APPENDIX

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RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)
File Name: 21a0052p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDWARD THOMAS KENDRICK, III, *Petitioner-Appellant*, v. MIKE PARRIS, Warden, *Respondent-Appellee*.	No. 19-6226

Appeal from the United States District Court
for the Eastern District of Tennessee of
Chattanooga.
No. 1:16-cv-00350—J. Ronnie Greer, District Judge.
Argued: January 26, 2021
Decided and Filed: March 2, 2021
Before: GUY, LARSEN, and MURPHY, Circuit Judges.

COUNSEL

ARGUED: Amanda Rauh-Bieri, MILLER, CANFIELD, PADDOCK, AND STONE, PLC, Grand Rapids, Michigan, for Appellant. John H. Bledsoe, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee. **ON BRIEF**: Amanda Rauh-Bieri, Paul D. Hudson,

MILLER, CANFIELD, PADDOCK, AND STONE, PLC, Grand Rapids, Michigan, for Appellant. John H. Bledsoe, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee. Joshua Counts Cumby, ADAMS AND REESE LLP, Nashville, Tennessee, for Amici Curiae.

OPINION

LARSEN, Circuit Judge. One evening in 1994, Edward Kendrick III fatally shot his wife outside a Chattanooga gas station. At trial, he insisted that his rifle had malfunctioned and fired **[*2]** without Kendrick pulling the trigger. But the jury didn't buy his account. Instead, it convicted Kendrick of first-degree murder.

In his petition for state postconviction relief, Kendrick raised seventy-seven claims alleging either ineffective assistance of counsel (IAC) or prosecutorial misconduct. He succeeded in the Court of Criminal Appeals on two of his IAC claims, but the Tennessee Supreme Court reversed as to both. In doing so, it held that counsel's decision not to adduce the testimony of a firearms expert was not constitutionally deficient performance. Neither was counsel's failure to introduce favorable hearsay statements under the excited utterance exception.

Kendrick then sought federal habeas review. The district court denied his forty-eight-claim petition. We granted a certificate of appealability (COA) on the two IAC claims that the Tennessee Court of Criminal Appeals had initially found meritorious. Because the

Tennessee Supreme Court did not unreasonably apply Supreme Court precedent in denying Kendrick relief, we now AFFIRM.

I.

Kendrick was holding his Remington Model 7400 hunting rifle at the time it fired a single bullet at point-blank range into his wife's chest. That much has never been disputed. Kendrick's intent, on the other hand, always has been. The State contended this was a cold-blooded execution. Kendrick insisted it was a freak accident.

A.

In the early months of 1994, Kendrick and his wife Lisa were in the process of pursuing what Kendrick described as an "amicable" divorce based on irreconcilable differences. They were still living together, along with their three-year-old son and four-year-old daughter. Lisa was working at a gas station in Chattanooga, Tennessee.

Lisa was on duty on the evening of March 6, 1994, and had been talking with her friend, Lennell Shepheard Jr., for over an hour. Just before 10:00 p.m., she received a page from her husband and returned his call. A little while later, Kendrick pulled into the parking lot with their two children sitting in the backseat of his car. Kendrick entered the gas station and told Lisa, **[*3]** "when she got a chance, to step outside, that he wanted to talk to her." Kendrick walked out first, and Lisa followed after she finished ringing up a customer. From where Shepheard was standing inside the station, "it looked like . . . they

were arguing" outside, but Shepheard couldn't hear anything or see clearly what was going on.

"After that [Shepheard] heard a boom." He did not know what it was at first, but upon opening the door, he saw Lisa lying on the ground with Kendrick "standing over her." The sound had been a gunshot, which two other witnesses heard as well. Charles Mowrer, who lived across the street, testified that he ran outside following the "extremely loud shot" and saw "a lady laying [sic] on the ground with a man looking over her." Timothy Benton, who was just pulling out of the gas station, "heard an explosion" too. Benton looked back and saw Kendrick holding a gun "pointed straight up in the air." "The right hand was on the pistol grip area around the trigger and the left hand was up near the stock."

Shepheard testified that Kendrick then stood over Lisa's body, while repeating "I told you so, I told you so," about six times. During trial, Kendrick denied making these statements. And Kendrick's counsel pointed out that the records from Shepheard's initial interview with police did not mention Kendrick saying "I told you so" at all. Nevertheless, it is undisputed that Kendrick did not "render any assistance" to Lisa or "call out for help" after shooting her. He made eye contact with Shepheard, fumbled for the passenger door "at least three times," and then "ran around the car, jumped in and left." During his flight, Kendrick threw the gun out of his vehicle onto the side of the road.

Meanwhile, Timothy Benton had turned his car around and had pulled back into the gas station to

help. But when he saw Lisa lying on the ground and Shepheard about to call 911, he gave chase to Kendrick instead—"to make sure he didn't get away." Within minutes, Benton caught up with Kendrick and "followed him into the Chattanooga Airport."

At the airport, now about five minutes after the shooting, Kendrick dialed 911 himself. He immediately stated: "I want to turn myself in. . . . My wife, I just shot my wife." Kendrick then revealed to the operator that he was at the airport and would wait with his kids for the police to arrive. After Kendrick was placed into a police vehicle and advised of his rights, he said "I **[*4]** hope this is only a dream." He made no suggestion to the officers that the shooting had been an accident.

An officer then spoke with Kendrick's four-year-old daughter, Endia, who "was very upset, was crying, [and] seemed to be very scared." At trial, a second officer also claimed that Endia was "hysterical" and "stated that she had told daddy not to shoot mommy but he did and she fell." Endia, for her part, testified that she "saw [Kendrick] shoot" her mother and that Lisa "was standing with her hands up" at the time. The positioning of Lisa's hands was supported by forensic evidence of stipple injuries on her forearms. Yet on cross-examination, Endia admitted that she "remember[ed] telling [Kendrick's counsel] that [she] didn't see [her] daddy shoot [her] mommy." And she agreed that Kendrick got the gun out of the front seat of the car "because [her] mommy wanted him to put the gun in the back of the car." Counsel also insinuated that Lisa's parents—with whom Endia

was living at the time of trial—were attempting to manipulate Endia's story.

Later that evening, Officer Steve Miller of the Chattanooga Police Department retrieved Kendrick's gun, a Remington Model 7400, from the side of the road. He placed the rifle in his car to take back to the station. But around 1:45 a.m., as Miller "was gathering the evidence" out of the trunk of his car, he pointed the gun downward and "the weapon discharged," firing a bullet into his left foot. According to police incident reports, Miller told other officers that the gun had fired without Miller having touched the trigger; but Miller claimed not to remember the "exact position of [his] hand" when asked on the stand.

Kendrick's counsel challenged this lack-of-memory testimony with a vigorous cross-examination. Miller admitted that he had been a police officer for twenty-two years, that he had never accidentally discharged a firearm, and that it is "drilled into you at the police academy don't ever put your hand on the trigger unless you're going to shoot the gun." He also confirmed that he would "[n]ever" otherwise "knowingly" place his finger on the trigger of a loaded gun. And Miller conceded that he "presumed [the gun] was loaded" at the time. Counsel next pointed out that when Miller reenacted the incident for the jury, he hadn't "put [his] finger on the trigger." Miller insisted that he could not "say for sure in th[e] courtroom how [his] hand was that night," but counsel wouldn't let Miller off the hook so easily. Eventually, counsel's **[*5]** questioning caused Miller

to admit that his reenactment for the jury—finger "not on the trigger"—was "to the best of [his] recollection how it happened[.]"

