No. 20-6273

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

JEROME SIDNEY BARRETT – PETITIONER, *PRO SE*

WARDEN MIKE PARRIS – RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO

SIXTH CIRCUIT COURT OF APPEALS

No. 20-5202

Jerome S. Barrett
Tennessee Department of Correction #73179
Morgan County Correctional Complex
541 Wayne "Cotton" Morgan Drive
P. O. Box 2000
Wartburg, Tennessee 37887

No Phone

QUESTIONS PRESENTED FOR REVIEW

1) Whether a state prisoner has the right to file his own appeal Pro *Se* under certain conditions after the denial of his *Pro Se* petition for post conviction relief and perceived abandonment through alarming and repeated failures to communicate with his client by Post Conviction Counsel ("PCC").

2) Whether Defendant's trial lawyer was Ineffective at trial of a 34-year old "Cold Case" for 1st degree murder which was primarily based on DNA evidence proposed by the State of Tennessee ("TN")'s phalanx of DNA experts when counsel was not assisted at trial by a DNA expert to provide the adversarial component for fair trial.

3) Whether a Defendant state prisoner should be able to raise on post conviction appeal a claim of IATC that sounds in the state and federal constitutions where the state appeal courts have a "understanding" to not allow '*Pro Se*" appeals or amendments, even where a nominal counsel of record exists.

4) Whether the procedural ground on which the state highest court dismissed prisoner's application for permission to appeal (12-14-16) is abuse of discretion or unreasonable for not giving due consideration to cause for prisoner filing his Application *Pro Se*.

PROCEEDINGS IN STATE AND FEDERAL TRIAL AND APPELLATE COURTS

Post Conviction Petition No. 2007-D-3201 was filed in the Trial Court on 11-2013.

Counsel filed the Appeal; Barrett V. State of TN, M2015-01161-CCA-R3-PC on 6-24-15;

The opinion of the highest state court to review the merits appears at Appendix "A" to the petition and is unpublished at Barrett v. State of TN, M2015-01161-SC-R11- PC) permission to appeal denied by the Tennessee Supreme Court on 12-4-16.

The date on which the highest state court decided my original case was 7-13-12. A copy of that decision appears at Appendix "A". State v. Barrett, No. M2009-02636-CCA-R3-CD, 2012 WL 2870571

A timely application for permission to appeal was thereafter denied on 12-12-12, and a copy of the order denying the application appears at Appendix "B".

A timely petition for the Writ of Habeas Corpus was filed on 1-12-17 and denied in the U.S. District court on 1-24-2017 and a copy of the order denying the petition appears at Appendix "C".

A timely petition for the certificate of appeal ability to the U.S. Court of Appeals for the Sixth Circuit was filed on 2-21-20, and denied on 7-20-2020. A copy of that decision appears at Appendix "D".

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

TREATISES

CONSTITUTIONAL PROVISIONS

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides that no person*** shall be compelled in any criminal case to be a witness against himself, *** that No person shall be *** deprived of life, liberty, or property, without due process of law; ***

The Sixth Amendment to the United States Constitution provides that "*in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, ***and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.*"

The Eighth Amendment to the United States Constitution provides that "*Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*"

The Fourteenth Amendment to the United States Constitution provides that "*** *nor shall any State deprive any person of life liberty, or property without due process of law;* ***

STATEMENT OF THE CASE

Post Conviction Experience

Petitioner ("Pet") will first present his post conviction ("P.C.") claims for relief, their treatment by the trial (P.C.) Court, and subsequent mistreatment by the Tennessee ("TN") appellate tier system.

More importantly, Pet will attempt to portray the merit of these claims which he has consistently maintained, with comments and support along the way, which reflects his responses he has received throughout his ordeal or path, as you will.

In re Petitioner's ("Pet's") Appeal Brief to the Tennessee Court of Criminal Appeals ("TCCA"), Trial Court # 2008-B-1791; TCCA No. M2015-01161-CCA-R3-PC. petitioner filed a "Pro Se Motion For Delayed Appeal and/or Motion To Vacate Judgment and Re-Enter The Judgment because his post conviction court appointed counsel ("PCC"), Mr. David Harris, disappeared following the denial of his petition for post conviction relief ("PPCR") and him entering the matter at the first tier review. (Motion filed May 31, 2016).

Petitioner filed a "*Pro Se* Motion For Delayed Appeal and/or Motion To Vacate Judgment and Re-Enter The Judgment because his post conviction court appointed counsel ("PCCC") Mr. David Harris, disappeared following (Motion filed May 31, 2016).(APPENDIX #6). He stated that "the vacuum that exist(ed) leads petitioner to believe that his right to appeal was being deliberately sabotaged" by Mr. Harris. and that "...counsel apparently unilaterally terminated the defendant's appeal without notice and thus would have deprived his client of the opportunity to secure substitute counsel in a timely manner or file appeal *Pro Se*. Attorney (Harris) seems to have abandoned him w/o a word at the onset of the appellate process.

P.C. Evidentiary hearing was held on March 13, 2015, in the Davidson County Criminal Court Division I trial court.. Attorney Jason Chaffin wrote Pet on August 3, 2015, that he was being replaced by Mr. Harris.

Before Mr. Harris had been hired by the P.C. Court, Pet wrote the trial Court on July 16, 2015, and attorney Mr. Jason Chaffin (P.C.C. at Evidentiary Hearing) for "Status of Appeal" following the denial of his Petition for Post Conviction Relief on May 21, 2015. By August 30, 2015, Pet had received no response from Mr. Harris, and Pet wrote him. On September 29, 2015, after Pet wrote the TCCA Clerk. The Clerk sent Pet a "Case History" which stated in part: *"No transcript/Stmt Filed"*. Atty. Jason Chaffin filed the Notice of Appeal on June 24, 2015. (APPENDIX #2) After a review of the Tennessee Rules of Appellate Procedure, ("T.R.A.P.") which requires that appellant has a time window in which to take preliminary steps towards filing an appeal in the TCCA, of filing a "Designation of Record" and "Issues For Review" or lose the right to appeal, Pet again wrote Mr. Harris after receiving this information, to determine the status of his Appeal, as the TCCA Court's Clerk clearly awared Pet that no steps had been taken as of September 29, 2015 to have the Record from the P.C. Court prepared and sent to the Clerk for the TCCA. (APPENDIX #3)

By October 17, 2015, Pet felt compelled to file with the P.C. Court a "*Pro Se* Designation of the Record and Issues For Review" [(@ APPENDIX #4] because these are mandatory filings. (TR.A.P. Rule 24(b). (@APPENDIX #5)

Several more months passed after Pet requested to view the "draft" Appeal Brief from Mr. Harris, so that he could make sure that some of the grounds Pet had submitted in his original and amended *Pro Se* Petition for PCR would be considered for Appeal based on the Order of the court denying Post Conviction Relief.

Therefore, in light of the history of Mr. Harris's lack of due diligence regarding Pet's Appeal and communicating with him, on May 31 2016, Pet filed a *Pro Se* Motion For Delayed Brief on Appeal" to the TCCA. (@APPENDIX #6)Including Each of his Twenty-one Grounds in his PCP .

This was cause when upon review of the TCCA denial of Appeal Pet noticed from their opinion that Mr. Harris had completely eviscerated or cast aside most of the P.C. Grounds For Relief which had caused the Evidentiary Hearing ("E.H.") in the first place, which Pet. had entered on the required "Statement of Issues To be Presented on Appeal" October 17, 2015. /Infra, Statement of Reasons for Review] (APPENDIX #4) The TCCA noted the superficial treatment of his cause on appeal: *"The original petition and amended petition contained numerous grounds for PCR, only three of which have been maintained on appeal." (M2015-01161-CCA-R3-PC; 2016 WL 4410649: Barrett v. State of TN)* APPENDIX #7

In his Motion For Delayed Appeal (Appendix #6) (*id.)* to post conviction court, Pet stated that "*To the best of Pet's knowledge information and belief, Mr. Harris had not filed an appeal following the denial of P.C.R.* (See #7,pg. 4, *Id). D*ue to the notice by the TCCA Court Clerk that the preliminary steps for Appeal had not been taken ("record", "transcript", "issues for review") APPENDIX #4, pursuant to the Tennessee Rules of Appellate Procedure ("TRAP") 24(b) and 25(a), Pet complied with those preliminary steps in his *Pro Se* Designation of the Record and Motion To Supplement The Record and/or Amend Appeal. @APPENDIX #4.

The TN S.Ct. Rules 11 (g)[1]; 10 (e), and in "TRAP" to accommodate *Pro Se* appeals under extraordinary situations such as this. Pet asked the TN. S.CT to strike Mr. Harris' feeble and insincere attempt at appeal, to allow Pet's *Pro Se* Appeal to go forward.. [2]

U.S. District court treatment of Pet's Claims

The petition for the Writ of Habeas Corpus was filed on January 12, 2017 for being wrongfully convicted and imprisoned in violation of the United States Constitution. *(Barrett v. Genovese,*

[1] T.R.A.P. 11(g): "Appeal in Criminal Actions. Permission to appeal under this rule may be sought by the state and defendant in criminal actions."

[2] *"However before a state may terminate a claim for failure to comply with procedural requirements such as statute of limitations, due process requires that potential litigants be provided an opportunity for the presentation of claims at a meaningful time and in a meaningful manner. Burford v. State 845 S.W. 2d 204, 208 (Tenn. 12-21-92).*

U.S.D.Ct., M.D. Tenn. Nashville Div. No. 3:17-cv-00062). Honorable U.S. District Judge Aleta A. Trauger maintained jurisdiction until December 17th, 2019.

Thereafter, Chief Federal District Judge Waverly Crenshaw assumed jurisdiction on the case, denied the Petition for Writ of Habeas Corpus on January 24, 2020. *"In June 2008, a Davidson County grand jury indicted the Petitioner for first-degree murder and felony murder. In July, 2009, (a) jury found Petitioner guilty of second-degree murder a lesser-included offense, on both counts." (Barrett v. Genovese, @ *1). State of TN v. Jerome S. Barrett, No. M2009-02636-CCA-R3-CD. 2012 WL 2870571 (TCCA, July 13, 2012) (perm. App. den, TN S. CT. 12-12-12:"That they find the Defendant guilty of counts one and two second degree murder." July 18, 2009 [Sentencing Hearing" Sept. 4 2009] pg. 210 State's Exhibit. (Barrett v. Genovese @ *23).*

Court also denied Certificate of Appeal ability on January 24, 2020. . ["*Petitioner is not entitled to relief on any of his claims."]* An evidentiary hearing was denied on his claims and motion for discovery also denied.

