [T]he relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, … and the judge exceeds his proper authority.

Blakely, 542 U.S. at 303-04 (internal citation and quotation marks omitted). Indeed, it also ignored the fact that, in *Booker*, the Supreme Court expressly "reaffirm[ed] [its] holding in *Apprendi*: Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Booker*, 543 U.S. at 244.

Thus, at the time that the state court reviewed Petitioner's *Blakely* claim, it was a matter of clearly established federal law that the Sixth Amendment right to trial by jury is violated when a judge imposes a sentence in excess of the relevant statutory maximum based on additional findings of fact that were not admitted by the defendant or proved to the jury beyond a reasonable doubt. Nonetheless, Tennessee's courts concluded that the Reform Act did

not conflict with the Sixth Amendment, despite the fact that sentencing judges were permitted to enhance the presumptive midrange—the relevant statutory maximum, as defined by *Apprendi* and *Blakely*—based on independent judicial findings of fact.

Such a result was contrary to the governing legal principles set forth in *Apprendi*, *Blakely*, and *Booker*. Indeed, the Supreme Court said as much in *Cunningham*, expressly stating that its *Apprendi* jurisprudence "leave[s] no room" for the interpretation adopted by the Tennessee Supreme Court in *Gomez I*. Had the state court applied the correct governing principles of *Apprendi*, *Blakely*, and *Booker*, it would have had no choice but to conclude that a *Blakely* error occurred when Petitioner's sentence was enhanced beyond the twenty-year presumptive sentence based on the sentencing judge's findings that Petitioner treated his victim with exceptional cruelty.

2. Harmless Error

Notably, Respondent does not contest these conclusions. He does not argue that the state court's interpretation of *Apprendi*, *Blakely*, and *Booker* was not contrary to clearly established federal law, and he does not argue that no *Blakely* violation occurred. Apparently conceding the state court's constitutional error, Respondent argues only that the sentencing judge's application of the exceptional cruelty enhancement in this case was "harmless error":

> In this case, it is clear that the jury would have found that the petitioner treated the victim with exceptional cruelty during the commission of the offense. The petitioner struck the victim, then bound her hands and

> feet and covered her mouth and nose with duct tape. The petitioner committed these actions while the victim was in his house and while her children were mere feet away. After the victim was dead, the petitioner took her body to an island in Tim's Ford Lake and buried it in a shallow grave. The facts established that the petitioner treated the victim with a calculated indifference to her suffering. The facts also established that the victim tried desperately to continue breathing but eventually suffocated to death. The Tennessee Court of Criminal Appeals []had no trouble concluding that the victim's suffering while she struggled to live was unfathomable and was the direct result of the method used by the Defendant to accomplish the killing. *Owens,* 2005 WL 2653973 at *6. There is no question that the jury would have found that the petitioner treated the victim with exceptional cruelty during the commission of the offense.

[Doc. 9 at 18].

Respondent is correct that *Blakely* errors are subject to a constitutional harmless error analysis. *See, e.g.*, *Lovins*, 712 F.3d at 303 ("In determining the proper remedy for a *Blakely* error, we ordinarily consider whether the error was harmless."); *Villagarcia v. Warden, Noble Corr. Inst.*, 599 F.3d 529, 536 (6th Cir. 2010) ("Failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error, and accordingly, such error is subject to harmless error analysis.") (internal

quotation marks omitted); *Washington v. Recuenco*, 548 U.S. 212 (2006); *c.f. Gilliam v. Mitchell*, 179 F.3d 990, 995 (6th Cir. 1999) (noting that the constitutional harmless error standard applies even "when the federal district court is the first court to review for harmless error."). In cases involving collateral review of state court decisions, an error is harmless "unless it had substantial and injurious effect or influence" on the outcome in question. *Villagarcia*, 599 F.3d at 536. Stated another way, an error is not considered harmless "when the matter is so evenly balanced that the habeas court has grave doubt as to the harmlessness of the error." *Lovins*, 712 F.3d at 303 (quoting *Villagarcia*, 599 F.3d at 537); *see also United States v. Hazelwood*, 398 F.3d 792, 801 (6th Cir. 2005) ("Under the harmless error test, a remand for an error at sentencing is required unless we are certain that any such error was harmless").

At the time of Petitioner's sentencing, Tennessee law required "a finding of acts 'separate and apart from the actions which constituted the offenses'" in order to sustain an enhancement for exceptional cruelty to the victim. *See State v. Scott*, 2011 WL 2420384, at *32 (Tenn. Ct. App. June 14, 2011) (quoting *State v. Poole*, 945 S.W.2d 93, 99 (Tenn. 1997)). "The facts of the case must denote the infliction of pain or suffering for its own sake or from the gratification derived therefrom, and not merely pain or suffering inflicted as the means of accomplishing the crime charged." *Id.* at *32 (*citing State v. Arnett*, 49 S.W.3d 250, 258 (Tenn. 2001)) (internal quotation marks and alteration omitted).

The following facts from Petitioner's trial are relevant to the Court's harmless error analysis. At trial, Defendant testified in his own defense. [Doc. 10-22 at 14-164]. He testified that, on the day of the victim's death, he had spoken with the victim—his estranged wife—and had asked when she would be coming by his house to pick up their children, but she did not tell him what time she planned to arrive. [*Id.* at 111-12, 116-17]. That afternoon, he was at home doing laundry while his children napped. As he walked to the kitchen, he heard someone yell "F-you." [*Id.* at 59-63, 120]. He then "swung as hard as [he] could," because he "just knew somebody was behind [him] and they were right on top of [him]." [*Id.* at 62-63, 121]. That swing hit the victim in the head, causing her to hit the floor hard. [*Id.* at 59-63, 124]. The victim made no movement, and Defendant believed that she was dead; after pacing for a few minutes, he checked her arm and confirmed that she had no pulse. [*Id.* at 63-65, 125-26, 130].

Defendant was expecting people to arrive at the house "any minute," so he tried to move the victim's body, but he could not secure it in his arms due to its flailing limbs. [*Id.* at 65-67, 130-31]. He bound her feet and arms with duct tape, and, noticing that her face was turning "gray colored," he covered her head with duct tape as well. [*Id.* at 65-67]. When asked why he proceeded to cover the victim's face with duct tape, Petitioner responded, "I don't know," and then stated that he "didn't want to look at her." [*Id.* at 67, 69]. Petitioner was "scared" and put the body in the shed behind his house. [*Id.* at 68-69]. He threw away her shoes, purse, and cellphone, and took the victim's truck to the parking lot of a local store; later that day,

he called the victim's cellphone and left a voice message, asking about her plan to pick up the children, and then he went with his girlfriend and children to a party. [*Id* at 69-74, 133-138]. When they returned home after 11:00 p.m. that evening, Petitioner asked his girlfriend to watch the children because he "wanted to go fishing[.]" [*Id.* at 74- 75, 142]. Because he felt that he "had to do something. Get [the victim] away from the house," he took the victim's body to an island in his boat and buried her. [*Id.* at 75-78, 142-44].

The medical examiner, Dr. Charles Harlan, testified regarding his autopsy of the victim's body. [Doc. 10-21 at 46-60]. He testified that the victim's wrists were duct taped behind her body and that duct tape also bound her ankles. [*Id.* at 52]. Duct tape was "wrapped in a circular fashion [all the way] around the head covering the area of the nose and mouth and upper portion of the chin[.]" [*Id.* at 53]. Based on his autopsy, Harlan concluded, with a reasonable degree of medical certainty, that the victim died as a result of asphyxia due to duct tape occluding her airway. [*Id.* at 55-56]. There was no testimony regarding tape particles in the victim's lungs; rather, Harlan testified that he reached his conclusion regarding death by asphyxiation due to the lack of evidence supporting any other cause of death. [*Id.* at 55-58]. Harlan stated that there was no evidence of blunt force trauma, such as hemorrhaging, fractures, bruising of the brain, or tearing of the skin. [*Id.* at 56-58].

On cross-examination, Harlan confirmed that asphyxia by duct tape was an "extremely unusual form of death." [*Id.* at 60]. He was also questioned

regarding whether the victim may have been conscious or unconscious when the duct tape was applied to her face:

> Counsel: Now, somebody that was tied up, death wouldn't be immediate, they'd struggle?
>
> Harlan: It depends on whether they're conscious or not.
>
> Counsel: You anticipate my point. You really don't have any opinion as to whether this person was rendered unconscious first, isn't that right?
>
> Harlan: I don't have an opinion about conscious or unconscious.
>
> Counsel: Right.
>
> Harlan: You can't tell the state of consciousness from a dead body.
>
> Counsel: The person could have been rendered unconscious before this happened?
>
> Harlan: Correct. You could receive a blow that would render you unconscious that would be enough to cause loss of consciousness, but not leave a mark and not be enough to be the direct cause of death.
>
> Counsel: Correct. And a person that was rendered unconscious might have the appearance of being dead?
>
> Harlan: They might.
>
> Counsel: And unless you were a trained medical professional that knew how to check

> for signs of life, you might think somebody was dead?
>
> Harlan: You might.

[*Id.* at 61-61]. Harlan was also questioned about petechial hemorrhaging—that is, ruptured capillaries—in the eyes, face, lungs, and neck, and responded that "[i]t can be seen in suffocation or asphyxia," and is "supportive" of a cause of death by asphyxiation but is not "required" or "necessary" for such a conclusion. He confirmed that he did not find such hemorrhaging in his autopsy of this victim. [*Id.* at 71-73].

The trial judge instructed the jury on first-degree murder, second-degree murder, and voluntary manslaughter. [Doc. 10-23 at 102-04]. First-degree murder required the jury to find that the defendant killed the victim, intentionally, and with premeditation; second-degree murder required the victim to "knowing[ly]" kill the victim; and voluntary manslaughter required the jury to find that the defendant intentionally or knowingly killed the victim as the result of "a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner." [*Id.* at 102-04, 107-08]. The jury unanimously found Petitioner guilty of second-degree murder. [*Id.* at 125].

Thus, the Respondent is correct that the evidence at trial showed that Petitioner struck the victim, then bound her hands and feet and covered her mouth and nose with duct tape, and committed these actions while the children of Petitioner and the victim were asleep in the same house. He is also correct that, after

the victim was dead, Petitioner took her body to an island and buried it in a shallow grave.

However, the facts at trial did not, as Respondent contends, clearly demonstrate that "the victim tried desperately to continue breathing," or that she "suffer[ed] while she struggled to live" and breathe. Petitioner himself testified that the victim was immobile and appeared to be dead by the time that he placed duct tape on her face. And, although he testified that suffocation was the cause of death, Harlan specifically testified that he had no medical opinion as to whether or not the victim struggled to breathe, or indeed, whether she was even conscious at the time that the Petitioner duct taped her mouth and nose. He confirmed that it was possible that the victim could suffocate from being duct taped after being knocked unconscious by a blow that left no mark, that she could have appeared dead to Petitioner, and subsequently suffocated as a result of the duct tape.

Given this limited and open-ended testimony regarding the timing and nature of the victim's cause of death, it is not, as Respondent now maintains, "clear" that the jury would unquestionably have found that Petitioner treated the victim with "exceptional cruelty." The jury convicted the Petitioner only of second-degree murder, which required them to find that he knowingly killed the victim; it specifically rejected a conviction for first-degree murder, thereby also rejecting any theory of premeditation. The evidence presented at trial, including Petitioner's own testimony and that of Dr. Harlan, allowed the jury to reach the conclusion that Petitioner knowingly killed the victim without accepting the State's theory that

Petitioner stood idle—or worse—while the victim suffered, struggling and gasping for breath, until succumbing to asphyxiation. Stated another way, the facts presented at trial are at least ambiguous as to whether Petitioner "inflict[ed] pain or suffering for its own sake or from the gratification derived therefrom," rather than merely "as the means of accomplishing the crime charged."

Based on this ambiguity, the Court has grave doubt that the jury would have found beyond a reasonable doubt that Petitioner acted with "exceptional cruelty" in committing this murder; such doubt results in the inevitable conclusion that the *Blakely* violation in this case was not harmless error.[5] *See State v. Higgins*, 2007 WL 2792938, at *13 (Tenn. Ct. App. Sept. 27, 2007) (finding that trial court's enhancement for exceptional cruelty to the victims violated the defendant's Sixth Amendment right because "the record shows that any evidence that would be necessary to justify application of th[is] enhancement factor[] was not found by the jury beyond a reasonable doubt"); *see also Lovins*, 712 F.3d

[5] The Court notes the irony inherent in Respondent's argument that the jury "would have" made factual findings supporting the exceptional cruelty enhancement. *Apprendi* and its progeny demonstrate that such speculation should not be necessary if the dictates of the Sixth Amendment have been faithfully followed, as any facts that increase the penalty for a crime beyond the statutory maximum must be submitted to the jury and proved by the prosecution beyond a reasonable doubt. If the parties and the courts are left to speculate and argue about what the jury "would have" found, it is a clear sign that *Apprendi* is implicated and that the sentence in question may infringe upon the defendant's Sixth Amendment rights.

at 303-04 (finding no harmless error for *Blakely* violation where jury's verdict could not possibly be considered to encompass facts supporting enhancements for "history of unwillingness to comply with conditions of release" and "showed no hesitation about committing a crime with a high risk of human life").

The Court is thus "constrained to conclude that the judicial factfinding in [Petitioner's] sentencing was unconstitutional and that the remedy [he] requests is due." *See Lovins*, 712 F.3d at 304. The petition for a writ of habeas corpus will be conditionally GRANTED with respect to Petitioner's *Blakely* claim; Petitioner's sentence will be VACATED, and Petitioner is to be released from incarceration, unless the State of Tennessee re-sentences him within ninety days.

B. Ineffective Assistance of Counsel Claims

Petitioner has also raised numerous grounds alleging ineffective assistance of counsel.[6] Ineffective assistance of counsel is a recognized constitutional violation that, when adequately shown, warrants relief under § 2254. The two-prong test set forth in

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[6] In his Answer, Respondent did not make specific arguments as to Petitioner's various grounds of ineffective assistance. Instead, Respondent quoted the TCCA's analysis of Petitioner's ineffective assistance of counsel claims—which were all denied—and concluded that all of Petitioner's claims should be denied because the state court's determination was "not contrary to or an unreasonable application of, clearly established federal law …. The [TCCA] correctly identified and applied the governing *Strickland* standard in this case, and its determination was supported by the record." [Doc. 9 at 18-24].

Strickland v. Washington, 466 U.S. 668, (1984), governs claims of ineffective assistance of counsel raised pursuant to 28 U.S.C. § 2254. *See Foust v. Houk*, 655 F.3d 524 (6th Cir. 2011). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense so as to render the proceedings unfair and the result unreliable. *Strickland,* 466 U.S. at 687.

In assessing counsel's performance, a court must presume that counsel's questioned actions might have been sound strategic decisions and must evaluate the alleged errors or omissions from counsel's perspective at the time the conduct occurred and under the circumstances of the particular case. *Id.* at 689; *see also Vasquez v. Jones*, 496 F.3d 564, 578 (6th Cir. 2007) ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.]") (quoting *Strickland*, 466 U.S. at 690). Only when the challenged actions are "outside the range of professionally competent assistance" will counsel's performance be considered constitutionally deficient. *Strickland*, 466 U.S. at 690.

To demonstrate prejudice, a petitioner must show "a reasonable probability that, but for [counsel's acts or omissions], the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691; *see also Smith v. Robbins*, 528 U.S. 259, 285-86 (2000). On balance, "[t]he benchmark for

judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the [proceedings] cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686.

When a petitioner raises an ineffective assistance of counsel claim in his § 2254 petition, the Court must review the state court's ruling on that claim under the highly deferential standard of the AEDPA. Thus, in order to succeed on a federal claim of ineffective assistance of counsel, a habeas petitioner must demonstrate that the state court's ruling on his ineffective assistance of counsel claim was an unreasonable application of *Strickland*. *Bell v. Cone*, 535 U.S. 685, 693-94 (2002). "Surmounting *Strickland*'s high bar is never an easy task," and "[e]stablishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (citing *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)).

The Court will address Petitioner's ineffective assistance of counsel claims in chronological order, considering first his claims against trial counsel, then his sentencing claim, and finally, his claim asserting ineffectiveness in his appellate proceedings.

1. Admitting Guilt to Manslaughter at Trial

It is undisputed that, at Petitioner's trial, counsel attempted to enter a plea to voluntary manslaughter on Petitioner's behalf immediately after the indictment was read. The trial court rejected the plea, instead submitting the case to the jury. During

counsel's opening statement, counsel advised the jury that Petitioner accepted responsibility for voluntary manslaughter but maintained that he was not guilty of first-degree or second-degree murder.

In Grounds 3 and 6, Petitioner argues that trial counsel rendered ineffective assistance "when he pled the Petitioner guilty to the offense of Manslaughter, in the presence of the jury" and without the consent of the Petitioner," thereby precluding a jury charge for any lesser-included offense to voluntary manslaughter. [Doc. 1 at 9-11, 13; Doc. 2 at 16-22, 27-29; Doc. 16 at 23-30]. He argues that the state court's determination that Petitioner consented to this strategy was erroneous, as it was based solely upon trial counsel's testimony that this strategy was discussed with Petitioner and that he consented. [Doc. 2 at 16-22, 27-29]. Petitioner, however, maintains that: (1) he was not told about the strategy; (2) he did not consent to the strategy; and (3) he believed that counsel intended to pursue only a theory of self-defense. [*Id.*]. Petitioner contends that written consent and/or an "on-the-record" inquiry was required in order for counsel to agree to a guilty plea in front of the jury and that no such consent is found in this case. [*Id.*].

Petitioner argues that he was prejudiced by this action because it destroyed his self-defense theory, as well as his "credibility [in testifying] that the homicide was not knowing and intentional." [*Id.*]. He also argues that he was prejudiced by this action, as it deprived the trial judge of an opportunity to charge the jury on any lesser-included offense below manslaughter and that counsel was further deficient

in failing to request a jury instruction for lesser-included offenses below manslaughter and/or in failing to object to the trial court's statement that it would not consider instructions on charges less than manslaughter. [*Id.* at 27; Doc. 16 at 38-39].

Petitioner raised this ground of ineffective assistance of counsel in his post-conviction proceedings in state court. [*See* Doc. 10-10 at 20, 32-36, 133-41]. The trial court conducted a hearing on the petition, where Petitioner testified, as did his trial attorneys.[7] [Doc. 10-13].

Petitioner testified that strategy was generally not discussed at his meetings with trial counsel, which lasted only ten to fifteen minutes, and occurred only every two to three months. He testified that he was not aware that counsel was planning to ask the jury to convict him of voluntary manslaughter, that he objected to such a strategy, and that he believed that counsel would pursue a theory of self-defense at trial. He confirmed that counsel told him that he would be "convicted of something," but he believed that statement referred to a self-defense theory.

