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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15-5384

[Filed: May 14, 2020]

ANTHONY DARRELL DUGGARD HINES,	)
Petitioner-Appellant,	)
v.	)
TONY MAYS,	)
Respondent-Appellee.	)

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF TENNESSEE

BEFORE: COLE, Chief Judge; KETHLEDGE and WHITE, Circuit Judges.

PER CURIAM. Petitioner-Appellant Anthony Darrell Dugard Hines, a Tennessee death-row inmate,

appeals from the district court's order denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. Because trial counsel were constitutionally ineffective for failing to investigate a crucial witness, and the state court's determination otherwise was an unreasonable application of the clearly established law of *Strickland v. Washington*, 466 U.S. 668 (1984), we **REVERSE**.

STATE COURT PROCEEDINGS

In 1986, a jury convicted Hines of first-degree murder and found three aggravating circumstances: (1) Hines was previously convicted of one or more felonies, other than the present charge, which involved the use or threat of violence to the person; (2) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and (3) the murder was committed while Hines was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any rape, robbery, or larceny. *See* Tenn. Code Ann. § 39-2-203(i)(2),(5),(7) (1982) (repealed). Hines was sentenced to death.

On direct appeal, the Supreme Court of Tennessee affirmed the conviction, but remanded the case for a new sentencing hearing. *State v. Hines*, 758 S.W.2d 515, 524 (Tenn. 1988). The Supreme Court set forth the following facts:

> Between 1:00 and 1:30 p.m. on 3 March 1985 the body of Katherine Jean Jenkins was discovered wrapped in a sheet in Room 21 of the CeBon

Motel off Interstate 40 at Kingston Springs. The victim was a maid at the motel and had been in the process of cleaning the room when she was killed. Her outer clothing had been pulled up to her breasts. Her panties had been cut or torn in two pieces and were found in another area of the room. A $20 bill had been placed under the wrist band of her watch.

The cause of death was multiple stab wounds to the chest. Four deep, penetrating wounds, ranging from 2.5 inches to 6.4 inches in depth, had been inflicted about the victim's chest with a knife similar to a butcher knife or a hunting knife. Other superficial cuts were found in the area of the neck and clavicle. There was also a knife wound which penetrated through the upper portion of the vagina into the mesentery in the lower part of the abdominal cavity. Dr. Charles Harlan who performed the autopsy on the victim's body testified that in view of the small amount of blood in the vaginal vault it was his opinion the wound occurred at or about the time of death. The victim also had what he described as "defensive wounds" on her hands and arms.

Jenkins had been left in charge of the motel at about 9:30 a.m. At that time the occupants of Rooms 9, 21 and 24 had not yet checked out. When the manager left her in charge she was given a Cheatham County State Bank bag containing $100 in small bills to make change for motel guests as they paid. The bank bag,

bloody and empty, was discovered in the room with her body. It was her established habit to lock her automobile at all times and to keep her keys and billfold on her person when she worked. Her car keys, billfold and her 1980 silver-colored Volvo were missing.

On 1 March 1985 defendant had departed by bus from Raleigh, North Carolina. He had been given a non-refundable ticket to Bowling Green, Kentucky and $20 in spending money. The traveling time from Raleigh, North Carolina to Nashville, Tennessee was approximately 17 hours. Prior to his departure he was observed by a witness to be carrying a hunting knife in a sheath which was concealed beneath his shirt. The witness admonished him that he could not carry a knife like that on the bus to which he responded "I never go anywhere naked." "I always have my blade." Sometime in the early morning hours of 3 March 1985 he checked in and was assigned to Room 9 at the CeBon Motel. He was wearing a green army-type fatigue jacket, fatigue pants and boots. He was next seen at approximately 9:30 a.m. walking in a direction from his room toward a drink machine. At that time he told the manager he was not yet ready to check out. He was also seen sometime prior to 9:30 purchasing a sandwich at a deli-restaurant across the street from the motel. The same witness who saw defendant also saw another stranger there somewhere between 1:30 and 2:30 who she described as taller than defendant with dark hair, kinky looking and

wild-eyed. He departed the restaurant in the general direction of the CeBon Motel. The C[hea]tham County Sheriff testified that he responded to a call to the CeBon Motel at 2:37 p.m. When he arrived on the scene blood spots in the room were beginning to dry and the body was beginning to stiffen. Defendant was seen between 11:00 and 11:30 a.m. walking from the direction of the Interstate toward the CeBon Motel. At 12:40 p.m. a witness saw the victim's Volvo automobile pulling out from the CeBon Motel driveway. It was being operated by a person who appeared to be a man with very short, light colored hair. The vehicle crossed over the Interstate and turned east on Interstate 40. She followed behind and endeavored to catch up but it sped off toward Nashville at a high rate of speed. Defendant was next identified in possession of the car a few miles past Gallatin on Interstate 65, heading in the direction of Bowling Green, Kentucky. A group of young people first endeavored to help him start the stalled automobile and then gave him a ride to Bowling Green.

During the trip to Bowling Green one of these witnesses observed some dried blood on the right shoulder of his shirt. He carried a jacket which he kept folded. After he arrived at his sister's home in Bowling Green defendant told her he had endeavored to pay another day's rent at a motel when he was attacked by the motel operator. He demonstrated to her how he had stabbed the man. He also related to her he had

a sum of money. She could not remember whether he said $35,000 or $3,500. Defendant also told his sister's husband he had earned approximately $7,000 working as a mechanic in North Carolina. He displayed a set of keys to a Volvo automobile and explained that a man who had given him a ride attempted to rob him. Defendant purportedly grabbed the steering wheel and when the car ran off the road he grabbed the keys and ran. According to the witness he was wearing an army fatigue jacket which had something large, heavy and bulky in the pocket. The witness had previously seen defendant with a survival knife with a 6 ½ to 7 inch blade hanging from his belt.

When defendant was taken into custody he volunteered the statement that he had taken the woman's car but had not killed her. According to the arresting officer he had not advised the defendant that a woman had been killed prior to the volunteered statement. There was evidence however that defendant was aware he had been charged in Tennessee on a murder warrant. The victim's wallet was found wrapped in a thermal underwear shirt a short distance from where her car was found abandoned. The key to Room 9 of the CeBon Motel was found at the site where defendant had been camping out near Cave City, Kentucky. When asked by a [Tennessee Bureau of Investigation ("TBI")] agent to tell the truth about the death of Katherine Jenkins defendant stated that if the officer could guarantee him the death penalty he would confess and tell him all

> about the murder and that he could tell him everything he wanted to know if he was of a mind to. There were marks on the wall of Room 9 at the CeBon Motel apparently made by someone stabbing a knife into the wall. When shown photographs of the marks on the wall defendant responded that they were knife marks. These marks were obviously made by a knife larger than [the] two taken from defendant at the time of his arrest.

Id. at 517–19. In 1989, the trial court conducted a new sentencing hearing, and the jury found the same three aggravating factors. Hines was again sentenced to death, and the Tennessee Supreme Court affirmed the sentence. *State v. Hines*, 919 S.W.2d 573, 584 (Tenn. 1995).

In March 1997, Hines sought post-conviction relief. The trial court held evidentiary hearings and denied relief. The Tennessee Court of Criminal Appeals affirmed the decision. *Hines State*, No. M2002-01352-CCA-R3-PD, 2004 WL 112876, at *39 (Tenn. Crim. App. Jan. 23, 2004). In June 2004, the Tennessee Supreme Court granted Hines's application to appeal and remanded the case to the court of criminal appeals to reconsider its determination that the trial court submitted an incorrect version of the aggravating circumstance in Tenn. Code Ann. § 39-2-203(i)(5) to the jury. On remand, the court of criminal appeals held that the (i)(5) aggravating circumstance instruction had been proper and again denied relief. *Hines v. State*, No. M2004-01610-CCA-RM-PD, 2004

WL 1567120, at *1 (Tenn. Crim. App. July 14, 2004). The Tennessee Supreme Court denied leave to appeal.

Hines's second post-conviction petition seeking funds and authorization to conduct DNA testing was unsuccessful. *Hines v. State*, No. M2006-02447-CCA-R3-PC, 2008 WL 271941, at *1 (Tenn. Crim. App. Jan. 29, 2008). The Tennessee Supreme Court denied leave to appeal.

FEDERAL COURT PROCEEDINGS

In January 2005, Hines filed a pro se petition for a writ of habeas corpus in the district court. After Hines received appointed counsel, he filed an amended petition in June 2005. One month later, Hines filed another amended petition in which he asserted thirty-one claims of constitutional error. The warden filed a response. In September 2005, Hines filed a motion to conduct discovery. In November 2005, the district court held the case in abeyance to allow Hines to pursue state-court remedies under Tennessee's Post-Conviction DNA Analysis Act of 2001. Hines's petition for DNA testing was ultimately denied, and the denial was affirmed on appeal. *Hines v. State*, M2006-02447-CCA-R3-PC, 2008 WL 271941, at *8 (Tenn. Crim. App. Jan. 29, 2008), *perm. app. denied* (Tenn. Dec. 8, 2008).

The federal case resumed in February 2009. In October 2010, the district court granted Hines permission to conduct DNA testing. In February 2013, the district court held the case in abeyance pending the issuance of *Trevino v. Thaler*, 569 U.S. 413 (2013), in light of the Supreme Court's decision in *Martinez v.*

Ryan, 566 U.S. 1 (2012). In May 2014, the warden filed a motion for summary judgment. After holding an evidentiary hearing, the district court granted the warden's motion and denied Hines's petition. The district court certified for appeal all claims related to the death sentence. Following a remand for reconsideration of its certified claims under *Slack v. McDaniel*, 529 U.S. 473 (2000), the district court narrowed the scope of the claims certified for appeal. We expanded the certification.

STANDARD OF REVIEW

The district court's denial of a habeas petition is reviewed de novo. *Adams v. Bradshaw*, 826 F.3d 306, 309 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 814 (2017). The district court's findings of fact are reviewed for clear error, and its legal conclusions on mixed questions of law and fact are reviewed de novo. *Id.* at 309–10. Hines's petition was filed in January 2005 and is subject to the requirements of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Id.* at 310. Under AEDPA, a writ shall not be granted unless the state court's adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Relief may be granted under the "contrary to" clause "if the state court arrives at a conclusion opposite to that reached by th[e Supreme] Court on a question of law or if the state court decides a case differently than th[e Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000). Relief may be granted under the "unreasonable application" clause "if the state court identifies the correct governing legal principle from th[e Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id*. at 413. Hines "has the burden of rebutting, by clear and convincing evidence, the presumption that the state court's factual findings were correct." *Henley v. Bell*, 487 F.3d 379, 384 (6th Cir. 2007) (citing 28 U.S.C. § 2254(e)(1)).

DISCUSSION

The following claims were certified for appeal: (1) whether Hines was entitled to an evidentiary hearing concerning (a) DNA and fingerprint evidence that would have supported an actual innocence claim to overcome a procedural bar, and (b) declarations by Hines's trial and post-conviction counsel concerning their omissions; (2) whether trial counsel were ineffective for failing to: (a) challenge the jury panel as to the underrepresentation of women, (b) make a closing argument at the resentencing hearing, (c) challenge the underrepresentation of women on the petit and grand juries, present evidence of Hines's personal history as well as his alcohol and drug abuse, and object to the prosecution's failure to provide notice of aggravating circumstances, (d) interview and

conduct an effective cross-examination of Ken Jones, (e) investigate and present evidence of residual doubt, (f) challenge Dr. Charles Harlan's testimony, and (g) challenge the imposition of the death penalty as arbitrary and unconstitutional because the trial judge rejected a plea agreement which would have resulted in a life sentence; and (3) the prosecution withheld exculpatory evidence and elicited false testimony in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). On appeal, Hines does not address his claims of trial counsel ineffectiveness for failing to make a closing argument at the resentencing hearing and to object to the prosecution's failure to provide notice of aggravating factors. Hines has thus waived those claims. *Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000).

For the reasons described below, we hold that trial counsel were ineffective for failure to interview and conduct an effective cross-examination of Ken Jones, and for the related failure to investigate and present evidence of residual doubt in relation to Ken Jones at the penalty phase of the trial. The state court's contrary ruling was an "unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States" in *Strickland v. Washington*, 466 U.S. 668 (1984), and we thus reverse the district court's denial of Hines's petition for a writ of habeas corpus. 28 U.S.C. § 2254(d)(1). Before discussing this meritorious claim, we explain below why we reject Hines's other claims of error.

I. Whether Hines's claim that trial counsel were ineffective for failing to investigate and conduct forensic testing warranted an evidentiary hearing.

Hines's habeas petition asserted the ineffective assistance of trial counsel (IATC) arising from trial counsel's failure to investigate and conduct forensic testing of various pieces of evidence. Hines now argues that he was entitled to an evidentiary hearing on this IATC claim because the evidence demonstrated his actual innocence. Acknowledging that this IATC claim is procedurally defaulted, Hines argues that a showing of either actual innocence or the ineffective assistance of post-conviction counsel can overcome this default.

The district court's decision not to hold an evidentiary hearing is reviewed for an abuse of discretion. *Hodges v. Colson*, 727 F.3d 517, 541 (6th Cir. 2013) (citations omitted). No evidentiary hearing is required "if the record refutes the applicant's factual allegations or otherwise precludes habeas relief." *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007).

The district court held the habeas proceedings in abeyance and permitted Hines to exhaust state-court remedies concerning the DNA testing of certain evidence. In state court, Hines filed a successive post-conviction petition seeking to subject the following evidence to DNA testing: Jenkins's underwear; Jenkins's dress; Jenkins's slip; a bloody bank bag; a cigarette butt from Room 21; a twenty-dollar bill that was found on Jenkins; and a plastic spray bottle found in Room 21. *Hines*, 2008 WL 271941, at *3. The trial

court denied the petition and that decision was affirmed on appeal. *Id.* at *6–8.

When the habeas proceedings resumed, the district court granted Hines discovery and permitted DNA testing of the same evidence. Test results revealed that a section of Jenkins's underwear contained "a mixture of DNA from at least three individuals." (R. 124-1, PID 1349.) The results further clarified that the sample contained genetic material from "at least two male individuals," and that Hines was excluded as a contributor. (*Id*.) The district court did not hold an evidentiary hearing on this matter because Jenkins's murder was not committed in the context of sexual assault. (R. 145, PID 2310 ("If this murder involved sexual intercourse, the Court would be inclined to agree with Petitioner about this DNA evidence warranting an evidentiary hearing. Yet, the victim's death was caused by multiple and deep knife wounds to her chest area including her heart, lungs[,] and diaphragm.").) The district court concluded that the IATC claim was procedurally defaulted because it was not raised in state court and, alternatively, lacked merit.

Hines concedes that this IATC claim is procedurally defaulted. Review of this claim is thus barred "unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). "[I]n an extraordinary case, where a constitutional violation has probably resulted in the

conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Murray v. Carrier*, 477 U.S. 478, 496 (1986). To successfully assert actual innocence, a petitioner "must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992). Because Hines's IATC claim is procedurally defaulted, the actual innocence claim "is thus 'not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.'" *Schlup v. Delo*, 513 U.S. 298, 315 (1995) (quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993)). Hines must show that "it is more likely than not" that "in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Id*. at 327–29.

To support his claim of actual innocence, Hines characterizes his trial as one involving a sexual assault and murder, and relies on *House v. Bell*, 547 U.S. 518 (2006), to underscore the importance of the DNA test results.

In *House*, the petitioner Paul House was convicted of the first-degree murder of Carolyn Muncey and sentenced to death. *Id*. at 521. At trial, the prosecution presented evidence suggesting that DNA material found on Muncey's nightgown and underwear belonged to House, and that the blood found on House's jeans belonged to Muncey. *Id*. at 528–30. In closing

arguments, the prosecution argued that House's desire to have sex with Muncey was a possible motive for the crime. *Id*. at 531–32. House unsuccessfully filed two state post-conviction petitions, the second of which contained several IATC claims that were found to be waived. *Id*. at 533–34. On habeas review, the district court and this court held that House had not shown actual innocence to overcome the default of his IATC claims. *Id*. at 534–36 (citing *House v. Bell*, 386 F.3d 668 (6th Cir. 2004) (en banc)).

The Supreme Court disagreed. The Court noted that subsequent testing revealed that Muncey's nightgown and underwear contained DNA from her husband rather than from House, eliminating "the only forensic evidence at the scene that would link House to the murder." *Id*. at 540–41. The Court observed that this new information altered the prosecution's theory of the case: "When the only direct evidence of sexual assault drops out of the case, so, too, does a central theme in the State's narrative linking House to the crime." *Id*. at 541. Additional testing prompted one expert to opine that the blood on House's jeans "came from the autopsy samples, not from Mrs. Muncey's live (or recently killed) body." *Id*. at 543. The Court explained that the prosecution's efforts to discredit the expert's opinion were undermined by a police officer's statement that he saw "reddish brown stains" on House's blue jeans and that "[t]he pants were in fact extensively soiled with mud and reddish stains, only small portions of which are blood." *Id*. at 547. Other evidence showed that Muncey's marriage had involved physical abuse and that Muncey's husband had purportedly confessed to killing her. *Id*. at 549–50. The Court granted relief

because "the central forensic proof connecting House to the crime—the blood and the semen—has been called into question, and House has put forward substantial evidence pointing to a different suspect." *Id*. at 554.

Hines also relies on *Mills v. Barnard*, 869 F.3d 473 (6th Cir. 2017). The plaintiff in *Mills* had been convicted of rape of a child, aggravated sexual battery, and casual exchange of a controlled substance. *Id.* at 478. The primary evidence in support of his conviction was the victim's statement that she had engaged in sexual intercourse with Mills and corroborating DNA evidence suggesting that Mills was a possible source of a DNA sample. *Id*. On habeas review, Mills presented new DNA analysis that directly contradicted the state's inconclusive evidence and excluded Mills as a contributor of the DNA. *Id*. at 478–79. The Tennessee Court of Criminal Appeals overturned all of Mills' convictions, finding that the DNA evidence called into question the victim's statement. *Id*.

Here, unlike in *House* and *Mills*, DNA evidence was not used to establish Hines's guilt. At trial, Sheriff Weakley testified that Room 21 did not contain Hines's blood or fingerprints and that Jenkins's blood was not found on Hines's clothing. At the 1989 resentencing hearing, the medical examiner, Dr. Harlan, testified that "[a] visual inspection [of Jenkins] was performed. Since there was no material that was indicative of semen, no scientific or laboratory study was performed, since there was no such material to evaluate." (R. 173-9, PID 4737.) He confirmed that he did not see any visual indication that a sexual assault had occurred. When asked whether that precluded a "penile sexual

assault," Dr. Harlan answered: "Not necessarily. It means that there is no semen present, so there was no ejaculation." (*Id*. at PID 4740.) In closing argument at Hines's resentencing, the prosecutor mentioned the injury to Jenkins's vagina, but did not describe the injury as a sexually motivated crime; rather, the wound was evidence of a "reprehensible," "vile" act by "a depraved mind." (R. 173-11, PID 5029, 5032, 5037.) Hines's reliance on *House* and *Mills* is thus misplaced because the new evidence does not undermine any evidence central to his conviction.

Hines also submits that new fingerprint evidence supports his actual-innocence claim. Max Jarrell, a former fingerprint examiner for the Federal Bureau of Investigation (FBI), declared that Hines's fingerprints did not match fingerprints found at the scene and on the relevant evidence. As with the DNA evidence, however, this does not demonstrate Hines's actual innocence. The prosecution did not rely on fingerprint evidence to convict Hines, and the existence of other people's fingerprints at the scene does not undermine any of the evidence that the prosecution presented at trial.

The prosecution offered the following evidence at trial. Sheriff Weakley testified that Hines confessed to stealing Jenkins's car, which had the keys in it, and left the motel at either 8:30 or 9:00 a.m. on Sunday. Jenkins's husband testified that Jenkins locked her car "religiously" and used a key ring emblazoned with the words "I love my Volvo," with a heart symbol in the place of "love." (R. 173-1, PID 3826–28.) Gay Doyle, who managed the CeBon Motel, testified that Jenkins

"always locked her car" and "always kept [her keys] in her pocket with her." (*Id*. at PID 3850–52.) Doyle testified that she saw Hines walking from his room to a vending machine when she was leaving the motel "[b]etween 9:25 and 9:30." (*Id*. at PID 3849.) Penny Rust, who worked with Jenkins on a part-time basis, testified that she saw Jenkins's car leave the motel at 12:40 p.m. on Sunday; though she could not determine the driver's gender, she knew that Jenkins was not driving because she "would never drive [that] fast." (R. 173-2, PID 3883–84.)

Daniel Blair testified that he and his friends were driving to Bowling Green, Kentucky when they saw Hines stranded on the side of the road in a silver car that had overheated. After looking for water for thirty to forty-five minutes, Blair and his friends gave Hines a ride to Bowling Green, where Hines's sister lived. This journey lasted "around an hour." (*Id*. at PID 3908.) Hines told Blair that he had purchased the car from an "old lady" for "three or four hundred dollars." (*Id*. at PID 3910–11.) Blair noticed that Hines had a key attached to a "black thing" that had a "9" on it. (*Id*. at PID 3913–14.) Blair and his friends dropped Hines off at "3:00 or 4:00 o'clock." (*Id*.)

Victoria Daniel, Hines's sister, testified that Hines was in her home when she arrived there between two o'clock and five o'clock on Sunday afternoon. Daniel testified that Hines told her that he was attacked when he attempted to pay rent for another night at a motel but "got [the attacker] in the side, you know, and in the chest" with a knife. (R. 173-2, PID 3966–68.) Daniel noticed that Hines had "something reddish" on his

t-shirt, which she described "as blood at first." (*Id*. at PID 3974.) She also saw Hines with a key ring that had the words "I love Volvo" on it. (*Id*. at PID 3975.)

Robert Daniel, Hines's brother-in-law, testified that he noticed that Hines had an "I love Volvo" key chain. Hines explained that he grabbed the key chain from the car's ignition after a man who had picked him up tried to rob him.

Hines has not established that it is more likely than not that no reasonable juror would have convicted him in light of the new forensic evidence. *See Schlup*, 513 U.S. at 327. Although a "petitioner's showing of innocence is not insufficient solely because the trial record contained sufficient evidence to support the jury's verdict," *id*. at 331, the lack of Hines's DNA on Jenkins's underwear and the failure to find his fingerprints on various items in the hotel does not contradict the evidence presented by the prosecution at trial. As such, Hines cannot satisfy his burden. *Cf. Souter v. Jones*, 395 F.3d 577, 596–97 (6th Cir. 2005) (finding that petitioner established actual innocence by presenting new evidence that diminished impact of trial evidence linking petitioner to commission of crime).

Alternatively, Hines argues that the ineffectiveness of counsel for failing to raise the IATC claim on post-conviction review can overcome the procedural bar. In *Martinez*, the Supreme Court held that a successful claim asserting the ineffective assistance of post-conviction counsel could excuse the procedural default of an IATC claim if the IATC claim could only be raised on collateral review:

> Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

566 U.S. at 17. The *Martinez* rule was expanded to incorporate jurisdictions in which the "procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." *Trevino*, 569 U.S. at 429. The *Martinez* rule applies to Tennessee. *See Sutton v. Carpenter*, 745 F.3d 787, 795–96 (6th Cir. 2014). As such, Hines must show both that post-conviction counsel was ineffective and that the IATC claim "is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez*, 566 U.S. at 14.

A successful claim of counsel ineffectiveness requires a showing that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient performance occurs when counsel makes "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. Prejudice occurs when counsel's errors are "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*.

In support, Hines relies on a declaration by his post-conviction counsel, Donald E. Dawson, who stated in relevant part:

> Though the post-conviction petition raised a general claim that counsel was ineffective for failing to properly obtain and examine the physical evidence at the original trial, our office never presented any evidence in support of such a claim at the evidentiary hearing. We did not raise a similar claim related to the resentencing hearing. We never secured the physical evidence or otherwise employed forensic experts (such as fingerprint or serology experts) to assist us in the investigation of the physical evidence and claims relating to counsel's ineffectiveness for failing to obtain, examine, and/or test the physical evidence. We had no tactical reason for not doing so.

(R. 124-10, PID 1385.) Assuming deficient performance arising from post-conviction counsel's failure to retain expert assistance or pursue forensic testing, Hines cannot show prejudice. As discussed, it is not likely that the new DNA evidence would not have produced a different result at trial, and any errors by trial counsel related to the forensic evidence were not so serious as to deprive Hines of a fair trial. As such, Hines cannot overcome the default of the IATC claim. Nor has Hines shown that the district court abused its discretion by denying him an evidentiary hearing.

II. Whether trial counsel were ineffective for failing to challenge systematic underrepresentation of women on venires and as grand-jury forepersons in Cheatham County.

Hines next contends that trial counsel were ineffective because they did not challenge the systematic underrepresentation of women on the venires in Cheatham County, Tennessee, or the systematic exclusion of women from serving as a grand jury foreperson in Cheatham County. The warden argues that the state court's resolution of the former claim was not an unreasonable application of Supreme Court precedent. As to the latter claim, the warden argues that the claim is procedurally defaulted.

Hines must show that trial counsel performed deficiently, that is, "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. In so doing, Hines "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id*. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). Second, Hines must show that the deficient performance resulted in prejudice, meaning, "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*. at 687.

Hines argues that trial counsel should have challenged the underrepresentation of women on the venires. Under the Sixth Amendment, a criminal defendant is guaranteed the right to be tried by a jury

selected from a fair cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975). A prima facie showing of the denial of this right requires a defendant to show:

> (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364 (1979). Notably, "neither *Duren* nor any other decision of th[e Supreme] Court specifies the method or test courts must use to measure the representation of distinctive groups in jury pools." *Berghuis v. Smith*, 559 U.S. 314, 329 (2010). Nevertheless, if the defendant makes the prima facie showing, then "it is the State that bears the burden of justifying this infringement by showing attainment of a fair cross section to be incompatible with a significant state interest." *Duren*, 439 U.S. at 368.

Hines correctly identifies women as a distinctive group within a community. *See id*. at 364 (citing *Taylor*, 419 U.S. at 531); *Ford v. Seabold*, 841 F.2d 677, 681 (6th Cir. 1988). Thus, Hines has satisfied the first prong.

To satisfy the second prong, Hines refers to the Tennessee Court of Criminal Appeals' opinion

concerning the disparity between the percentage of women living in Cheatham County and the percentage of women who have comprised the venires:

> Based upon the report of Dr. James O'Reilly which provided that the percentage of women in Cheatham County between 1979 and 1990 was 50.6 to 50.7% of the population, but the percentage of women in the Cheatham County jury venire for that same time period was between 10 and 22%, the State conceded that the first two prongs of the *Duren* test had been satisfied.

Hines, 2004 WL 1567120, at *34. The warden does not discuss the first or second prongs of the *Duren* test on appeal.

The issue then is whether Hines has established a systematic exclusion of women from the jury selection process. Unlike in *Taylor* and *Duren*, Hines does not argue that statutory provisions form the basis of the exclusion.[1] Rather, he relies on testimony offered during the initial post-conviction proceedings to support this claim.

Jennie Delores Harris Moulton, who worked in the clerk's office of the Cheatham County circuit court

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[1] In *Taylor*, the petitioner pointed to a Louisiana statute that automatically excluded all women from the jury-selection process unless they had previously filed a written declaration of their desire to serve. 419 U.S. at 523–24. Likewise, in *Duren*, Missouri law established an automatic exemption from jury service for women who either requested not to serve or failed to report for service. 439 U.S. at 361, 361 n.11, 368.

during Hines's trials, testified about the procedure for selecting a venire. A judge appointed three individuals as jury commissioners who would meet with the court clerk "each month to draw out names to get a panel of jurors for the next upcoming court." (R. 174-2, PID 5354.) This was called the "sheriff's voir dire." (*Id.* at PID 5355.) The sheriff served summons for those individuals, who, when they appeared, were placed on "a jury list." (*Id.*) "The judge, at that time, drew out a panel for the grand jury" and "the petit jury—the trial jury." (*Id.*)

The first step of the process involved "charging the jury box," which, as Moulton explained, meant that "they gather new names and all and put [the names] back into the box," a procedure that occurred every two years "unless the box is getting low and you need to do it more than that." (*Id.* at PID 5357.) Moulton explained that the jury commissioners obtained the names for the box from "the voter registration list, because we had more access to it. And they would go randomly, maybe, every sixteenth one or twentieth one down and write the name and address on a little jury ticket." (R. 174-2, PID 5357–58.) When charging the box, each of the three jury commissioners worked from a separate section of the County's voter registration list and would independently select names. Moulton testified that to assemble the list that would become the sheriff's voir dire, either a child or a blindfolded person would draw names from the box. Two men and one woman served as the jury commissioners; Ms. Adkisson, one of the commissioners, wrote down the names as the other two commissioners called them out.

Moulton testified that the jury commissioners tried "to get good solvent jurors" and would remove a name from consideration "if they knew at that time if there was someone that was deceased or someone that was real sick or in the hospital or if it was a student that they knew was off to college somewhere, [or] someone that maybe was in jail." (*Id*. at PID 5368.) When the selected person was a school teacher, the jury commissioners "would pitch it back—or lay him over to the side to put back into the box where they could—he could serve maybe during the summer months . . . when he's not in school." (*Id*. at PID 5368–69.) When asked whether women with children were also removed, Moulton replied: "Well, no, not all women with children. But if they had just had a baby or something and they knew it, yeah, you know, they—they did." (*Id*. at PID 5369.)

Moulton testified that once the jury commissioners compiled a list of individuals, the list was given to the sheriff, who prepared the jury summonses; the person was either served or instructed by telephone to pick up the summons, which contained the date for the individual to appear for jury service. When those summoned appeared in court, their information was collected and they were assigned a number. A judge then selected numbers from a box; the first twelve individuals who had a corresponding number served on the grand jury, and the remainder on the petit juries.

Moulton testified that the number of individuals who appeared pursuant to the summonses varied. Sheriff Weakley, who was sheriff during both of Hines's trials, would be given a list of 150 individuals to

summon, but only a third or less would appear. By contrast, under Sheriff Weakley's successor, approximately 75 to 80 percent would appear. There was no discipline for individuals who failed to appear, and no effort was made to understand why compliance was low during Sheriff Weakley's tenure. The individuals who did appear were divided into petit jurors and grand jurors.

When asked whether a conscious effort was made to exclude women from jury service, Moulton's response was characterized as inaudible in the transcript. Moulton denied that Black individuals were excluded from jury service. Moulton was again asked whether there was a conscious effort to exclude a particular group of people, and she responded: "I don't think it was an intentional thing. But Ms. Martha Adkisson, she didn't like too many women on the jury . . . She would say, ['']Getting too many women, getting too many women.['']" (R. 174-2, PID 5383.) Moulton expanded her answer:

> [S]he would be writing [the names] down, she would tell the guys, say, ["]We're getting too many women, getting too many women.["] I think they wanted to equal it out, but she had a thing about putting too many women on the jury. So when I wound up at one time, whenever I was clerk—or even when Mr. Harris was—was clerk—we wound up with a big box of women.

(*Id.*) When asked whether that circumstance was "an attempt to equalize that," Moulton responded: "Yes, sir. I think it was just an attempt. It wasn't being like—[s]he didn't have anything against women,

because, naturally, she was one herself. But she, I guess, probably wanted to equal out . . . the men and the women." (*Id*. at PID 5383–84.) Moulton added that the commissioners "never discriminated [against] anyone because of race, color, or nationality or men or women or if they had a limp or one eye or whatever." (*Id*. at PID 5384.)

Lloyd Harris testified that he had "never—never seen anyone" on the jury commission do something that would prevent a group of people from serving on the jury. (R. 174-3, PID 5417.) Harris denied hearing Ms. Adkisson say that the jury list contained too many women. Harris acknowledged, however, that some judgments were made:

> It was two men and Ms. Adkisson. She was a school teacher and she done the writing down. We'd have somebody draw them out of the box, a small child or somebody blindfolded. They would draw the names out and she would write them down. And she'd come across one, maybe, was a school teacher that she knew in the county. And she'd say, ["]It's going to be hard for her to serve because she's a school teacher.["] And back then, you couldn't get nobody, you know, to—fill in.

(*Id*.) Harris testified that Ms. Adkisson would "say, [']We'll get her this summer when school is out.[']" (*Id*. at PID 5417–18.) Harris explained that the same would happen for a tobacco farmer during a harvest. When asked whether the male commissioners would take steps to prevent a group of people from serving on the jury, Harris replied: "No, sir, I didn't see nothing." (*Id*.)

Harris testified that he was with the commission "[m]ost of the times," and that his daughter, Moulton, was there in his absence. (*Id*.)

When asked about women being excused from jury service, Harris testified that "[i]t was easy for them to get off" because "most of them had children at home and had to take care of them. They didn't have no babysitter. That's the number one thing." (R. 174-3, PID 5419.) Harris was asked whether he "observe[d] whether the court seemed to be more inclined not to let folks just be off jury duty just because they wanted to be off jury duty?"; he responded: "I think so, yes, sir." (*Id*. at PID 5420.)

On re-direct examination, Harris was asked whether Adkisson chose jurors, and he responded: "Only times she'd ask them not to [be] put on there if it was a school teacher or if it was a woman she knowed (sic) that had a bunch of children, [and had] nobody to stay with them[.]" (*Id*. at PID 5434–35.) Harris testified that, because the commission met once or twice a year during the school year, multiple possible jurors may have been excluded per year. Harris testified that, notwithstanding Adkisson's possible opinion regarding there being "too many women," he did not observe that opinion having any effect on the way that names were chosen. (*Id*. at PID 5435.)

Hines relies on *Duren v. Missouri* to support this claim. 439 U.S. 357 (1979). In *Duren*, there were two opportunities for the systematic exclusion of women from venires to occur: when the questionnaires were sent to those randomly selected from the voter registration list, they contained language stating that

a woman could elect not to serve by indicating that desire on the form and returning the questionnaire to the jury commissioner; and (2) a woman's failure to respond to a summons was treated as a claimed exemption, whereas other individuals had to do more to benefit from an exemption. *Id.* at 361–62, 366–67. Women comprised 54% of the Jackson County, Missouri, population at the relevant time. *Id.* at 362. Noting that "the percentage of the women at the final, venire, stage (14.5%) was much lower than the percentage of women who were summoned for service (26.7%)," the Court concluded that the petitioner "demonstrated that the underrepresentation of women in the final pool of prospective jurors was due to the operation of Missouri's exemption criteria." *Id.* at 367.

Hines fails to show an entitlement to habeas relief on this ineffective-assistance-of-counsel claim with regard to either his 1986 or 1989 trials. As to Hines's 1986 trial, the Tennessee Court of Criminal Appeals concluded that "[t]he record supports the post-conviction court's finding that Hines was not prejudiced" by counsel's failure to "challenge the 1986 venire." *Hines*, 2004 WL 1567120, at *36. We cannot say that the Tennessee court's conclusion was an unreasonable application of clearly established Supreme Court precedent. *See* 28 U.S.C. § 2254(d). Hines must show prejudice to succeed on his IATC claim, even though the alleged underlying error was structural in nature. *See Ambrose v. Booker*, 684 F.3d 638, 652 (6th Cir. 2012). To succeed on a fair-cross-section theory in the context of his ineffective-assistance claim, Hines must show that, given the underrepresentation of women in the jury

venire, there was a reasonable probability that "a properly selected jury [would] have been less likely to convict." *Id*. at 652 (quoting *Hollis v. Davis*, 941 F.2d 1471, 1482 (11th Cir. 1991)*; see also Garcia-Dorantes v. Warren*, 801 F.3d 584, 596–98 (6th Cir. 2015). Hines has not shown a reasonable probability that the result of his trial would have been different if the jury venire more adequately represented the community, particularly in light of the fact that three women served on the petit jury.

Regarding Hines's challenge to his 1989 resentencing jury, AEDPA also bars Hines's relief because the Tennessee Court of Criminal Appeals reasonably determined that Hines "failed to show that he was prejudiced" by 1989 counsel's decision not to challenge the venire. *Hines*, 2004 WL 1567120, at *36. The Tennessee court's decision was not an unreasonable application of *Strickland*.

The same is true of Hines's assertion that women were systematically excluded from serving as the foreperson of the grand jury. "[A] criminal defendant's right to equal protection of the laws has been denied when he is indicted by a grand jury from which members of a . . . group purposefully have been excluded." *Rose v. Mitchell*, 443 U.S. 545, 556 (1979). To prevail, Hines must (1) identify a distinctive and recognizable group, (2) determine the disparity between the identified group and the proportion of the group called to serve over a period of time, and (3) establish that the selection procedure is not gender-neutral. *Id*. at 565 (citing *Castaneda v. Partida*, 430 U.S. 482, 494 (1977)).

Here, Moulton testified that the grand jury foreman was selected and sworn in by the judge. The grand jury foreman was appointed for two-year terms; Mouton recalled that two men—Buddy Frazier and Billy Ellis—were appointed repeatedly. Hines also provided an affidavit from Gaye Nease, an investigator with the Office of the Federal Public Defender, stating that no woman had been chosen as a grand-jury foreperson between 1919 and 1985, when Hines was indicted.

Again, Hines fails to show prejudice. We also note that the grand jury foreperson's duties and powers in Cheatham County during this time appear to be merely "ministerial," and therefore do not present a risk of prejudice. *Hines*, 2004 WL 1567120, at *36 n.3. Contrary to the Supreme Court's description of the role of the Tennessee grand jury foreperson in *Hobby v. United States*, 468 U.S. 339, 348 (1984), the relevant state statute establishes that the foreperson has the same voting power as any other grand juror, Tenn. Code Ann. § 40-1506, and therefore does not have "virtual veto power over the indictment process." *Hobby*, 468 U.S. at 348. Thus, Hines is not entitled to relief on this claim.

III. Whether the prosecution withheld exculpatory evidence and elicited false testimony.

Next, Hines contends that he was denied due process because the prosecutor (1) did not disclose records indicating the existence of exculpatory DNA evidence and (2) presented testimony that falsely denied the existence of that evidence.

Before trial, defense counsel was given a report from the Tennessee Bureau of Investigation (TBI) that stated that the medical examiner's swabs "failed to reveal the presence of spermatozoa." (R. 175-6, PID 5790.) Post-conviction counsel later discovered some handwritten "raw notes" from the TBI stating that the swabs that had been sent to the TBI for testing had molded. (Hines Br. at 20; R. 175-4, PID 5787.) The final report did not disclose this fact. Hines now argues that the TBI did not find an absence of spermatozoa on the swabs. Rather, "the raw notes" reveal "no sperm was seen microscopically (likely because of mold)" and "no testing for semen was done on the swabs because of their molded condition." (Hines Br. at 20.) Thus, Hines argues, the final report was misleading. Further, because defense counsel was unaware that there might have been spermatozoa present, they were unable to explore the theory that the crime was committed by an unknown assailant by conducting their own testing for semen or DNA.

Hines also asserts that, had the raw notes been disclosed at trial, defense counsel would have been afforded an opportunity to impeach Dr. Harlan's testimony that there was "no material that was indicative of semen" present. (R. 173-9, PID 4737.)[2]

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[2] Hines also asserts that the prosecution presented false testimony by Sheriff Weakley, but refers to a district court pleading in support rather than present an argument in his brief. We thus need not address this portion of the claim. *See Northland Ins. v. Stewart Title Guar. Co.*, 327 F.3d 448, 453 (6th Cir. 2003) ("[W]e join the many circuits that have explicitly disallowed the incorporation by reference into appellate briefs of documents and pleadings filed in the district court.").

The warden responds that Hines cannot overcome the procedural default of this claim.

Hines first raised this claim on habeas review, asserting:

> The prosecution also knowingly presented false testimony from [Dr.] Harlan that there was no evidence of semen and that there was no study performed on any such evidence, and the prosecution withheld evidence which demonstrated the falsity of that testimony and which was otherwise material to the jury's guilt and death verdicts, including proof of the results of any such scientific or laboratory study concerning the existence and nature of any semen.

(R. 23, PID 112 ¶10(c)(3)). The district court conducted an evidentiary hearing to address the *Brady* claim and denied relief:

> First, there is not any scientific evidence that the mold was caused by the timing of the TBI laboratory testing. The possibility of the mold impacting any semen is speculative. There is not any scientific proof that if Petitioner's trial counsel had seen the laboratory working papers [the raw notes] about the molded swab that any testing could have been conducted. As discussed infra, Dr. Harlan's trial testimony was based upon his visual examination of the victim, not a laboratory test. At Petitioner's trial, a TBI laboratory technician testified about the testing of the victim's swabs. To date, the proof remains

> that the several swabs taken from the victim did not contain semen. Petitioner's tying of the inferences about another suspect was found by the State courts to be "farfetched" and this Court agrees. The cited suspect was not seen in the area at the time of the murder and the witness did not testify that this suspect, described as a wild person, was going to the motel.

(R. 145, PID 2316–17.)

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* The *Brady* rule applies to both exculpatory and impeachment evidence. *Giglio*, 405 U.S. at 154. The omission of such evidence "must be evaluated in the context of the entire record." *United States v. Agurs*, 427 U.S. 97, 112 (1976).

At the guilt phase, Dr. Harlan testified that he performed Jenkins's autopsy on March 4, Jenkins suffered a stab wound to her vaginal vault. It was the final wound inflicted on Jenkins.

At the resentencing hearing, defense trial counsel asked Dr. Harlan on cross-examination whether he

conducted any tests to determine whether sperm was present or a sexual assault had occurred, and he responded: "A visual inspection was performed. Since there was no material that was indicative of semen, no scientific or laboratory study was performed, since there was no such material to evaluate." (R. 173-9, PID 4737.) Trial counsel then asked, "So you didn't even observe visually anything indicating any type of sexual assault[,] is that right?"; Dr. Harlan responded, "That is correct." (*Id*.) The prosecution pursued this topic on re-direct examination:

> Q: Dr. Harlan, when you said there was no evidence of sexual assault, you meant there was no—what type of evidence did you mean?
>
> A: I meant that there was no evidence of ejaculation; that, there was no semen present.
>
> Q: There would be no penile sexual assault, then? Would that define it better?
>
> A: Not necessarily. It means that there is no semen present, so there was no ejaculation.

(*Id*. at PID 4740.)

In a deposition taken during the initial post-conviction proceedings, Dr. Harlan explained that an autopsy can determine whether sexual contact had occurred but not sexual assault because "sexual assault . . . has a legal connotation" related to whether there was consent "that goes beyond whether there's semen present or not." (R. 141-1, PID 2045–46.) He stated that he would consider a stab wound to the vagina a suspicious circumstance that would prompt him to

examine for sexual contact during an autopsy. He affirmed that he would use swabs if he saw no evidence of sexual contact with the naked eye but suspected that sexual contact had occurred. In this case, he sent swabs to the TBI, but could not recall whether he examined them. Dr. Harlan stated that he had not seen the TBI report "until this date." (*Id*. at PID 2060.)

When cross-examined, Dr. Harlan stated that sending anal and vaginal swabs to the TBI was standard practice. He added that he did not personally test the swabs and did not have the facility to do so. He denied that a visual inspection of Jenkins's body led him to believe that semen was present. He affirmed that he prepared the swabs out of "an abundance of caution." (*Id*. at PID 2066.)

In the evidentiary hearing held by the district court, Mike Turbeville, a forensic scientist supervisor at the Forensic Biology Unit at the TBI Crime Lab in Nashville, testified that Dr. Harlan's office submitted a form dated March 4, 1985, requesting toxicology testing and a review of the vaginal and anal swabs taken from Jenkins. Turbeville testified that a TBI report dated July 5, 1985, stated that the swabs—Exhibits No. 41A and 41B—"failed to reveal the presence of spermatozoa." (R. 142, PID 2080–81.)

At the hearing, Turbeville read aloud the raw notes' description of Exhibit No. 41A, the vaginal swabs : "Two swabs were molded when received. Numerous RBS, that stands for reddish brown stains, on tubes and—that second I can't make out. I don't know if it's slits or sheets. Micro, which is a microscopic exam, July 1, 1985. Scattered epithelial cells, bacteria, yeast.

No SP. No sperm." (*Id*. at PID 2087 (quoting R. 175-4, PID 5787).) Concerning the description of Exhibit No. 41B, the anal swabs, Turbeville quoted the notes as saying: "Rectal swabs, quotes, Jenkins Catherine, rectum, end quotes. Two swabs with RBS, reddish brown stains, and fecal material. Micro, July 1, 1985. Scattered debris, some epithelial cells, no sperm." (*Id*. at PID 2087 (quoting R. 175-4, PID 5787).) Turbeville testified that the notes meant that testing to determine the presence of semen had not occurred, but that the final reports do not reflect this fact. Turbeville acknowledged that it may have been "appropriate" for the TBI report to indicate that no testing for semen had occurred because the sample "was somewhat compromised by mold." (*Id*. at PID 2089–90.)

While this background demonstrates that laboratory notes were not turned over to trial counsel, Hines is not entitled to relief on his *Brady* claim because he has not demonstrated that the undisclosed notes are material. That is, Hines has not shown a reasonable probability that, had the raw notes been disclosed to the defense, the result of the proceeding would have been different. *See Bagley*, 473 U.S. at 682. Hines argues that had defense counsel been given the notes, they "would have used [them] . . . to establish that the prosecution could not exclude the reasonable hypothesis that someone other than Darrell Hines left semen on the victim," such as the "suspicious and wild-eyed individual – not Hines" seen by "the clerk of the store across from the motel . . . near the time of the killing." (Hines Br. at 23–24.) However, there is no indication that there was in fact semen on the swabs or the victim's body, so Hines's argument would have been

mere unconvincing speculation. Dr. Harlan testified that he found no evidence of semen upon a visual inspection and that he only ordered testing out of "an abundance of caution" and not because he saw evidence of semen, as Hines speculates. (R. 141, PID 2065–66.)

Nor can Hines show that Dr. Harlan testified falsely. "[A] prosecutor violates a criminal defendant's due process rights when she knowingly allows perjured testimony to be introduced without correction." *Thomas v. Westbrooks*, 849 F.3d 659, 666 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 390 (2017) (citing *Agurs*, 427 U.S. at 103). To prevail, Hines must show that: "(1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew it was false." *Rosencrantz v. Lafler*, 568 F.3d 577, 583–84 (6th Cir. 2009) (citing *Coe v. Bell*, 161 F.3d 320, 343 (6th Cir. 1998)).

Hines's argument focuses on Dr. Harlan's statements that based on a "visual inspection . . . there was no material that was indicative of semen," that there was "no such material to evaluate," and "there were no semen present." (Hines Br. at 83 (quoting R. 173-9, PID 4737, 4740).) Because Hines cannot show that the vaginal swabs contained any evidence of semen, he cannot show that Dr. Harlan's testimony was actually false. Hines argues that Dr. Harlan's office's request for the TBI to test "seminal type" indicates that it "concluded there were materials 'indicative of semen,'" contrary to Dr. Harlan's testimony. (Hines Br. at 25 (emphasis removed).) However, Dr. Harlan has explained that he requested this test out of "an abundance of caution," (R. 141, PID

2065–66), and this testing request does not establish that Dr. Harlan's testimony was actually false, *Rosencrantz*, 568 F.3d at 583–84. In fact, post-conviction forensic testing of Jenkins's underwear indicated that while there were bloodstains from which DNA testing could be conducted, the test for semen produced "negative results." (R. 124-1, PID 1347.) Thus, we reject Hines's claim that the prosecution withheld exculpatory evidence or knowingly elicited false testimony.

IV. Whether trial counsel were ineffective during the penalty phase of trial.

Hines contends that trial counsel were ineffective during the resentencing phase because they did not: (1) present available mitigating evidence; (2) challenge Dr. Harlan's testimony about the amount of time Jenkins survived after being wounded; or (3) object to the death penalty as arbitrary and unconstitutional under the circumstances of this case. We address, and reject, each of these sub-claims in turn.

A. Failure to present mitigation evidence

Hines contends that trial counsel were ineffective because they did not present available mitigation evidence at the penalty phase.[3] Specifically, Hines

[3] In the initial state post-conviction proceedings, Hines argued that trial counsel were ineffective because they did not "present available mitigation evidence, including but not limited to Petitioner's childhood exposure to violence, crime, poverty and substance addictions. Had Counsel fulfilled this duty it is likely Petitioner would have been spared the death sentence." (R. 174-6, PID 5751.) After an evidentiary hearing, the trial court denied the

asserts that trial counsel should have presented evidence that Hines endured physical and sexual abuse by his stepfather as well as sexual abuse by an uncle, suffered head injuries as a child, endured physical and psychological abuse at Green River Boys Ranch, sniffed gasoline and glue and consumed alcohol and drugs as an adolescent, suffered from paranoia and chronic post-traumatic stress disorder, which affected his brain function, and has a deficit of serotonin in his brain. The warden responds that the state court's decision was not an unreasonable application of Supreme Court precedent.

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claim, and the decision was affirmed on appeal. *Hines*, 2004 WL 1567120, at *32.

Hines raised the same argument in the habeas proceedings. The district court found that the state court's resolution of this claim was not an unreasonable application of Supreme Court precedent:

> [W]hatever the deficiencies of counsel at the resentencing hearing, the post conviction hearing present[ed] additional expert proof and afforded the state courts yet an additional opportunity to evaluate the appropriateness of Petitioner's death sentence. The state courts deemed the Petitioner's extensive mitigation evidence not to outweigh the State's other proof of aggravating circumstances of the wounds. The victim's wounds, Petitioner's escape and possession of the victim's vehicle and key, Petitioner's explanation of events to his sister and the Petitioner's statements to officers that he could provide all the details of the murder lead this Court to conclude that the state courts' decisions on the adequacy of counsel's performance at sentencing would not have caused a different result and those decisions were reasonable applications of clearly established federal law.

(R. 145, PID 2379.)

As an initial matter, Hines asserts that the state post-conviction appellate court applied the incorrect standard in reviewing his mitigating-evidence claim, and therefore we should review this claim de novo. *Strickland* requires that a petitioner show that there was a "reasonable probability" that, but for the counsel's failure to introduce the mitigating evidence, "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Hines argues the state court apparently applied a stricter standard, as evidenced by the use of the phrase "would not have affected" in its opinion:

> In *Goad v. State*, 938 S.W.2d 363 (Tenn. 1996), our supreme court set out the relevant factors to consider when determining if prejudice had resulted from a trial attorney's failure to present mitigating evidence during the penalty phase of a capital trial. . . . "[C]ourts have considered whether there was such strong evidence of aggravating factors that the mitigating evidence **would not have affected the jury's determination**."
>
> In the present appeal, the post-conviction court found that counsel were not deficient in their representation of the petitioner, saying that "[i]n view of the overwhelming strength of the aggravating factors in Petitioner's case . . . , the mitigating factors **would not have affected the jury's determination**[.]" Accordingly, under the principles enunciated in *Goad*, the post-conviction court found that the petitioner

> was not prejudiced. . . . We conclude that the record supports this determination.

Hines, 2004 WL 1567120, at *31–32 (emphases added) (quoting *Goad*, 938 S.W.2d at 371).

It is unclear what standard the post-conviction court actually applied. The opinion identifies the proper *Strickland* standard in its "Standard of Review" section but does not use the "reasonable probability" language anywhere else in the opinion—other than in footnote 2, where the court discusses a case, *Wiggins v. Smith*, 539 U.S. 510, 516 (2003), which the Tennessee court found inapplicable. *See Hines*, 2004 WL 1567120, at *22–23, 31–32, 32 n.2. Although habeas review includes a "presumption that state courts know and follow the law," *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002), we have previously found that a state post-conviction court's failure to apply the *Strickland* test warranted de novo review in circumstances similar to those here. *See Vazquez v. Bradshaw*, 345 F. App'x 104, 112 (6th Cir. 2009) (finding the de novo standard appropriate where the state post-conviction court reviewed whether the trial's outcome "would have been different" due to new evidence, rather than whether new evidence presented a "reasonable probability" of a different outcome). Here, although the court identified the correct legal standard early in the opinion, it used different language in explaining its decision. When a state court applies a decisional rule contrary to clearly established federal law, "'a federal court [is] unconstrained by § 2254(d)(1),' and de novo review is appropriate." *Fulcher v. Motley*, 444 F.3d 791, 799 (6th Cir. 2006) (quoting *Williams v. Taylor*, 529 U.S. 362,

406 (2000)). Thus, we will proceed with a de novo analysis. Hines's claim fails even under this standard.

Trial counsel presented extensive mitigation evidence at the 1989 penalty phase. First, counsel presented testimony from Therman Page, a counselor at the Tennessee State Prison. Page worked with Hines "on several occasions relating to visits and various other problems that he's had." (R. 173-9, PID 4745.) Page testified that Hines had been disciplined by "receiv[ing] two or three different writeups[,]" but that none related to violence against another individual. (R. 173-10, PID 4759–60.) Page described Hines as follows: "[He is] somewhat [of] a loner. He does not have a lot of close friends as far as the other people that he's incarcerated with. The times that I have talked to him and been with him, he has talked to me freely, but he does not have the friends that a lot of other people have in prison." (*Id*. at PID 4760.) According to Page, Hines "does not have very many visits at all. I don't recall, right off, any family members at all coming to see him, the time that I've known him," which was "close to three years." (*Id*. at PID 4760–61.)

Trial counsel next introduced the transcript of John Croft's testimony from Hines's first trial.[4] Croft and his wife, Nancy, lived in Cave City, Kentucky and were Hines's grandparents. Croft testified that Hines's mother, Barbara, first married a man named Dugard, with whom she had three children, including Hines. Dugard abandoned the family when Hines was "maybe ten or eleven." (*Id*. at PID 4767–68.) Barbara then

[4] Croft died before the resentencing hearing.

married Bill Hines. Croft and his wife kept the children because Barbara worked; he described Hines as "a well-mannered boy, a well minding boy. And the keeping of the children was kind of left to the older girl." (*Id*. at PID 4768.) When Hines was "about thirteen years old," Barbara and her family moved, and "it was no longer convenient for [Croft and his wife] to have the children." (*Id*. at PID 4769.) According to Croft, Hines was "a little high tempered" but not troublesome. (*Id*.)

Croft testified that Hines stayed with him briefly when he was a teenager, that Hines called him "Big John," "never g[a]ve [him] a minute's trouble," and "was always well behaved, and he minded good." (*Id*. at PID 4770.) When asked about discipline in the Hines's home, Croft replied that he "never figured it was so much a discipline problem as it was the separation. You know, there was a loneliness." (*Id*. at PID 4770–71.) Croft was asked whether Hines minded him, and he responded: "Always. I had the best respect from him; you know, sometimes even more respect from him than I did one of my boys. But mine were in and out, gone a lot, school and all. But Darrell always did mind, and he minded his grandmother, as well." (*Id*. at PID 4771.)

During this stay, Croft noticed a change in Hines's behavior, searched his room, and saw evidence that Hines had been sniffing glue. Croft viewed Hines as "a changed personality from that day on" and harbored "doubts" about having him live there permanently. (*Id*. at PID 4772–73.) Croft knew that Hines had been incarcerated and suspected that it changed Hines's

behavior: "He had a chip on his shoulder—a chip on his shoulder all the time. He just wasn't the same. He wasn't himself. You'd have to see the change in him to know it." (*Id.* at PID 4774.)

Croft testified that Hines had a three-year-old son. Hines and his son's mother suffered "an emotional conflict" because she had had a relationship with another man. (*Id.* at PID 4775.) Croft also offered insight into the crime that led to an earlier incarceration for Hines:

> When he was in that first assault, or whatever it was that he was sent up for, I begged the county judge at that time—I explained to the county judge that the boy needed help, that he didn't need confinement at that time, that he needed help. And I was laughed at. He needs help now. He's needed it all these many years, help that he didn't get. And since I'm sworn to tell the truth, this is the truth. I begged Basil Griffith, the county judge, to get him help, you know, on that.

(*Id.* at PID 4776.)

On cross-examination, Croft testified that Barbara, Hines's mother, had a drinking problem until 1979, when she stopped drinking. Croft confirmed that he did not visit Hines during his incarceration for assault and only saw him one or two times before Jenkins's murder. On re-direct examination, Croft testified that he believed that Hines could be helped and noted that Hines offered no resistance to his arrest.

Trial counsel next presented the testimony of Pamela Mary Auble, Ph.D., an expert in clinical psychology. Dr. Auble conducted a psychological examination of Hines, relying on three primary sources of information: test data; a clinical interview; and various records, such as school records and "interviews by various investigators." (*Id*. at PID 4796, 4800.) Dr. Auble administered several psychological tests, measuring Hines's I.Q., Hines's ability to learn and recall new information, Hines's adaptability, and other metrics of Hines's mental, creative, and motor abilities.

Dr. Auble summarized her analysis of Hines's neurological history. She testified that as an eight-year-old, Hines fell from a hay wagon, resulting in a loss of consciousness and a dent to his skull. She testified that Hines had "a history of a lot of alcohol and drug abuse, including glue sniffing, amphetamines, cocaine, heroin[], barbiturates, and a lot of those kinds of things." (*Id*. at PID 4803.) Dr. Auble testified that tests were inconclusive as to the existence of brain damage, however.

Dr. Auble also examined Hines's family history. She testified that Hines was "ignored a lot when he was growing up" and "didn't have a lot of interaction with his parents" because both "worked full time, and [Hines] reported that when they were not working, they tended to drink a lot." (*Id*.) Hines's mother "took Valium for a lot of years" and "was in a psychiatric hospital once when [Hines] was nineteen, for nerve problems." (*Id*. at PID 4803–04.) Dr. Auble saw "some evidence of physical abuse"; Hines "reported that he was beat with a tobacco stick by his stepfather" and

"reported whippings when his parents just didn't know when to stop." (*Id*. at PID 4804.) She recalled that Hines "hid in the woods for several days because he was afraid his stepfather would kill him" after he broke a tractor. (*Id*.)

Dr. Auble testified that "[t]here was also indications of some kind of sexual issues within [Hines's] family" as Hines reported "growing up early, sexually, somewhere around six years old" and has one sister who is bisexual and another sibling who is transgender. (*Id*. at PID 4804, 4806.) Dr. Auble testified that "the fact that he has [siblings] with such unusual sexual orientations suggests that in the family, there's something a little weird that they both turned out that way." (*Id*. at PID 4807.) Dr. Auble testified that Hines "has some issues about masculinity, that sexuality is a sensitive and troubling area for him, that he has had a lot of difficulty with, which is also consistent with [his] . . . history." (*Id*.) On cross-examination, Dr. Auble stated that she did not know whether Hines's early sexual contact at the age of six occurred with a relative; she did not ask him about the details, as Hines was "reluctant to talk about these things, which, I mean, is understandable, I think." (*Id*. at PID 4843.)

Dr. Auble observed that Hines's family did not help him with his problems. When Hines started abusing alcohol and drugs, the family "move[d] him into his own apartment when he was fifteen; in a sense, just to get him out of the family and put him out on his own, rather than trying to help him solve any of the problems." (*Id*. at PID 4807.) She added that the family "ha[d] a history of repeatedly turning him in to the

authorities," resulting in his incarceration. (*Id*. at PID 4807–08.) Further, Hines had "trouble" in school partly because he "had to work on his [step]father's farm a lot—his [step]father was a farmer—and he wasn't able to attend school as often as he should have, so he wasn't there a lot." (*Id*. at PID 4808.) She noted that her testing suggested a learning disability that would make learning more difficult.

Dr. Auble summarized the test results. She testified that Hines "is emotionally pretty immature, that he's never really grown up," adding that his "emotional level of maturity is that of about a teenager." (*Id*.) She testified that Hines has "very poor" self-esteem, "has a lot of trouble with criticism," "has a lot of trouble trusting other people easily," and "expects other people to harm him and is reluctant to trust people enough to confide anything, to tell people his troubles." (*Id*. at PID 4808–09.) She testified that Hines is "real insecure about his masculinity" and has "underlying depression and anger," which he managed by either avoiding the underlying problem or engaging in self-destructive behavior such as drug and alcohol abuse. (*Id*. at PID 4809–10.) She noted that "testing did not indicate that he possesses an alcoholic-type personality" and characterized the alcohol and drug use as "more an escape from the negative feelings that he has than something he's just got a natural weakness for." (*Id*. at PID 4810.) When stressed, Hines will become "angry and destructive,"; Dr. Auble recalled "reports of a lot of fights, whenever he's provoked in some way, that he just boils up and then stuff comes out of him." (*Id*.)

Dr. Auble diagnosed Hines as having paranoid-personality disorder and dysthymia. She explained that the former diagnosis requires the individual to exhibit four of the following symptoms: "expect without basis, to be exploited or conned by other people"; "question the trustworthiness of friends and associates without justification"; "tend to read threatening messages or insults into remarks or events that aren't really all that threatening or insulting"; "tend to bear grudges" and "don't forgive insults"; reluctance "to confide in people because they have this fear that information will somehow be, either, used against them or that they'll be betrayed"; "react [quickly] with anger"; and "question the faithfulness of their spouse or sexual partner without justification." (*Id*. at PID 4810–12.) Dr. Auble explained that Hines had many of these characteristics.

Dr. Auble testified that dysthymia is similar to depression, and Hines suffered the following symptoms of dysthymia: a depressed mood for at least two years; insomnia; low self-esteem; poor concentration, and a sense of hopelessness. She testified that the paranoid personality disorder, in particular, would affect Hines's ability to handle stress: "The worst thing in the world to happen to those people is if they finally do trust somebody and then they get betrayed. That's the worst. And, in particular, that kind of stress would be the hardest for him to handle." (*Id*. at PID 4815.)

Dr. Auble offered insight into Hines's only significant relationship with a woman, Melanie, whom Hines dated for about a year starting in 1981 and with whom he had a son. The relationship ended because

Hines perceived Melanie's mother and brother to be "freeloading on him," as "they weren't willing to pull their own weight in the household." (*Id*.) Hines's mother, with whom Hines's son lived, did not allow Hines to "keep him for any length of time." (*Id*. at PID 4815–16.) In 1985, following his release from prison, Melanie invited Hines to visit her in North Carolina; he did and they discussed reconciliation. According to Hines, Melanie had changed and was engaged in drug use and prostitution. Hines told Dr. Auble that Melanie's mother wanted him to fight Melanie's ex-husband, which was problematic because Hines was trying to adjust to life outside of prison. Dr. Auble described the situation as "particularly hard on [Hines] because, first, he is very insecure about his masculinity." (*Id*. at PID 4817.) "He has a general difficulty trusting people; and once he does trust somebody, the worst thing in the world for him would be to be betrayed, and that's sort of what he felt like happened." (*Id*.) Further, Hines "tends to avoid negative feelings," "doesn't deal with them[,]" and "just puts them inside [while]. . . they get worse and worse." (*Id*.) Hines decided to leave for Kentucky on a bus, intending to get his son and move to Montana. Hines's parents in Kentucky did not give him his son, called the police, and dropped him along a Tennessee highway. He later checked into the CeBon Motel.

Dr. Auble described Hines's state of mind during his time at the motel. After checking into his room, he drank and watched television throughout the night, getting little sleep. His mental state was "very fragile," he "fe[lt] worthless" and insecure," and he had "a whole lot of anger and disappointment and sadness towards

Melanie and his parents for rejecting him"; she added that Hines's "masculine image is just extremely vulnerable," meaning that he would "just be very sensitive to anything that might be seen as criticism." (*Id*. at PID 4818.) Dr. Auble surmised that "any provocation at all would probably result in an explosion of all these feelings." (*Id*. at PID 4819.) Dr. Auble found the "stab marks on the wall of the motel room where he was staying" telling because "most people don't go around with a knife and stab the walls of motels for fun or profit," but do it because they are "suffering from some kind of mental disorder or [are] under a lot of stress at the time they're doing stuff like that." (*Id*.)

Dr. Auble testified that she reviewed Hines's prison records and concluded that he had "done pretty well in prison" and "hasn't been any trouble to anybody, basically" as he "kind of keeps apart from other prisoners." (*Id*. at PID 4821.) She explained that Hines is "able to make a pretty good adjustment when he's not in a situation which brings up all these feelings" associated with Melanie and his family. (*Id*.) She testified that Hines suffered from a mental disease or defect on the day of the murder but did not pose a threat in a prison environment.

Trial counsel presented the testimony of Floyd Eugene Collins, Hines's childhood friend who first met Hines in their neighborhood at fourteen years old. Collins testified that he saw Hines sniff gasoline and glue, drink beer and whiskey, and consume marijuana and pills. He testified that Hines sniffed glue "all the time" and that "[e]very time you'd see him late in the evenings or something like that, he'd be—have him a

glue bag or something like that, just sniffing away." (*Id*. at PID 4861.) Collins testified that, compared to the other neighborhood children, Hines "was always more hyper, always going somewhere, always talking," but "was crazy" and "needed help." (*Id*. at PID 4861–62.) Collins testified that there was once a "gasoline party" in Hines's backyard where everyone was "just sniffing gas," and Hines displayed that he "wasn't right" by repeatedly riding a bicycle into a chain-link fence. (*Id*. at PID 4864.)

Trial counsel also presented the testimony of Charles Preston Smith, who knew Hines around 1975–76 and testified that Hines "used to sniff model-car glue, gasoline, [and] smoke some dope[.]" (*Id*. at PID 4873–74.) Smith testified that Hines "seemed like he would get pretty comatose. Go back there and talk to him, and he wouldn't even know you was there." (*Id*. at PID 4875.) Smith recalled that Hines had his own apartment at about fifteen years old and that he never saw any of Hines's family there.

Finally, trial counsel presented the testimony of sociologist Ann Marie Charvat, Ph.D. Dr. Charvat testified that she interviewed Hines's family, individuals from his neighborhood, and individuals who worked with him as a child. She also reviewed a variety of records and obtained "as many different kinds of reports as were available." (R. 173-11, PID 4925.) Dr. Charvat used the information to "set up a life-cycle study where I was able to get substantiation on various elements of his report." (*Id*.) To be included in her report, Dr. Charvat "had to hear [the information] not only from [Hines], but also from another person, or

read it in one of his documents, or it had to be consistent with what we already know about these different elements." (*Id.*)

Dr. Charvat explained how she collected data:

> Originally, what I started with was a social history. That's what came from him. Then I developed four criteria, four possible substantiations. If I could get a substantiation from conversation or interview with a primary relationship or with a secondary relationship or with an historical document or with my scholarly research, the literature in my field, if I got two of those, then I included it in the life-history section.

(*Id.* at PID 4927.) Primary relationships were defined as "your family or your friends," and, for Hines, included interviews with Bill Hines, Barbara Hines, Hines's sister Victoria, and Hines's brother, Bobby Joe. (*Id.*) Dr. Charvat also interviewed some of Hines's friends, as well as individuals who had a secondary relationship with Hines, such as his juvenile probation officer, his counselor, and a local policeman.

Dr. Charvat had access to a third category of information, historical documents, including: educational records from elementary school, junior high, and high school; medical records; and prison records. She reviewed additional records, such as "social histories, psychological evaluations, physical exam[s], medical history, FBI record of charges and dispositions, [a] psychological evaluation, a mitigation evaluation prepared by Capital Case Resource Center,

correspondence from [defense counsel], and the testimony of [Hines's grandfather] John Croft." (*Id*. at PID 4929.) Dr. Charvat testified that Green River Boys Ranch sent no records, but she talked to Mr. Courtney, who was Hines's counselor there. Dr. Charvat also reviewed the research and literature published in her field.

Dr. Charvat testified that Hines lived outside of Bowling Green for the first twelve years of his life—the first two years with his mother and her husband, Billy Frank Dugard, who had an "unstable" and "violent" marriage, and the next ten years with his mother and her second husband, Bill. (*Id*. at PID 4931–32.) Barbara and Bill, a farmer, lived on a rented farm with Hines's two sisters and brother. The family was "socially isolated" and did not participate in any community activities such as attending church. (*Id*. at PID 4932.) The parents were "very hardworking people," but "there was not very much supervision on the kids" and "an absence of rules within the family[.]" (*Id*. at PID 4933, 4935.) Dr. Charvat also testified that she found "evidence of violence" that she would categorize as "very serious abuse," and that "there were situations in this family that I found to be beyond and into the criminal violent category on Darrell and his older" sibling. (*Id*. at PID 4933.) Dr. Charvat testified that she suspected sexual "irregularities":

> Another issue about the family was I did not find sexual abuse—I did not— although, I did find that there were irregularities from sexual norms. And because the family was very self contained, there was no evidence whatsoever

> that [Hines] was sexually molested; however, there is—It's a very difficult topic to get information about, even in anonymous situations on the telephone.

(*Id*. at PID 4934.)

Addressing his education, Dr. Charvat described Hines as "slow" and explained that he was passed to the next grade "because he was not too much of a problem and because it was, simply, time to move him." (*Id*. at PID 4938.) Dr. Charvat testified that Hines's "formal education ended in the sixth grade," but added that he attended one school for the first six grades, and attended several different schools until ninth grade, which he repeated once, without evidence "of any kind of successful completion" of any of these grades. (*Id*. at PID 4938–39.) For a two-year period beginning when Hines was twelve years old, the family moved between Bowling Green and the farm, ultimately settling in a dangerous neighborhood in Bowling Green, which required Hines to learn social skills for the new environment.

Dr. Charvat testified that Hines started "getting into trouble" at fifteen years old, taking "a variety of drugs at this point in time, some of them glue, some of them gasoline," and "dropp[ing] out of school, basically without any objections from anybody, as far as I could determine." (*Id*. at PID 4941.) Around that time, Hines "moved out of the family unit" and "at various points, he would go back; but, essentially, he either had an apartment, sometimes stayed with his family, or stayed with other people in the neighborhood." (*Id*. at PID 4941–42.) Dr. Charvat explained that the separation

constituted "a significant, serious breach of a [familial] bond at that point in time." (*Id*. at PID 4942.) Hines had several experiences with juvenile court, which often resulted in warnings and probation; on one occasion, he was ordered to see a psychiatrist, and did so a couple times, but declined additional visits and no one made him return. Various reports noted that Hines possessed "an inability or an unwillingness to cooperate, and [that] no successful treatment has ever been noted." (*Id*. at PID 4948.)

Dr. Charvat testified that Hines was sent to Green River Boys Ranch at seventeen years old. Hines was subjected to intensive group therapy there, referred to as "grouping," in which "the bad behavior of one person in that group will lose the privileges for everybody in it." (*Id*. at PID 4946.) Dr. Charvat testified about what she had heard regarding practices at Green River:

> [T]hey would get boys on the ground and shout at them in their faces; that at various points, it would be physical, with all the guys in this group losing their privilege because of the bad behavior of this one guy participating in the grouping of another guy.
>
> Now, [Hines] described a situation to me in which he and another guy were getting grouped. And one of the things that occurred in this grouping was that somehow this thing moved out to where the sewage w[as], and there was pushing into the sewage as a result of this grouping to try to get about this behavior.

(*Id*. at PID 4946–47.) Dr. Charvat testified that these childhood experiences "would increase . . . the unlikelihood of [Hines] being able to learn the rules of the social order." (*Id*. at PID 4949–50.)

Finally, Dr. Charvat identified several factors in Hines's past that literature has found can lead to criminal behavior:

> In [Hines]'s specific case, these included: the level of physical abuse was too great, there was neglect of the children, there was social isolation of the family, there was evidence that there was uninformed parenting, irregular sexual norms, excessive adult responsibility, poor performance, achievement testing was significantly below grade level, excessive truancy, early onset of delinquency, early onset of drug use, self-abusive tendencies, lack of adult supervision, ineffective involvement with the juvenile justice system—it didn't work—terminated education, he had violent police models, his incarceration, his treatment at Green River. Basically, if I were working on predicting delinquency, each and every one of these would be found to be important contributors.

(*Id*. at PID 4958–59.) She considered prison to be an intervening factor because "the possibility is great that in th[at] environment, [Hines] can bond, and that he has the opportunity to develop these elements of a bond in that environment, in an environment where he understands the rules." (*Id*. at PID 4968.)

Hines argues that the evidence presented on state post-conviction review demonstrates that trial counsel's presentation of mitigation evidence at the resentencing hearing constituted ineffective assistance. He also argues that we should consider mitigation evidence presented for the first time in his habeas proceeding in district court, citing *Martinez*. Because this claim was adjudicated on the merits in state court, we cannot consider any evidence offered for the first time in federal district court. *See Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) ("We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits."). And Hines's reliance on *Martinez* is unavailing because the IATC claim was adjudicated on the merits in state court, rather than found to be defaulted. *Martinez*, 566 U.S. at 9 ("The precise question here is whether ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding.").

Hines has not demonstrated trial-counsel ineffectiveness related to the presentation of evidence concerning his use of alcohol and drugs because Croft, Collins, and Smith each offered testimony on that subject. Additionally, Dr. Auble testified about Hines's head injuries and that, after conducting neurological testing for brain damage, she found the tests inconclusive. Dr. Charvat also talked about Hines's substance abuse, as well as his difficult experience in the Green River Boys Home. The additional evidence presented during the state post-conviction proceedings concerning these topics was cumulative, and therefore

Hines cannot show any prejudice resulted from trial counsel's failure to present this evidence at his resentencing. *See Hill v. Mitchell*, 842 F.3d 910, 943–44 (6th Cir. 2016), *cert. denied*, 138 S. Ct. 82 (2017) ("A petitioner does not establish prejudice if he shows only that his counsel failed to present 'cumulative' mitigation evidence"); *Fautenberry v. Mitchell*, 515 F.3d 614, 626–27 (6th Cir. 2008).

As to trial counsel's alleged ineffectiveness concerning the presentation of evidence about sexual and physical abuse, William D. Kenner, M.D., a psychiatrist, testified during the initial post-conviction proceedings that he learned from Hines's older sibling, Lee, that Hines was sexually abused by his stepfather and uncle. Dr. Kenner acknowledged that he did not have a first-person account of the events, as all of his information came from Lee, while Hines did not discuss the events—nor did Dr. Kenner know if Hines even remembered them. Dr. Kenner stated that "it's not uncommon for even adults to, you know, have a blank spot in their memory when something traumatic like that happens." (R. 174-2, PID 5291.)

Hines's difficulty with sexuality, as well as the possibility that he was sexually abused, was discussed at the resentencing hearing. But, unlike Dr. Kenner, Dr. Charvat was unable to contact Lee for unknown reasons and instead only spoke with Hines's other siblings. Because Lee was the only source of that information and did not testify, there is a question whether the court would have found the evidence admissible, as the trial court only permitted Dr. Charvat to base her opinion on "reliable hearsay," to

the extent she relied on hearsay. (R. 173-10, PID 4920.) At any rate, although additional evidence of sexual and physical abuse might have made the mitigation case stronger, the new evidence does not differ from the information presented at the 1989 penalty phase in such a substantial manner to entitle Hines to relief. *See Tibbetts v. Bradshaw*, 633 F.3d 436, 444–45 (6th Cir. 2011) (explaining that new mitigation evidence that covers the same subject as evidence presented during the penalty phase of trial, but in greater detail, is insufficient to demonstrate prejudice).

Hines also takes exception to Dr. Auble's testimony, as she did not tell the sentencing jury that Hines suffered from post-traumatic stress disorder, nor that he had brain damage. But Hines was not prejudiced simply because trial counsel failed to retain "some other hypothetical expert." *Smith v. Mitchell*, 348 F.3d 177, 208–09 (6th Cir. 2003). Furthermore, "[a]bsent a showing that trial counsel reasonably believed that [Dr. Auble] was somehow incompetent or that additional testing should have occurred, simply introducing the contrary opinion of another mental health expert during habeas review is not sufficient to demonstrate the ineffectiveness of trial counsel." *McGuire v. Warden*, 738 F.3d 741, 758 (6th Cir. 2013) (citing *Black v. Bell*, 664 F.3d 81, 104–05 (6th Cir. 2011)). Hines makes no such showing.

Finally, Hines argues that trial counsel were ineffective for failing to tell the jury that Hines lacks a sufficient quantity of serotonin, "which makes it difficult for him to modulate and control his behavior."

(Hines Br. at 34.) The Tennessee Court of Criminal Appeals denied this claim, explaining:

> [Paul] Rossby[, Ph.D., a molecular biologist,] acknowledged that he did not work on developing this issue in a criminal case until approximately 1992, three years after the petitioner's resentencing trial. Further, he said that he did not actually testify on the issue of serotonin until 1999, ten years after the petitioner's resentencing trial, and knew of no one who had testified on the issue prior to that. As the post-conviction court stated: "Petitioner's counsel at re-sentencing could not reasonably have been expected to search for experts on a subject which they did not know existed." The record supports this conclusion.

Hines, 2004 WL 112876, at *32. The district court denied this claim without analysis.

At the initial post-conviction hearing, Dr. Rossby testified that molecular neurobiology involves "the study of the brain and the central nervous system at the level of molecules and systems." (R. 176-5, PID 6478.) He explained serotonin's effect on the brain:

> Serotonin is a naturally occurring neuromodulator in the brain. It comes under the broad heading of neurotransmitters but it is a neuromodulator. Serotonin is essentially produced in one very small region of the brain and then projected to every part of the brain. Projected meaning that it is, it is synthesized in one place and then it [is] sent to all parts of the

> brain. Serotonin essentially has an inhibitory effect on the neuronal firing that I was describing before. Serotonin blocks pain for example. Serotonin is released in tons [sic] of great stress and it opposes the stressful reaction or the fight[or] flight reaction. Serotonin appears and there has been a tremendous amount of research on the function of serotonin. Serotonin appears to orchestrate various systems of inhibition within the brain. And there is a tremendous amount of data that indicate that serotonin orchestrates these systems of inhibition within the brain.

(*Id*. at PID 6483–84.) He further explained that "[t]he level of serotonin activity in the brain has been associated with impulsive behavior." (*Id*. at PID 6486.) He testified that serotonin research dated "for sure back to the 70's," adding that "a great deal of information" would have been available in 1986 and 1989. (*Id*. at PID 6484.)