In the State's 'Answer' to Pet's Federal 2254 Petition, at "A" Exhaustion of State Remedies" their response that "*many of the pet's claims have not been fairly or adequately presented to the highest available state court in satisfaction of Section2254 (b)'s exhaustion requirement...*" should be reviewed in light of the facts of this case. *[Statement of the Case, Answer, pg. 3,* ***No. 3:17-cv-00062****]*

The view that "Pet" filed anything through P.C.C., should be tempered by the fact that counsel David D. Harris was inexcusably derelict in corresponding with his client, and there was no lack of due diligence by his client in attempts to make up for the slack linkage. The State of TN would want the reviewer to accept that "fair review" means "*...the prisoner has exhausted available state remedies by fairly presenting the same federal claims sought to be redressed to all levels of state-court review." [Id., pgs. 37-38]* yet this position is contradicted very plainly by its next admission that "*TN S Ct Rule 39 eliminated the need to seek review in the TN S Ct., in order to '" be deemed to have exhausted all available state remedies." (Id.)* (emphasis supplied) The law is clear that if the state court does not address the issue(s) but had the procedure available to review it or them, is not a bar to relief in the

federal courts. *Accord,* TRAP Rule 11 (g); 2002, Advisory Commission Comment, infra. APPENDIX # 7

TN S Ct Rules are discretionary, but there is no *"iron curtain"* that prevented the state's highest court from accepting his Pro Se Application For Permission To Appeal.

Pet should not have been barred from habeas corpus relief on procedural default in this context, when he has made a substantial showing of state (actor[s]) indifference, interference (inconsequential appeals) or abuse of discretion..

The State of TN limits its Answer in the District Court to *the "11 grounds for relief in his original petition". (Id.,* pg. 41) However, Pet's "Amended Petition in the Federal District Court", "Ground #12", where the original Petition left off. Pet stated in the Amended Petition *"If the Court please, the specific portion of his "original" Petition to be Amended, is from...up to #12(d). Only the "Ground" and "Supporting Facts" represent the Amended part, and then the (actual) Amended Petition begins at "#12 Federal Habeas Grounds". Id. (APPENDIX #8. original and amendment petitions))*

In their Answer, to his Amended Petition at #1, that his claim is procedurally defaulted because *"The petitioner raised this issue for the first time in his Pro Se rule 11 application,"* in that case, the TN S. Ct Rule allows for issues to be raised for the first time on Appeal. *TRAP Rule 11, supra.*

Actually, it was the second time he raised issue #1. See "Amendment To Petition For PCR", at ##4, 5 and 6. The State's mistake here should not have been made, because it provided the court below with these records Pet is relying on. The record of the Evidentiary Hearing should indicate that Pet personally argued these 21 grounds at the stand in his own behalf. The point being here is that PCC had no right to ignore theses and other grounds, when it surreptitiously filed a Appeal "Brief" with only three (3) grounds and no explanation, planning, or coordination with his client. PCC failed to comply

with Rule 28, TN Sup. Ct, Section 6©(2). (requiring post-conviction to interview relevant witnesses, including the petitioner and prior counsel, and diligently investigate and present all reasonable claims). APPENDIX #9

PCC did not meet with Pet at all after the PC Evidentiary Hearing, several of the Pet's issues were not developed investigated or discussed with Pet and there is no Rule 28 *Certification* in the record confirming that post conviction counsel had thoroughly investigated the possible constitutional violations, had discussed them with the Petitioner and had raised all non-frivolous constitutional grounds warranted by law. In close cases, the failure of post conviction counsel to communicate with his client on appeal grounds he requested, constitutes ineffective assistance on post conviction appeal. Roe v Flores-Ortega U.S. 470, 120 S.Ct. 1029 (2000) By post conviction counsel failing to put in his appeal brief the reasons why Pet claimed trial counsel was ineffective with respect to the State's DNA evidence, Pet received IAPCC on initial review.

Habeas Corpus Proceeding in the District Court:

The AEDPA empowers federal courts to grant habeas relief in cases where a state court's adjudication has "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." 28 U.S.C. § 2254 (d)(1); Abdul Kabir v. Quarterman, 550 U.S. 233, 246 (2007); Rompilla v. Beard, 545 U.S. 374, 380 (2005).

(1) In his 1-12-17 *Pro Se* Federal habeas petition Pet raised 21 claims for relief. The district court declined to grant Petitioner Habeas Corpus relief or a "certificate of appeal" on 1-24-2020, (COA). This Court has ruled that :

> *"A substantial showing" of the denial of a federal right does not require the pet to show that he should prevail on the merits". Barefoot v. Estelle, 463 U.S. at 893, n. 4. Rather, the petitioner must demonstrate that (1) the issues are debatable among jurists of reason; (11) a court could resolve the issues in a different manner and (iii) the questions are "adequate to deserve encouragement to proceed further."* Id. (citations omitted).

The state courts *"unreasonably applied it to the facts of this case."* Williams v. Taylor, *529 U.S. at 413, 120 S.Ct. 1495*. Pet submits that it is clear the state's tier post conviction review treatment of this case is not reasonable.

The 6th Circuit Treatment of Petitioner's Claims
"Non-Cognizable" Claims By The 6th Circuit

*"Barrett's eighth and ninth claims alleged the ineffective assistance of post conviction counsel during trial court proceedings." (claims 8A, *B, and *C) and on appeal (claims 9A, (B and ©".* The court then went on to conclude that the district court's determination that they were *"not cognizable as independent habeas claims"* citing *28 USC 2254 (I); p. 5* Id.

"Cognizable Claims" By The 6th Circuit

The *"District Court found that five claims were cognizable and not procedurally defaulted*

(1) *trial court's denial of motion to dismiss for excessive pre-indictment delay"* (Claim 2A) *(Id 5-6*
(2) *"improper consecutive sentence above the maximum (sic) claim 2R"*
(3) *"IATC for (not) retaining DNA EXPERT Ronald Acklen" (5D.pg.6)*
(4) *"failing to have a competent DNA expert conduct an independent DNA test" (Claim 5.F)*
(5) *"advising Barrett not to call any alibi witnesses" (Claim 5)*

District court determined that these claims of trial counsel's unconstitutional loss of alibi witnesses and independent DNA testing and analysis witness denied him the effective assistance of counsel. The 6th Cir concluded that a sentence on review by TCCA *"is binding on a federal court sitting in habeas review."* Citing, Bradley v. Richey, *546 U.S. 74, 76 (2005); (p. 7).* The court interpreted sentence within maximum range is OK under *"strict proportionality"* concept. (Id, pg. 7) and *"generally does not constitute '"cruel and unusual"' or excessive punishment". (pg. 7) (citations omitted)* This generality does not fit the factual background of Pet's petition

The Appeals court then interpreted the consecutive sentence as one that is *"discretionary"* and (this particular) judge can make that decision." (pg. 7, Order, 6th Cir.)

On the *"non-debatable"* conclusion of Pet's IAC claims, the court first cited *Strickland's objective standard of reasonableness" (Id @ 688)* but then rejected the *'reasonableness'* standard it just quoted, writing that *"the question [under §2254 (d)] is not whether court's actions were reasonable" at all, but "The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Citing Harrington v. Richter, 562 U.S. 86, 105 (2011).*

Pet disagrees with this conclusion regarding *"Strickland's 'deferential standard'"*. See Williams v. Taylor, 529 U.S. 362 (2000) discussing Section 2254 (d).

> *"In sum, the statute directs federal courts to attend to every state-court judgment with utmost care, but it does not require them to defer to the opinion of every reasonable state-court judge on the content of federal law...For purposes of today's opinion the most important point is that an unreasonable application of federal law is different from an incorrect application of federal law." Id.*
> *"On the other hand it is significant that the word '"deference"' does not appear in the text of the statute itself. Neither the legislative history nor the statutory text suggests any difference in the so-called '"deference"' depending on which of the two phrases is implicated." Id.*

"III. Procedurally Defaulted Claims" (pg. 9), the 6th Circuit listed;

1. *the defective indictment claim*
2. *"the twelve remaining allegations of trial –court error"*
3. *"a prosecutorial – misconduct claim (pg. 9)*
4. *"an insufficient evidence claim"*
5. *"...eleven remaining allegations of IAC*
6.

6th Circuit Court concluded that "*the district court determined that Barrett did not establish cause and prejudice to excuse the default.*" The 6th Circuit Court apparently did not give enough recognition to the just cited law in TN that a Pet need only file for appellate relief in *one* state appeals court (Rule 39, TRAP) because the court appears to conclude that Pet's 5 remaining claims are *"procedurally defaulted"*, even though Pet explicitly alleged and offered proof that the one appellate rule was excuse for these claims being properly before the Federal court due to the cause of ineffective assistance of post conviction counsel and his right to pursue relief on

appeal Pro Se.

The 6th Circuit apparently overlooked the fact that *"though he raised it (defective indictment) in his post conviction petition"*, he also raised this ground in the first tier *Pro Se* Motion For Delayed Appeal appellate review of the TCCA.

> "The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the constitution." Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 1093.
> *"Inadequate assistance of counsel ["IA"] at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of IA at trial."* Martinez v. Ryan, *566 U.S. 1, 132 S.CT. 1309, 1315. [*state collateral review is the first place a prisoner can present a challenge to his conviction." *Martinez, @ 1315]*

Pet submits that just because a procedural rule...is firmly established and consistently followed..." (citations omitted)... it is above contextual review or modification .Segregation, slavery and denial of women the right to vote were routinely and faithfully followed in the ole dirty South for hundreds of years before 1865. As an alternative it is humbly and respectfully suggested –this suggested review should start with the trial judge as the party who selects who gets the JOB of representing a defendant on Post Conviction Relief attempting to prove that that trial Judge (his BOSS) was wrong...

A panel of attorneys or appeal judges or Public Defender Office may be a better protector of prisoner's rights to Effective Assistance of Counsel on Post Conviction, since we don't have a right to assistance of counsel beyond initial collateral damage. The trial court's errors had a substantial and injurious effect and influence on the guilty verdict-causing Petitioner actual loss of his 5th, 6th and 14th Amendment rights to a fair trial by an impartial Jury. For those reasons the grant of the Writ should be permitted.

In its Order the 6th Circuit referenced the grounds wherein a state prisoner may file any additional post conviction petition, but Pet's filing had nothing to do with filing a *second post conviction petition.* The context was whether these claims were procedurally defaulted for not being presented *"on post conviction*

*appeal". (Id. *6)*.not arguing for a second post conviction petition.

In that vacuum created by the lawless, unconstitutional misconduct of PCC on initial review. Pet's *Pro Se* appeals were properly before the state's appeal courts following post conviction evidentiary hearings. Reasonable jurists would debate the district court's procedural rulings because these claims were raised *Pro Se* on initial review following the denial of his *Pro Se* Post conviction Petition for Relief. *(Id.)* (APPENDIX #9)

Likewise with the out-of-control prosecutorial misconduct of the State's Assistant (now Deputy) District Attorney Tom Thurman. The 6th Circuit observed *(Id.*6) "Barrett presented several claims of prosecutorial misconduct in his post conviction petition..."* His *Pro Se* post conviction appellate briefs (APPENDIX#6) will also reflect that Pet submitted these gross egregious instances of Mr. Thurman on appeal. His arguments, witness tampering (putting words in their mouths, criticizing his exercise of the right to remain silent, and constructively amending the indictment to such a degree no one is able to say with confidence what the Jury found him guilty of . The indictment says *"first degree murder"*, but Mr. Thurman's arguments to the jury repeatedly and flagrantly alleged "rape". According to the law in TN there was insufficient evidence to allege rape and according to the U.S. Constitution that allegation was a denial of due process.