By contrast, trial counsel testified that there were many meetings with Petitioner regarding trial strategy, including the strategy of admitting

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[7] As previously noted, Petitioner concedes that Respondent's statement of the evidence, as taken from the factual summary in the opinion of the TCCA on Petitioner's post-conviction petition, is "accurate" and properly reflects the facts and testimony relevant to his claims. [Doc. 16 at 3; *see* Doc. 9 at 3-15]. Accordingly, the Court will summarize the relevant facts with respect to Petitioner's ineffective assistance of counsel claims as set forth by the TCCA and as agreed upon by both parties.

Petitioner's guilt to manslaughter during the opening statement. Trial counsel maintained that Petitioner agreed to this strategy, which was discussed with him "about twenty-five times" in the year before his trial. Trial counsel believed that such a strategy was consistent with Petitioner's actions following the victim's death—namely, concealing her death, and his knowledge of it, and burying her body in a remote location—and that the strategy was agreed upon, in part, due to its success when previously utilized by counsel's law firm. Due to the prosecution's numerous witnesses and "great" circumstantial evidence, Petitioner's attorneys believed that this strategy was Petitioner's "best shot" at avoiding a first-degree murder conviction.

After the hearing, the trial court found that the testimony of Petitioner's attorneys was "much more credible than the [P]etitioner's testimony[.]" [Doc. 10-11 at 156]. The trial court categorized the trial strategy as "perhaps brilliant," noting that it "likely played a role in [Petitioner] avoiding a first-degree murder conviction." [*Id.*]. The trial court thus found no deficiency or prejudice, concluding that the strategy was a reasonable, tactical defense decision and that Petitioner could not show any adverse effect from the use of the strategy nor any more favorable outcome if the strategy had not been used. [*Id.*]. Thus, it found no ineffective assistance of counsel and rejected Petitioner's claim. [*Id.*]. The trial court also rejected Petitioner's claim that trial counsel was ineffective for failing to request jury instructions on lesser-included offenses to voluntary manslaughter, reasoning that such a request would have been "suspect" in light of

the reasonable trial strategy of admitting Petitioner's guilt to voluntary manslaughter. [*Id.* at 159-60].

On appeal, the TCCA affirmed the trial court's determination that counsel was not deficient for admitting Petitioner's guilt to voluntary manslaughter to the jury:

> Although the Petitioner did not sign a written waiver allowing trial counsel to argue before the jury that he was guilty of voluntary manslaughter, counsel's credited testimony was that the Petitioner consented to the trial strategy. Co-counsel stated that this strategy was discussed with the Petitioner "about twenty-five times" in the year before the trial. He said the Petitioner never stated that he did not want counsel to use this strategy. Trial counsel said his attempting to plead guilty to voluntary manslaughter and asking the jury for a manslaughter conviction during opening statements was part of their strategy. Counsel discussed the strategy with other attorneys in their firm long before the trial. Trial counsel stated that the strategy was discussed with the Petitioner and that the Petitioner agreed the strategy might be successful. Counsel advised the Petitioner of his constitutional right requiring the State to prove beyond a reasonable doubt each element of manslaughter. Counsel believed that this strategy was the Petitioner's "best shot" of avoiding a first-degree murder conviction and that manslaughter was consistent with the Petitioner's burying the

> victim's body in a remote location. We cannot conclude that the evidence preponderates against the trial court's conclusion that the strategy was reasonable given the facts of the case.

[Doc. 10-28 at 22]. Thus, the TCCA denied Petitioner's claim of ineffective assistance on this ground.

The TCCA, did, however find that counsel was deficient in failing to "request[] jury instructions on reckless and criminally negligent homicide because they were supported by the trial testimony and did not conflict with the Petitioner's theory of the case[.]" [*Id.* at 23-24]. Nonetheless, the court rejected Petitioner's claim of ineffective assistance, finding no prejudice, given that the jury declined to convict Petitioner of the lesser offense of voluntary manslaughter, instead finding him guilty of second-degree murder. [*Id.* at 24].

a. Admitting Petitioner's Guilt to Voluntary Manslaughter

Petitioner's first challenge is to the state court's findings of fact, as he argues that the state court erred in crediting counsel's testimony over that of Petitioner himself. Petitioner, however, neglects to note that this Court is bound to accept the state court's findings of fact as true unless Petitioner presents "clear and convincing evidence" to the contrary. 28 U.S.C. § 2254(e)(1) (providing that "a determination of a factual issue by a State court shall be presumed to be correct" unless the petitioner rebuts that presumption with clear and convincing evidence); *see Seymour v. Walker*, 224 F.3d 542, 551-52 (6th Cir. 2000). Indeed, the United States Court of Appeals for the Sixth Circuit has expressly held that "in the context of a

Strickland evidentiary hearing, it is for the [state court] judge to evaluate the credibility of the criminal defendant and the former defense counsel in deciding what advice counsel had in fact given to the defendant during his trial, and such findings are entitled to the Section 2254(e)(1) presumption[.]" *Shimel v. Warren*, 838 F.3d 685, 697 (6th Cir. 2016) (citing *Ramonez v. Berghuis*, 490 F.3d 482, 490 (6th Cir. 2007)), *petition for cert. filed* (U.S. Feb. 22, 2017) (No. 16-1020).

Here, Petitioner points the Court to his testimony in state court, wherein he testified that he was unaware of counsel's strategy to admit Petitioner's guilt to voluntary manslaughter and that he did not agree with such a strategy. However, that testimony was directly contrary to the testimony of trial counsel, who testified that the strategy was repeatedly discussed with Petitioner and that Petitioner agreed to utilize this strategy, as it represented his best shot of avoiding a conviction for first-degree murder. The state court, after hearing all of the testimony and having had the opportunity to assess the credibility of the witnesses, credited the testimony of counsel over that of Petitioner. Petitioner has submitted no evidence—let alone clear and convincing evidence—that would allow the Court to disregard the presumption of correctness afforded to the district court's credibility determination and accompanying findings of fact that Petitioner consented to the strategy of admitting guilt to voluntary manslaughter. Thus, the Court cannot find, based on the record before it, that the state court made "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *See* 28 U.S.C. § 2254(d)(2). The Court will thus accept the state

court's finding that counsel's testimony was credible and will defer to the court's findings of fact in determining whether the state court's denial of this ineffective assistance of counsel claim was contrary to or an unreasonable application of the *Strickland* standard.

Petitioner's next argument is that counsel was deficient in failing to either obtain written consent or ensure that an on-the-record inquiry demonstrating consent was made prior to admitting Petitioner's guilt to voluntary manslaughter to the jury. As support for his argument, he primarily relies upon *Wiley v. Sowder*, 647 F.2d 642, 648-50 (6th Cir. 1981) ("*Wiley I*"), and correctly notes that, in that case, the Sixth Circuit found ineffective assistance based on counsel's admission of guilt to the jury without his client's consent. The Sixth Circuit further noted that "[i]n those rare cases where counsel advises his client that the latter's guilt should be admitted, the client's knowing consent to such trial strategy must appear outside the presence of the jury on the trial record…." *Id.*

This Court, however, finds *Wiley I* to be of limited, if any, utility in assessing the instant claim. First, the Sixth Circuit has narrowed the applicability of its holding in *Wiley I* in subsequent cases, clarifying that, while the on-the-record inquiry discussed therein represents "the preferred practice," such an inquiry is not required to satisfy due process. *See, e.g.*, *Ashley v. Koehler*, 840 F.2d 16, at *4 (6th Cir. 1988) (table); *Wiley v. Sowders*, 669 F.2d 386, 389 (6th Cir. 1982) ("*Wiley II*"). Additionally, *Wiley I* was decided before the Supreme Court decided *Strickland v. Washington*,

and thus ineffective assistance in that case was not found based on the two-prong deficient performance and resulting prejudice test that the state court was bound to use in deciding the instant dispute, an analysis to which this Court is similarly bound. And Petitioner has pointed to no case from the Supreme Court that has found deficient performance by counsel solely on the basis that counsel did not obtain an on-the-record consent or inquiry before utilizing a strategy of admitting Petitioner's guilt to a lesser-included offense.[8] The Court thus finds no basis upon which to find that counsel was deficient in failing to secure a written consent or on-the-record inquiry before admitting Petitioner's guilt to voluntary manslaughter.

Remaining is the Court's obligation to determine whether the state court's finding that counsel's performance was not deficient is contrary to, or an unreasonable application of, the *Strickland* standard. Crediting trial counsel's testimony, the state court noted that: (1) the decision to admit Petitioner's guilt to manslaughter was a strategic decision, made with the intention of avoiding a conviction for first-degree murder; (2) the strategy was consistent with Petitioner's version of events, to which he testified at trial, including his decision to bury the body in a

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[8] Indeed, even *Wiley I* did not involve a plea to a lesser-included offense during trial as a strategy to avoid conviction on a more severe charge. Instead, that case involved counsel's full and unequivocal admission of guilt as to all charges against his client, without any specific strategy for so doing, an action that the Sixth Circuit classified as "a surrender of the sword" and the functional equivalent of complete desertion of the client by the attorney. *Wiley I*, 647 F.2d at 649-51.

remote location; (3) the strategy was discussed amongst the firm's lawyers long before trial; and (4) the strategy was discussed with Petitioner numerous times, and Petitioner agreed that it might be beneficial. It ultimately concluded that, under the *Strickland* standard, the strategy was reasonable given the facts of the case and that counsel was therefore not deficient.

The Court finds that the state court correctly set forth the governing legal standards for assessing this claim of *Strickland* error and further finds no error with the state court's application of those legal standards. Indeed, numerous federal court decisions support the state court's conclusion that counsel's strategy of admitting Petitioner's guilt to a lesser-included offense was not unreasonable or constitutionally deficient. *See, e.g.*, *Goodwin v. Johnson*, 632 F.3d 301, 310 (6th Cir. 2011) (death penalty case, citing *Florida v. Nixon*, 543 U.S. 175 (2004), for the proposition that it is not deficient to concede guilt and focus on penalty phase); *Adams v. Brewer*, 2016 WL 1223350, at *10 (E.D. Mich. Mar. 29, 2016) (appeal pending) ("A defense counsel's concession that his client is guilty of a lesser-included offense is a legitimate trial strategy that does not amount to the abandonment of the defendant or a failure by counsel to subject the prosecutor's case to meaningful adversarial testing so as to amount to the denial of counsel. In this case, to the extent that trial counsel conceded that Petitioner was guilty of larceny from a person, it was part of a strategy to obtain an acquittal on the more serious carjacking charge.") (internal citations omitted); *Johnson v. Warren*, 344 F. Supp. 2d 1081, 1095-96 (E.D. Mich. 2004) ("A defense

counsel's concession that his client is guilty of a lesser-included offense is a legitimate trial strategy that does not amount to the abandonment of the defendant or a failure by counsel to subject the prosecutor's case to meaningful adversarial testing so as to amount to the denial of counsel."); *see also Haynes v. Cain*, 298 F.3d 375, 381-82 (5th Cir. 2002); *Lingar v. Bowersox*, 176 F.3d 453, 459 (8th Cir. 1999); *Underwood v. Clark*, 939 F.2d 473, 474 (7th Cir. 1991). Thus, under the circumstances, the Court cannot conclude that the state court's decision on this claim was contrary to or an unreasonable application of the *Strickland* standard. Accordingly, the Court must DISMISS this claim for relief.

b. Failure to Request Jury Instructions on Other Lesser-Included Offenses

Petitioner's final argument with respect to counsel's strategy of admitting his guilt to voluntary manslaughter at trial is that this action deprived trial counsel of the opportunity to request, and the trial court of the opportunity to provide, jury instructions on any lesser-included offenses to voluntary manslaughter, including criminally negligent homicide and reckless homicide. The state court agreed with Petitioner that counsel was deficient in failing to request jury instructions on additional lesser-included offenses, but nonetheless, denied his claim of ineffective assistance of counsel. Specifically, the state court found no prejudice from the error, given that the jury declined to convict Petitioner of the lesser offense of voluntary manslaughter, instead finding him guilty of second-degree murder.

The Court finds no error with the state court's conclusion that Petitioner failed to demonstrate prejudice as a result of counsel's failure to request jury instructions on additional lesser-included offenses. As the state court correctly noted, the jury convicted Petitioner of second-degree murder, specifically rejecting the opportunity to convict Petitioner of the lesser-included offense of voluntary manslaughter. Given that the jury found the evidence sufficient to justify a conviction for second-degree murder, the Court concludes that there is no reasonable probability that the jury would have convicted Petitioner of criminally negligent homicide or reckless homicide had counsel requested inclusion of instructions on those charges. *See State v. Williams*, 977 S.W.2d 101, 104-07 (Tenn. 1998) ("[B]y finding the defendant guilty of the highest offense [first-degree murder] to the exclusion of the immediately lesser offense, second-degree murder, the jury necessarily rejected all other lesser offenses, including voluntary manslaughter. Accordingly, the trial court's erroneous failure to charge voluntary manslaughter is harmless beyond a reasonable doubt because the jury's verdict of guilt on the greater offense of first-degree murder and its disinclination to consider the lesser-included offense of second-degree murder clearly demonstrates that it certainly would not have returned a verdict on voluntary manslaughter."). This Court, like the state court, is convinced that counsel's alleged error had no effect on Petitioner's judgment. Thus, Petitioner has not demonstrated that the state court's denial of this ground of ineffective assistance was contrary to or an unreasonable application of *Strickland*, and this claim will be DISMISSED.

2. Testimony of Dr. Charles Harlan

In Ground 5, Petitioner argues that trial counsel was ineffective in failing to adequately cross-examine, impeach, or elicit favorable testimony from the medical examiner, Dr. Charles Harlan.[9] [Doc. 1 at 13]. He argues that counsel's cross examination of Harlan was "less tha[n] sub-standard," that counsel failed to elicit favorable facts from Harlan regarding the duct tape that was used in the commission of the crime that could have called into question the cause of death, and that counsel failed to impeach Harlan's credibility with available information—specifically, Harlan's "past misconduct of intentionally lying about the cause of death" in other criminal cases. [*Id.*].

Dr. Harlan's trial testimony regarding the victim's cause of death, and trial counsel's cross-examination of the same, is set forth in detail in Section II(A)(2), *supra*. Additionally, it is undisputed that: (1) Dr. Harlan was being investigated for malpractice by the Tennessee Board of Medical Examiners at the time of Petitioner's trial; (2) his medical license was revoked approximately six months after Petitioner's trial; and (3) Harlan's autopsy of Petitioner's victim and testimony in Petitioner's trial were not called into question as a part of the Medical Board's investigation into Harlan and did not form any part of the basis for the revocation of his license. It is also undisputed that Petitioner's trial counsel did not raise the issue of the

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[9] Unlike his other grounds for relief, Petitioner did not expand upon this argument in his accompanying memorandum of law. [*See* Doc. 2].

then-pending investigation into Harlan during the course of the trial.

Petitioner raised this ground of ineffective assistance of counsel in his post-conviction proceedings in state court. [*See* Doc. 10-10 at 36-47]. The trial court credited the testimony of counsel, namely, that counsel made a strategic decision not to question Harlan at trial about his then-pending medical board proceedings, as (1) no ruling had yet been made, and (2) counsel believed that he could adequately challenge Harlan's testimony regarding his medical findings and elicit favorable testimony from Harlan on cross-examination. [Doc. 10-11 at 156-57, 165-66]. It noted that Petitioner failed to present any evidence suggesting that his case was involved in Harlan's disciplinary proceedings before the Medical Board or that Harlan had been "negligent, incompetent, or deceitful" in performing the autopsy of Petitioner's victim or in testifying in Petitioner's case. [*Id.*]. The trial court further found that trial counsel "adequately challenged the doctor's opinion testimony via cross-examination, and the verdict of the jury supports the proposition that the jury did question the doctor's opinion." [*Id.* at 165]. It thus rejected Petitioner's claim of ineffective assistance of counsel with respect to counsel's questioning of Harlan.

On appeal, the TCCA affirmed the trial court's determination that counsel's examination of Dr. Harlan was not constitutionally infirm:

> Dr. Charles Harlan testified at the trial that the victim's cause of death was suffocation because he found no diseases or injuries

consistent with blunt force trauma and because the victim's airway was blocked by duct tape. During co-counsel's cross-examination, Dr. Harlan testified that of the many thousands of autopsies he had performed, less than ten involved suffocation by duct tape. He said that although he concluded the cause of death was suffocation, he did not find any evidence supporting his conclusion other than the duct tape over the victim's mouth and nose. Dr. Harlan could not state with a reasonable degree of medical certainty that the victim was conscious before the duct tape was applied. He stated that a person could receive a "blow" that caused unconsciousness but did not "leave a mark." He agreed that someone who was unconscious might look dead.

Dr. Harlan testified that petechial hemorrhaging was caused when the smallest blood vessels in the body ruptured and that it could be seen in the eyes as a result of suffocation. He said, though, that petechia was not required to diagnose suffocation. He said petechia supported such a conclusion but was not necessary. Dr. Harlan did not see petechia in the victim's eyes, face, lungs, or neck.

The Petitioner argues that co-counsel should have questioned Dr. Harlan about the ten cases in which he performed autopsies involving duct tape and his conclusions that most of the victims were dead before the tape

was applied. The Petitioner also argues that co-counsel should have questioned Dr. Harlan about his failure to find evidence that the victim "thrash[ed] around" when Dr. Harlan told co-counsel before the trial that individuals who die as a result of suffocation "thrash around." We cannot conclude that co-counsel was deficient by failing to ask Dr. Harlan these questions. Co-counsel highlighted during cross examination that although Dr. Harlan concluded the victim suffocated, there was no evidence supporting his conclusion other than the duct tape. Dr. Harlan could not determine if the victim was conscious or unconscious when the duct tape was applied to the victim's hands, feet, and face. He agreed it was possible for a victim to receive a blow that caused unconsciousness but left no evidence of an internal or external wound. Dr. Harlan found no evidence of petechia but concluded suffocation did not always result in petechial hemorrhaging. Co-counsel presented evidence that it was possible the victim's cause of death was not suffocation as Dr. Harlan concluded and that she was rendered unconscious by a blunt force trauma, preventing the victim's struggling.

With regard to co-counsel's failure to impeach Dr. Harlan with the pending proceeding to revoke Dr. Harlan's medical license, we cannot conclude that co-counsel provided deficient performance. The Petitioner's trial was held in November 2004, and Dr. Harlan's

> medical license was permanently revoked in May 2005. Although co-counsel knew about the pending proceedings, he denied knowing the substance of the allegations and said he contacted Dr. Harlan's attorney before the trial to investigate the pending proceedings.
>
> In any event, co-counsel elicited favorable testimony about whether the victim suffocated and whether the victim was conscious at the time the duct tape was applied. Cocounsel [sic] made the tactical decision not to question Dr. Harlan about the pending medical board proceeding because Dr. Harlan gave counsel exactly what counsel wanted. Because co-counsel made an informed tactical decision, we cannot conclude that co-counsel provided deficient performance.

[Doc. 10-28 at 20-21].