The State then called a firearms expert, Kelly Fite. Fite testified that he conducted a "drop test" on Kendrick's rifle and "abuse[d]" it to see if that affected the force needed to pull the trigger. It did not. He also "checked the rifle for what's called a slam fire" and "attempt[ed] to accidentally discharge this weapon with the safety," but "[t]he only way [he could] get this rifle to fire was by pulling the trigger." Fite thus declared that in his expert opinion, "[t]he only way that you can fire [Kendrick's] rifle without breaking it is by pulling the trigger."

After cross-examining Fite and attempting to cast doubt on the validity of his conclusion, Kendrick's counsel recalled Miller to the stand. Counsel showed Miller the police incident reports from the night he was shot, in which Miller purportedly told other officers that the gun had gone off without his finger on the trigger. Miller, however, could not recall making those statements. Counsel next tried to impeach Miller with the reports, but the trial court sustained the State's objection. So, counsel called to the stand Officer Glen Sims, one of the authors of the incident reports. He sought to impeach Miller that way, but the trial court again sustained the State's objection.

The defense called the rest of its witnesses, and then Kendrick took the stand in his own defense. He testified that he "loved [his] wife and [he] would have never taken [their] children to [his] wife and done

anything like that." He also maintained that they were not arguing outside the gas station and that he only carried a loaded rifle in the car for protection, as he and Lisa often cleaned houses in an unsafe part of town. According to Kendrick, Lisa had instructed him to "go ahead and put [the gun] in the trunk of the car." So he took it out of the front seat. When he reached into his pocket to retrieve his keys and moved the rifle to his right hand, "the gun went off" without him "pull[ing] the trigger." Lisa died almost instantly. Kendrick testified that he "just wanted to get the kids away" and that is why he "just got in the car and left." Because he was "scared," he threw the weapon out the window before calling 911 at the airport.

The jury was unconvinced by Kendrick's account. It found him guilty of first-degree murder, and Kendrick was sentenced to life in prison. The trial court denied Kendrick's motion **[*6]** for a new trial, and on direct review, the Tennessee Court of Criminal Appeals affirmed his conviction. *See State v. Kendricks*, 947 S.W.2d 875, 878 (Tenn. Crim. App. 1996). The Tennessee Supreme Court declined to hear Kendrick's case. *See State v. Kendricks*, 1997 Tenn. LEXIS 248, at *1 (May 5, 1997) (order).

B.

Kendrick then petitioned for state postconviction relief. The postconviction trial court initially dismissed Kendrick's petition without a hearing, finding that the issues he raised had either been waived or previously determined. *Kendricks v. State*, 13 S.W.3d 401, 404 (Tenn. Crim. App. 1999). But the Tennessee Court of Criminal Appeals reversed in part

and remanded the case for further proceedings. *See id.* at 405.

On remand, more than a dozen witnesses testified over the course of ten days of evidentiary hearings. Several of those witnesses are relevant to the two issues before us.

First, now-Sergeant Miller was asked again whether he recalled if his "fingers were anywhere near the trigger" when the rifle discharged and injured his foot. He responded, "No sir, I can't say with a hundred percent accuracy. They shouldn't have been." Miller then stated that he was put on pain medication shortly after the incident and didn't remember whether he had made any statements to fellow officers regarding the positioning of his fingers. Three other police officers also testified regarding Miller's statements on the night of the shooting—Michael Holbrook, Glen Sims, and James Gann. Holbrook, who had prepared the initial report about Miller's injury after visiting him in the hospital, testified that Miller told him "his finger was not near the trigger" when the rifle fired. Sims next testified that he did not recall the circumstances surrounding the supplemental incident report he generated later that night. But he confirmed that the report stated that Miller told Officer Gann that the rifle "just went off." Gann, for his part, testified that he was the first officer to render assistance to Miller. He confirmed that after the accident, Miller "was in a lot of pain, bleeding and starting to go into shock." Yet when Gann was shown Sims's report, it did not "refresh

[his] memory as to what [he] stated in regards to the incident[.]" **[*7]**

In addition to these four officers, Kendrick called Henry Jackson Belk Jr., a firearms expert from southern Idaho. Belk was the only expert called or identified during the postconviction hearings. He testified that Kendrick's Model 7400 rifle had "a common trigger mechanism" that "[g]enerally speaking," was contained within "all pumps and automatics manufactured after 1948 by Remington." According to Belk, Remington firearms with that particular design have "a history of firing under outside influences other than a manual pull of the trigger." This is because the buildup of debris in the trigger mechanism "can cause an insecure engagement between the hammer and the sear itself. So even with a gun on safe . . . it can still fire . . . [w]ithout pulling the trigger."

Belk stated that he "first identified the problem with the Remington Common Fire Control in 1970." And "[o]ver the years," he had been "consulted on probably two dozen cases" and had "given testimony in cases where the gun was subject to impact." The first case in which he examined the "Common Fire Control" as an expert was in 1994—a case he identified as "Keebler in Little Rock, Arkansas." That case was about a different firearm, a Remington 700, but Belk "did testify in the late nineties, probably '97 or '98, about a [Remington Model] 7400." Belk then surmised that "in '94, . . . if someone had done some research, they would have potentially been able to find [him.]"

Belk also "had occasion to look at" Kendrick's rifle prior to the hearing. He was unable to get the gun to fire without pulling the trigger. But Belk had an alternative theory as to what happened. He found that the rifle was dirty on the inside, "common to a gun that has not been cleaned." And while Belk did not find any debris in the trigger mechanism that could cause it to misfire, he explained that "transit debris" could have been "dislodged through mainly the recoil or even the operation of the gun." Even any "testing itself"—such as Fite's drop test—would tend to "destroy[] any evidence that was there." Belk therefore concluded that in his expert opinion, Kendrick's rifle "is capable of firing without a pull of the trigger, whether the safety is on or off." Belk's opinion thus contradicted Fite's conclusion at trial.

Finally, Kendrick called the public defender who had represented him during his November 1994 trial. Counsel testified that he did not personally interview Miller, but instead "relied on [his] investigator[]" to do so and "reviewed [Miller's] statements" to his colleague. **[*8]** When he heard that Miller "said specifically that he was not holding the gun anywhere near the trigger housing and it discharged," counsel believed that "ought to prove our case." "And then beyond that, [counsel] was aware of [Miller's] previous statements that he didn't touch the trigger and the gun went off accidentally."

Counsel further asserted that he "thought Mr. Miller would testify consistently with what [counsel] knew to be his statements" before trial. He elaborated that having known Miller "in the past," he didn't

think that Miller was "a dishonest person." So counsel "didn't think there would be any issue as to whether or not [Miller's] initial statements when he shot himself would come in." Because "there was not any doubt in [counsel's] mind" that Miller "was going to stick to his prior statements," he built his defense around that "gem." At one point, Kendrick asked if going into trial, counsel had a "backup plan" of "having other officers who made reports come in to testify[.]" Counsel responded that he did not "recall backup plans or specifically anything beyond that," explaining that he "presumed [he] would be able to get Mr. Miller's testimony that he was no[t] holding the trigger and the gun discharged." In counsel's view, he "could use that very effectively" to elicit an acquittal.

When Miller unexpectedly reversed course at trial, counsel felt "sandbagged by him." In fact, counsel expressed that he "was mad at [Miller]," because he "didn't think [Miller] was being fair" and he "thought [Miller] wasn't telling the truth" on the stand.