It would be a gross miscarriage of justice to allow the Court of Last Resort an invitation to continue these violations of the Federal Constitution.

The 6h Circuit's finding that Pet's *"fourth claim of 'insufficient evidence"* was error. The 6th Circuit Court said Pet alleged *"there was no evidence of a felony or premeditated murder" (*6 Id)* that the victim had been killed. The court then went on to side with the district Court that *"this claim was defaulted because Barrett did not present this claim under the same theory in state court where he contended that the evidence did not establish his identity as the perpetrator".* Of course he did not say anything as senseless or arrogant as "there was no evidence of a felony...."

Contrary to these findings as well, Pet's correct claim and the theory for it, were presented in the state court.... Note the opinion of the TCCA on direct appeal, (No. M2009-02636-CCA-R3) found "*On appeal he contends that: (1) the evidence is insufficient to support the conviction" [Id., @ *1; 2012 WL 2870571] (7-13-12)*

At *25 *Id. "The Defendant challenges the sufficiency of the convicting evidence. He states that there was no eyewitness*

account of the crime..." (emphasis supplied) Further, note the Insufficient Evidence Claim on Appeal of denial of Post Conviction Petition, *2016 WL 4410649; No. M2015-01161-CCA-R3-PC; 8-18-16.*

Even Post conviction counsel's unilateral and disputed appeal, there is no mention among the three grounds that Counsel claimed is there a statement or assertion that *"there was no evidence of a felony or premeditated murder." (6th Circuit Order, No. 20-5202, Id.).* Thus the Court states in error, trying to address a ludicrous, fictitious claim which would otherwise serve as a prejudicial predetermination not to take Pet or his claims seriously.

Another serious error by the Court of Appeals is that it misconstrues the Pet's standing. The *"eleven IATC claims in his initial post conviction petition" but his post conviction counsel did not raise them,* so the Court incorrectly concluded. Pet raised all eleven of these IATC claims in his initial Post Conviction Petition *Pro Se.* He didn't have an attorney when he raised them in his *"initial post conviction petition". (Id., *7)*
The Court does not correctly deduce the ground for "exhaustion". As stated, Pet submits that he did raise these eleven IATC grounds on initial appeal also *Pro Se.* Pet is actually seeking vindication of his right to file his own post conviction appeal, and under known and believed circumstances described and undisputed, he had a clear right to file.

The Appellate court is also mistaken that "*As explained above, however post-conviction counsel raised these eleven ineffective-assistance-of-trial counsel claims in his initial post-conviction petition but did not appeal the denial of the eleven claims to the Tennessee Court of Appeals." Id. @*7. Again,* Petitioner was the one who raised these eleven IATR claims in his initial post conviction petition not counsel. As observed by the state appellate court, the post conviction appointed counsel told the trial (post conviction) court that petitioner had a PC Petition that was 90 pages long (untrue it was 40 pgs long) and therefore he did not amend the petition. P C Counsel Jason Chaffin said *"he didn't file an amended one (post convicting petition) because Mr. Barrett's was 90 pages long..." The court accepted the amended petition, the court appointed counsel was aware of it, discussed it with petitioner, and asked the court to "...allow us to amend it..." Transcript Post Conviction Hearing 3-13-15 pg. 20, lns 6-7, 20. See also Barrett v. State of TN, M2015—01161-CCA-R3-PC fn. 1: "Although counsel had been appointed at the time, the amended petition was filed it was not filed by counsel and was submitted by the Petitioner." Id. 2016 WL 4410649.*

"IAPCC" is only germane to his insistence that under the circumstances known and believed by Pet –the vacuum of due diligence of PCC meant that his right to appeal would perish unless he filed his own appeal *Pro Se.* Which he did. (APPENDIX#6 The question then is, whether a state prison inmate have the

right to file his own appeal brief under certain conditions or no conditions? Pet asks this High Court of all the learned men's courts, to answer affirmatively. Yes! He does.

Summary of Argument

MERITORIOUS CLAIMS

SUBSTANTIAL CLAIMS

Petitioner has made a substantial showing of the denial of a constitutional right. Further, there are several instances where reasonable jurists would dispute or debate whether the petition should have been resolved in a different manner or the issues were adequate to deserve encourage ment to proceed further *"Wool bright v. Crews, 2018 WL 7247245, No. 18-5131, (7-9-2018, 6th Cir.), citing, Slack v. McDaniel, 529 U.S. 473 484 (2000) (quoting Barefoot v. Estelle, 463 U .S. 880, 893 & n. 4 (1983).*

To be "substantial", a claim must have some merit under the standard for IAC set forth in Strickland v. Washington 466 U .S. 668 (1984). The standard under Strickland is that petitioner must establish that a counsel's performance was deficient and that he suffered prejudice as a result. Strickland, 466 U.S. at 687. see Wiggins v. Smith, 539 U.S. 510, 530-31, 123 S.Ct. 2527, (2003). (Rejecting dissenters' contention it was required to give "deference" to state court findings because "'the state court made no such finding,"' and "'therefore"' it "'must determine de novo the unresolved factual issue).

Pet's claims are subject to review insofar as they are "plain". *Holguin-Hernandez v. U.S., 140 S.Ct. 762 (2020); United States v. Olano 507 U.S.725, 732-736, 113 S.Ct. 1770 (1993). "Appellate courts in Tennessee have 'the authority to 'consider an error that has affected the substantial rights of a party at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal.'" State v. Knowles, 470 S.W. 3d 416, 423 (Tenn. 2015) (quoting Tenn. R. App. P. 36[b]). "We refer to this discretionary consideration of waived issues as 'plain error' review." Knowles, 470 S.W. 3d at 423*; see also *Grindstaff v. State, 297 S.W. 3d 208, 219 n. 12. (Tenn. 2009). "Plain error"* review is also available when counsel fails to lodge a contemporaneous objection when the issue first arises. *State v. Thomas, 158 S.W. 3d 361, app. 413 (Tenn. 2005).* (emphasis supplied)

"The prefatory language of § 2254(d) provides: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the

judgment of a State court shall not be granted with respect to any claim that was 'adjudicated on the merits' in State court proceedings unless the adjudication of the claim...." In the usual case, a denial of relief on procedural grounds will completely bar federal review of the claim unless the prisoner can prove cause and prejudice or a miscarriage of justice. See *Wainwright v. Sykes, Murray v. Carrier; Engle v. Isaac; House v. Bell, (547 U.S. 518 (2006).*

The AEDPA standard applies only when the claim in question *'was adjudicated on the merits in State court proceedings.'" 28 U.S.C. § 2254(d).* When a state court did not adjudicate a claim on the merits, the federal court applies the general, less deferential habeas standard in *28 U.S.C. 2243. Muth v. Frank, 412 F. 3d 808, 814 (7th Cir. 2005)* Here, the AEDPA standard does not apply to Pet's claims that were "not adjudicated on the merits in State court... which includes most of the Pro Se claims the state appellate courts erroneously chose not to adjudicate. ("AEDPA standard of review does not apply where "'the state court misunderstood the nature of the claim, and therefore did not adjudicate that particular claim on the merits.'"

A state court must specifically identify a claim and must identify and review the correct claim" in order for the state court's action to reflect adjudication on the merits for AEDPA purposes." *Muth, 412 F.3d @ 815,n. 5; see also* Billings v. Polk, 441 F. 3d 238, 252 (4th Cir. 2006) (no adjudication on the merits where North Carolina Supreme Court "*did not consider-or at least there is no indication that it considered" petitioner's Sixth amendment claim); Apple v. Horn, 250 F.3d 203, 210 (3rd Cir. 2001) (no adjudication on the merits because Pennsylvania Supreme court "recharacterized" petitioner's constructive denial of counsel claim as IAC claim) ; Hameen v. Delaware, 212 F. 3d 226, 248 (3rd Cir. 2000) (no adjudication on the merits where Delaware court "did not pass on [petitioner's] Eighth Amendment constitutional duplicative aggravating circumstances argument, even though it had the opportunity to do so")* Accordingly, AEDPA's standard does not apply to the Fifth, Sixth and Eighth Amendment predicates for Pet's claims.

The TN S.Ct. had the opportunity to pass on Pet's Pro Se claims but it did not do so. Pet clearly explained the dilemma he had in trying to obtain meaningful assistance from PCC M. Harris, to no avail,

which forced him to file these claims Pro Se. In the end, the Respondent's effort to dodge the substantial constitutional issues permeating throughout this case should be unavailing.

ARGUMENT

1 Unconstitutional denial of right to File Pro Se Appeals

Date of offense was 2-25-1975; judgment entered 9-4-2009; Sentence imposed 9-4, 2-009. Petitioner filed a *Pro Se* petition for state post-conviction relief on 11-13; years passed without a ruling before an attorney (Jason Chaffin) was appointed. However, counsel did not "amend" the petition. In his amended PC petitions Petitioner alleged errors of (1)Unconstitutional denial of right to File Pro Se Appeals; (2) unconstitutional constructive amendment of the indictment; prosecutorial misconduct; (3) unconstitutional jailhouse liars ("criminal informants") quid pro quo arrangements with government; jailhouse 'criminal informants' were undisclosed agents of the government secretly seeking to obtain information incriminating Defendant on behalf of the District Attorney's Office; (4)unconstitutional jailhouse 'Silent' Video narration denied fair and impartial jury verdict) (5) TC unconstitutional loss of alibi witnesses and independent DNA testing and analysis witness; (6) pre-indictment inordinate prejudicial delay (7) unconstitutional prejudicial photo introduction at trial;; (8)IATC failure to request and give requisite jury instructions regarding professional and criminal informants; (9) IATC (10) trial court erred in ordering consecutive sentences. (11) failure to argue third party defense effectively;(12) unreliable, prejudicial trial testimony regarding DNA "match", chain of custody.

Post conviction counsel ("PCC") failed in this procedural due process which is a particular but crucial duty. See U.S. v. Cronic 466U.S. at 658, 104 S.Ct. 2039. "A unilateral decision to terminate appellate review without the appellant's knowledge or consent is ineffective assistance of counsel. Jones v. State, 1987 WL 15535 (TCCA, 1987), citing, Moultrie v. State, 542 S.W. 2d 835, 838 (TCCA 1976).

This is the law in the state of Tennessee and the Federal law. When *"an attorney who fails to file an appeal that a criminal defendant explicitly request has, as a matter of law, provided ineffective assistance of counsel that entitles the defendant to relief in the form of a delayed appeal."* Campbell v. United States *686 F. 3d 353 (6th Cir. 2012); Ludwig v. United States, 162 F. 3d 456 458-59 (6th Cir. 1998).* The context in *Campbell* in *Ludwig* emphasize "an appeal that a defendant explicitly requests..."