Dr. Rossby assessed Hines's serotonin level and concluded that it "is at the extreme[ly] low level in our society" and the effects of that low serotonin are "exacerbated by his Type II alcoholism[.]" (*Id*. at PID 6490.) Dr. Rossby offered the following insight:

> Essentially all of the studies that . . . have accumulated over the past twenty to twenty-five years, the low serotonin has been the central feature that distinguishes the impulsively violent offender from the non-impulsively violent offender. But there has also been a very strong correlation with Type II alcoholism and so,

> based on everything that I know and everything that I have read about the case and based on this analysis of his serotonin levels in his cerebral spinal fluid I would say that he is virtually, for biological reasons, he is virtually incapable of opposing his, his behavior, his spontaneous behavior. He is organically impaired.

(*Id*. at PID 6490–91.) Dr. Rossby added that "if you have low serotonin levels you have low serotonin levels for life." (*Id*. at PID 6492.)

Dr. Rossby testified that Hines's alcoholism is significant because, in a research study, "Type II alcoholism was detected in almost all of the violent offenders who had also low serotonin levels." (*Id*. at PID 6493.) Dr. Rossby described an individual who is a Type II alcoholic as having "low harm avoidance, gets bored easily and needs a lot of stimulation and is always out seeking alcohol." (*Id*. at PID 6494–95.) Dr. Rossby explained that serotonin, in conjunction with Type II alcoholism, affects impulse control:

> We are talking about an organic capacity to limit, to regulate or to control impulse and it doesn't determine what the impulse may be it just, we are talking about a failure of inhibitory systems and the systems are really designed to inhibit any kind of impulsive behavior, instinctual compulsive behavior.

(*Id*. at PID 6495–96.) When asked whether Hines could control impulsive rage or anger, Dr. Rossby responded: "No, I don't think so." (*Id*. at PID 6503.)

On cross-examination, Dr. Rossby testified that he first contributed serotonin research to a criminal case in 1992 and first testified as an expert on the subject in a criminal case in 1999. Dr. Rossby was not personally aware of anyone testifying about this topic before 1992.

Hines has not shown that trial counsel performed deficiently by failing to present evidence that he has low serotonin. In anticipation of the 1989 sentencing hearing, trial counsel retained a mental-health expert, Dr. Auble, who conducted a psychological examination that included testing for brain damage. She testified about the difficulty Hines had controlling his behavior when provoked. As noted previously, trial counsel is not ineffective for failing to retain a specific mental-health expert to obtain a specific outcome. *McGuire*, 738 F.3d at 758. Further, Dr. Rossby stated he was not aware of the use of the low-serotonin argument in a criminal case at the time of the resentencing hearing. Hines's counsel at resentencing were therefore not ineffective for failing to put forward mitigation theories that it was reasonable for them to be unaware of.

B. Failure to cross-examine Dr. Harlan's testimony

Hines next contends that trial counsel were ineffective because they did not effectively challenge Dr. Harlan's testimony about how long Jenkins would have remained conscious and would have survived following the infliction of her injuries. The warden responds that the state court's resolution of this claim was not unreasonable.

At resentencing, the prosecution relied on the aggravating factor that the offense was "heinous, atrocious, or cruel in that it involved torture or depravity of mind," Tenn. Code Ann. §39-2-203(i)(5)(1982), relying on Dr. Harlan's testimony that the victim was conscious for three to four minutes after being stabbed, during which she tried to fight off her attacker.

Dr. Harlan testified about the time elapsed between infliction of the wounds and the resulting death:

> The fact that there's hemorrhage from all three of these wounds indicate[s] that they occurred at approximately the same time. The amount of hemorrhage or bleeding from these wounds wou[l]d indicate that death occurred within a short period of time after the time of the infliction of these wounds, probably within a few minutes; most likely, within a span of probably four to five minutes, maybe six minutes.

(R. 173-9, PID 4721.) Dr. Harlan further testified that Jenkins "would have remained conscious for a period of time, several minutes, probably three to four minutes." (*Id*. at PID 4732.) Dr. Harlan clarified on cross-examination:

> Q: And I believe you stated that after receiving those wounds, the victim would have died within about four to five minutes?
> A: Yes, sir, that is correct.
> Q: And you indicated that consciousness would have lasted somewhere between, I think you said, three and four minutes?

A: Yes, sir, that is correct.
Q: All right. Now that's something that you can't absolutely find; that's your opinion based upon the appearance of the wounds, right?
A: That is my opinion based upon the type of wounds that were present, upon the lack of damage to the central nervous system, and on the fact that the wounds all occurred at approximately the same time.

(*Id*. at PID 4736–37.)

On state post-conviction review, Dr. Sperry opined that the period between the infliction of Jenkins's injuries and her death was shorter than Dr. Harlan had stated:

> In my opinion, all of the injuries except for the vaginal stab wound were sustained very very rapidly. That, from the time of the attack had [en]sued to when she . . . collapsed and was receding into unconsciousness because of internal bleeding was [happening] very rapidly. Again, less than a minute and probably less than thirty second[s] realistically.

(R. 176-5, PID 6544.) Dr. Sperry testified that Jenkins "would be unconscious[] in between fifteen and thirty seconds and then would be dead, that is her heart stopped beating, in about three to four minutes." (*Id*. at PID 6545.) Dr. Sperry explained that he disagreed with

Dr. Harlan's assessment because of the injuries Jenkins suffered:

> Not with two stab wounds involving the heart like this. That is not possible. People collapse very rapidly. And, in fact, . . . there is no evidence that there is any blood elsewhere other than again right beneath this air conditioner thing, on the inside of the door and then over where her body ultimately was found which is an indicator from the scene alone that she collapsed very rapidly and lost consciousness very rapidly. But irrespective of that, it is just not physically possibl[e] for someone to sustain wounds like this and stay conscious for four minutes. They will be dead by that time and have lost consciousness long before that.

(*Id*. at PID 6546.) When asked whether Jenkins would have sensation following unconsciousness, Dr. Sperry testified: "No. Once she was unconscious[] this would be the same as if she were under anesthesia. That is, she would not be able to feel or perceive pain in any way." (*Id*. at PID 6546–47.) On cross-examination, Dr. Sperry allowed that the "outer limits of [his] time envelope," from the start of the attack to Jenkins's loss of consciousness, would be "a minute and a half," which he conceded "could be a long time." (R. 176-6, PID 6572.)

Dr. Harlan testified during the post-conviction proceedings, expressly disagreeing with Dr. Sperry's assessment and reiterating his prior opinion. Dr.

Harlan specifically addressed the conflict between the two opinions:

> The—the problem that you have with the statements that he made is that he made—by he, I'm talking about Dr. Sperry—is that his statements are to the effect that the heart just stops beating immediately. Well, if the heart stops beating immediately, then you don't get the blood out there. If the blood, as we know is out there, because we can see it, then the heart has to have continued to beat. And the heart beating will allow blood to continue to flow to the brain in gradually reducing quantities.

(R. 174-4, PID 5580.) Dr. Harlan also explained that it is possible to perceive pain while unconscious: "To a certain extent, by anecdotal evidence. There are different levels of consciousness and unconsciousness. It is possible to be aware of your surroundings and what's going on without being able to move and without being able to respond." (*Id*. at PID 5583.) Dr. Harlan testified that Jenkins would have experienced pain if the vaginal wound was inflicted while she was conscious, but her state of consciousness could not be determined without being present at the time.

On state post-conviction review, the trial court found that trial counsel were deficient for failing to challenge Dr. Harlan's testimony. The court concluded, however, that there was no prejudice because the jury would have found that the offense was "depraved," even if forensic proof established that the offense was not torturous, as the prosecution maintained. *Hines*, 2004 WL 112876, at *33 (discussing district court decision).

The state trial court relied on *State v. Williams*, 690 S.W.2d 517, 529–30 (Tenn. 1985), which held that "depravity of mind" "may be inferred from acts committed at or shortly after the time of death." *Hines*, 2004 WL 112876, at *33 (citing *Williams*). The Tennessee Court of Criminal Appeals referred to portions of the trial court's opinion and affirmed the decision. *Id.* at *32–33. On habeas review, the district court determined that the Tennessee Court of Criminal Appeals' decision was not an unreasonable application of Supreme Court precedent.

Hines is required to show prejudice—a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Both Dr. Sperry and Dr. Harlan agreed that the wound to the victim's vaginal cavity occurred at, or shortly after, the time of death. Regardless whether the victim was unconscious, dying, or had just died, the infliction of such a wound may evince a "depravity of mind." *See State v. Zagorski*, 701 S.W.2d 808, 814 (Tenn. 1985) ("infliction of gratuitous violence" on a victim who was "already helpless from fatal wounds" indicates "a depraved state of mind at the time of the killing" and is sufficient to support a finding by the jury that the murder was especially heinous, atrocious and cruel); *Van Tran v. Colson,* 764 F.3d 594, 622 (6th Cir. 2014) (under Tennessee law, "'depravity of mind' can be found even where there is no gratuitous infliction of severe pain, physical or mental, that amounts to torture" (citation omitted)). In *Williams*, the Tennessee Supreme Court explained:

> If acts occurring after the death of the victim are relied upon to show depravity of mind of the murderer, such acts must be shown to have occurred so close to the time of the victim's death, and must have been of such a nature, that the inference can be fairly drawn that the depraved state of mind of the murderer existed at the time the fatal blows were inflicted upon the victim. This is true because it is "the murderer's state of mind at the time of the killing" which must be shown to have been depraved.

690 S.W.2d. at 529–530 (emphasis omitted). Thus, testimony that the victim was likely unconscious when she was stabbed in the vaginal cavity would not have prevented the jury from making a finding of depravity of mind. The state court was not unreasonable in concluding that even if the vaginal cavity stabbing "occurred close in time to the victim's death," rather than before it, the vaginal stabbing "allow[s] the drawing of an inference of the depraved state of mind of the murderer at the time the fatal blows were inflicted on the victim." *Hines*, 919 S.W.2d at 581.

Finally, Hines argues that the state appellate court's holding that Dr. Harlan's testimony could have shown depravity to support the heinous, atrocious, and cruel aggravating circumstance was contrary to Supreme Court precedent because "a finding of 'depravity' [is] unconstitutional[ly vague]." (Hines Br. at 94–95.) We have previously held otherwise. *See, e.g.*, *Van Tran*, 764 F.3d at 622–23 (holding that Tennessee's "depravity of the mind" aggravator "avoids

a constitutional vagueness problem"); *Strouth v. Colson*, 680 F.3d 596, 606 (6th Cir. 2012) (same). Hines's argument thus fails.

C. Failure to object to death sentence in light of prosecutor's agreement to life sentence

Hines contends that trial counsel were ineffective for failing to object to his death sentence because the prosecutor had agreed to a sentence of life imprisonment. The warden argues that this claim is procedurally defaulted because it was not presented to the state courts and that Hines cannot show cause and prejudice to excuse the default.

On direct appeal after his resentencing, Hines argued that the trial court erred in rejecting the plea agreement between the parties, in which Hines would have pleaded guilty to a new offense and received a life sentence. Relying on Tennessee Rule of Criminal Procedure 11, the Tennessee Supreme Court denied relief:

> In this case, the trial judge felt that the facts of the case, even when mitigating circumstances were considered, should be decided by a jury. He expressed the view that the interest of justice did not allow a plea bargain and he rejected it. We find that the trial judge acted within his authority under Rule 11 in rejecting the plea bargain.

Hines, 919 S.W.2d at 578. Now Hines argues that to carry out his sentence under the circumstances would be arbitrary or capricious in violation of the Eighth Amendment and would violate the Fourteenth

Amendment because: "Having agreed to a life sentence for Hines's murder conviction, the state proved empirically that it has no 'compelling interest' whatsoever in taking Hines's life. It proved by this agreement that a life sentence constitutes the 'least restrictive means' of achieving whatever interests it may have in punishing Hines." (Hines Br. at 99–103.)

Hines is not entitled to relief. "Counsel is not ineffective merely for failing to obtain a desired ruling from the court." *Hodge v. Haeberlin*, 579 F.3d 627, 645 (6th Cir. 2009). Here, the trial court rejected the plea agreement, which the Tennessee Supreme Court determined to be proper. Hines has not shown that an objection by trial counsel had any probability of producing a different result. *See Mapes v. Coyle,* 171 F.3d 408, 427 (6th Cir. 1999) ("Counsel could not be constitutionally ineffective for failing to raise . . . meritless arguments."). Regarding his Eighth Amendment claim, Hines relies on *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988), but that case is distinguishable. In *Adamson*, the trial court accepted a plea after considering "the presentence report, the matters in the file, the preliminary hearing transcript, the plea agreement, and the proceedings at the previous hearing." 865 F.2d at 1021. Thus, as the Ninth Circuit reasoned, the trial court's acceptance of the plea agreement constituted a judicial determination that the plea was the appropriate punishment and reflected the trial court's belief that the defendant would be appropriately punished by a prison sentence rather than death. *Id.* at 1021–22. But when the trial court later imposed a death sentence on the same information and "for the same conduct for which he had

previously found a prison term 'appropriate,'" the Ninth Circuit found the imposition of the death penalty arbitrary. *Id*. at 1022–23. Here, the trial court did not make a judicial determination as to the appropriate punishment; rather, as the Tennessee Supreme Court explained, "[t]he trial judge rejected the plea bargain agreement because he felt that the case should be decided by a jury." *Hines*, 919 S.W.2d at 577–78. Trial counsel was thus not ineffective for failing to object to the trial court's rejection of the plea agreement. Hines has not cited any directly applicable cases in support of his Fourteenth Amendment claim, and we therefore find it is also without merit.

V. Whether trial counsel were ineffective for failing to investigate and present evidence regarding Ken Jones.

Having rejected each of Hines's claims thus far, we now turn to the claim on which we reverse the district court's denial of Hines's petition for a writ of habeas corpus. During the guilt phase, trial counsel failed to investigate or effectively examine Ken Jones, who was at the motel at the time of Jenkins's death and had an apparent motive for the murder. During the penalty phase, defense counsel also failed to present evidence of residual doubt in relation to Ken Jones. Because the state court's decision that this did not constitute ineffective assistance of counsel was an unreasonable application of *Strickland*, we reverse the district court's denial of Hines's petition for a writ of habeas corpus.

A. Failure to investigate and present evidence regarding Jones at the guilt phase

Ken Jones was the witness at Hines's 1986 trial who testified to having first discovered Jenkins's body. Hines argues that trial counsel were ineffective because they did not investigate and present evidence explaining Ken Jones's presence at the CeBon Motel at the time of the murder. The Tennessee Court of Criminal Appeals affirmed the state trial court's rejection of this argument on post-conviction review, finding that Hines could not satisfy *Strickland*'s prejudice requirement:

> Missing in the petitioner's theory, which the post-conviction court described as "farfetched," is any motive or reason why Jones would want to kill the victim, except the petitioner's suggestion, recounted in the post-conviction findings, that the victim was killed because she had "thwarted" the sexual liaison between Jones and [Vernedith] White. In effect, the petitioner argues that fifty-one-year-old Ken Jones, accompanied by his twenty-one-year-old girlfriend, Vernedith White, following their normal Sunday morning routine and checking into the same motel where they had been together approximately 100 times before and were known by the staff, including the victim, stabbed the victim to death, with Jones driving White to another location, cleaning blood from himself and his vehicle, and then returning to the scene to report the crime and wait for law enforcement officers to arrive. We agree with the

> post-conviction court that, given the strength of proof against the petitioner, making the argument that Ken Jones was the actual killer would have been "farfetched" and could have resulted in a loss of credibility for the defense.

Hines, 2004 WL 1567120, at *27.

The district court rejected this claim on habeas review:

> Petitioner has not presented any evidence to suggest that Jones could have been the murderer. Jones's motivation for being at the motel was undisputed. Given the State's proof and Petitioner's statement to the officers, the Court concludes that there is not any basis to suggest any other identifiable person as the perpetrator of this horrendous crime. The Court also concludes that Petitioner has not demonstrated any prejudice for this claim. Given the state courts' finding of the absence of prejudice required by *Strickland*, the Court concludes that this claim was reasonably decided by the state courts applying clearly established federal law.

(R. 145, PID 2352.)

The following evidence was presented regarding Ken Jones at Hines's 1986 guilt trial. Mary Sizemore of the Cheatham County Ambulance Service testified that she received a call at 2:36 p.m. from a woman named Maxine to go to the CeBon Motel because a man reported that a woman had been stabbed. According to Sizemore, Maxine worked at the CeBon Restaurant,

which was across the street from the motel. Sizemore testified that Maxine indicated the man who discovered the body "was a man coming to rent a room there and was looking for the maid to make arrangements," but Sizemore did not know who the man was. (R. 173-2, PID 3899.) Sizemore arrived at the motel four minutes after the call, and Maxine then walked to the motel and met Sizemore. Sizemore found Jenkins on the floor of Room 21 "laying on her back wrapped in a bedspread." (*Id*. at PID 3890.) Sizemore "unwrapped the top of the bedspread to look at her chest to see where the blood was coming from and noticed the stab wounds." (*Id*. at PID 3891.) Sizemore testified that she saw Jenkins's underwear—torn into two pieces—in the room.

Ken Jones testified at trial that he stopped at the CeBon Motel on March 3, 1985, and was "acquainted" with the "older couple" who had run the motel. (*Id*. at PID 3941–42.) Jones "first pulled [in] around about 12:30 or possibly a few minutes past" and "stopped [for] a few minutes." (*Id*. at PID 3942.) Jones parked his car and walked to the motel's office. "[T]here was no one in the office," but Jones noticed a "key laying in [a] little box." (*Id*. at 3949.) Jones testified that he then went back to his car, at which time he saw a woman in a maroon car, accompanied by a child, drive up to Room 21 around 12:40. The woman got out of her car, knocked on the door of Room 21, and left when no one answered. Jones added that before leaving, the woman backed around and asked him if he "knew where the people were that run it." (*Id*. at PID 3957.) Jones said that he then left, going "up to [a roadside convenience store] for a few minutes" before coming back to the motel. (*Id*. at PID 3942.)

He came back "just past 1:00." (*Id*. at PID 3943.) He explained that when he returned to the motel, he "just sat there a few minutes" in his car and then realized that he had to use the bathroom and remembered the key that he had seen in the office. (*Id*. at PID 3953.) Jones explained that he "went to the office and there was no one there . . . so when no one showed up in a few minutes I took the key and left a note that I had the key that I was going to the restroom in that particular room." (*Id*. at PID 3943.) Jones testified that he went to the room at "probably about twenty after 1:00, in that neighborhood." (*Id*.)

Jones opened the door to the locked motel room, Room 21, using the key he had taken. He testified that he "saw a vacuum cleaner on the left, and I proceeded to go toward the bathroom, and I saw hair, a head of hair sticking out from behind the bed." (*Id*. at PID 3944.) When asked whether he recognized the individual as female or male, Jones responded: "No sir. Not then." (*Id*. at PID 3945.) When asked how close he was to the body, Jones testified that he was "heading for the restroom and was three feet, two-and-a-half to three feet I guess[.]" (*Id*.) When asked to describe his reaction, Jones answered: "Lord, I don't know. All I knowed [sic] to do is get out and call somebody." (*Id*.) Jones said, "I wasn't in that room but a second." (*Id*. at PID 3947.) Jones testified that he left the motel room, got into his car, and went straight to the restaurant across the street to call the sheriff. He observed a dark blue car parked near the motel's Room 8. He testified that a woman at the restaurant placed the call for him to the sheriff. When Jones was asked if he "stay[ed] there and talk[ed] to the sheriff," Jones replied, "Yes

sir." (*Id.* at PID 3948.) Jones testified that he knew Sheriff Weakley, and on that afternoon he told the sheriff what he had seen.

At closing argument of the guilt phase, Hines's trial counsel emphasized the significance of Jones's testimony, notwithstanding his failure to meaningfully cross-examine Jones:

> Now, this gets me. This confuses me. This causes me considerable reasonable doubt right here. We've got this Mr. Jones, Kenneth Jones. We already had one girl that said Mrs. Jenkins['s] car pulled out at 12:40. I don't know what time Mr. Jones was fooling around at that motel that Sunday afternoon or that Sunday morning. Or what he was really up to. But you can kind of gather from his testimony, kind of reading between the lines, he wasn't a traveling salesman just coming through; he had a usual spot where he always went to; he was meeting somebody. He said he got there around—what did he say—12:00 o'clock? Something like that? He saw a maroon car pull right up to Room 21 and a woman get out and bang on the door, a baby crying. A blue car parked right in front of #9 at that time. Was there anything about a silver car being there? I wonder if whoever he was meeting had a husband? I wonder if whoever he was meeting might have thought Mrs. Jenkins was this man's girlfriend in Room 21. Maybe somebody hired somebody to go down there and do something. I don't know. It causes

> me some concern though I'll tell you that; it causes me a lot of concern.

(R. 173-6, PID 4394–95.) Trial counsel continued:

> And I'll tell you something else that causes me some concern. Here we are, there's a murder that's been commit[t]ed, and you got this man, you saw how nervous Mr. Jones was, boy he was quivering, he was wanting to get in here and out. You saw that. Why didn't he tell Sheriff Weakley—and I feel sorry for Sheriff Weakley on this—why didn't he tell Sheriff Weakley, look, Sheriff Weakley, I saw a blue car right beside #9 and I saw a maroon car and I saw a woman get out and knock on Room 21. And wasn't it a casual relationship just going up and taking Room 21 key out and going up there and him just barging into Room 21. There was a lot of something going on up there that day.

(*Id.* at PID 4395.)

On post-conviction review, Hines presented the testimony of one of his trial counsel, William G. Wilkinson, who stated that he did not attempt to interview Jones before trial. Wilkinson testified about a conversation he had with Sheriff Weakley concerning Jones:

> Sheriff Weakl[e]y told me that [Jones] was the person who opened the door and discovered the body. He told me that he was married and that he was meeting there for the purpose of having an affair and had been there just a very short period of time and that he didn't want his wife to

> find out that he was carrying on the affair and that all he knew was that he was assigned that room, opened the door and saw the body and that is all that he knew about it.

(R. 176-3, PID 6195.)

Hines's other trial counsel, Steve Stack, also admitted that Jones was not interviewed, and explained:

> We never interviewed Mr. Jones. We were told early on in the case by, I was told by Sheriff Weakley that Mr. Jones had been over to the motel that day to have a meeting with a lady friend and that he didn't, all that he did was go in and discover the room and that he was there for a brief period of time and he had no further information and he didn't want him to be embarrassed by having it brought out that he had been over there to meet with a lady friend.

(R. 176-4, PID 6404.) Stack acknowledged that, though Jones found Jenkins's body, they made no effort to investigate Jones's reasons for being at the motel; nor did counsel make any attempt to find out who Jones's female companion was, despite the fact that she might have also been a witness to the scene. When asked whether he attempted to learn what Jones would say in his testimony, Stack responded:

> I remember being told by [Assistant Attorney] General Kirby who just gave a brief synopsis saying that Ken Jones will be testifying because he was the one, the person that found the body. Sheriff Weakley, like I said, talked to me more

> in detail explaining there that he was just there a few minutes. [H]e went up, opened the door, made the discovery and then left. I don't recall that he even described him going into the room or anything. Quite frankly, Sheriff Weakley's main concern was just that we didn't make an issue of him being there to protect him from his wife.

(*Id*. at PID 6407–08.) Stack explained that his trust in Sheriff Weakley informed that decision:

> And the Sheriff had asked me not to bring out what [Jones] was [at the motel] for. The Sheriff made it clear to me that Ken Jones had nothing to do with this case. If Do[r]ris Weakley had told me right now that it was going to rain so hard this afternoon that I will need a boat to get home I would be buying a boat right now. I mean, I would take that man's word for anything in the world. He say's [sic] this hadn't got a dog in the hunt, don't embarrass the man. I wasn't going to embarrass the man.

(R. 176-5, PID 6415.) Stack acknowledged, however, that "it was ridiculous for us not to have gone to interview [Jones] to at least hear his version of what happened so that we could confirm for ourselves, you know, what we could legitimately ask him that might help our case." (*Id*. at PID 6416.)

Stack admitted that the failure to interview Jones presented difficulties with the defense offered at trial, because defense counsel were unable to resolve factual discrepancies between Jones's testimony and that of

other witnesses. For example, Jones testified that he called for the ambulance from the CeBon Restaurant around 1:20, but Sizemore testified that the ambulance service received the call at 2:36. Further, Sizemore testified that the caller identified the victim as a woman who suffered from stab wounds, but Jones testified that he was unable to determine whether the victim was male or female when he found Jenkins's body in Room 21. And given the way Jenkins's body was wrapped in a bedspread, Jones would have been unlikely to determine the source of her wounds. In short, "[k]nowing now, going back and looking at things[,] definitely we should have interviewed him." (*Id*. at PID 6415.)

Trial counsel's performance was clearly deficient because they abandoned any effort to interview Jones based on nothing more than an assurance by the sheriff that Jones was not involved in Jenkins's murder. In *Strickland*, the Court explained that a reviewing "court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." 466 U.S. at 690. In *Towns v. Smith*, we interpreted that language to assign to trial counsel an "obligation to investigate all witnesses who may have information concerning his or her client's guilt or innocence." 395 F.3d 251, 258 (6th Cir. 2005) (citation omitted). In determining whether a particular decision not to investigate constituted ineffective assistance, "the relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Id*. (citations omitted). Hines's trial counsel made no effort to interview or investigate Jones, even though Jones

was a "known and potentially important witness" who clearly had information relevant to Hines's defense. *See id.* at 259 (citation omitted). This decision was unreasonable—as defense counsel Stack openly admitted—and constituted deficient performance under *Strickland*.

Hines has also shown prejudice, and the Tennessee court's conclusion to the contrary, *see Hines*, 2004 WL 1567120, at *27, was an unreasonable application of *Strickland*. *See* 28 U.S.C. § 2254(d)(1). Hines was prejudiced by his counsel's failure to investigate Jones because it hindered Hines's ability to effectively challenge the prosecution's theory and timeline of events, as well as undermined Hines's ability to build an affirmative argument pointing to Jones as an alternative suspect. *See Ramonez v. Berghuis*, 490 F.3d 482, 489–91 (6th Cir. 2007) (concluding a state court's finding of no prejudice under *Strickland* was objectively unreasonable—and thus the habeas petitioner was entitled to relief—where trial counsel was ineffective for failing to interview witnesses who could corroborate petitioner's version of events while undermining a key prosecution witness's testimony).

The failure to interview or investigate Jones left defense counsel without key information regarding Jones's relationship with Jenkins and his activities at the motel prior to and on the day of the murder—much of which could have helped the defense to credibly cast Jones as an alternative suspect, or at the very least seriously undermine his testimony. At a deposition taken during the initial state post-conviction proceedings, Jones offered information that would have

significantly aided Hines's defense at the trial. Jones stated that he and Vernedith White were at the CeBon Motel to use a room on the day of the murder because they were having an affair, which had been on-going for "[a] couple of years." (R. 174-5, PID 5674–75.) They went to the motel almost every Sunday, arriving "between 10:00 and 11:00." (*Id.* at PID 5675.) Jones explained that he usually contacted Jenkins about obtaining a room: "The girl that was dead, usually she took care of me when I was there." (*Id.* at PID 5676.) Most Sundays, Jones would get a motel room key from Jenkins instead of the motel owners. Jones stated that he "usually paid $20" for the room rather than the full rate. (*Id.* at PID 5692.)

On the day of Jenkins's murder, Jones was specifically looking for Jenkins when he arrived at the motel. Jones and White were at the motel for about an hour before finding the body. During that hour, they briefly left to go to the parking lot of a restaurant on the top of the hill before quickly returning—but Jones did not enter the restaurant because he wanted to watch the motel parking lot from the top of the hill to see if anyone would return who would be able to get him a room.

Jones also stated that, contrary to his trial testimony, he did not stick around after the call to the sheriff was made, and instead drove his female companion, Vernedith White, home. When he later returned to the motel, Jones spoke with Sheriff Weakley, whom Jones knew because "one of them boys of mine was always in trouble." (*Id.* at PID 5694.)

Jones explained that Sheriff Weakley had tried to put him at ease about the problem of why he was at the hotel when he discovered the body, and Jones "understood" that he would not be asked the reason for his presence at the motel by either party at the trial. (*Id*. at PID 5688–89.) Jones confirmed that he never spoke with an investigator or an attorney for Hines before trial. Jones said that he knew "[n]othing" about the murder other than finding Jenkins's body. (*Id*. at PID 5695.) Notably, at this deposition Jones gave a different timeline for when he found the body, explaining that he arrived at the motel at "[a]bout 10:30 or so," and found Jenkins's body "[a]round 11:00." (*Id*. at PID 5695–96.)

Much of this information provided by Jones in his post-conviction deposition could have provided ample fodder for defense counsel to focus on Jones as a reasonable alternative suspect. Jones, who was married, was at the motel due to an affair with a younger woman—an affair which he had a clear motive to hide. Jones had known the victim, Jenkins, through weekly interactions for approximately two years. Jenkins knew of Jones's secret affair with White, and she helped to facilitate the affair by getting Jones room keys and giving him a discounted rate for use of rooms. On the day of Jenkins's murder, Jones arrived at the motel specifically looking for her and monitored the parking lot of the motel closely for an hour. Jones typically paid for the rooms he rented with $20, and a $20 bill was found under the wrist band of Jenkins's watch when her body was found. Furthermore, Mary Sizemore of the Cheatham County Ambulance Service testified that she learned from dispatch that Jones had

reported "there was a woman stabbed," but when Sizemore entered Room 21, she was unable to determine that Jenkins had been stabbed until she unwrapped the bedspread around Jenkins, which only then revealed Jenkins's stab wounds. (R. 173-2, PID 3890–91.) If defense counsel had investigated and presented evidence of these suspicious circumstances regarding Jones, there is a reasonable probability that Hines would have been able to convincingly argue at trial that reasonable doubt existed due to Jones's role as a viable alternative suspect for Jenkins' murder. *See Poindexter v. Booker*, 301 F. App'x 522, 531 (6th Cir. 2008) (affirming a district court's grant of habeas relief where the petitioner was prejudiced by trial counsel's failure to investigate witnesses who could have implicated a third party as the shooter).

Contrary to the state court's determination, Jones's desire to keep his affair a secret from his wife could serve as motive, and the time he spent away from the motel could have been used to dispose of important evidence. Jones's motive and opportunity to commit the crime are at least as compelling as that offered by the prosecution for Hines, if not more compelling. There was no clear motive for Hines to have committed a murder so gruesome of a woman he had never met before, in which her body was brutally stabbed in the vagina even after she was incapacitated and possibly already dead.

Pointing to Jones as an alternative suspect may have been a viable path for the defense, as the evidence of Hines's guilt was not overwhelming. *See English v. Romanowski*, 602 F.3d 714, 730 (6th Cir. 2010) (finding

prejudice from counsel's failure to investigate where the "evidence of [the habeas petitioner's] guilt. . . [wa]s not overwhelming" and "[t]he government presented no physical evidence"). In so concluding, we are cognizant of the difference between overwhelming evidence and sufficient evidence. We do not question that there was sufficient evidence to sustain Hines's conviction for first-degree murder. The dissent recounts this evidence, which we have also carefully considered. But *Strickland*'s prejudice inquiry differs from a sufficiency-of-the-evidence analysis. *See Ferensic v. Birkett*, 501 F.3d 469, 474 (6th Cir. 2007). Under *Strickland*, we ask whether there is a "reasonable probability" that one juror would have voted differently but-for counsel's deficient performance. *See English*, 602 F.3d at 730. Here, there was ample room for defense counsel to point to Jones as an alternative murder suspect. There was no DNA or fingerprint evidence connecting Hines to Jenkins's murder—not on Jenkins's body, not in the room where the murder took place (Room 21), and not on Hines's clothing. In addition, no witness testified to seeing Hines near Room 21. In contrast, Jones was clearly in Room 21 on the day of the murder, had a plausible motive to kill Jenkins, and knew information about the circumstances of Jenkins's injuries that would not have been available to someone who just happened upon her wrapped body.

Defense counsel's closing argument at the guilt phase alluded to the idea that Jones's presence at the motel had been suspicious. Yet without any evidence collected from an investigation into Jones to support this argument, defense counsel likely undermined the

defense's credibility with the jury by making this implication. Where defense counsel fails to corroborate statements to the jury, "the jury may well have counted this . . . against [Hines] and his attorney." *English*, 602 F.3d at 729. "[T]he jury would naturally assume" that defense counsel's uncorroborated Jones theory "lacked reliability," without knowing that the lack of corroboration was instead a function of defense counsel's negligence in failing to investigate. *See Stewart v. Wolfenbarger*, 468 F.3d 338, 360 (6th Cir. 2006). Had defense counsel collected evidence to properly show the jury why Jones's behavior that morning and relationship with Jenkins were highly suspicious, the strength of Hines's defense likely would have looked much different. "The difference between the case that was and the case that should have been is undeniable." *Id.* at 361.

In any event, Hines does not need to show that Jones was the actual killer to succeed on his claim before this court. "Even though the jury could have discredited" the theory that Jones was the true murderer, "there certainly remained a reasonable probability that the jury would not have," and that is sufficient to show prejudice under *Strickland*. *Ramonez*, 490 F.3d at 491.

Furthermore, even absent attempting to affirmatively argue that Jones was an alternative suspect, pre-trial investigation into Jones could have allowed defense counsel to effectively challenge the prosecution's case by, at the very least, seriously undermining Jones's testimony and calling the prosecution's timeline of events into question. As trial

counsel explained during post-conviction proceedings, there were numerous inconsistencies between Jones's testimony and the testimony of others—such as an hour-long gap between when Jones allegedly found the body at 1:20 and when dispatch was called at 2:36, as well as the inexplicability of Jones's first report claiming that a woman had been stabbed given that Jenkins's body was wrapped in a bedspread and the cause of her injury would not be apparent unless someone attempted to unwrap her. Defense counsel were unaware of these inconsistencies before trial—and thus did not investigate them further—due to their failure to interview or investigate Jones.

Given that Jones gave an entirely different timeline for his presence at the motel and discovery of the body during his post-conviction deposition—estimating he found the body around 11:00, more than three hours before dispatch was called—there is ample reason to think a pre-trial interview of him would have provided defense counsel further evidence to argue that the prosecution's timeline was flawed and that Jones was an unreliable witness. Yet defense counsel was unprepared to challenge the government's case in this manner, as counsel made no attempt to investigate or interview Jones before trial—thereby prejudicing Hines. *See Stewart*, 468 F.3d at 360–61 (finding *Strickland* prejudice, and in turn the habeas petitioner entitled to relief, where trial counsel's failure to investigate allowed the prosecution's evidence "to go unchallenged").

The state court, in concluding there was no prejudice from counsel's failure to investigate Jones,

unreasonably ignored the key evidence learned at Jones's post-conviction deposition. *See Hines*, 2004 WL 1567120, at *27. The state court ignored the serious inconsistencies and gaps in Jones's story, and it ignored the new evidence of the *extent* of Jones's established relationship with the victim. *See id.* The court mentioned that Jones was "known by the staff" at the motel, "including the victim." *Id.* But Jones's deposition testimony clearly evidences more than that. It shows that Jenkins was the specific person at the motel who, on a weekly basis for two years, would provide Jones with a motel room to facilitate his affair while allowing him to circumvent the motel's established daily rate. And on the morning of the murder, Jones was lurking in the parking lot for about an hour, specifically looking for Jenkins—not just any staff member at the motel. Only by ignoring this evidence did the state court conclude that pointing to Jones as an alternative suspect would have been "farfetched." *See id.* For the state court's analysis to have ignored this evidence was objectively unreasonable, as "weighing the prosecution's case against the proposed witness testimony" that was not elicited due to counsel's ineffectiveness "is at the heart of the ultimate question of the *Strickland* prejudice prong." *Ramonez*, 490 F.3d at 491. As the Supreme Court explained in *Williams*, a state court's "prejudice determination" is "unreasonable insofar as it fail[s] to evaluate the totality of the available . . . evidence." 529 U.S. at 397–98.

Given that presenting Jones as an alternative suspect would not have been "farfetched" in light of Jones's deposition testimony, the state court was

similarly unreasonable in concluding that presentation of this theory "could have resulted in a loss of credibility for the defense." *Hines*, 2004 WL 1567120, at *27. Armed with evidence to emphasize the suspiciousness of Jones's activities at the motel—which is now apparent due to Jones's post-conviction testimony—Hines could have made a convincing argument that Jones was a viable alternative suspect. Hines's counsel alluded to this argument at trial anyway, without any evidence from an investigation in support—and that, in turn, was what undermined the defense's credibility with the jury. *See English*, 602 F.3d at 729. The state court's decision ignored the fact the defense counsel in closing had already pointed at Jones, and ignoring the trial record in its prejudice determination was objectively unreasonable. *See Williams*, 529 U.S. at 398 (explaining a state court's "prejudice determination was unreasonable" where it "failed to even mention the . . . argument . . . that trial counsel did advance").

Hines needs only to show "a reasonable probability"—*not* a certainty—"that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Hines has carried his burden. For the result of Hines's guilt trial to have been different, he only would have needed to sow reasonable doubt in at least one juror's mind based on evidence related to Jones. "[T]he negative consequences of defense counsel's failure to conduct a sufficient pre-trial investigation" into Ken Jones "sufficiently creates a reasonable probability that at least one juror would have struck a different balance had defense counsel not performed deficiently."

English, 602 F.3d at 730. The state court's contrary ruling was an unreasonable application of *Strickland*.

B. Failure to present evidence of residual doubt at the sentencing phase

Hines also contends that trial counsel were ineffective because they did not present evidence regarding Jones in support of residual doubt at the penalty phase. The warden argues that this claim is procedurally defaulted because it was not raised in state court and because Hines cannot establish the requisite cause and prejudice to excuse the default under *Martinez*.

The warden is correct that Hines did not raise this claim in the state trial court. Rather, he raised it at oral argument on post-conviction appeal at the Tennessee Court of Criminal Appeals, in conjunction with the IATC claim arising from counsel's failure to interview Jones. *Hines*, 2004 WL 1567120, at *26 ("We will review this argument along with the related claim, made at oral argument, that trial counsel could have created residual doubt by properly dealing with Ken Jones."). The Tennessee Court of Criminal Appeals subsequently denied the claim for the same reasons it denied the IATC claim. *Id*. at *28.

The Tennessee Court of Criminal Appeals thus adjudicated this claim—at least as to Jones's involvement—on the merits without imposing a state procedural bar. The claim is thus not defaulted and we address its merits. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991) ("If the last state court to be presented with a particular federal claim reaches the merits, it

removes any bar to federal-court review that might otherwise have been available.").

There is no Eighth Amendment right to a jury instruction concerning residual doubt in the penalty phase. *See Franklin v. Lynaugh*, 487 U.S. 164, 173 (1988). Under Tennessee law, however, a capital defendant may present evidence of residual doubt at the penalty phase. *State v. Hartman*, 42 S.W.3d 44, 55–56 (Tenn. 2001) (citing *State v. Teague*, 897 S.W.2d 248, 256 (Tenn. 1995)). The Tennessee Supreme Court explained that "residual doubt is established by proof that casts doubt on the defendant's guilt. It is not limited to proof that mitigates the defendant's culpability for the crime." *Id*. at 57.

As discussed, trial counsel were ineffective for failing to investigate Jones's conduct at the motel when Jenkins was killed, and were similarly ineffective for failing to present this evidence in the penalty phase of trial.[5] If presented with this evidence regarding Jones, there is a "reasonable probability" that the sentencing jury would have reached a different verdict, *see Strickland*, 466 U.S. at 694, and the Tennessee court's contrary conclusion was an unreasonable application of *Strickland*.

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[5] Hines also argues that counsel were ineffective for failing to present DNA evidence at the penalty phase in support of residual doubt. However, we reject this argument for the same reasons discussed above for why Hines was not entitled to an evidentiary hearing related to the DNA evidence.

CONCLUSION

Because Hines's trial counsel were ineffective for failing to investigate Ken Jones, and the state court's determination otherwise was an unreasonable application of *Strickland*, we **REVERSE** the district court's order denying relief and **REMAND** for proceedings consistent with this opinion.

KETHLEDGE, Circuit Judge, dissenting. Respectfully, the majority opinion makes precisely the same mistake for which our court was summarily reversed in *Etherton v. Rivard*, 800 F.3d 737 (2015), *rev'd sub nom. Woods v. Etherton*, 136 S. Ct. 1149 (2016) (per curiam). Specifically, the opinion "nowhere gives deference to the state courts, nowhere explains why their application of *Strickland* was unreasonable rather than merely (in the majority's view) incorrect, and nowhere explains why fairminded jurists could view [the petitioner's] claim only the same way the majority does. The opinion, in other words, does exactly what the Supreme Court has repeatedly told us not to do." *Etherton*, 800 F.3d at 756–57 (dissenting opinion).

Here, neither Hines nor the majority has remotely shown that Hines was prejudiced by his trial counsel's failure to investigate Ken Jones. To begin, the evidence that Hines killed Katherine Jenkins was overwhelming. Two days before the murder, Hines boarded a bus in North Carolina with a one-way ticket to Kentucky. He had a large hunting knife sheathed beneath his shirt. His girlfriend's mother—who had bought the ticket because Hines could not afford it himself—admonished him for taking the knife on the

bus, but Hines responded, "I never go anywhere naked. I always have my blade." R. 173-4, Pg. ID 4201.

Shortly after midnight on March 3, Hines checked into Room 9 of the CeBon Motel in Kingston Springs, Tennessee. Later that morning, around 9:30 a.m., the motel's manager put maid Katherine Jenkins in charge of the motel's operations and gave her a bank bag containing $100 in small bills. Three hours later, around 12:40 p.m., another maid saw a man driving Jenkins's Volvo away from the motel. The maid got into her own car and gave chase, but the Volvo sped off, heading east toward Nashville.

Around the same time, Ken Jones arrived at the CeBon Motel. Nobody was at the front desk, so Jones eventually took the key to Room 21 and left a note saying that he was using the restroom there. (Testimony at a state post-conviction hearing revealed that Jones was there that day with Vernedith White, with whom he had been having an affair for 11 years.) When Jones walked inside Room 21, however, he found Jenkins's body wrapped in a bedspread, on the floor on the far side of the room's two beds. He ran out of the room and across the street to a restaurant, where he asked someone to call the county sheriff.

Sheriff's deputies arrived soon thereafter. They searched Room 21 and, in addition to Jenkins's body, found the bank bag—bloody and empty—along with an unfiltered cigarette burned down to a nub. Then they examined the body. Someone had pulled Jenkins's clothing up to her breasts; her underwear was cut in two pieces and scattered across the room. Her neck had superficial wounds, consistent with "some firm sharp

object [held] to [her] neck," and her hands showed defensive wounds as if she had tried to "ward off injury." R. 173-5, Pg. ID 4304. But the fatal wounds were to her chest—five "deep, penetrating wounds, ranging from 2.5 inches to 6.4 inches in depth." *Hines v. State*, No. M2004-01610-CCA-RM-PD, 2004 WL 1567120, at *2 (Tenn. Crim. App. July 24, 2004); *see also* R. 173-4, Pg. ID 4168; R. 173-5, Pg. ID 4283. A final knife wound, likely inflicted after Jenkins had died, went through her vagina and penetrated her abdominal cavity. The deputies also discovered stab holes with similar widths and depths in the walls of Room 9—the room that Anthony Hines stayed in the prior night. Missing altogether from the scene was Jenkins's wallet, keys (which were attached to an "I love Volvo" keychain), and her Volvo.

Meanwhile, a group of young adults spotted the Volvo—along with Anthony Hines—on the side of the road near Gallatin, Tennessee. The car's engine had overheated—perhaps from being driven at high speeds—and the youths tried to help Hines cool it off. When that failed, Hines offered them $10 for a ride to his sister's house in Bowling Green, Kentucky. They accepted. On the way, the youths said, Hines "seemed real nervous," his eyes wide and bright; and he "talked a lot"—saying, for example, that he had bought the Volvo from "an old lady for $300 or $400." R. 173-2, Pg. ID 3910, 3932–33; R. 173-3, Pg. ID 4022. One of the youths noticed dried blood on Hines's shoulder. During the drive, Hines carried a jacket that he kept folded.

Hines arrived in Bowling Green sometime between 3:00 and 4:00 p.m. His sister too noticed blood on his

shirt. Hines explained that someone had attacked him at the CeBon Motel, and that he had stabbed the attacker "in the side . . . and in the chest[.]" R. 173-2, Pg. ID 3967. But he told his brother-in-law a different story: that he had hitchhiked a ride with a stranger driving a Volvo, that the stranger had tried to rob him, and that during the ensuing struggle the stranger's Volvo had run off the road and flipped over. Afterward, Hines said, he had grabbed the Volvo's keys and escaped. He showed his brother-in-law the keychain, which said something like, "I love Volvo." The brother-in-law gave Hines a ride to Cave City, Kentucky, where Hines's grandparents lived. When Hines arrived in Cave City, he bought a grill as a gift for his sister and brother-in-law.

The police found the Volvo around 4:45 p.m., precisely where Hines had abandoned it. They also found Jenkins's wallet about 20 feet in front of the car, wrapped in a shirt. Any cash that had been in the wallet was gone.

For the next eight days, Hines hid out in the hills around Cave City. On March 11 he turned himself in to a Kentucky sheriff. Before the sheriff said anything about the murder, Hines volunteered that he had stolen the Volvo but said that he had not killed Jenkins. Later that day, Hines told deputies that he would confess to the murder if they would guarantee that he would be sentenced to death. Deputies eventually investigated Hines's campsite and found, among other items, unfiltered cigarettes—much like the one discovered in Room 21.

The jury heard all this evidence at trial. They heard that Hines always carried a large hunting knife; that Jenkins's neck had wounds suggesting that someone had held her at knifepoint; that her chest and vagina had knife wounds consistent with holes in the wall in Hines's motel room; that on March 1 Hines could not afford a $20 bus ticket, but that on March 3—hours after Jenkins's murder—he was flush with cash and bought a grill for his sister; that Hines had stolen Jenkins's wallet, keys, and car; that Hines had blood on his shirt that afternoon; that he told his sister that he had stabbed an "attacker" at the motel; and that he volunteered to tell sheriff's deputies "all about the murder" if they guaranteed him the death penalty.

The question here is whether every "fairminded jurist" would agree that, if only Hines's counsel had investigated Ken Jones, there would have been a "reasonable probability" that the result at Hines's trial would have been different. *See Harrington v. Richter*, 562 U.S. 86, 101 (2011); *Strickland v. Washington*, 466 U.S. 668, 694 (1984). But neither Hines nor the majority has even attempted to make that showing. Nor could they. At trial, Jones offered no testimony regarding Hines's guilt, instead testifying about his discovery of the body. Any post-investigation to impeach him on that score would have been a waste of time—which makes this case easily distinguishable from the cases cited by the majority. *See Ramonez v. Berghuis*, 490 F.3d 482, 489–91 (6th Cir. 2007) (investigation could have led to impeachment of the prosecution's key witness); *Stewart v. Wolfenbarger*, 468 F.3d 338, 361 (6th Cir. 2006) (same). And there is zero reason to think that, after investigation, counsel

could have presented Jones as the "real killer" at trial. Quite the contrary: in post-conviction proceedings, Jones and White testified that they were regulars at the CeBon Motel, and that they came to the motel on March 3 to do what they had done at least "100 times"—namely, to carry on their affair, as part of their "normal Sunday routine." *Hines*, 2004 WL 1567120, at *27. And White testified that Jones was in Room 21 that morning for "less than a minute"—with her watching him the whole time—before he came running out, scared and—unlike Hines—without any blood on his clothes.

In sum, the Tennessee Court of Criminal Appeals had every reason to reject Hines's *Strickland* claim on the ground that it was "farfetched." *See id.* And we have no reason whatever to grant habeas relief on that same claim here. I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Case No. 3:05-0002

Judge Haynes

[Filed: March 16, 2015]

ANTHONY HINES,	)
	)
Petitioner,	)
	)
v.	)
	)
WAYNE CARPENTER, Warden,	)
	)
Respondent.	)
	)

MEMORANDUM

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Petitioner, Anthony Hines, filed this pro se action under 28 U.S.C. § 2254 seeking the writ of habeas corpus to set aside his conviction of first degree murder for which Petitioner received the death sentence. Petitioner moved for appointment of counsel and the Court granted that motion. Petitioner's counsel filed two amended petitions (Docket Entry Nos. 14 and 23). In his last amended petition, Petitioner asserts the following core claims[1]:

> 9. In violation of the Sixth, Eighth, and Fourteenth Amendments, Darrell Hines was denied his rights to due process, equal protection, and to juries selected free from discrimination and from a fair cross-section of the community, given discrimination against women in the selection of the petit jury, the grand jury, and the grand jury foreperson[.]
>
> 10. In violation of the Sixth, Eighth, and Fourteenth Amendments and Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963), and in order to convict Darrell Hines and

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[1] Petitioner filed two amended petitions. (Docket Entry Nos. 14 and 23). Rule 15 of the Federal Rules of Civil Procedure applies to a habeas proceeding. Mayle v. Felix, 545 U.S. 644, 649 (2005); Rule 6(a), Rules Governing Section 2254 Cases. Under Fed. R. Civ. P. 15 (a), the filing of an amended complaint supersedes the prior complaint. Clark v. Tarrant County, 798 F.2d 736, 740- 41 (5th Cir. 1986). Thus, the Court deems the last amended petition to supersede the pro se and first amended petitions and the claims therein. Unless adopted and supported by legal memorandum, the Court deems the claims in the pro se and first amended petition to be waived. In addition, the claims quoted above are characterized as core claims because each claim has numerous subparts.

sentence him to death, the prosecution knowingly presented false testimony and withheld exculpatory evidence which was material to both the conviction and the imposition of the death sentence.

11. Counsel was ineffective at the guilt phase of the proceedings, and absent counsel's failures, there is a reasonable probability that Darrell Hines would not have been convicted and/or sentenced to death. Counsel was ineffective for the following reasons[.]

12. In violation of the Eighth and Fourteenth Amendments, Darrell Hines is actually innocent of the offense for which he has been convicted. He was erroneously convicted based on, for example, the withholding of evidence, false testimony, ineffectiveness of trial counsel, prosecutorial misconduct, and other errors and failures that occurred at the trial which led to an erroneous conviction[.]

13. In violation of the Sixth, Eighth, and Fourteenth Amendments, counsel was ineffective at the re-sentencing proceedings, and absent counsel's failures, there is a reasonable probability that Petitioner would not have been sentenced to death.

14. Counsel was ineffective on appeal, and absent counsel's failures, there is a reasonable probability that Darrell Hines would have received relief on direct appeal.

15. In violation of the Sixth, Eighth, and Fourteenth Amendments, Darrell Hines' death sentence was based on a felony-murder aggravating circumstance which duplicated the jury's guilt finding and failed to meaningfully narrow the class of persons eligible for the death penalty. See Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441 (1990); State v. Middlebrooks, 840 S.W.2d 317 (Tenn 1992).

16. In violation of the Sixth, Eighth, and Fourteenth Amendments, the jury weighed an unconstitutional "heinous, atrocious, or cruel" aggravating circumstance when imposing the death sentence.

17. In violation of the Sixth, Eighth, and Fourteenth Amendments, Darrell Hines' 1989 death sentence was unconstitutional because the 1981 first-degree assault conviction which served as a prior violent felony aggravating circumstance under Tenn. Code Ann. § 39-2-203(i)(2) was void, invalid, and unonstitutional.

18. At re-sentencing, Darrell Hines' jury was misled into believing that mitigating circumstances had to be found unanimously, in violation of the Eighth and Fourteenth Amendments.

19. In violation of the Sixth, Eighth, and Fourteenth Amendments, jury instructions lessened the prosecution's burden of proof at the guilt and re-sentencing stages[.]

> 20. In violation of the Sixth, Eighth, and Fourteenth Amendments, the prosecution introduced inflammatory statements at the guilt/innocence trial which were irrelevant to the issue of guilt[.]
>
> 21. In violation of the Sixth, Eighth, and Fourteenth Amendments, the prosecution made improper arguments during closing statements at the guilt/innocence trial, including arguments which undermined the presumption of innocence and lessened the prosecution's burden of proof. This misconduct rendered Darrell Hines' trial fundamentally unfair.

(Docket Entry No. 23 at 4, 9, 13, 25; Docket Entry No. 23-1 at 16-17,18, 19, 25, 27, 28 and 30).

> 22. In violation of the Sixth, Eighth, and Fourteenth Amendments, at the re-sentencing trial, the prosecution made misleading, unconstitutional, and fundamentally unfair statements to the jury which violated Darrell Hines' constitutional rights.
>
> 23. In violation of the Sixth, Eighth, and Fourteenth Amendments, Darrell Hines' death sentence is arbitrary under United States v. Jackson, 390 U.S. 570,88 S. Ct 1209 (1968), and unconstitutional.
>
> 25. In violation of the Sixth, Eighth, and Fourteenth Amendments, the judge was and appeared to be biased, and should have been recused because of lack of impartiality.

26. In violation of the Sixth, Eighth, and Fourteenth Amendments, prior to the re-sentencing trial, the court failed to grant a continuance when the prosecution failed to provide timely notice of aggravating circumstances, and where Darrell Hines was prevented from securing attendance of necessary out of state witnesses.

27. In violation of the Sixth, Eighth, and Fourteenth Amendments, Darrell Hines' conviction and death sentence is unconstitutional because the empaneling of the jury at both the guilt/innocence trial and at the re-sentencing trial was improper.

30. In violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments and Miranda v. Arizona, 384 US. 436, 86 S.Ct. 1602 (1966), the introduction of Darrell Hines' post-arrest statements at the 1986 guilt/innocence trial and the 1989 re-sentencing trial was unconstitutional.

31. In violation of the Sixth, Eighth, and Fourteenth Amendments, Darrell Hines was denied his right to compulsory process and due process by the trial court's failure to have witnesses Norman Johnson and Bill Andrews produced to testify at the re-sentencing hearing. This likewise violated Darrell Hines' rights to present any and all available mitigating evidence in support of a sentence less than death.

32. In violation of the Sixth, Eighth, and Fourteenth Amendments, the evidence was insufficient to support Darrell Hines' conviction and death sentence. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979).

33. In violation of the Fifth, Sixth, Eighth and Fourteenth Amendments, and International Law, the death penalty is unconstitutional.

34. In violation of the Eighth and Fourteenth Amendments, execution by lethal injection constitutes cruel and unusual punishment, is torturous, and violates contemporary standards of decency, as it involves unnecessary, conscious suffering.

35. In violation of the Sixth, Eighth, and Fourteenth Amendments, Darrell Hines' 1986 first-degree murder conviction and 1989 death sentence are unconstitutional because Tennessee's murder and death penalty statutes (Tenn. Code Ann. § 39-2-202 through § 39-2-205) are constitutionally defective.

37. In violation of due process and equal protection under the Eighth and Fourteenth Amendments, the death sentence is unconstitutional because there were no standards for the decision to choose to seek (or impose) the death sentence (both within Cheatham County, and throughout the entire state of Tennessee), nor are there any consistent and objective standards for proportionality review. As a result of these ailings, especially in

a case where the prosecution has recognized that Darrell Hines ought to be sentenced to life in prison, the death sentence in this case (which impinges upon the fundamental right to life) violates rudimentary notions of due process and equal protection. See Bush v. Gore, 531 U.S. 98, 121 S.Ct. 525 (2000).

38. In violation of the Eighth and Fourteenth Amendments, Darrell Hines' death sentence is unconstitutional, as a result of the length of time (20 years) he has been incarcerated under sentence of death following the offense for which he was convicted. The death sentence is therefore unconstitutionally cruel and unusual. See Lackey v. Texas, 514 U.S. 1045, 115 S.Ct. 1421 (1995)(Stevens, J., respecting denial of certiorari).

39. In violation of the Eighth and Fourteenth Amendments, Darrell Hines is not competent to be executed. Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595 (1986). Mr. Hines acknowledges that such claim is not ripe, as execution is not imminent, but he raises this claim in accordance with Stewart v. Martinez-Villareal, 52.3 U.S. 637, 118 S.Ct. 1618 (1998), which holds that it is proper to raise the claim in the initial habeas petition and then to litigate the claim if it ever becomes ripe, *i.e.,* once an execution date is imminent.

40. The cumulative effect of the errors at trial and sentencing, including all errors cited in this

> petition, denied Darrell Hines due process of law under the Fourteenth Amendment.

(Docket Entry No. 23-2 at 3-4, 7, 9, 11, 12, 17, 18, 19, 20 22 and 27-28). As noted earlier, within the above quoted claims include numerous subparts.

The Court administratively closed this action twice. The first closure was on November 3, 2005, when the Court granted Respondent's motion to hold this action in abeyance pending completion of Petitioner's state court post-conviction proceeding, asserting Eighth and Fourteenth Amendments claims for deoxyribonucleic acid (DNA) testing of certain evidence at his trial. (Docket Entry No. 44). On December 8, 2008, the Tennessee Supreme Court denied Petitioner's application for permission to appeal the Tennessee Court of Criminal Appeals decision denying his claims. On January 14, 2009, Respondent moved to reopen this action and the Court granted that motion on February 2, 2009. (Docket Entry Nos. 53 and 56). In subsequent proceedings, the Court granted Petitioner's motion for DNA testing under an Agreed Protocol with the State. (Docket Entry Nos. 79, 83 and 85). The Court set a status conference on September 30, 2011. Throughout 2011 and 2012, Petitioner and Respondent filed numerous motions for extensions of the Court's deadlines for discovery and to file the joint statement of the relevant state record, the parties' claims defenses and the necessity for an evidentiary hearing. (Docket Entry Nos. 89, 90, 94, 95, 99, 100, 102, 103, 104, 105, 107 and 108).

The second closure was on February 3, 2013, after the United States Supreme Court granted certiorari in

Trevino v. Thaler, 449 Fed. Appx. 415 (5th Cir. 2011), cert. granted 568 U.S._ (Oct. 29, 2012) (U.S. No. 11-10189), addressing the applicability of Martinez v. Ryan, 566 U.S._ (2012). (Docket Entry No. 110). Given the numerosity of claims and the extensive factual record, the Court closed this action pending the Trevino decision. On January 16, 2014, the Court reopened this action and ordered the parties to submit an agreed order for the proceedings. (Docket Entry No. 113). The parties filed their schedule, but the Court shortened the schedule given the length of the pendency of this action.

Before the Court is the Respondent's motion for summary judgment (Docket Entry No. 118) contending, in sum, that most of Petitioner's claims were never presented to the State courts and are procedurally defaulted. For Petitioner's exhausted claims, Respondent argues that the State courts reasonably determined those claims under clearly established federal law. In his 191 page response with extensive evidentiary submissions and citations to Trevino and Martinez, Petitioner argues that he is actually innocent and his claims for ineffective assistance of his post conviction counsel will establish cause and prejudice for his unexhausted claims and procedural defaults. Petitioner contends that the State courts' decisions on his exhausted claims are erroneous and unreasonable applications of federal law. Respondent filed a six page reply to Petitioner's response.

Before addressing Petitioner's contentions, the Court must evaluate Petitioner's request for an evidentiary hearing.

A. Request for An Evidentiary Hearing

In the Joint Statement of the Case ordered by the Court, Petitioner requests an evidentiary hearing on his claims under Trevino and Martinez as well as his claim of actual innocence. (Docket Entry No. 109 at 1-43). Respondent argues that Petitioner has not met his burden of proof under 28 U.S.C.§2254(e)(2) and that Supreme Court precedent limits this Court's review to the State court record. Id. at 43-4. Since that submission, Petitioner has presented extensive evidence (Docket Entry Nos. 124-1 through 129) that Petitioner contends warrants an evidentiary hearing.

To decide this issue, the Court considers the State court record that exceeds 7400 pages with a trial, sentencing hearing, a resentencing hearing and a post conviction hearing. (Addendum Nos. 1 through 28). The post conviction hearing included depositions of experts as well as extensive publications on trial and sentencing issues in a death penalty case. (Addendum No. 20, Vols. 1 through 4). As a proxy for the extensiveness of the post conviction evidentiary hearing, in his post conviction appeal, Petitioner's lead brief is 172 pages of which 93 pages are devoted to a recitation of the evidence. The Tennessee appellate court's opinion reflects that the post conviction hearing contains the testimony from several witnesses, including a statistician on the issue of discrimination in the selection of the grand jury, grand jury foreperson and petit jury as well as testimony of a juror. Hines, 2004 WL 1567120 at* 6, 20-21. Seven psychiatrists/psychologists testified at the second sentencing hearing on Petitioner's personal history and

mental status. Id. at *14-18. See also Hines v. State, 919 S.W.2d 573, 577 (Tenn. 1995). Two doctors testified on the victim's stab wounds. Hines, 2004 WL 1567120 at *19. In addition, the witnesses who are cited as giving false testimony testified at the post conviction hearing, as well as witnesses whom Petitioner's counsel was cited for failing to call as witnesses at trial. Id. at *4-6, 8.

For an evidentiary hearing in a habeas action, in the AEDPA, Congress redefined the standards:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that - (A) the claims relies on - (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) **a factual predicate that could not have been previously discovered through the exercise of due diligence; and (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.**

28 U.S.C.§ 2254(e)(2) (emphasis added).

In Williams v. Taylor, 529 U.S. 420 (2000), the Supreme Court explained that if the petitioner demonstrated diligence, then the inquiry ends, but if

there is an issue of diligence the focus is on whether the petitioner or his counsel knew of the matters at issue and failed to pursue the matter:

> The question is not whether the facts could have been discovered but instead whether the prisoner was diligent in his effort . . . **Diligence for purposes of the opening clause [on Section 2254(e)(2)] depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court;** it does not depend, as the Commonwealth would have it, upon whether those efforts could have been successful.
>
> * * *
>
> **For state courts to have their rightful opportunity to adjudicate federal rights, the prisoner must be diligent in developing the record and presenting, if possible, all claims of constitutional error. If the prisoner fails to do so, himself or herself contributing to the absence of a full and fair adjudication in state court, § 2254(e)(2) prohibits an evidentiary hearing to develop the relevant claims in federal court, unless the statute's other stringent requirements are met. Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings.**

* * *

> Given knowledge of the report's existence and potential importance, a diligent attorney would have done more. Counsel's failure to investigate these references in anything but a cursory manner triggers the opening clause of § 2254(e)(2).
>
> **As we hold there was a failure to develop the factual basis of this Brady claim in state court, we must determine if the requirements in the balance of § 2254(e)(2) are satisfied so that petitioner's failure is excused . . . upon a showing, by clear and convincing evidence, that no reasonable factfinder would have found petitioner guilty of capital murder but for the alleged constitutional error.**

Id. at 435, 437, 439-440.

Independent of § 2254(e)(2), the Court also has the inherent authority to set an evidentiary hearing in a habeas action. Abdur' Rahman v. Bell, 226 F.3d 696, 705-06 (6th Cir. 2000). "[A] district court does have the inherent authority to order an evidentiary hearing even if the factors requiring an evidentiary hearing are absent." Id. at 705. Such hearings are set "to settle disputed issues of material fact." Id. at 706. Yet, "if [the court] concludes that the habeas applicant was afforded a full and fair hearing by the state court resulting in reliable findings, [the court] may, and ordinarily should accept the facts as found in the hearing. But [the court] need not. In every case [the

court] has the power, constrained only by [its] sound discretion, to receive evidence bearing upon the applicant's constitutional claim." Id. at 705 (quoting Townsend v. Sain, 372 U.S. 293, 318 (1963)). This authority extends to determine factual issues or if an inadequate record exists to resolve the petitioner's claims, on a procedural default controversy. Alcorn v. Smith, 781 F .2d 58, 60 (6th Cir. 1986).

Even prior to AEDPA, a habeas petitioner had to show cause for his failure to develop the state record or that "a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing," Kenney v. Tamayo-Reyes, 504 U.S.1, 11-12 (1992). In a word, the distinction between § 2254(e)(2) and the Court's inherent authority to order a hearing is "when a petitioner is entitled to a hearing [under § 2254(e)(2)] . . . versus whether a district court has the inherent discretion to order a hearing is still intact following Williams." Abdur' Rahman, 226 F.3d at 706. Evidentiary hearings have been held to be appropriately denied where the habeas petitioner "has not shown that his . . . claims would result in no reasonable factfinder finding him guilty of the underlying offenses . . . We therefore conclude that the district court did not abuse its discretion by declining to conduct an evidentiary hearing." Abdus-Samad v. Bell, 420 F .3d 614, 626-27 (6th Cir. 2005).

More recently, in Cullen v. Pinholster, _U.S._, 131 S. Ct 1388 (2011), the Supreme Court expressly stated that the federal habeas review is limited to the state court record:

We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that "resulted in" a decision that was contrary to, or "involved" an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time i.e., the record before the state court.

This understanding of the text is compelled by "the broader context of the statute as a whole," which demonstrates Congress' intent to channel prisoners' claims first to the state courts. Robinson v. Shell Oil Co., 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). "The federal habeas scheme leaves primary responsibility with the state courts .... " Visciotti, supra, at 27, 123 S.Ct. 357. Section 2254(b) requires that prisoners must ordinarily exhaust state remedies before filing for federal habeas relief. It would be contrary to that purpose to allow a petitioner to overcome an adverse state-court decision with new evidence introduced in a federal habeas court and reviewed by that court in the first instance effectively de novo.

Limiting § 2254(d)(1) review to the state-court record is consistent with our precedents interpreting that statutory provision. Our cases

emphasize that review under § 2254(d)(1) focuses on what a state court knew and did. State-court decisions are measured against this Court's precedents as of "the time the state court renders its decision." Lockyer v. Andrade, 538 U.S. 63, 71-72, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003). To determine whether a particular decision is "contrary to" then-established law, a federal court must consider whether the decision "applies a rule that contradicts [such] law" and how the decision "confronts [the] set of facts" that were before the state court. Williams v. Taylor, 529 U.S. 362, 405, 406, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (Terry Williams). If the state-court decision "identifies the correct governing legal principle" in existence at the time, a federal court must assess whether the decision "unreasonably applies that principle to the facts of the prisoner's case." Id., at 413, 120 S.Ct. 1495. It would be strange to ask federal courts to analyze whether a state court's adjudication resulted in a decision that unreasonably applied federal law to facts not before the state court.

Our recent decision in Schriro v. Landrigan, 550 U.S. 465, 127 S.Ct. 1933, 167 L.Ed.2d 836 (2007), is consistent as well with our holding here. We explained that "[b]ecause the deferential standards prescribed by § 2254 control whether to grant habeas relief, a federal court must take into account those standards in deciding whether an evidentiary hearing is appropriate." Id., at 474, 127 S.Ct. 1933. In

> practical effect, we went on to note, this means that when the state-court record "precludes habeas relief" under the limitations of § 2254(d), a district court is "not required to hold an evidentiary hearing." Id., at 474, 127 S.Ct. 1933 (citing with approval the Ninth Circuit's recognition that "an evidentiary hearing is not required on issues that can be resolved by reference to the state court record" (internal quotation marks omitted)).

Id. at 1398-99 (footnote omitted). Yet, the Sixth Circuit has since explained that Pinholster "was not a wholesale bar on federal evidentiary hearings", "such as when the State court decision was not an adjudication on the merits". McClellan v. Rapelje. 703 F.3d 344, 356 (6th Cir. 2013).

As to Petitioner's reliance upon Martinez for an evidentiary hearing on his post-conviction counsel's alleged deficiencies[2], there, the Supreme Court created an equitable exception to procedural default that "qualifies Coleman by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 132 S. Ct. at 1315. The Supreme Court defined "initial-review collateral proceedings" as proceedings "which provide the first occasion to raise a

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[2] Petitioner's challenges to the effectiveness of his post conviction counsel are not in his second amended petition, but in his request for an evidentiary hearing. (Docket Entry No. 109 at 1-43). In any event, those challenges are addressed in the procedural default section of this Memorandum, infra.

claim of ineffective assistance at trial." Id. In Martinez, the Supreme Court expressly recognized that"[d]irect appeals, without evidentiary hearings, may not be as effective as other proceedings for developing the factual basis for the [ineffective assistance of trial counsel] claim." Id. at 1318. In Trevino v. Thaler, _ U.S._, 133 S. Ct. 1911 (2013), the Supreme Court extended the Martinez exception where State law "does not expressly *require* the defendant to raise a claim of ineffective assistance of trial counsel in an initial *collateral review* proceeding .... [but the State] law on its face appears to permit (but not require) the defendant to raise the claim on *direct appeal."* Id. at 1918 (emphasis in the original).

Based upon its analysis of Tennessee's system, this member of the Court concluded, consistent with Trevino, that Tennessee's system by "'design and operation makes it **highly unlikely** in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal.'" Morrow v. Brandon, No. 3:06-0955, 2014 WL 49817 at *9 (M. D. Tenn. Jan. 7, 2014) (quoting Trevino, 133 S. Ct. at 1921and citing Fenton v. Colson, No. 3:09cv1057, 2013 WL 704317 at *13 (M. D. Tenn. Feb. 25, 2013) (emphasis in Brandon). In Sutton v. Carpenter, 745 F.3d 787 (6thCir. 2014), the Sixth Circuit ruled that "ineffective assistance of post-conviction counsel can establish cause to excuse a Tennessee defendant's procedural default of a substantial claim of ineffective assistance at trial." Id. at 795-96 (analyzing Trevino, 133 S. Ct. 1918-21 and citing Martinez, 132 S.Ct. at 1320).

Yet, "[t]o be successful under Trevino . . . [the habeas petitioner] must show a 'substantial' claim of ineffective assistance, and this requirement applies as well to the prejudice portion of the ineffective assistance claim." McGuire v. Warden, Chillicothe Correctional Inst., 738 F.3d 741, 752 (6th Cir. 2013) (citing Trevino, 133 S.Ct. at 1918). Although Petitioner's claims about his post conviction counsel may be raised under Martinez, the necessity of an evidentiary hearing on Petitioner's claims about his counsel is a separate issue.

In assessing an evidentiary hearing based upon Martinez, the Court considers the factual state record in its entirety: the trial, two sentencing hearings and an extensive post-conviction hearing. Of the issues that Petitioner identifies for an evidentiary hearing (Docket Entry No. 109 at 1-43), virtually all of the facts related to those issues were part of the trial record, the sentencing or resentencing hearings, or the post conviction evidentiary hearing that was quite extensive. As stated earlier, Petitioner's post conviction hearing reflects proof from several witnesses, including a statistician on the issue of discrimination in the selection of the grand jury, grand jury foreperson and petit jury, as well as testimony of a juror. Seven psychiatrists/psychologists testified at the second sentencing hearing on Petitioner's personal and medical history. Two doctors testified on the victim's stab wounds. In addition, the witnesses who are cited as giving false testimony testified at the post conviction hearing, as well as witnesses whom Petitioner's counsel was cited for failing to call as witnesses at trial.

Witnesses whom Petitioner asserts gave false testimony testified at the post conviction hearing.

Yet, the Court must evaluate the evidence submitted by Petitioner and whether such proof warrants an evidentiary hearing.

1. Petitioner's Medical Proof

Petitioner's new proof on his mental condition includes Dr. Stacey Wood, a clinical neuropsychologist who performed a battery of tests for an "intellectual and neuropsychological" evaluation" of Petitioner. (Docket Entry No. 125-2 at 1-4). Dr. George W. Woods, Jr., a neuropsychiatrist, who interviewed Petitioner on three occasions and reviewed the reports of Drs. David Lisak, Paul Moberg, Stacey Wood, Ruben Gur, and Pamela Auble, opined as follows:

> Darrell has multiple neurological and neuropsychiatric symptoms, including affective dysregulation, impaired regisration, defective problem initiation, impaired judgment, clinical perservation [sic], poor problem sequencing, grandiosity, irritability, agitation, flight of ideas, and circumstantiality. These symptoms are associated with disorders that are genetic/familial (Bipolar Disorder), environmentally derived (Post Traumatic Stress Disorder), and neurodevelopmental (FASD and dysexecutive syndrome). The etiology of these disorders is complex and interconnected, creating a depth of impaired functioning and disruptive behavior greater than would be predicted from any one disorder independently.

> The multiplicity of symptoms explains Darrell's atypical presentation and behavioral dysfunction.
>
> Moreover, Darrell's symptoms are interrelated in a cognitive synergy that rendered Darrell unable to function effectively as both an adolescent and an adult. At the time of his trial, Darrell was affectively labile, unable to tell his story coherently, unable to gather related facts and form an incisive conclusion, and impaired in effective decision making skills – symptoms that could have been presented to the triers of fact as mitigation.

(Docket Entry No. 125-1 at 1, 8-19).

Dr. Ruben Gur, Ph.D., director of the Brain Behavior Laboratory and Center for Neuroimaging in Psychiatry, provided a report that, in essence, found as follows:

> **Results of neuropsychological testing show abnormalities indicating brain damage.** These abnormalities are in regions that are very important for regulating behavior and executive functioning, and often result in a lack of inhibition, difficulty reading social cues, perseveration, viscosity, and grandiosity, as well as the inability to weigh and deliberate. The opinions I express with regard to the neuropsychological findings meet standards of scientific certainty.

(Docket Entry No. 125-3, p. 2 of 2) (citing Dr. Stacey Wood's testing with emphasis added).

In addition, Dr. David Lisak, Ph.D., a clinical psychologist and assistant professor of psychology at the University of Massachusetts and forensic consultant, interviewed Petitioner and his two siblings; reviewed Petitioner's medical school and institutional records including the prior evaluation by Dr. Kenner and draft report of Dr. Richart; and reviewed the affidavits of Victoria Hines, Petitioner's sister, and David Miles. In sum, Dr. Lisak concluded that:

> There is overwhelming evidence that Darrel Hines suffered extremely severe childhood trauma. He was subjected to pervasive neglect, and to years of violent physical abuse that left him literally and physically scarred for life. However, the most damaging trauma was very likely the sexual abuse that he suffered at the hands of multiple perpetrators over the course of his childhood, including older women and, almost certainly, his step-father, Bill Hines.
>
> This sexual abuse is directly linked to the very severe dissociative symptoms that Darrell displayed as a child, symptoms that were witnessed by and attested to by his siblings. These severe dissociative symptoms underscore the severity of the traumas that Darrell was subjected to, and they are also markers of severe and lifelong PTSD. The PTSD, in turn, is associated with Darrell's chronic emotional dysregulation, a vulnerability that has left him intensely reactive to stress and unable to de-escalate normally when he does react.

(Docket Entry No. 125-4, at ¶¶ 65-66).

Petitioner's medical proof in this action reflects mental evaluations almost three decades after the crime that was committed in 1985. Although some experts opine that Petitioner's condition existed from his youth, with an evidentiary hearing, this medical testimony on Petitioner's mental condition would be almost thirty years after the offense. As the Sixth Circuit stated:

> In his federal habeas petition, Strouth seeks to "supplement[ ]" the record with "expert evaluations of his longstanding mental illness." Br. at 99-100. But in reviewing the state court's resolution of Strouth's claim, federal courts must "limit[ ]" themselves to "the record that was before the state court." Cullen v. Pinholster, 563 U.S. –, 131 S.Ct. 1388, 1398, 179 L.Ed.2d 557 (2011). The new mental-health evidence has no bearing on whether AEDPA permits us to grant him habeas relief on this claim. And because that is the only ground on which Strouth seeks relief with respect to this claim, the claim necessarily fails. Even if that were not the case, the district court's reasoning on this score independently suffices to reject this claim: **recent mental evaluations offer little insight into Strouth's state of mind twenty-five-plus years ago, as the state courts reasonably concluded in finding no prejudice.**

Strouth v. Colson, 680 F.3d 596, 603 (6th Cir. 2012) (emphasis added).

In addition, the state court record includes evidence of Petitioner's personal history and abuse and his Post Traumatic Stress Disorder ("PTSD") and brain damage and lack of executive control.

> Dr. William Kenner, a psychiatrist, testified that the petitioner suffered from post-traumatic stress disorder ("PTSD"), antisocial personality disorder, status post-head injury, and inhalant abuse. He said that the petitioner was sexually abused by both his stepfather and a maternal uncle and physically abused by his stepfather, opining that the abuse caused the petitioner's PTSD. The physical abuse inflicted upon the petitioner by his stepfather included hitting him in the head with a tobacco stick, whipping him with car radio antennas, throwing him into a pond although he could not swim, and shooting the family dog and her puppies in front of him and his siblings. The petitioner's mother was also a victim of Bill Hines's abuse, and the petitioner often tried to protect her. At the age of eight or nine, the petitioner sustained a head injury when he fell off a wagon of hay and was knocked unconscious. The petitioner did not receive any medical treatment for this injury.
>
> Explaining how PTSD affects the brain, Dr. Kenner said that a person with PTSD repeats or replays traumatic events throughout life and that PTSD can alter a person's character and change his or her behavior. Dr. Kenner testified that in the petitioner, PTSD created a paranoid quality. Dr. Kenner opined that the head

injuries the petitioner suffered throughout his life could have caused organic personality syndrome, which made him even more volatile and difficult to manage. The petitioner's abuse of inhalants such as glue and gasoline also caused damage to his brain. Dr. Kenner concluded that the petitioner's choosing a woman for his victim was inconsistent with the petitioner's personal history, as there was no indication that he had hard feelings toward women.

On cross-examination, Dr. Kenner acknowledged that the petitioner had been in and out of jail since the age of fifteen. He further acknowledged that a report prepared by the Middle Tennessee Health Institute and the Harriet Comb Mental Health Center indicated that the petitioner experienced difficulty in relationships with women, as the result of problems with girlfriends and family interference, exhibited a preoccupation with thoughts of violence, and displayed extreme prejudice toward African-Americans. Additionally, a report prepared by the Tennessee Department of Correction stated that the petitioner, once confined on death row, acknowledged to security personnel that he hated both women and African-Americans. Dr. Kenner testified that although the petitioner said that he hated women, he did not believe him because his behavior indicated differently. He said he had much more information concerning the petitioner than Dr. Charvat did prior to preparing her report for the resentencing. He believed that Dr. Charvat

should have interviewed the petitioner's sisters and mother in order to get a true picture of "how bad things were for [the petitioner] growing up."