The record does not support Petitioner's contention that counsel's cross-examination of Harlan was "sub-standard." As the state court noted, counsel thoroughly cross-examined Harlan regarding his autopsy of the victim and his medical opinion regarding the victim's death. The Court agrees with the state court that the record demonstrates that counsel elicited favorable testimony from Harlan, as he called into question whether the victim suffocated as a result of the application of the duct tape and whether the victim could have been unconscious with the appearance of death at the time Petitioner applied duct tape to her face. Counsel testified that he was aware that Harlan was facing investigation and

prosecution by the medical board at the time of Petitioner's trial. However, a strategic decision was made not to question Harlan regarding his then-pending allegations of medical malpractice for two reasons: (1) no final adjudication had been rendered on those charges at the time of Petitioner's trial; and (2) counsel believed that he would be able to elicit favorable testimony from Harlan, and he did not want to impeach the credibility of a witness who provided beneficial testimony.

The Court agrees that counsel made a strategic decision regarding the scope of his cross-examination of Harlan after completing a thorough investigation and review of the law and facts of the case, and that decision was both reasonable and beneficial to Petitioner. The Court thus concludes that the state court's finding that counsel's actions with respect to Harlan were not deficient was not contrary to or an unreasonable application of *Strickland*, and this claim will be DISMISSED.

3. Ineffective Assistance of Counsel Claims Based on Prisoner's Sentence

In Ground 4, Petitioner argues that counsel was ineffective in failing to object to "erroneous and prejudicial" statements by the medical examiner that were contained in the pre-sentence report. [Doc. 2 at 23-27; Doc. 16 at 30-34]. Specifically, Petitioner notes that the presentence report contained a statement allegedly made by Harlan during the autopsy indicating that he had found duct tape particles in the victim's lungs. [Doc. 2 at 23-27]. Petitioner maintains that this statement is false, as it was not included in the autopsy report, Harlan's pretrial interviews, or his

testimony at trial. [*Id.*]. Petitioner's counsel did not object to this statement, and the sentencing court relied upon it in applying an enhancement for exceptional cruelty to the victim, concluding that the statement indicated how desperately the victim tried to continue breathing. [*Id.*]. Petitioner argues that, absent this statement, there is a reasonable probability that his sentence would have been lower. [*Id.*].

Similarly, he argues that he was prejudiced by counsel's failure to include the trial transcript on appeal, as it deprived the appellate court of an opportunity to discover that the statement in the presentence report regarding duct tape in the victim's lungs was false and of the opportunity to review his sentence *de novo*. [*Id.* at 25-26; Doc. 16 at 30, 36]. He argues that, in light of the evidence presented at trial and the false statement in the presentence report, there is a reasonable probability that his sentence would have been reversed on appeal had counsel included the trial transcript. [Doc. 2 at 25-26].

The Court has determined that Petitioner's claim that his sentence was unlawful in light of *Blakely* must be granted, and it has accordingly ordered that Petitioner's sentence be vacated. Because the Court has granted his request for relief as to *Blakely* claim, thereby vacating Petitioner's sentence, his ineffective assistance of counsel claim based on his sentence is MOOT and will accordingly be DISMISSED. *See United States v. Brown*, 819 F.3d 800, 829 (6th Cir. 2016) (citing *United States v. Jones*, 489 F.3d 243, 255 (6th Cir. 2007)); *United States v. Jackson*, 244 F. App'x

727, 729 (6th Cir. 2007); *United States v. Milledge*, 109 F.3d 312, 316 n.2 (6th Cir. 1997)).

4. Ineffective Assistance of Appellate Counsel

In Ground 2, Petitioner asserts that appellate counsel rendered ineffective assistance. [Doc. 1 at 8-9, 11-12; Doc. 2 at 9-16; Doc. 16 at 18-23]. First, Petitioner contends that his appellate attorney rendered ineffective assistance in failing to adequately communicate or consult with him regarding the issues to be appealed. [Doc. 2 at 9-16; Doc. 16 at 20-22]. He argues that counsel knew or should have known that he wanted to appeal his underlying convictions, rather than just his sentence, based on his plea of not guilty, his past interest in appealing a conviction that reflected anything more than an accidental killing, and his very active involvement in his defense. [Doc. 16 at 22-23]. He argues that counsel should have asserted a claim challenging the sufficiency of the evidence on direct appeal, based on the state's failure to meet its burden of proof and because the testimony and credibility of the medical examiner was been called into question after the verdict was rendered. [Doc. 2 at 9-16].

"Claims of ineffective assistance of appellate counsel are subject to the *Strickland* test, which requires a defendant to show both deficient representation and prejudice." *Evans v. Hudson*, 575 F.3d 560, 564 (6th Cir. 2009). When considering the *Strickland* standard in conjunction with the deferential standard of § 2254(d), the question in reviewing the state court's ruling "is whether there is any reasonable argument that [appellate] counsel

satisfied *Strickland*'s deferential standard." *See Harrington v. Richter*, 562 U.S. 86, 105 (2011).

Appellate counsel is not required "to raise every possible issue in order to render constitutionally effective assistance." *Hutton v. Mitchell*, 839 F.3d 486, 501 (6th Cir. 2016) (citing *Jones v. Barnes*, 463 U.S. 745, 750-53 (1983)); *see also Shaneberger v. Jones*, 615 F.3d 448, 452 (6th Cir. 2010) ("[T]he *Strickland* analysis does not require an attorney to raise every non-frivolous issue on appeal," nor does it require counsel to "raise an issue that lacks merit.") (internal quotation marks and citation omitted); *Smith v. Robbins*, 528 U.S. 259, 288 (2000) ("[A]ppellate counsel who files a merits brief need not (and should not) raise every nonfrivolous claim, but rather, may select from among them in order to maximize the likelihood of success on appeal."). Instead, the presumption of effective assistance will generally only be overcome "when omitted arguments are clearly stronger than those presented." *Hutton*, 839 F.3d at 501 (citing *Smith*, 528 U.S. at 288); *McFarland v. Yukins*, 356 F.3d 688, 699 (6th Cir. 2004) ("Counsel's failure to raise an issue on appeal c[an] only be ineffective assistance if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal.").

When evaluating the issue of ineffective assistance of appellate counsel for prejudice, the Court must determine whether there is a reasonable probability that, but for his counsel's failings, the defendant would have prevailed on his appeal. *Evans*, 575 F.3d at 564. "A reasonable probability is a probability sufficient to undermine confidence in the

outcome." *Id.* at 564-65 (citing *Burton v. Renico,* 391 F.3d 764, 773 (6th Cir. 2004); *Maples v. Stegall,* 340 F.3d 433, 437 (6th Cir. 2003)).

Petitioner raised this ground of ineffective assistance of counsel in his post-conviction proceedings in state court. [*See* Doc. 10-10 at 20-25]. The trial court noted that "the appeal taken on petitioner's behalf was successful," as his sentenced was lowered on direct review. [Doc. 10-11 at 152-53]. It also found that Petitioner "failed to show that there is a reasonable probability that an appeal as to his convictions would have been successful," as "[t]here was ample proof presented against the defendant[.]" [*Id.*]. Accordingly, the trial court rejected this claim of ineffective assistance. [*Id.*].

On appeal, the TCCA affirmed the trial court's determination that counsel was not deficient:

> The record shows that counsel and the Petitioner discussed whether to appeal the Petitioner's convictions and that they agreed the best opportunity for appellate relief was to appeal the sentence. Although trial counsel testified that he feared the Petitioner would be tried again for first-degree murder if this court granted relief from the conviction, a wholly unfounded fear given double jeopardy protections, co-counsel denied this was a factor in determining whether to appeal the conviction. Co-counsel, who worked on the Petitioner's appeal, did not think there were any meritorious issues regarding the conviction. The Petitioner argues counsel should have raised sufficiency of the

evidence …. We cannot conclude that the Petitioner was prejudiced.

With regard to the sufficiency of the evidence, we conclude that the evidence was sufficient to sustain the Petitioner's conviction for second-degree murder. *See* [Tenn. Code Ann.] § 39-13-210 (2010) (stating that second-degree murder is the knowing killing of another); *see also* [Tenn. Code Ann.] § 39-11-106(20) (2010) (stating that "[a] person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result"). The evidence showed that the Petitioner admitted striking the victim in the head, duct taping her hands and feet, duct taping her face from her nose to her chin, concealing her body, transporting her body to an island on Tim's Ford Lake, and burying the victim's body in a shallow grave. Various witnesses testified about the Defendant and the victim's pending divorce, inability to get along around the time of the victim's disappearance, and fighting over their two children.

The victim was last seen leaving work at 3:11 p.m. the day she disappeared. Greg Arp, the victim's coworker and boyfriend, and the victim discussed their evening plans during their lunch break. The victim called the Petitioner's home to speak with her children during lunch, but the Petitioner did not allow her to speak with them. Mr. Arp said that

after work, the victim was supposed to pick up her children at the Petitioner's home, bring the children to Mr. Arp's home, and go to dinner together. Mr. Arp called the victim's cell and home phones around 3:30 or 4:00 p.m. because the victim had not arrived at his home with her children. He said that he was unable to reach her and that the victim did not return his calls.

Kara Matthews, the Petitioner's girlfriend at the time of the killing, said she arrived at the Petitioner's home around 4:30 or 5:00 p.m. the day the victim disappeared and that the Petitioner was pacing the kitchen floor, was sweating, and was nervous. The Petitioner told her a story about some of his friends suggesting that they steal the victim's truck. The Petitioner told her that he believed they were joking but that someone arrived at his home with the victim's keys thirty minutes before she arrived. The Petitioner said his friends left the truck in Kroger's parking lot. Ms. Matthews said the Petitioner requested that she drive him to the parking lot to find the victim's truck. She said that the truck was in the Advanced Auto Parts' parking lot, which was in the same strip mall as Kroger. She stated that the Petitioner got into the truck, that he told her he was going to take the truck back to his friend, and that she followed him. She said the Petitioner drove the truck to "Smokehouse and hotel" and wiped the steering wheel and the door with a cloth. He left the keys inside the truck. She

> said they went to buy fast food. She said the Petitioner acted "normal" after they left the truck. She stated that after they returned home, the Petitioner asked her to watch his children for a while.
>
> The Petitioner told Mr. Rhoads that he killed the victim. According to Mr. Rhoads's testimony, the Petitioner said he had just put the children down for their naps when the victim appeared in the kitchen. The Petitioner stated that the victim was yelling at him and that before he knew what happened, he hit the victim, who fell to the floor. The cause of death, though, was suffocation. The medical examiner concluded the victim suffocated from the duct tape obstructing her airway. The autopsy did not show evidence of blunt force trauma to the victim's head, contradicting the Petitioner's version of events. We conclude the evidence was sufficient.

[Doc. 10-28 at 26-29].

In reviewing the sufficiency of the evidence, Tennessee courts assess "whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Parker*, 350 S.W.3d 883, 903 (Tenn. 2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In analyzing such a claim, the prosecution is afforded "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences which may be drawn therefrom," with questions concerning

credibility and the weight of the evidence resolved in favor of the decision reached by the trier of fact. *Id.*

Petitioner argues that counsel was ineffective in failing to raise a claim for sufficiency of the evidence on direct appeal because "the state failed to meet its burden of proof beyond a reasonable doubt." However, his arguments in support of this position are not arguments regarding the sufficiency of the evidence; rather, they are arguments regarding the *weight* of the evidence.[10] In reviewing whether Petitioner was

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[10] Petitioner states:

> The Petitioner contends that this case is not one involving a traditional stabbing, shooting, or poisoning of the victim. This case is one involving a very heated and contentious divorce between the Petitioner and the victim. The victim's family members, some of whom were employed with the local law enforcement, had got involved in the divorce and made threats to the Petitioner, and had vandalized his home. The Petitioner and the victim were separated and living apart. The Petitioner had been living in duress. Yet, on the day of the victim's death she had driven to the Petitioner's home, sneaked into the home and attacked the Petitioner from behind. The Petitioner responded to the assault by striking a blow to the victims head using his bare hands. The blow rendered the victim unconscious, to the point of death. The Petitioner covered the victim's face in approximately nine (9) feet of duct tape. The medical examiner testified before the jury that the COD was asphyxiation. That testimony has since been called into serious question, and the Chief Medical Examiner, Dr. Charles Harlan, has since been prosecuted, disbarred by the medical board for intentionally lying about the COD in hundreds of cases, among many other fraudulent and unethical crimes including fraud and deceit. Indeed, the Petitioner's Pre-Sentence Report (PSR) stated that

prejudiced by counsel's failure to raise a claim of sufficiency of the evidence, the state court summarized the evidence in a manner that afforded the prosecution the strongest legitimate view of the evidence and any reasonable inferences therefrom and gave deference to the jury's verdict in assessing the credibility of witnesses and weight of the evidence. Based on this view of the evidence, rather than Petitioner's own view which favors his testimony and version of events, the state court found that the evidence was sufficient to support Petitioner's conviction for second-degree murder and that he accordingly suffered no prejudice as a result of counsel's failure to raise this issue on direct appeal.

The Court cannot find that the state court unreasonably applied the *Strickland* standard in so holding. Although it is possible to draw inferences from the evidence presented at trial that would support Petitioner's theory of the case, the appellate court would have been constrained on direct review to view the evidence and all reasonable inferences therefrom in the light most favorable to the prosecution and to the jury's verdict. Viewed in such light, the evidence presented at trial supports the Petitioner's conviction. Petitioner admittedly struck

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> part of the Medical Examiner's autopsy report contained a finding that the victim had [particles] of [d]uct [t]ape in her lungs. Thus supporting that she asphyxiated as she struggled so hard to breathe. This finding is, not only incredible and impossible, but also false. Thus, the state failed to meet it's [sic] burden of proof beyond a reasonable doubt.

[Doc. 2 at 10-11 (internal citations omitted)].

the victim in the head and applied duct tape to her face, covering her nose and mouth. He took numerous steps to conceal his actions, disposing of her personal items, wiping down her vehicle, leaving voicemails for the victim after he knew her to be dead, and transporting her body to a remote location for burial. The medical examiner testified that he assigned the cause of death to asphyxiation by duct tape, as the examination did not reveal any other possible cause of death; he testified that there was no evidence that the victim's cause of death was blunt force trauma.[11] Thus, under the standard of review for sufficiency of the evidence, a rational trier of fact could have concluded that the evidence supported a finding that Petitioner was guilty of second-degree murder—that is, that he knowingly killed his victim. There is, then, no reasonable probability that the outcome of Petitioner's appeal would have been more favorable had counsel raised this issue on direct review, and without such probability, Petitioner suffered no

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[11] Petitioner argues that the sufficiency of the evidence could have been challenged based on the fact that Harlan's medical license was suspended subsequent. Petitioner concedes, however, that no evidence or testimony regarding the investigation into Harlan was presented at trial and that his license had not been revoked at the time of trial. Petitioner's claims about Harlan's credibility were properly raised, considered, and rejected in his post-conviction proceedings in state court. Under these circumstances, and given that the evidence must be viewed in the light most favorable to the prosecution when undertaking a sufficiency of the evidence analysis, this argument is wholly without merit, and the Court cannot find that counsel was deficient in failing to raise these issues on direct review or that Petitioner was prejudiced by such failure.

prejudice.[12] The Court accordingly cannot find that the state court unreasonably applied the *Strickland* standard in concluding that Petitioner was not prejudiced by counsel's failure to raise a sufficiency of the evidence claim on direct appeal, and this claim for relief will be DISMISSED.

III. CONCLUSION

For the above reasons, Grounds Two through Six of Petitioner's petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, raising claims of ineffective assistance of counsel, are hereby DISMISSED. However, the § 2254 petition will be conditionally GRANTED with respect to Ground 1, Petitioner's sentencing claim. Petitioner's sentence will accordingly be VACATED, and unless the State of Tennessee re-sentences him within ninety days, Petitioner SHALL be released from incarceration.[13]

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[12] The Court also notes that it does not find that counsel was deficient in failing to raise this claim for relief on direct review. Counsel raised only sentencing claims on direct review, finding no other meritorious claims for relief. Petitioner can show that this strategic decision was deficient only by demonstrating that omitted claims were stronger than those actually raised on direct review. *See Hutton*, 839 F.3d at 501. Given that the state court and this Court have concluded that a challenge to the sufficiency of the evidence on direct review had no likelihood to succeed on the merits, and that counsel actually did succeed in obtaining relief for Petitioner on two sentencing claims raised on direct review, Petitioner cannot make such a showing and has accordingly failed to demonstrate that counsel was constitutionally deficient.

[13] If an appeal is taken and the Court's determination stands, the State of Tennessee must take such action within ninety days of the resolution of the appeal.

IV. CERTIFICATE OF APPEALABILITY

Finally, the Court must consider whether to issue a certificate of appealability as to those claims in Petitioner's § 2254 petition that the Court has now dismissed. Under the AEDPA, a habeas petitioner must obtain a certificate of appealability ("COA") to appeal a federal district court's final order in a habeas proceeding. 28 U.S.C. § 2253(c)(1). A COA may issue only if the petitioner has made a "substantial showing of the denial of a constitutional right," and, if issued, it "shall indicate which specific issue" satisfies that showing. 28 U.S.C. § 2253(c)(2)-(3). Where claims have been dismissed on their merits, a petitioner must show that reasonable jurists would find the assessment of the constitutional claims debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Porterfield v. Bell*, 258 F.3d 484, 485-86 (6th Cir. 2001).

After having reviewed Grounds Two through Six of the petition, and in view of the law upon which the dismissal on the merits of the adjudicated claims is based, reasonable jurists could not disagree with the correctness of the Court's resolution of these claims. Because the Court's assessment of Petitioner's constitutional ineffective assistance of counsel claims could not be debatable by reasonable jurists, such claims are inadequate to deserve further encouragement, and the Court will DENY issuance of

a COA. *See* 28 U.S.C. § 2253; Fed. R. App. P. 22(b); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

IT IS SO ORDERED

/s/ *Harry S. Mattice, Jr.*

HARRY S. MATTICE, JR.
UNITED STATES
DISTRICT JUDGE

Appendix C

COURT OF CRIMINAL APPEALS OF TENNESSEE, AT NASHVILLE

No. M2011-02188-CCA-R3PC

LONNIE LEE OWENS,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

Dated: April 4, 2013

OPINION

JOSEPH M. TIPTON, P.J.:

The Petitioner, Lonnie Lee Owens, appeals the Franklin County Circuit Court's denial of his petition for post-conviction relief from his convictions for second degree murder, abuse of a corpse, and theft over $10,000 and his effective twenty-four-year sentence. On appeal, he contends that (1) counsel was ineffective by failing to object to an erroneous statement contained in the presentence report and by failing to include the trial transcript in the appellate record, (2) counsel was ineffective in cross-examining the medical examiner, (3) counsel was ineffective by attempting to negotiate a plea agreement in the jury's presence, (4) counsel was ineffective by failing to request a jury instruction on lesser included offenses,

(5) counsel was ineffective by failing to interview a witness before the trial, (6) counsel was ineffective by failing to request a change of venue, (7) counsel was ineffective by failing to file a motion for a new trial and by failing to appeal his conviction, (8) the cumulative effect of counsel's errors deprived him of the effective assistance of counsel, and (9) he is entitled to a delayed appeal. We affirm the judgment of the trial court.