The TN S CT acted indifferently to these set of facts with respect to the Ineffective Assistance of Post Conviction Counsel in initial review: *"Because Jerome Sidney Barrett is represented by counsel who filed a timely application for permission to appeal (*as if that is all he had to do) *Mr. Barrett's pro se application for permission to appeal (*along with the reasons he gave for filing) *is dismissed [PER CURIAM]*

This appellate court was very unreasonable, especially in light of the fact that in his Application at #17, Pet asked "*Whether this honorable court should allow him to go back to the court of criminal appeals on a delayed appeal, if he is not permitted to raise these assignments of error in this Application in order to raise these grounds which counsel on Appeal did not raise when he secreted the appeal brief to the TCCA but never to his client, Your appellant.* see *Walwyn v. Board of Prof. Resp. of the S.Ct of TN, 481 S.W. 3d 151 160; State v. Hall 461 S.W. 3d 469, 474 ("delayed appeal granted...based upon the lack of meaningful representation during original direct appeal") Baxter v. Rose, 523 S.W2d 936; 5th, 6th, 14th Amend. U.S.C.* There is no rule cited anywhere to the Pet's knowledge, in the State of Tennessee Rules of Appellate procedure which prohibits a state prisoner to not file anything if he has an nominal attorney of record. *"[F]undamental fairness entitles indigent defendants to an 'adequate opportunity to present their claims fairly within the adversary system." Ake v. Oklahoma, 470 U.S. 68, 77, 105 S.Ct. 1087, 1093 (1985) (citation omitted).*

Petitioner submits that the Tennessee Constitution and the U.S. Constitution gives him the right to be heard by counsel and himself:

> *"But, by our State constitution it is provided: '"That in all criminal prosecutions, the accused has a right to be heard by himself and his counsel....."' and our Supreme Court has held in the case of Wilson v. State, 3 Heisk, 232 , that the section means both in criminal cases." Grace v. Curley, 3 Tenn. App. 1 (1926); See Charles Wilson v. The State, 50 Tenn. 232,234, Supreme Court of Tennessee April Term, 1871 ("Under the Constitution of the State, Art. 1, § 9, giving to a person accused the right to be heard by himself and his counsel....")*
> *"Article I section 8 of the Tennessee Constitution,* provides *'"t]hat no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land." State v. White, 362 S.W. 3d 559 (TN. 2012).*

See Tennessee Code Annotated ("T.C.A.") section 40-30-116 (Appeal after final judgment) *Tennessee Constitution Article I§ 9, TN. S.Ct. Rule 28, 6©(2); Campbell v. United States, 686 F. 3d 353 (6th Cir. 2012); Roy v. Flores-Ortega, 528 U.S. 470 120 S.Ct. 1029 (2000); Ludwig v. United States, 162 F. 3d 456 459 (6th Cir. 1998). Loving v. State of TN, 286 S.W. 3d 275, 285 (TN. 2009). Cf., King v. Pfister, 834 F. 3d 808, 815-16* (*King* raised claim in his *Pro Se* post conviction petition (citing Ward v. Jenkins, 613 F. 3d 692, 700 [7th Cir. 2010]. However, "*King* failed to assert claim in his post conviction appellate brief, filed with representation, and his Pro Se petition for leave to appeal.")

In his "Reasons Supporting Review", Pet relies on the rendition of the TCCA as to the grounds filed on appeal, and also asked the TN S CT to allow him add his own grounds for this Appeal that he had filed in the trial court in that the TCCA notes in its Judgment that. *"The original and amended pet contained numerous grounds for post conviction relief only three of which have been maintained on appeal..." [CCA No. M2015-01161-CCA – R3-PC*

Rejection of his *Pro Se* appeal in light of circumstances was unreasonable. *T.C.A. § 40-30-106(e).* He *"did all he could do to fairly present these claims to satisfy the exhaustion requirement...reasonable jurists could debate that conclusion..." Woolbright v. Crews, supra, 2018 WL 7247245, 6th Cir., No. 18-5131; 7-9-18.* The federal Court cannot presume that because counsel did submit three grounds for appeal, appellant was afforded all the Due Process needed, because those meritorious grounds which the Court went on to deny habeas relief upon - which the PCC did not present, may have been a turning point in his state appeals had those courts exercised due process and reviewed them. Therefore the *Pro Se* appeal grounds that were presented by the defendant and heard in the evidentiary hearing at post conviction but were ignored on appeal by counsel and the appellate courts, were treated unreasonably in the federal court and the state appellate courts.

Failure to review *Pro Se* appeal grounds that were heard in the evidentiary hearing and submitted *Pro Se* on appeal was error. See also *Garza v. Idaho, 139 S.Ct. 738,744:*

> *"And, most relevant here, prejudice is presumed '"when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken." citing, Flores-Ortega, 528 U.S. at 484, 120 S.C. 1029. So long as a defendant can show that '"counsel's constitutionally deficient performance deprive[d him] of an appeal that he otherwise would have taken"' Courts are to '"presume prejudice with no*

further showing from the defendant of the merits of his underlying claims." Ibid. Gaza, @ 747, citing, Flores-Ortega, 528 U.S. at 484, 120 S.Ct. 1029.

Pet referenced the ABA Standards Relating to the Defense Function, at section 3.8. Essentially, his Motion For Delayed Appeal was for the "*court to appoint counsel so counsel can appeal the denial of his Petition for Post Conviction Relief ("PCR"), or to "re-enter Judgment in order for Pet to file appeal to the TCCA" Pro Se. Id.*

2 *DNA 'Evidence'*

The trial PC Court erroneously denied the petitioner's request at the original evidentiary hearing for expert (INDEPENDENT) DNA analysis and at the trial. Pet moved the PC court pursuant to T.C.A. 40-30-303--313 for independent DNA Analysis. Trial counsel agreed that he should have sought independent DNA analysis, instead of relying on the prosecution's tests reports and analysis. *Daubert v. Merrell Doc. Pharm, Inc., 509 U.S. 579, 589, 113 S.Ct. 2786, 2795.*

In 1994, "Lab Corp" tested *"samples from 35 people "who had not been ruled out by the testing at CBR, and added one more sample that CBR had been unable to develop. " Id., @ *17.*

Forensic DNA Expert TBI Agent Joe Minor testified *"that he tested the swabbings of the slides prepared by Lab Corp."* The one profile that had been previously undeveloped was determined by Agent Minor to be *"a male profile"*. He considered it a *"strong profile" but, "He said the male profile from the slide did not match the Defendant's profile." Id., @ *18.* In cross-examination, "*He reiterated that the defendant was not the contributor" from the five slides prepared from the two vaginal swabs from the victim's autopsy." @*18.* In this test result, petitioner was completely exonerated as below.

Jennifer Luttman, an FBI DNA expert, testified that crime scene evidence was received in the FBI lab on March 29, 2004. That no DNA a profile was obtained through *earlier "RFLP (DNA) testing and that the stains were consumed in the testing process." *21.* RFLP testing required a large sample from the victim's jeans and blouse." *Id.* Ms. Luttman testified that the victim's jeans and blouse were "*reanalyzed*" in 2004 after '*biologists conducted tests'*, and *"determined that semen was present on one sample from the victim's jeans and two samples from the victim's blouse." Id @ *21.*

Ms. Luttman was only able to examine nine of the thirteen loci. Prosecutors told the jury the DNA on the victim's blouse was a *"match"* to Pet's DNA, in spite of the science requiring thirteen loci, and when just one loci does not match, it should be declared a *"non-match"*.[3] TBI Agent Chad Johnson *"He said that comparing DNA profiles required comparison of thirteen loci from each sample and that all thirteen loci must match in order to be considered a DNA match."* State of TN v. Barrett, *M2010-00444-CCA-R3-CD, 2012 WL 2914119 @ *13*

Trial Counsel was unable to seek jury instructions or objections to this mathematical incongruence still being called a "match" to the Jury. . So when they talk about comparative matches what they are really saying is a partial match not in keeping with the scientific protocol. For example Ms. Luttman said that the comparison of the victim's DNA to the minor contributor's DNA was *"inconclusive"* but *"consistent"* (not a "match") with the victim's DNA on the victim's blouse. *Id @ 21.* Additional research indicated a DNA profile more commonly found in Caucasian which coincides with the eyewitness report of Ms. Maxwell. (see below *State v. Barrett 2012 WL 2870571)* The Center For Blood Research laboratory (CBR) did DNA profiles of stains on the victim's clothing which was compared with the victim's DNA from her hair roots. *State v. Barrett, 2012 WL 2870571 @ *15.* Those lab results indicated that the victim's DNA was not the same as the two samples from the victim. Jeans. *Id. *16.* This one unidentified sample, had a *DNA "profile that was developed matching someone in the Caucasian population of one in 180,000 and that it was one in 10,800,000 for the African American population." Id. @ *17.*

"TBI Special Agent Chad Johnson testified as an expert in forensic science and DNA analysis and said that in STR DNA testing thirteen loci and the sex-determining marker are analyzed.:" Id. @ 20) Trial Counsel was unable or unaware of the need for cross examination on this matter, even though she testified that *"due to the small quantity of DNA from the major contributor, she was only able to examine nine of thirteen loci." Id @ 21.* She said samples from the victim's underwear were **tested by** the serology unit and were negative for semen. She said the DNA testing on the jeans did not establish that DNA was present." @*21.

[3] Dr. John Butler, if 1 loci does not match, DNA profile must be declared a "non-match". *Id., p. 386; WL 2914119, @ *3.*

No semen was found on the victim's underwear when she was examined initially but semen was found on the victim's pants leg. Retired Metro Police Captain Thomas Cathey testified at the trial that the victim's body was found on March 30, (1975) and that *"after the body was on the table he removed the victim's clothing except her panties..." @*3. "Mr. Gavin identified underwear that he examined for the presence of blood and semen and testified that neither was present." @Id *10.*

At this point, DNA was (semen) not found on the victim's blouse, then later it was, it was not found on the underwear, but was found in the victim's vaginal fault. *Gary Harmor, a forensic serologist with* the *Serological Research Institute, testified as an expert in DNA analysis." Id., @ *19.* After "*amplifying*" Def's DNA from a package he received on December 12, 2007, he wrote a report and dated it as January 28, 2008, *He said that the first DNA test report, dated Jan. 28, 2008, stated an incorrect date for his receipt of the evidence and that the second, dated July 8, 2009,* " one year and six months later, "corrected the error". *(Id)* (emphasis supplied)

At the admission of that year and a half date 'error' in writing the scientific report, documenting when he *amplified* Pet's DNA the dates he received the DNA evidence, Trial Counsel did not move to have this entire report of Agent Harmor suppressed on grounds of inadmissibility for unreliability or chain of custody This witness is testifying that he misstated the wrong date by an inexplicable period of a 15 month discrepancy, – that instead of writing that he *amplified* the evidence ("blouse, pants") on January 28, 2008, later he changed his story and testified that he actually received them over a year and six months later, on July 8, 2009. @*19. Counsel had no DNA expert to advise *him in court* about the significance if any, of this glaring inconsistency by Agent Harmor's testimony.

These dubious DNA test reports by Mr. Harmor's for the first time in over 20 years of DNA tests, Petitioner's DNA is reportedly on these tested exhibits crime scene evidence by this crucial witness.

Mr. Harmor was not the only one who "amplified" Pet's DNA. These are additional reasons why an independent DNA test and analysis was necessary:

(a) "PCR product carryover results from 'amplified' DNA contaminating a sample that has not yet been amplified...DNA Forensic Typing, supra, p. 152; D.A. Office v. Osborne, 557 U.S 52, 129 S.Ct. 2301, ["*Amplifications was never tested as cause for false positive result*"] see *State v. Barrett*, 2012 wl 2870571, Id.., No. 2008-D-3201, 2012 2914119.