Dr. Murry Wilton Smith, a specialist in addiction medicine, testified that the petitioner is a Type II alcoholic. He explained that Type II alcoholism, a primary medical illness based in brain chemistry, is inherited and involves rapid early onset of alcoholism, usually between the ages of nine and twelve, and is associated with antisocial behavior and early legal trouble. Dr. Smith also testified that the petitioner had used inhalant solvents and marijuana. He was aware of the petitioner's low levels of serotonin, which is associated with violent behavior and Type II alcoholism. He said that current treatment for Type II alcoholism, which was not available in 1989, consisted of alcohol and drug treatment, intensive physiotherapy with a counselor, and medication to improve the serotonin level. On recross examination, Dr. Smith acknowledged that although medications to increase serotonin levels were available in 1986, there was not a routine to monitor. He also stated that a characteristic of Type II alcoholics is a lack of motivation to follow instructions or a schedule.

Dr. Paul Rossby, an expert in molecular neurobiology and the study of serotonin, testified that, as a molecular biologist, he studies the chemistry of the brain and the biological basis of behavior. According to Dr. Rossby, serotonin blocks pain and orchestrates inhibition within

the brain. Dr. Rossby testified that research of serotonin dated back to at least the 1970s. He further said that there would have been a "tremendous amount" of literature available on serotonin at the time of the petitioner's resentencing in 1989 and a "great deal" of literature available at the time of the petitioner's trial in 1986. He said that low levels of serotonin have been associated with impulsive behavior, but none of the studies has indicated that it causes violence.

Dr. Rossby had a spinal tap performed on the petitioner to determine his serotonin levels, which were "at the extreme low level" of the normal male population. He opined that the petitioner's serotonin levels, coupled with his Type II alcoholism, resulted in the petitioner's being organically impaired and said that the petitioner does not have the biological capacity to control his impulsive behavior. Dr. Rossby said that in a person with low levels of serotonin, once an impulse is triggered, there is no ability to control the impulse. He acknowledged that he did not testify on the issue of serotonin levels until 1999. He first worked on a case involving a serotonin defense in approximately 1992, and was not aware of any expert who had testified on the issue of serotonin prior to the time he was involved with his first case.

Dr. Henry Cellini, an educational psychologist who was offered as a rebuttal witness on behalf

of the State, testified that serotonin research began in the 1970s but had only been fully developed in the last fifteen to twenty years. With regard to the petitioner's case, Dr. Cellini testified that the practical application of serotonin levels to behavior was in its "infancy" in the mid-1980s. He said that research indicates that the two primary factors of antisocial personality disorder are impulsive aggression and psychopathic tendencies or thinking.

Two witnesses were presented as to the claims regarding the Green River Boys Camp in Kentucky and its alleged effects on the petitioner. Tammy Kennedy, an investigator with the post-conviction defender's office, said that she interviewed former residents and staff members. The former residents told her that, when they arrived at camp, they were immediately subjected to grouping, which consisted of several boys surrounding the new resident and physically and verbally abusing him. She said that the former residents told her at times they had sewage detail, which involved two boys holding a resident by the legs and dumping him into the sewage. They were forced to scrub the pavement until their brushes were gone and their hands were blistered. A juvenile specialist who had visited Green River advised Ms. Kennedy that schooling was minimal and that there were reports of physical, sexual, and verbal abuse of the residents. Ms. Kennedy said

> that several other death row inmates were former residents of Green River

Hines v. State, No. M2002-01352-CCA-R3-PD, 2004 WL 112876 at*15-17 (Tenn. Ct. Crim.App. Jan. 23, 2004).

In the state court proceedings, Dr. S. Paul Rossby, Ph.D. at the Vanderbilt University Department of Psychiatry and Division of Molecular Neurobiology, cited Petitioner's "extremely low" serotonin level that "**is essential for self-control.**" (Docket Entry No. 29, Addendum 20, Vol. 1, at 5193, 5198, 5199 (emphasis in the original). Dr. Rossby cited the impact of low serotonin on other psychiatric disorders. Id. Petitioner's "extremely low" serotonin level also impacts his amygdala, an inhibitory part of Petitioner's brain, id. at 5198, 5202, but "low serotonin activity does not in itself produce violent behavior, it simply reduces or in the case of Anthony Darrell Hines (and many other men) virtually eliminates one's capacity to control it after it has been triggered." Id. at 5202. Dr. Rossby reviewed Petitioner's medical records, institutional records and interviewed Vicki Hines, Petitioner's sister. Id. at 5201-02.

There are other such evaluations prior to Petitioner's trial. A 1977 psychological evaluation of Petitioner by Dr. Hecht S. Lackey, Ph.D and Danny Johnson, M.A., psychologist, found "no significant indication of organic brain damage or visual motor impairment." Id., Vol. 4 at 6518. In addition, in September and October 1985, Petitioner underwent a psychological testing evaluation and was found to be "rational, coherent, relevant, organized and devoid of

circumstantiality, tangentiality, looseness of associations, ideas of reference, paranoid ideation, delusional content, and other evidence of thought disorder." Id.; Vol. 2 at 5230. Yet, on occasion, Petitioner was "hostile, uncooperative, and virtually nonverbal." Id. at 5228.

Dr. Robert F. Heap, Ph.D, a clinical psychologist, and Julie Maddox, M.A., a psychological examiner, concluded that "at the time of the offense Mr. Hines was exhibiting Continuous Alcohol Abuse and Anti-Social Personality Disorder." Id. at 5231. Petitioner was found competent to proceed to trial. Id. at 5232. In November, 1985, another evaluation was performed by Dr. John P. Filley, M.D. with the same assessment and observations. Id. at 5250-51, 5333. In 1997 and 998, Petitioner was administered fifteen (15) psychological tests. Id. at 4890-95. Dr. Pamela Auble performed an extensive evaluation of Petitioner. Id. at 4890-4895. Dr. Auble concluded Petitioner was an "angry man with poor self-esteem." Id. at 4894.

Federal habeas relief has been awarded where the habeas petitioner's counsel presented essentially no expert proof. Powell v. Collins, 332 F.3d 376, 400 (6th Cir. 2003) ("We found that counsel should have found a different psychiatric expert for trial of the penalty phase, and that this deficient performance resulted in presentation of essentially no mitigating evidence at all, especially on the one topic which may have convinced jury that the death sentence was not justified-the defendant's mild mental retardation and his diminished mental capacity.") (citing Skaggs v. Parker, 235 F.3d 261 (6th Cir. 2000)).

In addition, proof of brain damage does not entitle a habeas petitioner convicted of murder to federal habeas relief where, as here, Petitioner challenged his guilt to this offense. Bowling v. Haeberlin, No. 03-28-ART, 2012 WL 4498647, at* 63-67 (E.D. Ky. Sept. 28, 2012); see also Hill v. Mitchell, No. 1:98-cv-452, 2013 WL 1345831, at *59 (S. D. Ohio March 29, 2013) (where claim based on "organic brain damage" held to be defaulted barring review). In addition, under Tennessee law, evidence of brain damage does not preclude conviction of first degree murder nor imposition of the death sentence. State v. Howell, 868 S.W.2d 238 (Tenn. 1993) (defendant convicted of murder and sentenced to death despite evidence of brain damage, learning disabilities and an eighth grade education).

From the Court's review, Petitioner's trial and post conviction counsel pursued Petitioner's brain condition and mental health condition and those facts are in the state record, as reflected above. Hines, 2004 WL 112876 at *23-39. The Court concludes that Petitioner's medical proof does not warrant an evidentiary hearing. Moreover, Petitioner's trial counsel secured a reversal and a new sentencing hearing. As discussed in more detail infra, the Court does not deem Petitioner's cited bases for a hearing to justify another evidentiary hearing. McGuire,738 F.3d at 752. The legality of the State's execution protocol in the petition has been abandoned and Petitioner has not presented this claim about the State's new protocol in the State courts.[3]

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[3] The State's new death penalty protocol is the subject of an action before the State courts by another prisoner.

In sum, to the extent Petitioner presents new expert medical proof, such proof is not probative as a matter of law. The expert proof in the state record is ample to evaluate any omission of Petitioner's trial and post conviction counsel. An evidentiary hearing for such witnesses is unnecessary given the extensive State court record. Petitioner's counsel seeks to expand these medical issues into claims about trial and state post conviction counsel. Petitioner's counsel's strategy is as if he were Petitioner's trial and post conviction counsel, but that is not the standard for setting an evidentiary hearing under 28 U.S.C.§ 2254(e)(2). Thus, the Court concludes that Petitioner's request for an evidentiary hearing, based on Martinez, should be denied, but the Court will consider Petitioner's proof on whether Petitioner has satisfied the standard for actual innocence to excuse his procedural defaults.

2. Petitioner's DNA and Fingerprint Proof

Petitioner next cites his forensic proof that Petitioner contends establishes his actual innocence and thereby excuses his procedural defaults.

> As a general rule, claims forfeited under state law may support federal habeas relief only if the prisoner demonstrates cause for the default and prejudice from the asserted error. The rule is based on the comity and respect that must be accorded to state-court judgments. The bar is not, however, unqualified. In an effort to "balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises

> in the extraordinary case,"the Court has recognized a miscarriage-of-justice exception.

House v. Bell, 547 U.S. 518, 536 (2006) (quoting Schlup v. Delo,, 513 U.S. 298, 324 (1995) (citations omitted)). This doctrine "recognize[s] a narrow exception to the general rule [of a procedural bar] when the habeas applicant can demonstrate that the alleged constitutional error has resulted in the conviction of one who is actually innocent of the underlying offense." Dretke v. Haley, 541 U.S. 386, 388 (2004). The "actual innocence 'does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty.'" Cleveland v. Bradshaw, 693 F.3d 626, 633 (6th Cir. 2012) (quoting Schlup, 513 U.S. at 329).

In this context, "'actual innocence' means factual innocence, not mere legal insufficiency." Bousley v. United States, 523 U.S. 614, 623 (1998). "[A] credible claim of actual innocence is extremely rare," Souter v. Jones, 395 F.3d 577, 600 (6th Cir. 2005), and "the actual innocence exception should 'remain rare' and 'only be applied in the extraordinary case.'" Id. at 590 (quoting Schlup, 513 U.S. at 321) (internal quotation marks omitted). Examples of "new reliable evidence" are "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence–that was not presented at trial." Schlup, 513 U.S. at 324. "This 'gateway actual innocence claim' does not require the granting of the writ, but instead permits the petitioner to present his original habeas petition as if he had not filed it late." Perkins v. McQuiggin, 670

F.3d 665, 670 (6th Cir. 2012). In assessing such proof, "the habeas court must consider 'all the evidence,' old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under 'rules of admissibility that would govern at trial.'" House, 547 U.S. at 538 (quoting Schlup, 513 U.S. at 327-28) (internal quotation marks omitted); Bell v. Howes, 703 F.3d 848, 855 (6th 2012).

Petitioner principally cites the results of DNA testing by Gary Harmor, a forensic serologist, who analyzed a stain from the victim's underwear employing two different types of DNA analysis. Harmor used the Identifiler™ and Minifiler™ typing systems - that is called autosomal DNA. This testing identifies Short Tandem Repeats markers (or STRs) that are in every person's DNA. Harmor also used the Yfiler™ system that identifies DNA from theY chromosome (or Y-STRs) exclusive to males, who alone have a Y chromosome. (Docket Entry No. 124-1, Exhibit 1, Harmo Affidavit at 1, 3-4). Applying these systems, Harmor concluded that the male DNA on the victim's underwear is not Petitioner's DNA. Id. at 4.

> The autosomal genetic marker result from the bloodstain from the crotch hem of the victim's panties (item 6-1) is a mixture of DNA from at least three individuals. The victim, Catherine Jenkins (item 7-1) could be a contributor to the mixture of types. Anthony Darrell Hines (item 14-1) is not a contributor to the genetic marker profile obtained from item 6-1.

Id. (emphasis in original). Using Y-STR analysis, Harm or determined that the underwear stain (6-1) contains

a mixture of male DNA from two separate sources that does not include Petitioner. Id.

Petitioner argues that such DNA evidence would have led to his acquittal because DNA evidence is reliable evidence. Petitioner cites as examples homicide cases, including those involving sexual assault. Petitioner also contends this DNA evidence proves that Dr. Charles Harlan testified falsely that there was not any semen on the victim. Petitioner presents a Tennessee Bureau of Investigation record that the various swabs from the victim tested positive for semen. Respondent contends that the State courts found that the semen was on the victim's underwear that was torn to pieces and found away from the victim's body, citing State v. Hines, 758 S.W.2d 515, 517 (Tenn. 1988).

On this issue, the Tennessee appellate court upheld the trial court's denial of DNA testing and found that even if DNA test were provided and exculpatory, the evidence would not exonerate Petitioner:

> The State's evidence against the Petitioner consisted of accounts of the Petitioner driving away from the motel in the victim's car and accounts of the Petitioner carrying a large hunting knife. Additionally, the Petitioner had $20 in spending money, and a $20 bill was left under the victim's watchband. Witnesses saw dried blood on the Petitioner's shirt, and, when he arrived in Kentucky, he explained how he had stabbed a male motel operator who attacked him. The Petitioner also explained to his sister that he obtained the victim's car by grabbing the

steering wheel and keys after an unidentified driver attempted to rob him. When taken into custody, before the arresting officer explained that the victim had been killed, the Petitioner admitted taking the victim's car but denied killing the victim. The victim's wallet was found a short distance from where her car was found abandoned. When questioned by police, the Petitioner stated that, if they could guarantee the death penalty, he would tell them all they wanted to know.

As we are required to presume the tests would be exculpatory, the question is whether these exculpatory results would form a reasonable probability that the Petitioner would not have been prosecuted or convicted-for mandatory testing-or that there is a reasonable probability that the Petitioner's verdict or sentence would have been more favorable-for discretionary testing. We conclude that the post-conviction court did not abuse its discretion in determining that, even if the DNA evidence were found to be exculpatory, the Petitioner would have still been prosecuted and convicted, and his sentence and verdict would not be any more favorable.

Initially, **there does not appear to be any evidence that this was a rape where sperm might be present on the victim. The victim was raped with a knife. However, even if sperm could be found on the victim's underwear, dress, and slip, and that sperm was identified with another man, that**

discovery does not preclude the prosecution and conviction of the Petitioner. It may simply mean the Petitioner was assisted by another man in the murder. Further, the Petitioner points to a cigarette butt, a spray bottle, a $20 bill, and a bloody bank bag. Again, even if all these items contained the DNA of another person, we still cannot find an abuse of discretion on the part of the post-conviction court. The State's theory might slightly change, but we are confident that the Petitioner would still have been prosecuted for the victim's murder.

The Petitioner may have a right to testing if the existence of exculpatory DNA evidence raises a reasonable probability that he would not have received the death penalty or been convicted of first-degree murder, as opposed to a lesser crime. However, again we cannot find an abuse of discretion by the post-conviction court. At best, if all this evidence were tested, and every piece of evidence revealed the presence of another person's DNA, the State might seek out another individual who likely assisted the Petitioner in the murder of the victim. In our view, the jury would have still convicted the Petitioner of first-degree murder.

We also note that the State contests the post-conviction court's determination that many of the objects have met requirement (2), that "[t]he evidence is still in existence and in such a condition

> that DNA analysis may be conducted." T.C.A. § 40-30-304(2), -305(2). The Petitioner has not made any showing that there is any semen on the victim's dress, underwear, or slip. The Petitioner only cites to his own *request* for a toxicology report in support of his contention. We find no evidence to support a contention that semen is "in existence." In fact, the State presented evidence at a sentencing hearing that there was no semen found at the scene. When these three pieces of evidence are removed from consideration, the Petitioner's "cumulative effect" argument become much weaker. The Petitioner is left to rely on the cigarette butt, the plastic spray bottle, the $20 bill, and the bloody bank bag. In our view, there is not a reasonable probability that another person's DNA on these four pieces of evidence would have changed the outcome of the trial or the Petitioner's sentence. The Petitioner is not entitled to relief on this issue.

Hines v. State, No. M2006-02447-CCA-R3-PC, 2008 WL 271941 at *5-6 (Tenn. Crim. App. Jan. 29, 2008) (emphasis in original and added).

If this murder involved sexual intercourse, the Court would be inclined to agree with Petitioner about this DNA evidence warranting an evidentiary hearing. Yet, the victim's death was caused by multiple and deep knife wounds to her chest area including her heart, lungs and diaphragm. (Docket Entry No. 29, Addendum 2, Vol. 3 at 948). The victim's multiple stab wounds were inflicted with a hunting type knife that pierced the victim's vagina to the extent of entering her intestinal area. Contrary to Petitioner's assertion, at

trial, Dr. Charles Harlan only performed the autopsy on the victim's body, that is, "[a] visual inspection was performed" of the victim's body. Id.; Addendum 9, Vol. 1 at 2061. Dr. Harlan responded "correct" to the question that "Q. So you didn't even observe anything indicating any type of sexual assault." Id. Dr. Harlan also testified that "I meant that there was no evidence of ejaculation; that is, there was no semen present." Id. at 2064. Dr. Harlan's report does not refer to his examination of clothing nor the swabs taken from the victim, id.; Addendum 2, Vol. 3 at 948-60 that were the subject of another state witness's testimony.

Daniel Michael Vansant, a TBI forensic serologist, testified that Dr. Harlan's office sent vaginal and rectal swabs as well as other items to the TBI laboratory. Id. at 644, 649, 962 Vansant testified that he examined a field jacket, blue shirt, blue vest, blue jeans, a pocket knife, knuckles attached to a knife, and the interior of the victim's vehicle. Id. at 645. There were not any other articles of the victim's clothing to examine. Id. at 648. Vansant did not testify to finding any semen. The victim's underwear, examined by Petitioner's DNA expert, had been removed and was found in a different part of the room where the victim was found. Given the State's proof against Petitioner, this Court concludes that Petitioner's DNA proof does not warrant a hearing or habeas relief. The State courts reached the same conclusion. See Hines, 2008 WL 271941, at *5-6.

Petitioner next submits the declaration of Max Jarrell, a certified latent print examiner, who is also a retired FBI fingerprint examiner. (Docket Entry No.

124-2). Jarrell examined "high resolution photographs" of the latent fingerprints and opines as follows:

> 7. To that end, on January 10, 2012, I accompanied Ms. Swift to the Tennessee Bureau of Investigation to examine the fingerprints in their custody and to determine whether it would be possible for me to conduct my examination using high resolution photographs of the prints.
>
> 8. After viewing the prints, I **concluded that high resolution photographs would be acceptable for my examination.**
>
> 9. On January 25, 2012, **I received from Ms. Swift, who had received from the TBI, high resolution photographs** of the following:
>
> a. Original Latent Fingerprints (#17) contained in one brown paper bag with several paper items recovered from the glovebox of the 1980 silver Volvo at the scene of the homicide of Catherine Jenkins on March 3, 1985;
>
> b. Original Latent Fingerprints and Palm Lifts (#18) contained in one brown paper bag recovered from the exterior of the 1980 silver Volvo, at the scene of the homicide of Catherine Jenkins on March 3, 1985;
>
> c. Original Latent Fingerprints (#19) contained on two (2) 8.5 x 11 sheets of plastic bearing finger impressions of the

victim, Catherine Jenkins, including negatives and paper strips;

d. Original Latent Fingerprints (#34), including One 3" x 5" card and one 6" x 6" lifter, recovered from the inside entrance door of Room #21 of the Ce Bon Motel at the scene of the homicide of Catherine Jenkins on March 3, 1985;

e. Original Latent Fingerprints (#35) from one brown paper bag containing one tan Cheatham County State Bank deposit bag containing three registration cards, one ink pen, and $.20 in change received from Bob Doyle on March 4, 1985 at the Ce Bon Motel Office, which was at the scene of the homicide of Catherine Jenkins; and,

f. Original Latent Fingerprints (#38) from one manila envelope containing one S.O. Ashland City, TN fingerprint card and one 8.5" x 11" sheet of paper bearing the inked finger and palm impressions of subject Anthony Darrell Dugard Hines, taken by Dorris Weakley, dated March 12, 1985.

10. Based upon my examination of these prints, I determined that none of the prints in question from the scene or on various pieces of evidence match either Mr. Hines or the victim, Catherine Jenkins.

11. On March 9, 2012, I accompanied Ms. Swift to Federal District Court to view and photograph the prints of Bobby Joe Hines, which had been received in chambers from the FBI. I examined the prints and determined that high resolution photographs of the prints would allow me to conduct my examination.

12. On March 13, 2012, I received from Ms. Swift the high resolution photographs of the prints of Bobby Joe Hines and thereafter conducted my examination of those prints by comparing them to prints at the scene or on various pieces of evidence.

Again, I did not identify a match.

13. In addition, as part of my examination, I was asked to determine if the prints from the scene or on various pieces of evidence were of the quality that they could be run through the Integrated Automated Fingerprint Information System to produce a possible match.

14. I determined based on my extensive experience with IAFIS and the criteria that are necessary for a print to be IAFIS quality, that four prints would be suitable for an IAFIS search. Those are:

a. Exhibit # 17 - Two original latent fingerprints from Volvo papers and envelope recovered from the glovebox of the victim's 1980 silver Volvo;

> b. Exhibit # 18 - One original latent fingerprint recovered from the exterior, passenger side of the Volvo;
> c. Exhibit #35 - One original latent fingerprint recovered from a registration card from the Ce Bon Motel.
>
> 15. Because I am not employed by a local law enforcement agency, I am not authorized to perform and cannot conduct an IAFIS search.

(Docket Entry No. 124-2 at 1-3) (emphasis added).

First, as to Jarrell's utilization of digital photographs, such photographs are subject to enhancement and distortion. Thus, one court required an additional showing to establish reliability of fingerprint examination. Lorraine v. Markel American Ins. Co., 241 F.R.D. 534 (D. Md. 2007).

> Photographs have been authenticated for decades under Rule 901(b)(1) by the testimony of a witness familiar with the scene depicted in the photograph who testifies that the photograph fairly and accurately represents the scene. Calling the photographer or offering exert [sic] testimony about how a camera works almost never has been required for traditional film photographs. Today, however, the vast majority of photographs taken, and offered as exhibits at trial, are digital photographs, which are not made from film, but rather from images captured by a digital camera and loaded into a computer. Digital photographs present unique authentication problems because they are a form

of electronically produced evidence that may be manipulated and altered. Indeed, unlike photographs made from film, digital photographs may be "enhanced." Digital image "enhancement consists of removing, inserting, or highlighting an aspect of the photograph that the technician wants to change." Edward J. Imwinkelried, Can this Photo be Trusted?, Trial, October 2005, at 48.

. . . .

For digitally converted images, authentication requires an explanation of the process by which a film photograph was converted to digital format. This would require testimony about the process used to do the conversion, requiring a witness with personal knowledge that the conversion process produces accurate and reliable images, Rules 901(b)(1) and 901(b)(9)- the later rule implicating expert testimony under Rule 702. Id. Alternatively, if there is a witness familiar with the scene depicted who can testify that the photo produced from the film when it was digitally converted, no testimony would be needed regarding the process of digital conversion. Id..

For digitally enhanced images, it is unlikely that there will be a witness who can testify how the original scene looked if, for example, a shadow was removed, or the colors were intensified. In such a case, there will need to be proof, permissible under Rule 901(b)(9), that the digital enhancement process produces reliable

and accurate results, which gets into the realm of scientific or technical evidence under Rule 702. Id. Recently, one state court has given particular scrutiny to how this should be done.

. . . .

Because the process of computer enhancement involves a scientific or technical process, one commentator has suggested the following foundation as a means to authenticate digitally enhanced photographs under Rule 901(b)(9): (1) The witness is an expert in digital photography; (2) the witness testifies as to image enhancement technology, including the creation of the digital image consisting of pixels and the process by which the computer manipulates them; (3) the witness testifies that the processes used are valid; (4) the witness testifies that there has been "adequate research into the specific application of image enhancement technology involved in the case"; (5) the witness testifies that the software used was developed from the research; (6) the witness received a film photograph; (7) the witness digitized the film photograph using the proper procedure, then used the proper procedure to enhance the film photograph in the computer; (8) the witness can identify the trial exhibit as the product of the enchantment process he or she performed. Edward J. Imwinkelried, Can this Photo be Trusted?, Trial, October 2005 at 54. The author recognized that this is an "extensive foundation," and whether it will be

> adopted by courts in the future remains to be seen. Id. However, it is probable that courts will require authentication of digitally enhanced photographs by adequate testimony that it is the product of a system or process that produces accurate and reliable results. Fed.R.Evid. 901(b)(9).

Id. at 561-62; see also Sandy L. Zabell, Ph.D, "Fingerprint Evidence," 13 J. L. & POL'Y 143, 155-58 (2005).

Second, as a basis for habeas relief, if there is sufficient evidence of guilt, the Sixth Circuit has not awarded habeas relief based upon proof of the absence of the habeas petitioner's fingerprints at the crime or murder scene. Smith v. Romanowski, 341 Fed. Appx. 96, 99, 101-02 (6th Cir. 2009) ("Smith's challenge to the sufficiency of the convicting evidence in this case relies upon his contention that the prosecution failed to establish that he was in constructive possession of the gun found in the pocket on the back of the front passenger seat. According to Smith, no witness ever saw him with a firearm, **his fingerprints were not found on the weapon or its ammunition,** the vehicle in which the gun was found did not belong to Smith, the handgun was not in plain view of the driver, and another friend of the petitioner admitted owning the firearm. . . . Because Smith has thus failed to satisfy the substantial burden placed upon him by the provisions of AEDPA, the district court appropriately denied the petition for the writ of habeas corpus.") (emphasis added); see also Brooks v. Tennessee, 626 F.3d 878, 887-88 (6th Cir. 2010).

Given the compelling evidence of Petitioner's guilt, with the presence of other fingerprints at the murder scene (a public place) and the vehicle that belonged to the victim, the Court does not deem this proof fingerprint to warrant an evidentiary hearing except on one issue

The Court set an evidentiary hearing on a TBI laboratory report that was ambiguous on whether the swab taken from the victim tested positive for semen. (Docket Entry No. 131, Order, attaching report). At that hearing, Michael Turbeville, the TBI laboratory supervisor, testified that the document attached to the Court's Order was a request for testing for semen on the swabs and provided the actual results of that test, revealing that semen was not on any of the swabs. (Docket Entry No. 142, at 6-12; Respondent's Collective Exhibit 1). Petitioner submitted several other TBI laboratory documents that revealed the presence of mold on one of the swabs that could not be tested for semen. Id. at 14, 15, 17, 28; Petitioner's Exhibit 3, 5 and 6. Petitioner submitted additional TBI documents revealing additional versions of the TBI laboratory test request with additional handwriting. (Petitioner's Exhibits 1 and 4). Petitioner notes that one of the laboratory work papers reflects that mold was found on one of the swabs and, thus, could not be tested. Petitioner cites that the condition of the molded swab was not noted on other TBI laboratory papers. Petitioner also cited delay in the testing. The request to test the swabs from the victim is shown as March 4, 1985, and the TBI testing began on March 22nd. (Exhibits 2-4; Docket Entry No. 131 at 2; Docket Entry No. 142 at 6-8, 24-25). Petitioner also proffered that if

Petitioner's trial counsel had had access to the TBI laboratory's working papers about the mold on one of the swabs, he would have pursued testing and explored the prospect of another suspect given the proof of sperm on the victim's panties. Petitioner's trial counsel proffered that the state prosecutor told him that the murder did not involve a sexual assault, and Petitioner's current counsel described Dr. Harlan's trial testimony as false.

First, there is not any scientific evidence that the mold was caused by the timing of the TBI laboratory testing. The possibility of the mold impacting any semen is speculative. There is not any scientific proof that if Petitioner's trial counsel had seen the laboratory working papers about the molded swab that any testing could have been conducted. As discussed infra, Dr. Harlan's trial testimony was based upon his visual examination of the victim, not a laboratory test. At Petitioner's trial, a TBI laboratory technician testified about the testing of the victim's swabs. To date, the proof remains that the several swabs taken from the victim did not contain semen. Petitioner's tying of the inferences about another suspect was found by the State courts to be "farfetched" and this Court agrees. The cited suspect was not seen in the area at the time of the murder and the witness did not testify that this suspect, described as a wild person, was going to the motel.

3. Petitioner's Other Suspects Proof

Coupled with his forensic proof , Petitioner identifies Tommy Sells and Ken Jones as possible murderers. According to Petitioner, Tommy Sells went throughout the country committing dozens of murders between 1980 and 1999 (including in Tennessee), before he was finally apprehended in Texas, and later executed. Sells was released from custody in February 1985 (Docket Entry No. 124-3, Tommy Sells Missouri Dept. of Corrections Records) and admitted to committing murder in Missouri in July 1985, months after the murder of Jenkins. (Docket Entry No.124-4, March 21, 2014 Article from the Branson Tri-Lake News).

For the Sells suspect theory, Petitioner cites the declarations of Norma Jean Rilling and Joe Nesbitt who worked across from the CeBon motel at the Hot Stop Market. Rilling purportedly identifies Sells as the person with whom Rilling had a confrontation the day of the murder, March 3, 1985, because she would not let him pay with rolled coins. (Docket Entry No. 124-5). According to Rilling, after the confrontation, this man headed over to the CeBon, where the victim was found shortly afterwards. Id. Rilling testified at Petitioner's trial that this man walked in the "general direction of the CeBon" motel. (Docket Entry No. 29, Addendum 2, Vol. 3 at 663). In her 2014 declaration, almost 30 years after the encounter, Rilling states that the photograph shown to her by Petitioner's investigator "looks like" that same man. (Docket Entry No. 124-5 at ¶ 12). At trial, Rilling testified "we get a lot of weird people" at her shop and described another man who was "wild-

eyed." (Docket Entry No. 29, Addendum 2, Vol. 3 at 662). Moreover, under Petitioner's view of the evidence, Petitioner opines that the murder occurred about 11:00 a.m. (Docket Entry No. 124, Petitioner's Memorandum at 11 n. 7). At trial, Rilling testified that she saw this weird person about 1:30 to 2:30 p.m. (after the murder) and then saw him walking in the general direction of the CeBon motel, not to the CeBon motel. (Docket Entry No. 29. Addendum 2, Vol. 3 at 663, 665).

Petitioner also identifies Ken Jones who was at the motel for a tryst with Vernedith White and who testified falsely that he arrived at the motel about 12:30 p.m. the day of the murder. (Docket Entry No. 29, Addendum 2, Vol. 1 at 260, 266). Jones actually arrived there between 10:00 a.m. and 11:00 a.m. This issue about Jones as a murder suspect was explored at the evidentiary hearing on Petitioner's state court post conviction proceeding. Hines, 2004 WL 1567120 at * 4-7. For this theory, Petitioner also submits excerpts of unauthenticated medical records of Vernedith White, Jones's mistress, who was evaluated in 2000, 2001, 2008, 2009, 2010 and 2013 for psychiatric problems, including schizophrenia. (Docket Entry No. 129). These treatment notes cite White's use of drugs and that her baby was killed by her ex-husband twenty two years ago, as of July 2000. Id. at 2-3. By 2008, White's prognosis was good so long as she remained on her medications. Id. at 8. Yet, by 2010, White was smoking marijuana. Id. at 10.

The state courts considered this proof on this theory of Jones as the murderer of the victim:

In his reply brief, the petitioner points to various portions of the testimony to establish that Ken Jones, himself, might have killed the victim. The petitioner explains how he might have gotten the keys to the victim's car without confronting her, surmising "because of the warmth on the day at issue, [the victim] was wearing only a very light weight summer shift" and that her maid's coat, where she kept her keys and wallet, "was most likely hanging on the cleaning cart, which gave [the petitioner] easy access." The petitioner argues that the statements of Jones and White that they neither saw nor heard anything "that was connected with the crime" are "unbelievable." The victim's schedule to clean the rooms, the petitioner asserts, was such that she would not have reached room 21, where she was killed, until "noon," resulting in Jones and White at least seeing her. The petitioner notes that, at the 1986 trial, Jones said he did not know whether the victim was male or female, yet he told Maxey Kittrell, another witness, that "a woman had been stabbed" and told White that "there was a dead woman in there." This testimony, according to the petitioner's argument, demonstrates "knowledge that no one but the perpetrator could have known." The petitioner points to other discrepancies, including Jones's testimony that the "randomly selected key" which he picked up "just happened to open the lock on room 21, the murder room"; and the fact that White testified that she and Jones were at the motel from 9:00 am until the emergency call, which was made at

2:36 p.m., leaves two hours of Jones and White's activities "unaccounted for." This time period, according to the petitioner's theory, allowed Jones to drive White to Dickson and "to cleanse himself and his van of the victim's blood." The petitioner surmises that Jones then returned to the motel to determine whether the motel owners had come back and found the body, and discovered that this had not occurred. Finally, according to this argument, "by belatedly announcing that a woman had been stabbed to death, Jones successfully removed himself as a suspect and thereby, with the help of his friend the sheriff, was able to keep himself from being investigated by the defense and by the prosecution."

The post-conviction court concluded that the petitioner would not have benefitted from the claim that Ken Jones had killed the victim:

Petitioner insists that his trial counsel should have attempted to cast suspicion upon Ken Jones as a possible perpetrator of the crime and that counsel was ineffective in allowing Mr. Jones to "perjure" himself in hiding his true reason for being at the hotel. While counsel had brought out that there had been another stranger in the area of the CeBon Motel that morning, they did not develop any reason for the jury to consider that someone other than Petitioner committed the offense. Petitioner asserts that his trial counsel should have suggested that perhaps, Ms. Jenkins had

thwarted Mr. Jones ['s] planned sexual liaison with Ms. White and that this was a motive to kill her. He further suggests that their theory might explain the twenty dollar bill under Ms. Jenkins's watch band [sic] and the careful insertion of the knife into her vagina. Trial counsel knew of the actual reason for Mr. Jones['s] presence at the motel, having learned it from the sheriff. Of course, they could have investigated further and learned the details of the encounter but the Court does not find that the information would have been particularly useful. To present such a farfetched theory with no supporting evidence would cause a loss of credibility by the defense at trial. Admittedly, if trial counsel had learned the exact details of the movements of Mr. Jones, Ms. White and the person(s) in the maroon or brown car, they could have "muddied the water" concerning the details of the discovery of the body. This would have been insufficient, however, to cast reasonable doubt on the guilt of Petitioner given the fact that Petitioner was shown by the proof to have taken the deceased's car keys, presumably from her billfold (in which she habitually kept them), and stolen her car. To accept Petitioner's argument that he didn't kill the deceased but merely took her car keys from her body (which was wrapped in a blanket) and stole her car would require the trial jury to depart from speculation and enter into fantasy.

Missing in the petitioner's theory, which the post-conviction court described as "farfetched,"

> is any motive or reason why Jones would want to kill the victim, except the petitioner's suggestion, recounted in the post-conviction's findings, that the victim was killed because she had "thwarted" the sexual liaison between Jones and White. In effect, the petitioner argues that fifty-one-year-old Ken Jones, accompanied by his twenty-one-year-old girlfriend, Vernedith White, following their normal Sunday morning routine and checking into the same motel where they had been together approximately 100 times before and were known by the staff, including the victim, stabbed the victim to death, with Jones driving White to another location, cleaning blood from himself and his vehicle, and then returning to the scene to report the crime and wait for law enforcement officers to arrive. We agree with the post-conviction court that, given the strength of proof against the petitioner, making the argument that Ken Jones was the actual killer would have been "farfetched" and could have resulted in a loss of credibility for the defense.

Hines, 2004 WL 112876 at *26-28.

The Court does not deem these facts about Jones and White long after the murder in 1985 to warrant an evidentiary hearing.

Petitioner next argues that his proof about other suspects, coupled with his DNA proof, renders his actual innocence claim similar to the claim in House. Yet, in House, the murder was tied to a sexual offense: "that the murder was committed in the course of a rape

or kidnaping. The alleged sexual motivation relates to both those determinations. This is particularly so given that, at the sentencing phase, the jury was advised that House had a previous conviction for sexual assault." 54 7 U.S. at 541. Here, despite the substantial knife wound to the victim's vagina, the victim's murder was not committed in the context of a sexual act and the causes of death were multiple wounds to her chest. The Rilling testimony about a weird looking man on the day of the murder does not rise to the level of substantial proof of another murder suspect, as in House and as reflected in the jury's rejection of Rilling's trial testimony. The Court concludes that Petitioner's factual showing is insufficient to justify another evidentiary hearing, and given the proof found by the Tennessee courts tying the Petitioner to the victim, the Court concludes that Petitioner's other suspect proof does not satisfy the standard for the actual innocence exception.

Second, the proof of other murder suspects in House was significant:

> Other testimony suggests Mr. Muncey had the opportunity to commit the crime. According to Dennis Wallace, a local law enforcement official who provided security at the dance on the night of the murder, Mr. Muncey left the dance "around 10:00, 10:30, 9:30 to 10:30." R274:56-57. Although Mr. Muncey told law enforcement officials just after the murder that he left the dance only briefly and returned, Wallace could not recall seeing him back there again. Later that evening, Wallace responded to Mr.

> Muncey's report that his wife was missing. Muncey denied he and his wife had been "a fussing or a fighting"; he claimed his wife had been "kidnapped." Id., at 58. Wallace did not recall seeing any blood, disarray, or knocked-over furniture, although he admitted he "didn't pay too much attention" to whether the floor appeared especially clean. According to Wallace, Mr. Muncey said "let's search for her" and then led Wallace out to search "in the weeds" around the home and the driveway (not out on the road where the body was found). Id., at 58, 60, 63.
>
> In the habeas proceedings, then, **two different witnesses (Parker and Letner) described a confession by Mr. Muncey**; two more (Atkins and Lawson) described suspicious behavior (a fight and an attempt to construct a false alibi) around the time of the crime; and still other witnesses described a history of abuse.

Id. at 550-51. The factual circumstances in which the Supreme Court found a sufficient showing of actual innocence are materially different from this action were as follows: "[I]n direct contradiction of evidence presented at trial, DNA testing has established that the semen on Mrs. Muncey's nightgown and panties came from her husband, Mr. Muncey, not from House." Id. at 540.

Here, the murder was not sexual rape. Second, in House:

> the central forensic proof connecting House to the crime–the blood and the semen–has been

> called into question, and **House has put forward substantial evidence pointing to a different suspect.** Accordingly, and although the issue is close, we conclude that this is the rare case where–had the jury heard all the conflicting testimony–it is more likely than not that no reasonable juror viewing the record as a whole would lack reasonable doubt.

Id. at 554 (emphasis added). Here, "When asked by a TBI agent to tell the truth about the death of Katherine Jenkins [Petitioner] stated that if the officer could guarantee him the death penalty he would confess and tell him all about the murder and that he could tell him everything he wanted to know if he was of a mind to." Hines, 758 S.W.2d at 518. As quoted below, the State courts considered Petitioner's proof and theory of another suspect to be "far-fetched." Hines, 2004 WL 112876, at *27.

Petitioner next presents declarations of two emergency medical technicians who responded to the murder site and describe Sheriff Weakley as moving about the motel and moving or touching items of possible evidence. (Docket Entry Nos. 125-10 and 125-11, Ken and Mary Sizemore declarations). Mary Sizemore testified at Petitioner's trial and post conviction hearing, but never disclosed the Sheriff's conduct nor do the Sizemores describe any specific item of evidence lost. Petitioner's proof based upon the victim's cut panties suggests that critical proof was undisturbed or destroyed by the Sheriff. Sheriff Weakley testified as to what he did at the murder scene and through his testimony, numerous items of

evidence were admitted, including the victim's torn panties. (Docket Entry No. 29, Addendum No. 2, Vol. 2 at 527-84; Docket Entry No. 29, Addendum 2, Vol. 3 at 917-941, Trial Exhibits 49 through 65). Given that Mary Sizemore testified at trial, but did not disclose her observations 27 years ago, coupled with the exhibits introduced through Weakley, lead the Court to conclude that an evidentiary hearing based on the Sizemore declarations is not warranted.

4. Petitioner's Trial and Post Conviction Counsel Declarations

As additional bases for an evidentiary hearing, Petitioner submits the declarations of his trial and post conviction counsel who describe their omissions. (Docket Entry Nos. 124-9 and 124-10). For Petitioner's trial counsel, the omissions in his declaration describe issues that were addressed either in the extensive state post conviction proceedings or in Petitioner's medical proof about his brain damage. Post conviction counsel's declaration cites omissions on Petitioner's appeal, is based on Petitioner's medical and other proof cited for an evidentiary hearing in this action. In essence, for the reasons stated on Petitioner's proof for an evidentiary hearing in this action and in the state courts' decisions, the Court concludes Petitioner's declarations from his prior counsels do not warrant an evidentiary hearing. As discussed earlier, these declarations do not present substantial claims under Martinez.

For these collective reasons, the Court concludes that Petitioner's request for an evidentiary hearing is not justified and should be denied.

B. Review of the State Record

1. Procedural History

Petitioner was charged with first degree murder and felony murder and on January 10, 1986, a jury convicted Petitioner of first degree murder and sentenced Petitioner to death. State v. Hines, 758 S.W.2d 515 (Tenn. 1988); (Docket Entry No. 299, Addendum 1, Vol. 1 at 77-84). On direct appeal, the Tennessee Supreme Court upheld his conviction, but remanded for a new sentencing hearing, citing the state trial court's failure to instruct the jury properly on the underlying felonies and the aggravating circumstances necessary for a death sentence. Id. at 524. At resentencing, the jury imposed the death penalty that was upheld on Petitioner's second appeal. State v. Hines, 919 S.W.2d 573 (Tenn. 1995). Although Petitioner's petition for rehearing was granted, the Tennessee Supreme Court denied relief. State v. Hines, 1996 Tenn. LEXIS 149 (Tenn. Mar. 11, 1996). The United States Supreme Court denied Petitioner's petition for the writ of certiorari. Hines v. Tennessee, 519 U.S. 847 (1996).

On March 4, 1997, Petitioner filed his state post-conviction petition, and with the assistance of counsel, Petitioner amended his petition twice. On May 9, 2002, after an extensive evidentiary hearing, the trial court denied relief and on appeal, the Tennessee Court of Criminal Appeals affirmed. Hines v. State, No. M2002-1352-CCA-R3-PD, 2004 WL 112876, at* 1 (Tenn. Crim. App. Jan. 23, 2004). On June 28, 2004, the Tennessee Supreme Court granted Petitioner's application for permission to appeal and remanded the appeal to the

Tennessee Court of Criminal Appeals to reconsider the issue of the aggravating circumstances instruction. Hines v. State, No. M2004-01610-CCA-RM-PD, 2004 WL 1567120 at *1 (Tenn. Crim. App. July 14, 2004). On July 14, 2004, The Tennessee Court of Criminal Appeals rendered its decision, concluding that the trial court correctly instructed the jury on aggravated circumstances. Id. On November 29, 2004, the Tennessee Supreme Court denied Petitioner's application for permission to appeal. Id. On January 3, 2005, Petitioner filed this action.

2. State Court's Findings of Fact[4]

In Petitioner's direct appeal, the Tennessee Supreme Court set forth the facts underlying Petitioner's conviction.

> Between 1:00 and 1:30 p.m. on 3 March 1985 the body of Katherine Jean Jenkins was discovered wrapped in a sheet in Room 21 of the CeBon Motel off Interstate 40 at Kingston Springs. The victim was a maid at the motel and had been in the process of cleaning the room when she was killed. Her outer clothing had been pulled up to her breasts. Her panties had been cut or torn in two pieces and were found in another area of the room. A $20 bill had been placed under the wrist band of her watch.

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[4] State appellate court opinion findings can constitute factual findings in a habeas action, Sumner v. Mata, 449 U.S. 539, 546-47 (1981), and have a statutory presumption of correctness. 28 U.S.C. § 2254(e).

The cause of death was multiple stab wounds to the chest. Four deep, penetrating wounds, ranging from 2.5 inches to 6.4 inches in depth, had been inflicted about the victim's chest with a knife similar to a butcher knife or a hunting knife. Other superficial cuts were found in the area of the neck and clavicle. There was also a knife wound which penetrated through the upper portion of the vagina into the mesentery in the lower part of the abdominal cavity. Dr. Charles Harlan who performed the autopsy on the victim's body testified that in view of the small amount of blood in the vaginal vault it was his opinion the wound occurred at or about the time of death. The victim also had what he described as "defensive wounds" on her hands and arms.

Jenkins had been left in charge of the motel at about 9:30 a.m. At that time the occupants of Rooms 9, 21 and 24 had not yet checked out. When the manager left her in charge she was given a Cheatham County State Bank bag containing $100 in small bills to make change for motel guests as they paid. The bank bag, bloody and empty, was discovered in the room with her body. It was her established habit to lock her automobile at all times and to keep her keys and billfold on her person when she worked. Her car keys, billfold and her 1980 silver-colored Volvo were missing.

On 1 March 1985 defendant had departed by bus from Raleigh, North Carolina. He had been

given a non-refundable ticket to Bowling Green, Kentucky and $20 in spending money. The traveling time from Raleigh, North Carolina to Nashville, Tennessee was approximately 17 hours. Prior to his departure he was observed by a witness to be carrying a hunting knife in a sheath which was concealed beneath his shirt. The witness admonished him that he could not carry a knife like that on the bus to which he responded "I never go anywhere naked." "I always have my blade." Sometime in the early morning hours of 3 March 1985 he checked in and was assigned to Room 9 at the CeBon Motel. He was wearing a green army-type fatigue jacket, fatigue pants and boots. He was next seen at approximately 9:30 a.m. walking in a direction from his room toward a drink machine. At that time he told the manager he was not yet ready to check out. He was also seen sometime prior to 9:30 purchasing a sandwich at a deli-restaurant across the street from the motel. The same witness who saw defendant also saw another stranger there somewhere between 1:30 and 2:30 who she described as taller than defendant with dark hair, kinky looking and wild-eyed. He departed the restaurant in the general direction of the CeBon Motel. The Cehatham County Sheriff testified that he responded to a call to the CeBon Motel at 2:37 p.m. When he arrived on the scene blood spots in the room were beginning to dry and the body was beginning to stiffen. Defendant was seen between 11:00 and 11:30 a.m. walking from the

direction of the Interstate toward the CeBon Motel.

At 12:40 p.m. a witness saw the victim's Volvo automobile pulling out from the CeBon Motel driveway. It was being operated by a person who appeared to be a man with very short, light colored hair. The vehicle crossed over the Interstate and turned east on Interstate 40. She followed behind and endeavored to catch up but it sped off toward Nashville at a high rate of speed. Defendant was next identified in possession of the car a few miles past Gallatin on Interstate 65, heading in the direction of Bowling Green, Kentucky. A group of young people first endeavored to help him start the stalled automobile and then gave him a ride to Bowling Green. During the trip to Bowling Green one of these witnesses observed some dried blood on the right shoulder of his shirt. He carried a jacket which he kept folded. After he arrived at his sister's home in Bowling Green defendant told her he had endeavored to pay another day's rent at a motel when he was attacked by the motel operator. He demonstrated to her how he had stabbed the man. He also related to her he had a sum of money. She could not remember whether he said $35,000 or $3,500. Defendant also told his sister's husband he had earned approximately $7,000 working as a mechanic in North Carolina. He displayed a set of keys to a Volvo automobile and explained that a man who had given him a ride attempted to rob him.

Defendant purportedly grabbed the steering wheel and when the car ran off the road he grabbed the keys and ran. According to the witness he was wearing an army fatigue jacket which had something large, heavy and bulky in the pocket. The witness had previously seen defendant with a survival knife with a 6 1/2 to 7 inch blade hanging from his belt. When defendant was taken into custody he volunteered the statement that he had taken the woman's car but had not killed her. According to the arresting officer he had not advised the defendant that a woman had been killed prior to the volunteered statement. There was evidence however that defendant was aware he had been charged in Tennessee on a murder warrant. The victim's wallet was found wrapped in a thermal underwear shirt a short distance from where her car was found abandoned. The key to Room 9 of the CeBon Motel was found at the site where defendant had been camping out near Cave City, Kentucky. When asked by a TBI agent to tell the truth about the death of Katherine Jenkins defendant stated that if the officer could guarantee him the death penalty he would confess and tell him all about the murder and that he could tell him everything he wanted to know if he was of a mind to. There were marks on the wall of Room 9 at the CeBon Motel apparently made by someone stabbing a knife into the wall. When shown photographs of the marks on the wall defendant responded that they were knife marks. These marks were

> obviously made by a knife larger than two taken from defendant at the time of his arrest.

Hines, 758 S.W.2d at 517-19.

As to the facts underlying Petitioner's death sentence, on his appeal after his resentencing hearing, the Tennessee Supreme Court cited the following facts:

> The State introduced proof that the defendant had previously been convicted of assault in the first degree. A detective who had investigated the case testified that the defendant had inflicted serious physical harm to the victim in this prior case. The State also presented proof that the defendant had stabbed the victim in the present case multiple times with a sharp instrument, probably a knife. Three of these wounds were lethal and had penetrated the victim's chest five to six inches. The pathologist who had performed the autopsy of the victim testified that all the lethal wounds were inflicted at about the same time and that death would have occurred within four to six minutes, most of which time the victim would have remained conscious. Defensive wounds were found on the victim's hands. Her clothing had been pulled up and her panties had been cut in half and removed from her body. About the time of death, and shortly after the infliction of the lethal wounds to the chest, the defendant had inserted a flat object through the victim's vaginal orifice into the vaginal pouch until the instrument penetrated the vaginal dome and passed into the abdominal cavity. A twenty dollar bill had been

placed under the victim's watchband. No semen or any other evidence of ejaculation was found.

At the time of her death, the victim had in her possession a bank bag containing approximately $100 in proceeds from the motel. The empty bag was discovered in the room where the victim's body was found. The victim's automobile was also missing. Around 12:40 p.m. the day of the murder, another employee of the motel saw the vehicle being driven out of the motel parking lot by someone other than the victim.

In mitigation, the defendant presented proof that, while in prison on this conviction, he had presented no serious disciplinary problems and posed no threat to the prison population. The defendant also presented proof of a troubled childhood. His father had abandoned the family when the defendant was young. His mother had an alcohol problem. In his teens the defendant became involved in sniffing gasoline and glue and began to abuse alcohol and drugs. He also exhibited self-destructive behavior. Dr. Pamela Auble, a clinical psychologist, testified that the defendant was suffering from a paranoid personality disorder and dysthymia, or chronic depression. According to Dr. Auble, the defendant would suppress his feelings until they "boiled up" under stress. In her opinion, the defendant, who had returned from turbulent visits with his parents and girlfriend shortly before he committed the murder, was under stress when he killed the victim. Dr. Ann Marie

> Charvat, a sociologist, also testified about the damaging effect of the circumstances of his childhood on the defendant.

Hines, 919 S.W.2d at 577. The state courts' other factual findings will be set forth in the analysis of the Petitioner's claims.

C. Conclusions of Law

Petitioner's viable habeas claims, if timely, are governed by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Lindh v. Murphy, 521 U.S. 320, 336 (1997). Under the AEDPA, federal courts may not grant habeas relief for claims adjudicated on their merits in a state court proceeding, unless that state court proceeding:

> (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).

In Williams v. Taylor, 529 U.S. 362, 413 (2000), the Supreme Court stated that a state court judgment 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." In such instances, the Supreme Court held that a federal habeas court may grant a writ. Id. The Supreme Court interpreted the language "clearly established Federal law, as determined by the Supreme Court of the United States"as referring to "holdings, as opposed to dicta" of its decisions "as of the time of the relevant state-court decision." Id. at 412. Moreover, the relevant analysis is "to apply a rule of law that was clearly established at the time [the Petitioner's] state-court conviction became final." Id. at 390; accord, Joshua v. DeWitt, 341 F.3d 430, 436 (6th Cir. 2003). In Bell v. Cone, 535 U.S. 685, 693 (2002), the Court reiterated that the AEDPA modified a federal court's role in reviewing state prisoner applications "in order to prevent federal habeas 'retrials' and to ensure that state court convictions are given effect to the extent possible under the law."

Under the "unreasonable application" clause, the Supreme Court stated that a state court judgment results in an "unreasonable application" of clearly established federal law "if the state court correctly 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." Williams, 529 U.S. at 413. The district court "must presume that all determinations of factual issues made by the state court are correct unless the defendant can rebut that presumption by clear and convincing evidence." Mitchell v. Mason, 325 F.3d 732, 737-38 (6th Cir. 2003) (citing 28 U.S.C. § 2254(e)(1)).

The Supreme Court explained that a state court's application of clearly established federal law must be "objectively unreasonable," and a district court may not grant habeas relief "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Williams, 529 U.S. at 411. A state court's application of federal law is unreasonable and habeas relief may be granted if the "'state court decision is so clearly incorrect that it would not be debatable among reasonable jurists.'" Herbert v. Billy, 160 F.3d 1131, 1135 (6th Cir. 1998) (quoting Drinkard v. Johnson, 97 F.3d 751, 769 (5th Cir. 1996)).

In reaching this decision, the Supreme Court reiterated that the claims were to be decided on the record before the state court:

> In this and related contexts we have made clear that whether a state court's decision was unreasonable must be assessed in light of the record the court had before it. See Yarborough v. Gentry, 540 U.S. 1, 6, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003) (per curiam) 124 S.Ct., at 4 (denying relief where state court's application of federal law was "supported by the record"); Miller-El v. Cockrell, 537 U.S. 322, 348, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (reasonableness of state court's factual finding assessed "in light of the record before the court"); cf. Bell v. Cone, 535 U.S. 685, 697, n. 4, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002) (declining to consider evidence not

> presented to state court in determining whether its decision was contrary to federal law).

Holland v. Jackson, 542 U.S. 649, 652 (2004) (emphasis added). The district court also "must presume that all determinations of factual issues made by the state court are correct unless the defendant can rebut that presumption by clear and convincing evidence." Mitchell v. Mason, 325 F.3d 732, 737-38 (6th Cir. 2003) (citing 28 U.S.C. § 2254(e)(1)). This presumption includes credibility findings of the state courts. Skaggs v. Parker, 235 F.3d 261,266 (6th Cir. 2001).

1. Petitioner's Undisputed Exhausted Claims

For resolution of the Petitioner's claims, the Court addresses first the undisputed exhausted claims. These undisputed claims are grouped to include closely related claims, albeit under a different legal theory. Thereafter, the analysis turns to Petitioner's claims that Respondent contends are procedurally defaulted.[5] For those claims, Petitioner appears to assert facts in

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[5] Respondent seeks judgment as a matter of law based upon Petitioner's procedurally defaulted s claims in Paragraphs 9, 10, 11(b), (e), (i), (l), (n)-(u), 13(b), (c), (t), (u), (w)-(ee), 14, 17, 19, 21(b), (d)-(f), portions of Paragraph 22, Paragraphs 23-24, 26-31, 33-34, portions of Paragraph 35, and Paragraphs 36-38 and 40 of the Second Amended Petition. (Docket Entry Nos. 23, 23-1 and 23-2). Respondent contends that these claims were not fairly presented to the state courts and the opportunity to present them under Tennessee law has passed. The Court adds Claim 11v that reads as follows: "Counsel failed to raise any and all challenges to the validity of Darrell Hines' conviction contained in this petition. See e.g., ¶¶ 9, 10, 12, 19, 20, 21, 27, 29, .30, 31, 32, incorporated by reference." (Docket Entry No. 23, Second Amended Petition at 25).

exhausted claims for claims under new and distinct legal theories.

a. Sufficiency of the Evidence and Related Claims

For this claim, Petitioner asserts that the State's proof was insufficient to support his guilt or his death sentence in violation of the Sixth, Eighth, and Fourteenth Amendments and Jackson v. Virginia, 443 U.S. 307 (1979). (Docket Entry No. 23-2, Amended petition at ¶ 32). Petitioner's related claims are that "[i]n violation of the Sixth, Eighth, and Fourteenth Amendments, Darrell Hines' death sentence was based on a felony-murder aggravating circumstance which duplicated the jury's guilt finding and failed to meaningfully narrow the class of persons eligible for the death penalty," citing Clemons v. Mississippi, 494 U.S. 738, 110 S.Ct. 1441 (1990); State v. Middlebrooks, 840 S.W.2d 317 (Tenn 1992), and that "[i]In violation of the Sixth, Eighth, and Fourteenth Amendments, the jury weighed an unconstitutional 'heinous, atrocious, or cruel' aggravating circumstance when imposing the death sentence." Id. at ¶¶ 15-16.

Respondent contends that the Tennessee Supreme Court reasonably decided the sufficiency of the evidence claims and detailed the evidence against Petitioner, including that he was found in possession of the victim's car keys, was in possession of a large amount of money after the robbery and was seen with a blood stain on his arm, citing Hines, 758 S.W.2d at 515, 518. Respondent cites the victim's wallet that was found near the location of the vehicle that Petitioner admitted taking. Petitioner stayed at the hotel where

the victim was found murdered by a knife, and Petitioner was seen carrying a knife shortly before the crime, and the hotel room in which he stayed had knife marks in the walls. Id. at 517-18. Petitioner offered to confess to the murder, if promised the death penalty. Id. Respondent also argues that the State courts' application of the harmless error doctrine was reasonable given the State's proof of alternative bases for Petitioner's conviction and death sentence.

From the Court's review, Petitioner's sufficiency challenges on direct appeal were "that the State's case was based wholly on circumstantial evidence which was insufficient to support the conviction. In argument defendant concedes the proof was sufficient to support a verdict of first degree murder but he insists it fails to establish beyond a reasonable doubt that the offense was committed by him to the exclusion of all others." 758 S.W.2d at 517. In addition, Petitioner argued that the State's proof on the depravity or torture element was insufficient to support his death sentence. Hines, 919 S.W.2d at 581.

For the former claim, the Tennessee Supreme Court decided that in addition to the proof quoted, 758 S.W.2d at 517-19, that "[t]here is additional evidence in the record incriminating defendant. That summarized above establishes guilt of the conviction offense. A criminal offense may be established exclusively by circumstantial evidence and the record in this case is abundantly sufficient for a rational trier of fact to find defendant's guilt beyond a reasonable doubt.... He concedes that the statements made by him to the effect that he would or could tell them all about the homicide

were relevant because they raised a reasonable inference he knew of the facts and circumstances of the murder and was in some way involved with it." 758 S. W. 2d at 519.

The Tennessee Supreme Court decided the sufficiency claim on the death sentence after the resentencing hearing as follows:

> Defendant says Tenn.Code Ann. § 39-2-203(i)(5) (the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind) is unconstitutionally vague and was unconstitutionally applied in this case. He concedes that the Court has repeatedly rejected vagueness challenges to this section of the statute and asserts the issue is presented for purposes of preserving the issue for later review.
>
> Citing Shell v. Mississippi, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990), he submits that the definition of "depravity" in State v. Williams, 690 S.W.2d 517, 529 (Tenn.1985), cannot survive constitutional scrutiny absent proof of mutilation. The constitutionality of this aggravating circumstance has been previously upheld in State v. Barber, 753 S.W.2d 659, 670 (Tenn.1988). See also State v. Cazes, 875 S.W.2d 253, 267 (Tenn.1994); State v. Black, 815 S.W.2d 166, 171 (Tenn.1991). In Williams, we wrote that
>
> > 'Torture' means the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious. In proving that such torture

> occurred, the State, necessarily, also proves that the murder involved depravity of mind of the murderer, because the state of mind of one who willfully inflicts such severe physical or mental pain on the victim is depraved.
>
> * * * * * *
>
> If acts occurring after the death of the victim are relied upon to show depravity of mind of the murderer, such acts must be shown to have occurred so close to the time of the victim's death, and must have been of such a nature, that the inference can be fairly drawn that the depraved state of mind of the murderer existed at the time the fatal blows were inflicted upon the victim.

690 S.W.2d at 529.

> When this case was originally considered on direct appeal, this Court commented that the evidence, equivalent to that presented at this sentencing hearing, was clearly sufficient to demonstrate that the murder was especially heinous, atrocious, or cruel. State v. Hines, 758 S.W.2d at 523. We continue to agree with this finding. **At resentencing, the pathologist testified that the stab wound to the victim's vagina was made around the time of death. The willful insertion of a sharp instrument into the vaginal cavity of a dying woman (or a woman who had just died) satisfies**

> **the requirements of Williams, supra. If committed prior to death, these acts constitute torture and thereby also support a finding of depravity. If they occurred close in time to the victim's death, they allow the drawing of an inference of the depraved state of mind of the murderer at the time the fatal blows were inflicted on the victim. The defendant also argues that to find that multiple stab wounds and defensive wounds constitute torture, there must be proof that the defendant specifically intended to inflict unnecessary pain and suffering. The evidence of the stab wound to the vagina was sufficient to support a finding that the wounds were intentionally inflicted and that the murder involved torture under Williams.**

919 S.W.2d at 581 (emphasis added).

For an insufficiency of the evidence claim, the Supreme Court in Jackson set forth the standard for this Court's review.

> [T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt." Instead, **the relevant**

> **question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.** This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. **Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution.** The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law.

443 U.S. at 318-19 (emphasis added with footnotes and citations omitted).

A presumption of correctness obtains in determining whether there exists sufficient evidence to support a conviction. If any rational finder of fact would accept the evidence as establishing each essential element of the crime, the Jackson standard of review is satisfied. Id. at 324. Circumstantial evidence, if sufficient to establish an element of the offense, satisfies constitutional requirement of due process, Wiley v. Sowders, 669 F.2d 386, 390 (6th Cir. 1982) (per curiam), and such evidence need not remove every reasonable hypothesis except that of guilt. Tilley v.

McMackin, 989 F.2d 222, 225 (6th Cir. 1993); United States v. Vannerson, 786 F.2d 221, 225 (6th Cir.1986). Uncorroborated accomplice testimony is sufficient to support a conviction under the United States Constitution. Takacs v. Engle, 768 F.2d 122, 127 (6th Cir. 1985).

Applying the Jackson principles here, the State's proof, as quoted at 758 S.W.2d at 517-19, included facts that Petitioner was seen driving the victim's car, Petitioner told his sister that he had been in a fight at a motel with the manager, Petitioner was observed with blood on his clothes in the shoulder area. Petitioner admitted taking the victim's car, the motel key to Room 9, the site of the murder, was found in the area where the Petitioner had camped, and Petitioner was observed with a survival knife with a 6 ½ to 7 inch blade. Petitioner also made statements that he could tell the officers all the details of the murder. With this collective proof, this Court concludes that the state courts could reasonably conclude that the state's proof supported Petitioner's conviction of first degree murder.

As to the merits of the State's proof for the death sentence, the Court concludes that given the nature of the victim's repeated hunting knife wounds to her vagina, the state court's decisions that Petitioner was guilty of torture are reasonable applications of federal law. As to the unconstitutionality of this statutory torture requirement, the Sixth Circuit observed that as in Bell v. Cone, 543U.S. 447 (2005), "the Tennessee Supreme Court's rejection of petitioner's challenge to the 'heinous, atrocious, or cruel' ("HAC") aggravator

was not contrary to clearly established federal law as determined by the United States Supreme Court." Payne v. Bell, 418 F.3d 644, 653 (6th Cir. 2005). For these reasons, the Court concludes that this claim does not warrant habeas relief.

As to Petitioner's reliance on Clemons, there, the Supreme Court held that the harmless error doctrine applied to a state appellate court's reweighing of the aggravating and mitigating factors and eliminating an improper aggravating factor considered by the jury. 494 U.S. at 741-46. The "[f]ederal Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance either by reweighing of the aggravating and mitigating evidence or by harmless-error review." Id. at 741. Given the nature of the victim's wounds and the State's other proof, the jury and Tennessee Supreme Court had ample alternative bases, other than Petitioner's prior assault conviction and felony theft of the victim's automobile, to justify Petitioner's death penalty sentence. See Landrum v Mitchell, 625 F.3d 905, 926 (6th Cir 2010).

b. Ineffective Assistance of Counsel Claims

Petitioner's ineffective assistance of counsel's claims are directed at the performances of his trial counsel and counsel at his resentencing and appeal. Those claims are addressed separately.

1. Ineffectiveness of Trial Counsel

Of Petitioner's claims on the ineffective assistance of his trial counsel, the undisputed exhausted claims about his trial counsel[6] are that:

> 11. Counsel was ineffective at the guilt phase of the proceedings, and absent counsel's failures, there is a reasonable probability that Darrell Hines would not have been convicted and/or sentenced to death. Counsel was ineffective for the following reasons, including:
>
> a. Counsel lacked the experience necessary to defend Darrell Hines (counsel had never tried a murder case), was unaware of the law applicable to Darrell Hines' case, was attempting to carry a full criminal practice while representing Darrell Hines, and was not properly compensated for his representation of Mr. Hines.

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[6] Petitioner' s challenges to the effectiveness of his post conviction counsel are not in his second amended petition, but in his request for an evidentiary hearing. (Docket Entry No. 109 at 1-43) In any event , those challenges are addressed in the procedural default section of this Memorandum, infra. In his post conviction appeal, the Tennessee appellate court described Petitioner's claims on appeal: "In his argument on appeal, the petitioner has set out five claims, three asserting that counsel were ineffective at his 1986 trial, his 1989 resentencing hearing, and on the direct appeal of his conviction, one asserting that he was prejudiced because of the exclusion of women from the jury panel, and one claiming that imposition of the death penalty violates various of his rights afforded by the federal and state constitutions." Hines, 2004 WL 1567120 at *22. This Court analyzes only claims that were actually presented to and decided by the state courts.

* * *

c. Counsel failed to properly pursue and inform Mr. Hines of possible terms and consequences of a plea bargain.

d. Counsel was ineffective for failing to allege that women were under-represented in the Cheatham County venire and to challenge women's under-representation on the petit jury, grand jury, and as forepersons of the grand jury. See ¶ 9, incorporated by reference.

* * *

f. Counsel failed to develop and pursue a comprehensive defense theory for the 1986 guilt/innocence phase of trial.

g. Counsel was ineffective for failing to interview and effectively cross-examine Ken Jones to show that he was lying at the trial. Counsel knowingly allowed Jones to present false testimony (which resulted in part from a conflict of interest with the sheriff) about when and why he was at the CeBon motel on the day of the murder and what he observed while he was there.

* * *

h. Counsel had a conflict of interest that constructively denied Darrell Hines his right to counsel where counsel purposefully did not investigate and interview Ken Jones based upon instructions from the Sheriff who directed him

not to talk to Ken Jones. Counsel's conflict created a bias whereupon counsel sided with Sheriff Weakley instead of diligently pursuing all avenues of defense for Darrell Hines.

* * *

k. Counsel failed to properly identify, gather and examine necessary documents, records and physical evidence, including but not limited to: arrest reports, reports of forensic testing, any recorded or memorialized version of statements made by Mr. Hines and others, autopsy reports, physical evidence seized by the prosecution, and prior criminal records of Mr. Hines and other witnesses. In addition, counsel failed to view the crime scene, and failed to fully investigate the forensic evidence collected at or from the crime scene or victim which was inconsistent with Darrell Hines' guilt and/or any testing done on such evidence, including, but not limited to, vacuumings from the room, a cigarette butt, an ashtray, clothing and fabrics and swabs, fingerprints, a bank bag, a $20 bill, a Pepsi bottle, a roll of Turns, and a chapstick (all found in room 21 where the victim was discovered). Had counsel investigated and analyzed this forensic evidence to establish the identity of any person(s) in the room, counsel would have established proof that Darrell Hines was not guilty and/or that someone else killed the victim.

* * *

> m. Counsel was ineffective for failing to discover impeachment evidence which would have undermined the testimony of critical witnesses for the prosecution

(Docket Entry Nos. 23-1, Seconded Amended Petition at 13, 15,18-19). Again, each claim has subparts that are discussed collectively infra.

i. Competency of Trial Counsel

The Court groups several of these claims that are interrelated. The first group includes those claims 11 a, c, and f, that challenge the competency of Petitioner's trial counsel, namely that Petitioner's trial counsel lacked the experience of trying a death penalty case; that Petitioner's trial counsel could not represent Petitioner and maintain his practice; that Petitioner's trial counsel failed to pursue and advise Petitioner on a guilty plea; and that Petitioner's trial counsel failed to develop and pursue a comprehensive defense theory for the guilt/innocence phase of the trial. For these claims, Respondent argues that Petitioner's trial counsel's inexperience is not ground for habeas relief and that Petitioner fails to identify any particulars for his comprehensive defense claim.

As to the guilt state of the proceedings, the Tennessee appellate court found that five lawyers represented Petitioner at various stages of his trial and sentencing hearings:

> Robert S. Wilson was the first attorney appointed to represent the petitioner, but his representation was short-lived because he was hired by the district attorney general's office

approximately two months after his appointment. He said that he represented the petitioner from shortly after his arrest in March1985 to approximately late June 1985. He began employment with the district attorney general's office on August 16, 1985, and said that he never discussed the case with anyone at that office. He testified that he had recommended Steve Stack as his co-counsel, and Stack was appointed. He knew that Stack had no prior death penalty experience when he recommended him.

Steve Stack represented the petitioner at the 1986 trial and the 1989 resentencing. He had tried two cases to a jury in the twenty months that he had been practicing law prior to his appointment and did not believe he was qualified to serve as lead counsel on the case. Stack estimated that between 60 and 75% of his practice at the time was civil. William Wilkinson was appointed to assist Stack after Wilson was allowed to withdraw. Wilkinson had practiced with Wilson prior to the time he joined the district attorney general's office. Stack considered himself to be co-counsel in the case, although he performed many of the lead counsel's duties. He spent 3 8.9 in-court hours and 133.6 out-of-court hours on the petitioner's case. He believed he was paid, at the time of his representation of the petitioner at the trial, $20 an hour for out-of-court time and $30 an hour for in-court time. By contrast, in retained cases he charged between $60 and $75 per hour for his

services. At the time of his representation of the petitioner, he did not have an office staff or an investigator. Accordingly, he and Wilkinson did all of the investigation themselves. Although Stack was in private practice during the 1986 trial, he was employed at the public defender's office by the time the case was remanded by the supreme court for resentencing and, as a public defender, was appointed to represent the petitioner at the resentencing.

Stack testified that he obtained a mental evaluation for the petitioner to determine competency issues and whether an insanity defense would be available prior to the original trial, but these services did not cover any mitigation issues. He requested the services of an independent psychiatrist, a private investigator, and an independent mental evaluation, but these requests were denied.

Stack said that he had interviewed many of the witnesses who testified at trial, including the owners of the motel and Sheriff Weakley. He recalled traveling to Bowling Green, Kentucky, but could not remember the specific witnesses he interviewed there. He did not run a criminal background check on Daniel Blair and, therefore, did not know he had been convicted of theft of livestock, which might have been used for impeachment purposes. He also interviewed Bill Hines, the petitioner's stepfather; Bobby Joe Hines, the petitioner's half-brother; and possibly Barbara Hines, the petitioner's mother.

Although he recalled traveling to the home of Victoria Hines Daniel, the petitioner's sister, he did not remember actually meeting with her. He acknowledged that he knew she would testify that she saw blood on the petitioner's clothing, but he did not obtain any information to impeach her testimony. He did not interview the petitioner's former girlfriend, Melanie Chandler, or her mother, Virginia Chandler, both of whom lived in North Carolina.

* * *

Stack testified that he became an assistant public defender in 1988 and was appointed to represent the petitioner at resentencing, as were Shipp Weems, the public defender, and Phillip Maxey. As for the defense team's decision to delay their opening statement at resentencing until just prior to their proof, Stack testified that they discussed this issue, but he did not know why they decided to do so. He said that Maxey, who was the least experienced of the three, gave the opening statement for the defense, and both he and Weems had anticipated a different opening. He testified that the opening did not outline the proof they planned to present, but rather simply asked the jury to listen to their proof. He testified that the defense team made the tactical decision not to present a closing argument because it was their opinion that General Kirby had not "presented a very forceful argument," and they wanted to prevent General Atkins, who was "exceptional in his ability to ...

bring emotions out in a jury," from making a rebuttal argument. Stack said that General Atkins had given a very impassioned closing argument at the original trial, and they wanted to keep him from doing so at the resentencing.

* * *

William G. Wilkinson, who had been practicing law since 1968, testified that he was appointed to assist Steve Stack, who had been in practice a "relatively short time." Wilkinson described his role as "kind of senior counsel" but said that Stack probably did more work on the case than he did. He said he had billed 59.5 out-of-court hours and 34.4 in-court hours on the petitioner's case, but those numbers were very conservative and did not include time he spent traveling to Bowling Green, Kentucky. Wilkinson testified that he believed he had sufficient time to prepare for the petitioner's trial, that he was adequately prepared for trial, and that none of his tactical decisions turned out to be erroneous.

Wilkinson knew that the petitioner's sister, Victoria Hines Daniel, had an alcohol and drug abuse problem and recalled examining her husband, Ernest Daniel, about her drinking problem. He was not aware of any sexual or physical abuse allegations of Mrs. Daniel but acknowledged that information as to this would have been useful. Wilkinson said that the petitioner "may" have told him about the abuse inflicted upon him by his stepfather. He had the

> petitioner examined by a psychiatrist who determined he was competent to stand trial.
>
> Wilkinson said he did not interview the four people from Kentucky who gave the petitioner a ride and did not know before trial that one of them, Daniel Blair, was going to testify that he saw blood on the petitioner's shirt. Had he known of the substance of Blair's testimony, he would have checked Blair's criminal record for impeachment purposes. He recalled that Blair testified about his ability to recognize blood and about washing bloodstains out of fabric although he could not recall Blair's exact testimony. He acknowledged that, in hindsight, it would have been helpful to have had an expert refute Blair's testimony about washing out bloodstains.

Hines, 2004 WL 1567120 at *9-10.

Based upon these facts, the Tennessee appellate court ruled that "The petitioner contends both that his counsel were too inexperienced to try a capital case and failed to represent him zealously because the compensation provided appointed attorneys was too low. The court determined that these arguments were without merit, and the record supports this conclusion. We have previously held that inexperience of counsel alone does not equate to ineffective assistance of counsel." Hines, 2004 WL 1567120 at *30 (citing Anthony J. Robinson v. State, No. 02C01-9707-CR-00275, 1998 WL 538566, at *2 (Tenn.Crim.App. Aug.26, 1998) ("The petitioner claims counsel's lack of trial experience constituted ineffective assistance. The trial court noted the petitioner claimed, but presented

no evidence, that his was the first trial that counsel conducted. Further, the trial court noted that inexperience, in itself, does not equate to ineffective assistance. We concur. The petitioner must identify specific acts and omissions to support the claim. The petitioner does not; therefore, this issue is without merit").

Under Strickland v. Washington, 466 U.S. 668, 687 (1984), to prevail on his claims of ineffective assistance of counsel, Petitioner must demonstrate that, under the totality of the circumstances, his trial counsel performed deficiently and that counsel's deficient performance resulted in prejudice. As the Supreme Court has explained:

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

Id.

As to the "performance" inquiry, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Id. at 688. Under Strickland, "counsel has a duty to make reasonable investigations or to make a

reasonable decision that makes particular investigations unnecessary." Id. at 691. As to the duty to investigate:

> These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the Court of Appeals concluded, **strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.**
>
> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. **Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are**

> **reasonable depends critically on such information.** For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And **when a defendant has given counsel reason to believe that pursing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.** In short, 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.

Id. at 690-91 (emphasis added).

Here, these claims center on Stack, one of Petitioner's several trial counsel. Petitioner's second counsel, Wilkinson, was an experienced trial lawyer who felt himself prepared for trial. The Court concludes that the state courts could reasonably determine that this claim lacked factual support and legal merit. As to the alleged lack of an overall defense strategy, Petitioner does not identify any specifics of this claim that were not presented to the state courts. These contentions lack merit. As to the guilty aspect of this claim, where counsel elected not to consult with a defendant on a guilty plea and to focus only on sentencing, counsel was not ineffective. Florida v. Nixon, 543 U.S. 175 (2004). In any event, Petitioner

reached a plea agreement with the State that the trial court rejected. See Hines, 919 S. W .2d at 578-79. Thus, in fact, Petitioner's trial counsel fully explored a guilty plea with Petitioner. This Court concludes that the state courts reasonably determined these claims lack factual merit.

ii. Failure to Challenge the Jury Panel

For this claim, Petitioner contends his trial counsel was ineffective for failing to allege that women were underrepresented in the Cheatham County venire for the petit jury, grand jury, and as forepersons of the grand jury. (Docket Entry No. 23 at ¶ 11d). Petitioner's related claim is that "[i]n violation of the Sixth, Eighth, and Fourteenth Amendments, Darrell Hines was denied his rights to due process, equal protection, and to juries selected free from discrimination and from a fair cross-section of the community, given discrimination against women in the selection of the petit jury, the grand jury, and the grand jury foreperson. Id at ¶ 9.

The Tennessee appellate court made findings on this claim on Petitioner's post conviction appeal and found this claim to lack factual support.

> James W. Kirby, a former assistant district attorney general and, at the time of the post-conviction hearing, the Executive Director of the Tennessee District Attorneys' General Conference, testified that he was involved in prosecuting the petitioner at the 1986 trial. .... Kirby also testified that in the 1980s most of the juries he was involved with in Cheatham County

were dominated by men; however, he recalled one death penalty case where the jury had a female foreperson.

* * *

Stack also testified that the defense did not challenge the composition of the jury venire at either the 1986 trial or the 1989 resentencing, saying that it was not considered as an issue at the original trial. Although he was aware that it may have been an issue at the time of the resentencing, they did not have the necessary time to devote to pursuing it.