Although the Petitioner did not appeal his conviction, he sought appellate relief from his sentence, but the trial transcript was not included in the appellate record. This court summarized the facts of the case based on the sentencing hearing transcript and presentence report. The court stated:

> The Defendant killed his estranged wife, Heather Owens, in May 2003 when she came to his house to pick up their two young children. The Defendant struck the victim and then bound her with duct tape. The Defendant wrapped duct tape over the victim's mouth and nose, such that she suffocated to death. The couple's children were in the house at the time of the homicide. The Defendant subsequently buried the victim's body and disposed of her pick-up truck. The Defendant's girlfriend assisted in the disposal of the victim's truck.

State v. Lonnie Lee Owens, No. M2005-00362-CCA-R3-CD, slip op. at 1-2 (Tenn.Crim.App. Oct. 18, 2005).

At the post-conviction hearing, the Petitioner testified that trial counsel did not file a motion for a new trial, that counsel knew the motion was required

before he could appeal his convictions, and that he did not know counsel did not file the motion. He denied signing a waiver of his right to appeal his convictions and said he wanted to appeal his second degree murder conviction. He said that counsel did not file a petition for a writ of error coram nobis and that he learned of the writ when he began conducting his own legal research. He said that he wrote letters to counsel after he was convicted but that he did not make any statements that might have led counsel to believe he did not want to appeal his conviction. He said he did not know counsel failed to prepare a trial transcript until he received this court's opinion. He said he received a copy of the opinion from counsel several months after it was filed.

The Petitioner testified that he received a copy of the appellate brief filed by trial counsel and that he was "shocked" counsel did not appeal his conviction. He said he wrote numerous letters to counsel but did not know the extent to which he discussed counsel's failure to appeal his convictions. With regard to counsel's opening statement during the trial, the Petitioner stated that he objected to counsel's pleading for the jury to convict him of voluntary manslaughter. He denied knowing counsel was going to ask the jury to convict him of manslaughter and said he thought the theory was self defense. He denied signing a waiver to exclude certain trial strategies. He stated that his meetings with trial counsel lasted approximately ten to fifteen minutes and that two or three months elapsed between meetings. He said strategy was never discussed during those meetings. He said counsel only told him that he would be

"convicted of something." He understood that the theory was self defense.

The Petitioner testified that after he was convicted, he learned that Dr. Charles Harlan, the medical examiner who performed the victim's autopsy, was permanently prohibited from practicing medicine on May 4, 2005. A copy of the order revoking Dr. Harlan's medical license was received as an exhibit. The order shows numerous instances of inadequate medical examinations and documentation and erroneous medical findings by Dr. Harlan. The order also shows erratic and unprofessional conduct by Dr. Harlan. The Petitioner said he learned this information on his own, not through counsel. The Petitioner identified a letter he wrote to counsel stamped filed May 12, 2005. He said that in his letter he asked counsel if he planned to raise Dr. Harlan's losing his license on appeal. The letter identified the article discussing Dr. Harlan.

The Petitioner testified that before the trial, he became concerned about his receiving a fair and impartial jury in Franklin County and that he discussed this with trial counsel. He said that he was told counsel was going to file a motion for a change of venue but that counsel never filed it. He said many of the jurors had previous knowledge about his case, knew the police officers involved, and discussed the case with those officers.

The Petitioner testified that he chose to testify at the trial and that he attempted to cooperate with trial counsel in preparing for the trial. He said he and counsel discussed the victim's affairs and the threats and extortion demands he received from her family,

but counsel did not mention these points at the trial. The Petitioner identified letters he wrote to counsel, which stated that his pastor could testify that the Petitioner took a Smith & Wesson .357 home for protection because he received threats after hiring a private investigator. Another letter stated that his pastor could testify that the Petitioner parked behind his church to prevent trouble with the victim and Don and Sandy Griffin.

The Petitioner testified that Barry Rhoads,[1] the Petitioner's pastor, testified at the trial and that trial counsel did not ask Mr. Rhoads about the threats and extortion demands the Petitioner received from multiple people who were members at his church. He said Mr. Rhoads knew about the victim's affairs. He said that the victim and Sheriff's Deputy George Dyer pointed a gun at him and told him to forget about the victim, their house, and their children. He said that they told him to leave the area and that he would begin to have legal troubles if he did not leave. He denied knowing the victim obtained an order of protection until church members told him about the order and denied ever being served. He denied knowing his marriage was in trouble. He said the victim and Deputy Dyer were distant cousins by marriage. He said he filed for divorce and was served with an order of protection by Deputy Dyer. He said the victim displayed "erratic behavior" and had an affair with Sheriff's Deputy Brian Brewer. He said

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[1] We note that the witness's name is spelled "Rhodes" in the post-conviction hearing transcript and "Rhoads" in the trial transcript. We use the spelling the witness gave in his trial testimony.

that he told counsel about these events before the trial but that they were not discussed at the trial.

The Petitioner testified that he stopped attending his church because of threats from the victim and her family and that he began attending Mr. Rhoads's church. He said the victim and her family told him to stop attending Mr. Rhoads's church, too, because they did not like Mr. Rhoads. He said he parked his car behind Mr. Rhoads's church to avoid problems with the victim and her family.

The Petitioner testified that the night of the victim's death, he was inside his home with his children, that someone approached him from behind, that the person said, "F-you," and that he reacted by "throwing a punch without realizing" it was the victim. He said that after one year of the tension, he was under duress and feared for his and his children's safety. He said he told trial counsel his version of events. He understood his actions were self defense. He agreed that he testified at the trial that he checked for a pulse but that the victim was dead. He said he did not call 9-1-1 because he knew about the victim's and her family's connections with the police and feared getting "a raw deal" and what would happen to his children. He said he knew the victim's family would attempt to obtain custody of his children.

The Petitioner identified letters he wrote trial counsel identifying potential witnesses. He said none of these potential witnesses testified at the trial, and he did not know if counsel interviewed them. He denied counsel's informing him of the potential witnesses they interviewed and denied counsel gave him a copy of the State's discovery package. He did not

know if the State made counsel aware of any problems with Dr. Harlan.

The Petitioner testified that the presentence report stated that Dr. Harlan concluded that there were traces of duct tape in the victim's lungs and that the Petitioner did not know of any evidence supporting Dr. Harlan's conclusion. He said his attorney did not object to the conclusion being in the presentence report.

On cross-examination, the Petitioner identified a letter dated February 5, 2005, from trial counsel to the circuit court clerk stating that a motion for a new trial would not be filed and that the sentence was the only issue to be appealed. He agreed the letter showed that a copy was sent to the Petitioner but said he never received the letter. He said he believed the letter was intentionally withheld, although he did not know if it was withheld by counsel or by the correctional officers.

The Petitioner testified that he did not meet with trial counsel after he was sentenced and that he wanted counsel to appeal his conviction and sentence. He denied his twenty-four-year sentence was a "pretty good" outcome. He admitted that he met with counsel at his home to prepare his trial testimony briefly and that he met with counsel to discuss trial strategy. He denied, though, that counsel told him there would be an admission to manslaughter and said that he thought the strategy was self defense.

The Petitioner testified that during his trial testimony, he discussed the contested divorce and his and the victim's problems. He said he did not know the victim was in his house when he punched her. He denied knowing that counsel knew about Dr. Harlan's

issues with the state medical board. He recalled counsel's cross-examining Dr. Harlan about his conclusion that the victim died as a result of suffocation and the lack of petechial hemorrhaging. He said that many subjects, though, were not covered during crossexamination, including the medical board's investigation.

The Petitioner testified that he was present for jury selection and that the trial court asked the potential jurors questions about their prior knowledge of the Petitioner's case. Although he recalled potential jurors who said they knew about the Petitioner's case, he could not recall whether any of those potential jurors were on the panel. He recalled that potential jurors who stated they could not be impartial and had already reached a conclusion about the Petitioner's guilt were excused from service.

The Petitioner testified that the victim had an affair but denied that he had an affair. He said he began dating someone after he filed for divorce. He said that Mr. Rhoads's testimony was "jumbled up and mixed up and was not brought out accurately." He said counsel should have been prepared and talked to Mr. Rhoads before the trial. He said that the manner in which counsel asked Mr. Rhoads questions misrepresented the facts, but he agreed Mr. Rhoads testified truthfully.

The Petitioner testified that the victim and her family attempted to control and manipulate him. He acknowledged his trial testimony that he did not call 9-1-1 because he panicked. He said he did not testify that he feared he would get "a raw deal" because he feared retaliation from Deputies Dyer and Brewer and

the victim's family. He denied lying during his trial testimony and said he withheld some of the facts.

The Petitioner testified that the potential witnesses he provided trial counsel would have been character and fact witnesses and that he only provided general information. A list of questions the Petitioner prepared for each of the twenty-four people he wanted counsel to call as witnesses was received as an exhibit.

The Petitioner testified that the trial court did not mention the particles found in the victim's lungs during the sentencing hearing and agreed that this court affirmed his sentence on grounds unrelated to the particles in the victim's lungs. He agreed this court concluded that the Defendant bound the victim's hands and feet and covered her face with duct tape. He said, though, that without the trial transcript, this court only had the "misguidance of the contradicting reports." He agreed he bound the victim's hands and feet with duct tape and bound her face "all the way up her forehead." He agreed the children were in the home sleeping when the victim was killed. He agreed he testified that he buried the victim's body in a shallow grave on an island in the Tims Ford Lake area and that he later had sex with his girlfriend. He said his girlfriend clarified at the trial that they did not have sex later that night. He could not recall if information about the duct tape particles inside the victim's lungs was presented at the trial. He said, though, that this court noted the discrepancies between the presentence report and the autopsy reports.

On redirect examination, the Petitioner testified that he and the victim did not live together at the time

of the victim's death and that they had been separated for almost one year. He said that although he and the victim agreed that they would not enter each other's home, the victim and her mother violated that agreement several times. He said he understood that this court enhanced his sentence based upon a finding that the victim was treated with exceptional cruelty. He agreed this court concluded that the victim struggled to breathe, suffocated to death, and suffered while she fought to survive and that the victim's death was the result of the method he used to kill the victim. He said that Dr. Harlan did not testify that the victim struggled and agreed that Dr. Harlan gave no opinion with regard to whether the victim was conscious. He noted that the victim suffered serious injuries from a car accident, including a broken leg, before she died and that Dr. Harlan did not mention those previous injuries.

Barry Rhoads testified that he was a bi-vocational pastor and an engineer, that he ministered to the Petitioner and the victim, and that he testified at the trial on the Petitioner's behalf. He said trial counsel did not interview him before the trial. He said he spoke to the Petitioner as his pastor twice between the time the victim disappeared and the time her body was found. He said that during those conversations, the Petitioner told him about the threats he received and that he listened to one threat that was recorded on the Petitioner's answering machine. He said it was a male voice telling the Petitioner to "stop this, stop that, and if he didn't there was going to be consequences." He said it was not a friendly message and considered it to be a threat. He said the Petitioner told him there had been other messages, too. He said

the Petitioner told him that he was followed on at least two occasions, that someone damaged his home, and that someone broke into his home through the back door.

Mr. Rhoads testified that before the victim's death, the Petitioner brought his guns to Mr. Rhoads's home for safekeeping. He said the Petitioner feared that the victim would take and sell the guns. He said that before the victim's death, the Petitioner requested one of the handguns because the Petitioner feared for his life. He recalled the Petitioner's parking behind the church and said the Petitioner told him that he parked there to prevent the victim's seeing him and "causing a scene." He recalled the Petitioner's telling him about the Petitioner's tires being slashed before the victim's death. He said the Petitioner believed it was an act of vandalism because it was on the sidewall of the tire and looked like a knife or a sharp objected was used to puncture the tire. He said counsel did not ask about these events.

Mr. Rhoads testified that the Petitioner's trial was a "hot topic of conversation" in Franklin County and that he was concerned whether the Petitioner could receive a fair trial. He agreed the victim's parents were well known.

On cross-examination, Mr. Rhoads testified that counsel told him they wanted to call him as a witness at the trial but that counsel did not discuss pastoral privileges with him. He said that he testified truthfully at the Petitioner's trial and that the information he knew came from the Petitioner. He said he knew the victim and her family through the

church community. He said they were well known outside the church community.

Trial counsel testified that he had practiced law for about thirty years and had handled several criminal appeals. He said he did not find in his case file any documentation showing that the Petitioner waived his right to appeal his conviction and did not recall receiving a waiver from the Petitioner. He said co-counsel was a former member of his law firm and no longer practiced law with him. He said that he and co-counsel divided the work in preparing for the trial and that they each had their respective responsibilities. He said they worked together on the case. He said co-counsel took responsibility for the sentencing hearing and the appeal.

Trial counsel testified that he did not have a copy of the trial transcript in his case file and that he did not think he ever received a copy. He said that he thought he and co-counsel believed it was in the Petitioner's best interest not to include the trial transcript in the appellate record. With regard to the presentence report, counsel recalled that the report included a statement that Dr. Harlan found traces of duct tape in the victim's lungs and that he did not recall if that was the first mention of traces of duct tape being found there. He agreed no objections were made to the statement.

Trial counsel testified that the Petitioner was actively involved in his defense and that he provided names of witnesses to testify at the trial on his behalf. He said he, co-counsel, and co-counsel's assistant interviewed everyone on the list who "had anything positive" that might have helped the case. He said he

did not recall speaking with any of the pastors included in the list and did not find any memorandum in the case file showing he talked to them. He said that if someone provided relevant information, a memorandum would have been prepared for the file and that a memorandum might not have been prepared if someone did not have relevant information.

Trial counsel identified a letter from the Petitioner about Mr. Rhoads's testifying at the trial and said that he and co-counsel reviewed the Petitioner's letters. He recalled a discussion about the Petitioner's receiving threats before the victim disappeared and said he and co-counsel reviewed the Petitioner's divorce file with his divorce attorney and used the relevant information. He said that self defense was "not really consistent" with the facts of how the Petitioner said the killing occurred. He said the Petitioner stated that

> somebody came up behind him in his house. He knew that his wife was coming, because she had called him, and said she was coming by the house, and he knew she was coming. Someone came in the house. He turned around and hit this person multiple times, knocking them out, then realized it was [the victim]….

He said the Petitioner thought the victim was dead and "for some reason" placed duct tape around her face, nose, and mouth, and hid the body in the shed. He agreed that if the jury believed those facts, it might have convicted the Petitioner of reckless or negligent homicide. He said, though, the problem was the

Defendant's placing duct tape on the victim after she was dead, which prevented arguing self defense or negligent homicide.

Trial counsel testified that co-counsel interviewed Dr. Harlan before the trial. He identified co-counsel's notes from the interview. He agreed co-counsel's notes stated that Dr. Harlan said less than ten of the 20,000 autopsies he had performed involved the use of duct tape and that the victim was already dead in "most of those cases." He agreed that the notes stated that Dr. Harlan "seem[ed] to suggest that the [d]uct tape [was] the only evidence of … asphyxiation." Counsel did not recall if Dr. Harlan was asked whether the victims in the ten cases involving duct tape were dead before or after the tape was applied. He did not recall if Dr. Harlan testified that he did not find any petechial hemorrhaging in the lungs, eyes, neck, and face.

Trial counsel testified that the Petitioner's case was well publicized and that he did not recall discussing a change of venue with the Petitioner. He did not recall the prospective jurors stating that they were familiar with the Petitioner's case and said a jury was picked from the people called for jury duty. He agreed the trial transcript showed that a discussion was held about "virtually every juror [who] … raised their hands that they'd had some exposure" to the Petitioner's case. He denied being concerned about the Petitioner's ability to receive a fair trial in Franklin County. He did not recall that one of the jurors said he heard the case involved a "heinous crime." He recalled one juror was the victim's co-worker and said counsel had a previous connection with the juror, although he

could not recall how he knew the juror. He said he and co-counsel were "comfortable" with the jury.

Trial counsel testified that he knew Dr. Harlan was no longer the medical examiner and that he had been disciplined by the medical board. He said co-counsel learned of Dr. Harlan's problems before the trial and recalled discussing "articles … about some problems … or allegations." He said that he understood there were allegations against Dr. Harlan but that the medical board had not made a final determination. He agreed that it would be "beneficial to impeach witnesses who have previously been adjudicated to have made false statements, false representations, and engaged in conduct constituting fraud and deceit." He said, though, that co-counsel believed Dr. Harlan would provide some beneficial testimony and that Dr. Harlan provided beneficial information. He said that impeaching a witness who gave favorable information was a judgment call. He agreed the sole medical expert was Dr. Harlan. He said co-counsel talked to Dr. Harlan more than once before the trial.

On cross-examination, trial counsel testified that he participated in many meetings with the Petitioner. He said that during opening statements, co-counsel told the jury that the Petitioner was guilty of manslaughter, that the statement was part of their strategy, and that he and co-counsel discussed with other attorneys in their firm whether to make such a statement. He said the discussions occurred long before the trial. He agreed the strategy was successfully used by another member in their firm. He said that the strategy was discussed with the

Petitioner and that the Petitioner agreed with it. He said asking the jury for a manslaughter conviction was consistent with the Petitioner's disposing and burying the victim's body in a remote location.

Trial counsel testified that although co-counsel worked on the appeal, he and cocounsel discussed what might be appealed. He said they agreed that the best opportunity for appellate relief was to appeal the sentence. He agreed this court reversed the trial court's ordering consecutive sentences and ordered concurrent sentences. He said the Petitioner's sentence was reduced from thirty to twenty-four years.

Trial counsel testified that there were no communication problems with the Petitioner. With regard to the list of witnesses the Petitioner provided counsel before the trial, counsel said that his office investigated the witnesses but that none of the witnesses knew anything about the victim's murder. He said that during jury selection he raised the issue of a fair trial with the trial court because he feared the jurors were familiar with the Petitioner's case. He said that he wanted the court to allow individual questioning of the jurors and that the court granted his request. He said individually questioning jurors was the standard procedure when pretrial exposure was an issue. He said he had never been successful in arguing for a change of venue.

Trial counsel testified that he did not think Mr. Rhoads's testimony conflicted with the Petitioner's testimony at the trial. With regard to counsel's failure to highlight the problems in the divorce case, he said that he did not want to open the door to the divorce

because there were facts in the divorce file that would have been unfavorable to the Petitioner.

On redirect examination, trial counsel testified that with regard to self defense, jurors were instructed to look at the facts from the defendant's subjective point of view. He recalled discussing the Petitioner's belief that he had been threatened. He did not recall the Petitioner's telling him about "lamps being trashed" inside his home. He agreed that a previous threat along with someone, whom he did not know, coming up behind him inside his home might cause someone to fear imminent bodily injury. He said, though, that based on the Petitioner's covering up the victim's death and the Petitioner's behavior following the killing, he believed the jury would have had a difficult time believing the Petitioner acted in self defense.