(b) Dr. Butler in his canon on DNA Forensic Typing,[4] wrote:

> *"The inadvertent transfer of even a very small volume of a completed PCR amplification to an unamplified DNA sample can result in the amplification of the 'contaminating sequence...PCR product carryover results from amplified DNA contaminating a sample that has not yet been amplified. Because the amplified DNA is many times more concentrated than the unamplified DNA template, it will be preferentially copied during PCR and the unamplified sample will be masked." (Id., pg. 152)["Dr. John Butler is said to have written the canonical test on Forensic DNA Typing". Dist. Atty's Office v. Osborne, 557 U.S. 52 129 S.Ct. 2308, 2327.] (emphasis supplied)*

Tennessee Bureau of Investigation ("TBI") 'Special Agent' Chad Johnson testified at trial that *"...extracted DNA might be copied through an amplification process...." Barrett, 2012 WL 2914119, @ *1. (T.T. Vol. VII, pgs. 425-38)* This potentially exculpatory admission went unnoticed by Defense Counsel because he apparently did not have knowledge of the significance of this testimony.

Contrary to what the district Court found Pet, did not claim that Mr. Ronald Acklen was not smart enough. His problem with the Dr. was that he was not in court. Had counsel been advised by an equally educated DNA expert as State witness Mr. Harmor, Counsel could have raised the defense of inadmissibility of Mr. Harmor's reports due to unreliability dates, and chain of custody issues. In the Post Conviction Court's Order (5-21-15) denying Post Conviction Relief, the Court surmised that *"Trial counsel said that he consulted with Dr. Ronald Atkin (sic) about the DNA evidence in the case. He said that Dr. Atkin looked at the DNA paperwork in the case and did not find any issues. Trial Counsel said*

that he did not call him as a witness because his testimony would have affirmed the State's witnesses." *Id, pg. 2.*

When there is a question as to the identity of the DNA contributors, or the number of contributors, the defense attorney should request a sample of the DNA for independent testing." Butler, p.42. *United States v. DeCoster*, 487 F. 2d 1197. The DNA profile from the victim's vagina did not match the Defendant/Petitioner's DNA profile. Nor was the single partial match a conclusive identification as Defendant's profile. Nor was independent testing performed.

(c) IAC not securing DNA expert at trial for significance of repeated "amplification", false positive due to repeated *amplification* of Pet's DNA profile. *Butler, Id., pg. 152.* Independent testing by a DNA expert is not performed by looking at pieces of paper and determine that there is no false positive resulting from amplification. Erroneous T.B.I.: (a) analysis (2) chain of custody (3) selective prosecution (4) unreliable categorization of various degrees of "match (5

Yet, these are the tests results which Counsel's DNA contact outside of trial, approved. See State v. Scott, 33 S.W. 3d 36 (Tenn. 2011)

> *"expert assistance on issues concerning anomalous results in various DNA tests could have made difference in preparation and presentation of Petitioner's case."* see also *State v. Barnett, 909 S.W. 2d 423 (Tenn. 1995); State v. Toomes, 191 S.W. 3d 122,129 (TCCA, 2005): "Scott said it was 'especially noteworthy that the appellant's expertise in criminal practice both testified that such expert assistance was 'absolutely critical' to competent representation in this area given that the procedures and protocols for DNA testing are extremely complex."*

*"The Petitioner said that there were multiple DNA analyses performed with varying results; thus he thought it was important to obtain an independent analysis. According to the Petitioner the State's expert testified inconsistently about the DNA evidence and '"missed a lot of words related to DNA that prejudiced [the] jury." (TCCA, Barrett v. State of TN., NO. M2015-01161-CCA-R3-PC, pg. *4)*

---

[4] DNA Typing: Biology and Technology Behind STR Markers, *Dr. John Butler*

In Scott, distinguished Attorney David Raybin testified that *"expert assistance...is absolutely critical to the point where (one) cannot competently and completely defend the person because the expert testimony is necessary."* Supra, @ 750. *Raybin added that he would not even consider representing a client in such a case where he did not have expert assistance in the cross examination of a witness." Id.*

3 Prosecutorial Misconduct

The extremely inflammatory and untrue arguments by the State's Assistant District Attorney General Tom Thurman in September, 2009, that petitioner was guilty of rape, was aggravated perjury in argument in the false statements to the jury that the two jail house liars also said that *"he* (petitioner) *raped her.* He lied on his witnesses Sheldon Anter and Andrew Napper. (He told them "he raped her".) "*a prosecutor's argument violates due process if it 'infects the trial with unfairness.'*" Darden v. Wainwright, 477 U.S. 168, 181 (1986). Darden frames the question as: *"Did the prosecutor's calculated, unprofessional and inflammatory closing argument rob the determination of petitioner's guilt of the fundamental fairness required by the eighth amendment?"*

Counsel never objected to these accusations that the deceased had been sexually assaulted by the Defendant. Prosecutorial misconduct by Mr. Thurman arguing to the Jury and taking unfair advantage of Def's previously announced intent to exercise his right to remain silent by asking the jury *"how his DNA got on her clothing. One fact he couldn't talk about was how Jerome Barrett's semen (sic) got on that blouse, an undisputed fact. He didn't want to talk about that because there was only one way his DNA got there." [Id., pg. 887 Vol 9, Trans Evid.]*

Mr. Thurman knew that "*semen*" does not have an identity other than DNA because he didn't argue DNA. The DNA evidence pointed to someone else insofar as a sexual assault occurring. *"It's not like a doctor being careless in an examination. (sic) It's semen. But he didn't want to talk about that fact...because there's no explanation." Id.* Here the State's Attorney made at least four references about Pet exercising his right to remain silent and turned it into a weapon against the Defendant. Mr. Thurman is using t he pejorative "semen" as if semen is DNA. (*"How would anybody have Jerome Barrett's semen? It's not like a touch from a lab person." [Id, p. 887]* Impermissible Prosecutorial misconduct on Def's exercise of his right to remain silent. *Arnold v. State of TN, 563 S.W. 2d 792, 794 (TCCA, 1997), citing, Illinois v. Somerville, 410 U.S. 458; 93 S.Ct. 1066.*

Trial counsel was ineffective for not having a DNA expert at trial in rebuttal that cross-contamination due to a "touch form a lab person" or where a "doctor being careless in an examination" may cause cross contamination in both these examples. Counsel was ineffective for not calling for a mistrial and post conviction counsel was ineffective for not appealing these meritorious grounds of Prosecutorial misconduct. The Order denying Post Conviction Relief (5-21-15) included *"The petitioner testified that trial counsel should have objected to the District Attorney's comments about rape during the closing argument." (Order, Davidson County Criminal Court Division I, Nashville TN.; 5-21-15) pg. 2, 6-7.*

> *("In addition to the science you have—uh—two people who knew Mr. Barrett who people (sic...making up his mind here to commit aggravated injury) that were in jail. Two people who told you that Mr. Barrett told them that he killed her...telling the truth about that...he raped her...killed her. That's direct evidence. And, those are the kind of eyewitnesses (sic) ...statements that Mr. Barrett made." [T.Evid., pgs. 869-870, Vol. 9] (Atty. General Miller, Id, pgs. 870-871)*

General rule excluding evidence of other crimes is based on recognition that such evidence easily results in jury improperly convicting defendant for his or her bad character or apparent propensity or disposition to commit crimes regardless of strength of evidence regarding offense on trial. T.R. Evid. Rule 404 (a) (b). *State v. Rickman, 876 S.W. 2d 824 (TN 1994)*

The claim that Pet 'changed the theory of his complaint' is false because all of his pleadings from the Pro Se appeals on to the Federal Petition for the Writ of Habeas Corpus insisted that the arguments used by State's Atty. Tom Thurman accused Pet of a crime which was not made out in the indictments that the trampling of his right to remain silent, etc., and his unlawful use of biased witnesses.

Denial of a Unanimous Jury Verdict

The State must elect at the close of its proof –in- chief as to the particular offense or offenses for which it is seeking a conviction. *State v. Shelton, 851 S.W. 2d @ 137; State v. Brown, 762 S.W. 2d @ 137; Burlison v. State, 501 S.W. 2d 801 (TN. 1973) fn. 2.* Instead, the trial Court and Defense Counsel allowed Mr. Thurman to argue several offenses one of which was not charged in the indictment. Violation of due process embodied in T.R. Crim. P. Rule 31, 6th, 14th Amendments, U.S.C.

The two primary purposes underlying the special rule articulated in *Shelton* and *Brown* are to preserve a criminal defendant's right under the state constitution to a unanimous jury verdict. Fn. 3, Art. 1, Section 6, TN. Const.

Unconstitutional Constructive Amendment Of The Indictment; Prosecutorial Misconduct

Trial counsel performed ineffectively by failing to object to a constructive amendment of the indictment. The charge of rape was never pled in the indictment. The grand jury did not make this charge on its own judgment, which is a substantial right, which cannot be taken away with or without court amendment. ***U.S.C.A. Const. Amend. 5, 6, 14; Tennessee Constitution Article 1, § 6, 14; State v. Goodson, 77 S.W. 3d 240; T.R.Crim. P. Rule 7 (b) (2); T.C.A. § 40-1713.*** *"The Sixth Amendment right to a jury trial, as incorporated against the States by way of the Fourteenth Amendment, requires a unanimous verdict to convict a defendant of a serious offense." (other cites omitted)*

By authority of *Article I, Section 8 of the Tennessee Constitution the Fifth, Sixth and Fourteenth Amendments* of the Federal Constitution, Count I and 2 should be dismissed. See *State v. Smith, 612 S.W.2d 493, 497 (Tenn. Crim. App. 1980), citing, Inman v. State, 195 Tenn. 303, 304-305, 259 S.W.2d 532, 532 (1953)* ("*The test for the sufficiency of an indictment is whether it contains the elements of the offense intended to be charged . . .*")

The absence of evidence of "larceny" was covered up by prosecutorial misconduct through improper argument and constructive amendment of the indictment: *"Is there any question that this was also done during the commission of a larceny, that the money was stolen from her? You have the intent to steal, intent to murder, intent to sexually assault. So, there is no question as to whether this is first degree murder and first degree felony murder."* Asst. DA Tom Thurman. (Trans. Evid. Vol. 9, pg. 886; Rebuttal Argument on Behalf of the State of Tenn.

"The Supreme Court held that the Sixth Amendment right to jury trial as incorporated against the States by way of the Fourteenth Amendment requires a unanimous verdict to convict a defendant of a serious offense...." *Ramos v. Louisiana, 2020 WL1906545; Patton v. United States, 281 U.S. 276, 50 S.Ct. 253, (1930); Andres v. United States, 333 U.S. 740 68 S.Ct. 880 (1948).*

The District Court jumped over his factual innocence to the charge of rape when it wrote irrelevantly in its Order of dismissal that: *"the medical examiner took vaginal swabs from the victim's vagina...Subsequent analysis showed the presence of sperm..."* The Court notes this without adding that the DNA analysis exonerated appellant as the depositor of the "sperm"? Just writing that examination had been performed for DNA, without connecting the results to anyone, leaves the impression that appellant was the depositor of the DNA. To appellant, this "Factual Background" (Pg.