* * *

The proof at the post-conviction hearing on the issue of the jury venire consisted of five witnesses and a report prepared by a statistician, Dr. James M. O'Reilly, which concluded that there was an underrepresentation of women on the jury venire for Cheatham County for years 1979 to 1990. During the pertinent years, the female population of Cheatham County accounted for 50.6 to 50.7% of the total population. By contrast, the percentage of women in the Cheatham County venire was between 10 and 22%.

Connie Westfall, of the post-conviction defender's office, testified that she had investigated the issue of the composition of the jury pool at the petitioner's 1986 trial as well as his resentencing. At the time of her

investigation, only one of the three jury commissioners for the relevant time period, C.E. Dunn, was able to meet with her. Dorris Winters, one of the commissioners, was deceased; and the other, Martha Adkisson, was confined to a nursing home and unable to be interviewed because of her mental condition. Dunn provided Westfall with an affidavit because he had suffered a stroke and was unable to travel to court. Basically, his affidavit stated that they used the voter registration list as the exclusive source of obtaining people for the purpose of filling the jury box, and the jury commissioners met every two years to fill the jury box. Ms. Westfall testified that she also interviewed Delores Moulton, Lloyd Harris, the tax assessor, and trustees. She said that when she first spoke with Mr. Harris, he recalled using the voter registration list and later remembered that they may have used property lists and the telephone book.

Dorothy Jones, the Cheatham County Trustee, said that she had been the trustee for six years at the time of the post-conviction hearing and, prior to her service as trustee, her husband was the trustee. She had worked in the trustee's office since 1982. During her years of employment in that office, no one ever had been allowed to remove the tax roll books from the office. She acknowledged, however, that the tax records were public records and anyone could come into the office and review them.

Betty Balthrop, the Cheatham County Property Assessor, said that she had occupied that position since 1988 and had worked in the office since 1978. Ms. Balthrop testified that since her employment in the assessor's office, no one had physically removed the tax records for the purpose of copying them. She acknowledged that the tax records were public records which exist in Nashville and elsewhere in the state.

Delores Moulton was the Cheatham County Circuit Court Clerk from 1990 to 1998. Previously, she served as the deputy clerk, beginning in 1972. Her father, Lloyd Harris, was the Cheatham County Circuit Court Clerk prior to her tenure. Ms. Moulton testified that the jury commissioners met every two years to charge the jury box and that the voter registration list was their major source of obtaining names because they had more access to it. She stated that they started out "randomly, maybe, every sixteenth one or twentieth one down and wr[o]te the name and address on a little jury ticket." She explained that each of the jury commissioners took a different section of the list and worked independently. While they were charging the box, the only names taken out were the names of those known to be deceased. She further explained that at the end of the two years, the names in the box were not removed, but new names were added.

After the jury box was charged, they gathered the jury list as needed. Either a child under the

age of ten or Ms. Moulton, wearing a blindfold, picked the names out of the box. Ms. Moulton testified that the jury commissioners sat together while compiling the names. Names of deceased persons were discarded. If school was in session, schoolteachers' names were set aside. Students away at college were omitted from the list. Also, at times, if they knew a woman had just had a baby, they removed her name. They compiled a list of 150 or more names, which made up the sheriff's venire. The sheriff summoned these persons to court where each was assigned a number. The judge then drew twelve numbers out of a box, and those persons comprised the grand jury. Ms. Moulton testified that Dorris Weakley was the sheriff in 1986 and 1989. During his administration, only thirty to fifty prospective jurors out of 150 actually appeared in court as summoned, but the percentages increased drastically under the next sheriffs administration.

On cross-examination, Ms. Moulton testified that, in addition to the voter registration list, they also used the telephone book and tax records to randomly select names, although the voter registration list was the main source. She believed they followed the Tennessee statutes in gathering and preparing the jury venire. She said the commissioners "never discriminated anyone because of race, color, or nationality or men or women." She recalled that Martha

Adkisson complained if she thought too many women were being put on the list; however, she believed Ms. Adkisson's reason for doing so was "to equal out ... the men and the women."

Lloyd Harris, Delores Moulton's father, served as the Cheatham County Circuit Court Clerk prior to Ms. Moulton, occupying the position for twenty-four years. He testified that the three jury commissioners met every two to three months to select names, and he recalled Junior Dozier, the tax assessor, providing him with names from the tax lists. He used the telephone book for this purpose, although most of the names were taken from the voter registration list. He testified that Martha Adkisson was a schoolteacher and sometimes set aside the names of teachers because, at that time, there was a shortage of substitute teachers. He also recalled that, a few times during harvest season, a farmer's name was set aside, and, during the 1970s and 1980s, it was easy for women with young children to get out of serving on the jury, but that changed through the years. He stated that the jury box was charged about every two years. He testified that they went down the voter registration list, wrote down every twentieth or twenty-fifth name, placed it in the box, and tried not to discriminate against any class of potential jurors. Harris said that the voter registration list, the tax list provided by Dozier, and the telephone books were the only

> sources used in the jury selection at the time of the petitioner's 1986 trial and in 1989.

Hines, 2004 WL 1567120 at* 7, 8, 20-21 (emphasis added).

Based upon these facts, the state trial court found an unrebutted *prima facie* showing of discrimination against women in the petit and grand jury service, as well as in the grand jury foreperson, but did not find Petitioner to have suffered any prejudice due to his counsel's failure to raise this issue at trial. Id. at* 34-36. Citing federal law, the Tennessee appellate court reversed the trial court's finding of discrimination, but agreed about the lack of prejudice to Petitioner:

> We respectfully disagree with the post-conviction court's finding that the underrepresentation of women compels the conclusion that women were systematically excluded from the venire. While the petitioner argues on appeal that "the state offer[ed] no plausible explanation" for the disparity and, therefore, he is entitled, as matter of law, to prevail, we disagree with this claim. In fact, substantial proof is in the record as to how the panel of prospective jurors was selected; and neither the petitioner nor the post-conviction court has identified illegalities or deficiencies in the process. Rather, both simply relied upon percentages of women called to jury duty to conclude that women had been systematically excluded. In Truesdale v. Moore, 142 F.3d 749, 755 (4th Cir.1998), the court explained that a statistical disparity does not, by itself, establish

systematic exclusion of a group from the jury pool:

> Truesdale has not advanced any direct evidence of "systematic exclusion" of African Americans from the venire. Instead he seeks to rely on the bare assertion of substantial under representation to prove that there was a structural or systemic impediment to voter registration by African Americans. We have consistently required more to make out a violation of the "fair cross-section" guarantee.... To allow Truesdale to substitute evidence of substantial underrepresentation for evidence of systematic exclusion would go a long way towards requiring perfect statistical correspondence between racial percentages in the venire and those in the community. Such a rule would exalt racial proportionality over neutral jury selection procedure.

Accordingly, we conclude that the post-conviction court erred in finding that women had been systematically excluded from the venire.

Regarding this issue as a post-conviction claim, the petitioner must prove that his counsel were ineffective under Strickland because counsel did not challenge the jury venire at trial and/or resentencing. Attorney Stack testified that he had no reason to suspect that women were underrepresented in the jury venire in 1986,

> and, in fact, three women were on the petitioner's 1986 jury. Moreover, counsel testified that they did not use all of their peremptory challenges at the 1986 trial. Our supreme court has found that the presence of three women on the petit jury constitutes a "fair representation of women on the jury and that is all that is required by the Constitution of the United States." Strouth, 620 S.W.2d at 470. The record supports the post-conviction court's finding that the petitioner was not prejudiced because counsel did not challenge the 1986 venire.

Id. at *35-36.

Petitioner does not present any showing to challenge the state appellate court's ruling that the jury selection process was not discriminatory. Petitioner has not demonstrated that the rulings of the state trial and appellate courts erred in concluding that Petitioner was not prejudiced by his counsel's failure to raise this claim at trial. Moreover, whatever omission of Petitioner's trial counsel in this regard, the issue was fully explored during Petitioner's post conviction proceedings, including the facts alleged in the second amended petition. Accordingly, the Court concludes these facts preclude any showing of prejudice required by Strickland. Petitioner's freestanding claim on exclusion of women from the grand and petit juries, as well as grand jury foreperson, also lacks merit. Thus, Petitioner's claims 9 and 11 should be denied for lack of factual support.

iii. Ineffective Cross Examination of Jones

In his post conviction appeal, Petitioner's claims about his trial counsel were "that trial counsel were ineffective in failing to interview and effectively cross-examine Ken Jones, to object to Sheriff Weakley's participating in the voir dire of prospective jurors, to discover impeachment evidence, and were ineffective as well because of their lack of experience and resources." Id. at *23. This claim focuses on the testimony of Ken Jones whom Petitioner now contends his counsel did not elicit on cross examination that Jones had lied about his presence at the motel, the scene of the murder.

According to Petitioner, his counsel did not investigate and cross-examine Ken Jones, even though he could have proved as false, Jones' s testimony that he arrived at the CeBon motel at 12:30 p.m., left and went to Stuckey's, returned at 1:20 or 1:30 p.m, left a note at the motel office saying he was using the restroom in Room 21, went to Room 21 to use the restroom, found the victim about whom he did not have any knowledge, then returned the key to the office and called the Sheriff, and waited his arrival. Petitioner contends that the falsity of Jones's testimony was also known by Vernedith White, Jones's mistress. Petitioner contends that his trial counsel failed to cross-examine Jones thoroughly because Sheriff Weakley advised counsel not to talk to Jones, resulting in an alleged conflict for Petitioner's counsel. (Docket Entry No. 23 at ¶¶ 11g and h). According to Petitioner, his trial counsel impermissibly accepted the Sheriff's statement that Ken Jones was at the CeBon motel to rent a room

with his lover, Vernedith White, and that during the time they were there, they did not see anything. Respondent asserts that the state courts reasonably determined that these claims lack proof of prejudice.

On this claim, the Tennessee appellate court made the following findings of fact in Petitioner's post conviction appeal:

> Stack said that he did not interview Ken Jones prior to the trial because he had been told by Sheriff Weakley that Jones was at the crime scene for only a very short period of time and did not know anything about the murder itself. Stack testified that he knew at the time of trial that part of Ken Jones's testimony was false or inaccurate. However, he explained that he held Sheriff Weakley in high regard and trusted what he had told him, saying: "I mean, I would take that man's word for anything in the world. He say[ ]s this hadn't got a dog in the hunt, don't embarrass the man. I wasn't going to embarrass the man." Stack acknowledged that the defense team should have interviewed Jones and that it was "ridiculous for [them] not to have gone to interview him." He said there were discrepancies in Jones's testimony regarding his timing of the events which should have been discovered and developed for the defense. Stack acknowledged that Jones testified at trial that he did not know the gender of the victim at the time of discovery because the victim's body was covered with a cloth or sheet. However, the person who made

the emergency call said that a woman had been stabbed.

* * *

Wilkinson said that he discussed Ken Jones's situation with Sheriff Weakley and believed that Weakley had told him everything he knew. He did not interview Ken Jones, Vernedith White, or Virginia Chandler and, in hindsight, would liked to have had more time to inquire about why Jones and White sat in front of the CeBon Motel for over three hours on the day of the murder. As for Dr. Harlan's testimony, Wilkinson said that it may have been helpful to have had another pathologist review Harlan's findings.

* * *

The petitioner argues that trial counsel sanctioned the perjured testimony of Ken Jones at the 1986 trial and failed, at the request of Sheriff Weakley, to effectively cross-examine Jones, these amounting to an actual conflict of interest for the trial attorneys. As we have set out, Ken Jones acknowledged at his deposition in 1999 that he was at the CeBon Motel on the day of the murder to rent a room to be with his paramour. However, at the petitioner's 1986 trial, Jones had testified that he was at the motel because he needed to use the restroom. Trial counsel Stack acknowledged that he knew Jones was at the motel to rent a room with his paramour, but did not cross-examine him on this

> fact. Sheriff Weakley did not want Jones to be embarrassed and had assured trial counsel that Jones knew nothing about the murder.

Id. at *8, 10, 23.

In response to Petitioner's reliance on Kyles v. Whitley, 514 U.S. 419, 434 (1995) and Jones v. Kentucky, 97 F.2d 335 (6th Cir.1938), the Tennessee appellate court, citing other federal circuit decisions, ruled that Petitioner's counsel did not have any conflict of interest and that Petitioner did not suffer any prejudice on this omission of his trial counsel.

> While trial counsel did not question Ken Jones as to why he was at the motel, this fact does not result in their representing the interests of Sheriff Weakley. Accordingly, to prevail on this claim, the petitioner must establish that he was prejudiced by trial counsel's not ascertaining and cross-examining Ken Jones's true reason for being at the motel, thus depriving the jurors of this knowledge in addition to missing the opportunity to cross-examine Vernedith White. We will review this argument along with the related claim, made at oral argument, that trial counsel could have created residual doubt by properly dealing with Ken Jones.
>
> In his reply brief, the petitioner points to various portions of the testimony to establish that Ken Jones, himself, might have killed the victim. The petitioner explains how he might have gotten the keys to the victim's car without confronting her, surmising "because of the warmth on the

day at issue, [the victim] was wearing only a very light weight summer shift" and that her maid's coat, where she kept her keys and wallet, "was most likely hanging on the cleaning cart, which gave [the petitioner] easy access." The petitioner argues that the statements of Jones and White that they neither saw nor heard anything "that was connected with the crime" are "unbelievable." The victim's schedule to clean the rooms, the petitioner asserts, was such that she would not have reached room 21, where she was killed, until "noon," resulting in Jones and White at least seeing her. The petitioner notes that, at the 1986 trial, Jones said he did not know whether the victim was male or female, yet he told Maxey Kittrell, another witness, that "a woman had been stabbed" and told White that "there was a dead woman in there." This testimony, according to the petitioner's argument, demonstrates "knowledge that no one but the perpetrator could have known." The petitioner points to other discrepancies, including Jones's testimony that the "randomly selected key" which he picked up 'just happened to open the lock on room 21, the murder room"; and the fact that White testified that she and Jones were at the motel from 9:00 am until the emergency call, which was made at 2:36 p.m., leaves two hours of Jones and White's activities "unaccounted for." This time period, according to the petitioner's theory, allowed Jones to drive White to Dickson and "to cleanse himself and his van of the victim's blood." The petitioner surmises that Jones then returned to

the motel to determine whether the motel owners had come back and found the body, and discovered that this had not occurred. Finally, according to this argument, "by belatedly announcing that a woman had been stabbed to death, Jones successfully removed himself as a suspect and thereby, with the help of his friend the sheriff, was able to keep himself from being investigated by the defense and by the prosecution."

The post-conviction court concluded that the petitioner would not have benefitted from the claim that Ken Jones had killed the victim:

> Petitioner insists that his trial counsel should have attempted to cast suspicion upon Ken Jones as a possible perpetrator of the crime and that counsel was ineffective in allowing Mr. Jones to "perjure" himself in hiding his true reason for being at the hotel. While counsel had brought out that there had been another stranger in the area of the CeBon Motel that morning, they did not develop any reason for the jury to consider that someone other than Petitioner committed the offense. Petitioner asserts that his trial counsel should have suggested that perhaps, Ms. Jenkins had thwarted Mr. Jones ['s] planned sexual liaison with Ms. White and that this was a motive to kill her. He further suggests that their theory might explain the twenty dollar bill under

Ms. Jenkins's watch band [sic] and the careful insertion of the knife into her vagina. Trial counsel knew of the actual reason for Mr. Jones['s] presence at the motel, having learned it from the sheriff. Of course, they could have investigated further and learned the details of the encounter but the Court does not find that the information would have been particularly useful. To present such a farfetched theory with no supporting evidence would cause a loss of credibility by the defense at trial. Admittedly, if trial counsel had learned the exact details of the movements of Mr. Jones, Ms. White and the person(s) in the maroon or brown car, they could have "muddied the water" concerning the details of the discovery of the body. This would have been insufficient, however, to cast reasonable doubt on the guilt of Petitioner given the fact that Petitioner was shown by the proof to have taken the deceased's car keys, presumably from her billfold (in which she habitually kept them), and stolen her car. To accept Petitioner's argument that he didn't kill the deceased but merely took her car keys from her body (which was wrapped in a blanket) and stole her car would require the trial jury to depart from speculation and enter into fantasy.

> Missing in the petitioner's theory, which the post-conviction court described as "farfetched," is any motive or reason why Jones would want to kill the victim, except the petitioner's suggestion, recounted in the post-conviction's findings, that the victim was killed because she had "thwarted" the sexual liaison between Jones and White. In effect, the petitioner argues that fifty-one-year-old Ken Jones, accompanied by his twenty-one-year-old girlfriend, Vernedith White, following their normal Sunday morning routine and checking into the same motel where they had been together approximately 100 times before and were known by the staff, including the victim, stabbed the victim to death, with Jones driving White to another location, cleaning blood from himself and his vehicle, and then returning to the scene to report the crime and wait for law enforcement officers to arrive. We agree with the post-conviction court that, given the strength of proof against the petitioner, making the argument that Ken Jones was the actual killer would have been "farfetched" and could have resulted in a loss of credibility for the defense.

Hines, 2004 WL 1567120 at *26-27.

Counsel's failure "'to conduct constitutionally adequate pretrial investigation into potential mitigation evidence'" can'" hamper[] [their] ability to make strategic choices.'" Harries v. Bell, 417 F.3d 631, 639 (6th Cir. 2005) (citation omitted); see also Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991) ("[O]ur

case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them.").

Yet, Petitioner has not presented any evidence to suggest that Jones could have been the murderer. Jones's motivation for being at the motel was undisputed. Given the State's proof and Petitioner's statement to the officers, the Court concludes that there is not any basis to suggest any other identifiable person as the perpetrator of this horrendous crime. The Court also concludes that Petitioner has not demonstrated any prejudice for this claim. Given the state courts' finding of the absence of prejudice required by Strickland, the Court concludes that this claim was reasonably decided by the state courts applying clearly established federal law.

iv. Failure to Acquire Forensic Evidence

For this claim, Petitioner alleges that his counsel failed to view the crime scene and to have the forensic evidence collected at or from the crime scene or victim to be analyzed. Petitioner cites, vacuuming the motel room, a cigarette butt, an ashtray, clothing and fabrics and swabs, fingerprints, a bank bag, a $20 bill, a Pepsi bottle, a roll of Tums, and a chapstick that were found in room 21 where the victim was discovered. (Docket Entry No. 23, Second Amended Petition at ¶ 11k). Petitioner argues that if his trial counsel had acquired and analyzed this forensic evidence counsel would have found the presence of another person(s) in the room. Thus, Petitioner would have been found not guilty and/or that someone else killed the victim. Although

Respondent does not challenge this claim as procedurally defaulted, the Court has not identified nor has Petitioner cited this claim as presented to the state Courts. This claim is governed by the Court's procedural default conclusions. In any event, for the reasons stated earlier on Petitioner's request for an evidentiary hearing, the State courts reasonably rejected the facts cited for the other suspect claim and Petitioner fails to present any material and persuasive facts for this claim.

v. Failure to Discover Impeachment and Exculpatory Evidence

For this claim, Petitioner alleges that "Counsel was ineffective for failing to discover impeachment evidence which would have undermined the testimony of critical witnesses for the prosecution." (Docket Entry No. 23, Second Amended Petition, at ¶ 11m). For particulars of this claim, Petitioner cites the probation status of Paul Blair; the serious drinking problem of Victoria Hines Daniel who saw blood on Petitioner's shirt; the testimony of Earnest Daniel who knew of his wife's drinking problem, but described her drinking as occasional; and Virginia Chandler, Petitioner's spurned girl friend who had a drinking problem and was motivated to get Petitioner. In a closely related claim, Petitioner alleges that his trial counsel failed to request material exculpatory evidence and cites Sheriff Weakley's information about Jones's arrival at the motel earlier in the morning for a tryst with Vernedith White. The exculpatory nature of this proof is that Jones was not at the motel to use the restroom. Id. at ¶ 11g.

On the latter claim, the state technical record reveals that Petitioner's counsel, in fact, filed a motion for, among other information, "All statements of confession or admission against interest in the possession of any law enforcement agency" as well as for any evidence that is "exculpatory in nature." (Docket Entry No.29, Addendum No. 1 at 9). As to the impeachment evidence claim, the Tennessee appellate court found the lack of materiality in this proof about Jones and the other cited witnesses.

> Stack said that he had interviewed many of the witnesses who testified at trial, including the owners of the motel and Sheriff Weakley. He recalled traveling to Bowling Green, Kentucky, but could not remember the specific witnesses he interviewed there. He did not run a criminal background check on Daniel Blair and, therefore, did not know he had been convicted of theft of livestock, which might have been used for impeachment purposes. He also interviewed Bill Hines, the petitioner's stepfather; Bobby Joe Hines, the petitioner's half-brother; and possibly Barbara Hines, the petitioner's mother. Although he recalled traveling to the home of Victoria Hines Daniel, the petitioner's sister, he did not remember actually meeting with her. He acknowledged that he knew she would testify that she saw blood on the petitioner's clothing, but he did not obtain any information to impeach her testimony. He did not interview the petitioner's former girlfriend, Melanie Chandler, or her mother, Virginia Chandler, both of whom lived in North Carolina.

* * *

Wilkinson knew that the petitioner's sister, Victoria Hines Daniel, had an alcohol and drug abuse problem and recalled examining her husband, Ernest Daniel, about her drinking problem. He was not aware of any sexual or physical abuse allegations of Mrs. Daniel but acknowledged that information as to this would have been useful. Wilkinson said that the petitioner "may" have told him about the abuse inflicted upon him by his stepfather. He had the petitioner examined by a psychiatrist who determined he was competent to stand trial.

Wilkinson said he did not interview the four people from Kentucky who gave the petitioner a ride and did not know before trial that one of them, Daniel Blair, was going to testify that he saw blood on the petitioner's shirt. Had he known of the substance of Blair's testimony, he would have checked Blair's criminal record for impeachment purposes. He recalled that Blair testified about his ability to recognize blood and about washing bloodstains out of fabric although he could not recall Blair's exact testimony. He acknowledged that, in hindsight, it would have been helpful to have had an expert refute Blair's testimony about washing out bloodstains.

* * *

Daniel Blair, who testified at the petitioner's original trial, was one of the four people from Kentucky who picked up the petitioner on March

3, 1985, on Interstate 65, after they noticed his car was disabled, and drove him to Bowling Green, Kentucky. Blair was on probation at the time and was not supposed to have left the State of Kentucky, although he was never charged with violating his probation and was told by a Kentucky deputy sheriff that his leaving the state would not be a problem. At the post-conviction hearing, Blair testified that he had seen "what looked like blood" on the petitioner's shirt, although at the trial he had testified that it was blood.

Melanie Chandler, the former girlfriend of the petitioner and a friend of Victoria Hines Daniel, his sister, testified that she and the petitioner had a child, Anthony Scott Hines, who was born January 1, 1981. The petitioner's mother adopted the child when he was two years old. She testified she had last seen the petitioner around February 1985 when he came to her house in North Carolina. When he arrived, he only had a few items with him, one of which was a small, folding knife she previously had given him. During his visit, they went to a party with some friends of hers, and, as they were returning home, the petitioner and the friend who was driving got into an argument. After the petitioner grabbed the friend who was driving the car, Chandler grabbed the petitioner, who accidentally struck her in the eye, causing bruising. She said that he had never before struck her but had always been protective. Chandler's mother, Virginia Chandler, called the

police and forced the petitioner to leave. Later that night, the petitioner appeared at Melanie's window. She allowed him inside, and he hid in her closet for approximately one week before her mother discovered him. Her mother bought the petitioner a one-way bus ticket to Kentucky.

Chandler said that she knew her mother had testified at the petitioner's trial, but defense counsel never contacted her. She acknowledged knowing she was supposed to appear in court at the trial, but she had just had a baby and decided not to do so. She testified that she did not know that the petitioner was on trial for murder. She thought her mother lied at the trial when she stated that she had seen the petitioner sharpening his knife with a bootstrap. She said that her mother later told her that the petitioner had been found guilty of murder and had been executed. She believed the petitioner was dead until the post-conviction defender's office contacted her in 1997 or 1998. Since learning that the petitioner was alive and in prison, she had written him several letters and had visited him in prison.

Robert Ernest Daniel testified that he had been married to Victoria Hines, the petitioner's sister, for about two years. He met the petitioner while the petitioner was on parole in Kentucky and gave him a job doing construction work. The petitioner was a hard worker, and they were friends "[t]o a point." Daniel said that the petitioner carried a small pocketknife with him

on the job and also had an "Army type survivor" knife with a fixed blade. He believed that the knife blade was approximately six inches long, with one end serrated and the other sharp. He recalled that the petitioner gave the knife to his brother, Bobby Joe, who kept it in a drawer at their home.

Daniel testified that on March 3, 1985, the petitioner appeared at his apartment, wearing blue jeans, a white t-shirt, an Army jacket, and white tennis shoes. Victoria's birthday was the day before or the day after the petitioner arrived, and the petitioner wanted to buy a grill for her. Daniel gave the petitioner some money because the petitioner did not have enough to purchase the grill. He then drove the petitioner to Park City or Cave City, Kentucky, and dropped him off. Later that night, the police came to his home and questioned him about the petitioner's whereabouts. At the time, he thought the police wanted to question the petitioner about a probation violation, so he "acted stupid." When he later learned that the police wanted to question the petitioner in connection with a murder, he told the police where he had taken the petitioner.

On cross-examination, Daniel said that he testified at the original trial that Victoria only drank occasionally "because she was my wife at the time and I would be very protective of her." This testimony was inaccurate because Victoria drank heavily. He denied testifying that the

petitioner had something bulky in his Army jacket and that he did not know when Victoria's birthday was. He denied remembering seeing the petitioner with a set of car keys or that he had asked the petitioner why he had a Volvo. During a recess, the court ordered Daniel to take a breath alcohol test. Daniel admitted that he had consumed "a couple of beers" before coming to testify at the post-conviction hearing, and the court found him to be in contempt, ordering him to serve twenty-four hours in the Cheatham County Jail.

Victoria Hines Daniel Furlong, the petitioner's sister, testified at both the original trial and the post-conviction proceeding. She said that her stepfather, Bill Hines, was abusive to her, her siblings, and her mother. Her stepfather used "tobacco sticks, belts, belt buckles ... anything that he could get a hold of to whoop us with." He also drank beer and liquor "all the time" which caused his attitude to change, and the "beatings got worse." She said that the petitioner often attempted to intervene to protect her and their sister, Debbie, which caused the petitioner to be beaten more severely. She recalled one incident where her stepfather knocked the petitioner into the corner of a fireplace, rendering him unconscious. However, medical attention was not sought for the petitioner. Often there was not much food in the house. In addition to the physical abuse, Bill Hines sexually abused her from the age of nine. She and the petitioner began drinking at the age of eleven or twelve.

They both also smoked "dope," and the petitioner sniffed glue. She admitted that she drank heavily from the time she was twelve or thirteen and had only recently stopped drinking. She also said that she was married to Ernest Daniel for five years, during which time he often beat her severely.

Furlong said that her birthday was February 4 and that on March 3, 1985, the petitioner had given her a grill as a belated birthday gift. She said that, if she had testified at the original trial that she saw blood on the petitioner on March 3, 1985, when he arrived at her house, it was because she had been drinking. At the post-conviction proceeding, she testified that the petitioner had fallen in red clay mud prior to arriving at her house and that is what she saw on his clothes. She said she was not interviewed by the petitioner's attorneys prior to the resentencing, and the prosecutors had tricked her into talking to them prior to the original trial by telling her they were the petitioner's attorneys. She said she was drinking whiskey and water when they came to her house and asked questions. She thought they were tape-recording their conversation, but they denied it. She said she later saw a recording device and ordered the men out of her home.

Furlong acknowledged that she was an alcoholic. She did not remember testifying that the petitioner had gotten into a struggle at the motel and did not believe that she had testified as the

> transcript of the original trial reflected. If the transcript were correct, then she was "[p]robably" lying in 1986 because of her drinking. She admitted that she had never reported any of the sexual abuse by her stepfather. It was her understanding that her stepfather had continued with his sexual abuse of young girls, including her niece, but she had never reported him to law enforcement officials.

Hines, 2004 WL 1567120 at* 8, 9-10, 11-13.

On these alleged omissions of Petitioner's trial counsel to secure the impeachment evidence concerning these witnesses, the Tennessee appellate court did not find any prejudice to Petitioner.

> The petitioner contends that trial counsel were ineffective by failing to discover impeachment evidence that State's witness Daniel Blair, on the day that he had given the petitioner a ride, was on felony probation for theft of livestock; that State's witness Victoria Hines Daniel Furlong was an alcoholic and had been drinking the day she supposedly saw blood on the petitioner's shirt; that State's witness Ernest Daniel also was an alcoholic and had not testified completely truthfully about Furlong's drinking; and that Melanie Chandler would have contradicted her mother's testimony that the petitioner carried a knife which he had been seen sharpening. We will consider these claims.
>
> As to Daniel Blair, trial counsel acknowledged that they did not investigate his criminal

history. The petitioner submits that the combination of the impeachment evidence of Blair's felony, coupled with discrediting his testimony that he saw blood on the petitioner's shirt on the day of the murder, would have affected his credibility. **The State argues that Blair's being on probation made him more credible because, in admitting that he had been in Tennessee, he admitted also that he had violated his probation. The post-conviction court found that effectively impeaching this witness would have been unlikely. We agree the petitioner's claim is speculative that Blair successfully could have been impeached with this additional information and conclude, accordingly, that the record supports the post-conviction court's determination.**

The petitioner also contends that trial counsel were ineffective in failing to discover that **Victoria Hines Daniel Furlong** was an alcoholic and had been drinking on the day she testified at the petitioner's trial. **At the post-conviction proceeding, she contradicted much of her prior testimony, as we have previously set out. The post-conviction court rejected Furlong's entire testimony as "incredible and worthless." The record supports this determination.**

Additionally, the petitioner contends that counsel were ineffective for failing to discover that Ernest Daniel, Victoria Furlong's husband

at the time of the petitioner's trial, was not truthful regarding the amount and extent of his wife's drinking. **The post-conviction court found Daniel to be in contempt of court at the post-conviction proceeding because he had been drinking prior to testifying. The court found the only fact that it could determine with respect to Daniel's and Furlong's testimony was that they each lied under oath at either the trial or the post-conviction hearing. Given this fact, the court determined that interviewing either of these witnesses would not have benefitted counsel in impeaching them at trial. The record supports this conclusion.**

Counsel testified that they did not interview Melanie Chandler or Virginia Chandler prior to trial. Melanie Chandler testified at the hearing that her mother had animosity toward the petitioner and drank heavily. Melanie Chandler admitted that she was not on good terms with her mother. **The post-conviction court noted that Chandler "glance[d] affectionately" at the petitioner during the hearing, making it obvious that she still had feelings for him. In conclusion, the court found that the impeachment value of Melanie Chandler's testimony was "marginal, at best." We concur with this assessment. Accordingly, as to this claim, we agree with the**

conclusion of the post-conviction court that the petitioner failed to establish prejudice.

Id. at* 29-30 (emphasis added).

As stated earlier, the statutory presumption of correctness applies to State courts' credibility determinations. Skaggs, 235 F.3d at 266. Here, the state courts deemed most of the cited witnesses' testimony as lacking credibility with the exception of Blair. As to Blair, the state court accepted the State's argument that for Petitioner's counsel to elicit Blair's probation status would have enhanced Blair's credibility, rather than diminish his testimony. Petitioner's trial counsel filed a motion for exculpatory information as well as all statements against interests in the possession of any law enforcement agency. With these findings, the Court concludes that the state courts reasonably determined this claim for which Petitioner has not shown the requisite prejudice under Strickland warrant any habeas relief.

vi. Failure to Make Closing Argument

For this claim, Petitioner contends that his counsel was ineffective for not making a closing argument at resentencing. (Docket Entry No. 23, Second Amended Petition at ¶ 13p(2)). In a related claim, Petitioner contends that Petitioner's counsel failed to object to improper statements of the state prosecutor during opening and closing arguments. Id. at ¶ 11s(2). Another related claim is that the prosecutor engaged in improper closing argument. (Docket Entry No. 23-1 at ¶ 21).

As to trial counsel's election not to make a closing argument, the Tennessee appellate court found the following facts:

> Stack testified that he became an assistant public defender in 1988 and was appointed to represent the petitioner at resentencing, as were Shipp Weems, the public defender, and Phillip Maxey. As for the defense team's decision to delay their opening statement at resentencing until just prior to their proof, Stack testified that they discussed this issue, but he did not know why they decided to do so. He said that Maxey, who was the least experienced of the three, gave the opening statement for the defense, and both he and Weems had anticipated a different opening. He testified that the opening did not outline the proof they planned to present, but rather simply asked the jury to listen to their proof. He testified that the defense team made the tactical decision not to present a closing argument because it was their opinion that General Kirby had not "presented a very forceful argument," and they wanted to prevent General Atkins, who was "exceptional in his ability to ... bring emotions out in a jury," from making a rebuttal argument. Stack said that General Atkins had given a very impassioned closing argument at the original trial, and they wanted to keep him from doing so at the resentencing.
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> * * *
>
> Weems confirmed Stack's testimony that they agreed to waive closing argument at

> resentencing in order to prevent the prosecution from giving a rebuttal argument ...
>
> * * *
>
> Phillip Maxey ... appointed to represent the petitioner at resentencing .... believed they had presented strong mitigation proof and said they waived closing argument in an effort to prevent the State from making a rebuttal argument. They believed that the State would wait until rebuttal to "really throw it all" at the jury.

Hines, 2004 WL 1567120 at *9, 10 and 11.

> In its rejection of this claim, the Tennessee appellate court reasoned as follows:
>
> The petitioner contends that his counsel were ineffective in not making a closing argument at resentencing. As to this claim, all three of the petitioner's resentencing counsel testified that their decision to waive closing argument was based on the fact that they did not want the State to present a rebuttal argument. The law is clear that this court may not second-guess the tactical and strategic choices made by trial counsel unless those choices were uninformed because of inadequate preparation. The post-conviction court concluded that trial counsel had made a tactical decision to waive closing argument to prevent the State's then being able to make a strong rebuttal argument. The record supports this conclusion.

Id. at *33 (citing Bell v. Cone, 535 U.S. 685 (2002); Hellard v. State, 629 S.W.2d4, 9 (Tenn.1982); and State v. Menn, 668 S.W.2d 671, 673 (Tenn. Crim. App.1984)).

Counsel for the defendant has a right to make a closing argument under the Sixth and Fourteenth Amendments as part of the defendant's right to assistance of counsel. Herring v. New York, 422 U.S. 853, 857-58, 863 n. 15 (1975). Concurrently, the right to effective assistance of counsel extends to closing arguments. Yarborough v. Gentry, 540 U.S. 1, 5 (2003); Bell v. Cone, 535 U.S. 685, 701-02 (2002); Herring, 422 U.S. at 864-65. Yet, "counsel's tactical decisions in [the] closing presentation ... because of the broad range of legitimate defense strategy at that stage" is entitled to "deference" and, as a matter of law, to "wide latitude." Yarborough, 540 U.S. at 6. "Indeed, it might sometimes make sense to forgo closing argument altogether." Id. (citing Bell, 535 U.S. at 701-02) (holding that trial counsel's election to forgo the closing argument as a tactical decision at the end of the sentencing phase of a murder trial did not constitute ineffective assistance of counsel). Under these principles, this Court concludes that the state courts reasonably decided these claims.

As to trial counsel's failure to object to the state prosecutor's alleged improper argument, as well as the related claim for the state prosecutor's improper closing argument, the Tennessee Supreme Court determined that these statements were neither improper nor unreasonable:

> Defendant poses an issue complaining of various purported improper arguments made by the

State which he says was with the apparent purpose to inflame the jury against him. He refers to the State's argument regarding his statement that he wanted the death sentence and that his statements to his sister were a twisted confession of murder. He argues that the Attorney General misstated the facts and made statements based upon his own personal knowledge rather than facts in evidence.

Here too, we find that defendant failed to make any contemporaneous objection to the allegedly improper argument. The record further reflects that he failed to preserve these complaints in his motion for new trial. Moreover, we do not find fault with the first part of the argument complained of. In reference to his statements to his sister, the Attorney General argued "that defendant would not admit to his sister he had killed a woman; he told her I killed a guy at a motel and robbed him." There is no question that he did tell his sister he stabbed a man at the motel and he also told her that he had a large sum of money. The trial judge admonished the jury to rely on their own recollection of the testimony and under the circumstances we do not find the Attorney General's comments to be the distorted misstatement of the testimony suggested in defendant's brief.

We do not approve of the District Attorney's statement, "that presumption of innocence is gone because we have shown you the proof to connect him and show he committed the murder.

There is no presumption of innocence anymore. We removed his presumption of innocence by the proof and you know that's true." This Court said in State v. Duncan, 698 S.W.2d 63, 70 (Tenn. 1985), "On its face this seems a misstatement of the position in Tennessee that the presumption of innocence remains with the defendant up until the verdict." (Citations omitted). However it becomes plain from reading the record that it was not the intent of the Attorney General to misstate the law. It is obvious he was carried away by his own rhetoric and in light of the failure of defense counsel to object coupled with the correct instruction by the court to the jury on the presumption of innocence, this statement was not plain error, nor in our opinion did it materially effect the verdict of the jury. State v. Duncan, supra.

Defendant has also raised an issue in reference to the argument of the State at the penalty phase of the proceedings. He says that argument was improper and inflammatory and encouraged the jury to consider defendant's statement that he would kill a guard if given a life sentence. He also complains that the District Attorney General characterized a life sentence as a reward rather than a penalty which he says is not supported by the record and is a mischaracterization which accrued to his prejudice. There is also an objection on the premise that the District Attorney General injected the matter of parole into his argument and argued that the jury would be recreant in its

duty to society if the death sentence was not imposed.

Most of the objections to the State's argument are made in isolated context which, when considered in view of the argument as a whole, gives them an exaggerated significance. Once again, we observe there was no contemporaneous objection at trial to any of the statements which are now raised here as grounds for error. We do find one or two of these grounds asserted in the motion for new trial, contrary to the State's insistence.

We agree that defendant's remark to the police officers that he would kill a prison guard if sentenced to life was inappropriate as a sentencing consideration. However it was a matter which had been properly placed in evidence before the jury at the guilt phase of the proceeding and if the comments of State's counsel were improper, they could not have affected the jury's verdict at the sentencing phase of the trial. Defense counsel made an impassioned plea against the death penalty in which he dwelt at length on the vicissitudes of a life sentence. The District Attorney's argument in that phase of his closing remarks was in direct response to the defense argument and did not exceed the reasonable latitude allowed to counsel in arguing their respective positions.

It is difficult to tell where the District Attorney General was going in argument when he commented that defendant had been on parole.

It was apparent that he was referring to defendant's prior conviction, as was defense counsel when he mentioned in argument that defendant had been on parole from Kentucky. Had he gone on to mention parole possibilities for defendant in this proceeding he certainly would have been treading on forbidden ground. See Smith v. State, 527 S.W.2d 737, 738 (Tenn.1975). However he was prevented from proceeding in that direction by the admonishment of the court to stay away from the subject of parole and we cannot see how the comments which were made could have adversely impacted upon the jury's determination as to sentencing.

The District Attorney General made some fanciful analogy to the frenzied conduct of wild cattle in a herd when exposed to the attack of a carnivore, and also called on the jury to do as he and the people of Tennessee asked them to do in following what the law called for in the case. We do not agree with the defense contention that the implication of these remarks was that the jury's responsibility was to impose the death sentence and not to weigh the aggravating and mitigating circumstances based on the evidence. The contested argument did no more than articulate the prosecutor's intent that the jury return a death sentence in accordance with the law and their oath.

Defendant complains of other comments of the State's counsel to the effect that defendant had

> bragged about a murder and that he had killed someone and got a lot of money and words to the effect that some people get a high or are exhilarated by killing and will go brag about it. This was unquestionably a misstatement of the evidence. These comments in argument were not objected to when made and seem to be legitimate inferences to be drawn from the proof which the jury heard and certainly did not effect the outcome of the sentencing hearing. State v. Cone, 665 S.W.2d 87, 94 (Tenn.1984).

Hines, 758 S.W.2d at 519-21.

To be entitled to federal habeas corpus relief as a violation of a defendant's right to due process, prosecutorial misconduct must be so egregious as to deny Petitioner a fundamentally fair trial. Caldwell v. Mississippi, 472 U.S. 320, 335-36 (1985); United States v. Hastings, 461 U.S. 499, 509-12 (1983). In United States v. Young, 470 U.S. 1 (1985), the Supreme Court upheld the conviction and observed that even if "the prosecutor's remarks exceeded permissible bounds and defense counsel raised a timely objection, a reviewing court could reverse an otherwise proper conviction only after concluding that the error was not harmless." Id. at 13 n.10 (citation omitted). As to the factors to be considered, the Court stated:

> Nevertheless, a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the

> prosecutor's conduct affected the fairness of the trial.
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> * * *
>
> [T]he remarks must be examined within the context of the trial to determine whether the prosecutor's behavior amounted to prejudicial error. In other words, the Court must consider the probable effect the prosecutor's response would have on the jury's ability to judge the evidence fairly. In this context, defense counsel's conduct, as well as the nature of the prosecutor's response, is relevant. . . . Courts of Appeals, applying these holdings, have refused to reverse convictions where prosecutors have responded reasonably in closing argument to defense counsel's attacks, thus rendering it unlikely that the jury was led astray.

Id. at 11, 12.

Here, the Tennessee court considered the prosecutor's remarks and decided that for each challenged statement, the prosecutor's remarks were consistent with the proof at trial or were tied to Petitioner's statements. The Tennessee appellate court also evaluated the prosecutor's remarks in the context of the trial record and did not find any prejudice to Petitioner. After review, this Court concludes that the state courts' reasonably decided these claims.

2. Counsel's Ineffectiveness on Direct Appeal

As to the alleged ineffectiveness of his counsel on direct appeal, Petitioner asserts that appellate

counsel's failures were: failure to preserve the claims in this habeas action in the motion for a new trial and the direct appeal; failure to obtain all necessary portions of the transcript and record for appeal, including the voir dire and the transcript of the motions hearings; failure to include in its brief to the Tennessee Supreme Court all issues raised in the Court of Criminal Appeals; failure to file an adequate petition to rehear before the Tennessee Supreme Court's adverse ruling on Petitioner's appeal; and failure to argue that the Tennessee Supreme Court erred when it concluded that "'in the instant case, a felony not underlying the felony murder conviction [was] used to support the felony murder aggravating circumstance.'" (Docket Entry No. 23-1, Second Amended Petition, at 46) (citing Hines, 919 S.W.2d at 583).

Under clearly established law on defense counsel's failure to raise a claim on appeal, the Supreme Court has observed that "[t]his process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." Smith v. Murray, 477 U.S. 527, 536 (1986) (quoting Jones v. Barnes, 463 U.S. 745, 751-52 (1983)). Moreover, Smith observed that:

> It will often be the case that even the most informed counsel will fail to anticipate a state appellate court's willingness to reconsider a prior holding or will underestimate the likelihood that a federal habeas court will repudiate an established state rule. But, as Strickland v. Washington made clear, "[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."

Id. (citation omitted).

Moreover, "the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for procedural default." Murray v. Carrier, 477 U.S. 478, 486-87 (1986).

As these principles are applied here, the Court concludes that Petitioner's appellate counsel cannot be second guessed as to issues to be raised on appeal. Petitioner's appellate counsel's assessments cannot be judged from the perspective of federal habeas counsel's review of the record decades later. Petitioner's appellate counsel successfully obtained a resentencing hearing. Any omissions of appellate counsel were cured by the extensive state post conviction petition and hearing at which Petitioner presented numerous claims with an extensive evidentiary record at the trial and on appeal. The Court concludes that these claims lack merit as a matter of law.

3. Ineffectiveness of Counsel at Resentencing

For this claim, Petitioner asserts that his counsel were ineffective at the re-sentencing proceeding and absent counsel's failures, a reasonable probability exists that Petitioner would not have been sentenced to death. For particulars, Petitioner cites his counsel's

failures to challenge the lack of women representation on petit and grand juries as well as forepersons in Cheatham County; to present evidence of Petitioner's tragic personal history and his drug and alcohol abuse; and to object to the prosecutors' failure to give notice of the aggravating circumstances as required by Tenn. R. Crim. P. 12.3(b)(Docket Entry Nos. 23 and 23-1, Second Amended petition, at 25-40). The facts about the women on grand and petit juries as well as serving as forepersons in Cheatham County are presented supra at 61-65. For the reasons stated earlier, the Court concludes that the state courts reasonably determined that this claim lacked any showing of prejudice.

As to the failure to present evidence of Petitioner's personal history at resentencing, on the post conviction appeal, the Tennessee appellate court first quoted findings in Petitioner's earlier appeal on the sentencing record:

> In mitigation, the defendant presented proof that, while in prison on this conviction, he had presented no serious disciplinary problems and posed no threat to the prison population. **The defendant also presented proof of a troubled childhood. His father had abandoned the family when the defendant was young. His mother had an alcohol problem. In his teens the defendant became involved in sniffing gasoline and glue and began to abuse alcohol and drugs. He also exhibited self-destructive behavior. Dr. Pamela Auble, a clinical psychologist, testified that the defendant was suffering**

> **from a paranoid personality disorder and dysthymia, or chronic depression. According to Dr. Auble, the defendant would suppress his feelings until they "boiled up" under stress. In her opinion, the defendant, who had returned from turbulent visits with his parents and girlfriend shortly before he committed the murder, was under stress when he killed the victim. Dr. Ann Marie Charvat, a sociologist, also testified about the damaging effect of the circumstances of his childhood on the defendant.**
>
> Hines, 919 S.W.2d at 577. The supreme court characterized the petitioner's mitigation proof as "extensive." Id. at 584.

Hines, 2004 WL 1567120 at *31 (emphasis added).

The Tennessee appellate court then analyzed the extensive expert and other proof on sentencing at the post conviction hearing:

> Stack testified that he obtained a mental evaluation for the petitioner to determine competency issues and whether an insanity defense would be available prior to the original trial, but these services did not cover any mitigation issues. He requested the services of an independent psychiatrist, a private investigator, and an independent mental evaluation, but these requests were denied.
>
> * * *

Stack acknowledged that he did not present all of the mitigation proof that the post-conviction defender had been able to assemble. He pointed out, however, that at the time of the trial and resentencing, he did not have the benefit, apparently referring to counsel representing the petitioner at the post-conviction hearing, of a three-year period of time to investigate the case as well as numerous attorneys and investigators to work on the mitigation proof. He testified that, as an appointed attorney, he did not have the benefit of working on the case as much as he would have liked because he could not afford to do so. However, he felt he had zealously represented the petitioner.

* * *

Stack recounted that at resentencing they called Dr. Pamela Auble and Dr. Ann Marie Charvat to testify for mitigation purposes. The two had been recommended by the Capital Case Resource Center, with whom defense counsel worked during the resentencing, and he believed they could explain how the petitioner had become the person he was. Dr. Charvat did not come across as well as they had hoped, and he did not believe the jury had grasped everything she said. Stack said that the defense team did not know the "extent and the nature of the types of abuse that [the petitioner] went through growing up" and that the resentencing jury never saw the background that the petitioner had. Stack ... concluded that the public

defender's office did not have, and still does not have, the sufficient resources or the time to devote to a capital case."

* * *

Dr. Pamela Auble, a psychologist specializing in clinical neuropsychology, who had testified at the resentencing, testified also at the post-conviction hearing, saying she first evaluated the petitioner in May 1989. After meeting with the petitioner, she reviewed his social history, as well as his school records, prison records, and records from the Middle Tennessee Mental Health Institute which were provided by defense counsel. Her diagnosis of the petitioner was paranoid personality disorder and dystonia, which is depression.

Dr. Auble said that she did not have enough time prior to the resentencing hearing to develop a trusting relationship with the petitioner. She said she was only given a little over a month to work on the petitioner's case but that, in general, three to four months was optimal, depending on the case. It would have been helpful to have had the petitioner evaluated by an expert in chemical dependency and to have had more information about his social history. She acknowledged that, at the time of resentencing, she knew little about the petitioner's alcohol abuse or the sexual abuse in his family. She testified that Steve Stack "didn't seem very confident in his own abilities," and she believed defense counsel did not have much

understanding of the mental health issues in the case.

On cross-examination, Dr. Auble acknowledged that she knew the petitioner's parents drank when they were not at work, suspected that he had suffered physical abuse, and knew that he abused alcohol and drugs. She said she was not aware of the alcoholism in the petitioner's family or of the extent of the abuse suffered by the Hines children. She believed her diagnosis of the petitioner's emotional problems, of which she testified at the resentencing hearing, was correct. She said that she would liked to have referred the petitioner to an expert on the issue of addiction, such an expert being needed to determine the extent and nature of the alcoholism and drug abuse and the effects these had on the petitioner. She explained that the combination of the history of addiction in the petitioner's family that she now had knowledge of, together with his relatively normal neuropsychological testing, raised the issue that the petitioner may have a "chemical lack of neurotransmitter substance." Dr. Auble said that this was one area of her testimony that would have been different had she had additional time to work on the petitioner's case.

Dr. Ann Marie Charvat, a sociologist and a mitigation specialist, also testified at the petitioner's resentencing hearing and again at the post-conviction hearing, the former being the first capital case on which she had worked. Her

first involvement with the petitioner's case was on May 10, 1989, "just a matter of days" after receiving her PhD. Dr. Charvat interviewed the petitioner, several of his family members, and several of his friends prior to the resentencing. She did not obtain any medical records on any of the family members. The petitioner told Dr. Charvat about the physical abuse he and his sisters endured, and she learned of the petitioner's alcohol and drug abuse. Dr. Charvat was not told about the sexual abuse, but she suspected that it had occurred. She said that information about the sexual abuse and the fact that the petitioner tried to be his sisters' protector were important for purposes of mitigation. Asked if she had overlooked anything in her evaluation of the petitioner, Dr. Charvat said that she had "failed to look at certain factors ... which include family history, medical records .... I would have collected more records. I believe that I did identify that his bond to society had suffered. I failed to tie it to the crime. There are a number of things to investigate that ... I hadn't."

Dr. Charvat testified, as she had done at resentencing, regarding the petitioner's confinement at Green River Boys Camp in Kentucky, where a method of behavior modification known as grouping was used. The groupings often became physically and verbally abusive. She explained that the bad behavior of one boy in the group caused the entire group to lose privileges. Dr. Charvat testified at

resentencing about one incident at Green River where the petitioner and another boy were pushed into sewage. She said that she was aware in 1989, the time of resentencing, that programs using grouping had extensive problems and that there was literature available on this issue. She explained that although the activities and potential abuse at Green River, as they related to the petitioner, could have been extremely important for mitigation purposes, she did not have enough time to further develop those issues.

Dr. Charvat said that she still agreed with the sociological conclusions that were presented to the jury at the resentencing. She believed the weakness was in the way they were presented to the jury and said that "there were many parts of [her testimony] that ... were not well articulated, not clear." It was also her opinion that the petitioner's background was not adequately distinguished from that of any other unruly child.

Dr. William Kenner, a psychiatrist, testified that the petitioner suffered from post-traumatic stress disorder ("PTSD"), antisocial personality disorder, status post-head injury, and inhalant abuse. He said that the petitioner was sexually abused by both his stepfather and a maternal uncle and physically abused by his stepfather, opining that the abuse caused the petitioner's PTSD. The physical abuse inflicted upon the petitioner by his stepfather included hitting him

in the head with a tobacco stick, whipping him with car radio antennas, throwing him into a pond although he could not swim, and shooting the family dog and her puppies in front of him and his siblings. The petitioner's mother was also a victim of Bill Hines's abuse, and the petitioner often tried to protect her. At the age of eight or nine, the petitioner sustained a head injury when he fell off a wagon of hay and was knocked unconscious. The petitioner did not receive any medical treatment for this injury.

Explaining how PTSD affects the brain, Dr. Kenner said that a person with PTSD repeats or replays traumatic events throughout life and that PTSD can alter a person's character and change his or her behavior. Dr. Kenner testified that in the petitioner, PTSD created a paranoid quality. Dr. Kenner opined that the head injuries the petitioner suffered throughout his life could have caused organic personality syndrome, which made him even more volatile and difficult to manage. The petitioner's abuse of inhalants such as glue and gasoline also caused damage to his brain. Dr. Kenner concluded that the petitioner's choosing a woman for his victim was inconsistent with the petitioner's personal history, as there was no indication that he had hard feelings toward women.

On cross-examination, Dr. Kenner acknowledged that the petitioner had been in and out of jail since the age of fifteen. He further acknowledged that a report prepared by the Middle Tennessee

Health Institute and the Harriet Comb Mental Health Center indicated that the petitioner experienced difficulty in relationships with women, as the result of problems with girlfriends and family interference, exhibited a preoccupation with thoughts of violence, and displayed extreme prejudice toward African–Americans. Additionally, a report prepared by the Tennessee Department of Correction stated that the petitioner, once confined on death row, acknowledged to security personnel that he hated both women and African–Americans. Dr. Kenner testified that although the petitioner said that he hated women, he did not believe him because his behavior indicated differently. He said he had much more information concerning the petitioner than Dr. Charvat did prior to preparing her report for the resentencing. He believed that Dr. Charvat should have interviewed the petitioner's sisters and mother in order to get a true picture of "how bad things were for [the petitioner] growing up."

Dr. Murry Wilton Smith, a specialist in addiction medicine, testified that the petitioner is a Type II alcoholic. He explained that Type II alcoholism, a primary medical illness based in brain chemistry, is inherited and involves rapid early onset of alcoholism, usually between the ages of nine and twelve, and is associated with antisocial behavior and early legal trouble. Dr. Smith also testified that the petitioner had used inhalant solvents and marijuana. He was aware of the petitioner's low levels of serotonin, which

is associated with violent behavior and Type II alcoholism. He said that current treatment for Type II alcoholism, which was not available in 1989, consisted of alcohol and drug treatment, intensive physiotherapy with a counselor, and medication to improve the serotonin level. On recross examination, Dr. Smith acknowledged that although medications to increase serotonin levels were available in 1986, there was not a routine to monitor. He also stated that a characteristic of Type II alcoholics is a lack of motivation to follow instructions or a schedule.

Dr. Paul Rossby, an expert in molecular neurobiology and the study of serotonin, testified that, as a molecular biologist, he studies the chemistry of the brain and the biological basis of behavior. According to Dr. Rossby, serotonin blocks pain and orchestrates inhibition within the brain. Dr. Rossby testified that research of serotonin dated back to at least the 1970s. He further said that there would have been a "tremendous amount" of literature available on serotonin at the time of the petitioner's resentencing in 1989 and a "great deal" of literature available at the time of the petitioner's trial in 1986. He said that low levels of serotonin have been associated with impulsive behavior, but none of the studies has indicated that it causes violence.

Dr. Rossby had a spinal tap performed on the petitioner to determine his serotonin levels, which were "at the extreme low level" of the

normal male population. He opined that the petitioner's serotonin levels, coupled with his Type II alcoholism, resulted in the petitioner's being organically impaired and said that the petitioner does not have the biological capacity to control his impulsive behavior. Dr. Rossby said that in a person with low levels of serotonin, once an impulse is triggered, there is no ability to control the impulse. He acknowledged that he did not testify on the issue of serotonin levels until 1999. He first worked on a case involving a serotonin defense in approximately 1992, and was not aware of any expert who had testified on the issue of serotonin prior to the time he was involved with his first case.

Dr. Henry Cellini, an educational psychologist who was offered as a rebuttal witness on behalf of the State, testified that serotonin research began in the 1970s but had only been fully developed in the last fifteen to twenty years. With regard to the petitioner's case, Dr. Cellini testified that the practical application of serotonin levels to behavior was in its "infancy" in the mid–1980s. He said that research indicates that the two primary factors of antisocial personality disorder are impulsive aggression and psychopathic tendencies or thinking.

Two witnesses were presented as to the claims regarding the Green River Boys Camp in Kentucky and its alleged effects on the

petitioner. Tammy Kennedy, an investigator with the post-conviction defender's office, said that she interviewed former residents and staff members. The former residents told her that, when they arrived at camp, they were immediately subjected to grouping, which consisted of several boys surrounding the new resident and physically and verbally abusing him. She said that the former residents told her at times they had sewage detail, which involved two boys holding a resident by the legs and dumping him into the sewage. They were forced to scrub the pavement until their brushes were gone and their hands were blistered. A juvenile specialist who had visited Green River advised Ms. Kennedy that schooling was minimal and that there were reports of physical, sexual, and verbal abuse of the residents. Ms. Kennedy said that several other death row inmates were former residents of Green River.

Dr. David Richart, an expert in the operation of the juvenile justice system and residential treatment facilities in Kentucky, testified that he had investigated Green River in connection with his position as the Executive Director of Kentucky Youth Advocates, Inc. He said that the theory behind creating the juvenile camps was to take youthful offenders out of large, training school facilities and place them in smaller, community-like settings where they would both work and receive therapy consisting of guided group interaction, positive peer culture, and reality therapy. These theories of treatment

were based on the fact that juveniles who committed crimes did so for peer-related reasons. The purpose of the therapy was "to turn something negative into something positive ." However, problems arose when the state reduced the number of employees, which resulted in the staff allowing the residents to discipline themselves. Dr. Richart's investigation also revealed that the staff had not received the essential training required for this type of "sophisticated treatment."

Dr. Richart testified that new residents at Green River were first greeted by a group of fifty to sixty boys who encircled the new resident, screaming at and intimidating him. Because the group would surround the new resident so tightly that the staff could not see "what was going on below shoulder height," the new resident was often physically assaulted as well. Dr. Richart explained that residents at Green River were subjected to "grouping" for simple reasons, such as not having a good opinion of themselves or taking an extra packet of sugar at lunch. After becoming convinced that the residents were being harmed "as a result of using these very controversial emotionally and psychologically harassing techniques," Dr. Richart became concerned about the youths' psychological state and the damage that might occur. He recalled having to transport some youths to mental institutions because they experienced "psychotic breaks" while at camp. Dr. Richart said that Green River had

> compounded the youths' feelings of isolation and had done nothing to contribute to pro-social behavior, and he was not surprised to learn that many of them subsequently went to prison.
>
> In Dr. Richart's opinion, the petitioner's six and one-half months at Green River intensified his criminal tendencies, exacerbated his antisocial tendencies, and made him see the world as a hostile place. Dr. Richart also believed that the petitioner was completely inappropriate for grouping, "because he just wasn't the kind of person that wanted to talk about his family." Referring to the treatment at Green River as "psychological torture," Dr. Richart opined that it was "probably the worst experience of [the petitioner's] life."
>
> On cross-examination, Dr. Richart acknowledged that some juveniles may have benefitted from Green River and that residents, including the petitioner who had a substance abuse problem prior to going to Green River, would not have had access to drugs or alcohol while there. Dr. Richart read into evidence some of the staff's reports on the petitioner, which characterized him as easily agitated and having a bad temper but also as a capable person, a good worker, and "fairly consistent in his supportive leadership in the group."

Id. at* 8, 9, 14-18.

On the post conviction appeal, the Tennessee appellate court addressed the proof at resentencing and determined the following:

> The petitioner argues that counsel should have called his family members to testify regarding the physical, sexual, and emotional abuse he suffered. Counsel did not call family members as witnesses at resentencing, presenting mitigation proof of the petitioner's abuse through two experts. The petitioner further contends that additional experts should have been employed, and additional proof regarding his treatment at Green River Boys Camp should have been presented. The post-conviction court noted that the detailed mitigation evidence presented at the post-conviction hearing was prepared by two attorneys, three investigators, and several medical experts over a three-year period, stating that that period of time was "far in excess of the time which would have been allowed to prepare for even a capital trial." The court found the additional mitigation proof of the petitioner's family background and abuse, presented at the post-conviction hearing, was essentially the same as that presented at the resentencing, simply more in-depth. Accordingly, the court determined that even with the additional mitigation proof, the aggravating circumstances would have continued to outweigh the mitigating circumstances.
>
> This court has stated that "[a]n investigation so inadequate as to fail to formulate an 'accurate

life profile' of the defendant may be the basis for post-conviction relief. Yet the extent of investigation required is largely dependent upon information supplied by the defendant." Bates v. State, 973 S.W.2d 615, 633 (Tenn. Crim. App.1997) (citing Jackson v. Herring, 42 F.3d 1350, 1367 (11th Cir.1995); Burger v. Kemp, 483 U.S. 776, 795, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987)).

In Goad v. State, 938 S.W.2d 363 (Tenn.1996), our supreme court set out the relevant factors to consider when determining if prejudice had resulted from a trial attorney's failure to present mitigating evidence during the penalty phase of a capital trial. There, the court found that counsel's failure to investigate, explore, and prepare the proposed mitigating evidence was not " 'the result of reasonable professional judgment' and 'fell outside the wide range of professionally competent assistance.'" Id. at 3 71. If counsel's performance is deficient, the court must next determine if the petitioner has discharged the duty of proving that prejudice resulted from counsel's performance. Id. The court explained how this determination is made:

> [If the] alleged prejudice under Strickland involves counsel's failure to present mitigating evidence in the penalty phase of a capital trial, several factors are significant. First, courts have analyzed the nature and extent of the mitigating evidence that was available but not

> presented. Second, courts have considered whether substantially similar mitigating evidence was presented to the jury in either the guilt or penalty phase of the proceedings. Finally, the courts have considered whether there was such strong evidence of aggravating factors that the mitigating evidence would not have affected the jury's determination.

Id. (citations omitted).

In the present appeal, the post-conviction court found that counsel were not deficient in their representation of the petitioner, saying that "[i]n view of the overwhelming strength of the aggravating factors in Petitioner's case ... the mitigating factors would not have affected the jury's determination. The jury would be required by logic and common sense to find that the aggravating circumstances outweighed the effect of the mitigating factors beyond a reasonable doubt." Accordingly, under the principles enunciated in Goad, the post-conviction court found that the petitioner was not prejudiced by the fact that counsel at the sentencing hearing had not presented mitigating evidence in the detail that was done at the post-conviction hearing. We conclude that the record supports this determination.FN2

> FN2. As supplemental authority, the petitioner relies on Wiggins v. Smith, 539 U.S. 510, 516, 123 S.Ct. 2527, 2532, 156 L.Ed.2d471 (2003), where the petitioner had

sought post-conviction relief from his capital conviction, alleging that trial counsel "had rendered constitutionally defective assistance by failing to investigate and present mitigating evidence of his dysfunctional background." Trial counsel utilized the defense that another person had killed the victim and did not present evidence they had showing the petitioner's "limited intellectual capacities and childlike emotional state ... and the absence of aggressive patterns in his behavior, his capacity for empathy, and his desire to function in the world[.]" Id. Counsel elected not to use specific information that the petitioner and his siblings were left "home alone for days, forcing them to beg for food and to eat paint chips and garbage," and that he had been "gang-raped" on more than one occasion. Id., 539 U.S. at 516-17, 123 S.Ct. at 2533. The court determined that trial counsel's decision not to utilize background information was one which "did not reflect reasonable professional judgment" and that the petitioner had been prejudiced as a result, there being a reasonable probability that the jury would have returned with a different sentence, had they known this information. Id., 539 U.S. at 534, 123 S.Ct. at 2541-42. In the present appeal, trial counsel presented substantial evidence at the sentencing hearing, although not to the extent that was done at the post-conviction hearing. We find that Wiggins is not applicable.

b. Serotonin Defense

The petitioner contends that resentencing counsel were ineffective for failing to present evidence of his serotonin deficiency. As to this claim, the post-conviction court determined that, based upon the testimony of the witnesses at the hearing, the serotonin evidence was not reasonably available to the petitioner's resentencing counsel, since it was not known to them and could not have been discovered by the exercise of reasonable diligence.

Dr. Rossby acknowledged that he did not work on developing this issue in a criminal case until approximately 1992, three years after the petitioner's resentencing trial. Further, he said that he did not actually testify on the issue of serotonin until 1999, ten years after the petitioner's resentencing trial, and he knew of no one who had testified on this issue prior to that. As the post-conviction court stated: "Petitioner's counsel at re-sentencing could not reasonably have been expected to search for experts on a subject which they did not know existed." The record supports this conclusion.

C. Heinous, Atrocious, and Cruel Aggravating Circumstance

The petitioner argues that counsel were ineffective at resentencing because they did not challenge the testimony of Dr. Charles Harlan regarding the length of time the victim was conscious and could have lived or experienced

pain following the stabbing. At resentencing, the petitioner offered the testimony of Dr. Chris Sperry who disagreed with Dr. Harlan's testimony regarding the victim's consciousness and amount of time she could have survived following the wound to the heart. Dr. Sperry opined that the victim would have been conscious only fifteen to thirty seconds following the stab wound to the heart, as opposed to Dr. Harlan's testimony that the victim lived four to five minutes following the wound to the heart and would have been conscious approximately 80% of that time.

The post-conviction court found counsel were deficient in failing to investigate and introduce testimony to refute Dr. Harlan's conclusions, determining, however, that the petitioner was not prejudiced by the lack of such testimony. The court found that the jury would have been much more persuaded by the testimony of the pathologist who performed the autopsy, as opposed to one who drew conclusions from the autopsy report and photographs. Accordingly, the court concluded that the testimony of Dr. Sperry would not have resulted in reasonable doubt that the victim was conscious during the apparently final wound to the vagina, both pathologists concluding that this wound occurred at or shortly after the time of death. Moreover, the court determined that even if the jury did have reasonable doubt in this regard and did not find this aggravating factor applied, the remaining two aggravating factors were still

strong enough to outweigh the mitigating factors as presented at the post-conviction hearing.

As to this issue, the State also argued that even if the victim were unconscious at the time the vaginal wound was inflicted, the jury could have found that the nature and infliction of that wound constituted depravity of mind and that the depraved state of mind of the petitioner existed at the time the fatal blows were inflicted upon the victim. Our supreme court has held that depravity of mind of the murderer may be inferred from acts committed at or shortly after the time of death. See State v. Williams, 690 S.W.2d 517, 529-30 (Tenn.1985). The court explained that the nature of injuries to a victim may constitute depravity of mind under the holding in Williams:

> The willful insertion of a sharp instrument into the vaginal cavity of a dying woman (or a woman who had just died) satisfies the requirements of Williams, supra. If committed prior to death, these acts constitute torture and thereby also support a finding of depravity. If they occurred close in time to the victim's death, they allow the drawing of an inference of the depraved state of mind of the murderer at the time the fatal blows were inflicted on the victim.

> Hines, 919 S.W.2d at 581. We conclude that the record supports the findings of the post-conviction court as to this issue.

Id. at *31-33

The prevailing constitutional requirement is that counsel who presents a defendant facing a death sentence, must "conduct a thorough investigation of the defendant's background." Williams, 529 U.S. at 396. The rationale is that "[e]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that Defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse . . ." Wiggins v. Smith, 539 U.S. 510, 535 (2003) (quoting Penry v. Lynaugh, 492 U.S. 302, 319 (1989) (internal quotation marks omitted)).

In Wiggins, the Supreme Court adopted the American Bar Association's 1989 standards for death penalty cases and stated that for mitigation evidence, counsel's duty is "to discover all reasonably available mitigating evidence," including, "medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences." 539 U.S. at 524 (quoting ABA guidelines for Appointment and Performance of Counsel on Death Penalty Cases 11.4.1(C), 11.8.6 (1989) (emphasis omitted)). Where appropriate, this inquiry should include the Defendant's potential brain damage. Skaggs, 235 F.3d at 266-75. Although Wiggins adopted the 1989 ABA standards, in 1975, the Tennessee

Supreme Court adopted the earlier ABA standards. Baxter v. Rose, 523 S.W.2d 930, 939 (Tenn. 1975).

The Sixth Circuit held that "when a client faces the prospect of being put to death unless counsel obtains and presents something in mitigation, minimal standards require some investigation." Mapes v. Coyle, 171 F.3d 408, 426 (6th Cir. 1999) (emphasis on original); see also Austin v. Bell, 126 F.3d 843, 848-49 (6th Cir. 1997). This duty of inquiry now applies notwithstanding the defendant's preference or his family's information. Rompilla v. Beard, 545 U.S. 374, 377 (2005); Coleman v. Mitchell, 268 F.3d 417, 449-50 (6th Cir. 2001). For example, once counsel is aware that the defendant has a mental illness, and despite competency evaluations, where counsel, "declined to seek the assistance of a mental health expert or conduct a thorough investigation of [the defendant's] mental health," counsel's performance in a death penalty case was held to be constitutionally insufficient. Harries v. Bell, 417 F.3d 631, 638 (6th Cir. 2005). Likewise, counsel's failure to "adequately investigate [the defendant's] . . . troubled childhood" can be deficient performance and prejudicial. Id. at 638-641. As the Sixth Circuit has stated, "[o]ur circuit's precedent has distinguished between counsel's *complete* failure to conduct a mitigation investigation, where we are likely to find deficient performance, and counsel's failure to conduct an *adequate* investigation, where the presumption of reasonable performance is more difficult to overcome." Beuke v. Houk, 537 F.3d 618, 643 (6th Cir. 2008) (emphasis in original) (citing Campbell v. Coyle, 260 F.3d 531, 552 (6th Cir.2001), & Moore v. Parker, 425 F.3d 250, 255 (6th Cir.2005)).

As to judicial deference to Petitioner's trial counsel's strategic choices, Wiggins notes that "'strategic choices made after less than complete investigations are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" 539 U.S. at 521 (citation omitted). Where the issue involves mitigation evidence in a death penalty case, the test to award habeas relief was stated as follows: "although we suppose it is possible that a jury could have heard [the mitigation evidence] and still have decided on the death penalty, that is not the test. . . . [T]he likelihood of a different result if the evidence had gone in is "'sufficient to undermine confidence in the outcome' actually reached." Rompilla, 545 U.S. at 393 (citations omitted).

Here, the State court considered the relevant Supreme Court decisions of Wiggins and Burger as well as federal circuit decisions on the applicable principles on counsel's obligations for a death sentence hearing. In reviewing the evidence at the resentencing hearing, two experts, Drs. Auble and Charvat, testified as to Petitioner's family history, troubled childhood, his father's abandonment of him, his mother's alcohol problem, Petitioner's abuse of alcohol, glue and gasoline, as well as his self-destructive behavior. Dr. Auble, a clinical psychologist, described Petitioner's paranoid personality disorder and dysthymia, or chronic depression. In Dr. Auble's view, Petitioner suppressed his feelings until those feelings "boiled up" after turbulent visits with his parents and girlfriend

shortly before the murder. Dr. Auble opined that Petitioner was under stress when he killed the victim. Dr. Charvat, a sociologist, described the damaging effects of Petitioner's childhood experiences. To be sure, the expert testimony at the post conviction hearing was more extensive, but those opinions were consistent with the expert opinions at the resentencing and post conviction hearings. The Tennessee appellate court affirmed the trial court's findings that "the additional mitigation proof of the Petitioner's family background and abuse, presented at the post-conviction hearing, was essentially the same as that presented at the resentencing, simply more in-depth. Accordingly, the court determined that even with the additional mitigation proof, the aggravating circumstances would have continued to outweigh the mitigating circumstances." Hines, 2004 WL 1567120 at *31.

Moreover, whatever the deficiencies of counsel at the resentencing hearing, the post conviction hearing present additional expert proof and afforded the state courts yet an additional opportunity to evaluate the appropriateness of Petitioner's death sentence. The state courts deemed the Petitioner's extensive mitigation evidence not to outweigh the State's other proof of aggravating circumstances of the wounds. The victim's wounds, Petitioner's escape and possession of the victim's vehicle and key, Petitioner's explanation of events to his sister and the Petitioner's statements to officers that he could provide all the details of the murder lead this Court to conclude that the state courts' decisions on the adequacy of counsel's performance at sentencing would not have caused a

different result and those decisions were reasonable applications of clearly established federal law.

c. Aggravating Circumstances Claims

In the first of these claims, Petitioner contends that the application of the felony murder as an aggravating circumstance violated his constitutional rights because he was also convicted of felony murder. (Docket Entry No. 23-1 at ¶ 15). In a related claim, Petitioner cites the State's alternative reliance on the "Heinous, Atrocious or Cruel" aggravating factor to uphold his death sentence. Id at ¶ 16. Other related claims are that the Petitioner's prior felony for assault that was used as an aggravating circumstance is based upon an invalid guilty plea and that the jury was improperly instructed that all jurors must agree as to **a** mitigating circumstance in order to consider it. Id. at ¶¶ 17,18. Respondent contends that the actual jury instruction does not support this contention, and instead reflects only that aggravating circumstances be found "unanimously."

In Petitioner's direct appeal, the Tennessee Supreme Court reversed and remanded the sentencing issue "for a new trial respecting the imposition of punishment only" citing the lack of proper instructions on the aggravating circumstance under Tennessee law. Hines, 758 S.W.2d at 524. The district court stated:

> It is insisted the death penalty cannot stand because the trial judge failed to fully instruct the jury on the aggravating circumstances of "committing a felony," "torture and depravity of mind" as required by law. In State v. Williams,

690 S.W.2d 517 (Tenn.1985), this Court mandated that at a capital sentencing proceeding a jury must be instructed as to the statutory definition of any felony relied upon by the State as an aggravating circumstance under T.C.A. § 39-2-203(i)(7)FN1 and that a jury must be fully instructed as to the meaning of the terms "heinous," "atrocious," "cruel," "torture," or "depravity of mind" as those words are used in the aggravating circumstance set forth in T.C.A. § 39-2-203(i)(5).FN2 This Court concluded that

> FN1. T.C.A. § 39-2-302(i)(7) reads:
> The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb;
>
> FN2. T.C.A. § 39-2-203(i)(5) reads:
> The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind;
>
> [u]nless a jury is instructed as required ..., its imposition of the death penalty cannot stand.
>
> * * *

> ... Without such instructions we have a "basically uninstructed jury," as stated by the Supreme Court in Godfrey [v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980)]. Such a jury cannot lawfully impose the death penalty.
>
> 690 S.W.2d at 533.FN3
>
> FN3. See also the recent decision of Maynard v. Cartwright, 486 U.S. 356, —, 108 S.Ct. 1853, 1858, 100 L.Ed.2d 372 (1988), wherein the Court noted that Eighth Amendment claims "characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)."

In the present case, which was tried eight months after the decision in Williams was released, the State relied upon four aggravating circumstances and the jury was instructed as follows:

> (1) The defendant was previously convicted of one or more felonies, other than the present charge, which involved the use or threat of violence to the person. [§ 39-2-203(i)(2)]

> (2) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind. [§ 39-2-203(i)(5)]
>
> (3) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any rape, robbery or larceny. [§ 39-2-203(i)(7)]
>
> (4) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another. [§ 39-2-203(i)(6)]

The jury returned a verdict unanimously finding the first three listed aggravating circumstances and that the punishment should be death.

It is clear that the trial court's instruction was inadequate under Williams. First of all, the court's instructions did not include any definition of the terms "heinous," "atrocious," "cruel," "torture" or "depravity of mind." Second, the court failed to define at sentencing any of the three felonies relied upon by the State in establishing the third aggravating circumstance.

Such failures have not always proven reversible error in the decisions this Court has rendered after Williams. For example, State v. Claybrook, 736 S.W.2d 95 (Tenn.1987); State v. King, 718 S.W.2d 241 (Tenn.1986); State v. O'Guinn, 709

S.W.2d 561 (Tenn.1986); and State v. Duncan, 698 S.W.2d 63 (1985), were all cases in which the trial court failed to define the terms used in T.C.A. § 39-2-203(i)(5) and in which this Court found no reversible error since the evidence clearly supported this aggravating circumstance and the other aggravating circumstances found by the jury were correctly charged and supported by the evidence. A crucial factor in all these cases, however, was that in each the trial had occurred before Williams, and this Court had held that the instructional requirement in Williams was not retroactive. State v. O'Guinn, supra, 709 S.W.2d at 568. This was consistent with this Court's prior holding, reiterated in Williams itself, 690 S.W.2d at 533, that the aggravating circumstance set out in T.C.A. § 39-2-203(i)(5) was not unconstitutionally vague and overbroad under Godfrey v. Georgia. See, e.g., State v. Melson, 638 S.W.2d342, 367 (Tenn.1982); State v. Pritchett, 621 S.W.2d 127, 137-139 (Tenn.1981); State v. Groseclose, 615 S.W.2d 142, 151 (Tenn.1981). In these earlier decisions this Court thoroughly reviewed the evidence to assure that it supported the jury's finding as to this aggravating circumstance. It is also notable that in Claybrook, Duncan and O'Guinn, the defendant had not objected to the pre- Williams instruction and that in King, supra the defendant had only sought an instruction as to the definition of "torture".

In State v. Porterfield, 746 S.W.2d 441, 451 (Tenn.1988), a case, like the present one tried eight

months after the Williams decision was released, this Court found that the defendant was not prejudiced by the trial court's failure to give the definitions of the terms "heinous," "atrocious," and "cruel" exactly as set out in Williams or to define "torture" or "depravity of mind" for the jury. After examining the definitions that the trial court had given, this Court stated:

> It would have been better had the trial judge used the definitions set out in State v. Williams, 690 S.W.2d 517, 533 (Tenn.1985), as they have been approved by this court. However, the definitions given were in our opinion adequate. Further, we find no prejudicial error in the trial court's failure to define the terms "torture" or "depravity of mind." The evidence in this case supports the aggravating circumstance, Tenn. Code Ann., § 39-2-203(i)(5), as defined in State v. Williams, supra, as the defendant repeatedly struck the victim with a tire iron, inflicting horrible head wounds. Furthermore, the remaining two aggravating circumstances were correctly charged and are supported by the evidence.
>
> 746 S.W.2d at 451.