Counsel confirmed that later in the trial, he "recalled Mr. Miller with the purpose of trying to impeach him with prior inconsistent statements" contained in the incident reports. He acknowledged, however, that he didn't invoke the excited utterance exception to the hearsay rule as a basis for admission. Counsel then opined: "Well, in hindsight, I think it could . . . well have been used as an excited utterance." But after Miller's unexpected shift in story and "[i]n the heat of the trial, [counsel] didn't see that" at the time.

As to counsel's strategy for rebutting the State's expert, he testified that he "reviewed Mr. Fite's report" and the defense also "talked to [Fite] before the trial." From counsel's experience, he knew that Fite's "position is his position and he's not very easily swayed from that position." But even after reviewing the report, counsel believed that Miller's fortuitous shooting would **[*9]** "trump[] anything Kelly Fite [could] say." He "thought that Mr. Miller shooting himself in the foot accidentally, without his hands near the trigger, was enough for a reasonable doubt as to anything." So counsel believed it was "a plausible and reasonable trial strategy" to have Kendrick testify "that the gun went off accidentally" and then to "buttress[]" that testimony with "the fact that it went off accidentally again and shot Mr. Miller." Counsel admitted that he did not seek an expert and could not recall whether he spoke with a local gunsmith he would often consult informally. And he agreed that "[i]n hindsight, especially with the knowledge now that there have been so many problems with the Remington trigger mechanism," it "would have been beneficial" to have an expert testify on Kendrick's behalf. But "at the time," counsel didn't recognize the potential significance of an expert; for despite his "fundamental knowledge of firearms," he "was not aware" of any "discussion in the industry about the trigger mechanism on the Remington being potentially able to malfunction." And, as counsel pointed out, "you couldn't Google Remington trigger mechanisms back then."

Following these hearings, the state trial court denied postconviction relief on each of Kendrick's claims. But the Court of Criminal Appeals reversed as to two of them. Specifically, it held that counsel was constitutionally deficient in his "failure to adduce expert proof about the Common Fire Control and his failure to adduce Sgt. Miller's excited utterances." *Kendrick v. State*, No. E2011-02367-CCA-R3-PC, 2013 WL 3306655, at *18 (Tenn. Crim. App. June 27, 2013). The court vacated Kendrick's conviction and declined to address the remaining issues. *See id.*

But the Tennessee Supreme Court reversed again. *See Kendrick v. State*, 454 S.W.3d 450, 481 (Tenn. 2015). In a lengthy opinion, the state's highest court unanimously concluded that neither of Kendrick's IAC claims had merit. First, it reasoned that "[t]his was not a case that hinged on expert testimony." *Id.* at 477. Kendrick's counsel "had a reasonable basis to believe Sergeant Miller would testify that he had not touched the trigger, and that this testimony would be 'enough for a reasonable doubt as to anything.'" *Id.* Moreover, "it remain[ed] entirely uncertain that Mr. Kendrick's trial counsel could have located and hired a firearm expert in 1994 who could have testified concerning the potential defects of the Remington Model 7400's trigger mechanism." *Id.* at 476. As such, the court rejected Kendrick's claim that it was ineffective **[*10]** assistance for his counsel not to find and call a firearms expert. *Id.* at 477. Second, the Tennessee Supreme Court concluded that "trial counsel did almost everything at his disposal to prove that Sergeant Miller had not pulled the trigger, with

the exception that he did not offer the statements as [excited utterances]." *Id.* at 480. The court thus disagreed that counsel had exhibited constitutionally deficient performance simply by "not attempting to use the excited utterance exception." *Id.* at 477, 481. In the alternative, the court held that Kendrick failed to show prejudice resulting from this second alleged error. *Id.* at 481.

Having rejected both IAC claims, the Tennessee Supreme Court remanded for further proceedings. *Id.* The U.S. Supreme Court declined to hear Kendrick's case. *See Kendrick v. Tennessee*, 577 U.S. 930 (2015). And finally, the Tennessee Court of Criminal Appeals rejected Kendrick's pretermitted claims. *See Kendrick v. State*, No. E2011-02367-CCA-R3-PC, 2015 WL 6755004, at *39 (Tenn. Crim. App. Nov. 5, 2015).

C.

Out of options in state court, Kendrick filed a timely habeas petition in the Eastern District of Tennessee, alleging four dozen claims of constitutional error. The district court determined that the majority of Kendrick's claims were procedurally defaulted. *See Kendricks v. Phillips*, No. 1:16-CV-00350-JRG-SKL, 2019 WL 4757813, at *10–17 (E.D. Tenn. Sept. 30, 2019). It then denied the remaining eighteen claims on the merits. *See id.* at *18–34. We granted a COA for two of Kendrick's claims regarding: (1) counsel's failure to call a rebuttal weapons expert; and (2) counsel's failure to admit Miller's statements to other officers under the excited utterance exception to the hearsay rule.

One last note before we turn to the merits. Shortly before this court issued a COA, Kendrick was released on parole. But since Kendrick "was incarcerated at the time his petition was filed and is presently subject to parole supervision, the 'in-custody' requirement for relief in habeas remains satisfied and the issues presented by this appeal have not been mooted." *Goodell v. Williams*, 643 F.3d 490, 495 n.1 (6th Cir. 2011); *see Maleng v. Cook*, 490 U.S. 488, 491 (1989) (per curiam); *Abela v. Martin*, 380 F.3d 915, 921 (6th Cir. 2004). **[*11]**

II.

Because the Tennessee Supreme Court denied Kendrick's claims on the merits, he faces a "formidable barrier to federal habeas relief." *Burt v. Titlow*, 571 U.S. 12, 19 (2013). Under the Antiterrorism and Effective Death Penalty Act (AEDPA), we may not grant his habeas petition unless the state court's ruling "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). The phrase "'[c]learly established Federal law' . . . includes only 'the holdings, as opposed to the dicta, of [the Supreme] Court's decisions.'" *White v. Woodall*, 572 U.S. 415, 419 (2014) (quoting *Howes v. Fields*, 565 U.S. 499, 505 (2012)). "And an 'unreasonable application of' those holdings must be 'objectively unreasonable,' not merely wrong; even 'clear error' will not suffice." *Id.* (quoting *Lockyer v. Andrade*, 538 U.S. 63, 75–76 (2003)). This is a "highly deferential standard for evaluating state-court

rulings, which demands that state-court decisions be given the benefit of the doubt." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (quoting *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam)).

Tack on to that the "exacting *Strickland* standard," which governs the pair of IAC claims before us. *Ambrose v. Booker*, 801 F.3d 567, 579 (6th Cir. 2015); *see Strickland v. Washington*, 466 U.S. 668 (1984). "Under *Strickland*, we first determine whether counsel's representation 'fell below an objective standard of reasonableness.' Then we ask whether 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (internal citation omitted) (quoting *Strickland*, 466 U.S. at 688, 694). This too is a "most deferential" standard, "[e]ven under *de novo* review." *Harrington v. Richter*, 562 U.S. 86, 105 (2011). *Strickland* commands us to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 466 U.S. at 689. And it cautions that we must make "every effort" to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* The challenger's burden is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687.