4, Order) omission indicates that the Court tripped over finding half-truths rather than objective analysis, when it leads to proof of his actual innocence.

Rape/Murder Unconstitutional Amendment of Indictment and Closing Argument

How can there be an argument (to the jury) about "rape" when the essential elements of the offense are absent? (*"Penetration is an essential element of rape... The slightest penetration is sufficient but it must be proved beyond a reasonable doubt."* Greene v. State *(1962), 210 TN. 276 358 S.W. (2d) 306),* citing, Underhill's Criminal Evidence, *5th Ed., § 764 ("It is likewise said in 75 C.J.S. Rape § 82b, pg. 5767: "In a prosecution for rape, the court must properly charge as to the necessity for penetration..."* Reagan v. State, *1986 WL 13063, TCCA 11-19-86. T.C.A. § 39-3701.* Counsel did not require it and the trial Court never instructed the jury as to the State's argument that the Defendant "raped" the victim.

Constructive amendment or variance happened because the government presented argument at trial distinctly from those set forth in the indictment. Id. P. 6-7, Order, PCCourt. The immediate response in the P.C. Court's Order was "Mr. Napper testified that he heard the defendant say "I killed her, I didn't rape her.'" The Petitioner has failed to prove this allegation by clear and convincing evidence and has failed to show how this was not an appropriate comment on relevant evidence." Id., p.7 This Order is documented prosecutorial misconduct by argument without any foundation.

Pretrial Publicity -"Secret Indictment" But Media Had It Before The Defendant

The trial court had an "*affirmative duty to insure that a defendant has a fair trial.*" Garrett v. DePasquale, 443 U.S. 368, 378, 99 S.Ct. 2898, 2904, (1979).

> ("To safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity. And because of the constitution's pervasive concern for those due process rights, a trial judge may surely take protective measures even when they are not strictly and inescapably necessary." (citation omitted)

Because city criminal court judges such as the trial judge are elected, and only certain populaces typically vote, this may be decided on the first law of nature, but that doesn't make it right. And the wife of the victim was married to the Associate Editor of the Tennessean, the sole local newspaper at the time of Pet's trial. Each juror during voir dire said they had heard about the case. Constant drum beats of nearly two years of "case solved" prejudiced his right o a fair jury verdict. Few, if any interests under the Constitution are more fundament than the right to a fair trial by 'impartial jurors, and an outcome affected by extrajudicial statements would violate that right." *Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 S.Ct. 2720 (1991)' Pennekamp v. Florida, 328 U.S. 331, 66 S.Ct. 1029, 1043 (1946) (Frankfurther, J., concurring.)*

4 Testimonial Statements of Jailhouse Liars

Andrew Napper and Sheldon Anter were two professional liars ("criminal informants") with everything to gain and nothing to lose; Napper, a *"paid police informant in drug cases"*, Anter, a twice deported illegal immigrant. *State v. Barrett*, 2012 WL 2870571, (7-13-12) @ *14.

Both state jailhouse liars were presented as due process and equal protection issues not *"solely as a matter of state evidence law"*, as the District Court held that the claim regarding *"Sheldon Anter"* ("S.A.") *"...is not cognizable in this federal habeas proceeding because Petitioner raised it on direct appeal 'solely' as a matter of state evidence law"*.

The Court did not cite any law to justify the learned court's odd holding on this matter. (Id., pg. 40). Trial Counsel should have at least moved to strike the pernicious biased testimony of jailhouse liar S.A. a twice-deported illegal alien, who was undergoing DEPORTATION proceedings by our Federal Government when Assistant (now Deputy) District Attorney Tom Thurman went down to New Orleans and begged the Feds to allow Anter to come back to Tennessee in order to (lie) his way back into the U.S.

It was exhibited that Mr. Thurman wrote a letter to the Federal authorities on behalf of Sheldon Anter. His sister Ann Graves thought that Mr. Thurman had reneged on his promise to the Anter family that if he testified at the first trial he would not be deported. So she went hysterical, exposed the quid pro quo, to avoid her brother being deported back to Trinidad for the third time after 14 years a daughter and the fear of *"being killed if he returned"*. That's why Pet wanted her at the Evidentiary Hearing and at trial.

Ms. Graves went to the news media (local Channels 3 and 4 April 3 4 2009) with her complaint that the "DA lied to her and her brother, that he wouldn't be deported if he "testified" against petitioner in the first trial, which he did. This was her complaint made *before* the second trial and counsel did not follow up on this information which was in the newspapers.

His testimony and appearance at the second trial should have been stricken, suppressed or something.

The State appellate court *Pro Se* application for permission to appeal was finally recognized by the District Court (pg. 40) regarding the prevarication of Andrew Napper ("A.N.") and prosecutorial misconduct but the Court's review was extremely strict against the *Pro Se* appellant: The District Court went on : *"Although Petitioner did raise this claim in a 'conclusory' fashion in his Pro Se application for permission to appeal to the TN Sup CT in his state post-conviction proceedings....that is not sufficient to fairly present the claim to the state courts." Id., pg. 40.*

Andrew Napper was a claim that petitioner stated was extremely prejudicial as well. Anter's testimony was fueled by personal animosity toward Defendant as well as the huge desire to parlay his lies into an agreement to stay in the U.S. with his family of 13 years. Napper was motivated by the scenario that he might be killed if sent back to state prison because he had been used by DEA previously to bust up gang related drug activities. Counsel was deficient in his handling of these two biased criminal informants.

Quid Pro Quo

Pet did describe adequate proof from the mouths and backgrounds of both jailhouse liars, the D.A., Ann Graves (the sister of jailhouse liar Sheldon Anter.) as well as the clear danger both faced without the intervention of the State, the circumstances surrounding both of their suspicious introduction into the life of

the Defendant, leaves little room for doubt and much for disagreement with the decision of the District Court, that they were hoping for, used to getting, and were promised – in exchange for their lies on the stand – *quid pro quo.*

Discovery was warranted because of the truth of the matter told. The Court of Appeals conclusion that "*he has no support for his claim that such agreements existed*". *[Id., @*7 "IV. Requests for Discovery and an Evidentiary Hearing"]* would be generally said in the prison sub-culture and probably among many judges to be "naïve". In *Black ledge v. Allison 431 U.S. at 76, 82-83 (1997),* this Court ruled that court's consider ordering Discovery before deciding whether an evidentiary hearing is appropriate whenever the claim on which Discovery is sought is not so 'palpably incredible' [or] 'patently frivolous or false' as to warrant summary dismissal." Accord, *Bracey v. Gramley 117 S.Ct. 1793 1799 (1997).*

Pet's grounds were not "palpably incredible or patently frivolous or false. This is what Discovery would have made clear. He shall re-submit facts and circumstances herein through certiorari.

The two jail inmates who shared the pod with Pet, that Pet requested trial Counsel to secure as witnesses, would have been able to testify that Anter hated the Pet because he asked him in front of the whole pod of inmates had Pet "said anything to him about my case?" After asking him twice, Anter replied "No". Because he kept trying to get Pet to talk about the charges he was facing. At the time, Pet had already served 28 consecutive years in prison been out five more years before this case was concocted and was prison-wise to the role of so-called jailhouse informants. Napper never confronted or talked to Pet about his case. He just hung around. These facts and or pertinent information could have been revealed to the jury had counsel called these witnesses as requested. That was IATRC.

Sheldon Anter's testimony at Petitioner's Trial

Criminal informant identity included:

"(1) convicted of Worker's Compensation Insurance Fraud on Nov. 18 2008 in Davidson County TN Case No 2008-A-777

"(2) Theft of property from Home Depot occurring on August 2, 2006 in Davidson County TN."

State Ex. Pg. 186

> *"He acknowledged that he (Anter) did not know the Defendant until he requested and was moved into the pod on May 21, 2008, Id. @ 14 (when the local TV and newspaper were feasting on the remains of his right to a fair jury verdict). and that the Defendant was already in the pod when he arrived. He said he asked the Defendant what his charges were but denied asking questions about the victim." Id. ("He*

*acknowledged that the Defendant did not answer him." Id.) "He said the Defendant and Mr. White did not like or trust each other." Id. *13 "He told the Sheriff's Department that he wanted to report a crime. He said that the 'crime' was a fight between Mr. White and the Defendant..." Id *14. "He agreed he had no knowledge whether his lawyer requested that the district attorney's office write a letter on his behalf regarding the deportation proceeding." Id. ("He said he had been deported previously. He agreed that he had been released from federal custody and was home with his family in Nashville but said his deportation proceeding was still pending..."" Id. *.*

*"Mr. Anter testified that on August 16, 2008 Mr. White was taunting the Defendant about being "a baby killer and a rapist". *13. He said the Defendant responded "I have killed before and I have no problem killing you." He said the Defendant went inside Mr. White's cell and stated that the Defendant would kill Mr. White as the Defendant had killed before. He said that Mr. White pushed the Defendant away and that the Defendant said "I will kill you like killed before." Id. He said that later the same evening Mr. White continued to taunt the Defendant and that the Defendant continued to admit killing the victim but denied raping her." *13.*

*Sheldon Anter testified that "the Defendant stated that the Defendant's DNA was on the victim but denied raping the victim" "Mr. Anter recalled another occasion in the recreation room where he and Mr. White inquired why the Defendant's DNA was on the victim, given the Def's previous denial of any knowledge of the victim." Id. (This kind of pressured questioning was admitted to by these two jailhouse liars without objection) (emphasis supplied) Metro Police Detective Hugh Coleman testified that "Mr. Anter did not know ahead of time that the sheriff's department was going to interview him." Id. @ *14. But, "He requested to be moved into the pod with Def on May 21, 2008". Id. @ *13.*

Such statements were inadmissible pursuant to the Confrontation Clause for not fulfilling the two requirements: (1) the declarant/witness must be unavailable (which it was never determined whether Frank White was or not) and (2) the declarant/witness (Sheldon Anter) must have a prior opportunity to cross-examine the declarant witness." (And Pet. Never did) See *State of TN v. Maclin, 183 S.W. 3d 335, 344-45, citing, Crawford v. Washington, 541 U.S. at 50, 124 S.Ct. 1354.* Even though it became apparent that Frank White would be a pivotal issue, as to Sheldon Anter's testimony regarding the "jail-house fight" video proffered by the Davidson County Sheriff's Department, at his trial, with White still in jail, he was never contacted or interviewed by the Public Defender's Office.

***Andrew Napper** testimony at Petitioner's Trial*

"He acknowledged his own lengthy criminal record, which included convictions for burglary, robbery, forgery, theft, escape, and criminal impersonation." He also acknowledged that he had worked as a paid police informant in drug cases. He had a pending probation violation case. He denied making any deals with the State

other than his transfer to another city for protection following his testimony." Id, @ *14.