In State v. Carter, 714 S.W.2d 241 (Tenn.1986), this Court also did not find harmful error in the trial court's failure to instruct the jury properly under Williams on the aggravating circumstance

in T.C.A. § 39-2-203(i)(7). The trial in Carter had occurred in November 1984. While this was before Williams was released, it was after this Court's directive in State v. Moore, 614 S.W.2d 348, 350-351 (Tenn. 1981), that trial judges "should regularly" include in their instructions to the jury the statutory definition of any felony relied on by the State as an aggravating circumstance. The Court noted that

> We recently held in State v. Williams, 690 S.W.2d 517 (Tenn.1985), that it was error to fail to give the statutory definition of the felonies which the jury was asked to consider in determining whether it should find the existence of the aggravating circumstance defined in T.C.A. § 39-2-203(i)(7). The felony involved in Williams was robbery and the opinion is silent as to whether the statutory definition of robbery was given during the guilt phase.
>
> In this case the jury had been given the statutory definition of larceny, robbery and kidnapping the day before they retired at 9:37 a.m. to consider the punishment. We think it is significant that they eliminated robbery from their finding of aggravated circumstances under T.C.A. § 39-2-203(i)(7). The definition of that crime includes the element of forcible taking from the person of the victim. The proof in this case was that the victim's wallet was found on his

> person with cash undisturbed and in addition cash was found clipped to a clipboard in the seat of the pick-up truck. Price testified that defendant took nothing from the person of Lile after killing him and before throwing him over the cliff. This demonstrates that the jury had clearly in mind the elements necessary to convict of the crime of the felony of robbery and quite properly declined to include it. It was patently obvious that defendant was guilty of the larceny of Lile's truck and kidnapping him from the Interstate 81 rest stop. We find this situation distinguishable from Williams and harmless.
>
> 714 S.W.2d at 250.

The present case is distinguishable from these earlier cases. First, and most obviously, the trial occurred several months after the Williams rule was announced. This Court's decisions in Duncan, O'Guinn, King, and Claybrook are thus inapposite in the present case. Unlike in Porterfield and Carter, the trial court here has erred in failing to instruct the jury fully on both the aggravating circumstances involved in Williams. Also unlike Porterfield, where two of the three aggravating circumstances were correctly charged, here there was plain error patently contradictory to this Court's clear mandate in Williams in charging two of the three aggravating circumstances found. Such

cumulative error injects an undue degree of unreliability into the sentencing procedure where the jury must weigh all aggravating and mitigating factors. See State v. Pritchett, supra, 621 S.W.2d at 139; State v. Moore, supra, 614 S.W.2d at 352. Compare State v. Laney, 654 S.W.2d 383, 388 (Tenn.1983). In Porterfield the defendant presented no proof as to mitigating circumstances.

In Williams the Court also made it clear that the evil it sought to avoid by mandating these instructions was that of "a basically uninstructed jury" and the attending risk of arbitrary and capricious sentencing. See also State v. Laney, supra, 654 S.W.2d at 388 ("The absence of proper legal guidance [at capital sentencing] invites ... a certain degree of capriciousness in the deliberation.") In Porterfield the trial court had adequately instructed the jury as to the most ambiguous terms in T.C.A. § 39-2-203(i)(5). In Carter the jury had been instructed at the guilt hearing as to the elements of the felonies relied upon by the State; and its verdict, selectively omitting certain of these felonies, revealed that, contrary to being uninstructed, the jury "had clearly in mind the elements necessary to convict" on one of these felonies. In the present case there was neither substantial compliance with Williams nor a verdict clearly showing that the jury understood the elements of the felonies it found supporting T.C.A. § 39-2-203(i)(7). Also, unlike Carter, only one of the felonies found by the jury

had been instructed at the guilt hearing. The jury was thus never told the legal definition of larceny and rape, two offenses even those trained in the law may at time have difficulty defining. See, e.g., State v. Brobeck, 751 S.W.2d 828 (Tenn.1988) (addressing the issue of whether a dead person may be raped, a factual issue raised by the proof in the present case).

Again, it may be pointed out that the juries in other cases where the Court has not found reversible error under Williams had also been correctly instructed as to all other aggravating circumstances involved. In the present case the jury was correctly instructed only as to one of the aggravating circumstances it found.

On the other hand, this case is distinguishable from Williams by the fact that the evidence here fully supports the aggravating circumstances found by the jury. In Williams the proof did not support the aggravating circumstance in T.C.A. § 39-2-203(i)(5) and two of the three felonies found by the jury under T.C.A. § 39-2-203(i)(7). Furthermore, there is no mention in Williams of whether the jury was ever instructed at the guilt phase as to the felonies found by the jury at sentencing. The jury in the present case was, as noted earlier, instructed only on the elements of robbery at the guilt phase. In Williams also both aggravating circumstances found by the jury were incorrectly instructed. Here one of the three aggravating circumstances found was correctly instructed. Thus in Williams there was

no valid aggravating circumstance upon which a sentence of death could be based.

Although language in Williams at first suggests that any failure to comply with its holding cannot be considered harmless, Porterfield reveals that this Court has not taken this approach. To the extent that the failure to give the instruction mandated by Williams is constitutional error in that it results in the "standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury," 690 S.W.2d at 532 quoting Godfrey v. Georgia, supra, 100 S.Ct. at 1765, the standard for determining harmless error is whether the error committed is harmless beyond a reasonable doubt. Satterwhite v. Texas, 486 U.S. —, 108 S.Ct. 1792, 1797, 100 L.Ed.2d 284 (1988); Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967); see also People v. Odle, 45 Cal.3d 386, 247 Cal.Rptr. 137, 151-155, 754 P.2d 184, 197-201 (1988) (discussing the harmless error doctrine as applied to instructional error in capital sentencing and anticipating the rule that the United States Supreme Court will adopt). Despite the strong proof of the aggravating circumstances shown here, it is difficult to say that this standard has been met. To the extent that the rule in Williams is procedural, mandated by this Court acting in its supervisory capacity to assure objective and reliable sentencing in capital cases, it is difficult to ignore the obvious failure of the trial court to

follow the clear commands of this Court; nor can it be said, where as here there was evidence of both aggravating and mitigating circumstances, that the defendant clearly was not prejudiced by leaving the jury uninstructed, particularly as to the felonies of rape and larceny.

> FN4. In the present case the defendant did not object to the trial court's failure to charge as required in Williams and did not call this error to the judge's attention. Such failure may be a factor in considering whether reversible error has occurred but is not always fatal to appellate review in cases where the defendant is under sentence of death. See State v. Duncan, supra, 698 S.W.2d at 67-68.

We are of the opinion that this case should be remanded for two reasons. First, the jury did find two felonies supporting the death penalty, the elements of which it had no way of knowing. This indicates a degree of "sheer speculation" and unguided discretion prohibited by Godfrey v. Georgia, supra, and Eighth Amendment jurisprudence. As the United States Supreme Court has stated in the recent case of Mills v. Maryland, 486 U.S. 367, —n. 10, 108 S.Ct. 1860, 1867 n. 10, 100 L.Ed.2d 384 (1988), "While juries indeed may be capable of understanding the issues posed in capital-sentencing proceedings, they must first be properly instructed." The jury here was not properly instructed. Second, this case represents a clear and inexcusable violation

> of Williams. We cannot say that the error committed is harmless beyond a reasonable doubt. Accordingly, the judgment of the trial judge sustaining the defendant's conviction of first degree murder is affirmed but the verdict and sentence imposing the death penalty is set aside and this cause is remanded to the trial court for a new trial respecting the imposition of punishment only.

758 S.W.2d at 521-24.

Felony murder constitutes a "proper and permissible narrowing factor at the eligibility stage." Coe v. Bell, 161 F.3d 320, 350 (6th Cir. 1998) (citing Tison v. Arizona, 481 U.S. 137 (1987)). A narrowing construction need only occur at one of the two stages and there is no double-counting. Bell v. Cone, 543 U.S. 447, 448-49, 455-57 (2005); see also, Blystone v. Pennsylvania, 494 U.S. 299, 306-07 (1990) (where the Supreme Court stated:

> At sentencing, petitioner's jury found one aggravating circumstance present in this case– that petitioner committed a killing while in the perpetration of a robbery. No mitigating circumstances were found. Petitioner contends that the mandatory imposition of death in this situation violates the Eighth Amendment requirement of individualized sentencing since the jury was precluded from considering whether the severity of his aggravating circumstance warranted the death sentence. We reject this argument. The presence of aggravating circumstances serves the purpose of

> limiting the class of death-eligible defendants, and the Eighth Amendment does not require that these aggravating circumstances be further refined or weighed by a jury. See Lowenfield v. Phelps, 484 U.S. 231, 244 (1988) ("The use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion") The requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence.

Id. at 306-07 (footnotes omitted).

As the Sixth Circuit stated, citing Supreme Court precedent, "it is acceptable for a first-degree murder conviction to be based on two alternative theories even if there is no basis to conclude which one (if only one) the jury used." Coe, 161 F.3d at 348 (citing Schad v. Arizona, 501 U.S. 624, 636-37 (1991)).

For the Tennessee Supreme Court, the basis for Petitioner's death sentence was "torture" reflected in Petitioner's "willful insertion of a sharp instrument into the vaginal cavity of a dying woman (or a woman who had just died) satisfies the requirements" qualifying as torture or depravity of the mind. Hines, 919 S.W2d at 581. Thus, this Court concludes that Petitioner's aggravating circumstances claim was reasonably decided by the State courts.

d. Trial Court's Failure to Recuse

Petitioner's next claim involves an alleged violation of his due process rights when the trial court failed to

recuse itself after the trial court's rejection of the State's and Petitioner's plea agreement for a life sentence. (Docket Entry No. 23-2, Second Amended Petition at ¶25 at 9-10). The Tennessee Supreme Court rejected this claim because state law grants the trial judge the discretion to reject a plea agreement:

> In his brief defendant argues that the trial judge should have recused himself from the case, or at least from determining whether the plea bargain was acceptable, because he was not a disinterested and neutral judge since he did not agree with the prior judgment of this Court in this case. He implies the Court's judgment was warped and influenced by the need to demonstrate he had been correct in the first case. He says the judge ignored the fact that the victim's family accepted the agreement, and dismissed defendant's mitigating factors. The argument is that even if actual partiality is not shown, there is an appearance of partiality which violates Supreme Court Rule 10, Canon 3(C)(1) mandating that the trial judge disqualify himself in a proceeding in which his impartiality might reasonably be questioned.
>
> A motion for recusal based upon the alleged bias or prejudice of the trial judge addresses itself to the sound discretion of the trial court and will not be reversed on appeal unless clear abuse appears on the face of the record. State ex rel. Phillips v. Henderson, 220 Tenn. 701, 423 S.W.2d 489, 492 (1968). The general rule is that a trial judge should recuse himself whenever he

> has any doubt as to his ability to preside impartially in a criminal case or whenever his impartiality can reasonably be questioned. State v. Cash, 867 S.W.2d 741, 749 (Tenn. Crim. App.1993); Lackey v. State, 578 S.W.2d 101, 104 (Tenn. Crim. App.1978). A judge is in no way disqualified because he tried and made certain findings in previous litigation. King v. State, 216 Tenn. 215, 391 S.W.2d 637, 642 (1965). The trial judge in this case stated that he was not prejudiced against the defendant. There is no indication in the record that the reversal of the prior sentencing hearing in any way biased the judge against the defendant or was the reason for rejection of the plea agreement. Furthermore, there is no showing that the judge refused the plea bargain in order to vindicate himself in reference to the prior proceedings. Under this record, it cannot reasonably be questioned that the trial judge was able to render an impartial decision regarding the plea bargain and to preside over this case in a neutral and unbiased manner.

Hines, 919 S.W.2d 578-79.

For this claim, the dispositive issue is the lack of clearly established federal law as determined by the United States Supreme Court to grant relief on this claim. Thus, the Court concludes that this claim fails as a matter of law.

2. Procedurally Defaulted Claims

Respondent asserts that most of Petitioner's claims are procedurally defaulted for his failures to present these claims to the state courts and to provide those courts with the opportunity to decide those claims. Respondent also argues that under Tennessee law, these defaulted claims are now time barred and are deemed to be waived for which Petitioner has failed to show cause or prejudice. Specifically, the Respondent identifies the claims in Paragraphs 9, 10, 11(b), (e), (i), (l), (n)-(u), 13(b), (c), (t), (u), (w)-(ee), 14, 17, 19, 21(b), (d)-(f), portions of Paragraph 22, Paragraphs 23-24, 26-31, 33-34, portions of Paragraph 35, and Paragraphs 36-38 and 40 of the Second Amended Petition. (Docket Entry Nos 23, 23-1 and 23-2).[7]

For his procedural defaults, Petitioner cites Martinez and his state post conviction counsel's failures to present certain claims to excuse these defaults. Petitioner also cites violations of Brady and Giglio to excuse his procedural defaults. For the reasons stated earlier on the evidentiary hearing issue, the Court analyzes the particulars of these contentions and thereafter conducts the procedural default analysis.

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[7] Given their length and with exceptions for the defaulted claims analyzed in this section, the remaining defaulted claims are attached in Appendix A to this Memorandum and are reformatted to make them more readable.

a. Martinez Claims

Petitioner's Martinez claims are asserted in the parties' joint statement, (Docket Entry No.109 at 1-43). In sum, these claims are for post conviction counsel's failures:

> to timely claim in the amended petition that women were underrepresented in the petit jury venire, particularly that for the relevant time period women in Cheatham County were 50.6-50.7% of the population, but comprised only 10-22% of the Cheatham County jury venire from which Hines' juries were drawn as well as exclusion of women as grand jury forepersons;
>
> to assert claims about trial counsel in ¶¶ 11 b, c, d, e, f, g, h, i, k, l, m, n, o, p, q, r, s, t, u, v and about sentencing counsel's failures detailed in ¶¶ 13b, d, e, f, g, h, I, k, l, m, n, o, q, s, t, u, v, aa, bb, dd, ee of the amended complaint (Docket Entry No. 23 and 23-1);
>
> to present evidence of Petitioner's childhood traumas, poverty with malnutrition, lack of medical care and exposure to toxins, Petitioner' untreated head injuries and mental illness;
>
> to seek a mistrial after jurors were informed that the case had been reviewed on appeal;
>
> to object to the use of restraints upon Petitioner and to secure proof from any available jurors about seeing Petitioner in shackles and handcuffs;

> to timely subpoena Norman Johnson, a counselor at the Comprehensive Care Center where Hines was treated, and Bill Andrews, a Juvenile Court Liaison Specialist with the Bureau of Social Services(¶13cc);
>
> to present any claims of ineffective assistance of appellate counsel, including all claims in this action;
>
> to prove that Petitioner's prior conviction was invalid and unconstitutional, or to present a valid defense of intoxication and self defense;
>
> to object to the instructions identified in Claim 19, that jury instructions lessened the prosecution's burden of proof;
>
> to fail to object to the prosecutor's unconstitutional arguments at sentencing to object to the imposition of death after the trial court's rejection of the agreed-upon offer of life under United States v. Jackson, 390 U.S. 570 (1968); and
>
> to object to the trial judge's denial of a continuance after the prosecution's untimely notice of aggravating circumstances.

(Docket Entry No. 109 at 2, 9, 13, 14, 16, 17, 18, 22, 23, 24, 25, 27, 28, 30, 31, 33, 34, 36, 37, 38 and 39).

As stated earlier, Martinez created an equitable exception to procedural default that "qualifies Coleman **by recognizing a narrow exception:** Inadequate assistance of counsel at initial-review collateral

proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." 132 S. Ct. at 1315 (emphasis added). In addition, Martinez applies to "initial-review collateral proceedings," "which provide the first occasion to raise a claim of ineffective assistance at trial." Id. Martinez, expressly recognized that "[d]irect appeals, without evidentiary hearings, may not be as effective as other proceedings for developing the factual basis for the [ineffective assistance of trial counsel] claim." Id. at 1318. Moreover, "[t]o be successful under Trevino, . . . [the habeas petitioner] must show a 'substantial' claim of ineffective assistance, and this requirement applies as well to the prejudice portion of the ineffective assistance claim." McGuire,738 F.3d at 752 (citing Trevino, 133 S.Ct. at 1918).

From the Court's review of the State record and decisions of the Tennessee courts, Petitioner's various counsel in fact presented these claims or a variation thereof. First, the state post conviction trial court made extensive and express findings on the exclusion of women, (Addendum No. 17 at 3216-3224) including the percentages cited by Petitioner. Id. at 3217; see also Hines, 2004 WL 1567120 at* 34-36. The Martinez claims about Petitioner's trial counsel's omissions at trial and sentencing were extensively analyzed in the post conviction appeal. The cited omissions of trial and appellate counsel, who were experienced counsel, were raised as claims in the state post conviction proceedings, and were considered on the merits by the state courts. Hines, 2004 WL 1567120 at *23-34. These rulings include alleged omissions of expert and lay proof on Petitioner's childhood, his experiences as a

juvenile and his mental condition as well as the experiences of his family members. Id. at * 11-18, 31-33. The Tennessee Supreme Court considered the prosecutor's arguments, some of which Petitioner's trial counsel objected and others they did not object, and found those arguments to be justified by proof or harmless without any effect on the jury's verdict. Hines, 758 S.W.2d at 519-21. Petitioner's appellate counsel raised jury instructions and vagueness issues in Petitioner's direct appeal. Id. at 521-24. Petitioner's counsel challenged the trial court's failure to grant a continuance based on the State's late notice of aggravating circumstances that the State intended to rely upon at trial, as well as the trial court's rejection of the plea agreement. Hines, 919 S.W.2d at 577-80.[8]

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[8] As to the claim that the trial court erred in denying a continuance after the State failed to provide timely written notice of aggravating circumstances to be presented at sentencing to justify the death penalty under Tenn.R.Crim.P. 12.3(b), absent such notice within 30 days, the trial judge must grant the defendant a reasonable continuance of the trial. The Tennessee appellate court ruled:

> In light of the unique posture of this case, however, as a continuation of an earlier proceeding and not a new proceeding in itself, we conclude that the defendant was on notice sufficient to satisfy the requirements of Rule 12.3(b), cf. State v. Chase, 873 S.W.2d7, 9 (Tenn.Crim.App. 1993), subject to the requirement that absent a new notice the State was limited at the resentencing hearing to the aggravating circumstances set forth in the initial notice. In the present case, the State had filed written notice of intent to seek the death penalty and of the aggravating circumstances on which it intended to rely in October 1985, prior to the original trial. All three of the aggravating circumstances relied upon by the State on

In sum, the Court concludes that Petitioner's Martinez claims are not substantial and do not qualify for the "narrow " and equitable exception created by Martinez. Petitioner's widespread challenges to his post conviction counsel's performance would undermine the Martinez exception and create a vehicle for a wholesale de novo review of Petitioner's claims despite the state courts' fora to address any claim about his trial and appellate counsel.

b. Brady and Gigilio Claims

For these claims, Petitioner asserts that the State withheld exculpatory evidence and false testimony in violation of Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150, 153-54 (1972).[9] As to the specifics of these claims, Petitioner alleges:

> that Ken Jones and Sheriff Dorris Weakley testified falsely; that the prosecution presented testimony from Dr. Charles Harlan and

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> resentencing were included in this notice. Under these circumstances, we find that the requirements of Rule 12.3(b) were met and that a continuance was not mandated. Furthermore, there has been no showing that the defendant has suffered prejudice as a result of the State's failure to re-file the notice before the resentencing hearing. Absent a showing of prejudice, the trial court did not abuse its discretion in refusing to grant a continuance. Cf. State v. Stephenson, 752 S.W.2d 80, 81 (Tenn.1988).

Hines, 919 S.W.2d at 579.

[9] Petitioner also uses the facts of these claims to assert claims for prosecutorial misconduct and ineffective assistance of counsel. See Docket Entry No. 23-1 at ¶ 12.

> withheld material exculpatory evidence of his conduct;
>
> that state prosecutors improperly coached state witnesses who testified about Petitioner with a key with the number "9" on it, Petitioner seeming nervous, there was a stain on the shoulder of Petitioner's shirt, and Petitioner had a silver Volvo (Docket Entry No. 23, at ¶ 10f);
>
> that the prosecution presented false testimony of Dr. Harlan of no semen on the victim when Dr. Harlan's file reflects semen was found on the victim;
>
> that post-conviction counsel was unaware of the falsity of Harlan's testimony about time of consciousness and the lack of semen evidence; and
>
> that petitioner has exculpatory evidence of serology test showing a DNA exclusion from the victim's underwear and fingerprint exclusion.

(Docket Entry No. 109 at 11-12, 13-14).

On Petitioner's post-conviction appeal, the Tennessee appellate court made the following findings of facts about Petitioner's false testimony claims:

> Witnesses testifying at the post-conviction hearings included Ken Jones, who testified at the petitioner's 1986 trial and 1989 resentencing hearing that he had found the victim's body; Marion Jones, Ken Jones's wife; and Vernedith White, his girlfriend. Neither Mrs. Jones nor Ms.

White had testified previously in guilt or sentencing proceedings.

Ken Jones testified via deposition from a nursing home in Hendersonville, Tennessee. In the years following the petitioner's resentencing, Jones suffered a stroke and was confined to a nursing home; therefore, he was unable to testify in person at the post-conviction hearing. He testified that he found the victim's body at the CeBon Motel. He acknowledged that he went to the motel on the day of the victim's murder to rent a room with Vernedith White, with whom he had been having an affair for two years, although at trial he had testified that his reason for being at the motel was to use the restroom. Jones explained that it had been his and Ms. White's custom to rent a room at the CeBon Motel most every Sunday. He usually rented a room from the victim, who was a maid at the motel. He recalled that, on the day in question, he and White had arrived at the motel between 10:00 and 11:00 a.m. Jones could not find anyone at the motel, so he and Ms. White sat in his van and waited for someone to arrive to rent them a room. They subsequently drove to a nearby restaurant and returned to the motel within fifteen minutes. Jones said that he could see the motel parking lot the entire time he was at the restaurant and never got out of his car while at the restaurant. He said that he found the victim's body within one hour of the time they arrived at the motel. Jones further testified he knew that keys were kept in a box outside the

office, so after no one showed up to rent them a room, he retrieved a key from the box.

Upon entering the motel room which had a maid's cart sitting outside, Jones saw the victim's body, immediately ran out of the room, drove across the street to a restaurant, and had someone call the sheriff. He could not recall exactly what he told the person at the restaurant about the victim. Thereafter, he drove Ms. White to her home in Dickson and returned to the motel to discuss his discovery with Sheriff Weakley, whom he said was a friend of his. He presumed that the sheriff knew why he was at the motel that day and admitted he told the sheriff that he was concerned about his wife finding out why he had been there. Jones testified that Sheriff Weakley tried to "put [him] at ease about the problem of being at the motel there with Vern[e]dith." When asked further about this issue, Jones said that he understood Sheriff Weakley would not question him about it. He also understood that none of the attorneys would question him about it, but remained nervous about testifying at the trial. He said that Sheriff Weakley called him the evening of the murder and asked him not to discuss it with anyone. Jones said that he was not contacted by any attorney prior to his testimony at trial, and his first contact with any attorney occurred when he was called to testify at the trial. Jones testified that he knew nothing concerning the actual murder itself. He stated that he did not see anyone at the motel that

morning other than a woman who pulled into the parking lot in either a brown or maroon car. He could not recall testifying at trial that the woman left her car and knocked on the door of the room where he later found the victim.

Marion Jones, Ken Jones's wife, testified at the post-conviction hearing as to her husband's longstanding affair with Vernedith White. She did not remember exactly when she learned of the affair but knew of it by the time of the petitioner's trial in 1986. She and Ken Jones had been married since 1956, and he had been involved in several extramarital affairs. She testified that after Jones suffered a stroke and entered the nursing home, she learned that he had given power of attorney to Ms. White. She also discovered that he had given Ms. White approximately $30,000. She did not know that her husband had testified at the 1986 trial until Connie Westfall, an investigator with the post-conviction attorney's office, contacted her years later. She said that her husband had a temper and had been verbally abusive to her but had never hit her.

Vernedith White, Ken Jones's former girlfriend, testified at the post-conviction hearing that she had neither been called to testify at the 1986 trial nor been contacted by anyone for investigative purposes prior to the post-conviction proceedings. She acknowledged at the hearing that she had been involved in an affair with Ken Jones for eleven years and was at the

CeBon Motel on the day Jones discovered the victim's body. Each week they rented one of two rooms, normally from the manager or the maid, and were usually at the motel from approximately 9:00 a.m. until 12:00 noon.

According to Ms. White, Ken Jones picked her up around 8:00 a.m. on Sunday, March 3, 1985, as was his custom. She lived in Dickson and estimated that they arrived at the motel around 9:00 a.m. They could not find anyone at the motel and waited in the parking lot. She suggested to Jones that they leave and go home or somewhere else instead of waiting, but he did not take her advice. She remembered a woman pulling into the motel parking lot, but did not recall her leaving her vehicle and knocking on the door, as Jones had testified at the 1986 trial. She said they did not leave the motel parking lot to go to the restaurant as Jones had testified. After they had waited awhile at the motel, Jones told her he was going to get a room key from a dish in the office and they would just use the room and leave. Ms. White said that, after Jones returned to the van with a key to room 21, they drove over and parked in front of that room. Jones told her to wait in the van while he went to check the room. Ms. White testified that the curtains to the room were open, and she could see sheets on top of both beds. Jones walked in the room past the beds, saw the victim's body, and ran out of the room. She could see Jones the entire time he was in the room, which was "[n]ot even a minute." He was very scared when he ran

out and told her there was a dead woman in the room. She wanted to go inside, but he would not let her. She said that Jones did not have any blood on him when he came out of the room and returned to the van. She believed that it was approximately 12:00 noon when Jones found the body. They immediately drove to the restaurant and called the sheriff. She was not sure if Jones or a woman at the restaurant actually placed the call. Informed that the emergency call had been made at 2:36 p.m, she said that she must have had her times wrong. Jones drove her home, which was an approximately forty-five-minute drive from the motel, and then returned to talk to the sheriff.

Ms. White testified that she and Mr. Jones had been together at the CeBon Motel on at least 100 occasions prior to March 3, 1985, but they had never before retrieved a key in the manner they did that day. She could not recall if Jones returned the key to room 21. Although she had seen the victim cleaning rooms at the motel on prior occasions, she did not know her name. She recalled that the day of the murder was a warm day, and she and Mr. Jones sat in the parking lot with the van doors open. They neither saw nor heard any suspicious activity at the motel that day prior to Mr. Jones discovering the victim's body. She believed they would have seen anyone who entered or left either room 21 or room 9.

Ms. White said that she and Mr. Jones were co-owners of a sporting goods store and that Sheriff Weakley was a regular customer. She testified that she never discussed the events of March 3, 1985, with Weakley and understood that he had told Jones that it was all right for him to take White home and then return to discuss the matter. She said that her relationship with Jones had ended about two years after March 3, 1985. According to Ms. White, there was no possibility that Ken Jones had anything to do with the victim's murder.

Sandra Kilgore testified that she served on the jury in the petitioner's 1986 trial. After learning that she had been selected for a jury, she called her pastor from home and asked for biblical scriptures regarding capital punishment. She said that she spoke to her pastor before she was sworn in as a juror in the petitioner's trial. She did not know that the State was seeking the death penalty in the petitioner's case until she came to court for jury service. According to Ms. Kilgore, there was some division among the jurors during deliberation.

Mary Sizemore of the Cheatham County Ambulance Service testified she and her partner went to the CeBon Motel in response to a call from someone at the Donnell Restaurant about a stabbing at the motel. Ms. Sizemore and her partner searched room to room until they came to a room with a maid cart outside. Her partner indicated that the room was open. They entered

the room and found the victim lying on her back wrapped in what appeared to be a bedspread up to her neck. The victim's wounds were not readily apparent, and they had to unwrap her and pull up her dress to actually see the wounds. They were not able to find a pulse on the victim. Ms. Sizemore remembered that the man who had reported the stabbing subsequently returned to the scene and talked with the sheriff. She later learned that this man was Ken Jones.

Maxey Jean Kittrell testified that she was working at the CeBon Restaurant on March 3, 1985, when a man came in and reported a stabbing at the CeBon Motel. She called an ambulance service and reported the stabbing.

J. Kenneth Atkins, one of the prosecutors in the petitioner's original trial in 1986, testified that he was involved both in the preparation for trial and the trial itself. He denied that Sheriff Weakley had asked him not to question Ken Jones regarding his reason for being at the CeBon Motel on the day of the murder, but acknowledged knowing that Jones was at the motel with a woman other than his wife and that Sheriff Weakley was concerned about embarrassing Jones. Atkins said that he had known Jones prior to his involvement in the petitioner's case because he had "prosecuted a guy that sold drugs and resulted in [Jones's] son's death." He testified that Jones did not express any reservation about testifying at the

> petitioner's trial, and Sheriff Weakley never asked him to limit his questioning of Jones. Atkins acknowledged that he did not interview Vernedith White. In his opinion, trial counsel were not deficient in their representation of the petitioner.
>
> James W. Kirby, a former assistant district attorney general and, at the time of the post-conviction hearing, the Executive Director of the Tennessee District Attorneys' General Conference, testified that he was involved in prosecuting the petitioner at the 1986 trial. He said that Atkins was the prosecutor who talked with Ken Jones and examined him on the witness stand. Kirby acknowledged that he was present at the deposition of Jones taken prior to the post-conviction hearing and had briefly discussed it with Atkins. He said that the deposition contained testimony that was not brought out at the 1986 trial. He did not recall having any discussions with Sheriff Weakley prior to the petitioner's trial, but it was . his understanding that Atkins recalled discussing Jones's situation with Sheriff Weakley.

Hines, 2004 WL 1567120 at* 4-7

The Tennessee Court of Criminal Appeals ruled that Petitioner's claim about Jones's false testimony about his presence at the hotel was not material under Brady standards and was without a reasonable probability of producing a different result. Id. at *26-28. Under Brady v. Maryland, 373 U.S. 83, 87 (1963), the prosecution's suppression of evidence favorable to an accused

violates due process where the evidence is material either to guilt or punishment. Petitioner has not established materiality nor that the evidence was suppressed. Indeed, Petitioner's counsel testified that he knew Jones's testimony as to why he was at the hotel was false at the time it was presented, but that he did not believe the falsity in that detail was relevant. Hines, 2004 WL 1567120, at *8.

After review of the state record, this Court concludes that Petitioner has not satisfied the materiality element for a "'substantial'" Brady claim. McGuire,738 F.3d at 752 (quoting Trevino, 133 S.Ct. at 1918). Petitioner's Giglio claims for false testimony fail for the same reasons. "[T]o establish a claim of prosecutorial misconduct or denial of due process, the defendant must show that the statement in question was false, that the prosecution knew it was false, and that it was material." Byrd v. Collins, 209 F.3d 486, 517 (6th Cir. 2000.) As noted, the state courts deemed the Jones's testimony issue not to be material and given the State's proof against Petitioner, including his offer to give the details of the murder and Jones's effort to avoid disclosure of his affair, this Court concludes that these Brady and Giglio claims based upon Jones's testimony do not qualify as "'substantial'" claims to violate Brady or Giglio or justify a Martinez hearing. McGuire, 738 F.3d at 752 (quoting Trevino, 133 S.Ct. at 1918).

As to Petitioner's false testimony concerning Dr. Charles Harlan, Dr. Harlan testified as to the victim's cause and time of death, a showing that an expert's opinion is inaccurate does not violate due process.

Fuller v. Johnson, 114 F.3d 491, 496-97 (5th Cir. 1997) (use of incorrect methods by expert does not demonstrate testimony was false). A challenge to the expert's opinions and the methodology implicates the sufficiency of the evidence, not its truth. Id. at 497. Likewise, the burden of proving indisputable falsity is not fulfilled with evidence of a difference of opinion or methodology. Rosencrantz v. Lafler, 568 F.3d 577, 586 (6th Cir. 2009). Despite the Court's authorization of discovery, Petitioner has not shown any Brady evidence concerning Dr. Harlan at the time of Petitioner's trial or his 1989 resentencing. Petitioner's allegations about Dr. Harlan have not been imputed to the State in habeas actions. See Sutton v. Bell, No. 3:06-cv-388, 2011 WL 1225891, *12-15 (E.D. Tenn. Mar. 30, 2011) (civil investigation into Dr. Harlan not imputable to prosecutors uninvolved with said proceeding).

As to Petitioner's cited serology testimony showing a DNA exclusion from the victim's underwear and fingerprint exclusion, as well as the presence of semen in the TBI report, those assertions, if true, would not warrant habeas relief, given the State's proof and the absence of exonerating proof from these cited materials.

> The State introduced proof that the defendant had previously been convicted of assault in the first degree. A detective who had investigated the case testified that the defendant had inflicted serious physical harm to the victim in this prior case. The State also presented proof that the defendant had stabbed the victim in the present case multiple times with a sharp

> instrument, probably a knife. Three of these wounds were lethal and had penetrated the victim's chest five to six inches. The pathologist who had performed the autopsy of the victim testified that all the lethal wounds were inflicted at about the same time and that death would have occurred within four to six minutes, most of which time the victim would have remained conscious. Defensive wounds were found on the victim's hands. Her clothing had been pulled up and her panties had been cut in half and removed from her body. About the time of death, and shortly after the infliction of the lethal wounds to the chest, the defendant had inserted a flat object through the victim's vaginal orifice into the vaginal pouch until the instrument penetrated the vaginal dome and passed into the abdominal cavity. A twenty dollar bill had been placed under the victim's watchband. No semen or any other evidence of ejaculation was found.

Hines, 919 S.W.2d at 577.

Under the facts of this action, the absence of Petitioner's blood or fingerprint on two evidentiary items alone does not establish material evidence under Brady and Giglio standards. In addition, Petitioner has not demonstrated prejudice due to any omission of Petitioner's trial counsel for not asserting this claim at trial, sentencing, resentencing or the post conviction proceeding. The absence of Petitioner's blood or fingerprint on two evidentiary items alone does not establish material exculpatory proof nor prove Petitioner's actual innocence under the standards of

Schlup v. Delo, 513 U.S. 298, 329 (1995) ("It is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do. Thus, a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.").

Given the State's proof described supra, the Court concludes that neither the DNA nor the finger print proof proves Petitioner's actual innocence nor demonstrates establish prejudice due to any omission of Petitioner's trial counsel for not testing these materials and asserting this claim at trial, sentencing, resentencing or the post conviction proceeding.

c. Remaining Defaulted Claims

Under the "Procedural Default Doctrine" the general rule is that for federal habeas proceedings, claims that were not fairly presented or were not presented to the State courts are barred as federal habeas claims for relief Coleman v. Thompson, 501 U.S. 722, 729-30 (1992). The exhaustion rule requires that the grounds raised in a petition for the federal writ of habeas corpus must have been "fairly presented" to the state courts. Duncan v. Henry, 513 U.S. 364, 365-66 (1995). A claim supported only by citation to state law is insufficient to present a federal claim, even if the cited state decision restated an analysis of federal law. Anderson v. Harless, 459 U.S. 4, 7-8 n.3 (1982) (per curiam). The federal petitioner

must inform the state courts of his federal legal theory or of the issue that arises under federal law. Franklin v. Rose, 811 F.2d 322, 325, 326 (6th Cir. 1987) ("To fairly present his constitutional argument to the state courts required more than the use of a generalized catch-all phrase which merely alleged the deprivation of a fair trial under the United States Constitution."). Petitioners can cite state law decisions that were based upon federal law grounds in similar factual circumstances. Levine v. Torvick, 986 F.2d 1506, 1516-17 (6th Cir. 1993). Yet, "mere similarity of claims is insufficient to exhaust." Duncan, 513 U.S. at 366.

The rationale for the procedural default doctrine arises out of federal respect for federalism and maintaining comity with state courts. Id. at 730-32. The Supreme Court further recognized that state procedural rules also serve a legitimate state interest in finality of criminal convictions. Francis v. Henderson, 425 U.S. 536, 542 (1976). State procedural rules channel the controversy to the state trial and appellate courts. Murray v. Carrier, 477 U.S. 478, 490-91 (1986). The first step in this analysis is whether Petitioner's claims in this action were fairly presented to the state courts. To fairly present a federal claim to a state court, the habeas petitioner: (1) must rely on federal cases interpreting the federal constitutional provision involved or state cases interpreting the federal constitutional provision involved; (2) identify the specific right guaranteed by the federal constitution; or (3) allege a factual pattern within the mainstream of federal constitutional litigation. Dietz v. Money, 391 F.3d 804, 808 (6th Cir. 2004). Procedural default can be excused where the habeas petitioner

proves his actual innocence of the offense based upon the elements of the offense and/or aggravating circumstances, resulting in a fundamental miscarriage of justice. Sawyer v. Whitley, 505 U.S. 333, 344-45 (1992).

Although the Tennessee appellate courts found that some of the Petitioner's claims were defaulted, Hines, 2004 WL 1567120 at* 29, 34, 36, 39, procedural default is inapplicable, if the state court decision "'fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of [the] state law ground is not clear from the face of the opinion.'" Coleman, 501 U.S. at 735 (citation omitted). A state court's actual ruling on a presented claim is not required for federal habeas review. Smith v. Digmon, 434 U.S. 332, 333-34 (1978). Moreover, a petitioner is not required to present to the state court every specific fact in support of his federal claim, and supplemental evidence that was not presented to the state court can be considered if that evidence does not "fundamentally alter the legal claim already considered by the state courts." Vasquez v. Hillery, 474 U.S. 254, 260 (1986).

In the Sixth Circuit, the analysis under the procedural default doctrine was set forth in the often cited decision, Maupin v. Smith, 785 F.2d 135 (6th Cir. 1986):

> When a state argues that a habeas claim is precluded by the petitioner's failure to observe a state procedural rule, the federal court must go through a complicated analysis. First, the court must determine that there is a state procedural

> rule that is applicable to the petitioner's claim and that the petitioner failed to comply with the rule.
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> * * *
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> Second, the court must decide whether the state courts actually enforced the state procedural sanction.
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> * * *
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> Third, the court must decide whether the state procedural forfeiture is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitutional claim. This question generally will involve an examination of the legitimate state interests behind the procedural rule in light of the federal interest in considering federal claims.

Id. at 138 (citations omitted).

1. Noncompliance with Applicable State Rules

Under Maupin, the threshold issue is the existence of an applicable state law rule and the petitioner's noncompliance therewith. Here, Tennessee's limitations period in the Tennessee Post-Conviction Act, Tenn. Code Ann.§ 40-30-102, was amended in 1995 to provide a one year period of limitation and is now codified at Tenn. Code Ann. § 40-30-202. Tenn. Code Ann. § 40-30-112(a), presumes that any issues not raised in an initial post conviction petition are waived, and Tenn. Code Ann. § 40-30-112(b) provides that any

issues raised in a prior proceeding were previously determined and therefore barred from further consideration. These statutes were amended in 1995 and recodified at Tenn. Code Ann. §§ 40-30-201 through 40-30-222. The waiver and previously determined provisions are now in Tenn. Code Ann. § 40-30-106(g), (h). Respondent contends this limitation statute bars Petitioner's remaining defaulted claims. For the remaining procedurally default claims, the Court concludes that the State records and state court opinions demonstrate Petitioner's non-compliance with these Tennessee statutes.

2. "Firmly Established" and "Regularly Followed" State Rules

To qualify for the procedural default rule, the cited state law must also be "firmly established and regularly followed" at the time the claim arose. Ford v. Georgia, 498 U.S. 411, 423-24 (1991). As the Sixth Circuit explained, "[c]onsiderations of comity do not require a federal court to abstain from deciding a constitutional claim on grounds of procedural default where the state courts have not enforced a given state procedural rule." Rice v. Marshall, 816 F.2d 1126, 1129 (6th Cir. 1987). Tennessee courts have enforced Tenn. Code Ann. § 40-30- 112(a) and (b) that were established in 1967 and 1971, as part of the Tennessee Post-Conviction Procedure Act. 1967 Tenn. Pub. Acts, 310 and 1971 Tenn. Pub. Acts, 96. The "previously determined" provision of Tenn. Code Ann. § 40-30-112(a), now Tenn. Code Ann.§ 40-30-106(h), has been regularly followed. See Harvey v. State, 749 S.W.2d 478, 479 (Tenn. Crim. App. 1987), as reflected in the

numerous annotations to former Tenn. Code. Ann. § 40-30-112(a); Simpson v. State, No. E2008-02288-CCA-R3-PC, 2010 WL 323049, at *7 (Tenn. Crim. App. Jan. 28, 2010). Moreover, the waiver rule, Tenn. Code Ann. § 40- 30-112(b)(l), now Tenn. Code Ann. § 40-30-106(g), is regularly enforced in state post-conviction proceedings, Holiday v. State, 512 S.W.2d 953 (Tenn. 1972); Williams v. State, No. W2010-01013- CCA-R3-PC, 2011 WL 3903224, at *8 (Tenn. Crim App. Sept. 1, 2011), unless the claim was not cognizable at the time, Pruett v. State, 501 S.W.2d 807, 809 (Tenn. 1973), or the petition is withdrawn before a decision on the merits. Williams v. State, 831 S.W.2d 281 (Tenn. 1992).

In Coe, the Sixth Circuit held that the Tennessee courts strictly and regularly followed the waiver rule and ruled that any cited exceptions "are isolated and unpublished, and so are insufficient to defeat an otherwise 'strict and regular' practice." 161 F.3d at 331. In Cone v. Bell, 243 F.3d 961, 970 (6th Cir. 2001), overruled on other grounds, Bell v. Cone, 535 U.S. 685 (2002), the Sixth Circuit cited the waiver and previously determined provisions in § 40-30-112(a) and (b) to conclude that habeas claims were procedurally defaulted because "the state actually enforced the state rule." In Hutchinson v. Bell, 303 F.3d 720, 738 (6th cir. 2002), the Sixth Circuit found the Tennessee limitations statute constituted a firmly established and regularly followed state law. Thus, the Court concludes Tennessee's waiver and limitations statutes are regularly enforced.

3. Independent and Adequate State Rule

As to what is an independent and adequate state rule, the Supreme Court recognized the following state interests as constituting adequate grounds for state procedural rules:

> the possible avoidance of an unnecessary trial or of a retrial, the difficulty of making factual determinations concerning grand juries long after the indictment has been handed down and the grand jury disbanded, and the potential disruption to numerous convictions of finding a defect in a grand jury only after the jury has handed down indictments in many cases.

Coleman, 501 U.S. at 745-46.

Another reason to support a finding of adequate state rules was articulated in Francis, wherein the Supreme Court enforced a state rule that promoted finality, noting a comparable federal rule.

> "Plainly the interest in finality is the same with regard to both federal and state prisoners. . . . There is no reason to ... give greater preclusive effect to procedural default by federal defendants than to similar defaults by state defendants. To hold otherwise would reflect an anomalous and erroneous view of federal-state relations."

425 U.S. at 542 (citation omitted). The Sixth Circuit has stated that "whether the state procedural ground is 'independent and adequate' . . . turns on the substantiality of the state interest involved."

Wesselman v. Seabold, 834 F.2d 99, 101 (6th Cir. 1987). There the court held, "Kentucky's interests in finality of judgments, judicial economy, and permitting defendants just 'one bite at the apple'" were deemed "both obvious and substantial." Id. (citation omitted). An exception to this rule, however, arises "where state collateral review is the first place a prisoner can present a challenge to his conviction." Coleman, 501 U.S. at 755.

As to types of procedural rules which have been found to be independent and adequate, in Coleman, the Supreme Court upheld a procedural rule that bars consideration of a federal claim for failure to meet state law requirements for timely appeals. 501 U.S. at 750-51. "'No procedural principle is more familiar to this court than that a constitutional right may be forfeited in criminal as well as in civil cases by the failure to make timely assertions of the right before a tribunal having jurisdiction to determine it'" ... and "[n]o less respect should be given to state rules of procedure." Id. at 751 (quoting Yakus v. United States, 321 U.S. 414, 444 (1944); accord Brown v. Allen, 344 U.S. 443, 485-86 (1953) (procedural default rule applied a state rule that placed time limits on appellate rights).

Procedural default also applies if counsel failed to pursue a claim on appeal in which event the claim can be defaulted. Murray, 477 U.S. at 489-92, (noting that in the federal system, counsel's failure to perfect an appeal precludes review of constitutional claims unless counsel's conduct was constitutionally deficient). Similarly, in Smith v. Murray, 477 U.S. 527 (1986), the petitioner's failure to raise his claim, objecting to a

psychiatrist's testimony, in the Virginia Supreme Court on his direct appeal precluded habeas relief. In Cone, the Sixth Circuit found the waiver and previously determined rules in former Tenn. Code Ann. §§ 40-30-112 (a) and (b) to be "independent and adequate" state rules. 243 F.3d at 970.

Based upon Coleman, Cone and Hutchinson, the Court concludes that Tennessee's limitations period for a post-conviction petition as well as its waiver and previously determined statutes are independent and adequate state rules that promote the timely presentation of claims. This Court is bound by Coe on the firmly established and adequacy of these Tennessee statutes.

4. The Cause and Prejudice Requirement

i. Cause

Once the respondent establishes procedural default, the burden shifts to the petitioner to show cause for the procedural default and actual prejudice or that the failure to consider the claim will result in a miscarriage of justice by the conviction of one who is actually innocent. Schlup, 513 U.S. at 322. Cause for a procedural default must depend on some "'objective factor external to the defense'" that interfered with the petitioner's efforts to comply with the procedural rule. Coleman, 501 U.S. at 752-53 (quoting Murray, 477 U.S. at 488). Under Martinez, inadequate defense counsel can prove cause, but only if counsel's conduct violates Sixth Amendment standards.

As to Petitioner's trial counsel, in Engle v. Isaac, 456 U.S. 107 (1982), the Court ruled that trial counsel's

strategic decisions do not establish cause, id. at 133-34, unless the decision is of constitutional significance. Murray, 477 U.S. at 486-88. Procedural defaults attributed to ignorance or the inadvertence of counsel or as a result of a deliberate appellate strategy that fails to raise a "particular claim" precludes federal habeas review of a claim. Id. at 487, 492. "[T]he mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for procedural default." Id. at 486. As to the failure to raise a claim on appeal, the Court also observed that "[t]his process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy. Smith, 477 U.S. at 536. (quoting Jones v. Barnes, 463 U.S. 745, 751-52 (1983)).

Given that this Court concluded that the state courts reasonably determined that Petitioner's trial counsel were effective, the Court also concludes that Petitioner cannot establish cause due to his appellate counsel's nor post-conviction counsel's performance. Without an extended repetition, the Court adopts the state court rulings that Petitioner's Brady claims lack materiality and this Court reaffirms its earlier conclusion that Petitioner's Martinez claims are not substantial to excuse these remaining defaults. Thus, the Court concludes that Petitioner has not established cause for any of these procedural defaults.

ii. Prejudice

Assuming Petitioner established "cause" for these defaults, Petitioner must also prove that he was

"actually prejudiced by the alleged constitutional error," Maupin, 785 F.2d at 138. The Supreme Court conceded that it has not given "precise content" to the term "prejudice," that has not been defined, "expressly leaving to future cases further elaboration of the significance of that term." United States v. Frady, 456 U.S. 152, 168 (1982) (quoting Wainwright v. Sykes, 433 U.S. 72, 91 (1977)). For the reasons stated above and as found by the state courts, the Court concludes that neither Petitioner's ineffective assistance of counsel claims nor his Brady and Giglio claims support a finding of prejudice to excuse his procedural defaults.

D. CONCLUSION

For the above stated reasons, the Court concludes that the petition for the writ of habeas corpus should be denied.

An appropriate Order is filed herewith.

ENTERED this the 16th day of March, 2015.

/s/ William J. Haynes, Jr.
WILLIAM J. HAYNES, JR.
Senior United States District Judge

APPENDIX

E. DEFAULTED CLAIMS

9. In violation of the Sixth, Eighth, and Fourteenth Amendments, Darrell Hines was denied his rights to due process, equal protection, and to juries selected free from discrimination and from a fair cross-section of the community, given discrimination against women in the selection of the petit jury, the grand jury, and the grand jury foreperson:

a. At the relevant times when the grand jury and petit juries were selected in this matter, the population of Cheatham County was 50.7 percent female.

b. Venires were selected by creating a large pool of names from voter registration lists, which was subsequently narrowed through the selection of a "sheriff's venire .. "

c. The grand and petit jury venires were then selected from the sheriffs venire, with the grand jury being selected first, after which the remaining persons would constitute the petit jury venire.

d. In selecting the sheriff's venire, however, jury commissioners not only would remove persons known to be dead or non-residents, but they also removed women with young children and those who worked as schoolteachers.

e. Women constitute a distinctive group for purposes of jury selection, and discrimination against women in the process of jury selection is

prohibited. There was, however, unconstitutional discrimination against women in this case.

f. Given the process by which women were excluded from the sheriff's venires because they were women, the sheriff's venires severely underrepresented women during the time Darrell Hines was indicted, tried, and sentenced, and throughout the period of 1980 through 1989:

1) Between 1980 and 1989, women comprised only 816 of 5655 members of the sheriffs venires, or 14.6% of such venires . This constitutes an absolute disparity of36% and a comparative disparity of 71 %. This is statistically significant: Women were underrepresented by -53 standard deviations during the period.

2) During 1985, when Darrell Hines was indicted, the sheriff's venires contained 450 persons, only 49 of whom were women. The venires during 1985 thus comprised only 11.1 % women. There was an absolute disparity of 40% and a comparative disparity of 78%. This is statistically significant: Women were underrepresented by -16.7 standard deviations in 1985.

3) During 1986, when Darrell Hines was convicted of first-degree murder, the sheriffs venires contained 375 persons, only 38 of whom -- or 10.2 % -- were women. This constitutes an absolute disparity of 40.5 % and a comparative disparity of 80%. This is statistically significant:

Women were underrepresented by -15.7 standard deviations in 1986.

4) During 1989, when Darrell Hines was sentenced to death, the sheriff's venires contained 475 persons, only 78 of whom- or 16.6%- were women. This constitutes an absolute disparity of 34.1% and a comparative disparity of 67%. This is statistically significant: Women were underrepresented by -14.8 standard deviations in 1989.

g. As a result of this process for jury selection, Darrell Hines was subjected to pervasive, invidious, and unconstitutional discrimination against women in the selection of the grand jury:

1) The grand jury venires in 1985 comprised 185 persons, only 29 of whom- or 10.2%-were women. Women were underrepresented by 40.5% in absolute terms, and 80% in comparative terms.

2) The 12-person June 1985 grand jury which indicted Darrell Hines only contained four (4) women. The percentage of women on the grand jury, therefore, was 33.3%. The absolute disparity between the percentage which should have appeared in the grand jury absent discrimination was 17.4%. The comparative disparity was nearly 50%. Throughout 1985, women were underrepresented by -13.9 standard deviations in the grand jury venires.

3) From 1980 through 1989, of a total of 2525 persons selected for possible service on the grand jury, only 418 persons -- or 16 . 6 % of all

the venires -- were women. Absent discrimination, one would have expected 1295 women to have been in the venires from 1980 through 1989. Women were thus underrepresented with an absolute disparity of 35.1 %, and a comparative disparity of 68%. This is statistically significant: From 1980 through 1989, women were underrepresented by-34.6 standards.

h. Darrell Hines was also subjected to pervasive, invidious, and unconstitutional discrimination against women in the selection of the petit jury:

1) As with the grand jury venires, as to the petit jury venires from 1980 through 1989, of a total of2525 persons selected for possible se1vice on the petit jury, only 418 persons -- or 16.6% of all the venires - were women. Absent discrimination, one would have expected 1295 women to have been in the venires from 1980 through 1989. Women were thus underrepresented with an absolute disparity of 35.1 %, and a comparative disparity of 68% This is statistically significant: From 1980 through 1989, when it came to the selection of petit juries, women were underrepresented by -34.6 standards.

2) As with the grand jury venires from 1985, the petit jury venires from 1985 comprised 185 persons, only 29 of whom - or 102% - were women. Women were underrepresented by 40

5% in absolute terms, and 80% in comparative terms.

3) The October 1985 petit jury venire -- from which the guilt-phase jury was selected --only comprised 20.8% women. This represents an absolute disparity of 29.9% and a comparative disparity of 59%.

4) The petit jury venires from 1989 comprised 338 persons, only 48 of whom -or 14.2% --were women. This represents an absolute disparity of 36.5%, and a comparative disparity of 72%.

5) The June 1989 petit jury venire - from which the sentencing-phase jury was selected - comprised 42 persons, only 5 of whom -- or 10.6% -- were women. This represents an absolute disparity of 40.1% and a comparative disparity of 79 %.

i. Darrell Hines was also subjected to invidious, pervasive discrimination against women and minorities in the selection of the grand jury foreperson in violation of the Sixth, Eighth and Fourteenth Amendments:

1) The process for selecting forepersons (who had the same powers as all grand jurors) was susceptible to discrimination or abuse.

2) Tenn R. Crim. P 6(g), governing the appointment of grand jury forepersons gave unfettered discretion to judges to appoint the forepersons of the grand jury.

3) Rule 6(g) provides: "The judge of the court authorized by law to charge the grand jury and to receive the report of that body shall appoint the foreperson of the grand juries in the counties of then respective jurisdictions. If concurrent grand juries are impaneled, a foreperson shall be appointed for each grand jury. Every person appointed as a foreperson shall possess all the qualifications of a juror. The foreperson shall hold office for a term of two (2) years from appointment: however, in the discretion of the presiding judge, the foreperson may be removed, relieved, or excused from office for good cause at any time ... The foreperson may vote with the grand jury and this vote shall count toward the twelve necessary for the return of an indictment... . "

4) Throughout the period from 1979 from 1990, there were only two grand jury forepersons, and both were white males. None were female. None were African-American, and Hines is part-African-American.

5) Between 1980 and 1989, there were twenty-nine (29) separate grand juries. Not one of the 19 grand juries had a woman or an African-American as a foreperson.

j. As a result of discrimination against women in the selection of the grand jury, grand jury foreperson, and petit jury, Darrell Hines was denied due process of law, the equal protection of the laws, the right to be free from invidious discrimination in the selection of juries, and the right to a

representative jury from a fair cross-section of the community. As a result, the indictment in this matter violated the Fifth, Sixth, Eighth, and Fourteenth Amendments; Darrell Hines's resulting conviction violated the Fifth, Sixth, Eighth, and Fourteenth Amendments; and Darrell Hines's death sentence violated the Fifth, Sixth, Eighth, and Fourteenth Amendments. He is entitled to habeas corpus relief.

10. In violation of the Sixth, Eighth, and Fourteenth Amendments and Brady v. Maryland, 373 US. 83, 83 S Ct. 1194 (1963), and in order to convict Darrell Hines and sentence him to death, the prosecution knowingly presented false testimony and withheld exculpatory evidence which was material to both the conviction and the imposition of the death sentence.

a. In order to convict Darrell Hines and sentence him to death, the prosecution knowingly presented false testimony from Ken Jones (who was a friend of the Sheriff) while simultaneously failing to disclose material, exculpatory evidence showing the falsity of Jones' testimony.

1) At the guilt/innocence trial, Jones claimed that he arrived at the CeBon motel at 12:30 p.m., left and went to Stuckey's, returned at 1:20 or 1:30 pm, left a note at the motel office saying he was using the restroom in Room 21, went to Room 21 to use the restroom, found the victim's body but didn't know anything about what happened to the victim, returned the key to the office, called the Sheriff immediately after finding the body, and waited for the Sheriff. See

e.g., 1986 Trial Tanscript 149-155. Jones' story to the jury was false.

2) Evidence known to the prosecution and law enforcement (including Sheriff Weakley, who received information about Jones' activities from Jones himself) confirms the falsity of Jones' testimony. The state knew that, in actuality, Jones arrived at the motel earlier in the morning for a tryst with Vernedith White (and not to use the restroom), the key to Room 21 was never recovered, no alleged note was ever found, Jones didn't call the Sheriff or wait for him after making any such alleged call, but Jones did tell the person who made the call that a woman had been stabbed, a fact which only the killer would have known.

3) While presenting Jones' false testimony, the prosecution also failed to disclose material exculpatory evidence showing the falsity of Jones' testimony, including evidence known to the prosecution and authorities (including Sheriff Weakley) that Jones arrived at the motel earlier in the morning for a tryst with Vernedith White (and not to use the restroom); that the key to Room 21 was never found; that no alleged note from Jones was ever recovered by authorities; and that Jones didn't call the Sheriff or wait for him after making any such alleged call. There is a reasonable probability that, had the prosecution properly complied with its constitutional obligations to disclose material,

exculpatory evidence, Darrell Hines would not have been convicted and/or sentenced to death.

b. The prosecution convicted and sentenced Darrell Hines to death by knowingly presenting false evidence and testimony from Sheriff Dorris Weakley and arguing that false testimony while withholding material exculpatory evidence showing that Weakley' s testimony was false.

1) Sheriff Weakley falsely stated in his March 7, 1985 affidavit of complaint that "the only persons at the motel at the time of this homicide were the victim, Catherine Jean Jenkins and the defendant," Darrell Hines. That was a knowingly false statement. Weakley knew full well that at the time of the homicide his friend Ken Jones and Vernedith White were at the motel for a tryst.

2) As with his false affidavit, Sheriff Weakley falsely testified that only Darrell Hines and the victim were at the motel at the time of the offense (Tr 4 70), while withholding material exculpatory evidence that Ken Jones and his paramour Vernedith White were at the motel at the time of the homicide for a tryst. Weakley and the prosecution knew that Jones was at the motel and that Weakley's testimony was therefore false.

3) The prosecution heavily relied on Sheriff Weakley' s false testimony when arguing for conviction by claiming that only Darrell Hines and the victim were at the motel at the time of

the homicide (Ir 581), when the prosecution knew that Jones and White were there when the victim was murdered.

4) In addition, Sheriff Weakley falsely testified that a cigarette butt in the victim's room connected Darrell Hines to the homicide (Tr. 469), while withholding material exculpatory evidence that the cigarette butt was not shown to connect Mr. Hines to Room 21.

c. The prosecution also knowingly presented false testimony from Dr. Charles Harlan and withheld material exculpatory evidence concerning Petitioner's guilt and sentence:

1) At the guilt phase of trial, the prosecution presented the false testimony of Harlan when Harlan claimed that the victim would have survived 4-5 minutes while remaining conscious eighty percent of that interval, while the prosecution simultaneously withheld material and exculpatory evidence that Harlan knew and the proof would show that the victim would have lost consciousness in less than 30 seconds.

2) At the sentencing phase of trial, the prosecution knowingly presented false testimony from Dr. Charles Harlan when Harlan claimed that the victim survived up to 6 minutes and would have remained conscious up to 4-5 minutes, where that testimony was inconsistent with Harlan's prior testimony, while the prosecution simultaneously withheld material and exculpatory evidence that Harlan knew and

the proof would show that the victim would have lost consciousness in less than 30 seconds.

3) The prosecution also knowingly presented false testimony from Harlan that there was no evidence of semen and that there was no study performed on any such evidence, and the prosecution withheld evidence which demonstrated the falsity of that testimony and which was otherwise material to the jury's guilt and death verdicts, including proof of the results of any such scientific or laboratory study concerning the existence and nature of any semen.

4) The falsity of Harlan's testimony is confirmed by the fact that Harlan has recently had his medical license stripped by the Board of Medical Examiners, because Harlan has engaged in numerous criminal, unprofessional, and unethical actions. See *In The Matter of Charles Harlan. MD*, No.17.18-022307A, Before The Board Of Medical Examiners, Tennessee Department Of Health.

d. The false testimony of Jones, Weakley, and/or Harlan affected the judgment of the jury at both the guilt and sentencing phases of trial.

e. There is a reasonable probability that had the prosecution not withheld exculpatory evidence concerning the testimony of Jones, Weakley, and/or Harlan, Darrell Hines would not have been convicted of first-degree murder and/or sentenced to death.

f. In addition, the prosecution improperly coached witnesses concerning their description of events which occurred while with Darrell Hines. In particular, witnesses were improperly influenced to claim at trial that they saw Mr. Hines with a key with the number "9" on it (Tr 120), that Mr. Hines seemed nervous (Tr. 121), that Mr. Hines had a stain on the shoulder of his shirt (Tr. 185), and that Mr. Hines had a silver Volvo (Tr. 225).

g. As a result, Darrell Hines is entitled to habeas corpus relief.

11. Counsel was ineffective at the guilt phase of the proceedings, and absent counsel's failures, there is a reasonable probability that Darrell Hines would not have been convicted and/or sentenced to death. Counsel was ineffective for the following reasons, including:

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b. Counsel failed to properly interview and build a relationship with Darrell Hines. Counsel met with Mr. Hines only a few times during the course of the guilt-innocence phase of the trial.

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e. Counsel failed to competently select the jury for the 1986 guilt/innocence phase of the trial, including but not limited to:

1) Counsel failed to object to Sheriff Weakley' s participation in voir dire, where it was likely that the Sheriff would testify for the prosecution and

that this premature exposure to the jury would lend the Sheriff a prejudicial aura of credibility.

2) Counsel failed to object to the court's failure to properly sequester the jury panel on the night of January 6, 1986, prior to the conclusion of voir dire on January 7, 1986. As a result, juror Sandra Kilgore was improperly exposed to extraneous information. See ¶ 27b, incorporated by reference.

3) Counsel failed to object to the state's incorrect presentation of the definitions of the elements of the charge, burdens of proof, and definitions of sentencing terms. Specifically, the state incorrectly stated that it was entitled to a fair trial. See Tr. at 15. The state also incorrectly stated on several occasions that in some circumstances the death penalty was required.

4) Counsel failed to object to the court's failure to order a mistrial following prejudicial statements made by potential jurors, including but not limited to juror Anderson's statement that it was a "brutal murder" and juror Winn's statement that it was a "horrendous act." See Tr. at 23-26.

5) Counsel failed to object to the court's failure to strike juror Cothan who was biased against Darrell Hines. See ¶ 27e, incorporated by reference.

6) Counsel failed to conduct adequate voir dire which would have exposed biases prejudicial to Mr. Hines - including jurors who were relatives and close friends of law enforcement, who had been victims of crime or were close to crime victims, and

jurors who had strong negative feelings about people who carry knives.

7) Counsel failed to challenge for cause those jurors who held some kind of bias against Mr. Hines, his case, or any class or group to which he belongs.

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i. All of counsel's failures regarding Ken Jones' story were especially egregious where counsel put Darrell Hines on the stand to get Mr Hines to say that he and counsel discussed all tactical decisions (Tr. 697), while at the same time counsel misled Darrell Hines about their knowledge of the falsity of Ken Jones' testimony. This further denied Mr. Hines his very right to counsel.

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l. Counsel failed to investigate potentially illegal activities occurring at the CeBon motel, and whether the victim was engaged in any affairs, and if so, with whom.

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n. Counsel was ineffective for allowing the prosecution to present prejudicial and/or inflammatory information which was irrelevant to Darrell Hines' guilt, including but not limited to, allegations that Mr. Hines had blood on his shirt (Tr. 128, 129), and information that Mr. Hines had been on parole at the time of the offense. Tr. 207. See ¶¶ 11m & 20f, incorporated by reference.

o. Counsel failed to object to the court requiring that Darrell Hines roll up his sleeves to aid the testimony and identification of the witnesses for the prosecution.

p. Counsel failed to object to the qualifications of medical examiner Dr. Charles Harlan to testify regarding marks found in the wall of the room at the motel where Darrell Hines had stayed. See , ¶ 10(c), incorporated by reference.

q. Counsel failed to adequately object to the prosecution's inappropriate methods of introducing evidence at the 1986 guilt/innocence phase of the trial, including but not limited to the prosecution's extensive practice of leading witnesses on direct examination. See e.g., Tr. at 231, 568. Counsel failed to move for a mistrial on the basis that the prosecution's extensive practice of leading witnesses rendered the prosecution's evidence ureliable and the entire proceeding fundamentally flawed.

r. Counsel failed to object to unconstitutional jury instructions given by the Court.

1) The guilt/innocence jury was allowed to convict Darrell Hines of felony-murder without being instructed on, or specifically finding, the element of malice. See ¶19aa, incorporated by reference.

2) The court's instructions regarding "reasonable doubt" were unconstitutional. The court instructed the jury that it could convict Darrell Hines based upon mere "moral certainty" of guilt (Tr. 63 7, 650) or a "satisfactory conclusion"of

guilt (Tr. 650), while allowing conviction based upon mere ability to let the mind rest easily about guilt (Tr. 637) and excluding "possible" doubts about guilt. Tr. 637 .. See ¶19b, incorporated by reference.

3) The trial court improperly instructed the guilt/innocence jury that it was required to presume the truthfulness of witnesses, thereby violating the jury's prerogative to assess the credibility of witnesses and determine facts. Tr 648.

4) The court improperly instructed the jury regarding the definitions of premeditation and the presumption of innocence. Tr. 638-639.

5) In addition, counsel failed to request the trial court to instruct the jury on the elements of all lesser included offenses.

s. Counsel did not competently perform during opening and closing arguments during the 1986 guilt/innocence phase of the trial, including but not limited to:

1) Counsel failed to adequately and accurately argue the evidence and law in their opening and closing arguments.

2) Counsel failed to object to the prosecution's improper, inflammatory, prejudicial, inappropriate and misleading or inaccurate statements concerning the law, the evidence and Darrell Hines during opening and closing arguments:

a) In closing arguments, the prosecution falsely told the jury that there was no presumption of innocence anymore because they had proved that Darrell Hines was guilty. Tr. 608. See ¶21(a), incorporated by reference.

b) The prosecution improperly vouched for the credibility of its witnesses, including Vicki Hines (Tr. 579), who later admitted that she was under the influence of alcohol at the time and recanted her testimony: and Sheriff Weakley (Tr. 611, 617), who the prosecution knew was testifying falsely. The prosecution also expressed his personal opinion about their credibility during his closing argument. See ¶21(b), incorporated by reference.

c) The prosecution injected passion and arbitrariness into the proceedings by persuading the jury to protect themselves, the county, and their country by convicting Darrell Hines. See ¶21(c), incorporated by reference.

d) The prosecution belittled Darrell Hines' exercise of his constitutionally guaranteed rights by focusing them on the victim's rights. Tr. 608. See ¶21(d),incorporated by reference.

e) The prosecution boasted to prospective jurors that this case was the most important in the history of the county, emphasizing his

lengthy experience and expertise. This type of argument is fundamentally unfair and unconstitutional See ¶21(e), incorporated by reference.

f) The prosecution shifted the burden of proof and encroached on Darrell Hines' right to present a defense and have witnesses testify in his favor when he implied that Darrell Hines must put on proof to secure an acquittal or avoid conviction. This argument violated due process. See ¶21(f), incorporated by reference.

t. Counsel failed to file proper pre-trial motions on Mr Hines' behalf: including but not limited to:

1) Any motion challenging Mr. Hines' illegal arrest, detention, and interrogation in Kentucky and his subsequent transfer from KY to Tennessee See ¶17, incorporated by reference.

2) Any motion challenging the constitutionality of Tennessee's murder statute, Tenn. Code Ann.§ 39-2-201 to -202 (repealed 1991). See ¶35, incorporated by reference.

3) Any motion requesting a bill of particulars.

4) Any motion seeking the prosecution's compliance with constitutional, statutory, and local rules governing the disclosure of discovery.

5) Any motion seeking preservation of all law enforcement rough notes and a complete copy of the District Attorney General's file.

6) Any motions seeking the resources necessary for competent representation in a capital murder trial, including but not limited to: investigative assistance, jury selection assistance, forensic expert witnesses, forensic evidence testing, and mental health experts.

7) Any motions in limine seeking special voir dire rules, including but not limited to the light to submit a jury questionnaire and the right to conduct individual voir dire.

8) Any adequate motion for judgment of acquittal alleging that the prosecution failed to meet its burden of proving the elements of robbery in order to support the felony murder charge and that Mr.. Hines' prim convictions were not applicable to support that aggravating circumstance .. See ¶¶15, 17, 32, incorporated by reference.

9) Any motion seeking an order which would have requi1ed the prosecution to elect which of two murder counts would go to the jury. See ¶15, incorporated by reference.

10) Any adequate motion seeking a continuance of the filing of the motion for new trial, and the hearing on the motion for new trial.

11) Any adequate and comprehensive motion for new trial.

12) Any motion to dismiss and/or motion to arrest the judgment on grounds that Tennessee's

murder statute was unconstitutional. See ¶35, incorporated by reference.

u. Counsel failed to raise the objections necessary to preserve issues for appellate review.

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13. In violation of the Sixth, Eighth, and Fourteenth Amendments, counsel was ineffective at the re-sentencing proceedings, and absent counsel's failures, there is a reasonable probability that Petitioner would not have been sentenced to death. Counsel was ineffective for the following reasons, including:

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b. Counsel was ineffective for failing to competently select the jury in this case, including but not limited to:

1) Counsel failed to object to the trial court's improper dismissal of jurors who expressed concern about the death penalty, See Witherspoon v. Illinois, 391 U.S 510, 88 S. Ct 1770 (1968): Adams v. Texas, 448 U.S. 38, 110 S.Ct. 2521 (1980), especially juror Citro. See ¶27(g), incorporated by reference.

2) Counsel failed to conduct a voir dire that would have exposed biases held by some jurors which prejudiced Darrell Hines and to challenge those jurors for cause.

c. Counsel failed to develop and pursue a comprehensive mitigation theory for Darrell Hines' re-sentencing trial. Counsel failed to develop a

comprehensive social history in order to get a complete picture of Darrell Hines' life. In fact, counsel admitted that at the time of resentencing, he had no idea how to put together a mitigation case. Tr. 587.

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t. Counsel failed to present evidence of false statements of Sheriff Weakley who stated in his March 7, 1985 affidavit of complaint that "the only persons at the motel at the time of this homicide were the victim, Catherine Jean Jenkins and the defendant," Darrell Hines. That was a knowingly false statement. Weakley knew full well that his friend Ken Jones and Vernedith White were at the motel at the time of the homicide for a tryst See ¶10, incorporated by reference.

u. As with his false affidavit, counsel failed to present evidence of the false testimony of Sheriff Weakley who claimed that only Darrell Hines and the victim were at the motel at the time of the offense (Ir 4 70), while he withheld material exculpatory evidence that the Sheriffs friend, Ken Jones, and his paramour, Vernedith White, were at the motel at the time of the homicide for a tryst Weakley and the prosecution knew that Jones was at the motel and that Weakley's testimony was therefore false. See ¶10, incorporated by reference.

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w. Counsel was ineffective for failing to object to the prosecution's improper, inappropriate, and

inflammatory statements during voir dire. See, ¶22, incorporated by reference.

x. Counsel was ineffective for failing to object to the prosecution's improper coaching of witnesses. See ¶22, incorporated by reference.

y. Counsel was ineffective for failing to object to the prosecution's introduction of the indictment against Mr. Hines which misled jurors into thinking that Mr Hines had been convicted of premeditated murder when, in fact, the guilt phase jury only found Darrell Hines guilty of felony-murder. See if22(d), incorporated by reference.

z. Counsel was ineffective for failing to properly object to the prosecution's improper and personal comment about Darell Hines' exercise of his right to counsel and to use the assistance of persons who assisted him in preparing his case, including the Capital Case Resource Center. See ¶22(e), incorporated by reference.

aa. Counsel was ineffective for failing to object to unconstitutional jury instructions and for failing to file proposed jury instructions, including but not limited to:

1) Counsel failed to object to jury instructions which equated "reasonable doubt" with "moral certainty" and permitted the finding of aggravating circumstances and the imposition of the death penalty based upon a "satisfactory conclusion" of the jury' s findings, while also improperly excluding from the jury' s consideration "possible" doubts about the

existence of a circumstance or the appropriateness of the death sentence. See ¶19(c), incorporated by reference.

2) Counsel failed to object to a jruy instruction which misstated that law regarding the necessity for a unanimous verdict in order for Darrell Hines to receive a life sentence. R Tr. 63, 588-590. See ¶18, incorporated by reference. Moreover, counsel failed to seek an instruction clarifying that the decision regarding sentence is to be made by individual jurors and does not have to be unanimous.

3) Counsel failed to seek an instruction clarifying that a life sentence means "life" and that a death sentence means "death" and that these sentences will be carried out.

4) Counsel failed to seek instructions clarifying the law regarding sentencing factors. Specifically, counsel failed to request:

a) an instruction clarifying that only statutory aggravating factors are to be considered;

b) an instruction defining aggravating and mitigating circumstances, including listing all non-statutory mitigating circumstances;

c) an instruction clarifying how aggravating circumstances are to be weighed;

d) an instruction establishing that the jury must find, unanimously, the existence of

aggravating circumstances beyond a reasonable doubt:

e) an instruction clarifying that Darrell Hines began the sentencing phase of the trial under the presumption that no aggravating circumstances existed in his case;

f) an instruction that the first degree murder conviction itself is not an aggravating circumstance;

g) an instruction clarifying that evidence put on to establish mitigating circumstances cannot be used to establish aggravating circumstances.

h) an instruction establishing that lingering doubt regarding Darrell Hines' guilt may serve as a non-statutory mitigating circumstance.

i) an instruction establishing that doubts regarding the appropriate sentence are to be resolved in favor of a life sentence.

j) an instruction establishing that the jury may base its decision on mercy, sympathy, and compassion.

5) Counsel failed to file a proposed verdict form that listed all mitigating circumstances raised by the evidence, statutory and non-statutory, and which required the jury to specifically state what mitigating circumstances were found to

exist by any juror, and failed to object to the verdict form used by the court.

bb. Counsel failed to object to the use of physical restraints on Darrell Hines in full view of the jurors. See ¶28, incorporated by reference.

cc. Counsel failed to timely subpoena witnesses or evidence, including witnesses Norman Johnson and Bill Andrews in violation of Mr. Hines' right to compulsory process, due process, and his rights to present any and all available mitigating evidence in support of a sentence less than death. See ¶31, incorporated by reference.

dd. Counsel was ineffective for failing to seek a mistrial once the re-sentencing jury was informed that the case had previously been reviewed by the Tennessee Supreme Court. Resentencing Transcript 215.

ee. Counsel failed to engage in the motions practice necessary to protect Mr. Hines' rights, including but not limited to:

1) Counsel failed to file pre-trial motions challenging the constitutionality of the sentencing provisions of Tennessee's murder statute, which is arbitrary and capricious and violates the Eighth and Fourteenth Amendments. See ¶35 incorporated by reference.

2) Counsel filed inadequate pre-trial motions seeking the state's compliance with constitutional, statutory, and local discovery

obligations and also objecting to the state's reciprocal discovery requests.

3) Counsel failed to file pre-trial motions seeking preservation of all law enforcement rough notes and a complete copy of the state's file, both for in camera inspection and later use on post-conviction.

4) Counsel filed inadequate and untimely pre-trial motions seeking expert assistance, including investigative services, mitigation specialist, jury selection assistance, and witnesses able to address forensic sentencing issues in this case, Mr. Hines' life history, and his mental condition.

5) Counsel filed inadequate pre-trial motions seeking timely notice of the state's intent to seek the death penalty and the mandatory continuance awarded upon the untimely filing of notice of intent to seek death. See Tenn. R. Crim. P 12.3(b).

6) Counsel filed inadequate pre-trial motions seeking a continuance of the re-sentencing hearing in order to adequately prepare. Counsel's request for a continuance inadequately addressed the state's failure to serve timely notice of its intent to seek death.

7) Counsel filed inadequate pre-trial motions seeking special voir dire rules, including but not limited to, the right to submit a comprehensive jury questionnaire and the right to conduct

individual voir dire as to death qualification of the venire members.

8) Counsel failed to file pre-trial motions charging the prosecution with abuse of discretion in seeking the death penalty, asserting the disproportionate application of the death penalty, and challenging the proportionality of the death sentence in Mr. Hines' case.

10) Counsel failed to file pre-trial motions seeking the right to allocution for Darrell Hines at the re-sentencing trial.

11) Counsel failed to file pre-trial motions seeking to limit the state's proof at the sentencing hearing to specific aggravating circumstances

12) Counsel failed to file pre-trial motions seeking dismissal of the invalid felony-murder aggravating circumstance because it duplicated Mr. Hines' felony-murder conviction and failed to produce the necessary narrowing of death eligible defendants. See ¶15, incorporated by reference.

13) Counsel filed an inadequate post-conviction petition challenging the constitutionality of Darrell Hines' prior felony conviction in Kentucky and then failed to properly challenge the invalid prior felony conviction aggravating circumstance See ¶17, incorporated by reference.

14) Counsel failed to timely file pre-trial motions causing the court to claim that counsel's motions were "dilatory." See R. Tr. 4.

15) Counsel failed to file motions seeking judgment of acquittal with respect to the death sentence based upon the improper application of aggravating circumstances.

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14. Counsel was ineffective on appeal, and absent counsel's failures, there is a reasonable probability that Darrell Hines would have received relief on direct appeal. Counsel was ineffective for the following reasons, including:

a. Counsel failed to timely object or otherwise preserve for appeal any or all of the claims presented in this petition for writ of habeas corpus.

b. Counsel failed to obtain all necessary portions of the transcript and record for appeal, including but not limited to, a transcript of the voir dire, and the transcript of the motions hearings in this case.

c. Counsel failed to adequately research and prepare Mr. Hines' case for appeal.

d. Counsel failed to raise all available issues in their motion for a new trial and to brief all issues on appeal.

e. Counsel failed to include in its brief to the Tennessee Supreme Court all issues raised in the Court of Criminal Appeals.

f. Counsel filed an inadequate petition to rehear following the Tennessee Supreme Court's adverse ruling on Darrell Hines' appeal. Specifically, counsel failed to argue that the Supreme Court erred when it concluded that" in the instant case, a felony not underlying the felony murder conviction [was] used to support the felony murder aggravating circumstance. " State v. Hines, 919 S.W2d 573, 583 (Tenn. 1995). There is no evidence in the record supporting this conclusion.

g. On appeal, counsel failed to raise any or all claims raised in this petition for writ of habeas corpus.