[*12] Add it all up and we are left to apply a "doubly deferential" standard of review. *Knowles v.*

Mirzayance, 556 U.S. 111, 123 (2009). Indeed, because of the "general" nature of the *Strickland* inquiry and the broad range of factual circumstances that might give rise to IAC claims, we must afford a state court considerable "latitude to reasonably determine that a defendant has not satisfied that standard." *Id.*; *accord Harrington*, 562 U.S. at 105 ("[T]he range of reasonable applications is substantial."). Kendrick cannot prevail unless he can show that the Tennessee Supreme Court's application of *Strickland* "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. That's a "high bar" to relief, which "is intentionally difficult to meet." *Woods v. Donald*, 575 U.S. 312, 316 (2015) (internal quotation marks and citation omitted). "It bears repeating that even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Harrington*, 562 U.S. at 102.

III.

Kendrick's appeal raises two IAC claims. First, he argues that counsel rendered ineffective assistance by failing to introduce Miller's hearsay statements—that the rifle discharged on its own—as excited utterances. Second, he contends that counsel was ineffective due to his failure to find and present a firearms expert to counter the State's own. Although we have our doubts about the viability of these two claims, our role as a federal habeas court under AEDPA is not to review them anew. And whether or not the Tennessee Supreme Court's unanimous rejection of these claims

"was *correct*, it was clearly *not unreasonable*." *Renico v. Lett*, 559 U.S. 766, 779 (2010); *see Shinn v. Kayer*, 141 S. Ct. 517, 523 (2020) (per curiam). We hold that at the very least, the Tennessee Supreme Court's opinion was not "so erroneous that 'there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the U.S. Supreme] Court's precedents.'" *Nevada v. Jackson*, 569 U.S. 505, 508–09 (2013) (per curiam) (quoting *Harrington*, 562 U.S. at 102). Hence, AEDPA forecloses us from granting Kendrick's petition. **[*13]**

A.

We first address Kendrick's claim that his counsel was constitutionally deficient in failing to admit Miller's statements that he did not pull the trigger when he shot himself in the foot. Even assuming that the hearsay statements could have been introduced as excited utterances, *see* Tenn. R. Evid. 803(2),[1] "we cannot say that the state court's application of *Strickland*'s attorney-performance standard was objectively unreasonable," *Bell v. Cone*, 535 U.S. 685, 702 (2002). "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003). And Kendrick's "[r]eliance on 'the harsh light of hindsight'" to second-guess his counsel's competence in the crucible of trial "is precisely what

[1] During postconviction review, the Criminal Court for Hamilton County and the Court of Criminal Appeals disagreed as to whether Miller's statements qualified as excited utterances. The Tennessee Supreme Court assumed without deciding that the statements would have qualified as excited utterances under Tennessee law. *See Kendrick*, 454 S.W.3d at 480.

Strickland and AEDPA seek to prevent." *Harrington*, 562 U.S. at 107 (quoting *Bell*, 535 U.S. at 702).

Indeed, it is clear that "trial counsel took great pains to inform the jury that the weapon apparently misfired for Sergeant Miller." *Kendrick v. State*, 454 S.W.3d 450, 481 (Tenn. 2015). First, even Kendrick concedes that his counsel put on a thorough and "skilled cross-examination" challenging the credibility of Miller's unexpected lack of memory. Counsel elicited testimony from Miller that he had served as a police officer for twenty-two years and that he had never accidentally discharged a firearm in the past. He also got Miller to admit that it was "drilled into you at the police academy don't ever put your hand on the trigger unless you're going to shoot the gun." And, he prompted Miller to confess that he would never "knowingly" put his finger "on the trigger of a loaded gun." On recross, counsel likewise led Miller into testifying that he "presumed [the gun] was loaded" and "treated the gun that way" in picking it up. He next pointed out that when Miller reenacted the events before the jury, he held the gun with his "finger off the trigger." Finally, counsel closed his interrogation by boxing the waffling Miller into admitting that his reenactment—with his finger off the trigger—was "to the best of [his] recollection how it happened[.]" Through his effective questioning, then, counsel "elicited **[*14]** answers strongly suggesting that Sergeant Miller would not have picked up the rifle with his finger on the trigger." *Id.* at 480.

And counsel didn't stop there. At the end of the prosecution's case-in-chief, counsel recalled Miller to the stand and attempted to refresh Miller's memory with the incident reports containing his hearsay statements. Miller, however, remained firm in his purported lack of memory.

So counsel tried a third route. He called one of the detectives who had produced one of the incident reports, seeking to introduce the report that way as impeachment evidence. *See* Tenn. R. Evid. 613(b). The trial court sustained the State's objection. But on direct review, the Tennessee Court of Criminal Appeals "found that the trial court erred by preventing Mr. Kendrick's trial counsel from impeaching Sergeant Miller based on his prior inconsistent statements." *Kendrick*, 454 S.W.3d at 480 n.19. That means that "counsel pursued a proper basis for the admission of the reports and failed only because of the *trial court's* error." *Id.* (emphasis added). That alone provides at least a "reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Harrington*, 562 U.S. at 105. After all, "it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." *Id.* at 111. And the appellate court only declined to reverse because, in its view, counsel's "thorough cross-examination of Officer Miller" rendered the trial court's error "harmless." *Kendricks*, 947 S.W.2d at 882.

In short, to prove that his counsel's zealous "[r]epresentation [was] constitutionally ineffective,"

Kendrick has to show that "it 'so undermined the proper functioning of the adversarial process' that [he] was denied a fair trial." *Harrington*, 562 U.S. at 110 (quoting *Strickland*, 466 U.S. at 686). Yet "counsel did almost everything at his disposal to prove that Sergeant Miller had not pulled the trigger, with the exception that he did not offer the statements as [excited utterances]." *Kendrick*, 454 S.W.3d at 480. So, Kendrick cannot show that the Tennessee Supreme Court "applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Bell*, 535 U.S. at 699. AEDPA therefore bars relief. **[*15]**

In response, Kendrick does not dispute that after Miller's unexpected testimony, his "counsel labored to convince the jury that Sergeant Miller's finger was not on the trigger of the rifle when it fired into his foot." *Kendrick*, 454 S.W.3d at 480. Nor does he contend that, despite these repeated attempts, counsel's failure to identify the excited utterance exception "during the heat of the trial" was constitutionally deficient by itself. *Id.* Rather, he protests that his counsel personally should have "spoken with Inspector Miller to verify his testimony and to gauge his confidence in what had happened." Doing so, Kendrick surmises, "would have prompted counsel to form a backup plan—and anticipate a forgetful witness."

We are unpersuaded that Supreme Court precedent clearly establishes such a specific investigatory obligation in this case. To be sure, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes

particular investigations unnecessary." *Strickland*, 466 U.S. at 691. But the Sixth Amendment does not require an attorney to interview a witness personally when he reasonably believes that doing so is unnecessary. *See id.*; *cf. LaGrand v. Stewart*, 133 F.3d 1253, 1274 (9th Cir. 1998); *Lewis v. Mazurkiewicz*, 915 F.2d 106, 113–14 (3d Cir. 1990); *Beans v. Black*, 757 F.2d 933, 936 (8th Cir. 1985). Instead, "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691.