*"On cross-examination, Mr. Napper acknowledged writing a letter to the district attorney about an inmate other than the Def in which he requested assistance with his case in exchange for his testimony against the inmate." Id., *15. "Detective Postiglione testified that he interviewed Andrew Napper ...on September 11, 2008. He said Mr. Napper did not request the interview 'but was cooperative. He said he did not offer assistance, nor did Mr. Napper request it." Id. (emphasis added)*

Napper denied making any deals with the State other than his transfer to another county for protection following his **quid pro quo** 'testimony' against Pet. *Id.* @ *15. Pet was not assigned to any "county" facility and the case was so well publicized it wouldn't matter where he was transferred to if Andrew Napper were just interested in going to another jail. Why out of 1,000 jail inmates at the CCA Correctional facility in Nashville Tennessee ("TN") did Detective Postiglione interview Andrew Napper? *("He said Mr. Napper did not request the interview but was cooperative". Id.)* He never told Pet he was a paid police informant at any time he questioned petitioner at the jail. (*"He said a paid police informant must be truthful." Id. @15)*.

4 Jailhouse Silent Video

Petitioner did not strenuously and repeatedly raise the trial court errors regarding admission of the jailhouse video in all of his petitions, which undermined his presumption of innocence and his right against compulsory self incrimination from the mouths of three witnesses, Assistant District Attorney General Tom Thurman, S.A. and A. N., and then, as the District Court erroneously concludes: *"...not then raise this claim to the TCCA." (Order, Pg. 41)*

The trial (post conviction) court never denied that it did not promise to review the video overnight....The transcript of the trial, as Petitioner showed in his state Petitions for post conviction relief proved contrary to the District Court's finding that Mr. Thurman did describe to the jury why he felt what was happening during the alleged altercation and why. In the jail video scene Sheldon Anter and Tom Thurman told the Jury Pet had assaulted Frank White. (T.E., Vol. V pg. 400, 454, Video 749-775)

'He (Anter) said that after being 'taunted' by White, the Def went inside Mr. White's cell and stated that the Def would kill Mr. White as the Def had killed before: and that *'Mr. White pushed the Def away." Id., @**

13-14. "He (Anter) said the incident was documented on the (jailhouse) video." (emphasis added) "The video recording introduced during Ms. Ray's Davidson County Sheriff Investigator "testified that she reviewed and recorded video footage from the jail in which the Defendant was confined. The recording was received as an exhibit" *without objection.* Id. @*12 "The video recording in which had no audio was played for the jury as Mr. Anter narrated it." Id. @ *13.

This video was inappropriate evidence –verbal commentary by Assistant District Attorney Tom Thurman ("T.T.") and jailhouse liar Sheldon Anter ("S.A.") was inappropriate and inadmissible and its introduction at trial denied pet his rights under the Confrontation Clause. Coy v. Iowa, 487 U.S. 1012 (1988) makes this videotape inadmissible. Trial counsel did not challenge possible editing.

In White v. Illinois, this Court observed that the confrontation clause mandates an "unavailability analysis" when the out-of-court statement was made in a prior judicial proceeding to satisfy the confrontation clause. Further, that the prosecution must establish that the declaring was unavailable to testify only if the prior statement to be admitted was made during a judicial proceeding. *502 U.S. 346 (1992).*

Frank White was not offered as witness and no proffer was made that he was an unavailable or absentee witness who had previously truthfully testified accurately about events discussed in the videotape. *Rules of Evidence Rule 803 (5); State v. Hocevar 2000 MT 157, 300 Mont. 167 7 OP. 3d 329 (2000).*

The TN S Ct held that the confrontation clause bars the use of an ex parte videotape statement... if the statement is used as "evidence in chief by the prosecution" as it was in this prosecution. State of TN v. Pilkey, *776 S.W. 2d 943 (TN. 1989), cert. Denied 494 U.S. 1032 (1990). No "fair and accurate portrayal"* determination was made by the Nashville Sheriff

Department videographer of what was presumably an exact representation of the actual facts or original events and occurrences alleged by both T.T. and S.A. *State v. Van Tran, 864 S.W. 2d 465 (TN. 1993).*

There was no way to determine except out of the mouths of these two biased state witnesses, T.T. and S.A., whether the videotape provided an accurate depiction the facts and failed the requirement of relevance" in *T.R. Evid. Rule 403*. This video did nothing but increases the risk of undue prejudice describing Pet as an aggressor in jailhouse clothes and added testimony of jailhouse liar Anter.

There was no precise event at issue in the case to justify the introduction of the silent video as evidence. The Sheriff's Department videographer could not testify that either T.T. or S.A. was giving an accurate portrayal of what was presented as proof. The trial Court said it would take the videotape overnight and view it to determine who was the aggressor but it came back the next day and never said a word about the videotape and failed to return with a limiting instruction to the effect of aggressor.

Counsel let it slide. Counsel should have at least objected to the tape on grounds of relevance and authenticity. *Van Tran supra*. *"Traditionally, the law has had a strong preference for live testimony as the only means by which the trier of fact could observe the demeanor of the witness (es) and substitutes for live testimony was only rarely permitted." 44 Am Jur Trials 171, Jordan S. Gruber, 60 A.L. R. 3d 333 § 2.*

Pet's identity was not in issue. Nor was the fact that he was in jail at the time he was allegedly being "taunted" by absentee witness Frank White. The only purpose of the jailhouse silent video was prejudice.

By law, the jailhouse silent video and the narrations of T.T. and S.A. is unethical and amounts to subversion of justice."

5Insufficient Evidence

"An autopsy showed that the victim's cause of death was asphyxia caused by manual strangulation." State of TN v. Jerome S. Barrett, No. M2009-02636-CCA-R3-CD, 2012 WL 2870571 (TCCA, July 13, 2012) (perm. App. den, TN S. CT., 12-12-12. The TCCA summarized its opinion that the evidence was sufficient as ""...proof of the statutory elements of the crime..." and that "...Her injuries were so great that he thyroid cartilage and hyoid bone were broken."

Dr. Francisco testified that "...a child could produce the necessary force" (to) break the hyoid bone." Id. @*5. At that point in time Pet was 6'2" and weighed approximately 175-185lbs, with typical physical features of African American male he is told. Whether the TCCA's summation is overblown in light of the record, by the Appeal Court's opinion to break a "thyroid cartilage", compared to their obvious feelings is telling, when compared to the expert's opinion.

Later "When asked if he recalled being asked whether the victim might have been penetrated by someone with an underdeveloped penis, he said, '"That...kind of rings a bell." Id. The TCCA made references to the Pet's 1975 conviction for rape of AJP. In that case, (B-6143 Davidson County, Nashville, TN. 1975) the victim testified that she had "gagged several times because he tried to put the 'whole thing' in her mouth," which crudely indicated that Pet is not the suspect with the "underdeveloped penis".

Ms. Marie Maxwell "acknowledges she told the FBI the next day that she thought the taller person (of two and the victim) was White." Id. State v. Barrett 2012 WL 2870571, @*6. (from 30 feet away) The suspect was White, with an underdeveloped penis, and could have been a child. Neither description by eyewitness or Dr. Francisco fits the Pet. Pet alleged mistaken identity as one of the

defenses TC should have raised. It was proper and fair to raise this issue of insufficient evidence in the lower Courts'.

Ms Maxwell also "agreed that she described the taller person in Ms. Howard's (next door) driveway as a child but that she did not know the person's gender. She recalled stating that the child was White..." that she recognized the victim." Id. @ *7. A composite sketch based on her recent identification of the adult in the driveway next door to her home was developed. "She agreed that the sketch depicted a white person." D. @ *8.

Further, State's witness Dr. Jerry Francisco also acknowledged that he didn't observe any vaginal injuries and that the victim's hymen was intact, which he said "suggested that it was unlikely there had been a sexual act performed." He performed the victim's autopsy. Id. @ *4. He further eroded justification for Attorney General argument that Def raped the victim.

Det Cathey also reported that the cookie box that held the money the victim received from cookie sales, was "unopened". *State of TN v. Barrett, M2010-00444-CCA-R3-CD, 2012 WL 2914119 @ *5*

6 Denial of Alibi and DNA expert Witness at Trial by IATC

Trial counsel worked with defense investigator Amber Cassitt who spent "*a considerable amount of time" attempting to local the list of potential alibi witness, and that Ms. Cassitt was able to locate abut half of the individual named by the Pet but some of them didn't remember the Pet. Two peoples remembered the Pet and "' thought that it was likely that he would have gone (to Chicago) because he was active in (the) [Nation of Islam] community at that time.*" Counsel refrained from calling either Nil Shakir or Cicero X. d. @ *3. Pet filed four motions for DNA analysis in the P.C.C. and made another request in open court at the Evidentiary Hearing. Counsel stood mute and declined to assist in securing this witness. (See Application For Permission to Appeal; TN. S.Ct. No. M2015-0661-CCA-R3-PC, Brief of the Pro Se Appellant, #16, pg. 15) His sole defense outside of third-party was alibi.

Pet was in Chicago, Illinois for the NOI's annual; "Saviour's day" celebration. He was on "post" there at the Chicago Amphitheatre the day the victim was killed. He gave to Counsel the names of nearly ½ dozen members of NOI who he traveled with, in a caravan scenario, from Nashville to Chicago 2-25-75, including (1) Gunnar and Van Bond (2) Minister Ilyas Muhammad (3) Yusuf Abdullah, (4) Cicero X, and Nail Shakur. These names were given to the Investigator and trial Counsel.

7 Cruel and Unusual Sentence

The State's Motion For Consecutive Sentencing was made August 13, 2009 on the grounds that:

"(1) The defendant is an offender whose record of criminal activity is extensive'

"(2) The defendant is a dangerous offender whose behavior indicates little or no regard for human life and no hesitation about committing a crime in which the risk to human life is high" Date of offense is 2-25-1975; Judgment entered July 18 2009 – 44 years count 2 – Second degree murder. *('Second-degree murder* "(T.C.A.§ 39-13-202(a)(2)[formerly *T.C.A.§ 39-2403]* is *not* a lesser included offense of first degree *felony* murder (T.C.A. *§* 39-2402(4). *"The only lesser included offenses of first-degree felony murder are reckless homicide and criminally negligent homicide."* See State v. Gilliam, *901 S.W. 2d 385[TCCA 1995];* State v. Brown *311 S.W. 3d 422 (Tenn. 5-27-10).* This sentence is therefore illegal.)