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17. In violation of the Sixth, Eighth, and Fourteenth Amendments, Darrell Hines' 1989 death sentence was unconstitutional because the 1981 first-degree assault conviction which served as a prior violent felony aggravating circumstance under Tenn. Code Ann.. § 39-2-203(i)(2) was void, invalid, and unconstitutional.

a. On August 21, 1981, Darrell Hines was involved in a series of escalating verbal assaults upon him by a number of college students.

b. These college students were attending a party in Bowling Green, Kentucky where Darrell Hines lived.. The students had all been drinking.

c. Darrell Hines was also intoxicated that night, but was not disturbing the college students. Mr Hines was standing and watching the party in an

alley on the perimeter of the yard of the home where the party was being held.

d. The victim and other eye-witnesses confirm that Darrell did nothing to provoke the students' verbal assaults, which were intended to force Darrell to leave the area and which were accompanied by aggressive body language and implied threats of physical force.

e. Only after several hours of these verbal assaults, and only after being confronted by four or five individuals "one final time," did Mr Hines arm himself with a lead pipe.

f. Mr. Hines then swung the pipe at the victim, breaking the victim's arm, because he reasonably believed it was necessary to protect himself against the hostile group of students that were surrounding him.

g. The victim suffered only a broken arm in the assault.

h. Mr. Hines was then charged with an offense under Kentucky law. Count I of the indictment as found by the grand jury specifically alleged that he committed an assault upon Stan Williams, and that his actions were "Contrary to 508.020" of the Kentucky Revised Statutes. The indictment did not allege any mental state, and while it identified the use of the pipe, it never alleged that the pipe was a deadly weapon.

i. Ky. Rev. Stat §508.020 governs the crime of assault in the second-degree and provides that a

second-degree assault occurs when a person "intentionally causes serious physical injury to another person" or "intentionally causes physical injury to another person by means of a deadly weapon or a dangerous instrument," or "wantonly causes selious physical injury to another person by means of a deadly weapon or a dangerous instrument.

j. In addition, Ky. Rev. Stat. Ann. § 508.010 dictates that: "A person is guilty of assault in the first degree when: (a) He intentionally causes se1ious physical injury to another person by means of a deadly weapon or a dangerous instrument; or (b) Under circumstances manifesting extreme indifference to the value of human life he wantonly engages in conduct which creates a grave risk of death to another and thereby causes serious physical injury to another person."

k. On October 10, 1981, Darrell Hines pleaded guilty to a charge of assault in the first-degree and received a sentence often years imprisonment.

l. However, as noted supra, Count I of the indictment alleged that Hines' actions were "Contrary to 508.020," the statute governing second-degree assault.

m. Consequently, because Hines pleaded guilty to an offense which was never properly alleged in the indictment, his conviction for the greater offense of first-degree assault is void.

n. In addition, though Mr.. Hines entered a guilty plea, his attorney had failed to inform him

regarding his constitutional rights and the waiver of those rights upon entering a guilty plea.

o. Moreover, the court failed to sufficiently advise Darrell Hines of his constitutional rights at the time he was entering his guilty plea.

p. As a result, Darrell Hines was unaware that he was waiving his rights when he entered a guilty plea to this 1981 charge.

q. Specifically, the court failed to inform Darrell Hines that he had a right to confront those who were accusing him and that he was waiving that right by pleading guilty.

r. As a result, Darrell Hines did not know that he had a constitutional right to confront his accusers.

1) Darrell Hines' knowledge of his constitutional right to confront his accusers and his ability to voluntarily and intelligently waive that right, was substantially impaired by the fact that Mr. Hines suffered from severe addictions, mental illness, and intellectual deficiencies.

2) At the time Darrell Hines pleaded guilty to this offense, he was an alcoholic and a severe abuser of inhalants and other drugs.

3) These addictions significantly impaired Darrell Hines' ability to know of or voluntarily waive his rights, especially a right of which he had not been advised.

4) Prior to pleading guilty in 1981, Darrell Hines was diagnosed with a number of mental illnesses including adjustment reaction, dysthymia and paranoia.

5) Mr. Hines also suffered from significant intellectual deficiencies-he stopped attending school after he reached the ninth grade, at which time his math and reading skills were determined to be at a third grade level.

6) Mr Hines' IQ has been determined to be in the low average range.

7) Moreover, despite Darrell Hines' previous contact with the judicial system, Mr. Hines had never seen a trial and had never observed a cross-examination conducted on his behalf or for anyone else.

s. Darrell Hines did not voluntarily and intelligently waive his rights at the time he pleaded guilty. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct 1709 (1969).

t. In addition, Darrell Hines' court-appointed counsel was ineffective. She failed to conduct any investigation into the factual basis of the crime or into Mr .. Hines' mental health background and also failed to raise important legal claims available to Mr Hines.

1) Counsel failed to know the law regarding assault. Had counsel known the legal definitions related to the assault statute, counsel would have known that Mr. Hines could not be legally

convicted of the greater charge of first-degree assault when Count I of the indictment only specifically said that his actions violated §508 .020, the second-degree assault statute.

2) Counsel also would have been able, after investigation, to conclude that Mr. Hines was not guilty of aggravated assault because the victim did not suffer "serious physical injury" which is defined as a "serious and prolonged disfigurement or impairment" See Ky. Rev Stat. Ann.§ 508.010 and 500.080(15). The victim in this case merely had a broken arm.

3) Moreover, counsel failed to challenge the indictment which was insufficient as it did not allege any serious physical injury and only was sufficient to support a charge of the lesser offense of second-degree assault.

4) Counsel failed to challenge the fact that the indictment failed to charge mens rea. Counsel then failed to advance a defense of intoxication for Mr. Hines since he was intoxicated and unable to form any intent at the time of the incident.

5) Counsel failed to investigate Mr. Hines' placement in Green River Boys Camp. Had counsel investigated, counsel would have learned that the abuse the college boys directed at Mr. Hines was virtually identical to the abuse Mr. Hines suffered at Green River which often preceded violence being inflicted on the boy

being abused See ¶13(i), incorporated by reference.

6) Counsel failed to investigate and present evidence respecting Darrell Hines' extremely low serotonin level See ¶13(i), incorporated by reference. Had counsel investigated that serotonin level, counsel would have learned that:

a) Serotonin is a naturally occurring neuromodulator in the brain.

b) A low serotonin level affects brain functioning by adversely affecting a person's ability to control extreme emotions (such as anger, fear, rage, sadness, etc.): adversely affecting the various systems of inhibition in the brain; and, adversely affecting a person's ability to control impulsive behavior associated with emotions such as anger, fear, rage, and sadness.

c) Darrell Hines has an extremely low serotonin level which renders him incapable of controlling impulsive behavior associated with emotions such as anger, fear, rage, sadness, etc.

d) Low serotonin levels have also been associated with Type II alcoholism, which is characterized an inability to abstain from ingesting intoxicants and thus persistent alcohol/drug seeking behavior; and impulsivity, high risk-taking/low harm avoidance, fighting and other violence, and arrests.

e) Darrell Hines' social history is replete with incidents exhibiting symptoms of having low serotonin level and Type II alcoholism.

7) Counsel failed to conduct an investigation into the facts of the incident or into Mr Hines' background. See ¶¶7(a)-(g), supra. Had counsel investigated, she would have known that Mr. Hines was provoked and was only defending himself and that he had a valid defense of self-defense under Kentucky law. In addition, she would have been aware of Mr. Hines' mental illness and learning deficiencies.

8) In addition, counsel only met with Mr. Hines two times during the course of her representation.

u. Had counsel properly researched the law, reviewed the indictment, and investigated the facts and the victim's background, she would not have advised Darrell Hines to plead guilty and Mr. Hines would not have entered a guilty plea. Instead, Mr Hines would have challenged the insufficiency of the indictment, raised the defenses of self-defense and intoxication, and would have been acquitted.

v. As a result, the 1981 guilty plea was unconstitutional.

w. Mr Hines is actually innocent of any offense, because all the evidence(including proof of the taunting and threats made by the students) would establish that he did not commit a first-degree assault and/or that he had, as a matter of fact acted

in self~defense and was therefore not guilty of the offense for which he was convicted

x. Mr. Hines is therefore entitled to habeas corpus relief because the prior felony conviction aggravating circumstance was void and invalid, but the jury relied on that aggravating circumstance when it imposed the death sentence. Mr. Hines is entitled to habeas corpus relief Under the Eighth and Fourteenth Amendment, Mr. Hines is entitled to a new sentencing proceeding free from the taint of this invalid prior conviction.

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19. In violation of the Sixth, Eighth, and Fourteenth Amendments, jury instructions lessened the prosecution's burden of proof at the guilt and re-sentencing stages:

a. The guilt/innocence jury was allowed to convict Darrell Hines of felony murder without being instructed on, or specifically finding, the element of malice. Tr. 640. The Jury was unconstitutionally allowed to convict by merely finding a "killing" in the course of a felony, when all "murder" under Tennessee law required a finding of killing with malice. See Tenn. Code Ann. 39-2-201 (1982).

b. The jury was instructed at the guilt phase of trial that it could convict Darrell Hines based upon mere "moral certainty" of guilt (Tr. 637, 650) or a "satisfactory conclusion" of guilt (Tr. 650), while allowing conviction based upon mere ability to let the mind rest easily about guilt (Tr. 637) and

excluding "possible" doubts about guilt. Tr. 637. These instructions relieved the prosecution of proving guilt beyond a reasonable doubt of the charges for which Darrell Hines was ultimately convicted.

c. Similar instructions at the re-sentencing phase (R. Tr. 580) unconstitutionally understated the prosecution's burden of proof; allowing the finding of aggravating circumstances based upon mere "moral certainty" of guilt (R Tr 580), so long as jurors could let the mind rest easily that any such circumstance existed, while also improperly excluding from the jury's consideration "possible" doubts about the existence of a circumstance or the appropriateness of the death sentence

d. The trial court improperly instructed the guilt/innocence jury that it was required to presume the truthfulness of witnesses, thereby violating the jury's prerogative to assess the credibility of witnesses and determine fact.. Ir 648.

e. At the guilt/innocence trial, the court improperly instructed the jury regarding the definitions of premeditation and the presumption of innocence. Tr. 638-639.

f. Because these jury instructions are unconstitutional, Darrell Hines is entitled to habeas corpus relief.

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21. In violation of the Sixth, Eighth, and Fourteenth Amendments, the prosecution made improper

arguments during closing statements at the guilt/innocence trial, including arguments which undermined the presumption of innocence and lessened the prosecution's burden of proof. This misconduct rendered Darrell Hines' trial fundamentally unfair

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b. The prosecution improperly vouched for the credibility of its witnesses, also expressing his personal opinion about their credibility during his closing argument:

1) The prosecution told the jury that Darrell Hines' sister, Vicki, was telling the truth when she claimed to the jury that she saw on her brother's clothing.

2) The prosecution told the jury: "this is his sister It's not easy for her to get up here and testifying knowing the consequences that might befall her brother She got on the witness stand and took that oath to tell the truth and when she did that she told the truth. It wasn't easy for her. But she wasn't going to get up here and perjure herself" Tr. 579.

3) In fact, Vicki Hines was under the influence of alcohol during her testimony and later recanted her story. This argument violated due process.

4) In addition, the prosecution repeatedly attempted to bolster the credibility of the Sheriff and his performance during this case.

5) First, the prosecution claimed to the jury that: "The Sheriff did one of the best jobs on this case that I've seen in a long time." Tr. 611.

6) Then, the prosecution told the jury: "I'm kind of glad we've got a sheriff like we've got." Tr. 617.

7) This was improper and also violated due process.

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d. The prosecution belittled Darrell Hines' exercise of his constitutionally guaranteed rights by focusing them on the victim's rights.

1) The prosecution questioned the jury: "What about the rights of Mrs. Jenkins? What about her rights?" Tr. 608.

2) As a result, jurors were induced to find Mr. Hines guilty for irrelevant and constitutionally impermissible reasons This was highly prejudicial to the jury's decision, as it skewed the jury's decision toward guilt.

e. The prosecution told prospective jurors that this case was the most important in the history of the county, emphasizing his lengthy experience and expertise.

1) The prosecution boasted: "There's never been a more important case in Cheatham County. There's never been a more atrocious murder in Cheatham County - any individual that went through the suffering that this lady did, and I've

never been involved in anything quite like this since I've been District Attorney General, and while I was with General Lockert for several years while he was the District Attorney General." Tr. 606.

2) This type of "prosecutorial expertise" statement or argument is fundamentally unfair, as it unfairly persuades jurors to impose death out of deference to the prosecution's supposed "expertise" in determining the proper outcome for the jury' s decision. See Brooks v. Kemp, 762 F.2d 1381, 1410 (11th Cir. 1985) (en banc); Tucker v. Kemp, 762 F2d 1496, 1505 (11th Cir 1985); Hance v. Zant, 696 F2d 940, 953 (11th Cir. 1983).

3) Such a "prosecutorial expertise" argument is unconstitutional, because it "improperly suggest[s] that the prosecutor had canvassed all murder cases and selected this one as particularly deserving of the death penalty, thus infringing upon the jury's decision-making discretion and improperly invoking the prosecutorial mantle of authority. Brooks, 762 F 2d at 1413.

f. The prosecution shifted the burden of proof and encroached on Darrell Hines' right to present a defense and have witnesses testify in his favor.

1) The prosecution told the jury that "you know if he had any conversation with his grandfather or anybody else - I remember Mr. Wilkinson asking that sheriff about did you talk with that

grandfather -and if the grandfather had told him anything about it that would've helped them in their defense the grandfather would've been brought in and put on the witness stand.. If any family member had passed any word on to him, these are good defense lawyers, they would have had them in here to tell you about it." Tr. 627.

2) Because the prosecution was attempting to shift the burden of proof in the jury' s mind by implying that Darrell Hines must put on proof to secure an acquittal or avoid conviction, this argument violated due process.

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22. In violation of the Sixth, Eighth, and Fourteenth Amendments, at the re-sentencing trial, the prosecution made misleading, unconstitutional, and fundamentally unfair statements to the jury which violated Darrell Hines' constitutional rights.

a. During voir dire at re-sentencing, the prosecution made various misstatements to jurors indicating, incorrectly, that the death sentence had to be returned merely if aggravating circumstances were found. R. Tr. 18, 19, 40, 41.

b. During voir dire at re-sentencing, the prosecution made objectionable statements concerning the rights of the victim which denigrated Darrell Hines' constitutional rights and improperly focused jurors on irrelevant factors. R. Tr. 164. This violated due process and led to the arbitrary imposition of the death sentence in violation of the Eighth and Fourteenth Amendments.

c. During voir dire at re-sentencing, jurors were misled about their responsibility for imposing the death sentence, by being misled into thinking that Darrell Hines' acts relieved them of their individual responsibility for imposing the death sentence, in violation of the Eighth and Fourteenth Amendments. R. Tr. 423.

d. At re-sentencing, the prosecution misled jurors into thinking that Darrell Hines had been convicted of premeditated murder when the prosecution introduced the indictment against Mr. Hines, when, in fact, the guilt phase jury only found Darrell Hines guilty of felony murder. R. Tr. 130. This prejudiced the jury against Darrell Hines and led jurors to erroneously believe that the offense was more agg[r]avated than it actually was, leading to the arbitrary imposition of the death sentence

e. At re-sentencing, the prosecution made improper comment and personal comment about Darrell Hines' exercise of his right to counsel and to use the assistance of persons who assisted him in preparing his case, including the Capital Case Resource Center (CCRC).

1) During the cross-examination of two key witnesses and in closing argument, the prosecution, over defense objection, repeatedly referred to the fact that Darrell Hines had used CCRC and attorney Brock Mehlet. The prosecution distorted the role and purpose of the organization in attempt to impeach the witnesses.

a) During the cross-examination of expert witness Pam Auble, the prosecution asked Dr. Auble about her familiarity with CCRC.. R Tr 347. The prosecution asked Dr. Auble if she had worked with CCRC and in how many cases she had consulted with them R. Tr. 347, 348.

b) The prosecution characterized CCRC as an organization that "assists in the defense of people charged with capital crimes" whose "primary motivation or primary reason for their existence is to keep somebody from going to the electric chair" R. Tr. 349, 350.

c) The prosecution then asked Dr Auble if she had worked with CCRC during the Darrell Hines' case, indicating that CCRC had done "background investigation" for Dr. Auble and were providing her with information. R. Tr. 349,350.

d) The prosecution went so far as to imply that CCRC might be paying Dr Auble to testify in the Darrell Hines case. R. Tr. 351.

e) Then, the prosecution asked Dr. Auble to identify Brock Mehler in the courtroom and identify what sort of information Mr. Mehlrl, who was an attorney at CCRC, had given to her. R. Tr. 352.

f) The prosecution also asked Dr. Charvat about her familiarity with CCRC, with Brock Mehler, and with the nature of the assistance that CCRC provided to her. R. Tr. 492,493.

g) The prosecution asked Dr. Charvat if she had worked with CCRC on other ca ses and if she was opposed to the death penalty. R. Tr. 495, 496.

h) Finally, during closing arguments, the prosecution attempted to impeach Dr Charvat one more time: "Ms Charvat was assisting attorneys in this case. She was assisting the Capital Case Resources Group whose sole function in life is to fight against the death penalty regardless of the circumstances. "R. Tr. 556.

2) The prosecution's comments about the CCRC and attempts to impeach Darrell Hines' expert witnesses penalized Darrell Hines' exercise of his right to counsel.

a) The prosecution is not permitted to use the defendant's choice of defense counsel as a basis for impeachment or rebuttal. Nor is the prosecution permitted to attack the integrity of defense counsel.

b) In this situation, the prosecution's attack on CCRC (a government-funded organization established to assist capital defense attorneys), and the prosecution's attempt to impeach key defense witnesses because they utilized the services of CCRC, is fundamentally fair and contrary to due process

c) The assistance provided by the CCRC is intended to ensure that a capital defendant

receives the effective assistance of counsel guaranteed by the Constitution. Prosecutorial comment about CCRC' s assistance to defense counsel and their agents penalized Darrell Hines for exercising his right to counsel.

3) The prosecution's comments deprived Darrell Hines of a reliable and individualized sentencing determination.

a) In this case, the testimony of Dr. Auble and Dr. Charvat was at the heart of Darrell Hines' case in mitigation.

b) The prosecution's improper attack on their credibility adversely affected the jury's consideration of mitigating factors and violated the defendant's constitutional right to a reliable and individualized sentencing determination See Lockett v. Ohio, 438 U.S. 586, 98 S. Ct 2965 (1978).

c) The prosecution misstated the role and purpose of CCRC, improperly used the fact that the CCRC had provided assistance to the defense as a basis for impeachment, and then implied to the jury that the testimony of Dr. Auble and Dr. Charvat was biased because of their affiliation with CCRC.

d) In a proceeding where the jury must weigh aggravating and mitigating circumstances and determine whether the defendant shall be sentenced to death, it cannot be said that the prosecution's calculated and repeated

efforts did not affect the verdict beyond a reasonable doubt

g. As a result, Darrell Hines is entitled to habeas corpus relief

23. In violation of the Sixth, Eighth, and Fourteenth Amendments, Darrell Hines' death sentence is arbitrary under United States v. Jackson, 390 U.S. 570, 88 S. Ct 1209 (1968), and unconstitutional.

a. Prior to re-sentencing, Mr Hines and the prosecution agreed that Mr. Hines should enter a plea of guilty and be sentenced to two consecutive life sentences in order to avoid proceeding with the re-sentencing trial.

b. The prosecution's sentencing offer establishes that it has no compelling interest in executing Mr. Hines and that a lesser sentence is appropriate under the circumstances. There are less restrictive means of punishing Darrell Hines than imposing the death sentence.

c. Moreover, the prosecution's sentencing offer demonstrates that it does not believe that Mr. Hines's case merited the death penalty.

d. However, because the trial court believed that Darrell Hines should get the death penalty, he forced both the prosecution and Mr. Hines to re-sentencing.

e. As a result, the death sentence infringes upon Mr. Hines' fundamental right to life and is

arbitrary. Darrell Hines is entitled to habeas corpus relief

24. In violation of the Sixth, Eighth, and Fourteenth Amendments, the trial court's rejection of the prosecution's offer to sentence Darrell Hines to consecutive sentences of life imprisonment was unconstitutional.

a. Prior to re-sentencing, Mr. Hines and the prosecution agreed that Mr. Hines should enter a plea of guilty and be sentenced to two consecutive life sentences in order to avoid proceeding with the re-sentencing trial.

b. Upon presenting this agreement to the trial court on June 20, 1989, the trial court refused to accept two consecutive life sentences for Mr Hines and insisted that the parties proceed to the re-sentencing hearing.

c. Regarding its decision, the trial court stated, "I think [Mr. Hines' case] is a case that requires, if the jury so finds, the ultimate punishment. I think it's just the plain justice of it." R. Tr. at 3. "I think justice requires the court to reject the proffered plea agreement as to sentencing and we will allow the jury to decide this issue." R. Tr. at 4.

d. The court's rejection of the sentencing offer revealed that the court was indeed biased against Mr. Hines and believed that he should have the death penalty. Because of this bias, the trial court should have been recused.

e. Moreover, the court's rejection of the sentencing offer improperly interfered with the district attorney general's discretion regarding sentencing.

1) Specifically, the district attorney is solely vested with the discretion whether or not to seek the death penalty.

2) Darrell Hines was denied due process and equal protection when the court stripped the district attorney general of his sentencing disc1etion in this case.

3) The district attorney general had exercised his discretion not to seek the death penalty in this case, as evidenced by the prosecution's offer to sentence Mr. Hines to consecutive life sentences and by the fact that the district attorney general had not filed notice of the prosecution's intent to seek the death penalty, as required by Tenn. R. Crim. P. 12.3(b).

f. As a result, Darrell Hines is entitled to habeas corpus relief.

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26. In violation of the Sixth, Eighth, and Fourteenth Amendments, prior to the resentencing trial, the court failed to grant a continuance when the prosecution failed to provide timely notice of aggravating circumstances, and where Darrell Hines was prevented from seeming attendance of necessary out of state witnesses.

a. Prior to the re-sentencing trial, Darrell Hines filed two motions to require the prosecution to provide written notice of aggravating circumstances pursuant to Tenn R Crim. P. 12.3(b).

b. The prosecution failed to respond to these motions until just one week before trial.

c. Darrell Hines filed a motion for a continuance on June 20, 1989 based on the prosecution's failure to give notice of the aggravating circumstances and difficulties in obtaining the cooperation and attendance of out-of-state witnesses. (Obtaining the necessary court orders and subpoenas could not be accomplished unless the trial court granted Mr.. Hines' motion for a continuance.)

d. Rule 12.3(b) contains mandatory language - written notice of aggravating circumstance must be filed not later than 30 days plior to trial and the court must grant the defendant a reasonable continuance of his trial if the notice is not timely

e. The trial court denied Mr Hines' motion for a continuance claiming that "You wouldn't be in any better shape four months from now than you would be now."

f. The trial court's failure to grant the continuance was in error and prejudiced Mr. Hines. Mr. Hines had a due process liberty interest established by Tenn. R. Crim. P 12.3(b) which was violated by the trial court. As a result, Mr. Hines is entitled to habeas corpus relief.

27. In violation of the Sixth, Eighth, and Fourteenth Amendments, Darrell Hines' conviction and death sentence is unconstitutional because the empaneling of the jury at both the guilt/innocence trial and at the re-sentencing trial was improper.

a. During voir dire at the guilt/innocence trial, the court failed to properly prohibit the participation of Sheriff Weakley in the selection of the jury where it was likely that the Sheriff would testify for the prosecution and that this premature exposure to the jury would lend the Sheriff a prejudicial aura of credibility.

b. During voir dire at the guilt/innocence trial, the court failed to properly sequester the jury panel on the night of January 6, 1986, prior to the conclusion of voir dire on January 7, 1986. As a result, juror Sandra Kilgore improperly exposed the jury to extraneous information See ¶¶27(b), 29, incorporated by reference.

c. During voir dire, the cout failed to order a mistrial or to seek to correct the state's incorrect presentation of the definitions of the elements of the charge, burdens of proof, and definitions of sentencing terms. Specifically, the state incorrectly stated that it was entitled to a fair trial. See Tr. at 15. The state also incorrectly stated on several occasions that in some circumstances the death penalty was required.

d. During voir dire at the guilt/innocence trial, the court failed to order a mistrial following prejudicial statements made by potential jurors,

including but not limited to juror Anderson's statement that it was a "brutal murder" and juror Winn's statement that it was a "horrendous act" See Tr. At 23-26.

e. During voir dire at the guilt/innocence trial, the court failed to strike juror Cothan who was biased against Darrell Hines.

1) Cothan was related to the victim in this case - the victim was married to juror Cothan's second cousin. Tr. 171.

2) Cothan claimed that he could tell whether a person was lying if he could look in their eyes as he spoke. For this reason, Cothan wanted the witnesses to look at the jury as they testified. Tr. 146-147.

3) In addition, Cothan had served together with another juror as a magistrate on the "county court" .. See Tr. 1.

f. At the re-sentencing trial, the prosecution impermissibly struck jurors in violation of Batson v. Kentucky, 476 U.S. 79, 106 S Ct. 1712 (1989).

g. At the re-sentencing trial, the trial court impermissibly struck jurors who expressed concern about the death penalty. See Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct 1770 (1968); Adams v. Texas, 448 U.S. 38, 110 S.Ct. 2521 (1980).

1) During voir dire at the re-sentencing trial, Juror Citro was questioned about his thoughts on the death penalty. Citro indicated that he

was not sure about the death penalty. R. Tr. 18-36.

2) The trial court asked juror Citro if, in regard to imposing the death penalty, there was "a reasonable possibility that your personal beliefs might affect or will affect your decision" R. Tr. 27. Juror Citro responded that he believed that his personal beliefs might affect his decision. Id.

3) However, juror Citro also indicated that he would not automatically vote against the death penalty and that he believed that there were circumstances where the death penalty would be proper R Tr. 29-31.

4) The trial court then struck juror Citro for cause because the court believed that "[his] personal opinions may get in the way of following the law." R Tr. 36.

5) Because juror Citro stated that he could impose the death penalty and merely indicated that his personal beliefs might affect his decision, juror Citro should not have been excused for cause. See Adams v. Texas, 448 US 38, 110 S .Ct2521 (1980) (it is unconstitutional to strike jurors who honestly concede that their personal opinions about the death penalty might affect their decision at sentencing).

h. At the guilt/innocence and re-sentencing trials, the trial court failed to conduct voir dire to expose biases of jurors which prejudiced Darrell Hines, including jurors who were relatives and/or close friends of law enforcement: jurors who had

been victims of crime and/or were close to crime victims; and, jurors who had strong negative feelings about drug and alcohol abuse.

i. At the guilt/innocence and re-sentencing trials, the trial court failed to strike, for cause, those jurors who held some kind of bias against Darrell Hines, his case, or any class or group to which Darrell Hines belongs.

j. As a result, Darrell Hines is entitled to habeas corpus relief.

28. In violation of the Sixth, Eighth, and Fourteenth Amendments and Deck v. Missouri, 544 U.S. (May 23, 2005), the jurors were permitted to observe Darrell Hines in handcuffs and shackles prior to rendering a verdict at the re-sentencing hearing.

a. Mr Hines was restrained with handcuffs and shackles in full view of the jury.

b. Prior to allowing jurors to observe Mr. Hines in handcuffs and shackles, the trial court had made no determination that restraints were justified by a state interest See Deck v. Missouri, supra

c. Displaying Mr. Hines to the jury in physical restraints created an impression that Mr Hines posed a present and future danger.

1) This impression permitted juror's to consider future dangerousness as a non-statutory aggravating circumstance, which is not permissible under Tennessee law.

2) Mr. Hines was unable to rebut the impression of future dangerousness created by the physical restraints.

d. Displaying Mr. Hines to the jurors in physical restraints, created an inference that Mr Hines deserved the death sentence.

e. The use of physical restraints lessened the prosecution's burden of proof.

f. The use of physical restraints shifted the burden of proof to Mr. Hines.

g. The use of physical restraints denied Mr. Hines the opportunity to rebut damaging inferences against him.

h. The use of physical restraints lead to an arbitrary sentencing determination at Mr . Hines' re-sentencing trial.

i. As a result, Darrell Hines is entitled to habeas corpus relief.

29. In violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments, the conviction in this matter is unconstitutional because jurors considered and/or were exposed to extraneous and prejudicial information.

a. At the 1986 guilt/innocence phase, juror Sandra Kilgore contacted her pastor to find out whether the Bible said capital punishment was right or wrong. P. Tr. 66.

1) Juror Kilgore contacted her pastor from home after the jury had been selected. It was "after they said I was going to be on a jury, that we were supposed to be back here at a certain time and in between that time I called and asked him about the scriptures on it" P. Tr 74, 78, 79.

2) The call was made when the jurors "were told to go home and get your things and come back to begin your jury service and that is the period of time which you made your call." P. Tr. 80.

3) Juror Kilgore's pastor gave her scripture verses that supported capital punishment, including the verse that says, "An eye for an eye .. " P Tr. 67.

4) Such extraneous contact tainted the jury and their deliberations. As a result, Darrell Hines was denied his light to a fair trial He is entitled to habeas corpus relief.

30. In violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments and Miranda v. Arizona, 384 US 436, 86 S. Ct 1602 (1966), the introduction of Darrell Hines' post-arrest statements at the 1986 guilt/innocence trial and the 1989 re-sentencing trial was unconstitutional.

a. On June 11, 1985, Darell Hines surrendered to Barren County, Kentucky law enforcement officers who had been searching for Mr. Hines in connection with the murder of the victim at the CeBon motel.

b. Upon his surrender, Mr. Hines was not advised of his Miranda rights by Barren County officials. He was not informed regarding his rights to remain silent or to have an attorney to represent him. Tr. 248.

c. Despite the fact that Kentucky officials did not advise Mr Hines of his rights, they talked to him about the murder and the circumstances surrounding the incident. Tr. 248, 281.

d. As a result of their questions, Mr. Hines told the Sheriff of Barren County that "he took the automobile but he didn't murder the woman." Tr 248, 252.

e. Subsequently, Mr. Hines was transported to Cheatham County, Tennessee.

f. On June 12, 1985, Mr Hines was interrogated by TBI Agent Sherman McGill.

g. Agent McGill did not advise Mr. Hines of his Miranda rights prior to interrogating him, although he asserted that Mr Hines had previously been read and waived his rights. Tr. 371.

h. Agent McGill then took a statement from Mr. Hines regarding his involvement in the murder at the CeBon motel.

i. As a result, the statements obtained by Barren County Officials and TBI Agent McGill were taken in violation of Darrell Hines' right to remain silent and his right to counsel.

j. Because the prosecution did not prove that Darrell Hines knowingly, intelligently, and voluntarily waived these rights, Darrell Hines is entitled to habeas corpus relief

31. In violation of the Sixth, Eighth, and Fourteenth Amendments, Darrell Hines was denied his right to compulsory process and due process by the trial court's failure to have witnesses Norman Johnson and Bill Andrews produced to testify at the re-sentencing hearing. This likewise violated Darrell Hines' rights to present any and all available mitigating evidence in support of a sentence less than death.

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33. In violation of the Fifth, Sixth, Eighth and Fourteenth Amendments, and International Law, the death penalty is unconstitutional.

a. The death penalty is unconstitutional because the discretion to impose death is not closely confined in order to avoid arbitrariness, See Furman v. Georgia, 408 U.S 238, 92 S. Ct. 2726 (1972).

b. The death penalty is unconstitutional because the sentencer does not have unlimited discretion not to impose death. See Lockett v. Ohio, 438 U.S. 586, 98 S .Ct. 2954 (1978).

c. The death penalty is unconstitutional because the death penalty, which is not imposed "fairly, with reasonable consistency." Callins v. Collins, 510 U.S 1141, 1144, 114 S.Ct 1127, 1129 (1994) (Blackmun, J, dissenting from the denial of

cert.), quoting Eddings v. Oklahoma, 455 U.S 104, 112, 102 S.Ct. 869, 875 (1982).

d. As a result, because the death penalty has proven impossible to administer in practice, there is no way to constitutionally administer the death penalty and it should not be imposed "at all" Callins, supra

e. In addition, the death penalty violates International Law.

1) Article 6 of the International Covenant on Civil and Political Rights (ICCPR), GA. res 2200A(XXI), 21 UN. GAOR Supp (No. 16) at 52, UN. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force on March 23, 1976, provides that "Every human being has the inherent right to life... sentence of death may only be imposed for the most serious of crimes. "

2) Article 7 states that "No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment."

3) At least one Justice on the United States Supreme Court has suggested that the long delays inherent in the review of death sentences violate this provision of the ICCPR. See Knight v. Florida, 528 U.S. 990, 120 S.Ct. 459 (1999) (Breyer, J, dissenting from the denial of cert).

f. As a result, Darrell Hines is entitled to habeas corpus relief.

34. In violation of the Eighth and Fourteenth Amendments, execution by lethal injection constitutes cruel and unusual punishment, is tortuous, and violates contemporary standards of decency, as it involves unnecessary, conscious suffering:

a. In Tennessee, the lethal injection protocol involves the use of three separate chemicals: sodium thiopental, pancuronium bromide (pavulon), and potassium chloride.

b. The sodium thiopental used in the process does not adequately anaesthetize an individual prior to the injection of pavulon and potassium chloride, which, absent anesthesia, cause a gruesome and horrifying death of which the individual is conscious

1) Researchers have made clear that the amount of sodium thiopental used in lethal injection is inadequate to produce anesthesia, which requires blood levels of at least 63 mg/L. Almost all lethal injections studied by researchers in a recent study have failed to provide that amount of anesthesia. See Leonidas Koniaris et al, Inadequate Anaesthesia In Lethal Injection For Execution, Lancet 2005: 365:1412-1414.

2) In the only modem-day execution in Tennessee, thiopental blood levels in Robert Coe were only approximately 10 mg/L, which clearly indicates that Robert Coe was not anesthetized when he was executed.

c. Pancuronium bromide is prohibited for euthanizing animals in Tennessee, notably because

it is a paralyzing agent which stops breathing. A person who is not anesthetized, however, would be fully conscious of the extreme pain caused by pancuronium bromide. Pancuronium bromide also serves no legitimate state interest, and it violates due process and the equal protection of the laws for the state to use pancuronium bromide in lethal injections, especially when its use on animals is categorically prohibited.

d. Further, the amount of potassium chloride used in lethal injection is inadequate to stop the heart. The amount of potassium used in the execution of Robert Coe was also inadequate to stop the heart. As a result, any individual lethally injected in Tennessee actually dies from the pancmonium bromide, while at the same time being conscious, given the lack of anesthesia from the sodium thiopental.

e. Consequently, it violates the Eighth and Fourteenth Amendments for Respondent to seek to execute Darrell Hines using sodium thiopental, pancuronium bromide, and potassium chloride. Such a process is cruel and unusual: inflicts and creates the risk of imposing excessive, wanton, and gratuitous suffering: and violates contemporary standards of decency. See Brown v. Crawford, __F 3d __, 2005 US. App. Lexis 8813 (8th Cir. 2005)(Bye, J, dissenting) (detailing Eighth Amendment violation arising from execution protocol involving sodium thiopental, pancuronium bromide, and potassium chloride); See also Brown v. Crawford, 544 US (2005) (Stevens, J, dissenting).

f. Likewise, the use of pancuronium bromide violates the Eighth and Fourteenth Amendments, including Darrell Hines' entitlement to due process of law and to the equal protection of the laws, and the First Amendment as the use of pancuronium bromide precludes access to the courts.

g. As a result, Darrell Hines is entitled to habeas corpus relief.

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35. In violation of the Sixth, Eighth, and Fourteenth Amendments, Darrell Hines' 1986 first-degree murder conviction and 1989 death sentence are unconstitutional because Tennessee's model and death penalty statutes (Tenn. Code Ann. § 39-2-202 through § 39-2-205) are constitutionally defective. The constitutional defects include, but are not limited to:

a. Tennessee's model statue is vague and failed to fulfill the requirements of Article II § 17 which prohibits the enactment of any bill that embraces more than one subject expressed in the title of the bill. Tenn. Code Ann. § 39-2-202 (repealed 1991) contains more than one subject and the title of the statute gives no notice of some of the subjects addressed by the statute. As a matter of due process under the Fourteenth Amendment, Mr. Hines had a protected liberty interest under § 17 which has been violated here.

b. Tennessee's death penalty statute violates the Eighth and Fourteenth Amendments because it provides for the sentence of death by electrocution, which is cruel and unusual.

c. Tennessee's death penalty statute provides insufficient guidance to the jury concerning what standard of proof the jury should use in making the determination that the aggravating circumstances outweigh the mitigating circumstances.

d. Tennessee's death penalty statute does not sufficiently limit the exercise of the jury's discretion, because once the jury finds the existence of one aggravating factor, it can impose a sentence of death no matter what evidence of mitigation is shown.

e. Tennessee's death penalty statute limits the jury's discretion to exercise mercy by requiring the jury to impose a sentence of death if it finds that the aggravating factors outweigh the mitigating factors.

f. Tennessee's death penalty statute fails to ensure that non-statutory mitigating factors are given the same weight as statutory mitigating factors by failing to require that the jury be given written instructions on the equal weight of non-statutoly mitigating factors.

g. Tennessee's death penalty statue does not require the jury to make the ultimate determination that the appropriate punishment is a death sentence.

h. Tennessee's death penalty statute does not require that the jury be instructed in writing that it may impose a life sentence on the basis of mercy alone.

i. Tennessee's death penalty statute does not provide a way to correct, by written instructions or the presentation of evidence, jurors' common misperceptions regarding the actual terms of life sentences and death sentences, the cost of incarceration, the cost of execution, the death penalty's deterrent effect, and the painful nature of death by electrocution.

j. Tennessee's death penalty statute prevents effective review on appeal because it does not require the jury to make specific findings with respect to the presence or absence of mitigating factors.

k. Tennessee's death penalty statute provides for a punishment (death), which is cruel and unusual.

l. Tennessee's death penalty statute is applied in a discriminatory manner- unfairly affecting racial, gender, geographic, economic, and political classes.

m. Tennessee's death penalty statute does not provide an adequate method for proportionality and arbitrariness review by the Tennessee Supreme Court.

n. Tennessee's death penalty statute has been applied by prosecutors in a manner that abuses their discretion because the statutes do not provide uniform standards for application of the death sentence.

o. Tennessee's death penalty statute violates equal protection because it does not provide uniform standards for qualifying jurors for service on capital juries.

p. Tennessee's death penalty statute permits the introduction of unreliable evidence in support of aggravating factors and in rebuttal of mitigating factors.

q. Tennessee's death penalty statute allows the prosecution to make closing arguments to the jury in the penalty phase.

r. Tennessee's death penalty statute does not require that the jury be instructed regarding the consequences of its failure to reach a unanimous verdict in the penalty phase.

s. Tennessee's death penalty statute requires the jury to agree to an unanimous verdict in order to impose a life sentence.

t. Tennessee's death penalty statute violates international law.

1) Article 6 of the International Covenant on Civil and Political Rights (ICCPR), G.A. res 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, UN. Doc. A/6316 (1966),999U.N.T.S. 171, entered into force on March 23, 1976, provides that "Every human being has the inherent right to life . . . sentence of death may only be imposed for the most serious of crimes . . . "

2) Article 7 states that "No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment." At least one Justice on the United States SupremeCourt has suggested that the long delays inherent in the review of death sentences violate this provision of the ICCPR. See Knight v. Florida, 528 U.S. 990, 120 S. Ct. 459 (1999) (Breyer, J., dissenting from the denial of cert.).

u. Tennessee's death penalty statute imposes a penalty, death, that is unconstitutional because it affects the right to life and doesn't promote a compelling state interest

v. Tennessee's death penalty statute does not require that aggravating circumstances be found by a grand jury and included in the indictment.

w. As a result, Darrell Hines is entitled to habeas corpus relief.

36. In violation of the Sixth, Eighth, and Fourteenth Amendments, the proportionality review conducted by the Tennessee Supreme Court was unconstitutional.

a. In reviewing a sentence of death, Tennessee appellate courts are charged with determining whether "[t]he sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant." T.. C.A. § 39-13-206(c)(1)(D)(Supp. 1994): Tennessee Supreme Court Rule 12.

b. At the time of the Tennessee Supreme Court's proportionality review in Mr. Hines' case,

Rule 12 provided that a specified Rule 12 form "shall be completed in its entirety" by the trial court and "included in the technical record" in every case where a defendant has been convicted of first-degree murder. The Tennessee Supreme Court relies on information found in the Rule 12 form as a starting point for its comparative review.

c. The Rule 12 proportionality review form is not part of the 1986 or 1989 technical records in Darrell Hines' case.

d. The Rule 12 forms from other first-degree murder convictions, which were to serve as the baseline for the Tennessee Supreme Court's proportionality review for Mr Hines' case, had not been completed in their entirety at the time of Mr Hines' proportionality review, as required by Tenn. Sup Ct. R. 12.

e. In fact, the Tennessee Supreme Court had access to fewer than 20% of the Rule 12 forms "from similar cases," which were to provide the baseline for the Court's proportionality review in Mr. Hines' case.

f. As a result, the proportionality review process in Darrell Hine' case denied him due process because the material facts used for the determination of proportionality, including his own Rule 12 forms and the Rule 12 forms of other defendants, were non-existent.

g. Therefore, Darrell Hines was denied a meaningful opportunity for proportionality review.

h. As a result, Darrell Hines is entitled to habeas corpus relief.

37. In violation of due process and equal protection under the Eighth and Fourteenth Amendments, the death sentence is unconstitutional because there were no standards for the decision to choose to seek (or impose) the death sentence (both within Cheatham County, and throughout the entire state of Tennessee), nor are there any consistent and objective standards for proportionality review. As a result of these failings, especially in a case where the prosecution has recognized that Darrell Hines ought to be sentenced to life in prison, the death sentence in this case (which impinges upon the fundamental right to life) violates rudimentary notions of due process and equal protection. See Bush v. Gore, 531 U.S 98, 121 S. Ct. 525 (2000).

38. In violation of the Eighth and Fourteenth Amendments, Darrell Hines' death sentence is unconstitutional, as a result of the length of time (20 years) he has been incarcerated under sentence of death following the offense for which he was convicted. The death sentence is therefore unconstitutionally cruel and unusual. See Lackey v. Texas, 514 U.S. 1045, 115 S. Ct. 1421 (1995)(Stevens, J., respecting denial of certiorari).

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40. The cumulative effect of the errors at trial and sentencing, including all errors cited in this petition,

denied Darrell Hines due process of law under the Fourteenth Amendment.

(Docket Entry Nos. 23, 23-1 and 23-2).

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

No.3:05-0002

Senior Judge Haynes

[Filed: March 16, 2015]

ANTHONY HINES	)
	)
Petitioner,	)
	)
v.	)
	)
RICKY BELL, Warden	)
	)
Respondent.	)
	)

O R D E R

In accordance with the Memorandum filed herewith, the Respondent's motion for summary judgment (Docket Entry No. 118) is **GRANTED**. This action is **DISMISSED with prejudice**. Pursuant to 28 U. S. C. § 2253(c), the Court **GRANTS** a Certificate of Appealability on all claims in this action that involves a death sentence.

This is the Final Order in this action.

It is so **ORDERED**.

ENTERED this the 16th day of March, 2015.

/s/ William J. Haynes, Jr.
WILLIAM J. HAYNES, JR.
Senior United States District Judge

APPENDIX C

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT NASHVILLE

Remanded by Supreme Court June 28, 2004

No. M2004-01610-CCA-RM-PD

[Filed: July 14, 2004]

ANTHONY DARRELL HINES	)
	)
v.	)
	)
STATE OF TENNESSEE	)

Appeal from the Circuit Court for Cheatham County
No. 9852 Robert E. Burch, Judge

The opinion of the court in this matter was released on January 23, 2004, and the petitioner filed an application for permission to appeal. On June 28, 2004, our supreme court granted the application and remanded to this court, directing that we reconsider our previous conclusion that "the trial court charged the incorrect version of the aggravating circumstance in Tennessee Code Annotated section 39-2-203(i)(5) (1982)." We have reconsidered this issue and conclude that the trial court utilized the correct version of this statute when instructing the jury at the resentencing hearing as to aggravating circumstances. Additionally, as explained in this opinion on remand, we erred in the

original opinion by stating that our supreme court had addressed, in the direct appeal of the resentencing hearing, whether "instructing an inapplicable version of aggravating circumstance (i)(5) was harmless error." In fact, the court did not do so. In our opinion on remand, we again affirm the post-conviction court's denial of relief, and refile our opinion which has been altered only to reflect our consideration of those matters, as previously explained, set out in the remand order.

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

ALAN E. GLENN, J., delivered the opinion of the court, in which JOE G. RILEY and THOMAS T. WOODALL, JJ., joined.

Donald E. Dawson, Post-Conviction Defender; and Jon Joseph Tucci, Assistant Post-Conviction Defender, Nashville, Tennessee, for the appellant, Anthony Darrell Hines.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; Angele M. Gregory, Assistant Attorney General; Dan M. Alsobrooks, District Attorney General; and B. Dent Morriss, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION ON REMAND

I. BACKGROUND

The petitioner, Anthony Darrell Hines, was originally tried in 1986 in the Cheatham County

Circuit Court for the murder of Katherine Jean Jenkins. The jury found him guilty of first degree felony murder and sentenced him to death. Although the petitioner's 1986 conviction for first degree felony murder was affirmed on direct appeal by the Tennessee Supreme Court, the case was remanded for resentencing because of erroneous jury instructions. State v. Hines, 758 S.W.2d 515 (Tenn. 1988).

On remand, the Cheatham County jury again sentenced the petitioner to death, finding three aggravating circumstances: "[t]he [petitioner] was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person," Tenn. Code Ann. § 39-2-203(i)(2) (1982); "[t]he murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind," id. § 39-2-203(i)(5) (1982); and "[t]he murder was committed while the [petitioner] was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb," id. § 39-2-203(i)(7) (1982). Subsequently, the Tennessee Supreme Court affirmed the petitioner's conviction and death sentence, and the United States Supreme Court denied certiorari. State v. Hines, 919 S.W.2d 573 (Tenn. 1995), cert. denied, 519 U.S. 847, 117 S. Ct. 133, 136 L. Ed. 2d 82 (1996).

The petitioner filed a petition for post-conviction relief on March 4, 1997, which was twice amended. On

May 9, 2002, after evidentiary hearings, the post-conviction court filed its findings of fact and conclusions of law and entered an order denying the petition.

A. Proof Presented at 1986 Trial

The following proof, introduced at the petitioner's original trial in 1986, was set out by our supreme court in affirming the petitioner's conviction:

> Between 1:00 and 1:30 p.m. on 3 March 1985 the body of Katherine Jean Jenkins was discovered wrapped in a sheet in Room 21 of the CeBon Motel off Interstate 40 at Kingston Springs. The victim was a maid at the motel and had been in the process of cleaning the room when she was killed. Her outer clothing had been pulled up to her breasts. Her panties had been cut or torn in two pieces and were found in another area of the room. A $20 bill had been placed under the wrist band [sic] of her watch.
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> The cause of death was multiple stab wounds to the chest. Four deep, penetrating wounds, ranging from 2.5 inches to 6.4 inches in depth, had been inflicted about the victim's chest with a knife similar to a butcher knife or a hunting knife. Other superficial cuts were found in the area of the neck and clavicle. There was also a knife wound which penetrated through the upper portion of the vagina into the mesentery in the lower part of the abdominal cavity. Dr. Charles Harlan who performed the autopsy on the victim's body testified that in view of the

small amount of blood in the vaginal vault it was his opinion the wound occurred at or about the time of death. The victim also had what he described as "defensive wounds" on her hands and arms.

Jenkins had been left in charge of the motel at about 9:30 a.m. At that time the occupants of Rooms 9, 21 and 24 had not yet checked out. When the manager left her in charge she was given a Cheatham County State Bank bag containing $100 in small bills to make change for motel guests as they paid. The bank bag, bloody and empty, was discovered in the room with her body. It was her established habit to lock her automobile at all times and to keep her keys and billfold on her person when she worked. Her car keys, billfold and her 1980 silver-colored Volvo were missing.

On 1 March 1985 defendant had departed by bus from Raleigh, North Carolina. He had been given a non-refundable ticket to Bowling Green, Kentucky and $20 in spending money. The traveling time from Raleigh, North Carolina to Nashville, Tennessee was approximately 17 hours. Prior to his departure he was observed by a witness to be carrying a hunting knife in a sheath which was concealed beneath his shirt. The witness admonished him that he could not carry a knife like that on the bus to which he responded "I never go anywhere naked." "I always have my blade." Sometime in the early morning hours of 3 March 1985 he checked in

and was assigned to Room 9 at the CeBon Motel. He was wearing a green army-type fatigue jacket, fatigue pants and boots. He was next seen at approximately 9:30 a.m. walking in a direction from his room toward a drink machine. At that time he told the manager he was not yet ready to check out. He was also seen sometime prior to 9:30 purchasing a sandwich at a deli-restaurant across the street from the motel. The same witness who saw defendant also saw another stranger there somewhere between 1:30 and 2:30 who she described as taller than defendant with dark hair, kinky looking and wild-eyed. He departed the restaurant in the general direction of the CeBon Motel. The Cheatham County Sheriff testified that he responded to a call to the CeBon Motel at 2:37 p.m. When he arrived on the scene blood spots in the room were beginning to dry and the body was beginning to stiffen. Defendant was seen between 11:00 and 11:30 a.m. walking from the direction of the Interstate toward the CeBon Motel. At 12:40 p.m. a witness saw the victim's Volvo automobile pulling out from the CeBon Motel driveway. It was being operated by a person who appeared to be a man with very short, light colored hair. The vehicle crossed over the Interstate and turned east on Interstate 40. She followed behind and endeavored to catch up but it sped off toward Nashville at a high rate of speed. Defendant was next identified in possession of the car a few miles past Gallatin on Interstate 65, heading in the direction of Bowling Green, Kentucky. A group of young

people first endeavored to help him start the stalled automobile and then gave him a ride to Bowling Green. During the trip to Bowling Green one of these witnesses observed some dried blood on the right shoulder of his shirt. He carried a jacket which he kept folded. After he arrived at his sister's home in Bowling Green[,] defendant told her he had endeavored to pay another day's rent at a motel when he was attacked by the motel operator. He demonstrated to her how he had stabbed the man. He also related to her he had a sum of money. She could not remember whether he said $35,000 or $3,500. Defendant also told his sister's husband he had earned approximately $7,000 working as a mechanic in North Carolina. He displayed a set of keys to a Volvo automobile and explained that a man who had given him a ride attempted to rob him. Defendant purportedly grabbed the steering wheel and when the car ran off the road he grabbed the keys and ran. According to the witness he was wearing an army fatigue jacket which had something large, heavy and bulky in the pocket. The witness had previously seen defendant with a survival knife with a 6½ to 7 inch blade hanging from his belt. When defendant was taken into custody he volunteered the statement that he had taken the woman's car but had not killed her. According to the arresting officer he had not advised the defendant that a woman had been killed prior to the volunteered statement. There was evidence however that defendant was aware he had been

> charged in Tennessee on a murder warrant. The victim's wallet was found wrapped in a thermal underwear shirt a short distance from where her car was found abandoned. The key to Room 9 of the CeBon Motel was found at the site where defendant had been camping out near Cave City, Kentucky. When asked by a TBI agent to tell the truth about the death of Katherine Jenkins[,] defendant stated that if the officer could guarantee him the death penalty he would confess and tell him all about the murder and that he could tell him everything he wanted to know if he was of a mind to. There were marks on the wall of Room 9 at the CeBon Motel apparently made by someone stabbing a knife into the wall. When shown photographs of the marks on the wall defendant responded that they were knife marks. These marks were obviously made by a knife larger than two taken from defendant at the time of his arrest.
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> There is additional evidence in the record incriminating defendant. That summarized above establishes guilt of the conviction offense. A criminal offense may be established exclusively by circumstantial evidence and the record in this case is abundantly sufficient for a rational trier of fact to find defendant's guilt beyond a reasonable doubt.

Hines, 758 S.W.2d at 517-19.

B. Proof Presented at 1989 Resentencing

The following proof was presented during the resentencing and set out by the supreme court in affirming the petitioner's death sentence:

> The State introduced proof that the defendant had previously been convicted of assault in the first degree. A detective who had investigated the case testified that the defendant had inflicted serious physical harm to the victim in this prior case. The State also presented proof that the defendant had stabbed the victim in the present case multiple times with a sharp instrument, probably a knife. Three of these wounds were lethal and had penetrated the victim's chest five to six inches. The pathologist who had performed the autopsy of the victim testified that all the lethal wounds were inflicted at about the same time and that death would have occurred within four to six minutes, most of which time the victim would have remained conscious. Defensive wounds were found on the victim's hands. Her clothing had been pulled up and her panties had been cut in half and removed from her body. About the time of death, and shortly after the infliction of the lethal wounds to the chest, the defendant had inserted a flat object through the victim's vaginal orifice into the vaginal pouch until the instrument penetrated the vaginal dome and passed into the abdominal cavity. A twenty dollar bill had been placed under the victim's

watchband. No semen or any other evidence of ejaculation was found.

At the time of her death, the victim had in her possession a bank bag containing approximately $100 in proceeds from the motel. The empty bag was discovered in the room where the victim's body was found. The victim's automobile was also missing. Around 12:40 p.m. the day of the murder, another employee of the motel saw the vehicle being driven out of the motel parking lot by someone other than the victim.

In mitigation, the defendant presented proof that, while in prison on this conviction, he had presented no serious disciplinary problems and posed no threat to the prison population. The defendant also presented proof of a troubled childhood. His father had abandoned the family when the defendant was young. His mother had an alcohol problem. In his teens the defendant became involved in sniffing gasoline and glue and began to abuse alcohol and drugs. He also exhibited self-destructive behavior. Dr. Pamela Auble, a clinical psychologist, testified that the defendant was suffering from a paranoid personality disorder and dysthymia, or chronic depression. According to Dr. Auble, the defendant would suppress his feelings until they "boiled up" under stress. In her opinion, the defendant, who had returned from turbulent visits with his parents and girlfriend shortly before he committed the murder, was under

> stress when he killed the victim. Dr. Ann Marie Charvat, a sociologist, also testified about the damaging effect of the circumstances of his childhood on the defendant.

Hines, 919 S.W.2d at 577.

C. Proof Presented at Post-Conviction Hearing

Witnesses testifying at the post-conviction hearings included Ken Jones, who testified at the petitioner's 1986 trial and 1989 resentencing hearing that he had found the victim's body; Marion Jones, Ken Jones's wife; and Vernedith White, his girlfriend. Neither Mrs. Jones nor Ms. White had testified previously in guilt or sentencing proceedings

Ken Jones testified via deposition from a nursing home in Hendersonville, Tennessee. In the years following the petitioner's resentencing, Jones suffered a stroke and was confined to a nursing home; therefore, he was unable to testify in person at the post-conviction hearing. He testified that he found the victim's body at the CeBon Motel. He acknowledged that he went to the motel on the day of the victim's murder to rent a room with Vernedith White, with whom he had been having an affair for two years, although at trial he had testified that his reason for being at the motel was to use the restroom. Jones explained that it had been his and Ms. White's custom to rent a room at the CeBon Motel most every Sunday. He usually rented a room from the victim, who was a maid at the motel. He recalled that, on the day in question, he and White had arrived at the motel between 10:00 and 11:00 a.m. Jones could not find anyone at the motel, so he and Ms.

White sat in his van and waited for someone to arrive to rent them a room. They subsequently drove to a nearby restaurant and returned to the motel within fifteen minutes. Jones said that he could see the motel parking lot the entire time he was at the restaurant and never got out of his car while at the restaurant. He said that he found the victim's body within one hour of the time they arrived at the motel. Jones further testified he knew that keys were kept in a box outside the office, so after no one showed up to rent them a room, he retrieved a key from the box.

Upon entering the motel room which had a maid's cart sitting outside, Jones saw the victim's body, immediately ran out of the room, drove across the street to a restaurant, and had someone call the sheriff. He could not recall exactly what he told the person at the restaurant about the victim. Thereafter, he drove Ms. White to her home in Dickson and returned to the motel to discuss his discovery with Sheriff Weakley, whom he said was a friend of his. He presumed that the sheriff knew why he was at the motel that day and admitted he told the sheriff that he was concerned about his wife finding out why he had been there. Jones testified that Sheriff Weakley tried to "put [him] at ease about the problem of being at the motel there with Vern[e]dith." When asked further about this issue, Jones said that he understood Sheriff Weakley would not question him about it. He also understood that none of the attorneys would question him about it, but remained nervous about testifying at the trial. He said that Sheriff Weakley called him the evening of the murder and asked him not to discuss it with anyone. Jones said that he was not contacted by any attorney

prior to his testimony at trial, and his first contact with any attorney occurred when he was called to testify at the trial. Jones testified that he knew nothing concerning the actual murder itself. He stated that he did not see anyone at the motel that morning other than a woman who pulled into the parking lot in either a brown or maroon car. He could not recall testifying at trial that the woman left her car and knocked on the door of the room where he later found the victim.

Marion Jones, Ken Jones's wife, testified at the post-conviction hearing as to her husband's longstanding affair with Vernedith White. She did not remember exactly when she learned of the affair but knew of it by the time of the petitioner's trial in 1986. She and Ken Jones had been married since 1956, and he had been involved in several extramarital affairs. She testified that after Jones suffered a stroke and entered the nursing home, she learned that he had given power of attorney to Ms. White. She also discovered that he had given Ms. White approximately $30,000. She did not know that her husband had testified at the 1986 trial until Connie Westfall, an investigator with the post-conviction attorney's office, contacted her years later. She said that her husband had a temper and had been verbally abusive to her but had never hit her.

Vernedith White, Ken Jones's former girlfriend, testified at the post-conviction hearing that she had neither been called to testify at the 1986 trial nor been contacted by anyone for investigative purposes prior to the post-conviction proceedings. She acknowledged at the hearing that she had been involved in an affair

with Ken Jones for eleven years and was at the CeBon Motel on the day Jones discovered the victim's body. Each week they rented one of two rooms, normally from the manager or the maid, and were usually at the motel from approximately 9:00 a.m. until 12:00 noon.

According to Ms. White, Ken Jones picked her up around 8:00 a.m. on Sunday, March 3, 1985, as was his custom. She lived in Dickson and estimated that they arrived at the motel around 9:00 a.m. They could not find anyone at the motel and waited in the parking lot. She suggested to Jones that they leave and go home or somewhere else instead of waiting, but he did not take her advice. She remembered a woman pulling into the motel parking lot, but did not recall her leaving her vehicle and knocking on the door, as Jones had testified at the 1986 trial. She said they did not leave the motel parking lot to go to the restaurant as Jones had testified. After they had waited awhile at the motel, Jones told her he was going to get a room key from a dish in the office and they would just use the room and leave. Ms. White said that, after Jones returned to the van with a key to room 21, they drove over and parked in front of that room. Jones told her to wait in the van while he went to check the room. Ms. White testified that the curtains to the room were open, and she could see sheets on top of both beds. Jones walked in the room past the beds, saw the victim's body, and ran out of the room. She could see Jones the entire time he was in the room, which was "[n]ot even a minute." He was very scared when he ran out and told her there was a dead woman in the room. She wanted to go inside, but he would not let her. She said that Jones did not have any blood on him when he came out of the room and

returned to the van. She believed that it was approximately 12:00 noon when Jones found the body. They immediately drove to the restaurant and called the sheriff. She was not sure if Jones or a woman at the restaurant actually placed the call. Informed that the emergency call had been made at 2:36 p.m, she said that she must have had her times wrong. Jones drove her home, which was an approximately forty-five-minute drive from the motel, and then returned to talk to the sheriff.

Ms. White testified that she and Mr. Jones had been together at the CeBon Motel on at least 100 occasions prior to March 3, 1985, but they had never before retrieved a key in the manner they did that day. She could not recall if Jones returned the key to room 21. Although she had seen the victim cleaning rooms at the motel on prior occasions, she did not know her name. She recalled that the day of the murder was a warm day, and she and Mr. Jones sat in the parking lot with the van doors open. They neither saw nor heard any suspicious activity at the motel that day prior to Mr. Jones discovering the victim's body. She believed they would have seen anyone who entered or left either room 21 or room 9.

Ms. White said that she and Mr. Jones were co-owners of a sporting goods store and that Sheriff Weakley was a regular customer. She testified that she never discussed the events of March 3, 1985, with Weakley and understood that he had told Jones that it was all right for him to take White home and then return to discuss the matter. She said that her relationship with Jones had ended about two years

after March 3, 1985. According to Ms. White, there was no possibility that Ken Jones had anything to do with the victim's murder.

Sandra Kilgore testified that she served on the jury in the petitioner's 1986 trial. After learning that she had been selected for a jury, she called her pastor from home and asked for biblical scriptures regarding capital punishment. She said that she spoke to her pastor before she was sworn in as a juror in the petitioner's trial. She did not know that the State was seeking the death penalty in the petitioner's case until she came to court for jury service. According to Ms. Kilgore, there was some division among the jurors during deliberation.

Mary Sizemore of the Cheatham County Ambulance Service testified she and her partner went to the CeBon Motel in response to a call from someone at the Donnell Restaurant about a stabbing at the motel. Ms. Sizemore and her partner searched room to room until they came to a room with a maid cart outside. Her partner indicated that the room was open. They entered the room and found the victim lying on her back wrapped in what appeared to be a bedspread up to her neck. The victim's wounds were not readily apparent, and they had to unwrap her and pull up her dress to actually see the wounds. They were not able to find a pulse on the victim. Ms. Sizemore remembered that the man who had reported the stabbing subsequently returned to the scene and talked with the sheriff. She later learned that this man was Ken Jones.

Maxey Jean Kittrell testified that she was working at the CeBon Restaurant on March 3, 1985, when a

man came in and reported a stabbing at the CeBon Motel. She called an ambulance service and reported the stabbing.

J. Kenneth Atkins, one of the prosecutors in the petitioner's original trial in 1986, testified that he was involved both in the preparation for trial and the trial itself. He denied that Sheriff Weakley had asked him not to question Ken Jones regarding his reason for being at the CeBon Motel on the day of the murder, but acknowledged knowing that Jones was at the motel with a woman other than his wife and that Sheriff Weakley was concerned about embarrassing Jones. Atkins said that he had known Jones prior to his involvement in the petitioner's case because he had "prosecuted a guy that sold drugs and resulted in [Jones's] son's death." He testified that Jones did not express any reservation about testifying at the petitioner's trial, and Sheriff Weakley never asked him to limit his questioning of Jones. Atkins acknowledged that he did not interview Vernedith White. In his opinion, trial counsel were not deficient in their representation of the petitioner.

James W. Kirby, a former assistant district attorney general and, at the time of the post-conviction hearing, the Executive Director of the Tennessee District Attorneys' General Conference, testified that he was involved in prosecuting the petitioner at the 1986 trial. He said that Atkins was the prosecutor who talked with Ken Jones and examined him on the witness stand. Kirby acknowledged that he was present at the deposition of Jones taken prior to the post-conviction hearing and had briefly discussed it with Atkins. He

said that the deposition contained testimony that was not brought out at the 1986 trial. He did not recall having any discussions with Sheriff Weakley prior to the petitioner's trial, but it was his understanding that Atkins recalled discussing Jones's situation with Sheriff Weakley. Kirby also testified that in the 1980s most of the juries he was involved with in Cheatham County were dominated by men; however, he recalled one death penalty case where the jury had a female foreperson.

Robert S. Wilson was the first attorney appointed to represent the petitioner, but his representation was short-lived because he was hired by the district attorney general's office approximately two months after his appointment. He said that he represented the petitioner from shortly after his arrest in March 1985 to approximately late June 1985. He began employment with the district attorney general's office on August 16, 1985, and said that he never discussed the case with anyone at that office. He testified that he had recommended Steve Stack as his co-counsel, and Stack was appointed. He knew that Stack had no prior death penalty experience when he recommended him.

Steve Stack represented the petitioner at the 1986 trial and the 1989 resentencing. He had tried two cases to a jury in the twenty months that he had been practicing law prior to his appointment and did not believe he was qualified to serve as lead counsel on the case. Stack estimated that between 60 and 75% of his practice at the time was civil. William Wilkinson was appointed to assist Stack after Wilson was allowed to withdraw. Wilkinson had practiced with Wilson prior

to the time he joined the district attorney general's office. Stack considered himself to be co-counsel in the case, although he performed many of the lead counsel's duties. He spent 38.9 in-court hours and 133.6 out-of-court hours on the petitioner's case. He believed he was paid, at the time of his representation of the petitioner at the trial, $20 an hour for out-of-court time and $30 an hour for in-court time. By contrast, in retained cases he charged between $60 and $75 per hour for his services. At the time of his representation of the petitioner, he did not have an office staff or an investigator. Accordingly, he and Wilkinson did all of the investigation themselves. Although Stack was in private practice during the 1986 trial, he was employed at the public defender's office by the time the case was remanded by the supreme court for resentencing and, as a public defender, was appointed to represent the petitioner at the resentencing.

Stack testified that he obtained a mental evaluation for the petitioner to determine competency issues and whether an insanity defense would be available prior to the original trial, but these services did not cover any mitigation issues. He requested the services of an independent psychiatrist, a private investigator, and an independent mental evaluation, but these requests were denied.

Stack said that he had interviewed many of the witnesses who testified at trial, including the owners of the motel and Sheriff Weakley. He recalled traveling to Bowling Green, Kentucky, but could not remember the specific witnesses he interviewed there. He did not run a criminal background check on Daniel Blair and,

therefore, did not know he had been convicted of theft of livestock, which might have been used for impeachment purposes. He also interviewed Bill Hines, the petitioner's stepfather; Bobby Joe Hines, the petitioner's half-brother; and possibly Barbara Hines, the petitioner's mother. Although he recalled traveling to the home of Victoria Hines Daniel, the petitioner's sister, he did not remember actually meeting with her. He acknowledged that he knew she would testify that she saw blood on the petitioner's clothing, but he did not obtain any information to impeach her testimony. He did not interview the petitioner's former girlfriend, Melanie Chandler, or her mother, Virginia Chandler, both of whom lived in North Carolina.

Stack acknowledged that he did not present all of the mitigation proof that the post-conviction defender had been able to assemble. He pointed out, however, that at the time of the trial and resentencing, he did not have the benefit, apparently referring to counsel representing the petitioner at the post-conviction hearing, of a three-year period of time to investigate the case as well as numerous attorneys and investigators to work on the mitigation proof. He testified that, as an appointed attorney, he did not have the benefit of working on the case as much as he would have liked because he could not afford to do so. However, he felt he had zealously represented the petitioner.

Stack also testified that the defense did not challenge the composition of the jury venire at either the 1986 trial or the 1989 resentencing, saying that it was not considered as an issue at the original trial.

Although he was aware that it may have been an issue at the time of the resentencing, they did not have the necessary time to devote to pursuing it.

Stack said that he did not interview Ken Jones prior to the trial because he had been told by Sheriff Weakley that Jones was at the crime scene for only a very short period of time and did not know anything about the murder itself. Stack testified that he knew at the time of trial that part of Ken Jones's testimony was false or inaccurate. However, he explained that he held Sheriff Weakley in high regard and trusted what he had told him, saying: "I mean, I would take that man's word for anything in the world. He say[]s this hadn't got a dog in the hunt, don't embarrass the man. I wasn't going to embarrass the man." Stack acknowledged that the defense team should have interviewed Jones and that it was "ridiculous for [them] not to have gone to interview him." He said there were discrepancies in Jones's testimony regarding his timing of the events which should have been discovered and developed for the defense. Stack acknowledged that Jones testified at trial that he did not know the gender of the victim at the time of discovery because the victim's body was covered with a cloth or sheet. However, the person who made the emergency call said that a woman had been stabbed.

Stack testified that he became an assistant public defender in 1988 and was appointed to represent the petitioner at resentencing, as were Shipp Weems, the public defender, and Phillip Maxey. As for the defense team's decision to delay their opening statement at resentencing until just prior to their proof, Stack

testified that they discussed this issue, but he did not know why they decided to do so. He said that Maxey, who was the least experienced of the three, gave the opening statement for the defense, and both he and Weems had anticipated a different opening. He testified that the opening did not outline the proof they planned to present, but rather simply asked the jury to listen to their proof. He testified that the defense team made the tactical decision not to present a closing argument because it was their opinion that General Kirby had not "presented a very forceful argument," and they wanted to prevent General Atkins, who was "exceptional in his ability to . . . bring emotions out in a jury," from making a rebuttal argument. Stack said that General Atkins had given a very impassioned closing argument at the original trial, and they wanted to keep him from doing so at the resentencing.

Stack recounted that at resentencing they called Dr. Pamela Auble and Dr. Ann Marie Charvat to testify for mitigation purposes. The two had been recommended by the Capital Case Resource Center, with whom defense counsel worked during the resentencing, and he believed they could explain how the petitioner had become the person he was. Dr. Charvat did not come across as well as they had hoped, and he did not believe the jury had grasped everything she said. Stack said that the defense team did not know the "extent and the nature of the types of abuse that [the petitioner] went through growing up" and that the resentencing jury never saw the background that the petitioner had. Stack further acknowledged that they did not attempt to challenge the petitioner's prior felony conviction in Kentucky because of the time constraints. He

concluded that the public defender's office did not have, and still does not have, the sufficient resources or the time to devote to a capital case.

William G. Wilkinson, who had been practicing law since 1968, testified that he was appointed to assist Steve Stack, who had been in practice a "relatively short time." Wilkinson described his role as "kind of senior counsel" but said that Stack probably did more work on the case than he did. He said he had billed 59.5 out-of-court hours and 34.4 in-court hours on the petitioner's case, but those numbers were very conservative and did not include time he spent traveling to Bowling Green, Kentucky. Wilkinson testified that he believed he had sufficient time to prepare for the petitioner's trial, that he was adequately prepared for trial, and that none of his tactical decisions turned out to be erroneous.

Wilkinson knew that the petitioner's sister, Victoria Hines Daniel, had an alcohol and drug abuse problem and recalled examining her husband, Ernest Daniel, about her drinking problem. He was not aware of any sexual or physical abuse allegations of Mrs. Daniel but acknowledged that information as to this would have been useful. Wilkinson said that the petitioner "may" have told him about the abuse inflicted upon him by his stepfather. He had the petitioner examined by a psychiatrist who determined he was competent to stand trial.

Wilkinson said he did not interview the four people from Kentucky who gave the petitioner a ride and did not know before trial that one of them, Daniel Blair, was going to testify that he saw blood on the

petitioner's shirt. Had he known of the substance of Blair's testimony, he would have checked Blair's criminal record for impeachment purposes. He recalled that Blair testified about his ability to recognize blood and about washing bloodstains out of fabric although he could not recall Blair's exact testimony. He acknowledged that, in hindsight, it would have been helpful to have had an expert refute Blair's testimony about washing out bloodstains.

Wilkinson said that he discussed Ken Jones's situation with Sheriff Weakley and believed that Weakley had told him everything he knew. He did not interview Ken Jones, Vernedith White, or Virginia Chandler and, in hindsight, would liked to have had more time to inquire about why Jones and White sat in front of the CeBon Motel for over three hours on the day of the murder. As for Dr. Harlan's testimony, Wilkinson said that it may have been helpful to have had another pathologist review Harlan's findings.

Regarding the petitioner's jury, Wilkinson said that three women, two of whom he knew, served on the jury and he believed he had adequately prepared for the jury selection. He was not aware of any disparity between the number of women available and the number actually called to serve in Cheatham County. He was aware of some Tennessee case law prior to 1985 where challenges had been made to jury composition based on race or gender.

Shipp Weems was the District Public Defender for the Twenty-Third Judicial District, which included Cheatham County, at the time of resentencing and in that capacity had been appointed to represent the

petitioner at resentencing. He was not involved in the preparation phase of resentencing but assisted in voir dire. Weems confirmed Stack's testimony that they agreed to waive closing argument at resentencing in order to prevent the prosecution from giving a rebuttal argument. He had tried six or seven capital cases prior to the petitioner's resentencing and was aware of the importance of mitigation proof. In hindsight, he felt that much more work should have been done on the petitioner's social history for purposes of mitigation. As to the workload of the public defender's office in 1989, Weems said that the office had three attorneys who each handled approximately 800 cases. Although the office was budgeted to have an investigator, that position was filled by an attorney because the office was only budgeted to have two attorneys, and that number could not handle the entire district. In his opinion, at the time of the petitioner's resentencing, the attorneys in that public defender's office "didn't have the luxury to prepare a misdemeanor case much less a capital case." Weems testified that they were "looking for women" when choosing the jury for resentencing, and concluded that the defense team did not get the jury pool they wanted for the resentencing.

Phillip Maxey, a juvenile court judge at the time of the post-conviction hearing, had been appointed to represent the petitioner at resentencing. At the time, he had been practicing for about five years. Although he had taken several cases to trial, he "knew very little" about capital case representation at the penalty phase. He testified that he interviewed Sheriff Weakley, the investigating officers, and a juvenile court judge in Bowling Green, Kentucky. He also worked

with Drs. Auble and Charvat and the Capital Case Resource Center. He said that the defense team was as prepared as they could have been and that they had been able to negotiate two life sentences for the petitioner, which were denied. He believed they had presented strong mitigation proof and said they waived closing argument in an effort to prevent the State from making a rebuttal argument. They believed that the State would wait until rebuttal to "really throw it all" at the jury. He did not recall any discussions about challenging the jury venire.

Daniel Blair, who testified at the petitioner's original trial, was one of the four people from Kentucky who picked up the petitioner on March 3, 1985, on Interstate 65, after they noticed his car was disabled, and drove him to Bowling Green, Kentucky. Blair was on probation at the time and was not supposed to have left the State of Kentucky, although he was never charged with violating his probation and was told by a Kentucky deputy sheriff that his leaving the state would not be a problem. At the post-conviction hearing, Blair testified that he had seen "what looked like blood" on the petitioner's shirt, although at the trial he had testified that it was blood.

Melanie Chandler, the former girlfriend of the petitioner and a friend of Victoria Hines Daniel, his sister, testified that she and the petitioner had a child, Anthony Scott Hines, who was born January 1, 1981. The petitioner's mother adopted the child when he was two years old. She testified she had last seen the petitioner around February 1985 when he came to her house in North Carolina. When he arrived, he only had

a few items with him, one of which was a small, folding knife she previously had given him. During his visit, they went to a party with some friends of hers, and, as they were returning home, the petitioner and the friend who was driving got into an argument. After the petitioner grabbed the friend who was driving the car, Chandler grabbed the petitioner, who accidentally struck her in the eye, causing bruising. She said that he had never before struck her but had always been protective. Chandler's mother, Virginia Chandler, called the police and forced the petitioner to leave. Later that night, the petitioner appeared at Melanie's window. She allowed him inside, and he hid in her closet for approximately one week before her mother discovered him. Her mother bought the petitioner a one-way bus ticket to Kentucky.

Chandler said that she knew her mother had testified at the petitioner's trial, but defense counsel never contacted her. She acknowledged knowing she was supposed to appear in court at the trial, but she had just had a baby and decided not to do so. She testified that she did not know that the petitioner was on trial for murder. She thought her mother lied at the trial when she stated that she had seen the petitioner sharpening his knife with a bootstrap. She said that her mother later told her that the petitioner had been found guilty of murder and had been executed. She believed the petitioner was dead until the post-conviction defender's office contacted her in 1997 or 1998. Since learning that the petitioner was alive and in prison, she had written him several letters and had visited him in prison.

Robert Ernest Daniel testified that he had been married to Victoria Hines, the petitioner's sister, for about two years. He met the petitioner while the petitioner was on parole in Kentucky and gave him a job doing construction work. The petitioner was a hard worker, and they were friends "[t]o a point." Daniel said that the petitioner carried a small pocketknife with him on the job and also had an "Army type survivor" knife with a fixed blade. He believed that the knife blade was approximately six inches long, with one end serrated and the other sharp. He recalled that the petitioner gave the knife to his brother, Bobby Joe, who kept it in a drawer at their home.

Daniel testified that on March 3, 1985, the petitioner appeared at his apartment, wearing blue jeans, a white t-shirt, an Army jacket, and white tennis shoes. Victoria's birthday was the day before or the day after the petitioner arrived, and the petitioner wanted to buy a grill for her. Daniel gave the petitioner some money because the petitioner did not have enough to purchase the grill. He then drove the petitioner to Park City or Cave City, Kentucky, and dropped him off. Later that night, the police came to his home and questioned him about the petitioner's whereabouts. At the time, he thought the police wanted to question the petitioner about a probation violation, so he "acted stupid." When he later learned that the police wanted to question the petitioner in connection with a murder, he told the police where he had taken the petitioner.

On cross-examination, Daniel said that he testified at the original trial that Victoria only drank occasionally "because she was my wife at the time and

I would be very protective of her." This testimony was inaccurate because Victoria drank heavily. He denied testifying that the petitioner had something bulky in his Army jacket and that he did not know when Victoria's birthday was. He denied remembering seeing the petitioner with a set of car keys or that he had asked the petitioner why he had a Volvo. During a recess, the court ordered Daniel to take a breath alcohol test. Daniel admitted that he had consumed "a couple of beers" before coming to testify at the post-conviction hearing, and the court found him to be in contempt, ordering him to serve twenty-four hours in the Cheatham County Jail.

Victoria Hines Daniel Furlong, the petitioner's sister, testified at both the original trial and the post-conviction proceeding. She said that her stepfather, Bill Hines, was abusive to her, her siblings, and her mother. Her stepfather used "tobacco sticks, belts, belt buckles . . . anything that he could get a hold of to whoop us with." He also drank beer and liquor "all the time" which caused his attitude to change, and the "beatings got worse." She said that the petitioner often attempted to intervene to protect her and their sister, Debbie, which caused the petitioner to be beaten more severely. She recalled one incident where her stepfather knocked the petitioner into the corner of a fireplace, rendering him unconscious. However, medical attention was not sought for the petitioner. Often there was not much food in the house. In addition to the physical abuse, Bill Hines sexually abused her from the age of nine. She and the petitioner began drinking at the age of eleven or twelve. They both also smoked "dope," and the petitioner sniffed

glue. She admitted that she drank heavily from the time she was twelve or thirteen and had only recently stopped drinking. She also said that she was married to Ernest Daniel for five years, during which time he often beat her severely.