Applying these principles, Kendrick is wrong that counsel's failure to interview Miller personally "can only be attributed to a professional error of constitutional magnitude." *Yarborough*, 540 U.S. at 9. This is readily apparent once we "reconstruct the circumstances of counsel's challenged conduct" and "evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. For one, counsel did not simply neglect to investigate Miller, as Kendrick suggests. To the contrary, counsel "relied on [his] investigator[]" in the public defender's office to do so and then "reviewed [Miller's] statements" to his colleague. At the same time, "counsel reasonably believed that an investigation of what Miller's testimony would be was unnecessary," because "Miller had made statements to other officers to that effect." *Kendricks v. Parris*, No. 19-6226, slip op. at *7 (6th Cir. Mar. 31, 2020) (Readler, J.) (denying a COA on a similar IAC claim). Put those together and here's what counsel saw: **[*16]** Miller's statements to the

investigator aligned with those Miller had made to other officers the night of the incident, and having known Miller "in the past," counsel didn't have any reason to believe he was "a dishonest person." In these circumstances, counsel did what was arguably "reasonable at the time" and "balance[d] limited resources" in electing not to interview Miller personally. *Harrington*, 562 U.S. at 107; *see Jackson v. Warden, Chillicothe Corr. Inst.*, 622 F. App'x 457, 464 (6th Cir. 2015). That Miller later changed his story on the stand does not mean that counsel was constitutionally deficient.

Thus, in concluding that "counsel had a reasonable basis to believe Sergeant Miller would testify that he had not touched the trigger," *Kendrick*, 454 S.W.3d at 477, the state court's decision was not objectively unreasonable. Fairminded jurists could agree that Kendrick had not shown his attorney was deficient under *Strickland*.[2] Accordingly, the district court did not err in denying Kendrick's first IAC claim.

B.

We now turn to Kendrick's expert-witness claim. Kendrick is right that "[c]riminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence." *Hinton v. Alabama*,

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[2] For this reason, we need not address the state court's alternative conclusion that the alleged deficiency was not prejudicial under *Strickland*. *See Shinn*, 141 S. Ct. at 524 ("[I]f a fairminded jurist could agree with either [the] deficiency or prejudice holding, the reasonableness of the other is 'beside the point.'" (quoting *Wetzel v. Lambert*, 565 U.S. 520, 524 (2012) (per curiam))).

571 U.S. 263, 273 (2014) (per curiam) (quoting *Harrington*, 562 U.S. at 106). "But *Strickland* does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense." *Harrington*, 562 U.S. at 111. In this case, it was "well within the bounds of a reasonable judicial determination for the state court to conclude that defense counsel could follow a strategy that did not require the use of experts." *Id.* at 106–07.

1.

First, a fairminded jurist could agree with the Tennessee Supreme Court that counsel's pre-trial strategy for rebutting the State's firearms expert was reasonable. "Miller's injury was not speculative," *Kendrick*, 454 S.W.3d at 477, whereas any expert could only conjecture **[*17]** whether Kendrick's gun might have spontaneously discharged in the past. So "[t]he best evidence that Mr. Kendrick's Model 7400 was capable of misfiring" would have been "the undisputed fact that Sergeant Miller was shot in the foot by the very same rifle." *Id.* Counsel therefore strategically built his case around the Miller mishap—an "available" approach which did not "require[]" expert assistance. *Hinton*, 571 U.S. at 273 (quoting *Harrington*, 562 U.S. at 106).

This was not an uninformed decision. Counsel "reviewed Mr. Fite's report" and the defense also "talked to him before the trial." Even so, counsel believed that Miller's expected testimony would "trump[] anything Kelly Fite [could] say." As counsel explained, "Miller shooting himself in the foot

accidentally, without his hands near the trigger, was enough for a reasonable doubt as to anything." And, as described above, counsel reasonably believed that Miller would "stick to his prior statements" at trial. "In hindsight, Sergeant Miller's testimony deviated from what trial counsel expected. But at the time defense counsel was forming his trial strategy, it was reasonable to anticipate that he could 'use [Sergeant Miller's testimony] very effectively' to elicit an acquittal." *Kendrick*, 454 S.W.3d at 477 (alteration in original) (quoting counsel's testimony). It is thus difficult for us to conclude that counsel's strategy was "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. At a minimum, "[n]o precedent of [the Supreme] Court clearly forecloses that view." *Woods v. Etherton*, 136 S. Ct. 1149, 1152 (2016) (per curiam).

Second, even if counsel should have sought out an expert, a fairminded jurist could agree that it was "entirely uncertain" whether counsel would have found one in 1994 with a reasonable investigation. *Kendrick*, 454 S.W.3d at 476. Henry Belk is the only expert Kendrick has identified who might have been available to testify about the Remington trigger mechanism. Yet Belk offered his first testimony about the mechanism on a different Remington model at some unidentified point in 1994—the same year as Kendrick's trial. Belk did not testify about the Remington Model 7400 until several years later. And as counsel observed, "you couldn't Google Remington trigger mechanisms back then." Even if Belk's 1994 testimony preceded Kendrick's trial, Kendrick failed

to present any evidence that counsel should have known that Belk might have been an available witness. To the contrary, despite counsel's "fundamental **[*18]** knowledge of firearms," he "wasn't aware" of any "discussion in the industry about the trigger mechanism on the Remington being potentially able to malfunction."[3] "It was at least arguable that a reasonable attorney could decide to forgo inquiry" into a firearms expert in these circumstances. *Harrington*, 562 U.S. at 106.

2.

Kendrick offers four counterarguments, none of which persuade us. First, he maintains that, as in *Hinton v. Alabama*, the "only reasonable and available defense strategy" was to employ a defense expert. 571 U.S. at 273 (citation omitted). But as we have already explained, that is simply not true. It was arguably reasonable for counsel to build his case around Miller's testimony instead. Miller's

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[3] Kendrick cites two civil cases that would have revealed allegations of defective Remington firearms before 1994. *See Lewy v. Remington Arms Co.*, 836 F.2d 1104 (8th Cir. 1988); *Chapa v. Garcia*, 848 S.W.2d 667 (Tx. 1992). But neither case involved Belk or the Remington Model 7400. Neither mentioned experts that testified regarding a defective trigger mechanism. And neither involved circumstances of accidental discharge like those alleged here. The incident in *Lewy* occurred when the plaintiff "placed the safety on the fire position." 836 F.2d at 1105. And in *Chapa*, the "rifle discharged during loading." 848 S.W.2d at 667. Those cases therefore do not present clear and convincing evidence that counsel would have reasonably found Belk, or another expert, in 1994. While these cases do show that problems regarding other Remington firearms were not unknown at the time, counsel did attempt to cross-examine Fite about this.

unexpected change in his story "shows merely that the defense strategy did not work out as well as counsel had hoped, not that counsel was incompetent." *Harrington*, 562 U.S. at 109.

Moreover, the Tennessee Supreme Court reasonably found *Hinton* distinguishable. In that case, the defendant was charged with a pair of murders committed during the course of two robberies. 571 U.S. at 265. In order to convict Hinton of these murders, Alabama sought to link him to a third robbery "through eyewitness testimony and forensic evidence about the bullets" recovered from the scene. *Id.* The State's strategy was "then to persuade the jury that, in light of the similarity of the three crimes and forensic analysis of the bullets and the Hinton revolver, Hinton must also have committed the two murders." *Id.* Yet without any other evidence, "[t]he State's case turned on whether its expert witnesses could convince the jury that the six recovered bullets had indeed been fired from the Hinton revolver." *Id.* **[*19]**

Hinton's attorney filed a motion to hire an expert, and the trial court afforded him $1,000, which both the judge and Hinton's attorney believed was the statutory maximum. *Id.* at 266. The attorney later testified that the only expert he could hire for that amount "did not have the expertise he thought he needed and that he did not consider [the expert]'s testimony to be effective." *Id.* at 268 (citation omitted). Nevertheless, counsel "felt he was 'stuck'" with this inadequate expert who was later "badly discredited" at trial. *Id.* at 269, 273.