Trial counsel testified that before he told the jury the Petitioner was guilty of manslaughter, he and co-counsel advised the Petitioner of his constitutional right requiring the State to prove beyond a reasonable doubt each element of manslaughter. He denied that the Petitioner signed a written waiver. He said he and co-counsel believed that was the Petitioner's "best shot" of avoiding a first degree murder conviction.

Trial counsel testified that Mr. Rhoads's testimony about how the killing occurred was different from the Petitioner's version. He agreed Mr. Rhoads testified that the Petitioner said the victim was "suddenly there in his face yelling." He said he and co-counsel spoke to Mr. Rhoads "extensively" before the trial. He said that he expected Mr. Rhoads's testimony to be more consistent with the Petitioner's version.

Trial counsel testified that co-counsel's license to practice law was suspended. He denied that co-counsel's suspension was based on the failure to include the transcripts of the trial in the appellate record.

On recross-examination, trial counsel testified that people sometimes remembered things differently. He said he and co-counsel did not want a new trial on appeal because they did not want the Petitioner to face the possibility of a first degree murder conviction in a second trial. He believed there was a "substantial likelihood" that the Petitioner would be convicted of first degree murder during a second trial. He denied that co-counsel appeared to be under the influence of alcohol or other intoxicants during the trial or appellate process. On further redirect examination, counsel stated that he thought the Petitioner received the best possible outcome during the first trial.

Co-counsel testified that he worked on the Petitioner's appeal, that the Petitioner's sentence was the only issue raised on appeal, and that the strategy was discussed with the Petitioner before the trial and before the deadline to file a motion for a new trial. He said that all the pretrial issues were settled before the trial, that six objections were made during the four-day trial, and that he did not find any appellate issues with the trial, jury deliberations, or verdict. He stated that he and the Petitioner discussed appealing only the sentence and that the Petitioner did not say he wanted his conviction appealed. He agreed the appeal was successful in lowering the Petitioner's sentence by six years. He said he never included a trial transcript

in the appellate record when the sentence was the only issue.

Co-counsel testified that although Dr. Harlan did not testify that particles were found in the victim's lungs, the presentence report stated particles were found in her lungs. He said he should have caught the error. He said that he did a lot of research regarding sentencing and that his primary focus was having this court reverse the trial court's ordering consecutive sentencing.

Co-counsel testified that he discussed with trial counsel and other attorneys in his firm the strategy to tell the jury the Petitioner was guilty of manslaughter. He said he used the strategy before when he worked in the Judge Advocate General's Office in the Navy Department. He said the State had a "great" case based upon circumstantial evidence and presented approximately forty witnesses. He said he thought the circumstantial evidence was going to "bury" the Petitioner. He believed the Petitioner had to testify at the trial to prevent his being convicted of first degree murder. He said he and trial counsel believed that admitting to voluntary manslaughter was the only way to prevent a first degree murder conviction. He said he and the Petitioner discussed the strategy "about twenty-five times" in the year before the trial. He said the Petitioner never stated that he did not want counsel to use this strategy. He stated that with regard to the Petitioner's duct taping the victim's hands, feet, and face, placing the victim's body in the shed, and later placing the victim's body in a boat and burying her on an island, he argued the Petitioner's

"incompetent[]" behavior showed a lack of premeditation.

Co-counsel testified that before the trial, he knew generally about Dr. Harlan's problems with the medical board, although he denied knowing any specifics. He said he and an associate met with Dr. Harlan three or four months before the trial for about five or six hours. He said he did not cross-examine Dr. Harlan about his pending prosecution with the medical board because Dr. Harlan gave counsel exactly what they wanted. He said he spent much of his cross-examination discrediting Dr. Harlan's conclusion that the victim suffocated, including highlighting the lack of petechial hemorrhages. He said Dr. Harlan had not lost his medical license at the time of the trial.

Co-counsel testified that he did not ask for a change of venue because he did not think the trial court would grant the request. He said they addressed their concern by individually questioning potential jurors in an anteroom. He thought that any potential jurors who were affected by the pretrial publicity were excused from the panel and that they had the jury they wanted.

Co-counsel testified that he did not ask Mr. Rhoads to testify about the threats the Petitioner received from the victim's family months before the killing because he made a tactical decision that the threats were self-serving evidence and because the evidence was inadmissible hearsay. He said he thought some evidence of the threats was going to be presented during the testimony of some of the State's witnesses. He said that the Petitioner and Mr. Rhoads

were close and that the Petitioner wanted Mr. Rhoads to testify.

Co-counsel testified that self defense was not supported by the facts. He said the victim only weighed about 105 pounds. He said the Petitioner told him that the victim had a "bad temper" but denied the Petitioner's telling him that the victim was "out to get him, or … that he was seriously threatened by it." He did not recall the Petitioner's discussing anything that rose to the level of serious bodily injury or death. He recalled, though, that the Petitioner thought people entered his home and slashed his tires. He said he spoke to someone at the sheriff's department and expressed the Petitioner's concerns. Co-counsel stated that he thought the Franklin County Sheriff's Department did a professional job in the Petitioner's case. He said an investigator was hired but did not find evidence that any of the deputies threatened, extorted, or intimidated the Petitioner.

Co-counsel testified that he did not file a petition for a writ of error coram nobis when he learned that Dr. Harlan's medical license was suspended. He said that Dr. Harlan's credibility was not a "serious issue" and that there was no new evidence related to the victim's autopsy.

On cross-examination, co-counsel testified that his law license was suspended for fourteen months because of a substance abuse problem and that he received a censure for his failure to include the trial transcript in the Petitioner's appeal. He agreed he pleaded guilty to theft over $10,000 as a result of misappropriation of law firm money.

Co-counsel testified that he was primarily responsible for the sentencing hearing and the appeal. He said that he did not object to the statement in the presentence report that duct tape particles were found in the victim's lungs. He agreed that Dr. Harlan never made such a finding in his reports or testimony. He agreed this court concluded in the appeal of the Petitioner's sentence that the trial court did not err in finding that the victim was subjected to cruelty and torture and in enhancing the Petitioner's sentence. He agreed this court concluded that the victim tried to continue breathing and suffocated.

Co-counsel testified that he heard rumors about Dr. Harlan's bizarre behavior before the trial and denied that he heard Dr. Harlan falsified records. He denied knowing that Dr. Harlan was accused of not performing a skeletal survey during a 2001 autopsy and said if he and trial counsel would have known this information, they would have "exploited it" at the trial. He believed the allegation arose after the trial. He said that he asked Dr. Harlan's attorney about the problems with the medical board.

Co-Counsel testified that Dr. Harlan could not testify to a reasonable degree of medical certainty that the victim struggled before her death. He agreed that Dr. Harlan told him before the trial that he had performed ten autopsies in which a victim had been duct taped and that most of the victims were killed before the duct tape was applied. He agreed he did not cross-examine Dr. Harlan about these statements. He agreed Dr. Harlan testified that the duct tape was the only evidence of suffocation.

Co-counsel testified that at the trial, he did not ask Mr. Rhoads about the threats because Mr. Rhoads was the last witness and he thought the evidence was self-serving. He said the evidence of the threats was admitted through other witnesses. After reviewing the trial transcript, he agreed that there were two witnesses after Mr. Rhoads, that one of those witnesses was Carla Zajac, the Petitioner's sister, and that she testified about the threats. He denied that a jury might credit the testimony of the Petitioner's sister over that of a pastor. He agreed the Petitioner's letters stated that Mr. Rhoads could testify about the Petitioner's taking a handgun for protection because of the threats he received and his parking behind Mr. Rhoads's church to avoid any problems with the victim and her family. He said the Petitioner told him about his tires being slashed and people breaking into his home.

Co-counsel testified that he admitted during opening statements that the Petitioner was guilty of manslaughter, although he knew the Petitioner had the right to have the State prove each element of an offense beyond a reasonable doubt. He denied the Petitioner signed a waiver of his constitutional right to have the state prove each element of the offense. He denied the Petitioner signed a waiver to appeal his convictions.

Co-counsel testified that by not filing a notice of appeal, he waived the right to raise sufficiency of the evidence on appeal. He said that from the time the Petitioner retained him to about six months after the trial, the Petitioner's version of events did not change. He said he and trial counsel thought self defense and

criminally negligent homicide theories were not believable and would sacrifice credibility with the jury. He said the Petitioner told him that he expected the victim to come to the Petitioner's home after work to pick up their children.

Co-counsel testified that he did not order a trial transcript, although he knew the trial court was required to look at the evidence presented at the trial and the sentencing hearing and the information contained in the presentence report when determining the proper sentence. He said that although he did not include a transcript of the trial in the appellate record, he and trial counsel believed all the relevant information and evidence was contained in the sentencing hearing transcript. He denied receiving letters from the Petitioner stating that he did or did not want to waive his right to appeal his convictions.

Co-counsel testified that during jury selection, almost all the potential jurors said they had heard something about the Petitioner's case and that ten of the twelve jurors had some form of pretrial publicity exposure. He agreed one of the jurors said during jury selection that he thought it was a "heinous crime." He agreed another juror said he discussed this case with a friend who worked with the county rescue squad and agreed a third juror worked at the same place as the victim.

Co-counsel testified that he interviewed Mr. Rhoads many times before the trial and that Mr. Rhoads's testimony was consistent with his previous interviews. He said he thought Mr. Rhoads's testimony that the Petitioner told him the victim was "in his face yelling" was somewhat consistent with the

statements made during the interviews. He said Mr. Rhoads's testimony was consistent enough with the Petitioner's version of events.

On redirect examination, co-counsel testified that he did not have a substance abuse problem during his representation of the Petitioner. He said his substance abuse stemmed from a spring 2007 car accident, which was after the supreme court denied the Petitioner's application for permission to appeal. He agreed this court relied on factors other than the statement in the presentence report that Dr. Harlan found particles of duct tape in the victim's lungs.

The trial court denied relief. Regarding trial counsel failing to appeal the Petitioner's convictions, the court concluded that counsel were not ineffective. The court credited counsel's testimony. It found that trial counsel and co-counsel discussed the appeal and concluded that there "were no legitimate issues to appeal, other than sentencing issues." Counsel agreed that the acquittal of first degree murder was a success. The court noted counsel's success on appeal and the sentence reduction from thirty to twenty-four years. The court found that the Petitioner failed to present evidence showing that a reasonable probability existed that an appeal of his convictions would have been successful.

With regard to counsel's admitting the Petitioner was guilty of voluntary manslaughter during opening statements, the trial court concluded that the strategy was "reasonably based" and that it would not "second-guess the well thought-out tactical defense decision." The court credited counsel's testimony and concluded that counsel were not deficient. It found that counsel

discussed this strategy with each other and other attorneys in their firm. The court found that they were "ethically locked into a certain set of facts … based on the Petitioner's admissions" to counsel "before the victim's body was found." The court credited counsel's testimony that self-defense would have been difficult to establish because of the Petitioner's "elaborate 'cover-up'" in concealing the victim's body. The court found that the strategy of admitting the Petitioner's guilt to manslaughter was discussed with the Petitioner before the trial and that the Petitioner agreed to the strategy. Counsel told the Petitioner that he would be convicted of some level of homicide but that the goal was to avoid a first degree murder conviction. The court stated that the strategy was "perhaps brilliant" and that given the amount of evidence against the Petitioner, "the strategy likely played a role in avoiding a first-degree murder conviction."

With regard to counsel's failure to investigate Dr. Harlan's problems with the state medical board and their failure to cross-examine Dr. Harlan adequately, the trial court found that counsel were not deficient. The court found that co-counsel discussed with Dr. Harlan the autopsy findings before the trial. The court found that although co-counsel was aware of the allegations against Dr. Harlan, his medical license was not permanently revoked until six months after the Petitioner's trial. It found that co-counsel chose not to question Dr. Harlan about the medical board proceedings because Dr. Harlan provided favorable testimony about the cause of death and lack of petechial hemorrhaging in the victim's eyes. The court found that co-counsel's cross-examination was "within

the range of competence demanded of attorneys in criminal cases" and that his failure to question Dr. Harlan about the medical board proceedings was a "reasonable tactic."

With regard to the erroneous statement in the presentence report regarding duct tape particles in the victim's lungs, the trial court found that co-counsel admitted he should have seen the error and objected. The court concluded that co-counsel was deficient by failing to object. With regard to counsel's failure to include a trial transcript in the appellate record, the court found that counsel were not deficient. The court found that because co-counsel only appealed the Petitioner's sentence, he did not believe a transcript was necessary for the relief sought and that the evidence contained in the transcript might have prevented appellate relief. The court found that co-counsel and trial counsel discussed whether to include the transcript and agreed a transcript was not required or beneficial to the sentencing issues. It noted that although this court "included the incorrect 'duct tape in the lung' comment when it discussed the exceptional cruelty as a sentencing factor," this court included other factors supporting the enhancement factor. The court concluded that the Petitioner failed to establish that this court would have ruled differently had counsel included the trial transcript on appeal.

With regard to counsel's failure to request jury instructions on lesser included offenses, the trial court concluded that counsel were not deficient. The court found that counsel's sound and reasonable trial strategy of admitting guilt to voluntary manslaughter

prevented the court's giving instructions on reckless and criminally negligent homicide.

With regard to counsel's failure to request a change of venue after the Petitioner's case received pretrial publicity, the trial court found that counsel were not deficient. The court credited counsel's testimony that counsel believed a motion for a change of venue would be denied and that any concerns related to the Petitioner's ability to obtain a fair trial were addressed through individual voir dire. The court found that the Petitioner failed to present any evidence that the jurors were "wrongly influenced by pretrial publicity or notoriety."

With regard to trial counsel's failure to interview Barry Rhoads adequately before the trial, the trial court found that trial counsel and co-counsel interviewed Mr. Rhoads before the trial and that they thought Mr. Rhoads's testimony would be consistent with the Petitioner's testimony at the trial. The court stated that the trial transcript supported counsel's testimony.

The trial court discredited the Petitioner's testimony. It found that the Petitioner's testimony that he fabricated his version of events because of threats and extortion was "totally unbelievable." It found that the Petitioner's allegations that he was threatened and extorted by two sheriff's deputies was "totally unsupported by any evidence, credible or otherwise." This appeal followed.

The burden in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. T .C.A. § 40-30-110(f) (2012). On appeal, we are bound by the trial court's findings

of fact unless we conclude that the evidence in the record preponderates against those findings. *Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn.2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. *Id.* at 457. Post-conviction relief may only be given if a conviction or sentence is void or voidable because of a violation of a constitutional right. T.C.A. § 40-30-103 (2012).

Under the Sixth Amendment, when a claim of ineffective assistance of counsel is made, the burden is on the Petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *see Lockhart v. Fretwell*, 506 U.S. 364, 368-72, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). In other words, a showing that counsel's performance fell below a reasonable standard is not enough because the Petitioner must also show that but for the substandard performance, a reasonable probability exists that "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The *Strickland* standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. *State v. Melson*, 772 S.W.2d 417, 419 n. 2 (Tenn.1989).

A petitioner will only prevail on a claim of ineffective assistance of counsel after satisfying both prongs of the *Strickland* test. *Henley v. State*, 960 S.W.2d 572, 580 (Tenn.1997). The performance prong

requires a petitioner raising a claim of ineffectiveness to show that counsel's representation fell below an objective standard of reasonableness or "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The prejudice prong requires a petitioner to demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability means a "probability sufficient to undermine confidence in the outcome." *Id.*

In *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn.1975), our supreme court decided that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. Further, the court stated that the range of competence was to be measured by the duties and criteria set forth in *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir.1974), and *United States v. DeCoster*, 487 F.2d 1197, 1202-04 (D.C.Cir.1973). *See Baxter*, 523 S.W.2d at 936. Also, in reviewing counsel's conduct, 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." *Strickland*, 466 U.S. at 689. "Thus, the fact that a particular strategy or tactic failed or even hurt the defense does not, alone, support a claim of ineffective assistance." *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn.Crim.App.1992). Deference is made 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); see *DeCoster*, 487 F.2d at 1201.

I.

The Petitioner contends that co-counsel was ineffective by failing to object to the erroneous statement in the presentence report that duct tape particles were found in the victim's lungs and by failing to include the trial transcript in the appellate record. He argues that the failure to object to the erroneous statement was compounded by the failure to include the transcript in the appellate record in order for this court to consider the appropriate sentence. The State responds that the Petitioner was not prejudiced by counsel's failure to object to the statement contained in the presentence report or counsel's failure to include the transcript. We agree with the State.

We conclude that co-counsel was deficient by failing to object to the erroneous statement included in the presentence report. Co-counsel admitted his deficiency at the postconviction hearing and said Dr. Harlan did not testify at the trial about duct tape particles found in the victim's lungs. Co-counsel also admitted that the autopsy report did not include such a finding. In addressing the trial court's enhancement of the Petitioner's sentence based on his treating the victim with exceptional cruelty, this court looked to factors other than the presence of duct tape particles in the victim's lungs. This court concluded that the enhancement factor was properly applied because the Petitioner bound the victim's hands and feet, covered her mouth and nose with duct tape, and killed the victim while their children were sleeping upstairs. *See*

Lonnie Lee Owens, slip op. at 6. Although this court included the improper statement in its reasoning for upholding the trial court's sentence enhancement, there were other factors upon which the court relied.

At the trial, Dr. Harlan testified that the victim's wrists, ankles, and head were duct taped, that the wrists were taped behind the victim's back, and that the tape around the head was wrapped in a circular pattern and covered the nose, mouth, and the upper portion of the chin. Dr. Harlan concluded that the cause of death was suffocation because the duct tape blocked the victim's nose and mouth. He stated that had the victim been struck in the head with enough force to cause her death, he would have expected to find bleeding beneath the outer membrane surrounding the brain, bruising to the brain, fractures to the skull or face, or tearing of the skin. He found no evidence of these injuries and excluded blunt force trauma as the victim's cause of death. Dr. Harlan did not find evidence of petechial hemorrhaging in the victim's eyes but stated that petechia was not always present after suffocation and that the condition of the victim's eyes were poor because of exposure. We cannot conclude that a reasonable probability exists that the sentencing outcome would have been different had counsel objected to the statement in the presentence report.

With regard to trial counsel's failure to include a trial transcript in the appellate record because he thought the transcript would prevent this court's granting sentencing relief, his decision would have the opposite effect. "[T]here is a duty to prepare a record which conveys a fair, accurate and complete account of

what transpired with respect to the issues forming the basis of the appeal." *State v. Ballard*, 855 S.W.2d 557, 560 (Tenn.1993) (citing *State v. Bunch*, 646 S.W.2d 158, 160 (Tenn.1983)). Although counsel only appealed the Petitioner's sentence, the trial proceedings were relevant to the issue of enhancing the petitioner's sentence. *See* T.C.A. § 40-35-210(b)(1) (2010) (requiring a trial court to consider evidence presented at the trial in making its sentencing determinations). Counsel's failure constituted deficient performance. Although the presentence report refers to Dr. Harlan's conclusion on the victim's cause of death, the trial transcript would have highlighted the inaccurate statement in the presentence report regarding the duct tape particles being found in the victim's lungs. The discrepancy went unnoticed because counsel failed to include the trial transcript in the appellate record. We agree, though, that the victim was treated with exceptional cruelty and cannot conclude that a reasonable probability exists that but for counsel's deficient performance, the result of the proceeding would have been different. The Petitioner has failed to establish prejudice.