Furlong said that her birthday was February 4 and that on March 3, 1985, the petitioner had given her a grill as a belated birthday gift. She said that, if she had testified at the original trial that she saw blood on the petitioner on March 3, 1985, when he arrived at her house, it was because she had been drinking. At the post-conviction proceeding, she testified that the petitioner had fallen in red clay mud prior to arriving at her house and that is what she saw on his clothes. She said she was not interviewed by the petitioner's attorneys prior to the resentencing, and the prosecutors had tricked her into talking to them prior to the original trial by telling her they were the petitioner's attorneys. She said she was drinking whiskey and water when they came to her house and asked questions. She thought they were tape-recording their conversation, but they denied it. She said she later saw a recording device and ordered the men out of her home.

Furlong acknowledged that she was an alcoholic. She did not remember testifying that the petitioner had gotten into a struggle at the motel and did not believe that she had testified as the transcript of the original trial reflected. If the transcript were correct, then she was "[p]robably" lying in 1986 because of her drinking. She admitted that she had never reported any of the sexual abuse by her stepfather. It was her

understanding that her stepfather had continued with his sexual abuse of young girls, including her niece, but she had never reported him to law enforcement officials.

Lee David Miles testified at the post-conviction hearing that he is a transsexual and formerly had been the petitioner's oldest sister, Debbie Hines. According to Miles, the petitioner and Bill Hines were very close until the petitioner was approximately age six and learned that Bill Hines was not his biological father. At that time, the petitioner became resentful toward Bill Hines. Miles saw Bill Hines hit the petitioner with his hands, a belt, a tobacco stick, and a car antenna. Hines beat the petitioner "four or five times a week." Miles related one incident where Bill Hines threw the petitioner, who could not swim, into a partially frozen pond as punishment for throwing tires in the pond. An uncle and Miles had to go in after the petitioner, and Miles pulled him out. Miles also testified that their stepfather got mad at Miles for breaking an antenna off his car. He beat Miles, Furlong, and the petitioner with the antenna to the point that he drew blood. Miles further testified that the petitioner once fell off a stack of hay bales on top of a wagon. He hit his head on the ground and was bleeding, but Bill Hines refused to take him to the doctor. Miles also testified that the petitioner was very protective of his siblings and often intervened during Bill Hines's attacks and abuse. Bill Hines also shot and killed the family dog and her puppies in front of the children.

Miles also testified that Bill Hines sexually abused him four to five times a week from the age of six until

the age of eighteen and that he was a female at the time the sexual abuse occurred. Miles also said that he was raped at the age of sixteen by Bill Hines and that Hines tried to force him to have sex with a friend of his, but Miles "fought with his friend for a while and then his friend got tired and said well I am not going to do this, let's just leave."

Miles said that when the family moved to Bowling Green, Kentucky, the petitioner and Victoria began drinking heavily and the petitioner also began sniffing glue and gasoline and smoking marijuana. The children often ate cereal with water for all three meals because their parents spent their money on beer and cigarettes. However, Bill Hines bought food for Bobby Joe Hines because he was his biological son. Miles never saw Bill Hines strike Bobby Joe. Miles recalled visiting the petitioner at the Green River Boys Camp and the petitioner cried and begged their mother to take him home, but their stepfather refused to let her. After their mother attempted suicide, she left with only Bobby Joe and moved to Illinois. Soon thereafter, Miles left home also. Their mother subsequently returned home after learning that Miles had left. Miles testified that he was never contacted by the defense attorneys, but he tried to contact them to offer to pay their fees.

Connie Westfall, an investigator in the post-conviction defender's office, said that she met with the Hines family and that it took them a "great deal of time" to open up to her. Ms. Westfall estimated that she worked more than 1000 hours on the petitioner's case.

Dr. Pamela Auble, a psychologist specializing in clinical neuropsychology, who had testified at the resentencing, testified also at the post-conviction hearing, saying she first evaluated the petitioner in May 1989. After meeting with the petitioner, she reviewed his social history, as well as his school records, prison records, and records from the Middle Tennessee Mental Health Institute which were provided by defense counsel. Her diagnosis of the petitioner was paranoid personality disorder and dystonia, which is depression.

Dr. Auble said that she did not have enough time prior to the resentencing hearing to develop a trusting relationship with the petitioner. She said she was only given a little over a month to work on the petitioner's case but that, in general, three to four months was optimal, depending on the case. It would have been helpful to have had the petitioner evaluated by an expert in chemical dependency and to have had more information about his social history. She acknowledged that, at the time of resentencing, she knew little about the petitioner's alcohol abuse or the sexual abuse in his family. She testified that Steve Stack "didn't seem very confident in his own abilities," and she believed defense counsel did not have much understanding of the mental health issues in the case.

On cross-examination, Dr. Auble acknowledged that she knew the petitioner's parents drank when they were not at work, suspected that he had suffered physical abuse, and knew that he abused alcohol and drugs. She said she was not aware of the alcoholism in the petitioner's family or of the extent of the abuse

suffered by the Hines children. She believed her diagnosis of the petitioner's emotional problems, of which she testified at the resentencing hearing, was correct. She said that she would liked to have referred the petitioner to an expert on the issue of addiction, such an expert being needed to determine the extent and nature of the alcoholism and drug abuse and the effects these had on the petitioner. She explained that the combination of the history of addiction in the petitioner's family that she now had knowledge of, together with his relatively normal neuropsychological testing, raised the issue that the petitioner may have a "chemical lack of neurotransmitter substance." Dr. Auble said that this was one area of her testimony that would have been different had she had additional time to work on the petitioner's case.

Dr. Ann Marie Charvat, a sociologist and a mitigation specialist, also testified at the petitioner's resentencing hearing and again at the post-conviction hearing, the former being the first capital case on which she had worked. Her first involvement with the petitioner's case was on May 10, 1989, "just a matter of days" after receiving her PhD. Dr. Charvat interviewed the petitioner, several of his family members, and several of his friends prior to the resentencing. She did not obtain any medical records on any of the family members. The petitioner told Dr. Charvat about the physical abuse he and his sisters endured, and she learned of the petitioner's alcohol and drug abuse. Dr. Charvat was not told about the sexual abuse, but she suspected that it had occurred. She said that information about the sexual abuse and the fact that the petitioner tried to be his sisters' protector were

important for purposes of mitigation. Asked if she had overlooked anything in her evaluation of the petitioner, Dr. Charvat said that she had "failed to look at certain factors . . . which include family history, medical records. . . . I would have collected more records. I believe that I did identify that his bond to society had suffered. I failed to tie it to the crime. There are a number of things to investigate that . . . I hadn't."

Dr. Charvat testified, as she had done at resentencing, regarding the petitioner's confinement at Green River Boys Camp in Kentucky, where a method of behavior modification known as grouping was used. The groupings often became physically and verbally abusive. She explained that the bad behavior of one boy in the group caused the entire group to lose privileges. Dr. Charvat testified at resentencing about one incident at Green River where the petitioner and another boy were pushed into sewage. She said that she was aware in 1989, the time of resentencing, that programs using grouping had extensive problems and that there was literature available on this issue. She explained that although the activities and potential abuse at Green River, as they related to the petitioner, could have been extremely important for mitigation purposes, she did not have enough time to further develop those issues.

Dr. Charvat said that she still agreed with the sociological conclusions that were presented to the jury at the resentencing. She believed the weakness was in the way they were presented to the jury and said that "there were many parts of [her testimony] that . . . were not well articulated, not clear." It was also her

opinion that the petitioner's background was not adequately distinguished from that of any other unruly child.

Dr. William Kenner, a psychiatrist, testified that the petitioner suffered from post-traumatic stress disorder ("PTSD"), antisocial personality disorder, status post-head injury, and inhalant abuse. He said that the petitioner was sexually abused by both his stepfather and a maternal uncle and physically abused by his stepfather, opining that the abuse caused the petitioner's PTSD. The physical abuse inflicted upon the petitioner by his stepfather included hitting him in the head with a tobacco stick, whipping him with car radio antennas, throwing him into a pond although he could not swim, and shooting the family dog and her puppies in front of him and his siblings. The petitioner's mother was also a victim of Bill Hines's abuse, and the petitioner often tried to protect her. At the age of eight or nine, the petitioner sustained a head injury when he fell off a wagon of hay and was knocked unconscious. The petitioner did not receive any medical treatment for this injury.

Explaining how PTSD affects the brain, Dr. Kenner said that a person with PTSD repeats or replays traumatic events throughout life and that PTSD can alter a person's character and change his or her behavior. Dr. Kenner testified that in the petitioner, PTSD created a paranoid quality. Dr. Kenner opined that the head injuries the petitioner suffered throughout his life could have caused organic personality syndrome, which made him even more volatile and difficult to manage. The petitioner's abuse

of inhalants such as glue and gasoline also caused damage to his brain. Dr. Kenner concluded that the petitioner's choosing a woman for his victim was inconsistent with the petitioner's personal history, as there was no indication that he had hard feelings toward women.

On cross-examination, Dr. Kenner acknowledged that the petitioner had been in and out of jail since the age of fifteen. He further acknowledged that a report prepared by the Middle Tennessee Health Institute and the Harriet Comb Mental Health Center indicated that the petitioner experienced difficulty in relationships with women, as the result of problems with girlfriends and family interference, exhibited a preoccupation with thoughts of violence, and displayed extreme prejudice toward African-Americans. Additionally, a report prepared by the Tennessee Department of Correction stated that the petitioner, once confined on death row, acknowledged to security personnel that he hated both women and African-Americans. Dr. Kenner testified that although the petitioner said that he hated women, he did not believe him because his behavior indicated differently. He said he had much more information concerning the petitioner than Dr. Charvat did prior to preparing her report for the resentencing. He believed that Dr. Charvat should have interviewed the petitioner's sisters and mother in order to get a true picture of "how bad things were for [the petitioner] growing up."

Dr. Murry Wilton Smith, a specialist in addiction medicine, testified that the petitioner is a Type II alcoholic. He explained that Type II alcoholism, a

primary medical illness based in brain chemistry, is inherited and involves rapid early onset of alcoholism, usually between the ages of nine and twelve, and is associated with antisocial behavior and early legal trouble. Dr. Smith also testified that the petitioner had used inhalant solvents and marijuana. He was aware of the petitioner's low levels of serotonin, which is associated with violent behavior and Type II alcoholism. He said that current treatment for Type II alcoholism, which was not available in 1989, consisted of alcohol and drug treatment, intensive physiotherapy with a counselor, and medication to improve the serotonin level. On recross examination, Dr. Smith acknowledged that although medications to increase serotonin levels were available in 1986, there was not a routine to monitor. He also stated that a characteristic of Type II alcoholics is a lack of motivation to follow instructions or a schedule.

Dr. Paul Rossby, an expert in molecular neurobiology and the study of serotonin, testified that, as a molecular biologist, he studies the chemistry of the brain and the biological basis of behavior. According to Dr. Rossby, serotonin blocks pain and orchestrates inhibition within the brain. Dr. Rossby testified that research of serotonin dated back to at least the 1970s. He further said that there would have been a "tremendous amount" of literature available on serotonin at the time of the petitioner's resentencing in 1989 and a "great deal" of literature available at the time of the petitioner's trial in 1986. He said that low levels of serotonin have been associated with impulsive behavior, but none of the studies has indicated that it causes violence.

Dr. Rossby had a spinal tap performed on the petitioner to determine his serotonin levels, which were "at the extreme low level" of the normal male population. He opined that the petitioner's serotonin levels, coupled with his Type II alcoholism, resulted in the petitioner's being organically impaired and said that the petitioner does not have the biological capacity to control his impulsive behavior. Dr. Rossby said that in a person with low levels of serotonin, once an impulse is triggered, there is no ability to control the impulse. He acknowledged that he did not testify on the issue of serotonin levels until 1999. He first worked on a case involving a serotonin defense in approximately 1992, and was not aware of any expert who had testified on the issue of serotonin prior to the time he was involved with his first case.

Dr. Henry Cellini, an educational psychologist who was offered as a rebuttal witness on behalf of the State, testified that serotonin research began in the 1970s but had only been fully developed in the last fifteen to twenty years. With regard to the petitioner's case, Dr. Cellini testified that the practical application of serotonin levels to behavior was in its "infancy" in the mid-1980s. He said that research indicates that the two primary factors of antisocial personality disorder are impulsive aggression and psychopathic tendencies or thinking.

Two witnesses were presented as to the claims regarding the Green River Boys Camp in Kentucky and its alleged effects on the petitioner. Tammy Kennedy, an investigator with the post-conviction defender's office, said that she interviewed former residents and

staff members. The former residents told her that, when they arrived at camp, they were immediately subjected to grouping, which consisted of several boys surrounding the new resident and physically and verbally abusing him. She said that the former residents told her at times they had sewage detail, which involved two boys holding a resident by the legs and dumping him into the sewage. They were forced to scrub the pavement until their brushes were gone and their hands were blistered. A juvenile specialist who had visited Green River advised Ms. Kennedy that schooling was minimal and that there were reports of physical, sexual, and verbal abuse of the residents. Ms. Kennedy said that several other death row inmates were former residents of Green River.

Dr. David Richart, an expert in the operation of the juvenile justice system and residential treatment facilities in Kentucky, testified that he had investigated Green River in connection with his position as the Executive Director of Kentucky Youth Advocates, Inc. He said that the theory behind creating the juvenile camps was to take youthful offenders out of large, training school facilities and place them in smaller, community-like settings where they would both work and receive therapy consisting of guided group interaction, positive peer culture, and reality therapy. These theories of treatment were based on the fact that juveniles who committed crimes did so for peer-related reasons. The purpose of the therapy was "to turn something negative into something positive." However, problems arose when the state reduced the number of employees, which resulted in the staff allowing the residents to discipline themselves. Dr.

Richart's investigation also revealed that the staff had not received the essential training required for this type of "sophisticated treatment."

Dr. Richart testified that new residents at Green River were first greeted by a group of fifty to sixty boys who encircled the new resident, screaming at and intimidating him. Because the group would surround the new resident so tightly that the staff could not see "what was going on below shoulder height," the new resident was often physically assaulted as well. Dr. Richart explained that residents at Green River were subjected to "grouping" for simple reasons, such as not having a good opinion of themselves or taking an extra packet of sugar at lunch. After becoming convinced that the residents were being harmed "as a result of using these very controversial emotionally and psychologically harassing techniques," Dr. Richart became concerned about the youths' psychological state and the damage that might occur. He recalled having to transport some youths to mental institutions because they experienced "psychotic breaks" while at camp. Dr. Richart said that Green River had compounded the youths' feelings of isolation and had done nothing to contribute to pro-social behavior, and he was not surprised to learn that many of them subsequently went to prison.

In Dr. Richart's opinion, the petitioner's six and one-half months at Green River intensified his criminal tendencies, exacerbated his antisocial tendencies, and made him see the world as a hostile place. Dr. Richart also believed that the petitioner was completely inappropriate for grouping, "because he just wasn't the

kind of person that wanted to talk about his family." Referring to the treatment at Green River as "psychological torture," Dr. Richart opined that it was "probably the worst experience of [the petitioner's] life."

On cross-examination, Dr. Richart acknowledged that some juveniles may have benefitted from Green River and that residents, including the petitioner who had a substance abuse problem prior to going to Green River, would not have had access to drugs or alcohol while there. Dr. Richart read into evidence some of the staff's reports on the petitioner, which characterized him as easily agitated and having a bad temper but also as a capable person, a good worker, and "fairly consistent in his supportive leadership in the group."

Dr. Chris Sperry, the Chief Medical Examiner for the State of Georgia, testified concerning the number and location of stab wounds found on the victim. He had reviewed the victim's autopsy report, photographs of the crime scene, and witness reports of Mary Sizemore and Sheriff Weakley. He testified that there were pools of blood beneath the air conditioning unit and a spot where the victim's body was found, but none between those two areas. Due to the lack of blood in the room, Dr. Sperry concluded that the struggle was "very quick" and may have occurred in less than one minute. He also stated that all of the wounds, except the vaginal wound, were inflicted very rapidly. He opined that the victim remained conscious for about fifteen to thirty seconds following the stab to the heart. He explained that once she lost consciousness, she felt no pain; it was as if she were under anesthesia. As a result of the wounds to her heart, it was not possible

for her to have been conscious for three or four minutes, contrary to Dr. Harlan's testimony. Dr. Sperry further estimated that the victim would have been dead, her heart would have stopped beating, between three and four minutes after she sustained the heart wounds. On cross-examination, Dr. Sperry acknowledged that the stab to the heart could have occurred last, and, if so, the victim could have been conscious until that time.

Dr. Sperry also testified that it was possible that the assailant had blood transferred onto his or her person because the victim had blood on the inside of her legs, and it appeared that someone with bloody hands had gripped her legs. It also appeared that the victim had been dragged to the area where her body was found, which would also have caused a transfer of blood from her to the assailant. He said that blood is difficult to wash out of clothing and that if someone committed a stabbing, washed off the blood, and then immediately got into a vehicle, there would usually be traces of blood transferred to the vehicle. Dr. Sperry testified that the wound to the victim's vagina occurred at or after the time of death. He said that the infliction of this type of wound was "an indicator of some kind of mental problem dealing with . . . women. Hatred or anger towards women." He also said that this type of injury was a "very specific expression of power of a female victim."

Dr. Charles W. Harlan, who performed the victim's autopsy, testified that he strongly disagreed with Dr. Sperry's opinion that the victim's attack and injuries occurred in less than one minute. He said that the

victim lost 950 "cc's" of blood into her chest. He explained that the heart pumps between 25 and 30 "cc's" per heartbeat "under an optimum situation," but the stroke volume would be "gradually diminishing" because of blood squeezing the victim's heart, as the result of the wound, and the loss of blood itself. He further testified that an individual is usually conscious approximately 80% of the time that it takes to bleed to death. He believed that it would have taken considerably longer than thirty seconds to a minute for the victim to bleed to death, opining that "she probably lived a minimum of four to five minutes and that she would have been conscious for 80 percent of that time. It's possible that she lived longer than that, up to ten to fifteen minutes, but at least a minimum of four to five minutes." In his opinion, the victim's vaginal wound was inflicted at or near the time of her death, and there was no way to know for certain whether she was conscious at the time it was inflicted. Dr. Harlan acknowledged that Dr. Sperry had testified in contradiction to his testimony in nine cases, including the petitioner's case.

The proof at the post-conviction hearing on the issue of the jury venire consisted of five witnesses and a report prepared by a statistician, Dr. James M. O'Reilly, which concluded that there was an underrepresentation of women on the jury venire for Cheatham County for years 1979 to 1990. During the pertinent years, the female population of Cheatham County accounted for 50.6 to 50.7% of the total population. By contrast, the percentage of women in the Cheatham County venire was between 10 and 22%.

Connie Westfall, of the post-conviction defender's office, testified that she had investigated the issue of the composition of the jury pool at the petitioner's 1986 trial as well as his resentencing. At the time of her investigation, only one of the three jury commissioners for the relevant time period, C.E. Dunn, was able to meet with her. Dorris Winters, one of the commissioners, was deceased; and the other, Martha Adkisson, was confined to a nursing home and unable to be interviewed because of her mental condition. Dunn provided Westfall with an affidavit because he had suffered a stroke and was unable to travel to court. Basically, his affidavit stated that they used the voter registration list as the exclusive source of obtaining people for the purpose of filling the jury box, and the jury commissioners met every two years to fill the jury box. Ms. Westfall testified that she also interviewed Delores Moulton, Lloyd Harris, the tax assessor, and trustees. She said that when she first spoke with Mr. Harris, he recalled using the voter registration list and later remembered that they may have used property lists and the telephone book.

Dorothy Jones, the Cheatham County Trustee, said that she had been the trustee for six years at the time of the post-conviction hearing and, prior to her service as trustee, her husband was the trustee. She had worked in the trustee's office since 1982. During her years of employment in that office, no one ever had been allowed to remove the tax roll books from the office. She acknowledged, however, that the tax records were public records and anyone could come into the office and review them.

Betty Balthrop, the Cheatham County Property Assessor, said that she had occupied that position since 1988 and had worked in the office since 1978. Ms. Balthrop testified that since her employment in the assessor's office, no one had physically removed the tax records for the purpose of copying them. She acknowledged that the tax records were public records which exist in Nashville and elsewhere in the state.

Delores Moulton was the Cheatham County Circuit Court Clerk from 1990 to 1998. Previously, she served as the deputy clerk, beginning in 1972. Her father, Lloyd Harris, was the Cheatham County Circuit Court Clerk prior to her tenure. Ms. Moulton testified that the jury commissioners met every two years to charge the jury box and that the voter registration list was their major source of obtaining names because they had more access to it. She stated that they started out "randomly, maybe, every sixteenth one or twentieth one down and wr[o]te the name and address on a little jury ticket." She explained that each of the jury commissioners took a different section of the list and worked independently. While they were charging the box, the only names taken out were the names of those known to be deceased. She further explained that at the end of the two years, the names in the box were not removed, but new names were added.

After the jury box was charged, they gathered the jury list as needed. Either a child under the age of ten or Ms. Moulton, wearing a blindfold, picked the names out of the box. Ms. Moulton testified that the jury commissioners sat together while compiling the names. Names of deceased persons were discarded. If school

was in session, schoolteachers' names were set aside. Students away at college were omitted from the list. Also, at times, if they knew a woman had just had a baby, they removed her name. They compiled a list of 150 or more names, which made up the sheriff's venire. The sheriff summoned these persons to court where each was assigned a number. The judge then drew twelve numbers out of a box, and those persons comprised the grand jury. Ms. Moulton testified that Dorris Weakley was the sheriff in 1986 and 1989. During his administration, only thirty to fifty prospective jurors out of 150 actually appeared in court as summoned, but the percentages increased drastically under the next sheriff's administration.

On cross-examination, Ms. Moulton testified that, in addition to the voter registration list, they also used the telephone book and tax records to randomly select names, although the voter registration list was the main source. She believed they followed the Tennessee statutes in gathering and preparing the jury venire. She said the commissioners "never discriminated anyone because of race, color, or nationality or men or women." She recalled that Martha Adkisson complained if she thought too many women were being put on the list; however, she believed Ms. Adkisson's reason for doing so was "to equal out . . . the men and the women."

Lloyd Harris, Delores Moulton's father, served as the Cheatham County Circuit Court Clerk prior to Ms. Moulton, occupying the position for twenty-four years. He testified that the three jury commissioners met every two to three months to select names, and he

recalled Junior Dozier, the tax assessor, providing him with names from the tax lists. He used the telephone book for this purpose, although most of the names were taken from the voter registration list. He testified that Martha Adkisson was a schoolteacher and sometimes set aside the names of teachers because, at that time, there was a shortage of substitute teachers. He also recalled that, a few times during harvest season, a farmer's name was set aside, and, during the 1970s and 1980s, it was easy for women with young children to get out of serving on the jury, but that changed through the years. He stated that the jury box was charged about every two years. He testified that they went down the voter registration list, wrote down every twentieth or twenty-fifth name, placed it in the box, and tried not to discriminate against any class of potential jurors. Harris said that the voter registration list, the tax list provided by Dozier, and the telephone books were the only sources used in the jury selection at the time of the petitioner's 1986 trial and in 1989.

II. ANALYSIS

In his argument on appeal, the petitioner has set out five claims, three asserting that counsel were ineffective at his 1986 trial, his 1989 resentencing hearing, and on the direct appeal of his conviction, one asserting that he was prejudiced because of the exclusion of women from the jury panel, and one claiming that imposition of the death penalty violates various of his rights afforded by the federal and state constitutions.

A. Standard of Review

In order to determine the competence of counsel, Tennessee courts have applied standards developed in federal case law. See State v. Taylor, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that the same standard for determining ineffective assistance of counsel that is applied in federal cases also applies in Tennessee). The United States Supreme Court articulated the standard in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), which is widely accepted as the appropriate standard for all claims of a convicted petitioner that counsel's assistance was defective. The standard is firmly grounded in the belief that counsel plays a role that is "critical to the ability of the adversarial system to produce just results." Id. at 685, 104 S. Ct. at 2063. The Strickland standard is a two-prong test:

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

Id. at 687, 104 S. Ct. at 2064. The Strickland Court further explained the meaning of "deficient performance" in the first prong of the test in the following way:

> In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. . . . No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.

Id. at 688-89, 104 S. Ct. at 2065. The petitioner must establish "that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms." House v. State, 44 S.W.3d 508, 515 (Tenn. 2001) (citing Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996)).

As for the prejudice prong of the test, the Strickland Court stated: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694, 104 S. Ct. at 2068; see also Overton v. State, 874 S.W.2d 6, 11 (Tenn. 1994) (concluding that petitioner failed to establish that "there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different").

Courts need not approach the Strickland test in a specific order or even "address both components of the inquiry if the defendant makes an insufficient showing on one." 466 U.S. at 697, 104 S. Ct. at 2069; see also Goad, 938 S.W.2d at 370 (stating that "failure to prove

either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim").

By statute in Tennessee, the petitioner at a post-conviction relief hearing has the burden of proving the allegations of fact by clear and convincing evidence. See Tenn. Code Ann. § 40-30-210(f) (1997). A petition based on ineffective assistance of counsel is a single ground for relief, therefore all factual allegations must be presented in one claim. See Tenn. Code Ann. § 40-30-206(d) (1997).

The procedure which we follow in our review was explained in detail by our supreme court in State v. Honeycutt, 54 S.W.3d 762, 766-67 (Tenn. 2001):

> The issue whether a petitioner has been denied the effective assistance of counsel is a mixed question of law and fact. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999). A trial court's findings of fact are entitled to substantial deference on appeal unless the evidence preponderates against those findings. See Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997). Under this standard, appellate courts do not substitute their own inferences for those drawn by the trial court, and questions concerning the credibility of the witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the trial judge. Henley, 960 S.W.2d at 579. However, this Court reviews de novo the application of law to those factual findings to determine whether counsel's performance was deficient or whether the

> defendant was prejudiced by that deficiency. Thus, when evaluating a claim of ineffective assistance of counsel, we review the trial court's findings of fact under a de novo standard, accompanied by a presumption that the findings are correct unless the preponderance of the evidence suggests otherwise, while the trial court's conclusions of law are reviewed de novo with no presumption of correctness. Fields v. State, 40 S.W.3d 450, 457-58 (Tenn. 2001).

B. Ineffective Assistance of Counsel at 1986 Trial

The petitioner alleges that trial counsel were ineffective in failing to interview and effectively cross-examine Ken Jones, to object to Sheriff Weakley's participating in the voir dire of prospective jurors, to discover impeachment evidence, and were ineffective as well because of their lack of experience and resources. We will review these claims.

1. Failure to Interview and Effectively Cross-Examine Ken Jones

The petitioner argues that trial counsel sanctioned the perjured testimony of Ken Jones at the 1986 trial and failed, at the request of Sheriff Weakley, to effectively cross-examine Jones, these amounting to an actual conflict of interest for the trial attorneys. As we have set out, Ken Jones acknowledged at his deposition in 1999 that he was at the CeBon Motel on the day of the murder to rent a room to be with his paramour. However, at the petitioner's 1986 trial, Jones had testified that he was at the motel because he needed to

use the restroom. Trial counsel Stack acknowledged that he knew Jones was at the motel to rent a room with his paramour, but did not cross-examine him on this fact. Sheriff Weakley did not want Jones to be embarrassed and had assured trial counsel that Jones knew nothing about the murder.

To support his arguments as to counsel's limiting his cross-examination of Jones, the petitioner relies upon State v. Thompson, 768 S.W.2d 239 (Tenn. 1989), in which our supreme court explained the broad scope of the right to counsel:

> Plainly, an accused is entitled to zealous representation by an attorney unfettered by a conflicting interest. To establish a denial of the sixth amendment right to counsel, it is sufficient to show that an actual conflict existed. If an attorney actively represents conflicting interests, no analysis of prejudice is necessary; it is presumed that his divided interests adversely affected his representation.

Id. at 245 (citations omitted). The petitioner argues that trial counsel had an actual conflict of interest and, therefore, the second prong of the Strickland test, requiring a showing of prejudice, is eliminated, the petitioner contending that "an actual conflict or an apparent conflict may exist anytime a lawyer cannot exercise his or her independent professional judgment free of 'compromising influences and loyalties.'" State v. Culbreath, 30 S.W.3d 309, 315 (Tenn. 2000) (citing State v. Tate, 925 S.W.2d 548, 554 (Tenn. Crim. App. 1995)). Additionally, the petitioner argues that "[w]hen the fairness of a trial is compromised by an actual

conflict of interest, the conclusion that finding that trial counsel's performance, *per se*, deprived the defendant to his right to a fair trial is not subject to 'harmless error analysis.'"

As to these arguments, the State responds that any agreement between Sheriff Weakley and trial counsel not to question Ken Jones about his reason for being at the CeBon Motel did not constitute an actual conflict and, thus, cannot warrant a presumption of prejudice. The petitioner disputes this analysis, citing Rule 1.7(b) of the Rules of Professional Conduct which provides:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) The lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) The client consents in writing after consultation[.]

Tenn. Sup. Ct. R. 8, RPC 1.7(b) (2003).[1] The petitioner notes that the disciplinary rule that was in effect in 1986 provided that "[a] lawyer shall decline proffered employment . . . if it would likely involve the lawyer representing differing interests." He responds to the State's contention that prejudice was not shown by

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[1] As the petitioner notes in his brief, this rule is a part of the new Rules of Professional Conduct that came into effect in March 2003.

arguing that all he has to do is "undermine confidence in the outcome of the trial." See Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 1566, 131 L. Ed. 2d 490 (1995). To support his argument in this regard, the petitioner cites Jones v. Kentucky, 97 F.2d 335 (6th Cir. 1938), where the court determined that the conviction of the defendant was based in part on perjury as follows:

> that "the fundamental conceptions of justice which lie at the base of our civil and political institutions" must with equal abhorrence condemn as a travesty a conviction upon perjured testimony if later, but fortunately not too late, its falseness is discovered, and that the state in the one case as in the other is required to afford a corrective judicial process to remedy the alleged wrong, if constitutional rights are not to be impaired.

Id. at 338.

This court has explained the showing which must be made to establish that counsel had a conflict of interest:

> An actual conflict of interest is usually defined in the context of one attorney representing two or more parties with divergent interests. An actual conflict of interest occurs when "regard for one duty tends to lead to [the] disregard of another." State v. Reddick, 230 Neb. 218, 222, 430 N.W.2d 542, 545 (1988); see Gardner v. Nashville Housing Authority, 514 F.2d 38 (6th Cir. 1975). In Ford v. Ford, the court declared a

> conflict of interest when an "attorney was placed in a position of divided loyalties." 749 F.2d 681, 682 (11th Cir. 1985).
>
> The right to counsel requires complete devotion to the interest of the defendant. State v. Knight, 770 S.W.2d 771 (Tenn. Crim. App. 1988). When counsel is unable to provide a "zealous representation . . . unfettered by conflicting interests," there has been a breach of the right to the effective assistance of counsel. State v. Thompson, 768 S.W.2d 239 (Tenn. 1989). In Cuyler v. Sullivan, the United States Supreme Court held that because there is a breach of loyalty in cases involving a conflict of interest, prejudice is presumed. 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980). Unless the petitioner can establish that his counsel "actively represented conflicting interests," he can not established [sic] the constitutional predicate for his claim. Id. at 350. To establish a claim based upon conflict of interests, the conflict must be actual and significant, not irrelevant or "merely hypothetical." Howard Clifton Kirby v. State, No. 03C01-9303-CR-00074 (Tenn. Crim. App., at Knoxville, Sept. 28, 1994).

Jesse Jameel Dawan v. State, No. W2001-00792-CCA-R3-CD, 2002 WL 1483210, at *2 (Tenn. Crim. App. Mar. 11, 2002), perm. to appeal denied (Tenn. Sept. 23, 2002).

The petitioner argues that because the attorneys allowed Mr. Jones to testify falsely at the 1986 trial

and agreed not to question Mr. Jones about why he was present at the CeBon Motel on the day of the murder, his trial was not a true adversarial proceeding and that, by not investigating, his attorneys missed an opportunity to develop and present additional defense theories.

The Eighth Circuit explained the limited circumstances in which prejudice may be presumed:

> We believe there is much to be said in favor of holding that Cuyler's [Cuyler v. Sullivan, 446 U.S. 335, 100 S. Ct. 1708 (1980)] rationale favoring the "almost per se rule of prejudice" does not apply outside the context of a conflict between codefendants or serial defendants. As Strickland explained, some finding of prejudice is an essential factor in proving ineffective assistance of counsel. Under Cuyler, loyalties divided between codefendants necessarily will infect the very core of at least one's defense, and prejudice should be presumed. However, the same impact will not be found automatically in other conflict situations. The latter may have such limited consequences that they will not invariably demonstrate prejudice and "a denial of the 'right to have the effective assistance of counsel.'" Cuyler, 446 U.S. at 349, 100 S. Ct. 1708 (quoting Glasser [v. United States], 315 U.S. [60], 76, 62 S. Ct. 457 [(1942)]. In those cases, sound reasoning supports requiring a defendant to prove actual prejudice under the Strickland standard in order to meet the

> constitutional standard for ineffective assistance of counsel.

Caban v. United States, 281 F.3d 778, 782 (8th Cir. 2002).

While trial counsel did not question Ken Jones as to why he was at the motel, this fact does not result in their representing the interests of Sheriff Weakley. Accordingly, to prevail on this claim, the petitioner must establish that he was prejudiced by trial counsel's not ascertaining and cross-examining Ken Jones's true reason for being at the motel, thus depriving the jurors of this knowledge in addition to missing the opportunity to cross-examine Vernedith White. We will review this argument along with the related claim, made at oral argument, that trial counsel could have created residual doubt by properly dealing with Ken Jones.

In his reply brief, the petitioner points to various portions of the testimony to establish that Ken Jones, himself, might have killed the victim. The petitioner explains how he might have gotten the keys to the victim's car without confronting her, surmising "because of the warmth on the day at issue, [the victim] was wearing only a very light weight summer shift" and that her maid's coat, where she kept her keys and wallet, "was most likely hanging on the cleaning cart, which gave [the petitioner] easy access." The petitioner argues that the statements of Jones and White that they neither saw nor heard anything "that was connected with the crime" are "unbelievable." The victim's schedule to clean the rooms, the petitioner asserts, was such that she would not have reached

room 21, where she was killed, until "noon," resulting in Jones and White at least seeing her. The petitioner notes that, at the 1986 trial, Jones said he did not know whether the victim was male or female, yet he told Maxey Kittrell, another witness, that "a woman had been stabbed" and told White that "there was a dead woman in there." This testimony, according to the petitioner's argument, demonstrates "knowledge that no one but the perpetrator could have known." The petitioner points to other discrepancies, including Jones's testimony that the "randomly selected key" which he picked up "just happened to open the lock on room 21, the murder room"; and the fact that White testified that she and Jones were at the motel from 9:00 am until the emergency call, which was made at 2:36 p.m., leaves two hours of Jones and White's activities "unaccounted for." This time period, according to the petitioner's theory, allowed Jones to drive White to Dickson and "to cleanse himself and his van of the victim's blood." The petitioner surmises that Jones then returned to the motel to determine whether the motel owners had come back and found the body, and discovered that this had not occurred. Finally, according to this argument, "by belatedly announcing that a woman had been stabbed to death, Jones successfully removed himself as a suspect and thereby, with the help of his friend the sheriff, was able to keep himself from being investigated by the defense and by the prosecution."

The post-conviction court concluded that the petitioner would not have benefitted from the claim that Ken Jones had killed the victim:

Petitioner insists that his trial counsel should have attempted to cast suspicion upon Ken Jones as a possible perpetrator of the crime and that counsel was ineffective in allowing Mr. Jones to "perjure" himself in hiding his true reason for being at the hotel. While counsel had brought out that there had been another stranger in the area of the CeBon Motel that morning, they did not develop any reason for the jury to consider that someone other than Petitioner committed the offense. Petitioner asserts that his trial counsel should have suggested that perhaps, Ms. Jenkins had thwarted Mr. Jones['s] planned sexual liaison with Ms. White and that this was a motive to kill her. He further suggests that their theory might explain the twenty dollar bill under Ms. Jenkins's watch band [sic] and the careful insertion of the knife into her vagina. Trial counsel knew of the actual reason for Mr. Jones['s] presence at the motel, having learned it from the sheriff. Of course, they could have investigated further and learned the details of the encounter but the Court does not find that the information would have been particularly useful. To present such a farfetched theory with no supporting evidence would cause a loss of credibility by the defense at trial. Admittedly, if trial counsel had learned the exact details of the movements of Mr. Jones, Ms. White and the person(s) in the maroon or brown car, they could have "muddied the water" concerning the details of the discovery of the body. This would have been insufficient, however, to cast reasonable

> doubt on the guilt of Petitioner given the fact that Petitioner was shown by the proof to have taken the deceased's car keys, presumably from her billfold (in which she habitually kept them), and stolen her car. To accept Petitioner's argument that he didn't kill the deceased but merely took her car keys from her body (which was wrapped in a blanket) and stole her car would require the trial jury to depart from speculation and enter into fantasy.

Missing in the petitioner's theory, which the post-conviction court described as "farfetched," is any motive or reason why Jones would want to kill the victim, except the petitioner's suggestion, recounted in the post-conviction's findings, that the victim was killed because she had "thwarted" the sexual liaison between Jones and White. In effect, the petitioner argues that fifty-one-year-old Ken Jones, accompanied by his twenty-one-year-old girlfriend, Vernedith White, following their normal Sunday morning routine and checking into the same motel where they had been together approximately 100 times before and were known by the staff, including the victim, stabbed the victim to death, with Jones driving White to another location, cleaning blood from himself and his vehicle, and then returning to the scene to report the crime and wait for law enforcement officers to arrive. We agree with the post-conviction court that, given the strength of proof against the petitioner, making the argument that Ken Jones was the actual killer would have been "farfetched" and could have resulted in a loss of credibility for the defense.

As our supreme court explained in State v. McKinney, 74 S.W.3d 291 (Tenn. 2002), "'[r]esidual doubt evidence,' in general, may consist of proof admitted during the sentencing phase that indicates the defendant did not commit the offense, notwithstanding the jury's verdict following the guilt phase." Id. at 307 (citing State v. Hartman, 42 S.W.3d 44, 55-56 (Tenn. 2001)). Residual evidence may be that which relates "'to the circumstances of the crime or the aggravating or mitigating circumstances, including evidence which may mitigate [the defendant's] culpability.'" Hartman, 42 S.W.3d at 56 (quoting State v. Teague, 897 S.W.2d 248, 256 (Tenn. 1995)).

We previously have set out the evidence that the petitioner argues could have been used to establish residual doubt, consisting primarily of contrasting testimony from the jury proceedings in 1986 and 1989 and that of Vernedith White at the post-conviction hearing. Asked at the post-conviction hearing about the significance of this testimony, one of petitioner's trial counsel responded to post-conviction counsel: "To be honest with you at this point and time I don't remember putting all of these time periods together as you are, as you have done right now." Thus, most of the information relied upon by post-conviction counsel was before the jury but was not utilized, as post-conviction counsel has done, to make it appear that Ken Jones might have been the perpetrator. The petitioner argues that, had Vernedith White testified in 1986 or 1989, her "eyewitness information . . . very well could have created reasonable doubt in the minds of the jurors and changed the outcome of the trial." We respectfully disagree with this assertion because White said that

Jones was not in the motel room long enough to have killed the victim. Thus, White's testimony would not help the petitioner unless the jurors believed her as to the various times of the events so as to make it appear that Jones could have been the killer, but disbelieved her when she said that Jones could not have killed the victim. While Jones was not truthful in his trial testimony, and its acceptance by trial counsel prevented White from being identified as a witness, their true purpose for being at the hotel would appear to be irrelevant to the guilt, innocence, or punishment of the petitioner. Thus, we concur with the post-conviction court's determination that the petitioner was not harmed by the fact that trial counsel neither discovered Ken Jones's true purpose for being at the motel nor that Vernedith White was with him. See State v. Austin, 87 S.W.3d 447, 459 (Tenn. (while trial court erred in excluding from evidence vice squad report which may have identified other persons with motive to kill the victim, the "essence" of the report was put before the jury during cross-examination of a witness, so the error was harmless). We conclude, further, that the petitioner would not have created residual doubt by arguing that Ken Jones had killed the victim.

2. Failure to Object to Sheriff Weakley's Participation in Voir Dire

The petitioner argues he was prejudiced by the facts that Sheriff Weakley was involved in the voir dire and, because he participated in the investigation, testified at the trial, and "[s]urely . . . possessed an opinion as to [the petitioner's] guilt before the trial and there [was]

a great potential for the sheriff to hand-pick jurors sympathetic to the prosecution." Additionally, the petitioner argues that "a jury could easily associate with the credibility of the sheriff who testified against [the petitioner]." Thus, according to the petitioner, he "was denied due process and a trial by a fair jury." The State responds that, as to this argument, the petitioner included no citations to the record required by Rule 10(b) of this court, which would demonstrate the degree of participation by Sheriff Weakley in the jury selection process. Additionally, the State argues that this issue has been waived because no proof was presented as to it during the hearing on the post-conviction petition. We agree with the State's arguments and conclude that this claim has been waived.

3. Failure to Discover Impeachment Evidence

The petitioner contends that trial counsel were ineffective by failing to discover impeachment evidence that State's witness Daniel Blair, on the day that he had given the petitioner a ride, was on felony probation for theft of livestock; that State's witness Victoria Hines Daniel Furlong was an alcoholic and had been drinking the day she supposedly saw blood on the petitioner's shirt; that State's witness Ernest Daniel also was an alcoholic and had not testified completely truthfully about Furlong's drinking; and that Melanie Chandler would have contradicted her mother's testimony that the petitioner carried a knife which he had been seen sharpening. We will consider these claims.

As to Daniel Blair, trial counsel acknowledged that they did not investigate his criminal history. The

petitioner submits that the combination of the impeachment evidence of Blair's felony, coupled with discrediting his testimony that he saw blood on the petitioner's shirt on the day of the murder, would have affected his credibility. The State argues that Blair's being on probation made him more credible because, in admitting that he had been in Tennessee, he admitted also that he had violated his probation. The post-conviction court found that effectively impeaching this witness would have been unlikely. We agree the petitioner's claim is speculative that Blair successfully could have been impeached with this additional information and conclude, accordingly, that the record supports the post-conviction court's determination.

The petitioner also contends that trial counsel were ineffective in failing to discover that Victoria Hines Daniel Furlong was an alcoholic and had been drinking on the day she testified at the petitioner's trial. At the post-conviction proceeding, she contradicted much of her prior testimony, as we have previously set out. The post-conviction court rejected Furlong's entire testimony as "incredible and worthless." The record supports this determination.

Additionally, the petitioner contends that counsel were ineffective for failing to discover that Ernest Daniel, Victoria Furlong's husband at the time of the petitioner's trial, was not truthful regarding the amount and extent of his wife's drinking. The post-conviction court found Daniel to be in contempt of court at the post-conviction proceeding because he had been drinking prior to testifying. The court found the only fact that it could determine with respect to

Daniel's and Furlong's testimony was that they each lied under oath at either the trial or the post-conviction hearing. Given this fact, the court determined that interviewing either of these witnesses would not have benefitted counsel in impeaching them at trial. The record supports this conclusion.

Counsel testified that they did not interview Melanie Chandler or Virginia Chandler prior to trial. Melanie Chandler testified at the hearing that her mother had animosity toward the petitioner and drank heavily. Melanie Chandler admitted that she was not on good terms with her mother. The post-conviction court noted that Chandler "glance[d] affectionately" at the petitioner during the hearing, making it obvious that she still had feelings for him. In conclusion, the court found that the impeachment value of Melanie Chandler's testimony was "marginal, at best." We concur with this assessment. Accordingly, as to this claim, we agree with the conclusion of the post-conviction court that the petitioner failed to establish prejudice.

4. Lack of Experience and Resources of Counsel

The petitioner contends both that his counsel were too inexperienced to try a capital case and failed to represent him zealously because the compensation provided appointed attorneys was too low. The court determined that these arguments were without merit, and the record supports this conclusion. We have previously held that inexperience of counsel alone does not equate to ineffective assistance of counsel. Anthony J. Robinson v. State, No. 02C01-9707-CR-00275, 1998

WL 538566, at *2 (Tenn. Crim. App. Aug. 26, 1998). Additionally, the argument that the State's compensation of appointed counsel contributed to the ineffectiveness of counsel has been rejected by this court. See Henry Eugene Hodges v. State, No. M1999-00516-CCA-R3-PD, 2000 WL 1562865, at **21-22 (Tenn. Crim. App. Oct. 20, 2000), perm. to appeal denied (Tenn. Mar. 26, 2001).

C. Ineffective Assistance of Counsel at 1989 Resentencing

As to this proceeding, the petitioner argues that counsel were ineffective in failing to investigate his background and present effective mitigation proof; failing to challenge the heinous, atrocious, and cruel aggravating circumstance; and failing to give a closing argument. We will consider these claims.

1. Mitigation Proof

a. Family Background/Proof of Abuse

In its opinion affirming the 1989 resentencing of the petitioner, our supreme court set out the mitigation evidence presented in his behalf:

> In mitigation, the defendant presented proof that, while in prison on this conviction, he had presented no serious disciplinary problems and posed no threat to the prison population. The defendant also presented proof of a troubled childhood. His father had abandoned the family when the defendant was young. His mother had an alcohol problem. In his teens the defendant became involved in sniffing gasoline and glue

> and began to abuse alcohol and drugs. He also exhibited self-destructive behavior. Dr. Pamela Auble, a clinical psychologist, testified that the defendant was suffering from a paranoid personality disorder and dysthymia, or chronic depression. According to Dr. Auble, the defendant would suppress his feelings until they "boiled up" under stress. In her opinion, the defendant, who had returned from turbulent visits with his parents and girlfriend shortly before he committed the murder, was under stress when he killed the victim. Dr. Ann Marie Charvat, a sociologist, also testified about the damaging effect of the circumstances of his childhood on the defendant.

Hines, 919 S.W.2d at 577. The supreme court characterized the petitioner's mitigation proof as "extensive." Id. at 584.

The petitioner argues that counsel should have called his family members to testify regarding the physical, sexual, and emotional abuse he suffered. Counsel did not call family members as witnesses at resentencing, presenting mitigation proof of the petitioner's abuse through two experts. The petitioner further contends that additional experts should have been employed, and additional proof regarding his treatment at Green River Boys Camp should have been presented. The post-conviction court noted that the detailed mitigation evidence presented at the post-conviction hearing was prepared by two attorneys, three investigators, and several medical experts over a three-year period, stating that that period of time was

"far in excess of the time which would have been allowed to prepare for even a capital trial." The court found the additional mitigation proof of the petitioner's family background and abuse, presented at the post-conviction hearing, was essentially the same as that presented at the resentencing, simply more in-depth. Accordingly, the court determined that even with the additional mitigation proof, the aggravating circumstances would have continued to outweigh the mitigating circumstances.

This court has stated that "[a]n investigation so inadequate as to fail to formulate an 'accurate life profile' of the defendant may be the basis for post-conviction relief. Yet the extent of investigation required is largely dependent upon information supplied by the defendant." Bates v. State, 973 S.W.2d 615, 633 (Tenn. Crim. App. 1997)(citing Jackson v. Herring, 42 F.3d 1350, 1367 (11th Cir. 1995); Burger v. Kemp, 483 U.S. 776, 795, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987)).

In Goad v. State, 938 S.W.2d 363 (Tenn. 1996), our supreme court set out the relevant factors to consider when determining if prejudice had resulted from a trial attorney's failure to present mitigating evidence during the penalty phase of a capital trial. There, the court found that counsel's failure to investigate, explore, and prepare the proposed mitigating evidence was not "'the result of reasonable professional judgment' and 'fell outside the wide range of professionally competent assistance.'" Id. at 371. If counsel's performance is deficient, the court must next determine if the petitioner has discharged the duty of proving that

prejudice resulted from counsel's performance. Id. The court explained how this determination is made:

> [If the] alleged prejudice under Strickland involves counsel's failure to present mitigating evidence in the penalty phase of a capital trial, several factors are significant. First, courts have analyzed the nature and extent of the mitigating evidence that was available but not presented. Second, courts have considered whether substantially similar mitigating evidence was presented to the jury in either the guilt or penalty phase of the proceedings. Finally, the courts have considered whether there was such strong evidence of aggravating factors that the mitigating evidence would not have affected the jury's determination.

Id. (citations omitted).

In the present appeal, the post-conviction court found that counsel were not deficient in their representation of the petitioner, saying that "[i]n view of the overwhelming strength of the aggravating factors in Petitioner's case . . . the mitigating factors would not have affected the jury's determination. The jury would be required by logic and common sense to find that the aggravating circumstances outweighed the effect of the mitigating factors beyond a reasonable doubt." Accordingly, under the principles enunciated in Goad, the post-conviction court found that the petitioner was not prejudiced by the fact that counsel at the sentencing hearing had not presented mitigating evidence in the detail that was done at the post-

conviction hearing. We conclude that the record supports this determination.[2]

b. Serotonin Defense

The petitioner contends that resentencing counsel were ineffective for failing to present evidence of his serotonin deficiency. As to this claim, the post-conviction court determined that, based upon the testimony of the witnesses at the hearing, the serotonin evidence was not reasonably available to the petitioner's resentencing counsel, since it was not

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[2] As supplemental authority, the petitioner relies on Wiggins v. Smith, 539 U.S. 510, 516, 123 S. Ct. 2527, 2532, 156 L. Ed. 2d 471 (2003), where the petitioner had sought post-conviction relief from his capital conviction, alleging that trial counsel "had rendered constitutionally defective assistance by failing to investigate and present mitigating evidence of his dysfunctional background." Trial counsel utilized the defense that another person had killed the victim and did not present evidence they had showing the petitioner's "limited intellectual capacities and childlike emotional state . . . and the absence of aggressive patterns in his behavior, his capacity for empathy, and his desire to function in the world[.]" Id. Counsel elected not to use specific information that the petitioner and his siblings were left "home alone for days, forcing them to beg for food and to eat paint chips and garbage," and that he had been "gang-raped" on more than one occasion. Id., 539 U.S. at 516-17, 123 S. Ct. at 2533. The court determined that trial counsel's decision not to utilize background information was one which "did not reflect reasonable professional judgment" and that the petitioner had been prejudiced as a result, there being a reasonable probability that the jury would have returned with a different sentence, had they known this information. Id., 539 U.S. at 534, 123 S. Ct. at 2541-42. In the present appeal, trial counsel presented substantial evidence at the sentencing hearing, although not to the extent that was done at the post-conviction hearing. We find that Wiggins is not applicable.

known to them and could not have been discovered by the exercise of reasonable diligence.

Dr. Rossby acknowledged that he did not work on developing this issue in a criminal case until approximately1992, three years after the petitioner's resentencing trial. Further, he said that he did not actually testify on the issue of serotonin until 1999, ten years after the petitioner's resentencing trial, and he knew of no one who had testified on this issue prior to that. As the post-conviction court stated: "Petitioner's counsel at re-sentencing could not reasonably have been expected to search for experts on a subject which they did not know existed." The record supports this conclusion.

c. Heinous, Atrocious, and Cruel Aggravating Circumstance

The petitioner argues that counsel were ineffective at resentencing because they did not challenge the testimony of Dr. Charles Harlan regarding the length of time the victim was conscious and could have lived or experienced pain following the stabbing. At resentencing, the petitioner offered the testimony of Dr. Chris Sperry who disagreed with Dr. Harlan's testimony regarding the victim's consciousness and amount of time she could have survived following the wound to the heart. Dr. Sperry opined that the victim would have been conscious only fifteen to thirty seconds following the stab wound to the heart, as opposed to Dr. Harlan's testimony that the victim lived four to five minutes following the wound to the heart and would have been conscious approximately 80% of that time.

The post-conviction court found counsel were deficient in failing to investigate and introduce testimony to refute Dr. Harlan's conclusions, determining, however, that the petitioner was not prejudiced by the lack of such testimony. The court found that the jury would have been much more persuaded by the testimony of the pathologist who performed the autopsy, as opposed to one who drew conclusions from the autopsy report and photographs. Accordingly, the court concluded that the testimony of Dr. Sperry would not have resulted in reasonable doubt that the victim was conscious during the apparently final wound to the vagina, both pathologists concluding that this wound occurred at or shortly after the time of death. Moreover, the court determined that even if the jury did have reasonable doubt in this regard and did not find this aggravating factor applied, the remaining two aggravating factors were still strong enough to outweigh the mitigating factors as presented at the post-conviction hearing.

As to this issue, the State also argued that even if the victim were unconscious at the time the vaginal wound was inflicted, the jury could have found that the nature and infliction of that wound constituted depravity of mind and that the depraved state of mind of the petitioner existed at the time the fatal blows were inflicted upon the victim. Our supreme court has held that depravity of mind of the murderer may be inferred from acts committed at or shortly after the time of death. See State v. Williams, 690 S.W.2d 517, 529-30 (Tenn. 1985). The court explained that the nature of injuries to a victim may constitute depravity of mind under the holding in Williams:

> The willful insertion of a sharp instrument into the vaginal cavity of a dying woman (or a woman who had just died) satisfies the requirements of Williams, supra. If committed prior to death, these acts constitute torture and thereby also support a finding of depravity. If they occurred close in time to the victim's death, they allow the drawing of an inference of the depraved state of mind of the murderer at the time the fatal blows were inflicted on the victim.

Hines, 919 S.W.2d at 581. We conclude that the record supports the findings of the post-conviction court as to this issue.

d. Closing Argument

The petitioner contends that his counsel were ineffective in not making a closing argument at resentencing. As to this claim, all three of the petitioner's resentencing counsel testified that their decision to waive closing argument was based on the fact that they did not want the State to present a rebuttal argument. The law is clear that this court may not second-guess the tactical and strategic choices made by trial counsel unless those choices were uninformed because of inadequate preparation. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982); see also Bell v. Cone, 535 U.S. 685, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002); State v. Menn, 668 S.W.2d 671, 673 (Tenn. Crim. App. 1984). The post-conviction court concluded that trial counsel had made a tactical decision to waive closing argument to prevent the State's then being able to make a strong rebuttal argument. The record supports this conclusion.

e. Assistance of Counsel on Direct Appeal

The petitioner also contends that his appellate counsel were ineffective in failing to challenge the constitutionality of the jury instructions at his 1986 trial. He did not present evidence of this issue at the post-conviction hearing, and the post-conviction court did not address it in its order. Moreover, the petitioner did not cite to the record or to any legal authority in making this skeletal argument. Accordingly, this issue is waived. Tenn. R. App. P. 27(a)(7); Tenn. Ct. Crim. App. R. 10(b).

D. Underrepresentation of Women in the Cheatham County Jury Venire

The petitioner contends that there was an underrepresentation of women in the Cheatham County jury venire from which his petit jury was chosen. Because this issue was not presented on direct appeal, it has been waived. Tenn. Code Ann. § 40-30-206(g). Post-conviction proceedings may not be used as a substitute for an appeal to review or correct errors of fact or law allegedly committed by a court of competent jurisdiction. State v. McClintock, 732 S.W.2d 268, 271-72 (Tenn. 1987). However, the petitioner presents this argument in the additional fashion that counsel were ineffective in failing to challenge the composition of the jury at trial. Accordingly, we will review this matter as a claim of ineffective assistance of counsel.

The court noted that at the petitioner's 1986 trial, three of the jurors were women, but there was only one female juror at the 1989 resentencing hearing. Relying

on State v. Strouth, 620 S.W.2d 467, 470 (Tenn. 1981), the post-conviction court found that there was no underrepresentation of women on the 1986 jury. As to the 1989 resentencing, the court determined that women were systematically excluded, but the petitioner had failed to show that he was prejudiced by the fact that resentencing counsel did not seek to quash the venire.

Defendants are entitled to a petit jury selected from a representative cross-section of the community. Taylor v. Louisiana, 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975). The Taylor Court held: "the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." Id., 419 U.S. at 538, 95 S. Ct. at 702. In Duren v. Missouri, 439 U.S. 357, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979), the Supreme Court set forth a three-pronged test for determining whether a jury was properly selected from a fair cross-section of the community:

(1) the group alleged to be excluded is a "distinctive" group in the community;

(2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and

(3) this under-representation is due to systematic exclusion of the group in the jury-selection process.

Id., 439 U.S. at 364, 99 S. Ct. at 668. Based upon the report of Dr. James O'Reilly which provided that the percentage of women in Cheatham County between 1979 and 1990 was 50.6 to 50.7% of the population, but the percentage of women in the Cheatham County jury venire for that same time period was between 10 and 22%, the State conceded that the first two prongs of the Duren test had been satisfied. However, the State argues that the petitioner did not prove the third prong of the Duren test, that the underrepresentation resulted from systematic exclusion of women in the jury selection process.

As to this issue, the post-conviction court found that the petitioner had made a prima facie showing of exclusion:

> By the numerical disparity, Petitioner has established a prima facie case of systematic exclusion. The proof by the State that jurors were selected from a presumably gender balanced voter list does not overcome the fact of the dramatic under-representation of women. In fact, there is no proof which explains the disparity. There can be no explanation other than that the process, for whatever reason, systematically excluded women from Petitioner's 1989 re-sentencing trial.
>
> The Court finds that women were systematically excluded from the jury panel which sentenced Petitioner to death in the 1989 proceeding.

The State disagrees with this conclusion, relying on State v. Nelson, 603 S.W.2d 158 (Tenn. Crim. App. 1980), which explained that "the courts have been reluctant to find the existence of a prima facie case based on statistics alone, instead requiring proof of a substantial disparity coupled with systematic exclusion." Id. at 163 n.3. The Nelson court determined that the systematic exclusion prong of the test had been established by proof that the statistical disparity occurred not just occasionally but in every venire for a period of four years, explaining that "[s]uch evidence 'manifestly indicates that the cause of the underrepresentation was systematic that is, inherent in the particular jury-selection system utilized.'" Id. at 165 (quoting Duren, 439 U.S. at 366, 99 S. Ct. at 669). Thus, the court in Nelson found that the jury selection process had not been carried out in conformity with the statutory requirements and explained the proper method of selecting the venire:

> [U]tilization of wholly subjective criteria in a selection process such as Tennessee's will invite a challenge to the array whenever it appears to produce jury venires that are not representative of the community at large. This problem could be avoided by utilization of a random selection or "key number" system, which is in use in many areas of Tennessee, as well as most other states and the federal system. Use of a "key number" applied to county registration lists which are reflective of a cross-section of the community may occasionally produce a venire which appears to underrepresent some identifiable group in the community. However, when an

> objective selection criterion of this nature is used, such an underrepresentation can be shown to be the result of mischance rather than the deliberate, systematic exclusion of any group.

Id. at 167 (citations and footnote omitted).

We respectfully disagree with the post-conviction court's finding that the underrepresentation of women compels the conclusion that women were systematically excluded from the venire. While the petitioner argues on appeal that "the state offer[ed] no plausible explanation" for the disparity and, therefore, he is entitled, as matter of law, to prevail, we disagree with this claim. In fact, substantial proof is in the record as to how the panel of prospective jurors was selected; and neither the petitioner nor the post-conviction court has identified illegalities or deficiencies in the process. Rather, both simply relied upon percentages of women called to jury duty to conclude that women had been systematically excluded. In Truesdale v. Moore, 142 F.3d 749, 755 (4th Cir. 1998), the court explained that a statistical disparity does not, by itself, establish systematic exclusion of a group from the jury pool:

> Truesdale has not advanced any direct evidence of "systematic exclusion" of African Americans from the venire. Instead he seeks to rely on the bare assertion of substantial under-representation to prove that there was a structural or systemic impediment to voter registration by African Americans. We have consistently required more to make out a violation of the "fair cross-section" guarantee. . . . To allow Truesdale to substitute

> evidence of substantial underrepresentation for evidence of systematic exclusion would go a long way towards requiring perfect statistical correspondence between racial percentages in the venire and those in the community. Such a rule would exalt racial proportionality over neutral jury selection procedure.

Accordingly, we conclude that the post-conviction court erred in finding that women had been systematically excluded from the venire.

Regarding this issue as a post-conviction claim, the petitioner must prove that his counsel were ineffective under Strickland because counsel did not challenge the jury venire at trial and/or resentencing. Attorney Stack testified that he had no reason to suspect that women were underrepresented in the jury venire in 1986, and, in fact, three women were on the petitioner's 1986 jury. Moreover, counsel testified that they did not use all of their peremptory challenges at the 1986 trial. Our supreme court has found that the presence of three women on the petit jury constitutes a "fair representation of women on the jury and that is all that is required by the Constitution of the United States." Strouth, 620 S.W.2d at 470. The record supports the post-conviction court's finding that the petitioner was not prejudiced because counsel did not challenge the 1986 venire.

With respect to the 1989 resentencing, Attorneys Weems and Stack testified that they considered challenging the jury venire but knew to do so would cost a vast amount of time. The State argues that counsel were not deficient "to forgo the preparation of

a time-consuming jury challenge in favor of developing further mitigating proof, which could spare [their] client the death penalty. All defense attorneys must use their discretion to decide how best to use the time given to them to prepare the defense." The State argues that such decisions are strategic in nature and should not be second-guessed by this court. As to this issue, the post-conviction court found that the petitioner had failed to establish that he was prejudiced by counsel's decision not to challenge the venire. Testimony of the petitioner's 1989 counsel was that this was a strategic decision made in an effort to best utilize the time which they had for trial preparation. Based upon the testimony regarding this issue, the record supports the determination of the post-conviction court that the petitioner failed to show that he was prejudiced because counsel did not seek to quash the 1989 jury.

The petitioner further contends that the post-conviction court erred in ignoring his claims that the grand jury forepersons were selected separately by the judge and the two forepersons, serving from 1979 to 1990, both were male. We note that the only proof as to this claim consisted of short portions of the testimony of Delores Moulton and Lloyd Harris. The petitioner's counsel were not questioned as to the matter, and we have been unable to locate in the petitioner's ninety-six-page proposed findings of fact and conclusions of law, filed after completion of the hearings, a reference that a claim had been presented and the post-conviction court was to rule on the foreperson selection process. Thus, we cannot conclude that this claim was presented to the post-conviction court separately and not simply as additional

information in support of the petitioner's jury claim which we have reviewed. Accordingly, the claim is waived.[3]

E. Apprendi v. New Jersey and Ring v. Arizona Arguments

The petitioner argues that his death sentence is invalid under the principles set forth in Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), making two basic arguments: the Tennessee Supreme Court substituted its judgment for that of the jury when it determined that it was harmless error for the trial court to have instructed the jury with a former version of the Tennessee Code with respect to the (i)(5) aggravating circumstance; and (2) Apprendi and Ring require the aggravating circumstances to be set forth in the indictment, which was not done in his case. The State responds that neither Apprendi nor Ring may be retroactively applied to the petitioner's case on collateral review, and neither decision extends to Tennessee's capital sentencing procedure or requires

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[3] As to this issue, we note that our supreme court, in State v. Bondurant, 4 S.W.3d 662, 675 (Tenn. 1999), explaining the holdings in Rose v. Mitchell, 443 U.S. 545, 99 S. Ct. 2993, 61 L. Ed. 2d 739 (1979), and Hobby v. United States, 468 U.S. 339, 104 S. Ct. 3093, 82 L. Ed. 2d 260 (1984), said that the method of selecting the grand jury foreperson is relevant only as to reviewing the composition of the grand jury as a whole, the "role of the grand jury foreperson in Tennessee [being] ministerial and administrative."

that aggravating circumstances be set forth in the indictment.

This court has declined to apply Apprendi and Ring retroactively to support a request for post-conviction relief. See, e.g., Stephen Michael West v. State, No. E2001-02520-CCA-R28-PC (Tenn. Crim. App. Sept. 6, 2002), perm. to appeal denied (Tenn. Jan. 31, 2003); Gregory Thompson v. State, No. M2001-02256-CCA-28M-PD (Tenn. Crim. App. Oct. 3, 2001), perm. to appeal denied (Tenn. May28, 2002). In so holding, this court has relied on federal cases, concluding that Apprendi did not create a new constitutional right that is retroactively applicable. See Burch v. Corcoran, 273 F.3d 577 (4th Cir. 2001), cert. denied, 535 U.S. 1104, 122 S. Ct. 2311, 152 L. Ed. 2d 1065 (2002); McCoy v. United States, 266 F.3d 1245 (11th Cir. 2001), cert. denied, 536 U.S. 906, 122 S. Ct. 2362, 153 L. Ed. 2d 183 (2002); In re Clemmons, 259 F.3d 489 (6th Cir. 2001); United States v. Moss, 252 F.3d 993, 997 (8th Cir. 2001), cert. denied, 534 U.S. 1097, 122 S. Ct. 848, 151 L. Ed. 2d 725 (2002). Thus, we conclude Apprendi and Ring should not be given retroactive application on collateral review. Regardless, we discern no violation of Apprendi and Ring. As for the petitioner's argument that the ruling of the United States Supreme Court in Ring means that the holding of our supreme court in Dellinger is no longer viable, our supreme court has concluded otherwise. State v. Holton, 126 S.W.3d 845, 863 (Tenn. 2004) ("Ring provides no relief to the defendant and does not invalidate this Court's holding in Dellinger.").

Additionally, the petitioner argues that, at the resentencing hearing, the court "instructed the jury using the 1989 [version of Tenn. Code Ann. § 39-2-203(i)(5)], but then found the error harmless." Further, according to the petitioner, "an aggravating factor, found by the 1989 re-sentencing jury that supported the death penalty was that '[t]he murder was especially heinous, atrocious or cruel in that [sic] involved torture or serious physical injury [sic] beyond that necessary to produce death.'" Additionally, in this regard, he argues that "[t]he Tennessee Supreme Court held that it was error for the trial court to have instructed the jury using the 1989 language, but then found the error harmless . . . [and] [i]n so doing, the court substituted its own judgment finding that the evidence supported a finding of torture, and further found that had the jury been properly instructed it would have found depravity." As we will explain, we respectfully disagree that the petitioner has accurately described the jury instructions or the holding of our supreme court in the direct appeal of this matter.

First, contrary to the petitioner's assertions, the jury was instructed using the 1982, not the 1989, version of this statute and found, as one of the aggravating circumstances, that "the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind,"[4] as instructed

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[4] In State v. Middlebrooks, 995 S.W.2d 550, 569 (Tenn. 1999), our supreme court explained that the "phrase "depravity of mind," in the 1982 version, was replaced with the phrase "serious physical abuse beyond that necessary to produce death" in the 1989 version. At the resentencing hearing, the post-conviction court properly

by the 1982 statute, and not the language of the 1989 statute that, instead of "depravity of mind," involved "serious physical abuse beyond that necessary to produce death." Accordingly, since the jury was not instructed using the 1989 version of Tenn. Code Ann. § 39-2-203(i), our supreme court could not determine, as argued by the petitioner, that its use was error but harmless. Further, the petitioner's argument that this error in instructing the jury results in there being "no way to determine whether the jurors relied on the torture prong or the serious physical injury [sic] prong in making its determination" is without merit. In fact, the jury could not have relied on the "serious physical abuse" prong, for this phrase is found only in the 1989 version of the statute, which was not used in the resentencing.

Further, we disagree with the petitioner's claims as to our supreme court's findings as to harmless error in the direct appeal of the resentencing hearing. Although he argues that the court found "it was error for the trial court to have instructed the jury using the 1989 language, but then found the error harmless," this portion of the review, by our supreme court, was as to the adequacy of the instruction for "depravity," which had been defined by the trial court as meaning "moral corruption; wicked or perverse act." Hines, 919 S.W.2d at 587. Concluding "that this aggravating circumstance has been constitutionally applied under the circumstances of this case and is not unconstitutionally

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instructed the jury using the 1982 version of Tenn. Code Ann. § 39-2-203(i), which was in effect at the time of the offenses. See id. at 556 n.6.

vague," the court explained that "even if the instructions given by the trial judge were unconstitutional . . ., the failure to give a constitutionally proper instruction on depravity was harmless error beyond a reasonable doubt." Id. Thus, contrary to the petitioner's argument, instead of finding error by the trial court which was harmless, our supreme court determined that even if the resentencing court had committed error in this regard, the error would have been harmless. Thus, the petitioner's arguments that "the aggravating factor that made [the petitioner] eligible for death in this case was found by a court and not the jury" is without merit, for it is based upon a misreading of the opinion of our supreme court in the direct appeal of the resentencing in this matter.

Finally, the petitioner argues that because the aggravating circumstances that resulted in his being eligible for the death penalty were not set forth in the indictment and returned by the grand jury as required by Apprendi, his sentence must be set aside. However, Apprendi specifically noted the Fifth Amendment right to indictment by a grand jury has not been applied to the states under the due process clause of the Fourteenth Amendment. Apprendi, 530 U.S. at 77 n.3, 120 S. Ct. at 2355. Accordingly, our state supreme court's holdings that there is no constitutional violation due to the failure to allege the aggravating circumstances in the indictment are consistent with Apprendi. See Holton, 126 S.W.3d at 863; State v. Carter, 114 S.W.3d 895, 910 n.4 (Tenn. 2003); State v. Dellinger, 79 S.W.3d 458, 467 (Tenn.), cert. denied, 537

U.S. 1090, 123 S. Ct. 695, 154 L. Ed. 2d 635 (2002). This issue is without merit.

F. Constitutional Arguments

The petitioner argues that his sentence violates various provisions of the Constitutions of the United States and the State of Tennessee and international law. As the State correctly responds, these arguments have either been previously determined on direct appeal or were waived by the petitioner's failure to make the argument on direct appeal. To the extent the petitioner argues that if an issue was not raised by prior counsel, counsel provided ineffective assistance of counsel, the petitioner has failed to raise any constitutional claim with respect to the death penalty that has not already been rejected by the appellate courts of this state. See, e.g., State v. Stevens, 78 S.W.3d 817, 850-52 (Tenn. 2002), cert. denied, 537 U.S. 1115, 123 S. Ct. 873, 154 L. Ed. 2d 790 (2003); State v. Keen, 31 S.W.3d 196, 233 (Tenn. 2000), cert. denied, 532 U.S. 907, 121 S. Ct. 1233, 149 L. Ed. 2d 142 (2001); State v. Nesbit, 978 S.W.2d 872, 902 (Tenn. 1998), cert. denied, 526 U.S. 1052, 119 S. Ct. 1359, 143 L. Ed. 2d 520 (1999); State v. Vann, 976 S.W.2d 93, 117 (Tenn. 1998), cert. denied, 526 U.S. 1071, 119 S. Ct. 1467, 143 L. Ed. 2d 551 (1999); State v. Caughron, 855 S.W.2d 526, 542 (Tenn. 1993). Accordingly, an ineffective assistance of counsel claim on this issue must fail. The petitioner's claims on this issue are without merit.

III. CONCLUSION

Based upon the foregoing authorities and reasoning, we affirm the order of the post-conviction court denying the petition for post-conviction relief.

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ALAN E. GLENN, JUDGE

APPENDIX D

IN THE CIRCUIT COURT OF THE 23rd JUDICIAL DISTRICT, CHEATHAM COUNTY, TENNESSEE

No. 9852

[Filed: May 09, 2002]

ANTHONY DARRELL DUGARD HINES,	)
v.	)
STATE OF TENNESSEE	)

DEATH PENALTY
POST-CONVICTION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner, Anthony Darrell Dugard Hines, was convicted of first degree felony murder in this Court in 1986 and sentenced to death. On direct appeal, the Supreme Court of Tennessee ordered a new sentencing hearing. *State v. Hines,* 758 S.W.2d 515 (Tenn. 1988). Following the second sentencing hearing, Petitioner was again sentenced to death in 1989. His second death sentence was affirmed by the Supreme Court of Tennessee. *State v. Hines*. 919 S.W.2d 573 (Tenn. 1996). Petitioner's petition for writ of certiorari to the United States Supreme Court was denied in October of

1996. *Hines v. Tennessee,* 519 U.S. 847, 117 S.Ct. 133, 136 L.Ed.2d 82 (1996)

On March 4, 1997, Petitioner filed his pro se Petition for Post-Conviction Relief. On March 31, 1997, the Court entered a preliminary order appointing the office of the post-conviction defender as counsel. Several extensions of time were granted to Petitioner to file his amended petition. On October 6, 1997, Petitioner filed his amended petition and on November 7, 1997, the State filed its answer. The matter was scheduled for hearing and continued several times in 1998. In March 1999, the parties filed a joint motion to recuse the Office of the District Attorney General for the Twenty-Third Judicial District, with a stipulation of the facts in support of the motion and a proposed order. Subsequently that motion was granted and Dent Morriss, esq., an assistant district attorney general from the Nineteenth Judicial District was assigned to represent the State. Thereafter, an amendment to the amended petition was filed on April 21, 1999 and an answer thereto was filed on July 15, 1999.

The first phase of the evidentiary hearing in this matter was held from August 30 to September 3, 1999. Petitioner requested an opportunity to obtain and present additional proof. The hearing on Petitioner's additional proof was completed on October 30 and 31, 2000 after having been continued at Petitioner's request from the originally set date of February 3, 2000.

Petitioner's counsel have raised numerous issues concerning both the 1986 trial and the 1989 re-sentencing. The Court addresses these issues *seriatim*.

I. Jury Composition Claim (1986 Trial and 1989 Re-sentencing)

FACTS

The parties stipulated to the testimony and report of James M. O'Reilly, Ph.D., that from 1979 through 1990 there was an under-representation of women on the Sheriff's venire and the petit and grand jury venire in Cheatham County. According to Dr. O'Reilly's report, which was admitted as substantive evidence, the United States Census for 1970 shows the female population of Cheatham County was 50.6 per cent, and in 1980 and 1990 it was 50.7 per cent. Therefore, Dr. O'Reilly found the percentage of the population that was female remained steady over the period and used 50.7 as the female percentage of the jury eligible population. He then compared the percentage of women in the county population to that in the jury venire. The venire during the time in question was composed of from 10 to 22 percent women.

Cheatham County has two jury panels, the Sheriff's venire (i.e., the list of prospective jurors delivered by the clerk of the jury commission to the sheriff) and the petit and grand jury venire (i .e., the list of persons who actually appear for jury duty). Both originate from the jury box which is filled at least once every two years by the three member jury commission. The commission during the period in question consisted of two male members, Dorris Winters and C.E. Dunn and one female member, Martha Adkisson. By the time of the filing of the post-conviction petition in this matter, Mr. Winters was deceased and Ms. Adkisson was in a nursing home unable, due to her illness, to recall any

of the pertinent facts concerning her role as a jury commissioner. Although, Mr. Dunn was ill at the time of the hearing and unable to come to court, he had prepared an affidavit that was entered in lieu of his testimony. In his affidavit Mr. Dunn stated that he served on the jury commission with Mrs. Martha Adkisson and Mr. Dorris Winters. He further stated that they exclusively used the voter registration list for the purpose of choosing the names to fill the jury box.

The first step in creating the venire in Cheatham County is to charge the box with names of potential jurors. This is done at least once every two years. Names were added each time they charged the box but the box was never purged of the names already there. As a result, a person's name might be in the box multiple times. The procedure was to take the voter registration list and arbitrarily pick a starting point and then take names at a specified interval (for example they might take every 16th or 20th name). The names chosen would then be written on a jury ticket and placed in the box. The only names removed at this stage were individuals whom a commissioner knew to be deceased or to have moved out of the county. Once the names were in the box it was locked and only the commission chairman or the clerk of the court, Lloyd Harris, could open the box.

Evidence was presented to show that the voter list was not the exclusive source of names, however, said proof was insufficient to establish this fact. For all intents and purposes, the voter list was the exclusive source of names for filling the box. Some names of individuals who had recently moved into the county

and were known to the commissioners may have been added to the box from the telephone book but they were so few as to be inconsequential. The percentage of women on the voter registration list roughly approximated that of the general population of the county.

The next step in the selection of the venire was to select the sheriff's venire. This was the creation of the list of people that would be given to the sheriff to be subpoenaed to court for jury service. Although at one time they used a child under 10 years old to draw the names for the sheriff's venire, during most if not all of the period in question, they used a blindfolded adult. Generally, deputy clerk Dolores Moulton performed this duty. As a result she was the individual who spent the most time with the commissioners during this process. After the names were pulled from the box Mr. Winters or Mr. Dunn would read the names and Ms. Adkisson would write them on the sheriff's venire list, Ex. 47. At this point in the process the commissioners would pull out names of those known to be deceased or to have left the county. They would also remove the names of women with young children and schoolteachers. On occasion, Ms. Adkisson, as she was writing in the names would comment that there were too many women, but the proof does not establish that the commissioners substantially altered their method of selection because of these comments.

During the time that both trials occurred, only about one third of the people on the sheriff's venire list would actually appear for jury duty. Once the list was prepared it was delivered to the sheriff's office and the

sheriff's office was responsible to see that the subpoenas were prepared and delivered to the individual venire members.

The grand and petit jury venire was derived from those individuals on the sheriffs venire who actually come to court. Information is taken from the people who appeared pursuant to the jury subpoenas and then each was given a number. The grand jury was first selected by randomly drawing numbers and the remainder of the jurors constituted the petit jury venire for the trials scheduled in that term of court. The gender distribution of women and men on the grand and petit jury venire was very similar to that of the sheriff's venire.

In Petitioner's 1985 trial, three women were jurors. Only one woman sat on the 1989 resentencing trial.

There is no proof that Petitioner's counsel considered the issue of the gender composition of the jury at the 1986 trial.