But that view was fundamentally mistaken. It turned out that $1,000 "was *not* the statutory maximum at the time of Hinton's trial," as the relevant Alabama statute had been amended to provide the defense with "'any expenses reasonably incurred'" in obtaining an expert. *Id.* at 267 (quoting Ala. Code § 15-12-21(d) (1984)). Thus, the Court held that counsel was deficient in his "failure to request additional funding in order to replace an expert he knew to be inadequate because he mistakenly believed that he had received all he could get under Alabama law." *Id.* at 274. *Hinton* was careful to explain, however, that "[t]he only inadequate assistance of counsel . . . was the inexcusable mistake of law—the unreasonable failure to understand the resources that state law made available to him—that caused counsel to employ an expert that *he himself* deemed inadequate." *Id.* at 275.

Here, by contrast, Kendrick has not identified any legal error that his counsel made in failing to obtain an expert. Nor has he shown that it was objectively unreasonable for Kendrick's counsel to put together his defense without one. *See Swaby v. New York*, 613 F. App'x 48, 50 (2d Cir. 2015) ("[T]he failure to seek an expert does not satisfy the performance prong of *Strickland* where counsel chooses a strategy that does not require an expert."). Nor does *Hinton* clearly establish that an attorney must hire an expert when, as here, he reasonably expects to be able to rebut the prosecution's expert effectively with a lay witness's testimony. *Cf. Hinton*, 571 U.S. at 273 (noting that "effectively rebutting [the State's] case *required* a

competent expert on the defense side" (emphasis added)). Though we need not decide whether we would reach the same result *de novo*, we are satisfied that there is "ample room for reasonable disagreement" as to the need to hire an expert in this case. *Shinn*, 141 S. Ct. at 520. A fairminded jurist could agree with the Tennessee Supreme Court that "counsel made a reasonable tactical decision to construct his 'accidental firing' defense around Sergeant Miller's mishap with Mr. Kendrick's **[*20]** rifle." *Kendrick*, 454 S.W.3d at 477; *see also Harrington*, 562 U.S. at 106 ("It can be assumed that in some cases counsel would be deemed ineffective for failing to consult or rely on experts, but even that formulation is sufficiently general that state courts would have wide latitude in applying it.").

Kendrick next maintains that counsel had no reasonable strategy to counter Fite's testimony. But again, that's not true. "In many instances cross-examination will be sufficient to expose defects in an expert's presentation." *Harrington*, 562 U.S. at 111. And in this case, counsel both cross-examined Fite and sought to introduce Miller's statements in order to undermine Fite's opinion testimony. In cross-examining the State's expert, counsel first attempted to discredit Fite by characterizing him as someone who erroneously believed he never made mistakes. Then, he labored to have Fite concede that "there have been situations" where Fite had previously testified that a gun could not possibly discharge accidentally, but that, in fact, "guns of the same make and model" as those he described "did fire without

pulling the trigger." Immediately after poking these small holes in Fite's testimony, counsel recalled Miller to the stand and presented him with the incident reports in an effort to show the jury that this particular gun had in fact misfired for Miller. That would have been a damaging blow to Fite's adamant testimony—that "[t]he *only* way you could fire this rifle [was] by pulling the trigger or breaking the gun." Hence, counsel devised a reasonable approach to counteract Fite's testimony and to introduce proof suggesting that Kendrick's rifle could—and did—discharge on its own. Once we eliminate the distorting effects of hindsight, Kendrick cannot "overcome the presumption that, under the circumstances," his counsel's tactics "'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

Kendrick also insists that the Tennessee Supreme Court erred in its factual determination that counsel could not "have located and hired a firearm expert in 1994" with a reasonably diligent investigation. *Kendrick*, 454 S.W.3d at 476. At the outset, we reiterate that "[a]n attorney can avoid" investigations "that appear 'distractive from more important duties.'" *Harrington*, 562 U.S. at 107 (quoting *Bobby v. Van Hook*, 558 U.S. 4, 11 (2009) (per curiam)). And in light of Miller's anticipated testimony, it was reasonable for the state court to conclude **[*21]** that counsel did not need to seek expert assistance at all. *See id.* at 106 ("*Strickland* . . . permits counsel to 'make a reasonable decision that makes particular investigations unnecessary.'" (citation omitted)).

But even if we believed that counsel was required to seek an expert, that would not justify our setting aside the Tennessee Supreme Court's decision. Under AEDPA, "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). "And we apply the same deference 'even to state-court factual findings made on appeal.'" *Johnson v. Genovese*, 924 F.3d 929, 938 (6th Cir. 2019) (quoting *Franklin v. Bradshaw*, 695 F.3d 439, 447 (6th Cir. 2012)); *see Burt*, 571 U.S. at 22.

Kendrick has not met this demanding standard. To be sure, the record "does suggest that [counsel] could well have made a more thorough investigation than he did." *Burger v. Kemp*, 483 U.S. 776, 794 (1987). But the Sixth Amendment "does not force defense lawyers to scour the globe on the off chance something will turn up." *Rompilla v. Beard*, 545 U.S. 374, 383 (2005). We cannot say by clear and convincing evidence that, in 1994, counsel would have reasonably found Belk—a southern Idaho resident who first testified in the same year as Kendrick's trial about a different Remington model in one civil case in Little Rock, Arkansas. In fact, even if counsel could have reasonably tracked down Belk's out-of-state testimony in 1994, and even if counsel could have discovered that the two Remington models had the same trigger mechanism, nothing in the record clearly states that Belk had testified or even filed a publicly available expert report, about any type of

firearm, *before* Kendrick's trial. *See Cullen*, 563 U.S. at 181 (holding that a habeas court's review "is limited to the record that was before the state court that adjudicated the claim on the merits"). Nor is there anything else in the record to suggest why Kendrick's counsel should have reasonably found this lone expert that Kendrick claims was so readily available.[4] **[*22]**

Finally, Kendrick turns to two of our prior cases addressing, under AEDPA, an attorney's failure to retain an arson expert. *See Stermer v. Warren*, 959

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[4] Though we need not decide, we are also skeptical that Kendrick can show by clear and convincing evidence that he would have been permitted to hire an expert in 1994. *Cf. Kendrick*, 454 S.W.3d at 476. At the time, the state legislature had authorized funding for expert witnesses only in capital cases. *See* Tenn. Code Ann. § 40-14-207(b). And the most recent opinions of the Tennessee Supreme Court had held that "an indigent defendant does not have a right under the federal or state constitution, to the services of [an expert], at state expense." *Graham v. State*, 547 S.W.2d 531, 536 (Tenn. 1977); *accord State v. Williams*, 657 S.W.2d 405, 411 (Tenn. 1983). However, after these decisions, the U.S. Supreme Court held that an indigent defendant is constitutionally entitled to a psychiatric examination when his sanity at the time of the offense is seriously in question—at least in a capital case. *See Ake v. Oklahoma*, 470 U.S. 68, 70, 86–87 (1985); *id.* at 87 (Burger, C.J., concurring) ("Nothing in the Court's opinion reaches noncapital cases."). In the wake of *Ake*, multiple panels from the Tennessee Court of Criminal Appeals produced conflicting dicta as to whether *Ake* extended to noncapital cases like Kendrick's. *Compare State v. Harris*, 866 S.W.2d 583, 585 (Tenn. Crim. App. 1992), *and State v. Chapman*, 724 S.W.2d 378, 380 (Tenn. Crim. App. 1986), *with State v. Edwards*, 868 S.W.2d 682, 697–98 (Tenn. Crim. App. 1993). The law was thus unsettled at the time, and this is all the more reason to believe that counsel acted reasonably in building his case without expert assistance.