II.

The Petitioner contends that co-counsel was ineffective by cross-examining Dr. Charles Harlan inadequately. He argues that co-counsel failed to elicit favorable testimony about the victim's cause of death and failed to question Dr. Harlan about the pending proceedings to revoke his medical license. The State responds that co-counsel's crossexamination was

professionally reasonable and did not prejudice the Petitioner. We agree with the State.

Dr. Charles Harlan testified at the trial that the victim's cause of death was suffocation because he found no diseases or injuries consistent with blunt force trauma and because the victim's airway was blocked by duct tape. During co-counsel's cross-examination, Dr. Harlan testified that of the many thousands of autopsies he had performed, less than ten involved suffocation by duct tape. He said that although he concluded the cause of death was suffocation, he did not find any evidence supporting his conclusion other than the duct tape over the victim's mouth and nose. Dr. Harlan could not state with a reasonable degree of medical certainty that the victim was conscious before the duct tape was applied. He stated that a person could receive a "blow" that caused unconsciousness but did not "leave a mark." He agreed that someone who was unconscious might look dead.

Dr. Harlan testified that petechial hemorrhaging was caused when the smallest blood vessels in the body ruptured and that it could be seen in the eyes as a result of suffocation. He said, though, that petechia was not required to diagnose suffocation. He said petechia supported such a conclusion but was not necessary. Dr. Harlan did not see petechia in the victim's eyes, face, lungs, or neck.

The Petitioner argues that co-counsel should have questioned Dr. Harlan about the ten cases in which he performed autopsies involving duct tape and his conclusions that most of the victims were dead before the tape was applied. The Petitioner also argues that

co-counsel should have questioned Dr. Harlan about his failure to find evidence that the victim "thrash[ed] around" when Dr. Harlan told co-counsel before the trial that individuals who die as a result of suffocation "thrash around." We cannot conclude that co-counsel was deficient by failing to ask Dr. Harlan these questions. Co-counsel highlighted during crossexamination that although Dr. Harlan concluded the victim suffocated, there was no evidence supporting his conclusion other than the duct tape. Dr. Harlan could not determine if the victim was conscious or unconscious when the duct tape was applied to the victim's hands, feet, and face. He agreed it was possible for a victim to receive a blow that caused unconsciousness but left no evidence of an internal or external wound. Dr. Harlan found no evidence of petechia but concluded suffocation did not always result in petechial hemorrhaging. Co-counsel presented evidence that it was possible the victim's cause of death was not suffocation as Dr. Harlan concluded and that she was rendered unconscious by a blunt force trauma, preventing the victim's struggling.

With regard to co-counsel's failure to impeach Dr. Harlan with the pending proceeding to revoke Dr. Harlan's medical license, we cannot conclude that co-counsel provided deficient performance. The Petitioner's trial was held in November 2004, and Dr. Harlan's medical license was permanently revoked in May 2005. Although co-counsel knew about the pending proceedings, he denied knowing the substance of the allegations and said he contacted Dr. Harlan's attorney before the trial to investigate the pending proceedings.

In any event, co-counsel elicited favorable testimony about whether the victim suffocated and whether the victim was conscious at the time the duct tape was applied. Cocounsel made the tactical decision not to question Dr. Harlan about the pending medical board proceeding because Dr. Harlan gave counsel exactly what counsel wanted. Because co-counsel made an informed tactical decision, we cannot conclude that co-counsel provided deficient performance. *See Hellard*, 629 S.W.2d at 9.

III.

The Petitioner contends that trial counsel was ineffective by "attempting to negotiate a plea agreement in the jury's presence." He argues that he did not waive his right requiring the State to prove that he acted with the required mens rea and intent for voluntary manslaughter. The State responds that counsel's decision to acknowledge voluntary manslaughter in the jury's presence was a tactical and strategic decision and did not constitute deficient performance. We agree with the State.

After the indictment was read, co-counsel attempted to enter a plea to voluntary manslaughter. The trial court rejected the plea and submitted the case to the jury. During co-counsel's opening statement, counsel discussed the elements of first and second degree murder and told the jurors that the Petitioner accepted responsibility for voluntary manslaughter, a killing in the heat of passion with adequate provocation.

Although the Petitioner did not sign a written waiver allowing trial counsel to argue before the jury that he was guilty of voluntary manslaughter,

counsel's credited testimony was that the Petitioner consented to the trial strategy. Co-counsel stated that this strategy was discussed with the Petitioner "about twenty-five times" in the year before the trial. He said the Petitioner never stated that he did not want counsel to use this strategy. Trial counsel said his attempting to plead guilty to voluntary manslaughter and asking the jury for a manslaughter conviction during opening statements was part of their strategy. Counsel discussed the strategy with other attorneys in their firm long before the trial. Trial counsel stated that the strategy was discussed with the Petitioner and that the Petitioner agreed the strategy might be successful. Counsel advised the Petitioner of his constitutional right requiring the State to prove beyond a reasonable doubt each element of manslaughter. Counsel believed that this strategy was the Petitioner's "best shot" of avoiding a first degree murder conviction and that manslaughter was consistent with the Petitioner's burying the victim's body in a remote location. We cannot conclude that the evidence preponderates against the trial court's conclusion that the strategy was reasonable given the facts of the case.

IV.

The Petitioner contends that trial counsel provided ineffective assistance by failing to request jury instructions on the lesser included offenses of criminally negligent and reckless homicide. He argues that although the trial court stated that it would not instruct the jury on any lesser included offenses of voluntary manslaughter based on counsel's statements during opening statements and closing

arguments, counsel should have objected to the court's refusal. The State responds that counsel were not ineffective. We agree that the Petitioner is not entitled to relief.

In criminal cases, the trial court has the duty to charge the jury on all the law that applies to the facts of the case. *See State v. Harris*, 839 S.W.2d 54, 73 (Tenn.1992) (citing *State v. Thompson*, 519 S.W.2d 789, 792 (Tenn.1975)). The Defendant also "has a right to have every issue of fact raised by the evidence and material to his defense submitted to the jury upon proper instructions by the judge." *Thompson*, 519 S.W.2d at 792; *see* T.C.A. § 39-11-203(c) (2010) (entitling a defendant to have the issue of the existence of a defense submitted to the jury when it is fairly raised by the proof). An erroneous jury instruction may deprive the defendant of the constitutional right to a jury trial. *See State v. Garrison*, 40 S.W.3d 426, 433-34 (Tenn.2000). A jury instruction must be reviewed in its entirety and read as a whole rather than in isolation. *State v. Leach,* 148 S.W.3d 42, 58 (Tenn.2004). An instruction will be considered prejudicially erroneous only if it fails to submit the legal issues fairly or misleads the jury as to the applicable law. *State v. Faulkner*, 154 S.W.3d 48, 58 (Tenn.2005) (citing *State v. Vann*, 976 S.W.2d 93, 101 (Tenn.1998)). A trial court should give an "instruction if it is supported by the evidence, embodies a party's theory, and is a correct statement of the law." *State v. Phipps*, 883 S.W.2d 138, 150 n. 20 (Tenn.Crim.App.1994). Counsel may provide ineffective assistance by failing to request jury instructions on applicable lesser included offenses.

Jimmy Dale Hogan v. State, No. M2007-02104-CCA-RM-CD, slip op. at 2-3 (Tenn.Crim.App. Aug.12, 2008).

Trial counsel's credited testimony shows that he believed the Petitioner's duct taping the victim's hands, feet, and face, hiding the victim's body in a shed, burying the victim's body on a remote lake island, and concealing the victim's death made it difficult for counsel to argue in favor of reckless homicide, negligent homicide, and self defense. Admitting guilt to manslaughter was part of counsel's strategy, and the Petitioner agreed to concede guilt. The strategy was discussed with other attorneys in counsel's firm and contemplated for about one year before the trial. Counsel thought voluntary manslaughter was consistent with the Petitioner's disposing and burying the victim's body in a remote location and was the best strategy to avoid a first degree murder conviction. Co-counsel's credited testimony shows that he also thought the Petitioner's only chance of avoiding a first degree murder conviction was to admit guilt to voluntary manslaughter. The strategy was discussed with the Petitioner numerous times in the year leading to the trial, and the Petitioner never told counsel that he did not want to admit guilt to manslaughter.

The Petitioner testified at the trial that he was home with his children when he heard the voice of someone he did not know behind him and that he reacted by hitting the person. The Petitioner said that by the time he realized it was the victim, she was already dead and that he panicked. We conclude that regardless of counsel's admitting guilt to voluntary manslaughter, counsel should have requested jury

instructions on reckless and criminally negligent homicide because they were supported by the trial testimony and did not conflict with the Petitioner's theory of the case. Failure to request these instructions was deficient performance. We also conclude that the trial court should have provided the instructions regardless of counsel's failure to request them. We conclude, though, that the Petitioner has not established prejudice based on the jury's finding the Petitioner guilty of second degree murder. The jury rejected voluntary manslaughter. *See State v. Williams*, 977 S.W.2d 101, 104-07 (Tenn.1998).

V.

The Petitioner contends that trial counsel and co-counsel were ineffective by failing to interview Barry Rhoads before the trial. Alternatively, he contends that if counsel interviewed Mr. Rhoads before the trial, counsel were ineffective by failing to investigate adequately the substance of Mr. Rhoads's trial testimony. He argues that counsel should have presented evidence that the Petitioner felt threatened and that counsel should not have questioned Mr. Rhoads about the substance of the Petitioner's confession because it undermined the Petitioner's claim of self defense. The State responds that Mr. Rhoads was interviewed before the trial and that counsel were not deficient. We agree with the State.

Although counsel does not have an absolute duty to investigate particular facts or a certain line of defense, counsel has a duty to make a reasonable investigation or to make a reasonable decision that makes a particular investigation unnecessary. *Strickland*, 466 U.S. at 691. Counsel is not required to

interview every conceivable witness. *See Hendricks v. Calderon*, 70 F.3d 1032, 1040 (9th Cir.1995). Furthermore,

> no particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel. Rather, courts must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct, and judicial scrutiny of counsel's performance must be highly deferential.

Roe v. Flores-Ortega, 528 U.S. 470, 477, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (internal citations and quotations omitted).

A reasonable investigation does not require counsel to "leave no stone unturned." *Perry Anthony Cribbs v. State*, No. W2006-01381-CCA-R3-PD, slip op. at 57 (Tenn.Crim.App. July 1, 2009), *perm. app. denied* (Tenn. Dec. 21, 2009). Rather,"[r]easonableness should be guided by the circumstances of the case, including information provided by the defendant, conversations with the defendant, and consideration of readily available resources." *Id.* The United States Supreme Court has said, "inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions." *Strickland*, 466 U.S. at 691.

Counsel interviewed Mr. Rhoads "extensively." Counsel were aware of the threats the Petitioner claimed to have received and reviewed the Petitioner's

divorce attorney's file. Counsel concluded that although the threats could have supported a self defense theory, the facts of how the Petitioner said the killing occurred were inconsistent with self defense. Although the evidence could have been used to show the Petitioner's state of mind at the time of the killing, counsel decided not to question Mr. Rhoads about the threats. Counsel did not highlight the threats and the Petitioner's divorce because they did not want to open the door to the State's asking Mr. Rhoads questions about the divorce. Trial counsel concluded that the divorce case involved facts that were unfavorable to the Petitioner's first degree murder trial.

We note that the divorce file is not included in the appellate record and that counsel did not testify at the post-conviction hearing about the substance of the divorce file or the unfavorable facts they feared coming into evidence. Likewise, the record does not contain evidence supporting counsel's conclusion that the information contained in the divorce file would have been admissible at the trial. As a result, we cannot conclude that counsel made a reasonable, tactical decision without proof of the information counsel feared would be admitted at the trial and thought would damage the Petitioner's case. In any event, evidence of the threats was presented during the testimony of the Petitioner's sister, Carla Zajac. Counsel thought Mr. Rhoads's testimony would be consistent with the Petitioner's trial testimony, although Mr. Rhoads testified that before the killing the Petitioner said the victim was "in his face yelling." We conclude that without evidence about the information in the divorce file that concerned counsel, we cannot disagree with the trial court's crediting

counsel's decision not to question Mr. Rhoads about the threats.

VI.

The Petitioner contends that counsel were ineffective by failing to request a change of venue. He argues that counsel should have requested a change of venue because of the pretrial publicity. The State responds that counsel provided the effective assistance of counsel. We agree that the Petitioner is not entitled to relief.

A change of venue may be granted when it appears that because of "undue excitement against the defendant in the county where the offense was committed or any other cause, a fair trial probably could not be had." Tenn. R.Crim. P. 21(a). The decision to grant a motion for a change of venue is within the sound discretion of the trial court and will only be reversed upon an abuse of discretion. *State v. Howell*, 868 S.W.2d 238, 249 (Tenn.1993). A change of venue is not warranted merely because jurors have been exposed to pretrial publicity. *State v. Mann*, 959 S.W.2d 503, 531-32 (Tenn.1997). Jurors "can have knowledge of the facts surrounding the crime and still be qualified to sit on the jury." State *v. Crenshaw*, 64 S.W.3d 374, 386 (Tenn.Crim.App.2001). "The test is 'whether the jurors who actually sat and rendered verdicts were prejudiced by the pretrial publicity.'" *Id.* (quoting *State v. Kyger*, 787 S.W.2d 13, 18-19 (Tenn.Crim.App.1989)).

With regard to whether counsel should have requested a change of venue, counsel did not think a change of venue would be granted. Trial counsel had never successfully argued for a change of venue. Co-

counsel said that although a change of venue was not requested, any concerns about the pretrial publicity were addressed during voir dire. We cannot conclude that the Petitioner was prejudiced by counsel's failure to request a change of venue.

Counsel raised their concern about the impact of the pretrial publicity, and the trial court allowed counsel and the prosecutor to voir dire in chambers each potential juror who indicated knowing about the Petitioner's case. The jurors who were prejudiced against the Petitioner because of the pretrial media exposure were excused from service. Counsel were satisfied with the jury empaneled to decide the case.

During voir dire, many of the potential jurors indicated that they had been exposed to various forms of pretrial publicity. Of the jurors who were questioned in chambers, two indicated that they had formed an opinion about the Petitioner's guilt based on the pretrial publicity and were excused from service. The information reported by the jurors included hearing that "the body was dumped," that the Petitioner was suspected of killing his wife, that the victim's body was found on a lake island, and that the victim was missing for a period of time.

One juror admitted working at the same company where the Petitioner worked but denied knowing the Petitioner. Another juror stated that a friend, who worked for the rescue squad, told him that he was part of the group that found the victim's body. He denied hearing any statements about who killed the victim and having formed an opinion about the Petitioner's guilt. Another juror stated that her adult children told her about the victim's being missing and that she

heard about the case on the radio. She said her children went to school with someone whose last name was Owens but did not know if that person was related to the victim. She denied forming an opinion about the Petitioner's guilt.

Although the Petitioner raises issue with jury selection generally, he addresses the individual voir dire of juror Wayne Signs. Mr. Signs stated that he heard about the Petitioner's case in the newspapers and by talking to people in the community. He denied talking to anyone who claimed to be a witness in the case or remembering the substance of the newspaper articles. He said that he probably formed an opinion about the case when the victim's death was initially reported in the news but that he had no opinion of the case at the time of voir dire. He said his initial opinion was that this was a "heinous crime" but denied forming an opinion about whether the Petitioner was innocent or guilty. He said he could evaluate the case based solely on the evidence and the trial court's instructions.

Although the jurors were exposed to pretrial publicity, the record shows that the jurors empaneled had not formed an opinion about the case or the Petitioner's innocence or guilt and were capable of evaluating the case based on the evidence presented and the trial court's instructions. We conclude that the Petitioner has failed to establish that the jurors were wrongly influenced by pretrial publicity. The Petitioner is not entitled to relief.

VII.

The Petitioner contends that counsel were ineffective by failing to file a motion for a new trial and

by failing to appeal his conviction. He argues that counsel's failure to file the motion for a new trial and to appeal his convictions prevented appellate review of the sufficiency of the evidence and that the evidence is insufficient. He also argues that James Koski's testimony at the trial about a statement the Petitioner made five years before the victim's death violated Tennessee Rule of Evidence 403 and that counsel waived the issue by failing to file the motion and to appeal his convictions. The State responds that the Petitioner was not denied his right to appeal his conviction. We agree that the Petitioner is not entitled to relief.

The record shows that counsel and the Petitioner discussed whether to appeal the Petitioner's convictions and that they agreed the best opportunity for appellate relief was to appeal the sentence. Although trial counsel testified that he feared the Petitioner would be tried again for first degree murder if this court granted relief from the conviction, a wholly unfounded fear given double jeopardy protections, co-counsel denied this was a factor in determining whether to appeal the conviction. Co-counsel, who worked on the Petitioner's appeal, did not think there were any meritorious issues regarding the conviction. The Petitioner argues counsel should have raised sufficiency of the evidence and an evidentiary issue on appeal. We cannot conclude that the Petitioner was prejudiced.

With regard to the sufficiency of the evidence, we conclude that the evidence was sufficient to sustain the Petitioner's conviction for second degree murder. *See* T.C.A. § 39-13-210 (2010) (stating that second

degree murder is the knowing killing of another); *see also* T.C.A. § 39-11-106(20) (2010) (stating that "[a] person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result"). The evidence showed that the Petitioner admitted striking the victim in the head, duct taping her hands and feet, duct taping her face from her nose to her chin, concealing her body, transporting her body to an island on Tim's Ford Lake, and burying the victim's body in a shallow grave. Various witnesses testified about the Defendant and the victim's pending divorce, inability to get along around the time of the victim's disappearance, and fighting over their two children.

The victim was last seen leaving work at 3:11 p.m. the day she disappeared. Greg Arp, the victim's coworker and boyfriend, and the victim discussed their evening plans during their lunch break. The victim called the Petitioner's home to speak with her children during lunch, but the Petitioner did not allow her to speak with them. Mr. Arp said that after work, the victim was supposed to pick up her children at the Petitioner's home, bring the children to Mr. Arp's home, and go to dinner together. Mr. Arp called the victim's cell and home phones around 3:30 or 4:00 p.m. because the victim had not arrived at his home with her children. He said that he was unable to reach her and that the victim did not return his calls.