Former Public Defender Shipp Weems and assistant Public Defender Steve Stack testified that, prior to the 1989 trial, Petitioner's counsel noted that the panel seemed suspect as there were not enough women. They discussed challenging the venire but did not have enough time to effectively do so by the time they perceived the problem.

CONCLUSIONS OF LAW

In *Duren v. Missouri,* 439 U.S. 357, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979), the United States Supreme Court set forth a three-pronged test for determining whether a jury was properly selected from a fair cross-section of the community:

> (1) that the group alleged to be excluded is a "distinctive" group in the community;
>
> (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and
>
> (3) that this under representation is due to systematic exclusion of the group in the jury-selection process.

Duren, 439 U.S. at 364, 99 S. Ct. at 668. This test was first applied in Tennessee in the case of *State v. Nelson,* 603 S.W.2d 158, 161 (Tenn. Crim. App. 1980), and later by our supreme court in *State v. Buck,* 670 S.W.2d 600, 610 (Tenn. 1984). Interestingly, the undersigned was counsel for the appellant in *State v. Nelson* and was before the Court of Criminal Appeals preparing for oral argument in said case when notified that he had been appointed to his current position.

The defendant has met the first prong of this test, in that women are a "distinctive" group in the community. *State v. Thompson,* 768 S.W.2d 239, 246 (Tenn. 1989), cert. denied, 497 U.S. 1031, 110 S. Ct. 3288, 111 L. Ed. 2d 796 (1990).

With regard to the second prong of the *Duren* test, the two proceedings differ in outcome. In the 1986 trial, three women sat as jurors. Our supreme court has held that the presence of three women on the petit jury constitutes a "fair representation of women on the jury and that is all that is required by the Constitution of the United States." *State v. Strouth,* 620 S.W.2d 467, 470 (Tenn. 1981). The Court is aware that in *Strouth* both alternate jurors were also women. There is no proof in this case concerning the sex of the alternate jurors. The fact remains, however, that the actual jury panels in the two cases were identical in gender composition. Our supreme court rejected an argument of under-representation of women in *State v. Taylor 711* S.W. 2d 387 (Tenn. 1989) in which the two panels contained three and four women respectively. Therefore, the Court finds that there was no under-representation of women in the 1986 trial.

In the 1989 re-sentencing trial, there was only one female juror. The unchallenged venire statistics demonstrate that the representation of women in the venire from which Petitioner's 1989 jury was selected was neither fair nor reasonable. The State concedes this point.

The third prong of the test requires a showing that the under-representation was due to a systematic exclusion of the group in the jury selection process. By the numerical disparity, Petitioner has established a prima facie case of systematic exclusion. The proof by the State that jurors were selected from a presumably gender balanced voter list does not overcome the fact of the dramatic under-representation of women. In fact,

there is no proof which explains the disparity. There can be no explanation other than that the process, for whatever reason, systematically excluded women from Petitioner's 1989 re-sentencing trial.

The Court finds that women were systematically excluded from the jury panel which sentenced Petitioner to death in the 1989 proceeding.

The fact of systematic exclusion does not, however, necessary entitle Petitioner to a new trial.

Waiver

T.C.A. § 40-30-206(g) provides as follows:

> (g) A ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented unless
>
> (1) The claim for relief is based upon a constitutional right not recognized as existing at the time of trial if either the federal or state constitution requires retroactive application of that right; or
>
> (2) The failure to present the ground was the result of state action in violation of the federal or state constitution

The case of *Duren v Missouri,* supra, was decided in 1979 and adopted by the courts of Tennessee in 1980. This case was originally tried in 1986. The claim for relief was, therefore, recognized as existing at the time of the trial. There is no proof in the record that the

failure to present the ground was the result of any state action.

Thus, the statute which provides for Post-Conviction Relief also provides that such relief is waived if not presented in a timely manner. This is a legislative limitation upon the right of Post-Conviction Relief which this Court is required to respect. The ground is waived.

Petitioner approaches this same issue from another direction, asserting that the failure of trial counsel in both trials to present this issue is ineffective assistance of counsel. Even assuming *arguendo* that the limitation of T.C.A. § 40-30-206(g) may be circumvented in this manner and that counsel was ineffective in this respect, Petitioner must still establish that he was prejudiced by this failure of counsel. *Strickland v. Washington* 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).

If counsel in either or both cases had moved to quash the venire and established a significant statistical disparity between women in the general population and on the venire, the remedy would have been to grant the motion, quash the venire, correct the selection process and select a properly constituted jury. Assuming that this properly constituted jury would have been presented the same evidence as the actual trial jury, the evidence does not indicate that the result would have been any different. The Court notes that the Cheatham County juries, although arguably improperly constituted, sentenced Petitioner to death based upon the evidence that they were presented.

Petitioner has failed in his burden of proof on this issue.

The prayer for relief upon the issue of under-representation of women on the juries on both the 1986 and 1989 trials is denied.

2. Ineffective Assistance of Counsel at the 1986 Trial

Petitioner has alleged that his trial counsel were ineffective at his initial trial in 1986 in the following particulars:

1. Steve Stack was inexperienced and not ready to take on a major trial as lead counsel;

2. William Wilkinson's practice kept him from devoting sufficient time to Petitioner's case;

3. Failure of counsel to investigate and prepare:

4. State compensation for appointed counsel was inadequate to allow counsel to devote sufficient time to Petitioner's case:

5. Counsel failed to obtain adequate defense services;

6. Counsel forfeited opportunities to impeach and demonstrate reasonable doubt.

7. "Perjured testimony" at 1986 trial (Testimony of Ken Jones).

FACTS

Robert S. Wilson was appointed to represent Petitioner at the preliminary hearing and asked Steve Stack if he was interested in getting involved if Petitioner was indicted. Stack became involved in the case on June 6, 1985, and was appointed as co-counsel to Wilson at the arraignment on June 10, 1985.

Stack had been practicing less than two years prior to representing Petitioner, Stack had been counsel in two criminal trials. Stack's work was 60 to 75 percent civil.

At the time of the trial in 1986, Stack had not had any specialized training in the area of defense of capital cases. He had obtained the Tennessee Association of Criminal Defense Lawyers 1985 edition of the capital case manual and had read the same.

Shortly after arraignment, Wilson accepted employment with the district attorney and withdrew as counsel. Stack requested that a new lead counsel be appointed .. The court appointed William G. Wilkinson. Wilkinson had been practicing for over fifteen years at the time and had considerable criminal experience, serving at one time for two and one-half years as an assistant attorney general. He had experience in only one death penalty case and that was as assistant attorney general. This is not surprising since there had been only two death penalty cases tried in Cheatham County during the fifteen years that Wilkinson had been practicing. See *State v. Guy Smith* 554 S.W.2d 648 (Tenn. Crim. App. 1977), [death penalty commuted to life imprisonment] & *State v Michael & Morgan*

Gribble (unreported) Lexis 2962 (Tenn. Crim. App. 1984) [transferred to Madison County - Death penalty remanded, sentenced to life imprisonment]. A court can take judicial notice of its own records. The Court also observes that during five years of that time (1972 - 1977), Tennessee did not have a valid death penalty statute. Petitioner admits that no one had any death penalty experience during that time. While this is not totally accurate (See *State v Guy Smith,* infra), it is substantially correct.

The proof establishes that there was apparently no express agreement as to whom would be lead counsel. The two lawyers worked together. Stack, as the more inexperienced lawyer, did most of the "leg work" and Wilkinson, the more experienced of the two, directed the trial strategy. Of course, both lawyers were in private practice and could not devote full time to Petitioner's case. Nevertheless, they did extensive work on the case.

Both lawyers investigated the case but Stack did more active investigation than did Wilkinson. Wilkinson started working on the case in September 1985. He interviewed the witnesses in Kingston Springs and made two or three trips to Kentucky. In all he spent 59.5 hours in pretrial preparation including 6 hours interviewing witnesses in Kingston Springs, and 12.3 interviewing the members of the Petitioner's family and the law officers in Kentucky.

Neither counsel interviewed the students who picked up Petitioner along the interstate and they were unaware of Daniel Ray “Bud” Blair's criminal record or the fact that he was on probation. Wilkinson

acknowledged that this information would have been helpful in an attempt to impeach Blair. He also did not know prior to trial that Blair would say that he saw blood on Petitioner's shirt.

Victoria Marlene Hines Daniel Furlong, Petitioner's sister, testified at trial that she saw blood on Petitioner's shirt when he came to her house. At the hearing of this petition, she testified that she had been drinking on the day that she testified at trial. This witness' testimony was contradictory and suspect. On cross-examination, she was effectively impeached on her prior inconsistent statements given on direct examination. Her relationship to Petitioner causes the Court to question her veracity at the hearing. If this witness had been drinking to any appreciable extent during the trial, this Court would have noticed it and taken action. In fact, her ex-husband was found to have had been drinking at the hearing and was incarcerated for contempt. The Court rejects Ms. Furlong's entire testimony as incredible and worthless.

The same is true for the testimony of Robert Earnest Daniel, Ms. Furlong's ex-husband. He was found to have been drinking before testifying at the hearing yet attempted to testify about Ms. Furlong's drinking problem. At trial, he testified that she only drank occasionally. At the hearing he testified that his trial testimony was false and was given in an effort to protect her. The Court can only assume that he would have responded to an interview by counsel prior to the trial in the same manner that he testified at trial, his motive still then existing. Obviously, in the intervening years, his attitude toward Ms. Furlong has changed.

When pressed on cross-examination, Mr. Daniel became increasingly belligerent, occasionally denying his testimony on direct examination. The Court rejects his testimony.

Both of these witnesses testified to one set of facts at trial and the opposite at the hearing. The only fact the this Court can confidently find is that they both lied under oath at one proceeding or the other. Given these facts, it is impossible to determine what, if any, value interviewing either of these witnesses' would have been toward impeaching their testimony at trial.

Neither counsel interviewed either Virginia Chandler or Melanie Chandler prior to the trial. Melanie Chandler did not testify at the trial. Virginia Chandler testified at trial that Petitioner boarded the bus with a survival knife. Melanie Chandler testified at the hearing that her mother, Virginia Chandler, drank a lot and had animosity toward Petitioner. Perhaps her testimony would have useful for impeachment of her mother's testimony at trial but her obvious affection for Petitioner would have made the impeachment value of her testimony marginal, at best. Melanie Chandler admitted on cross-examination that she was not then on good terms with her mother. In addition, Melanie Chandler's testimony was, on occasion, self-impeaching, e.g., that she had to walk twenty miles to work each day while pregnant and that Virginia Chandler threatened to have Melanie Chandler "committed" if she came to testify at the hearing of this petition. During this witness' testimony, the Court noted that several times she would glance affectionately at Petitioner. She obviously still has

strong feelings for him, a fact which she admitted on cross-examination. In fact, prior to the beginning of proceedings on September 1, 1999 there was a security incident in which Ms. Melanie Chandler had been allowed to have direct contact with Petitioner in the courtroom, requiring another search of Petitioner. The Court does not know whether this incident appears in the record of the Post-Conviction Petition hearing because it occurred prior to opening court.

Stack testified that no substantial work was done in preparing for trial until after October 21, 1985. On October 30 they had a discovery conference with the district attorney and the state filed its discovery response on November 1. The State's discovery response had a list of 29 witnesses. Stack's practice was to sit down with assistant district attorney Kirby and review the witnesses and their expected testimony. Stack testified that he is certain that he would have known before trial that Blair would testify that he saw blood. Defense counsel did not request a criminal record on Blair and did not interview either of the female students to learn that Blair had become nervous and hesitant when they suggested that they contact the police.

Stack recalled going to Victoria Hines Furlong's house but could not recall interviewing her. He went to Rufus "Bill" Hines's house twice and talked to Bill and his son, Bobby Joe. He is not sure whether Petitioner's mother, Barbara Hines, was at the house. He also went to Cave City and interviewed Grandfather Cross. He did not learn of any sexual or physical abuse of any of

the siblings. Bill Hines did tell him that Petitioner had problems growing up.

Stack recalled that at the time of the 1986 trial the rate for appointed counsel was $20 per hour out-of-court and $30 per hour in-court. This compared to the fee he charged his private clients at that time of $60 to $75 per hour. Stack spent 133.6 hours out-of-court preparing for the trial and 38.9 hours in-court. He indicated that he believed this figure to be probably accurate. Stack further testified that a rate of $20 per hour he would not have been able to pay his office overhead if he had put the time in preparation for trial that he now wishes he had.

Trial counsel did not ask for expert and investigative services prior to trial. In hindsight Wilkinson testified that, in his opimon, it would have been helpful to have their own expert to assist in examining Dr. Harlan and to rebut Harlan's testimony. Prior to trial they had not interviewed Harlan and did not know exactly what his testimony would be although they had seen the autopsy report. Wilkinson testified that his custom was not to file a motion unless he thought their was a reasonable chance that it would be granted. At the time of the trial neither Stack nor Wilkinson was aware of the case of Ake v Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed. 2d 53 (1985), giving capital defendants a due process right to expert services. Although they testified that they were unaware of the Tennessee statute which provided for a grant of support services, they had filed a motion for a psychiatric expert on November 7, 1985, under Tenn. Code Ann. 40-14-207(b). The Court, therefore,

concludes that, whether or not counsel was aware of the authority for such a request, they did know that expert services were available to indigent defendants.

Defense counsel did have Petitioner tested for competency to stand trial and to determine whether Petitioner was sane at the time of the offense. This testing was done by the state experts at Harriet Cohn Mental Health Center. On July 30, 1985, the medical director at Harriet Cohn notified the court that they could not determine either sanity at the time of the offense or competency to stand trial on an out patient basis. As a result, Petitioner was sent to the Middle Tennessee Mental Health Institute for a thirty day evaluation. This evaluation was limited to the issues of competency and sanity and the report sent to the court and both parties.

Prior to the hearing of the Post-Conviction Petition, Petitioner requested and received the services of psychiatrist William Kenner, M.D., neurobiologist, Paul Rossby, Ph.D., and addictionologist Murray Smith, M.D. These witnesses testified mostly concerning mitigation matters, however, Petitioner offered some speculative expert testimony concerning Petitioner's likely actions in certain situations given their diagnosis of his condition which would have been offered to prove Petitioner's innocence.

Petitioner also requested and was granted the services of Jeff Christian Sperry, M.D., the Chief Medical Examiner for the State of Georgia. Dr. Sperry explained that based upon the wounds to Ms. Jenkins and the location of the blood in the room, it is clear that her death resulted from an extremely violent and rapid

attack. However, as Dr. Sperry further explained, the knife wound to the vagina shows that the weapon was carefully inserted and thus made by a person under complete control. How Dr. Sperry could determine this fact from pictures and the autopsy report, he did not explain. Drs. Kenner and Rossby found this change of composure totally inconsistent with the psychiatric and neurobiological makeup of Petitioner. This evidence, if admissible, would have been somewhat useful in Petitioner's original trial.

Petitioner insists that his trial counsel should have attempted to cast suspicion upon Ken. Jones as a possible perpetrator of the crime and that counsel was ineffective in allowing Mr. Jones to "perjure" himself in hiding his true reason for being at the hotel. While counsel had brought out that there had been another stranger in the area of the CeBon Motel that morning, they did not develop any reason for the jury to consider that someone other than Petitioner committed the offense. Petitioner asserts that his trial counsel should have suggested that perhaps, Ms. Jenkins had thwarted Mr. Jones planned sexual liaison with Ms. White and that this was a motive to kill her. He further suggests that this theory might explain the twenty dollar bill under Ms. Jenkins's watch band and the careful insertion of the knife into her vagina. Trial counsel knew of the actual reason for Mr. Jones presence at the motel, having learned it from the sheriff. Of course, they could have investigated further and learned the details of the encounter but the Court does not find that the information would have been particularly useful. To present such a farfetched theory with no supporting evidence would cause a loss of

credibility by the defense at trial. Admittedly, if trial counsel had learned the exact details of the movements of Mr. Jones, Ms. White and the person(s) in the maroon or brown car, they could have "muddied the water" concerning the details of the discovery of the body. This would have been insufficient, however, to cast reasonable doubt on the guilt of Petitioner given the fact that Petitioner was shown by the proof to have taken the deceased's car keys, presumably from her billfold (in which she habitually kept them), and stolen her car. To accept Petitioner's argument that he didn't kill the deceased but merely took her car keys from her body (which was wrapped in a blanket) and stole her car would require the trial jury to depart from speculation and enter into fantasy.

Trial counsel did bring out at trial that there was no blood in the car. It could be reasonably argued that blood would have been expected to have been in the car if the perpetrator of this violent murder had immediately jumped in the car and left the scene. Of course, this could be countered with the possibility that the perpetrator did not immediately leave the premises. Victoria Hines Furlong testified that she saw blood on Petitioner's clothing when he arrived at her house and Daniel Blair testified that he saw blood on Petitioner's shirt when he was in the car. Both witnesses could, of course, been impeached but effectively impeaching both witnesses would have been unlikely. If the jury accepted the fact that Petitioner had blood on his clothing and that there was none found in the car, they could reasonably find that the blood had dried before Petitioner entered the car. This would tend to negate a panicked departure from the

scene and allow the inference that Petitioner was acting in a cold and deliberate manner. Of course, the jury could also have determined that Petitioner did not have blood on his clothes which could have been explained by a change of clothing (he was traveling from North Carolina to Kentucky). In fact, Mr. Wilkinson testified that it was his impression of the State's case at trial that the state had not shown that Petitioner had blood on his clothes.

CONCLUSIONS OF LAW

Petitioner insists that Steve Stack was lead counsel for the defense and was too inexperienced to adequately perform such a role. He also submits that William G. Wilkinson did not have sufficient time to devote to the case to be lead counsel. The Court finds that it matters little who was lead counsel. What matters is how effectively trial counsel functioned as a team. Trial counsel functioned effectively in the trial of this case.

Next, Petitioner submits that both counsel were not sufficiently experienced in the trial of capital cases to render effective assistance of counsel.

The Court of Criminal Appeals has held that inexperience, in itself, does not equate to ineffective assistance of counsel. A petitioner must identify specific acts and omissions to support the claim. *Anthony J. Robinson v. State* (unreported) Tenn. Crim. App. At Jackson #02C01-9707-CR-00275, LEXIS 893, opinion filed August 26, 1998.

Petitioner then asserts that the State's compensation of appointed counsel contributed to the

ineffectiveness of trial counsel. This issue has been considered and rejected by the Court of Criminal Appeals in *Henry Eugene Hodges v State* (unreported) # M1999-00516-CCA-R3-PD Tenn. Crim. App. at Nashville. Lexis 810 Opinion filed October 20, 2000.

This leaves Petitioner with his specific allegations of ineffectiveness of his trial counsel.

Both the Sixth Amendment to the United States Constitution and Article I, § 9 of the Tennessee Constitution guarantee a defendant the right to representation by counsel. See *State v. Burns,* 6 S.W.3d 453, 461 (Tenn. 1999); *Baxter v Rose,* 523 S.W.2d 930, 936 (Tenn. 1975). This right to counsel includes the right to effective counsel. See *Burns,* 6 S.W.3d at 461; *Baxter,* 523 S.W.2d at 936; *Strickland v. Washington,* 466 U.S. 668, 686, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). To determine whether counsel provided effective assistance at trial the court must decide whether counsel's performance was within the range of competence demanded of attorneys in criminal cases. *Baxter,* 523 S.W.2d at 936; *Hicks v. State,* 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998). To succeed on a claim that his or her counsel was ineffective at trial, a defendant bears the burden of showing that counsel made errors so serious that he or she was not functioning as counsel as guaranteed under the Sixth Amendment and that the deficient representation prejudiced the defendant resulting in a failure to produce a reliable result. *Strickland,* 466 U.S. at 687; *Burns,* 6 S.W.3d at 461; *Hicks,* 983 S.W.2d at 245.

When reviewing trial counsel's actions, this Court should not use the benefit of hindsight to second-guess

trial strategy and criticize counsel's tactics. See *Hellard v. State,* 629 S.W.2d 4, 9 (Tenn. 1982); *Owens,* 13 S.W.3d 742, 749. Counsel's alleged errors should be judged at the time they were made in light of all facts and circumstances. See *Strickland,* 466 U.S. at 690; *Hicks,* 983 S.W.2d at 246.

The performance of counsel is generally measured using the *Strickland* standard. In *Strickland,* a capital case, the United States Supreme Court determined that the ineffective assistance of counsel claim that would merit relief from a conviction or sentence has two components: (1) that counsel's performance was professionally deficient and (2) that the deficiency was prejudicial in terms of rendering a reasonable probability that the result of the trial was unreliable or the proceedings fundamentally unfair. Id. at 687, 104 S.Ct. at 2064.

To satisfy the second prong of the *Strickland* test, a petitioner must show a reasonable probability that, but for counsel's unreasonable errors, the fact finder would have had reasonable doubt regarding the defendant's guilt. See *Strickland,* 466 U.S. at 694-95. This reasonable probability must be "sufficient to undermine confidence in the outcome." id. at 694; see also *Harris v. State,* 875 S.W.2d 662, 665 (Tenn. 1994); *Owens v. State,* 13 S.W.3d 742, 750 (Tenn. Crim. App. 1999). In addition, with respect to the prejudice prong of ineffective assistance of counsel, the court said showing that "errors had some conceivable effect on the outcome of the proceeding" is insufficient. *Strickland,* 466 U.S. at 693, 104 S.Ct. at. 2067. Rather, the defendant must show there is a "reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694, 104 S. Ct. at 2068 . In assessing the claim of prejudice, the "court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law." Id. The reviewing court must consider the "totality of the evidence before the judge or jury" and should take into account the relative strength or weakness of the evidence supporting the verdict or conclusion. *Strickland,* 466 U.S. at 695, 104 S. Ct. at 2069

With respect to the prejudice (second) prong of *Strickland,* this Court finds that the omissions of trial counsel were not such that would undermine confidence in the outcome of Petitioner's trial. This Court finds that Petitioner has not established a reasonable probability that, but for counsel's omissions, the result of his trial would have been different.

Petitioner's allegation of ineffectiveness of counsel at his trial is denied.

3. Ineffective Assistance of Counsel at the 1989 Re-sentencing.

Petitioner has alleged that his trial counsel were ineffective at his re-sentencing hearing in 1989 in the following particulars:

1. Phillip Maxey (now Judge Maxey), Public Defender Shipp Weems and Assistant Public Defender Steve Stack were inexperienced and not ready to adequately represent Petitioner in his re-

sentencing in which the death penalty was a possible punishment;

2. Counsel's workload prevented effective representation;

3. Failure to designate a lead counsel prevented counsel from adequately representing Petitioner;

4. Counsel failed to adequately investigate for, develop and present significant mitigation;

5. Failure to attack the heinous, atrocious, or crucial aggravating factor;

6. Failure to make a closing argument.

The first three issues have been addressed with respect to Petitioner's original trial. Essentially, inexperience, workload and organization of the defense team, in and of themselves, do not amount to ineffective representation of counsel. Petitioner must show specific instances of prejudicial conduct or omissions in order to prevail on an ineffectiveness of counsel claim. In his fourth, fifth and sixth issues, Petitioner has made such 1 allegations. The Court, therefore, addresses only these issues.

FACTS

When this case was remanded for re-sentencing Wilkinson withdrew as counsel and Phillip Maxey(now General Sessions Judge), who was at Wilkinson's firm, was substituted for him. Stack had become an assistant public defender. Shipp Weems, the Public Defender, was always involved in any capital case handled by his office and was involved in this case.

Maxey had been practicing at the time for about five years and did mostly general sessions trials. He did have some jury trial experience in criminal cases but none were homicide cases. He testified that he had extensive contact with Dr's. Charvat and Auble. Maxey further testified that he used the facilities of the Capital Resource Center and had visited their office on this case several times. He had read the transcript of the original tri al and had done strategy planning and considerable research. Maxey felt that Petitioner's mitigation evidence was strong. He testified that the closing argument for the re-sentencing had been prepared but that Petitioner's counsel agreed that it would be tactically wise to waive it in order to prevent District Attorney Kenneth Atkins from presenting his usual highly effective and emotional closing argument.

Shipp Weems testified that he was not involved in the preparation for the 1989 re-sentencing. He did not get involved in the case until the second day of voir dire because he had been defending a death penalty case in Dickson County. As soon as that trial ended he joined the team representing Petitioner. Weems testified that there were three attorneys in his office and they handled cases in five counties. The attorneys rarely saw each other and although they had monthly meetings they did not hold in-depth case strategy discussions. At the time, each attorney handled approximately 800 cases per year, they had one secretary and no investigators. The geographical makeup of the district meant spending as much as forty hours a week traveling. They did not have sufficient time to adequately prepare their cases for trial and that this was especially true of a capital case.

On cross-examination, Weems admitted that he had never tried a case, whether he won or lost, that he felt totally prepared to try. He testified that he had the TACDL Capital Defense manual and was familiar with it prior to the re-sentencing trial.

Weems testified that Petitioner's counsel made a conscious decision not to present a final argument at re-sentencing in order to prevent District Attorney Atkins from inflaming the jury in his final argument. He further testified that Petitioner's counsel delayed making their opening statement until the beginning of the defense proof because they anticipated that the State would abbreviate their proof-in-chief and counsel wished to know what the State's proof would be before committing to a particular defense strategy.

Steve Stack concurred with Mr. Weems that his office did not have sufficient resources to adequately handle a capital case. He personally was handling all courts in two or three counties at the time and spending at least two to three days a week in court. He testified that he had filed a motion for expert psychiatric assistance but that this motion was never granted. He agreed with Maxey and Weems that Petitioner's counsel had agreed to waive their closing argument in the re-sentencing trial because they believed that the State's initial opening argument was primarily factual and hadn't hurt the defense significantly and that they had more to gain by preventing Gen. Atkins' anticipated closing argument than by presenting their argument.

Mitigation evidence presented at 1989 re-sentencing rehearing

The defense's first mitigation witness was Thurman Page, a counselor at the Tennessee State Penitentiary who had dealt with Petitioner since his incarceration after the 1986 trial. He testified that Petitioner had no serious disciplinary problems and none involving violence during that period. In his opinion Petitioner was not a threat to the general prison population. He also characterized Petitioner as a loner and did not remember any family visits. It was brought out under cross-examination that the witness had no idea if there were write-ups prior to the time the witness came to work on the Petitioner's unit.

The next mitigation evidence presented was the reading of the prior testimony (from the 1985 trial) of John Croft, Petitioner's grandfather. This evidence brought out facts concerning the family background and Petitioner's early use of solvents. No mention was made of any physical or sexual abuse or alcoholism within the family. He did testify that Petitioner's mother had not drunk since 1979. Croft had lived away from Petitioner since he was 13, although Petitioner would come to visit. After Petitioner had gone to prison in Kentucky, Croft had rarely seen him.

The only other lay witnesses called by the defense were Eugene Gollins and Preston Smith, who testified as to their drug use with Petitioner. Collins had only known Petitioner from the age of 14, and had not seen him since 1976. Smith's knowledge of the Petitioner was also limited to a few years and experiences. Collins described Petitioner as high tempered and crazy, while

Smith told the jury that he never saw the Petitioner in a fight and knew him to be calm.

The two experts that made up the remaining defense witnesses in the 1989 re-sentencing were a neuropsychologist and a sociologist.

Dr. Pam Auble performed a psychological examination of Petitioner, administering a number of tests and conducting a clinical interview. She also reviewed supplemental sources such as records and reports. Her diagnosis was (1) paranoid personality disorder and (2) dysthymia. She found that Petitioner did not meet the criteria for major depression, mania or schizophrenia. Dr. Auble spent one day testing Petitioner and a second day reviewing the results of testing and other reports. She testified that she spent roughly sixteen hours reaching her diagnosis. Dr Auble testified that she was aware of Petitioner's head injury at age eight; his parent's excessive drinking and his physical abuse by his step-father. Her test results indicated that Petitioner:

> was emotionally immature;
>
> had low self-esteem;
>
> had difficulty trusting others;
>
> was insecure about his masculinity;
>
> suffers from underlying depression and anger, resulting in self-destructive behavior and his ignoring problems; and
>
> experiences anger which boils up under stress.

Her diagnoses were:

l. Paranoid personality disorder

A. expects to be exploited by others;

B. questions trustworthiness of friends without justification;

C. reads threats or insults when none exist;

D. bears grudges;

E. reluctant to confide in others;

F. easily slighted, quick to anger; and

G. likely lo question faithfulness of spouse or partner without justification.

2. Dysthymia

A. depression for at least two years

B. trouble sleeping or poor appetite;

C low energy;

D. low self-esteem;

E. Poor concentration;

F. feelings of hopelessness;

G. no major depression, mania nor schizophrenia.

Dr Auble concluded that Petitioner had a lengthy history of alcohol and drug abuse, including glue sniffing, but that there was no conclusive evidence of

brain damage and testing did not indicate an alcoholic personality although she opined that he had a possible learning disability. She opined that his mental and emotional condition would have affected his ability to handle stress. The most difficult stress for Petitioner to handle would be betrayal. The facts of the murder, she testified, fit a pattern of betrayal and explosion essentially beyond Petitioner's ability to control. She further concluded that the fact that Petitioner was traveling back to his family suggested "extreme emotional disarray". Dr. Auble also concluded that Petitioner would not be a threat in a prison environment.

At the hearing of the Petition for Post-Conviction Relief, Dr. Auble testified that this was her first death penalty case and that she became involved only a month and a half before testifying. She had interviewed Petitioner twice before her testimony at re-sentencing and this was not sufficient time to form a trusting relationship with him. Dr. Auble did not talk to Petitioner's family but relied on reports instead. She didn't have time to refer him to other professionals although she did receive the social history done by Ann Charvat, the sociologist witness, about a month after she had tested Petitioner. Dr. Auble opined at the hearing that she didn't have time prior to the re-sentencing hearing to adequately diagnose his alcoholism and have Petitioner diagnosed by an expert in chemical dependancy and addiction medicine. This would have been useful, she testified, in determining his true psychological situation. She further testified that her own neuropsychological testing at the time of the re-sentencing did not reveal chemical causes of

Petitioner's brain injury because this is best done by analysis of spinal fluid and she is not qualified to perform such a procedure.

On cross-examination, Dr. Auble did admit that she knew of the fact of Petitioner's family history of alcohol abuse.

In response to the Court's questions, Dr. Auble testified that if she had known then what she knew at the time of the Post-Conviction hearing, she would have insisted on further testing of Petitioner. She would have suspected a possible chemical imbalance in the brain.

Dr. Ann Charvat testified in the re-sentencing as an expert in sociology and created a social and life history of Petitioner based on information she had collected over a six week period. Petitioner's family, she testified, was violent, unstable and socially isolated. Dr. Charvat determined that Petitioner had experienced very serious abuse and had too much responsibility at too young an age. He was dysfunctional in family bonding and his early social models were violent. The result of this, she opined, was that Petitioner had no attachment bond, no commitment and no belief system. Dr. Charvat spent over twenty hours with Petitioner and interviewed some of his family and friends. She testified that she did not find evidence of sexual abuse, bul did find deviations from the sexual norm. Petitioner's experiences at the Green River Boys Camp and the detrimental effects 'grouping' treatment were explained by Dr. Charvat. She testified about how Petitioner's

family background, juvenile delinquency, and lack of education combined to bring about his violent actions.

Dr. Charvat's findings were that Pecitioner had no bonds or relationships. She testified that factors which produced Petitioner's deviant behavior were:

a. Significant physical abuse;

b. being neglected as a child;

c. social isolation of his family;

d. poor parenting;

e. irregular sexual norms;

f. excessive adult responsibility on Petitioner as a child;

g. poor academic performance;

h. truancy;

i. poor achievement tests;

j. early delinquence;

k. early drug use;

l. self-abusive tendencies;

m. lack of adult supervision;

n. ineffective involvement with the juvenile justice system;

o. terminated education;

p. violent role models;

q. incarceration; and

r. Petitioner's treatment at Green River Boy's Camp.

Dr. Charvat testified that, in her opinion, the facts preceding the murder were very destabilizing to Petitioner. These factors included his severed relationship with his family, his son and his son's mother. The result was that Petitioner had become completely unbonded. Lastly, she testified that Petitioner's cycle of violence had now been broken.

At the Post-Conviction hearing, Dr. Charvat testified that the evidence she presented at the re-sentencing represented only the beginnings of a comprehensive social or life history. If she had to testify in such a trial now, she would attempt to obtain the records of Petitioner's family members but she did not do this at Petitioner's re-sentencing. She did not testify whether this was due to lack of time or that it did not occur to her to do so at the time. When discussing the risk factors she discovered, Dr. Charvat admitted that she may have found more risk factors "if I'd gone further." Prior to the re-sentencing, she never contacted Melanie Chandler, Virginia Chandler or Debbie Hines (now Lee Miles) and spoke with Victoria Hines Furlong 'only briefly.' Thus, she opined, she did not discover the severe sexual abuse that occurred within the family and did not gain any real insight into important aspects of Petitioner's upbringing. She further testified that, in her re-sentencing testimony, she missed episodes of trauma and failed to tie things in well although she did not testify to what effect these omissions might have had upon her conclusions. On

cross-examination, she testified with regard to her failure to adequately present Petitioner's condition to the jury that, "We are not just communicating facts, we are communicating feelings". Apparently, the witness was of the opinion that she had failed in this regard. She further testified that the basic sociological evidence was presented in Petitioner's re-sentencing trial. These facts, she testified, should have been presented more extensively and persuasively.

The testimony of the forgoing witnesses constituted the mitigation evidence that was presented by Petitioner at his re-sentencing. Petitioner insists that his counsel was ineffective in not discovering and presenting additional mitigation evidence at his re-sentencing. This allegedly omitted evidence was presented at the hearing of the Post-Conviction Petition.

Additional mitigation testimony

Victoria Hines Furlong, Petitioner's sister, testified to the details of Petitioner's abusive childhood in addition to her testimony concerning her observations of Petitioner the day after the murder and her drinking habits during that period. The Court has addressed her testimony concerning her observations and drinking hereinabove.

Lee David Miles, Petitioner's brother (formerly Debbie Hines Page, his sister), testified in detail concerning the abuse of Petitioner and his siblings by their step-father.

Dr. Murray Wilton Smith was qualified with the state's stipulation as an expert in both internal

medicine and addiction medicine. He has been involved in addiction medicine since 1981 and has treated approximately 5,000 patients for drug and alcohol addiction in the past ten years. In addition, he has consulted in four death penalty cases.

Dr. Smith testified that alcoholism has been recognized as a disease since 1956. Type I alcoholism is characterized by a gradual increase in usage and problems. Type II alcoholism is inherited from father to son. It is characterized by rapid early onset, usually by age 9, 10, or 12. It will manifest with trouble before the end of teen years and antisocial behavior. A Type II alcoholic is usually incarcerated before the age of twenty. It is a medical illness based on inherited brain chemistry. Long term use of intoxicants causes permanent changes in the brain chemistry which, in turn, is the basis of one's being.

Dr. Smith's diagnosis was that Petitioner is a Type II alcoholic. Factors like abuse would have contributed to Petitioner's condition. Petitioner's trouble with aggression and the law is to be expected in Type II alcoholism. Petitioner also has low levels of serotonin, which is connected to Type II alcoholism and aggression. Dr. Smith testified that the ability to monitor and treat serotonin levels was available in 1989.

Although it was possible to receive behavioral therapy in the eighties, it was not very readily available for people in Petitioner's home and social situation. Free programs such as Alcoholics Anonymous were readily available and quite effective in treating alcoholism. Twelve step programs can have

a two-thirds success rate. Dr. Smith's opinion was that if Petitioner were kept away from alcohol and in a controlled environment, he would be relatively non-violent. Prisons which house violent offenders, he testifies, have a large percentage of Type 11 alcoholics.

Dr. Paul Rossby testified as an expert in molecular neurobiology, the field that studies brain chemistry - the biological basis of behavior. Dr. Rossby explained the chemical make-up of the brain and the effects that imbalances can have on brain function. His testimony established that the central nervous system is comprised of four billion neurons which conduct an electrical current. Neurotransmitters are chemicals in the brain which regulate the firing of the neurons. There are two types of neurotransmitters, those that cause the neurons to fire - excitatory, and those that inhibit them from firing - inhibitory. The effect of firing or not firing depends on which area of the brain they are located There is a dynamic balance between the two to produce consciousness, memory, feelings, emotion. etc. If the balance is upset it can upset these functions .

Serotonin is a naturally occurring neuromodulator in the brain that comes under the broad heading of neurotransmitters. It appears to orchestrate various systems of inhibition within the brain. There has been a significant amount of research on serotonin since the 1970's, and Dr. Rossby testified that much of this information was available in 1986.

Dr. Rossby went on to explain that there is a hierarchy of different systems of inhibition in the brain. If one level of inhibition fails, the one below is

activated. There is a vast body of research which indicates that low serotonin levels decrease the brain's capacity to inhibit impulses. Two studies on violent inmates have shown that those who committed impulsive violence had low serotonin levels, and inmates who committed crimes with premeditation had normal levels. Hundreds of inmates were tested in many studies in the 70's, 80's and continuing into the 90's. Tests analyze the spinal fluid for 5HIAA, a major metabolite of serotonin. Serotonin levels do not fluctuate from day to day although there is a gradual increase of function with age.

Dr .. Rossby testified that in Finland researchers were able to do research in prisons. Type II alcoholism was detected in almost all of the violent offenders who also had low serotonin levels, approximately eighty five percent. Such findings indicate a connection between Type II alcoholism and low serotonin. There is a also genetic component to Type II alcoholism. The son of a Type II alcoholic has a nine times greater chance of becoming Type TI, even if reared apart, than the son of a non-Type II.

Dr. Rossby pointed out that low serotonin does not produce violence, it only indicates an organic impairment in the control or that type or behavior. One can predict with much success that such a person will get in trouble with the law. He testified that it appears that the ingestion of alcohol further exacerbates or lowers that threshold.

Dr. Rossby and associated specialists measured Petitioner's serotonin levels by testing spinal fluid taken via a spinal tap. They then compared the sample

from Petitioner to the mean average from twenty-eight other healthy men of the same age. Petitioner's level is at the extreme low end in our society. Dr. Rossby's report of Petitioner's serotonin levels was entered as Exhibit number 17 to the Post-Conviction hearing. He testified that research has found a strong connection with low serotonin, impulsive violence and Type II alcohlolism. Dr. Rossby found Petitioner to be organically impaired and that once an impulsive action is triggered, Petitioner does not have the biological capacity to control it. Petitioner was found by Dr. Rossby to have been very damaged with no control over his impulsive behavior. The root cause of this situation is biological. In Dr. Rossby's professional opinion, Petitioner does not have the ability to control impulsive rage or anger. Low serotonin does not cause violent, behavior, rather it causes the brain to be biologically impaired in terms of control of impulsive behavior. The impulse itself is a different factor, not created by a serotonin deficit. A person can have low serotonin and not commit violent acts. A person who does not have strong self or outward destructive impulses that would require normal levels of serotonin to control, can live a normal life with low levels of serotonin if the person lives a relatively stress free life. The person's capacity to control things like diet or resist small impulses would be impaired. It is for this reason that proof of Petitioner's stressors in life are important lo explaining his behavior.

Dr. Rossby stated that experts in this field would have been available in 1989. To the extent that a lawyer may not have been aware of this research, psychological experts would have known and could

have made referrals between branches. Dr. Rossby noted that a landmark study, widely quoted in the field, was published in 1982. (Exhibit No. 50, Human Aggression and Suicide, Their Relationshjp to Neuropsychiatric Diagnoses and Serotonin Metabolism, 1982.) Under cross examination, Dr. Rossby testified that he was unaware of anyone testifying as an expert witness on the subject of serotonin levels prior to his 1992 testimony in the Post-Conviction hearing in the case of *Victor James Cazes v State,* (unreported) Lexis 1194, Tenn. Crim. App. at Jackson #W1998-00386-CCA-R3-PC, opinion filed December 09, 1999. This Court doubts the accuracy of Dr. Rossby's recall of the year of his testimony. The opinion affirming the conviction of Victor James Cazes was filed in 1994. See *State v. Cazes,* 875 S.W.2d 253 (Tenn. 1994). It is inconceivable to this Court that the filing and hearing of the Petition for Post-Conviction Relief would have been prior to the release of the opinion of the Supreme Court affirming Cazes' conviction. Dr. Rossby also stated that he testified in one other case concerning serotonin and impulse control in Dayton, Ohio in 1999.

Dr. William Kenner was called by Petitioner to explain the implication of the evidence produced by the lay and expert witnesses. Dr. Kenner is a physician with specialty training in psychiatry - child psychiatry and psychoanalysis. The Court noted that Dr. Kenner is known by the Court and recognized him as an expert psychiatrist. Kenner brought together all aspects of the mitigation case; other expert testimony, the time-line, social history and testimony of lay witnesses, and directly related it to the effects upon Petitioner.

Dr. Kenner described his preparation for his testimony. He interviewed Petitioner, his brother (formerly his sister), Lee, and his sister Victoria. Dr Kenner saw Petitioner twice with two hour interviews each time; saw Victoria for two hours and Lee twice ror a total of four hours. Dr. Kenner also reviewed a considerable amount of information including school records, Green River records and other evaluations. Dr. Kenner reviewed testimony given in the first post-conviction hearing by Petitioner's siblings and by Drs. Rossby and Smith.

Dr. Kenner presented his diagnosis of Petitioner as follows:

> Diagnosis:
>
> Axis I: Post traumatic stress disorder, severe, chronic Polysubstance abuse
>
> Axis II: Antisocial personality disorder, with paranoid features
>
> Axis III: status post-head injury and inhalant abuse
>
> Axis IV: Stressors - legal issues, severe
>
> Axis V: GAP - functional ability- 60 on scale of 100.

Dr. Kenner's report was entered as Exhibit 42.

Dr. Kenner described the traumatic events in Petitioner's life that formed the basis for his diagnoses and opinions concerning Petitioner. Paramount was

Petitioner's life-history of being physically and sexually abused in childhood.

Dr. Kenner described Petitioner's history of repeated head injuries. In addition to constantly being hit in the head by his step-father with tobacco sticks, coffee cups and other objects, when Petitioner was eight or nine he fell off a hay wagon and was knocked unconscious. Petitioner was unconscious for approximately 30 minutes and had bleeding from his ear. Dr. Kenner noted that bleeding through the ear is a sign of a fracture at the base of the skull. Bill Hines, Petitioner's step father, did not seek medical attention for Petitioner. Dr. Kenner's opinion is that repeated injuries such as these are cumulative and create "organic personality syndrome" Dr. Kenner stated that it makes it difficult for people to learn because it decreases recent memory. It also impairs abstract thinking and makes the person more volatile. Petitioner's other head injuries include getting hit in the head with a baseball bat playing sandlot ball at age twelve. Petitioner's neuropsychological testing shows he actually got better while in prison. One of the reasons, according lo Dr. Kenner, is that he stopped getting hit in the head and getting into fights.

Dr. Kenner opined that Petitioner's physical injuries were likely compounded by his use of inhalants, sniffing glue and gasoline. Dr. Kenner testified that organic solvents are neurotoxic in and of themselves. In addition, the method used for inhaling or huffing them is to put a plastic bag over one's head to concentrate the fumes . The result is that the brain gels insufficient oxygen which also is harmful.

Dr. Kenner described the effects of Post-Traumatic Stress Disorder ("PTSD). He stated that PTSD literally changes the way the brain works; it changes the architecture of the brain. He described it as being analogous to an electrical surge rewriting the motherboard on a computer. It can happen both with traumatic brain injury and PTSD. Dr. Kenner explained that individuals with PTSD experience stressful events organically differently than normal people. A normal person experiences the event and immediately the body's fight or flight mechanism is triggered, releasing the hormones epinephrin and norepinephrin (formerly known as adrenalin and noradrenalin). Dr. Kenner stated that for PTSD patients this is a chronic state. Normal people also have a calming hormone, cortisol, when the event ends. People with PTSD don't have the calming hormone and thus there is nothing to catch the arousal state. Through the use of PET scans and more advanced MRI's, studies have shown the part of the brain that deals with emotions and inhibits action, the hippocampus, actually shrinks in patients with PTSD.

Dr Kenner explained the "beta endorphin system". In normal population, good, warn, fuzzy feelings are mediated by the endorphins, an example being the "runners high." People with PTSD are in a perpetual state of deficiency of beta endorphins. As a result they will put themselves in dangerous situations to get the endorphins to release. Essentially, they jump start the beta endorphin system through risky or dangerous behavior. People traumatized, particularly as children, are far more likely to get involved in co-morbid conditions, problems with substance abuse, self-

destructive behavior, etc. Persons with PTSD also will have low serotonin - it is one of the neurotransmitters that one has problems with.

Dr. Kenner testified that in adults a dramatic change in personality will accompany PTSD. However, in children, because they are developing, it is more difficult to recognize. In Petitioner's case, his sisters described him as a sweet, happy little kid until he got about grade school age. This corresponds with Bill Hines' beginning to attack him more severely. The symptoms of children with PTSD are similar to those with a conduct disorder, so quite often kids with PTSD are diagnosed with a conduct disorder which is a precursor to an adull antisocial personality disorder.

When an adult experiences a traumatic event, even if they develop PTSD, they have the knowledge that the event is abnormal and therefore have some basis to still know that the whole world is not like that. However, a child knows no other world, so the whole world becomes filled with abusive, dangerous, volatile men (in Petitioner's case, Bill Hines) who will attack Petitioner.

People with PTSD have a "repetition compulsion" which means they have a way of repeating the traumaric events. Examples: Women who are sexually abused go into the sex trade at a rate four times higher that other women. Men traumatized in battle will become soldiers of fortune. In Petitioner's case one of the themes in his life is to fight with male authority figures.

Dr. Kenner testified that, as related in Dr. Auble's report, the testing shows a paranoid quality to Petitioner's personality. He is always vigilant to who is going to attack him, who is going to sexually abuse him.

Petitioner's experience at Green River would have been very similar to the abuse he got from Bill Hines and would have been very traumatic for him.

Dr. Kenner testified that the facts of the murder are inconsistent with Petitioner. There is no indication that Petitioner had hard feelings at that primitive level toward women. Dr. Kenner cited the relationship of trust that Petitioner has formed with Connie Westfall, an investigator for the Office of the Post-Conviction Defender. According to Dr. Kenner, Petitioner's history shows that he did not strike women. Dr. Kenner stated that the facts of this case are trademarks of someone who is starting or in the middle of a career as a serial killer. The person who' killed Ms. Jenkins hated women. According to Dr. Kenner's testimony, this is not what is shown by Petitioner's history. Petitioner's history shows he forms better relationships with women than he does with men.

Dr. Kenner stated that the evalualion performed by Middle Tennessee Mental Health Institute (MTMHI) was superficial and the results largely inconclusive. He explained that MTMHI was ruling out schizophrenia, and may also have been ruling out a bi-polar illness. One would not be able to pick up PTSD based on lhe examination performed by MTMHI. Dr. Kenner also noted that, to the extent that the MTMHI report was based on the self reporting of Petitioner.

Dr Kenner testified that the information gathered by Dr. Charvat was not thorough enough. For example, she should have interviewed Victoria Hines Furlong in more detail and should have interviewed Lee Miles.

On cross-examination, Dr. Kenner testified that most of the information upon which he based his opinions was available to Dr. Charvat in 1989. He admitted that Petitioner's prison records show a hatred toward blacks and women. This fact calls into question the accuracy of Dr. Kenner's opinion concerning Petitioner's affinity toward women. If Petitioner's statements in the prison records are accurate, they would tend to put him in the position of the person who Dr. Kenner testified likely killed the deceased, a hater of women. Dr. Kenner explained this apparent discrepancy by stating that Petitioner "says he hates women but his actions are otherwise". In fact, other experts testified that at the time of the crime Petitioner was extremely affected by emotional distress caused by two women, Mrs. Virginia Chandler and Ms. Melanie Chandler.

In view of this fact, Lhe Court does not consider Dr. Kenner's testimony to be particularly strong mitigation evidence.

Dr. David Richart, an Associate Professor at Spalding University, Louisville, Kentucky, and executive director of the National Institute on Children, Youth and Families, testified as to the type of programs used at the Kentucky Green River Boys Camp and the effects that they had on children who were sent there.

Petitioner was at Green River for about six months in 1977-8. Richart paid particularly close attention to records and reports from that period. Richart found that Petitioner's descriptions matched with what other former residents had reported as well as what Richart had personally witnessed and what was shown in the various reports.

Richart explained to the court the group therapy techniques or modalities such as 'guided group interaction' 'positive peer culture' and 'reality therapy'. These were used in residential facilities throughout the country, and in particular at Green River during the time that Petitioner was a resident there. Richart founded an organization called Kentucky Youth Advocates, which was responsible for a series of exposes about children who were in these facilities and some of the misapplications of these modalities.

These programs were originally well meaning in design but began to draw criticism because they were being inappropriately used. They called for confronting the juvenile with what he had done and how it affected others. These programs are currently being used in other states but they are using them differently than they were being used in Kentucky. The systems presently being used no longer have the emotionally or physically confrontive element as used in Kentucky. In direct response to these abuses of the group therapies, the second edition of the book *Positive Peer Culture* by Mr. Vorrath, the founder of guided group interaction, adds warnings about its use. In his book, Vorrath warns that if a group treatment program is involved in harassment, name-calling, screaming in somebody's

face, that is not a proper use of his treatment modality and will do more harm than good.

An affidavit from Charles Bonta, a retired juvenile specialist for Kentucky who oversaw the programs at various juvenile camps, supported Petitioner's position that such events occurred at the time that Petitioner was at Green River.

From his experience as an aftercare worker, Richart observed that it was often only a month or two after release from the camp that the youths were back in trouble. Some residents actually experienced psychological breakdowns and Richart had to pick them up and take them to mental hospitals. Others became more withdrawn or aggressive. It hardened them more toward society because they learned that no one cared about them. Richart testified that many of the former residents of Green River ended up in prison or on death row.

Richart reviewed the Hines family file and came to the conclusion that Petitioner was completely inappropriate for guided group interaction, even in its intended form. In the form that the program was applied at Green River it simply reinforced Petitioner's view that the world was a hostile and abusive place and abuse and violence were simply facts of everyday life. Richart testified that the effect of Green River on Petitioner was probably to make him psychologically tougher, diminish any sensitivities he had toward other people and make him less tolerant of other people confronting him. He opined that Petitioner's experiences there compounded his criminal tendencies and exacerbated his feelings of isolation. Dr. Richart

also pointed out that Petitioner was not given any alcohol or drug treatment while at Green River.

To counter Petitioner's mitigation evidence, the State offered Dr. Henry Cellini, who was currently engaged in private consulting and employed by the University of New Mexico in the violence and substance abuse studies program. Dr. Cellini's degree is in Educational Psychology. Because of his area of expertise, the Court allowed Dr. Cellini to testify in the area of the effects of serotonin on behavior but not on the subject of medical tests. The Court ruled that the fact that his Ph.D. is in another area effects the weight of his testimony but did not prohibit its admissibility

In this limited capacity Dr Cellini's testimony did not vastly differ from that of Dr. Rossby. Dr. Cellini agreed that research into serotonin and other neurotransmitters dates back to the 70's or early 80's. He was aware that recent research authoritatively establishes a connection between low serotonin levels and suicide. Dr. Cellini agreed with Dr. Rossby that low serotonin level is not shown to cause violent behavior, rather it prevents the person from controlling impulsive violence. Dr. Cellini was aware that there were many articles concerning research in this area conducted in the 1970's, and he agreed that some of this research was reasonably well done. He testified that serotonin research was in its infancy in the mid-1980's. Dr. Cellini further agreed that the primary studies on serotonin were sponsored by the National Institute of Mental Health and that serotonin research is not "pop psychology".

Although Dr. Cellini did not know whether the role of neurotransmitters on crime was known to criminal defense attorneys in the mid to late 80's, he testified that it was often brought up in departments of corrections. Dr. Cellini agreed that even if attorneys may not have known about serotonin research in the mid 1980's, psychologists and psychiatrists did. He further testified that in the past decade there has been a lot of interest in the area by attorneys.

The primary contribution of Dr. Cellini's testimony was to establish the level of awareness of serotonin research in the professional community during the time in question. This Court accepts Dr. Rossby's testimony concerning the details of serotonin level physiology and its effect upon Petitioner. Dr. Cellini did not contradict this testimony.

The Court finds that, with the exception of the serotonin evidence, the mitigation evidence presented by Petitioner at his Post-Conviction hearing was essentially a more detailed presentation of the mitigation evidence at trial. The record shows that this detailed mitigation evidence was prepared by two attorneys and three investigators over a three year period of time. This time was far in excess of the time which would have been allowed to prepare for even a capital trial.

While the serotonin evidence would have been very useful in mitigation for Petitioner, there is no evidence that this information was known outside the medical community at the time of Petitioner's re-sentencing. Petitioner's medical experts who testified at re-sentencing did not appreciate the importance of this

subject. In this regard, the *Cazes* opinion is instructive. The trial judge in *Cazes* found that Dr. Auble had not attended any seminars in forensic psychology at the time of Cazes' 1990 trial. Apparently, was not aware of the importance of serotonin levels to impulse control. In the opinion of this Court, Petitioner's counsel are entitled to rely upon the expertise of their selected professionals to determine whether further examination of Petitioner might prove fruitful. Steve Stack testified that the mitigation experts who testified in Petitioner's re-sentencing trial were suggested by the Capital Case Resource Center. Legal counsel could not be expected to know which medical speciality might prove beneficial in discovering additional information about Petitioner's mental or emotional condition which might prove useful. The taxpayers of this state could not be expected to finance a "fishing expedition" designed to possibly discover information which might ultimately prove useful to Petitioner's case. This Court would not approve an expenditure for an examination of Petitioner without some articulable facts to support a reason for such examination. 'Petitioner's counsel at re-sentencing could not reasonably have been expected to search for experts on a subject which they did not know existed.

Failure to attack heinous, atrocious or cruel aggravating factor

Petitioner submits that his counsel at re-sentencing should have challenged the testimony of Dr. Charles Harlan concerning the extent of suffering experienced by the deceased immediately prior to her death. He alleges that a pathologist could have provided evidence

that the victim suffered only briefly, thus minimizing the effect of the "heinous, atrocious or cruel" aggravating factor.

Dr. Jeff Christian Sperry, the Chief Medical Examiner for the State of Georgia, testifying on Petitioner's behalf in post-conviction, opined that there was pathological evidence that could have mitigated against the severity of the crime as well as casting doubt upon Petitioner's guilt. This Court has previously found that the medical evidence would have had little, if any, impact upon the jury's finding of guilt in his original trial.

Dr. Sperry has been a forensic pathologist since 1985. He testified that he is familiar with crime scenes as he has been to many in his career and he has investigated hundreds of stabbings. In preparation for his testimony at the post-conviction hearing, Dr. Sperry studied the testimony of Dr. Harlan, Sheriff Weakely and E.M.T. Mary Sizemore, the autopsy report, photographs of the crime scene and autopsy, and reports. He testified that he generally agreed with the autopsy report. Dr. Sperry's opinion was that the superficial wounds to the chest and defensive wounds to the hands were related. The wounds demonstrate that as the deceased tried to prevent stabs to her chest, her hands were cut. She was successful in preventing the first thrusts from penetrating deeply.

Dr. Sperry noted that the crime scene environment is remarkable for the absence of blood. In most stabbings blood is transferred to many different surfaces. In the motel, there were only a couple of puddles. The TBI investigation disclosed no evidence of

other blood, hence the struggle was likely very brief. Dr. Sperry's opinion is that the entire time frame of the stabbing was probably less than a minute or less than thirty seconds, with the victim becoming rapidly incapacitated.

Dr. Sperry stated that the two stab wounds into the heart would cause massive bleeding instantly. Blood would be pumping into the chest cavity instead of the brain. Loss of consciousness would have occurred in 15 or 20 seconds. Dr. Sperry testified that the brain begins starving for oxygen within seconds. If blood does not reach the brain, loss of consciousness is very rapid. He likened the effect of the injuries to the heart as similar to a tire blowout. Death would occur in three to four minutes. Dr. Sperry disagreed with Dr Harlan's opinion that loss of consciousness would take 3 or 4 minutes. In Dr. Sperry's opinion, the lack of blood at the crime scene shows collapse was rapid and that it would have been impossible for someone to receive wounds like this and stay conscious for four minutes. Once unconscious, the victim would be anesthetized to pain.

Both Drs. Sperry and Harlan agree that the stab wound to the victim's vagina occurred perimortem, at or very close to death. Dr. Sperry noted that there were no other injuries to vagina so it was, in his opinion, a careful, deliberate act. He testified that the wound was out of context with the other wounds. The first part of the attack was rapid, but this wound was deliberate. The wound is gratuitous, because it played no role in the deceased's death. Dr. Sperry's opinion is that

attacking a woman's genitals is associated with intense hatred or anger towards women.

Dr. Sperry's opinion is that there was no suffering from the vaginal wound because the victim was unconscious. Dr. Sperry testified that the entire attack could have occurred in thirty seconds. He also testified that adrenalin and brain mechanisms can block pain in major injuries, and that fear and desire for self-preservation can be a stimulus to pain blockage. Dr. Sperry testified that there was, in his opinion, very little movement from the victim during the attack as evidenced by the lack of blood transfer even from the defensive wounds on the hands, indicating that she was incapacitated very quickly.

The State called Dr. Charles Harlan, who testified that he considered his testimony at Petitioner's trial and re-sentencing to be accurate. He further testified that he believed Dr. Sperry to be a competent pathologist but considered him, "...a professional whore and a liar.".

The Court concludes that a "battle of experts" at the re-sentencing trial would certainly have been colorful but would have gained Petitioner little, if anything, by way of rebutting this aggravating factor.

Failure to make closing argument

This Court has detailed the facts of Petitioner's failure to make a closing argument at his re-sentencing hereinabove. The testimony of Steve Stack essentially conveys the facts concerning this issue when he stated that Petitioner's counsel had agreed to waive their closing argument in the re-sentencing trial because

they believed that the State's initial opening argument was primarily factual and hadn't hurt the defense significantly and that they had more to gain by preventing Gen. Atkins' anticipated closing argument than by presenting their argument. The Court finds that the failure to make a closing argument was a tactical decision agreed to by all three of Petitioner's counsel.

CONCLUSIONS OF LAW

Failure to investigate for, develop and present mitigation evidence

Petitioner's burden under *Strickland* applies to his re-sentencing trial. This Court has previously set out these requirements in its consideration of Petitioner's 1986 trial and adopts them here as well.

Significant factors

Where the alleged prejudice under *Strickland* involves the failure of counsel to present mitigating evidence in the penalty phase of a capital trial, our supreme court has held that several factors are significant. First, the nature and extent of the mitigating evidence that was available but not presented. Second, whether substantially similar mitigating evidence was presented to the jury in either the guilt or penalty phase of the proceedings. Finally, whether there was such strong evidence of aggravating factors that the mitigating evidence would not have affected the jury's determination. *Goad v. State,* 938 S.W.2d 363, 371 (Tenn. 1990).

(1) Nature and extent of mitigating evidence

The nature and extent of the mitigation evidence which was available but not presented is essentially cumulative with the exception of the serotonin evidence. The other evidence presented simply explored in greater detail Petitioner's mental and emotion state with particular emphasis upon his deprived and abusive childhood. The mental and legal professionals who were involved in Petitioner's re-sentencing trial testified that they could have and should have been more through and detailed in their respective tasks at Petitioner's re-sentencing. The professionals who did not testify at Petitioner's re-sentencing indicated that, had they examined Petitioner or the evidence prior to his re-sentencing, they would have been able to have given the jury more insight as to Petitioner's mental and emotional problems. Although not precisely mitigation evidence, the Court considers the testimony of Dr. Sperry to be essentially mitigation evidence as its purpose (in addition to creating reasonable doubt as to Petitioner's guilt) was to create reasonable doubt in the "heinous, atrocious or cruel" aggravating factor, thus hopefully preventing aggravating factors from outweighing mitigating factors or at least creating reasonable doubt thereof.

Substantially all of the evidence which was not presented at Petitioner's re-sentencing was on the same basic subject but considerably more in depth than that presented with the exception of the serotonin evidence and Dr. Sperry's rebuttal of Dr. Harlan's conclusions about the time of consciousness of the deceased prior to her death and matters related to the

manner of her death. The Court finds that the serotonin evidence was not reasonably available to Petitioner's re-sentencing counsel, since it was not known to them and could not have been discovered by the exercise of reasonable diligence. Dr. Sperry's rebuttal testimony was of a type which could reasonably have been discovered by counsel. There is no evidence that Petitioner's re-sentencing counsel investigated the possibility of impeaching Dr. Harlan's conclusions for the purpose of mitigation. The autopsy report was known to counsel and an independent forensic opinion could have been obtained relatively inexpensively.

(2) Whether substantially similar evidence was presented at re-sentencing

Former Chief Justice O'Brien succinctly set out the mitigation evidence at Petitioner's resentencing in his opinion on the appeal of Petitioner's sentence of death at said trial:

> In mitigation, the defendant presented proof that, while in prison on this conviction, he had presented no serious disciplinary problems and posed no threat to the prison population. The defendant also presented proof of a troubled childhood. His father had abandoned the family when the defendant was young. His mother had an alcohol problem. In his teens the defendant became involved in sniffing gasoline and glue and began to abuse alcohol and drugs He also exhibited self-destructive behavior. Dr. Pamela Auble, a clinical psychologist, testified that the defendant was suffering from a paranoid

> personality disorder and dysthymia, or chrome depression. According to Dr. Auble, the defendant would suppress his feelings until they "boiled up" under stress. In her opinion, the defendant, who had returned from turbulent visits with his parents and girlfriend shortly before he committed the murder, was under stress when he killed the victim. Dr Ann Marie Charvat, a sociologist, also testified about the damaging effect of the circumstances of his childhood on the defendant

State v Hines, 919 S.W.2d 573, 577 (Tenn. 1995)

To this summary, this Court would respectfully add the fact of the abuse of Petitioner by his step-father, Rufus "Bill" Hines. This fact was considered by Dr. Auble in her testimony in Petitioner's re-sentencing.

It should be noted that the Supreme Court characterized the mitigation evidence presented at Petitioner's re-sentencing trial as "extensive". id.,584.

As this Court has found hereinabove with respect to the first issue, the evidence presented at Petitioner's re-sentencing was substantially similar to that presented at the hearing ofhis Post-Conviction Petition. The evidence concerning Petitioner's mental and emotional condition was substantially introduced at trial and the evidence at the hearing of the Post-Conviction Petition was on the same subject but in more detail and with more evaluation. The conclusions were similar.

The serotonin evidence was not presented at Petitioner's re-sentencing but, as the Court has

previously found, was not reasonably available at that time.

The subject of medical expert rebuttal of Dr. Harlan's forensic medical conclusions was not presented at Petitioner's re-sentencing.

(3) Effect upon jury's determination

At Petitioner's re-sentencing, the followmg aggravating factors w ·ere presented (the notations to the *Tennessee Code Annotated* are to the sections as they existed at the time of the re-sentencing):

> (1) The defendant was previously convicted of one or more felonies, other than the present charge, which involved the use or threat of violence to the person. [§ 39-2-203(i)(2)]
>
> (2) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind. [§ 39-2-203(i)(5)]
>
> (3) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any rape, robbery or larceny.[§ 39-2-203(i)(7)]

With regard to the first aggravating factor, the proof presented at Petitioner's resentencing hearing established that he had previously been convicted in Kentucky of assault in the first degree. A detective who had investigated the case testified that the defendant

had inflicted serious physical harm to the victim in this prior case.

The second aggravating factor was characterized by the Supreme Court in its opinion in the appeal of the re-sentencing of Petitioner as "the key aggravator". *id.,* 584. The opinion described this and the first factor as "fully and strongly supported by the record". *id*. Even taking into account Dr. Sperry's rebuttal of Dr. Harlan's opinion, the facts of this murder are brutal and fit the aggravating factor. It should be observed that the jury would quite likely be more impressed with the opinion of Dr. Harlan, who actually performed the autopsy than that of Dr. Sperry, who only reviewed the records of it. In the opinion of the Supreme Court in Petitioner's re-sentencing, it held, "When this case was originally considered on direct appeal, this Court commented that the evidence, equivalent to that presented at this sentencing hearing, was clearly sufficient to demonstrate that the murder was especially heinous, atrocious, or cruel. *State v Hines,* 758 S.W.2d at 523. We continue to agree with this finding." *id.,* 581.

The third aggravating factor was that the murder was committed while the petitioner was engaged in rape, robbery and larceny. On this third factor, the Supreme Court considered and rejected an argument that this aggravating factor was defective under *State v Middlebrooks,* 840 S. W.2d 317 (Tenn. 1992). Although the robbery was the basis of the finding of guilt of the petitioner of felony murder, the other two crimes, rape and larceny were not. The Court held that lhese two other factors were sufficient to sustain this

aggravaling factor. The harmless error analysis was conducted on the chance that the jury might have considered robbery in arriving at this factor. *id.,*583. The Supreme Court found that, "... under these facts the aggravating circumstance as applied restricts the sentencer's discretion to those who kill while in the perpetration of multiple felonies, a class of murderers demonstrably smaller and more blameworthy than the general class of murderers eligible for lhe death penalty...". *id.*

In view of the overwhelming strength of the aggravating factors in Petitioner's case, this Court finds that the mitigating factors would not have affected the jury's determination. The jury would be required by logic and common sense to find that the aggravating circumstances outweighed the effect of the mitigating factors beyond a reasonable doubt. It should be noted that Steve Stack, when recalled to testify, opined that in his judgment even if all the mitigation evidence which was presented at the hearing of the Post-Conviction Petition had been presented at Petitioner's re-sentencing trial, it was more likely than not that a verdict of death would have resulted.

This being the case, this Court finds that Petitioner's counsel at his re-sentencing hearing were not ineffective in that they failed to investigate for, develop and present significant mitigating factors and no prejudice to Petitioner therefrom is shown in the record in this case.

Failure to attack heinous, atrocious or cruel aggravating factor

Petitioner submits that his counsel at re-sentencing should have challenged the testimony of Dr. Charles Harlan concerning the extent of suffering experienced by the deceased immediately prior to her death. He alleges that a pathologist could have provided evidence that the victim suffered only briefly, thus minimizing the effect of the "heinous, atrocious or cruel" aggravating factor.

As the Court has previously found, Dr. Sperry studied the testimony of Dr. Harlan, Sheriff Weakely and E.M.T. Mary Sizemore, the autopsy report, photographs of the crime scene and autopsy, and reports and opined that while he generally agreed with the autopsy report, his professional opinion was that the entire time frame of the stabbing was probably less than a mmute or less than thirty seconds, with the victim becoming rapidly incapacitated. Loss of consciousness would have occurred in 15 or 20 seconds, not the 3 or 4 minutes testified to by Dr. Harlan. Once unconscious, the victim would be anesthetized to pain.

Both Dr.'s Sperry and Harlan agree that the stab wound to the victim's vagina occurred perimortem, at or very close to death. Dr. Sperry testified that the wound is gratuitous, because it played no role in the deceased's death. In his opinion, there was no suffering from the vaginal wound because the victim was unconscious. Dr. Speny testified that the entire attack could have occurred in thirty seconds.

The Court finds that the failure to introduce such testimony was ineffective assistance of counsel under *Strickland*. The inquiry now becomes whether this failure on the part of counsel at the re-sentencing hearing was prejudicial to Petitioner.

If the jury found that the deceased lost consciousness within a matter of seconds from receiving the fatal stab wounds to the chest, the "heinous, atrocious and cruel" aggravating factor could not have been sustained by the facts as a matter of law. See *State v Odom,* 928 S.W.2d 18, 26 (Tenn. 1996).

In the opinion of the Court, the jury would have been much more impressed with the testimony of the pathologist who actually performed the autopsy as opposed to one who made his hypothesis from photographs and the autopsy report. For example, in explaining his conclusion that the death of the deceased took much longer than Dr. Sperry hypothesized, Dr. Harlan stated that he found 950 ccs of blood in the chest cavity and opined, "It takes a while to pump that much blood". If Dr. Sperry was incorrect about the time of death, he may likewise have been incorrect about the time that the Deceased was conscious. Although it impossible to state with certainty, the Court finds that the testimony of Dr. Sperry would have been insufficient to cause the jury to have a reasonable doubt that the deceased was conscious during the apparently final wound to the vagina.

Even assuming that the jury did have a reasonable doubt that the deceased was conscious at the time of the final wound and did not find that aggravating

factor, the Court finds that the remaining two aggravating factors were still strong enough to outweigh the mitigating factors as presented at the hearing of the Post-Conviction Petition. This Court does not find a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Therefore, the Court finds that Petitioner was not prejudiced by this failure of counsel.

Failure to make closing argument

Petitioner has submitted that the failure of his counsel at his re-sentencing trial to make a closing argument constitutes ineffective assistance of counsel. In support of this argument, he cites the case of *Cone v. Bell,* 243 F3d 961 (6th Cir. 2001), cert. granted 122 S.Ct. 663 (2001). In the state appeal of defendant Cone's case, the Tennessee Court of Criminal Appeals had held that waiver of closing argument by the defense was, "a legitimate trial tactic, the exercise of which furnishes no basis for a finding of ineffectiveness of counsel." *State v. Cone,* 747 S.W.2d 353, 357 (Tenn. Crim. App. 1987). In so finding, the Court of Criminal Appeals stated:

> One of the prosecuting attorneys made a low-key opening argument after the punishment hearing. It was trial counsel's judgment that he should waive argument to prevent the other prosecuting attorney from making closing argument. The other prosecutor was capable of making very devastatmg closing arguments and he could not be answered by defense counsel. This is a legitimate trial tactic, the exercise of

> which furnishes no basis for a finding of ineffective assistance.

Id. This is exactly the situation which occurred in the *sub judice.* Admittedly, there were other issues of ineffectiveness of counsel considered by the Court of Criminal Appeals in it's *Cone* opinion but this language related only to the issue of failing to make a closing argument.

In the Federal case, the Sixth Circuit Court of Appeals ruled that the presentation of no mitigating evidence except that presented in the guilt phase of the trial and failing to present a final argument constituted ineffectiveness of counsel to the extent that prejudice was presumed. This is not the situation in the case *sub judice.* Petitioner's counsel presented (in the words of the Tennessee Supreme Court) "extensive" mitigation evidence. The mitigation information was before the jury, the question became whether the benefit to the defense by restating and arguing the mitigation evidence would be overcome by the prosecutor's anticipated forceful and emotional final argument, probably focusing upon the brutal and inhuman manner in which the Deceased met her death. In the words of Petitioner's re-sentencing counsel, Steve Stack, "we had more to gain by preventing Gen. Atkins' anticipated closing argument than by presenting our argument". To use a sports analogy, the manager chose to "walk the Babe" rather than risk a home run.

This Court is of the opinion that the case of *Cone v. Bell* is distinguishable on these facts and that the Court of Criminal Appeals opinion is more on point. This is certainly the wisest course. Counsel for the

defense should not be placed in the position of having to pursue an unwise trial tactic in order to prevent a later finding of ineffectiveness of counsel. As the Court of Criminal Appeals stated,

> The question of what witnesses to use and whether to waive final argument are tactical questions upon which competent lawyers might disagree. It cannot be said that incompetent representation had occurred merely because other lawyers, judging from hindsight, might have made a better or different choice of tactics.

State v. Cone, supra.

The Federal court in *Cone v Bell* held that counsel's conduct amounted to an abrogation of counsel's responsibility to his client without a strategic reason for doing so. This is not the case here. Petitioner's re-sentencing counsel presented a spirited and well-prepared defense. Their decision to waive final argument was strategically based. Trial counsel's job is to prevail at trial, not to avoid being criticized on appeal. If Petitioner had avoided the death penalty, his trial counsel's strategic decision would have been viewed as inspired. The courts should not be outcome oriented in viewing this decision.

This Court is aware that the United State Supreme Court has accepted certiorari in the case of *Cone v Bell,* supra and that oral argument on the issue of waiving final argument was presented on March 26, 2002. Rather than delay the release of this opinion for some months to determine the ruling of the U.S. Supreme

Court, this Court has elected to release its findings and conclusions at this time.

This Court finds no ineffectiveness of counsel in waiving final argument.

In summary, this Court finds no prejudicial ineffectiveness of counsel in Petitioner's resentencing trial.

4. Failure to conduct motions practice (both trials and post-trial)

Petitioner has made numerous allegations concerning the alleged failure of his counsel to file certain motions before his original 1986 trial, his 1989 re-sentencing and post-trial motions in both trials. The Court has reviewed the records of these proceedings in addition to the evidence presented at the hearing on the Post-Conviction Petition and finds no demonstration by Petitioner of prejudice from these alleged failures. In this, Petitioner has failed in his burden of proof of establishing that, but for the alleged ineffectiveness of his counsel in this regard, the result would have been different.

5. Ineffectiveness of counsel on appeal

Petitioner has alleged that his counsel was ineffective on appeal, citing numerous instances in which counsel should have preserved and argued issues on appeal. This Court has considered each of these and finds that the issues presented by Petitioner would not have been successful on appeal, mostly because they did not affect the outcome of the case but also because they are simply incorrect. For example, Petitioner

alleges that it was error for the Court to allow certain statements of the prosecutor at voir dire, "Specifically, the state incorrectly stated that it was entitled to a fair trial." This Court is of the opinion that it is the sworn duty of a trial judge to insure a fair trial for BOTH sides. In this, the appellate courts agree. See *Stale v. Robert L. Drew* (unreported) Tenn. Crim. App. at Nashville # M2000-01853-CCA-R3-CD, LEXIS 703 opinion filed September 07, 2001.

Petitioner has not demonstrated prejudice in his counsel's performance on appeal.

6. Failure of counsel at trial and on appeal to challenge the constitutionality of the death penalty.

Petitioner has submitted numerous pages of particulars in which he alleges his counsel were ineffective in challenging Tennessee's death penalty statutes. These challenges have been unsuccessfully presented to the appellate courts of this state on countless occasions. There is no reason for this Court to assume that the outcome would have been any different had they been presented in this case.

This Court finds no ineffectiveness of counsel in this respect.

7. Failure to perform proportionality review

Although this issue is primarily a matter for consideration by the Supreme Court, the undersigned must accept somes responsibility for the confusion surrounding this issue. The report of the trial judge which is required by Rule 12 of the Rules of the

Supreme Court in capital cases was prepared and submitted in a timely fashion by the undersigned after the original trial. The report, however, was filed in the Office of the Executive Secretary of the Supreme Court (now the Administrative Office of the Courts) instead of being included in the technical record. Upon inquiry after the release of the 1995 opinion of the Supreme Court in Petitioner's case, the same was located and is now in the possession of the Supreme Court.

8. Other grounds listed in petition or amendments thereto

Petitioner has submitted various other grounds for relief in his petition, his amended petition or the amendment to the amended petition. Among these are:

1. Involuntariness of Petitioner's statements after arrest because he was starving;

2. Involuntariness of Petitioner's statements at the jail due to his having beaten by inmates;

3. Being required to exhibit tattoos at Petitioner's original trial;

4. *Brady* violations concerning:

   A. Olan Smith interview; and

   B. Existence of witness Melanie Chandler;

5. Newly discovered evidence, to wit: the statements of Bill Hines, Bobby Joe Hines, Melanie Chandler and Olan Smith; and

6. Rejection by the Court of the proposed plea bargain before the 1989 resentencing trial.

Statements

Petitioner insists that his statements given at his arrest and while in jail in Kentucky were involuntary due to hunger in the first instance and beatings by his fellow inmates in the second. No evidence concerning these conditions was presented. The Court, therefore, denies relief based upon these complaints.

Exhibiting tattoos

Petitioner alleges that being required to exhibit the tattoos on his arms was error and that his counsel was ineffective for not objecting to this procedure.

A trial court has discretion to allow a jury to view certain aspects of an individual's physical appearance, such as tattoo or scars. 3 *Wharton's Criminal Evidence* § 16:20 (15th ed. 1999). Tennessee courts recognize this principle. *State v. Henderson,* 623 S.W.2d 638, 641 (Tenn. Crim. App. 1981). This exhibition does not violate a defendant's Fifth Amendment right against self-incrimination. *Black v. State,* 479 S.W.2d 656, 658 (Tenn. Crim. App. 1972).

Brady violation

A *Brady* violation is alleged by Petitioner with respect to an alleged interview with one Olan Smith and the existence of Melanie Chandler.

Petitioner has presented no proof concerning Olan Smith or what his testimony might have been. This being the case, this Court could find no *Brady* violation.

This Court is hard-pressed to imagine that Petitioner would not know of Melanie Chandler and the

possible substance of her potential testimony. Her testimony at the hearing established that she is the mother of his child and Petitioner had been in her house in North Carolina in the days prior to the murder. The Court finds that the witness Melanie Chandler was more available to Petitioner than to the State. Any potentially exculpatory information which she may have had could have easily been discovered by Petitioner or his counsel.

Newly discovered evidence

In his petition, Petitioner submits that there existed newly discovered evidence which would have been beneficial to him at trial. At the hearing, Petitioner did not introduce evidence characterizing any of these statements as newly discovered evidence nor relating to any other factors necessary to prevail upon this ground. With regard to most of the evidence, this Court has previously ruled that it would not have affected the outcome of the trial. This ground for relief is denied.

Rejection of plea bargain

This precise issue has been considered and rejected by the Supreme Court in Petitioner's appeal of his re-sentencing hearing. *State v Hines,* 919 S.W.2d 573, 577-8 (Tenn. 1995). As such, it cannot form the basis of relief in a Post-Conviction proceeding. T.C.A. § 40-30-206(f) provides that any matter which has previously been determined cannot form the basis of relief in a Post-Conviction proceeding.

CONCLUSION

For all of the above reasons, the Petition for Post-Conviction Relief is respectfully denied.

This the 8th day of May 2002.

/s/ Robert E. Burch
Robert E. Burch
Circuit Judge