F.3d 704 (6th Cir. 2020); *Richey v. Bradshaw*, 498 F.3d 344 (6th Cir. 2007). In *Stermer*, however, a divided panel granted habeas relief on other grounds and expressly declined to decide the merits of the IAC claim based on counsel's failure to retain an arson expert. *See* 959 F.3d at 738. So our discussion of counsel's duties with respect to rebutting expert testimony was dicta. *See Wright v. Spaulding*, 939 F.3d 695, 701 (6th Cir. 2019). In *Richey*, counsel affirmatively recognized the need for an expert and retained one, but counsel then unreasonably failed to consult the expert to help with the defense. 498 F.3d at 362. In this case, by contrast, a fairminded jurist could conclude that counsel had reasonably decided that no expert was necessary given Miller's anticipated testimony. Moreover, *Richey* predates the Supreme Court's guidance in *Harrington*, which held that a federal court misapplied AEDPA by finding that an IAC claim had merit under *de novo* review and then "declar[ing], without further explanation," that the state court's contrary ruling was unreasonable. 562 U.S. at 101–02. *Richey* engaged in that type of now-outdated review and barely referenced AEDPA's deferential standards when granting relief. *See* 498 F.3d at 361–64. "AEDPA demands more." *Harrington*, 562 U.S. at 102.

In sum, "the Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance." *Burt*, 571 U.S. at 24. And that, Kendrick at least arguably received. "Recognizing the duty and ability of our state-court colleagues to adjudicate claims of constitutional wrong," we

conclude that the Tennessee Supreme Court's decision was "reasonable and supported by the record." *Id.* at 19, 24. As a result, Kendrick's second claim fails as well. **[*23]**

* * *

We AFFIRM the district court's denial of Kendrick's habeas petition.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 19-6226

EDWARD THOMAS KENDRICK, III,
Petitioner - Appellant,

v.

MIKE PARRIS, Warden,
Respondent - Appellee.

FILED
Mar 02, 2021
DEBORAH S. HUNT, Clerk

Before: GUY, LARSEN, and MURPHY, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Tennessee of Chattanooga.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the district court's denial of Edward Thomas Kendrick's petition for a writ of habeas corpus is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s Deborah S. Hunt
Deborah S. Hunt, Clerk

No. 19-6226

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED
Mar 31, 2020
DEBORAH S. HUNT, Clerk

EDWARD THOMAS KENDRICKS,
Petitioner-Appellant,

v.

SHAWN PHILLIPS,
Respondent-Appellee.

O R D E R

Before: READLER, Circuit Judge.

Edward Thomas Kendricks III (often referred to as "Edward Thomas Kendrick III" in court proceedings), a Tennessee state prisoner, appeals pro se a district court judgment denying his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254. The court construes the notice of appeal as an application for a certificate of appealability. *See* Fed. R. App. P. 22(b)(2).

In 1994, a jury convicted Kendricks of the first-degree murder of his wife. He was sentenced to life imprisonment. The incident occurred on March 6, 1994. Kendricks drove to his wife's workplace with

their two children in their car seats and a rifle in the front passenger seat. He asked her to come outside, where she spoke briefly with the children. Kendricks took the rifle out of the front seat, walked to the back of the car, and shot his wife in the chest. He then drove to the airport, where he was apprehended, throwing the rifle out of the car along the way.

The conviction was upheld on direct appeal in the state courts. *State v. Kendricks*, 947 S.W.2d 875 (Tenn. Crim. App. 1996). Kendricks then filed for post-conviction relief. The trial court denied the motion after holding an evidentiary hearing including testimony from a firearms expert that the type of firing mechanism used in the murder weapon was defective, although he could not cause the murder weapon to fire without pulling the trigger. The appellate court concluded that two claims of ineffective assistance of counsel were meritorious. *Kendrick v. State*, **[*2]** No. E2011-02367-CCA-R3-PC, 2013 WL 3306655 (Tenn. Crim. App. June 27, 2013). On appeal, the Tennessee Supreme Court reversed that decision and remanded the matter for consideration of the remaining claims. *Kendrick v. State*, 454 S.W.3d 450, 455 (Tenn. 2015). The appellate court found the remaining claims meritless. *Kendrick v. State*, No. E2011-02367-CCA-R3-PC, 2015 WL 6755004 (Tenn. Crim. App. Nov. 5, 2015).

In this petition for federal habeas corpus relief, Kendricks enumerated forty-eight issues: numerous claims of ineffective assistance of trial counsel, several claims of ineffective assistance of appellate counsel, several claims of prosecutorial misconduct, a

claim of new evidence of innocence, a claim that post-conviction proceedings in Tennessee do not provide equal protection for African Americans, and a claim that the Antiterrorism and Effective Death Penalty Act is unconstitutional. The State filed a response, and Kendricks filed a reply.

The district court determined that the majority of the claims were procedurally defaulted when they were not raised by counsel in the appeal of the post-conviction proceeding, although Kendricks attempted to raise them in pro se filings. The court therefore addressed only the claims that had been raised by appointed counsel in the post-conviction appeal. The district court also reviewed de novo one claim that was raised but not addressed in the state court. Finding no merit to the claims, the district court denied the petition.

To receive a certificate of appealability, a petitioner must make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(1). On claims that are denied on procedural grounds, a petitioner must show that jurists of reason would find it debatable whether the petition stated a valid claim of the denial of a constitutional right and whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). On claims that were denied on the merits, the petitioner may meet the standard by showing that reasonable jurists would find the district court's assessment of the claims debatable or wrong. *Id*.

Reasonable jurists would not find it debatable whether the district court was correct in finding most

of the claims procedurally defaulted. These include many of the claims of ineffective assistance of trial and appellate counsel and prosecutorial misconduct. They were not raised by **[*3]** counsel in the post-conviction appeal, and, although Kendricks attempted to raise them in pro se filings and counsel attempted to incorporate the claims by reference in a reply brief, defendants in Tennessee are barred from representing themselves while being represented by counsel. *See Williams v. State*, 44 S.W.3d 464, 469 (Tenn. 2001). Also, counsel could not raise new arguments in a reply brief under Tennessee law. *Caruthers v. State*, 814 S.W.2d 64, 69 (Tenn. Crim. App. 1991).

Procedurally defaulted claims will not be heard on their merits unless the petitioner shows cause and prejudice to excuse the procedural default, or that a miscarriage of justice would occur if the claims were not examined because of the existence of new evidence of actual innocence. *See House v. Bell*, 547 U.S. 518, 536-37 (2006). Although Kendricks attempts to establish cause for his default by blaming ineffective assistance of appellate post-conviction counsel, the Supreme Court has recognized ineffective assistance on initial post-conviction proceedings only as cause to excuse procedural default, not appeals from those proceedings. *See Martinez v. Ryan*, 566 U.S. 1, 16 (2012). Moreover, Kendricks would be hard-pressed to establish ineffective assistance of post-conviction counsel on appeal, where his counsel initially succeeded in having the sentence vacated. Finally, Kendricks

claims to have new evidence of his actual innocence to allow his procedurally defaulted claims to be addressed, but his evidence of problems with the firing mechanism in the murder weapon was cumulative to evidence presented at trial and rejected by the jury.