Kara Matthews, the Petitioner's girlfriend at the time of the killing, said she arrived at the Petitioner's home around 4:30 or 5:00 p.m. the day the victim disappeared and that the Petitioner was pacing the kitchen floor, was sweating, and was nervous. The

Petitioner told her a story about some of his friends suggesting that they steal the victim's truck. The Petitioner told her that he believed they were joking but that someone arrived at his home with the victim's keys thirty minutes before she arrived. The Petitioner said his friends left the truck in Kroger's parking lot. Ms. Matthews said the Petitioner requested that she drive him to the parking lot to find the victim's truck. She said that the truck was in the Advanced Auto Parts' parking lot, which was in the same strip mall as Kroger. She stated that the Petitioner got into the truck, that he told her he was going to take the truck back to his friend, and that she followed him. She said the Petitioner drove the truck to "Smokehouse and hotel" and wiped the steering wheel and the door with a cloth. He left the keys inside the truck. She said they went to buy fast food. She said the Petitioner acted "normal" after they left the truck. She stated that after they returned home, the Petitioner asked her to watch his children for a while.

The Petitioner told Mr. Rhoads that he killed the victim. According to Mr. Rhoads's testimony, the Petitioner said he had just put the children down for their naps when the victim appeared in the kitchen. The Petitioner stated that the victim was yelling at him and that before he knew what happened, he hit the victim, who fell to the floor. The cause of death, though, was suffocation. The medical examiner concluded the victim suffocated from the duct tape obstructing her airway. The autopsy did not show evidence of blunt force trauma to the victim's head, contradicting the Petitioner's version of events. We conclude the evidence was sufficient.

With regard to the evidentiary issue, James Koski testified about his and the Petitioner's familiarity with Tim's Ford Lake, their fishing the area, and their discussing camping in the area where the victim's body was found. He stated that in 1999, about four or five years before the killing, the Petitioner told him about his marital problems. He said the Petitioner told him that the victim could leave but that the Petitioner would kill her if she attempted to take his children. He agreed he did not think the Petitioner was serious about killing the victim. Counsel objected to the testimony as being too remote in time in relation to the killing. The court overruled the objection.

Tennessee Rule of Evidence 403 states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice…." We conclude that although the statement was made four or five years before the victim's death, the trial court did not err by admitting the statement. *See State v. Wilson*, 164 S.W.3d 355 (Tenn.Crim.App.2003) (concluding that the trial court did not err by admitting evidence of a five-year-old protective order awarding the victim custody of the defendant's son because the order was relevant to the issue of motive to commit murder). Other witnesses testified about the marital difficulties between the Petitioner and the victim, including the Petitioner's desire to maintain custody of his children. The Petitioner is not entitled to relief.

VIII.

The Petitioner contends that the cumulative effect of counsel's errors deprived him of the effective assistance of counsel. The State responds that the

cumulative error doctrine does not apply. We agree that the Petitioner is not entitled to relief.

Our supreme court has stated that "'the combination of multiple errors may necessitate the reversal … even if individual errors do not require relief.'" *State v. Jordan*, 325 S.W.3d 1, 79 (Tenn.2010) (quoting *State v. Cribbs*, 967 S.W.2d 773, 789 (Tenn.1998)). This court has stated, "when an attorney has made a series of errors that prevents the proper presentation of a defense, it is appropriate to consider the cumulative impact of the errors in assessing prejudice." *Timothy Terell McKinney v. State*, W2006-02132-CCA-R3-PD, slip op. at 37 (Tenn.Crim.App. Mar. 9, 2010) (citing *Harris ex rel Ramseyer v. Wood*, 64 F.3d 1432, 1438 (9th Cir.1995), cert. denied, 490 U.S. 1075, 109 S.Ct. 2088, 104 L.Ed.2d 651 (1989)), perm. app. denied (Tenn. Aug. 25, 2010). "The reviewing court does not ask as to whether the defendant is innocent of the crime. The question remains whether the defendant was deprived of a reasonable chance of acquittal due to his counsel's performance." *Id.*

We have concluded that counsel were deficient by failing to object to the erroneous statement contained in the presentence report, by failing to include the trial transcript in the appellate record, by failing to request jury instructions on reckless and criminally negligent homicide, by failing to file a motion for a new trial and to appeal the second degree murder conviction, and by failing to request a change of venue. We have also concluded that the Petitioner failed to establish prejudice on each of these grounds. We cannot conclude, though, that there was cumulative error,

that the Petitioner was deprived of the effective assistance of counsel, or that he was deprived of a reasonable chance of acquittal.

IX.

The Petitioner contends that he is entitled to a delayed appeal. He argues that counsel failed to comply with Tennessee Rule of Criminal Procedure 37(d)(2) and that counsel failed to withdraw as counsel of record, preventing the Petitioner from appealing his conviction pro se. The State responds that the Defendant is not entitled to a delayed appeal. We agree with the State.

Tennessee Rule of Criminal Procedure 37(d)(2) states that

> [b]efore a judgment on the guilty verdict becomes final the following shall be done: If a[ ] … defendant who has the right to appeal a conviction chooses to waive the appeal, counsel for the defendant shall file with the clerk, during the time within which the notice of appeal could have been filed, a written waiver of appeal, which must
>
> (A) clearly reflect that the defendant is aware of the right to appeal and voluntarily waives it;
>
> (B) be signed by the defendant and the defendant's counsel of record.

The evidence shows that counsel failed to obtain a written waiver from the Petitioner showing his intent to waive an appeal of his conviction for second degree murder. We cannot conclude, though, that the Petitioner is entitled to a delayed appeal.

A petitioner is entitled to a delayed appeal under the Post-Conviction Procedure Act when the petitioner has been "denied the right to an appeal from the original conviction." T.C.A. § 40-30-113(a) (2012); *see State v. Evans*, 108 S.W.3d 231, 235-36 (Tenn.2003). A delayed appeal may be granted when the petitioner has been denied the effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and Article I, section 9 of the Tennessee Constitution. *Wallace v. State*, 121 S.W.3d 653, 656 (Tenn.2003). Appellate courts determine whether there has been a denial of the effective assistance of counsel by applying the two-pronged test established in *Strickland v. Washington.*

Although counsel failed to comply with Rule 37(d), counsel sought appellate relief with regard to the Petitioner's sentence and informed the Petitioner of his right to appeal his conviction. Counsel and the Petitioner agreed the best course of action was to appeal only his sentence. Co-counsel stated that the Petitioner never expressed a desire to appeal his conviction.

Counsel discussed with another attorney in their firm and the Petitioner whether to appeal the Petitioner's conviction and decided the best opportunity for appellate relief was to appeal his sentence and agreed there were no other meritorious issues to raise on appeal. Counsel discussed the strategy with the Petitioner before the trial and before the deadline to file the motion for a new trial. Counsel noted that six objections were made during the trial and that he did not believe they were worthy of appellate relief. Although trial counsel incorrectly

feared that the Petitioner could be tried for first degree murder if an appeal of his conviction were successful, trial counsel was not responsible for the appeal. Co-counsel denied this was the reason he did not appeal the Petitioner's conviction. Co-counsel believed that given the evidence of the Petitioner's duct taping the victim's hands, feet, and face, hiding her body, burying her body in a shallow grave on a lake island, and the witness testimony prevented a successful appeal of his conviction. We previously concluded that counsel were deficient by failing to include the trial transcript in the appellate record and that the evidence was sufficient to sustain the Petitioner's conviction for second degree murder. We note that a trial court is required to consider the evidence presented at the trial in making its sentencing determination, making the trial transcript relevant for appellate relief of sentencing. *See* T.C.A. § 40-35-210(b)(1) (2010). The Petitioner failed to present any evidence at the post-conviction hearing showing there was a reasonable probability that an appeal of his conviction would have been successful. The Petitioner is not entitled to relief.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

Appendix D

COURT OF CRIMINAL APPEALS OF TENNESSEE, AT NASHVILLE

No. M2005-00362-CCA-R3-CD

STATE OF TENNESSEE,

v.

LONNIE LEE OWENS.

Dated: October 18, 2005

OPINION

DAVID H. WELLES, J.:

The Defendant, Lonnie Lee Owens, was convicted by a jury of second degree murder, abuse of a corpse, and theft over $10,000. The trial court sentenced the Defendant as a Range I, standard offender to twenty-five years for the murder, one year for the abuse of a corpse, and four years for the theft. The trial court ordered these sentences to be served consecutively in the Department of Correction for an effective term of thirty years. In this direct appeal, the Defendant challenges the length of his sentence for the murder and also challenges the trial court's order that his sentences be served consecutively. We reduce the Defendant's sentence for the second degree murder conviction to twenty-four years. We further reverse the trial court's imposition of consecutive sentences.

The record before this Court does not contain a transcript of the Defendant's trial, but does contain a transcript of the Defendant's sentencing hearing, including a copy of the Defendant's presentence report, which was made an exhibit to the hearing. From the materials before us, we have gleaned that the Defendant killed his estranged wife, Heather Owens, in May 2003 when she came to his house to pick up their two young children. The Defendant struck the victim and then bound her with duct tape. The Defendant wrapped duct tape over the victim's mouth and nose, such that she suffocated to death. The couple's children were in the house at the time of the homicide. The Defendant subsequently buried the victim's body and disposed of her pick-up truck. The Defendant's girlfriend assisted in the disposal of the victim's truck.

At the sentencing hearing, the victim's mother and brother testified about the effects of the murder on them, their family and the children. Judy Bolin, the victim's mother, testified that the Defendant "can … be a good person at times, but just in a snap he's off like a rock. He'll tell you off in a minute, and he'll do whatever he can to you to hurt you." Ms. Bolin also stated that the Defendant "controlled everything [the victim] did," including how she spent money and where she spent her time. Ms. Bolin explained that the Defendant murdered her daughter on Ms. Bolin's birthday, and that he knew he was doing so.

Doug Smith testified on behalf of the Defendant, explaining that the Defendant was an employee of his for seven or eight months. Mr. Smith described the Defendant as a "good employee." Barry Rhoads also

testified on behalf of the Defendant. Mr. Rhoads explained that he is a minister as well as the owner of an engineering consulting firm. Mr. Rhoads met the Defendant and the victim in 1998 because they were attending the church at which he was serving as co-pastor. The Defendant was actively involved in the church, becoming a deacon and involving himself "heavily" with the youth. Sometime in 2000, the victim spoke to him about the marital troubles she and the Defendant were experiencing. From that point until late 2001 or early 2002, Mr. Rhoads' contact with the Defendant and his wife became infrequent. Later, he saw the Defendant more frequently as he tried to help the Defendant "work his way through separation and then the divorce."

Mr. Rhoads testified that he never knew the Defendant to be mean, aggressive, controlling or dishonest. After the victim disappeared, however, he began to suspect that the Defendant might be somehow involved. Eventually, the Defendant confessed to him that he had killed his estranged wife. In Mr. Rhoads' opinion, the Defendant had repented of his actions and "his confession and his asking for forgiveness was as genuine as anybody else's." Mr. Rhoads continued to minister to the Defendant after his confinement and continued to consider the Defendant a friend.

On cross-examination, Mr. Rhoads acknowledged that the Defendant did not confess his crime until after he realized the police were coming to arrest him.

The Defendant testified on his own behalf. He stated that he met his wife, the victim, in 1996 when he was twenty-seven and she was nineteen. They

married in July 1997 and had two children. During the marriage he worked repairing heavy-duty equipment. They separated in September 2002. He killed the victim nine or ten months later. The Defendant stated that, prior to the victim's death, he never struck her or threw anything at her.

During the separation, the Defendant began keeping a detailed diary including notations on the victim's whereabouts. The Defendant stated that he kept this diary because he was afraid of accusations the victim was making. The beginning of the divorce proceedings were "very hot," he said, but settled down after some time passed. However, the Defendant began dating Kara Matthews in May 2003. After he began seeing Ms. Matthews, he stated, he "started receiving threats. There was vandalism to [his] house and property."

The Defendant maintained that he had not planned to kill the victim. He stated that he "just wish[ed] it never happened" and that, as a result, he felt "like [his] whole inside has been ripped out." He testified, "I don't know how to describe the emptiness and the tore apart feelings that I have or how I could ever repay. No way I would want to them [sic] to suffer anything. I'm-I'm sorry from the bottom of my heart. I just don't know how to describe it."

On cross-examination, the Defendant acknowledged that, a day or two after burying the victim, he lied to the victim's mother about her whereabouts. The Defendant maintained that his own family never inquired about where she was or what had happened to her after her disappearance. According to the Defendant, their children made no

inquiries for the two weeks before their mother's body was found.

The Defendant also admitted that, within an hour of killing the victim, he called her cellphone and left a message on it. He also admitted to leaving child support checks for her after her death. He claimed, however, that he took these actions not to deceive the police but because he "didn't know what to do." He admitted to having gotten rid of the victim's vehicle after killing her. He admitted to getting rid of her body after killing her. He admitted to having involved Ms. Matthews in disposing of the victim's truck.

After hearing the above testimony, the trial court issued its ruling from the bench. The trial court noted that the Defendant was being sentenced as a Range I, standard offender and that the presumptive sentence for the Defendant's second degree murder conviction was twenty years. As a mitigating factor, the trial court found that the Defendant had no prior criminal history. The trial court then applied two enhancement factors: (1) the Defendant treated the victim with exceptional cruelty in the commission of the offense, and (2) the personal injuries inflicted on the victim during the commission of the offense were particularly great. Weighing the single mitigating factor against the two enhancement factors, the trial court found that the maximum sentence of twenty-five years was the appropriate sentence for the second degree murder conviction.

The trial court found no enhancement factors applicable to the abuse of a corpse offense and imposed the minimum sentence of one year for that conviction.

With respect to the theft offense, the trial court applied as a single enhancement factor that the Defendant was the leader in the commission of that crime. Accordingly, the trial court imposed a sentence of four years for that offense, out of a possible range of three to six years.

The trial court then determined that the sentences should all run consecutively to one another on the basis that the Defendant is a "dangerous offender."

The Defendant now appeals the trial court's ruling on his sentences. Specifically, the Defendant contends that the trial court erred in applying the two enhancement factors to his murder conviction; did not apply sufficient weight to mitigating factors; and erroneously ordered his sentences to be served consecutively. The State concedes that the trial court erred in applying one of the enhancement factors to the murder conviction but argues that the overall effective sentence of thirty years should be affirmed.

STANDARD OF REVIEW

Before a trial court imposes a sentence upon a convicted criminal defendant, it must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; and (f) any statement the defendant wishes to make in the defendant's own behalf about sentencing. *See*

Tenn.Code Ann. § 40-35-210(b); *State v. Imfeld*, 70 S.W.3d 698, 704 (Tenn.2002). To facilitate appellate review, the trial court is required to place on the record its reasons for imposing the specific sentence, including the identification of the mitigating and enhancement factors found, the specific facts supporting each enhancement factor found, and the method by which the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. *See State v. Samuels*, 44 S.W.3d 489, 492 (Tenn.2001).

Upon a challenge to the sentence imposed, this court has a duty to conduct a *de novo* review of the sentence with a presumption that the determinations made by the trial court are correct. *See* Tenn.Code Ann. § 40-35-401(d). However, this presumption "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn.1991). If our review reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then the presumption is applicable, and we may not modify the sentence even if we would have preferred a different result. *See State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn.Crim.App.1991). We will uphold the sentence imposed by the trial court if (1) the sentence complies with the purposes and principles of the 1989 Sentencing Act, and (2) the trial court's findings are

adequately supported by the record. *See State v. Arnett*, 49 S.W.3d 250, 257 (Tenn.2001). The burden of showing that a sentence is improper is upon the appealing party. *See* Tenn.Code Ann. § 40-35-401 Sentencing Commission Comments; *Arnett*, 49 S.W.3d at 257.

LENGTH OF INDIVIDUAL SENTENCES

The Defendant does not challenge the minimum sentence imposed for his abuse of a corpse conviction. Accordingly, we need not address that sentence. As to his other two sentences, the Defendant identifies as issue number two in his initial appellate brief that the trial court "erred in sentencing the Defendant to the maximum sentence in the range for second degree murder and theft of property ." In fact, the trial court did not sentence the Defendant to the maximum for his theft offense. The Defendant's theft conviction is a Class C felony. *See* Tenn.Code Ann. § 39-14-105(4). As a Range I, standard offender, the Defendant faced a sentencing range of three to six years for that offense. *See id.* § 40-35-112(a)(3). The presumptive Range I sentence for a Class C felony is three years. *See id.* § 40-35-210(c). The trial court increased the Defendant's presumptive sentence for that crime by only one year, based on the enhancement factor for being a leader in the commission of the offense. *See id.* § 40-35-114(3). The Defendant tacitly admitted during the sentencing hearing that Ms. Matthews took direction from him in conjunction with their joint effort to dispose of the victim's truck. The Defendant offers no argument in either his initial appellate brief or his reply brief that the trial court erred in applying this enhancement factor. Accordingly, this issue is

waived. *See* Tenn. Ct.Crim.App. R. 10(b). Furthermore, we see no error by the trial court in its application of this enhancement factor to the theft offense. Therefore, the Defendant has failed to establish that he is entitled to any reduction in his sentence for the theft offense.

We turn now to the Defendant's sentence for his murder of the victim. Second degree murder is a Class A felony. *See* Tenn.Code Ann. § 39-13-210(b). The Defendant is a Range I, standard offender. The Range I sentencing range for a Class A felony is fifteen to twenty-five years. *See id.* § 40-35-112(a)(1). The presumptive sentence for a Class A felony is midpoint in the range, *see id.* § 40-35-210(c), or twenty years in this instance. "Should there be enhancement and mitigating factors for a Class A felony, the court must start at the midpoint of the range, enhance the sentence within the range as appropriate for the enhancement factors, and then reduce the sentence within the range as appropriate for the mitigating factors." *Id.* § 40-35-210(e).

The trial court enhanced the Defendant's sentence for his second degree murder conviction on the basis that the Defendant "treated … a victim … with exceptional cruelty during the commission of the offense" and that "[t]he personal injuries inflicted upon … the victim w[ere] particularly great." *Id.* § 40-35-114(6), (7). The State concedes in its appellate brief that the trial court erred in applying factor (7) because the personal injuries inflicted in every homicide are "particularly great" and this factor is therefore an essential element of the offense such that it may not be applied to enhance the

Defendant's sentence. *See id.* § 40-35-114; *State v. Williamson*, 919 S.W.2d 69, 82 (Tenn.Crim.App.1995). Accordingly, the trial court should not have enhanced the Defendant's sentence for the second degree murder on this basis.

We find no error, however, in the trial court's application of enhancement factor (6). Although we do not have any medical testimony about the victim's death in the record before us, the trial court did make a finding for the record during the sentencing hearing that "this was a death by strangulation where the lady was duct taped." The Defendant admitted that he assaulted the victim in his house while their children were close by. The presentence report admitted into evidence at the sentencing hearing without objection sets forth in part that the Defendant

> used duct tape to tape the victim's legs together and her hands behind her back. He then taped her face from the chin to just under her eyes covering her mouth and nose.... Dr. Charles Harlan noted in the autopsy report that ... [h]e ... found traces of duct tape in the victim's lung. Dr. Harlan concluded that the victim's death was caused by suffocation as a result of having her mouth and nose covered with duct tape.