Consecutive sentence in this case rode right over the impermissible boundary line of the 8th Amendment's cruel and unusual prohibition. The District Court correctly concludes that there is a "federal '"due process right to a fair sentencing procedure." *(Id., pg. 23.* However, The District Court erroneously found that *"Petitioner does not dispute the fact of these convictions." (Id., pg. 27)* Untrue! Petitioner has long disputed the fact that he was lawfully convicted of "unlawful carnal knowledge of minor", that there was insufficient evidence to convict him of murder and larceny or rape, all the way from the state courts to the federal court, both in this matter and previously. Thus the prior disposition of these claims as well are contrary to and an unreasonable application of federal law. See *Barrett v. State 1993 WL 8605.*

Appellant submitted an exhibit "APPEAL" for an indictment in 1974 for "Rape" and sentence for "*unlawful carnal knowledge of a woman forcibly and against her will*". **(T.C.A. § 39-3701)** The conviction under another statute – **T.C.A. 39-3706**. The federal court case which followed [*2013 WL*

1178266, M. D. Tenn.] found regarding the concerned indictment *B-36512: "As the Indictment in B-36512 only made reference to carnal knowledge of a woman,* **T.C.A. § 39-3701**." (Tenn. Code Ann § 39-3701 [1955]) emphasis supplied)

Yet the Tennessee Department of Correction (TDOC)'s Sentence Information Services unlawfully changed the conviction to *"carnal knowledge of Female between twelve eighteen not amounting to Rape" (T.C.A. § 39-3706)* The Western District Federal Court in Case No. 1:12-cv-178, and related 6th Circuit Case, No. 13-5814 found in this matter: *"The Court observes that Appellant alleged that he was indicted for '"rape"' and pleaded guilty to the indictment, and specifically to '"unlawful carnal knowledge of a woman forcibly and against her will." (U.S. District Court Case No. 1:12-cv-178) (Docket Entry No. 1-1, @21. At that time under Tennessee law the crime of rape was defined by statute as "the unlawful carnal knowledge of a woman forcibly and against her will." Tenn. Code Ann.* § 39-3701 (1955) (amended by Tennessee Public Acts 1979 pg. 1065, ch. 415)

The trial Court went on record stating that it based its' decision to run sentences consecutive so that the victim's family in both cases, would feel satisfied in essence, that the sentences were consecutive to the Life sentence he had already received See *Barrett, 2012 WL 2870571m @ *43-44; [Order, Barrett v. Genovese, pg. 24]. ("Defendant's sentence '"needed to be long enough to keep [the Defendant] permanently incarcerated'" and that Petitioner must serve this sentence consecutive to a previously imposed (Life) sentence in part because to do other wise would minimize the death of the victim and the murder victim on the previous case." Id. Pg. 26, fn. 4).*

The trial court then justified the consecutive ordering of his sentences based on two cases that came after the date the court had its jurisdiction in that case to order the amount of sentence he should receive in that case, not augment that sentence by a subsequent sentence. Cruel and unusual punishment. *Gray v. State 538 S.W. 2d 391 (Tenn. 1976)* and *State v. Taylor, 739 S.W. 2d 227 (Tenn. 1987).*

In TN, a "crime spree" where two offenses happened in the same month in the same county, must be sentenced concurrently. *Blovett, II and Dennis James Ogle, 904 S.W. 2d 111 (1995). (2-2-75; 2-25-75)*

Petitioner also pointed to the five years he was free and his conduct belied the justification upheld by the district court that "*Defendant was a dangerous offender with little or no regard for human life and who had no hesitation about committing a crime involving a high risk to human life." (Id. Pg.*

26, Order) Petitioner had not been accused of coming any crime since March 1975 a total of 34 years including over five calendar years of freedom. Petitioner was over sixty (60) years of age when he was sentenced in January 2009. Protecting the public from someone who would be over 90 years of age when he began the sentence is grandstanding and political opportunism.[5]

The state court, in violation of *Eddings v. Oklahoma, 455 U.S. 104 113-114, 102 S.Ct. 869 (1982)* refused to consider as mitigating evidence the five years of freedom event-free petitioner spent prior to arrest and after having served 28 consecutive years of incarceration in the TDOC as a "excellent role model" prisoner. In *Eddings*, the sentencing judge and appellate court found mitigating evidence about the defendant's "family history" irrelevant as a matter of law. *455 U.S. at 113, 102 S.Ct. 869.*

The Supreme Court held: "*Just as the State may not by statute preclude the sentencer from considering any mitigating factor neither may the sentencer refuse to consider as a matter of law any relevant mitigating evidence.*" Id., at 113-114, 102 S.Ct. 869. Appellant did not even get a traffic ticket. His business (*"A.J.'s 'One Man Army' Expert Lawn Service"*) required him to have contact with hundreds of people on a regular basis. He told trial counsel he was elected to the Neighborhood Anti-Crime block Club presidency by members of his neighborhood (Evergreen). He also was a "judge" on the Shelby County Voting Registrar for the years 2005-7). Counsel also learned that appellant received several decorations for combat tour in Viet Nam including the Purple Heart. These facts could have gone to sway the jury to a lesser sentence.

The consecutive sentencing and the sentence of "44 years" is "*'greater than necessary to accomplish the goals of sentencing.'*" *Holguin supra, [2], citing, Kimbrough v. United States, 552 U.S. 85, 101, 128 S.Ct. 558, (2007) "Congress has instructed sentencing courts to impose sentences that are '"sufficient, but not greater than necessary, to comply with'" (among other things) certain basic objectives, including the need for '"just punishment, deterrence protection of the public, and rehabilitation."' Holquin, [3], citing, Dean v. United States, 581 U.S. ____, ___, 137 S.Ct. 1170, 1175.*

---

[5] A "Life" sentence in 1975 requires a service of "30 full calendar years" before parole. *"Provided further, any person who shall have been convicted and sentenced to a term of imprisonment in the state penitentiary for a period or term of sixty-five (65) years or more or life may become eligible for parole provided such person shall have been confined or served a term in the state penitentiary of not less than thirty (3) full calendar years...."* T.C.A. 40-3613:

2934, 2951 (1989) (quoting California v. Brown, 479 U.S. 538, 545, 107 S.Ct. 837, 841 (1987) (O'Connor, J., concurring).[6]

Appellant's attorney failed him during the sentencing phase as to mitigation.[7] that resulted in prejudice to defendant for not raising all available defenses. *Strickland, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). Cronic v. United States, 104 S.Ct. 2039. (1984). "A trial is unfair if the accused is denied counsel at a critical stage of the trial." Id.* "Mitigation" is a constitutional right when an accused faces a mandatory "Life" sentence if found guilty. Other than the death penalty, 1st degree murder carries a mandatory "life" sentence in Tennessee. *"The right to present mitigating factors is tied to a defendant's right to present a defense.* Allen v. Hawley, 74 Fed. Appx. 457, (6th Cir; .8-7-2003), 2003 WL 21911327, citing, Chambers v. Mississippi, 410 U.S

8 Prejudicial Photos

The District Court also overlooked the fact that petitioner did present his claim of prejudicial photographs in post conviction petition and pro se appeals and unreasonably held that petitioner did not present the claim of prejudicial photographs to the TCCA on either direct appeal or post conviction appeals. *(Id., pg. 40)* Further, holding that the photographs were useful, as in *State v. Nesbitt, 978 S.W. 2d 872, 901 n. 2, "as proof that the deceased was a reasonable creature in being; that is to say a child that was born alive"*. This proof was not at issue.

Plus the District Court using still another unreasonable excuse for the pictures of the child stating *"And Ms. Trimble used the victim's school picture to identify her as the person named in the indictment." (Id., pg. 56)* is ludicrous. The mother did not need a picture to identify her own child.

Testimony was uncontroverted that the child had that blouse on around the time of her disappearance. There was no need to show her to the jury in her gala Happy Birthday party with this blouse on celebrating, except to evoke the sympathy and passion of the jury.

"[6] defense counsel's failure to prepare for mitigation phase until after defendant was convicted was deficient." Jells v. Mitchell, supra; Strickland v. Washington, at 466 U.S. at 688, 104 S.Ct. 2052; W

"[7] defense counsel's failure to prepare for mitigation phase until after defendant was convicted was deficient." Jells v. Mitchell, supra; Strickland v. Washington, at 466 U.S. at 688, 104 S.Ct. 2052; W

Counsel was deficient in not challenging the introduction of these prejudicial provocative pictures to the Jury or at least objecting to the surprise introduction on the grounds of relevance and prejudice. Their probative value was outweighed by their prejudicial effect.

9 Pre-Indictment Inordinate Prejudicial Delay

Pet was denied a fast and speedy trial and due process for failure to prosecute. As provided in Tennessee Rules of Criminal Procedure Rule 48 and the Tennessee and United States Constitutions.. count for not prosecuting Def should begin when NMPD Sgt. Ralph Langston testified that the NMPD was *"looking for a single suspect to all three crimes"*, in 1975. Pet was in prison from Feb., 1975 during the period when Sgt. Langston was testifying about, where he remained for 28 years. So he was not hard for law enforcement to find.

When he was released in 2002, the same year the "cold case" unit was started, his DNA was obtained by the TDOC in conjunction with a new law enacted to obtain DNA of all released prisoners. The gaps in time reflect that the police irresponsibly dropped their investigation in this case, in 1975, 1990, 1992, 2002, and 2004. NMPD Det. Brad Putnam sent evidence to the NMPD Lab for DNA testing, on March 18, 1992. (*"DNA profiling is what we have presently during the time of this investigation in 1975..."*

There have not been advances in DNA since the cold case unit was established in 2002. (CODIS – combined DNA index system)) had been established since the mid-1980s (fn., pg. 2, DNA Typing: Biology and Technology Behind STR Markers, Dr. John T. Butler, 2001).

Yet it was seven (7) more years of memories turning stale, DNA evidence being corrupted, cross contamination and amplification of witnesses dying or moving out of the state. There were multiple "amplifications" by at least 3 laboratories and two government agencies (FBI,TBI) which increased the likelihood of false positives, which could not be determined without independent testing where DNA profiles attributed to Pet, were the result of "amplification". (see below)

(1) TBI Special Agent Chad Johnson received the Def's sample on October 25 2007 'analyzed it' and issued his report on Nov. 7, 2007. *State v. Barrett WL 2870571 @ 20; 7-12-12*

(2) Gary Harmon a forensic serologist with the Serological Research Institute received Def's referenced sample on 12-12-07. He gave the sample to Amy Lee who 'performed testing and

gave him the extracted DNA. Mr. Harmon 'amplified' the extracted DNA on 12-12-07 determined the typing and wrote his report." Id., @*19.

(3) Ms. Luttman testified that evidence from the victim's homicide was received in March 29 2004 that the evidence was also submitted in 1975 and 1990 and 1995. *Id @ *20. (She said that the laboratory's policy was not to re-examine previously analyzed evidence." Id.*

(4) *TBI Special Agent Forensic Scientist Joe Miner who testified for the State as an expert in DNA analysis, "amplified" Pet's DNA profile in 2000. Id. @ 18.*

These pre-indictment delays typify the hundreds, if not thousands of innocent "cold case" sexual assault and homicide unsolved untested case throughout the U.S. Crime scene evidence is allowed to languish deteriorate cross contaminate and render false positives just because the State is dilatory in prosecution of the crimes. See *Barker v. Wingo 407 U.S. 514, 92 S.Ct. 2182 (1972); Trigg v. Tennessee 507 F. 2d 949 (6th Cir. 1974), cert. Den., 420 U.S. 938 95 S.Ct. 1148 (1975) rehear den. 420 U.S. 998, 95 S.Ct. 1439*

Further, DNA testing had been used in Nashville, TN in 1992 and the State has not shown how the delay of 15 years from that point in time is not their fault and actually helped them through the realities of amplification..

CONCLUSION

The judgment of the Sixth Circuit Court of Appeals should be reversed and the case remanded for further proceedings. The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jerome S. Barrett
TDOC #73179
M.C.C.X., Unit 6/7
541 Wayne "Cotton" Morgan Drive
P. O. Box 2000
Wartburg, TN 37887