The Defendant does not contest these facts but contends that the method by which he killed the victim did not involve abuse or torture and that this enhancement factor is therefore inapplicable.

The use of exceptional cruelty in the killing of the victim is not an element of second degree murder and may therefore, where appropriate, be considered as an

enhancement factor. *See State v. Gray*, 960 S.W.2d 598, 611 (Tenn.Crim.App.1997). The proper application of this factor in a murder case requires evidence that denotes the infliction of pain or suffering for its own sake or from the gratification derived therefrom, and not merely the pain or suffering inflicted as the means of accomplishing the murder. *See Arnett*, 49 S.W.3d at 258. Our supreme court has recognized that this enhancement factor may be applicable where there is proof of extensive *psychological* abuse or torture. *See id.* at 259. For example, the application of this enhancement factor to an especially aggravated robbery conviction has been upheld where the defendant executed two persons by gunshots after having forced them onto the floor of a walk-in cooler. *See State v. Reid*, 91 S.W.3d 247, app. 311 (Tenn.2002) (finding that the defendant committed the especially aggravated robbery with exceptional cruelty because "[t]he anguish experienced by the victims at this point [in the cooler] while they awaited their execution is unfathomable"). In upholding the application of this enhancement factor in the *Reid* case, this Court also noted the defendant's "calculated indifference toward suffering." *Id.*

We think the facts support the application of this enhancement factor to the means by which the Defendant killed his estranged wife. The record before us indicates that the Defendant bound the victim's hands and feet and then covered her mouth and nose with duct tape. The Defendant committed these actions while the victim was in his house and while

her children were mere feet away.[1] The autopsy of the victim revealed traces of duct tape in one of the victim's lungs: indicating how desperately she tried to continue breathing. After the victim was dead, the Defendant took her body to an island in Tims Ford Lake and buried it in a shallow grave. He then returned to his house and had sex with his girlfriend.[2] These facts indicate that this Defendant treated the victim with a calculated indifference to her suffering and that he achieved some form of gratification from murdering his wife. These facts also establish that the victim tried desperately to continue breathing but eventually suffocated to death. We have no trouble concluding that the victim's suffering while she struggled to live was "unfathomable" and was the direct result of the method used by the Defendant to accomplish the killing. As noted by Judge Scott, "If strangulation, with the victim vigorously fighting for another breath, is not exceptional cruelty, I don't know what is." *State v. Bobby Lee Knight*, No. 87-234-III, 1989 WL 24436, at *4 (Tenn.Crim.App., at Nashville, Mar. 21, 1989) (Scott, J., dissenting). The Defendant's assertion that the trial court erred in applying this enhancement factor to his conviction for second degree murder is without merit.

The Defendant also argues that the trial court erred in applying enhancement factors to his sentence on the basis of the United States Supreme Court's

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[1] The Defendant testified during the sentencing hearing that the children were 30 to 40 feet away when he killed the victim.

[2] The presentence report includes these circumstances of the offense in the section titled "Official Version."

decision in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). The *Blakely* decision holds that the Sixth Amendment to the federal Constitution permits a defendant's sentence to be increased only if the enhancement factors relied upon by the judge are based on facts reflected in the jury verdict or admitted by the defendant. *See id.*, 124 S.Ct. at 2537. The only basis upon which enhancement is otherwise permitted is the defendant's previous criminal history: where the defendant has prior convictions, the trial court may enhance the defendant's sentence without an admission or jury finding. *See Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Blakely* at 2536. Subsequent to the Defendant's appeal of this case, the Tennessee Supreme Court considered the impact of *Blakely* on Tennessee's sentencing scheme and concluded that the Criminal Sentencing Reform Act of 1989, pursuant to which the Defendant was sentenced, does not violate a defendant's Sixth Amendment rights. *See State v. Gomez*, 163 S.W.3d 632, 661 (Tenn.2005). Accordingly, the Defendant's argument on this basis has no merit.

The Defendant also complains that the trial court did not recognize and/or accord sufficient weight to several mitigating factors.[3] The Defendant asserts in

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[3] The State argues in its appellate brief that the Defendant has waived this issue because his lawyer specifically mentioned only the lack of the Defendant's criminal record as a mitigating factor during closing remarks at the sentencing hearing. However, defense counsel had filed a comprehensive listing of mitigating factors for the trial court's consideration prior to the hearing. Moreover, proof of the Defendant's work history and church

his initial appellate brief that, in addition to having no criminal record, he "had a great amount of family support, had a good, honest and steady work record, and was a church and community leader."[4] He further states that "had these factors been properly considered, the sentence calculation would have been … at the lower end of the range."

In imposing the twenty-five year term for the Defendant's second degree murder offense, the trial court recognized the Defendant's lack of a criminal history as a mitigating factor but determined that it entitled the Defendant to no downward movement "at all" in the sentencing range. As this Court has previously recognized, "[p]rovided the trial court complies with the purposes and principles of the Criminal Sentencing Reform Act of 1989 and its findings are adequately supported by the record, the weight afforded to enhancement and mitigating factors is left to the trial court's discretion." *State v. Souder*, 105 S.W.3d 602, 606 (Tenn.Crim.App.2002). We find no abuse of discretion by the trial court in refusing to reduce the Defendant's sentence on this basis. Nor do we find any abuse of discretion by the trial court in failing to recognize or weigh the additional mitigating factors urged by the Defendant. The Defendant murdered his wife. He did so by a

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activities was adduced at the hearing. We will, accordingly, address this issue on the merits.

[4] These circumstances are not specifically codified as mitigating factors in our Criminal Sentencing Reform Act of 1989, but may be considered as such if the trial court determines them to be appropriate for the offense and "consistent with the purposes of" the Act. *See* Tenn.Code Ann. § 40-35-113(13).

process that was most certainly agonizing to the victim. He did so while his children were in the house with him and the victim. The Defendant's past good deeds and alleged family support[5] simply do not entitle him to a sentencing benefit under the facts and circumstances of this case. This issue is without merit.

Given our determination that the trial court properly applied only one enhancement factor to the Defendant's sentence for his second degree murder conviction, we must modify the Defendant's sentence for that crime to twenty-four years.

CONSECUTIVE SENTENCES

We turn now to the Defendant's contentions regarding the trial court's order that he serve his sentences consecutively. A trial court may order a convicted defendant to serve his or her sentences consecutively upon finding by a preponderance of the evidence that the defendant "is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high." Tenn.Code Ann. § 40-35-115(b) (4). However, before imposing consecutive sentences upon this basis, the trial court must further find that "the terms imposed are reasonably related to the severity of the offenses committed and are necessary in order to protect the public from further criminal acts by the offender." *State v. Wilkerson*, 905 S.W.2d 933, 938 (Tenn.1995).

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[5] The record contains no testimonials by the Defendant's family members as to the level of support they are allegedly willing to provide him.

In this case, the trial court found that, based upon the Defendant's murder of the victim, he is a dangerous offender. The trial court further found that the effective term of thirty years was reasonably related to the severity of the Defendant's crimes. As to the requirement that consecutive service is necessary to protect the public from further offenses by the Defendant, the trial court told the Defendant that "notwithstanding your testimony about remorse and your apology to this Court I was convinced from your testimony that everything you said was self serving and done to protect you and that you'll continue to protect your own interest." This finding by the trial court was consistent with its earlier general finding that the Defendant's testimony during his sentencing hearing was not credible but, rather, "totally self serving." Accordingly, the trial court determined that the public needed protection from the Defendant, apparently on the basis that the Defendant's willingness to testify in a self serving as opposed to a truthful manner indicated that the Defendant would also be willing to engage in further criminal acts if necessary to protect himself in some regard.

We are constrained to respectfully disagree with the trial court on this point. The Defendant has no previous history of serious criminal offenses. The instant crimes were committed against the Defendant's estranged wife during the pendency of divorce proceedings. According to the Defendant's testimony, these proceedings had been heated and hostile, at least sporadically. The Defendant had begun dating someone prior to the divorce becoming final. The Defendant committed the murder shortly after his new romantic relationship began and after

the victim was allegedly threatening him. These circumstances point not to an existing or future pattern of criminal behavior during which the general public is put at risk, but rather to an isolated event occurring in the midst of domestic difficulties. We do not imply that this violent murder is not deserving of harsh punishment. However, a single episode of criminal violence directed at a family member during a time of strife does not indicate, in and of itself, a propensity to commit future violent acts so as to establish that the public needs protection from "further criminal acts" by the offender. In short, we conclude that the proof in this case is not sufficient to establish that consecutive sentences are necessary to protect the public from *further* criminal conduct by the Defendant, as required by the *Wilkerson* decision. *See* 905 S.W.2d at 938. Accordingly, we have no choice but to overturn the trial court's imposition of consecutive sentences on the basis that the Defendant is a "dangerous offender."

CONCLUSION

The trial court erred when it enhanced the Defendant's sentence for the second degree murder conviction on the basis that the murder involved particularly great personal injuries. We have therefore reduced the Defendant's sentence for this conviction from twenty-five years to twenty-four years. We have further determined that the trial court erred when it ordered the Defendant's sentences to be served consecutively. Accordingly, we reverse that portion of the trial court's judgments and remand this matter such that the judgments against the Defendant may be corrected to reflect the modification

of his second degree murder sentence and that his sentences are to be served concurrently. In all other respects, we affirm the judgments of the trial court.

Appendix E

IN THE TWELFTH JUDICIAL DISTRICT OF TENNESSEE

No. 15356

STATE OF TENNESSEE,

v.

LONNIE LEE OWENS.

Dated: February 1, 2005

SENTENCING TRANSCRIPT

THE COURT: [77] * * *

I am going to find however that in this record there are two enhancement factors. I'm going to find that you did, in fact, treat the victim with exceptional [78] cruelty and that personal injuries were inflicted upon the victim.

Now I'm not unmindful that there is case law that says as pointed out by your attorney that a homicide, a second degree murder case, you don't apply those two factors, but I think factually there is a distinction here. I think we have an individual that based on the proof that was presented in the trial—at the trial was duct taped while alive, and was allowed to suffocate and die, and I think that, in fact, fits the statutory definition of both inflicting personal—personal injuries and exceptional cruelty, and because of that factual basis I make that finding.

When I weigh the en—the two enhancement factors against the mitigating factor I don't think there's any comparison. There's no movement at all the—the sentence that the Court has impose in my judgment based on those—those two factors is a sentence of 25 years.

* * *

Appendix F

RELEVANT TENNESSEE STATUTES (EFFECTIVE 2003)

Tenn. Code. Ann. § 39-13-202 First degree murder

(a) First degree murder is:

(1) A premeditated and intentional killing of another;

(2) A killing of another committed in the perpetration of or attempt to perpetrate any first degree murder, act of terrorism, arson, rape, robbery, burglary, theft, kidnapping, aggravated child abuse, aggravated child neglect or aircraft piracy; or

(3) A killing of another committed as the result of the unlawful throwing, placing or discharging of a destructive device or bomb.

(b) No culpable mental state is required for conviction under subdivision (a)(2) or (a)(3) except the intent to commit the enumerated offenses or acts in such subdivisions.

(c) A person convicted of first degree murder shall be punished by:

(1) Death;

(2) Imprisonment for life without possibility of parole; or

(3) Imprisonment for life.

(d) As used in subdivision (a)(1) "premeditation" is an act done after the exercise of reflection and judgment. "Premeditation" means that the intent to kill must have been formed prior to the act

itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.

Tenn. Code. Ann. § 39-13-210
Second degree murder

(a) Second degree murder is:

(1) A knowing killing of another; or

(2) A killing of another which results from the unlawful distribution of any Schedule I or Schedule II drug when such drug is the proximate cause of the death of the user.

(b) Second degree murder is a Class A felony.

Tenn. Code. Ann. § 40-35-114
Enhancement factors

If appropriate for the offense, enhancement factors, if not themselves essential elements of the offense as charged in the indictment, may include:

(1) The offense was an act of terrorism, or was related to an act of terrorism;

(2) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;

(3) The defendant was a leader in the commission of an offense involving two (2) or more criminal actors;

(4) The offense involved more than one (1) victim;

(5) A victim of the offense was particularly vulnerable because of age or physical or mental disability, including, but not limited to, a situation where the defendant delivered or sold a controlled substance to a minor within one thousand feet (1,000') of a public playground, public swimming pool, youth center, video arcade, low income housing project, or church;

(6) The defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense;

(7) The personal injuries inflicted upon or the amount of damage to property sustained by or taken from the victim was particularly great;

(8) The offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement;

(9) The defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community;

(10) The defendant possessed or employed a firearm, explosive device or other deadly weapon during the commission of the offense;

(11) The defendant had no hesitation about committing a crime when the risk to human life was high;

(12) The felony resulted in death or bodily injury or involved the threat of death or bodily injury to another person and the defendant has previously been convicted of a felony that resulted in death or bodily injury;

(13) During the commission of the felony, the defendant willfully inflicted bodily injury upon another person, or the actions of the defendant resulted in the death of or serious bodily injury to a victim or a person other than the intended victim;

(14) The felony was committed while on any of the following forms of release status if such release is from a prior felony conviction:

(A) Bail, if the defendant is ultimately convicted of such prior felony;

(B) Parole;

(C) Probation;

(D) Work release; or

(E) Any other type of release into the community under the direct or indirect supervision of the department of correction or local governmental authority;

(15) The felony was committed on escape status or while incarcerated for a felony conviction;

(16) The defendant abused a position of public or private trust, or used a special skill in a manner that significantly facilitated the commission or the fulfillment of the offense;

(17) The crime was committed under circumstances under which the potential for bodily injury to a victim was great;

(18) The defendant committed the offense while on school property;

(19) A victim, under § 39-15-402, suffered permanent impairment of either physical or mental functions as a result of the abuse inflicted;

(20) If the lack of immediate medical treatment would have probably resulted in the death of the victim under § 39-15-402;

(21) The defendant was adjudicated to have committed a delinquent act or acts as a juvenile that would constitute a felony if committed by an adult;

(22) The defendant, who was provided with court-appointed counsel, willfully failed to pay the administrative fee assessed pursuant to § 40-14-103(b)(1); or

(23) The defendant intentionally selects the person against whom the crime is committed or selects the property that is damaged or otherwise affected by the crime in whole or in part because of the actor's belief or perception regarding the race, religion, color, disability, sexual orientation, national origin, ancestry or gender of that person or of the owner or occupant of that property. However, this subsection should not be construed so as to permit the enhancement of a sexual offense on the basis of gender selection alone.

Tenn. Code. Ann. § 40-35-210
Imposition of sentence; evidence; presumptive sentences

(a) At the conclusion of the sentencing hearing, the court shall first determine the appropriate range of sentence.

(b) To determine the specific sentence and the appropriate combination of sentencing alternatives that shall be imposed on the defendant, the court shall consider the following:

(1) The evidence, if any, received at the trial and the sentencing hearing;

(2) The presentence report;

(3) The principles of sentencing and arguments as to sentencing alternatives;

(4) The nature and characteristics of the criminal conduct involved;

(5) Evidence and information offered by the parties on the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114; and

(6) Any statement the defendant wishes to make in the defendant's own behalf about sentencing.

(c) The presumptive sentence for a Class B, C, D and E felony shall be the minimum sentence in the range if there are no enhancement or mitigating factors. The presumptive sentence for a Class A felony shall be the midpoint of the range if there are no enhancement or mitigating factors.

(d) Should there be enhancement but no mitigating factors for a Class B, C, D or E felony, then the court may set the sentence above the minimum in that range but still within the range. Should there be enhancement but no mitigating factors for a Class A felony, then the court shall set the sentence at or above the midpoint of the range. Should there be mitigating but no enhancement factors for a Class A felony, then the

court shall set the sentence at or below the midpoint of the range.

(e) Should there be enhancement and mitigating factors for a Class B, C, D or E felony, the court must start at the minimum sentence in the range, enhance the sentence within the range as appropriate for the enhancement factors, then reduce the sentence within the range as appropriate for the mitigating factors. Should there be enhancement and mitigating factors for a Class A felony, the court must start at the midpoint of the range, enhance the sentence within the range as appropriate for the enhancement factors, and then reduce the sentence within the range as appropriate for the mitigating factors.

(f) Whenever the court imposes a sentence, it shall place on the record either orally or in writing what enhancement or mitigating factors it found, if any, as well as findings of fact as required by § 40-35-209.

(g) A sentence must be based on evidence in the record of the trial, the sentencing hearing, the presentence report, and, the record of prior felony convictions filed by the district attorney general with the court as required by § 40-35-202(a).

(h)(1) Upon sentencing a defendant to the department of correction or to a local jail or workhouse for a period of more than two (2) years, the judge shall announce in open court that information explaining the sentence just imposed is available to anyone upon request. The information explaining the sentence

shall consist of a copy of the completed uniform judgment document required by Rule 17 of the Rules of the Supreme Court and § 40-35-209(e), and an accompanying document that shall contain the following information:

(A) A statement explaining that an estimate of the number of years of a felony sentence that a defendant is required to serve before being first eligible for release on parole can be calculated by determining the defendant's range and release eligibility percentage and then applying that percentage to the defendant's sentence. An example is a defendant sentenced to ten (10) years in the department of correction as a persistent range III offender with a release eligibility percentage of 45%. That means the defendant must serve forty-five percent (45%) of ten (10) years or four and a half (4 1/2) years before being first eligible for release on parole. This four and a half (4 1/2) year minimum length of sentence service does not include a defendant's sentence reduction credits or the possible effect of prison overcrowding which are discussed in subdivisions (h)(1)(C) and (h)(1)(E), respectively;

(B) A statement that whether a defendant is actually released from incarceration on the date when such

defendant is first eligible for release is a discretionary decision made by the board of probation and parole based upon many factors and that such board has the authority to require the defendant to serve the entire sentence imposed by the court;

(C) A statement that pursuant to § 41-21-236, a defendant, after incarceration, may earn sentence reduction credits of up to eight (8) days per month for good institutional behavior and up to eight (8) days per month for satisfactory program performance for a maximum total of sixteen (16) days per month;

(D) A statement that the actual number of such reduction credits for good behavior and program performance that a defendant earns depends upon the defendant's conduct while incarcerated and that the department may remove sentence credits previously awarded for certain disciplinary infractions; and

(E) A statement that during certain specified times of prison overcrowding the governor may, pursuant to § 41-1-504, direct the board of probation and parole to grant early parole to a sufficient number of certain types of inmates to reduce the overcrowding.

(2) The failure of a judge to provide the sentence explanation information upon request as required by this subsection or the fact that the sentence

explanation information provided may be inaccurate, incomplete or erroneous shall not be used by a defendant in a criminal case as a ground for appeal, new trial, post-conviction relief or habeas corpus, nor shall it be construed to set aside, reverse, vacate, or void a finding of guilt, an acceptance of a plea of guilty or the sentence imposed in any criminal case.