The district court examined the rest of the claims, all asserting ineffective assistance of counsel, on the merits. To prevail on these claims, Kendricks had to show that his counsel's performance was deficient and that the result of the trial was prejudiced. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The first non-procedurally defaulted claim argued that trial counsel was ineffective in failing to hire a weapons expert. The defense presented at trial was that the gun accidentally discharged. Counsel planned to rely on the fact that the police officer who found the murder weapon along the side of the road where Kendricks had thrown it—Officer Miller—accidentally shot himself in the foot when removing it from the trunk of his vehicle at the police station. Miller had told other police officers investigating the incident that he had not touched the **[*4]** trigger. The prosecutor put on an expert who testified that the gun would not fire without pulling the trigger. The Tennessee Court of Criminal Appeals granted post-conviction relief on this claim, but the Tennessee Supreme Court reversed. The district court found that it was not unreasonable for the Tennessee Supreme Court to conclude that the failure to hire an expert was not ineffective assistance. However, it did not find the appellate court's decision unreasonable

either. Because it appears that reasonable jurists could find this claim debatable, a certificate of appealability will be granted on this claim.

The second claim is in the same posture. Kendricks argued that counsel was ineffective in failing to have Officer Miller's statements to his fellow officers admitted under the excited utterance exception to the hearsay rule after Miller claimed at trial not to remember whether he touched the trigger. The Tennessee appellate court granted post-conviction relief on this claim before being reversed by the Tennessee Supreme Court. The district court concluded that the Tennessee Supreme Court was not unreasonable in finding that counsel's performance was not deficient because he challenged Miller's trial testimony through cross-examination. Again, the district court did not find the appellate court's opposite conclusion unreasonable. It appears that reasonable jurists would find this claim debatable, and a certificate of appealability will be granted on this claim.

Kendricks next argued that trial counsel was ineffective in opening the door to admission of his prior convictions, including returned checks, marijuana possession, and driving under the influence, and failing to seek a limiting instruction on this evidence. Reasonable jurists would not find debatable the district court's conclusion that the state court's decision that the admission of these prior crimes could not have prejudiced the result of the trial, given the minor nature of the convictions and the other evidence of guilt.

Kendricks argued that counsel was ineffective in challenging the admission of testimony from an airport security officer. Kendricks drove to the airport after the shooting, and his daughter told the officer, while she was being removed from her car seat, that she had told daddy not to shoot mommy but he did and she fell. Kendricks argued that, because the prosecutor called this **[*5]** surprise witness, counsel should have insisted on specific performance of the plea agreement Kendricks rejected before trial. The state court found that no such remedy was required by state law. The district court's conclusion that the state court's decision was not contrary to clearly established Supreme Court precedent is not debatable by reasonable jurists, where Kendricks points to no Supreme Court holding to this effect, and there is none.

Kendricks also challenged counsel's performance with regard to an eyewitness. Counsel was surprised at trial by his testimony that Kendricks stood over his wife's body saying "I told you so" several times. The state court found that counsel effectively cross-examined the witness, pointing out that the witness had not given this evidence in his earlier statements, attempted to impeach his testimony, and argued in closing that the testimony was fabricated, and therefore did not perform ineffectively. Reasonable jurists would not find debatable the district court's conclusion that this finding by the state court was not contrary to clearly established federal law.

Kendricks also argued that the prosecutor, after securing his agreement to waive a preliminary

hearing in exchange for open-file discovery, violated this agreement by introducing the surprise testimony of the above two witnesses and that of Officer Miller, and that counsel was ineffective in failing to object. The state court found that Kendricks was not entitled to the witness statements under Tennessee law. Reasonable jurists would not debate whether the district court was correct in finding that counsel's failure to object to the non-receipt of statements to which Kendricks was not legally entitled was not ineffective assistance.

Kendricks also alleged ineffective assistance of counsel in failing to object to a police officer's testimony concerning statements Kendricks made after his arrest at the airport. He argued that the officer's testimony amounted to the use of his silence against him because the prosecutor argued that Kendricks did not tell the officer that the shooting was an accident. The state court found that Kendricks had agreed to speak to the officer after receiving warnings. Reasonable jurists would not debate the district court's finding that no claim of the denial of the right to remain silent was stated in this case. *See Berghuis v. Thompkins*, 560 U.S. 370, 385-86 (2010). **[*6]**

Kendricks alleged that counsel was ineffective in calling the attorney who was representing him in divorce proceedings. The state court found that the attorney gave generally favorable testimony and that Kendricks had agreed with the decision to call him. The attorney testified that the divorce was amicable, that Kendricks was going to receive custody of the

children, most of the marital property, and child support, and that Kendricks was a truthful person, but also that Kendricks believed his wife had been unfaithful, which Kendricks argues supplied a motive for the crime. Reasonable jurists would not debate the district court's rejection of this claim on the ground that the benefit of the testimony outweighed any inference as to motive which would have been available without the testimony.

Similarly, Kendricks argued that counsel was ineffective in failing to call his cousin to testify that he had seen Kendricks and the victim together earlier in the day and that they were not arguing, and that he had found food simmering on the stove after the crime, which Kendricks argues would show a lack of premeditation. However, the state court found that Kendricks did not ask counsel to call this witness, and that his testimony would have merely been cumulative of the attorney's testimony that the divorce was amicable. Reasonable jurists would not debate the district court's conclusion that failing to call this witness was not deficient and did not prejudice the result of the trial, where Kendricks did not show that he made counsel aware of the cousin's non-cumulative evidence.

Kendricks also faulted counsel for failing to call another police officer who saw Kendricks at the airport after his arrest to testify that Kendricks was distraught. The state court found that there was no evidence that counsel was aware of this possible witness and that his testimony would have only been cumulative of other testimony. Reasonable jurists

would not debate the district court's conclusion that the state court decision was not contrary to clearly established Supreme Court law.

Finally, the district court examined de novo a claim that counsel was deficient in promising the jury during the opening argument that Officer Miller would testify that he did not touch the trigger when he shot himself in the foot, without investigating what Miller planned to testify. **[*7]** Because Miller had made statements to other officers to that effect, the district court concluded that counsel reasonably believed that an investigation of what Miller's testimony would be was unnecessary. *See English v. Romanowski*, 602 F.3d 714, 728 (6th Cir. 2010). Reasonable jurists would not debate the district court's assessment of this claim.

Accordingly, a certificate of appealability is **GRANTED** as to the two claims of ineffective assistance of counsel regarding the failure to call a weapons expert and the failure to seek to admit Officer Miller's statements to other officers under the excited utterance exception to the hearsay rule, because reasonable jurists could debate the resolution of these claims. A certificate of appealability is **DENIED** on the remaining claims. A briefing schedule shall issue.

ENTERED BY ORDER OF THE COURT

/s Deborah S. Hunt

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

EDWARD THOMAS KENDRICKS,	)	
Petitioner,	)	[Filed 09/30/19]
v.	)	No. 1:16-CV-00350 -JRG-SKL
SHAWN PHILLIPS, Respondent.	)	

MEMORANDUM OPINION

Before the court is a pro se prisoner's petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 [Doc. 1]. Respondent has filed a response in opposition [Doc. 15], as well as the state court record [Doc. 14]. Petitioner filed a reply [Doc. 30]. After reviewing all of the relevant filings, the Court has determined that Petitioner is not entitled to relief under §2254 and no evidentiary hearing is warranted. *See* Rules Governing § 2254 Cases, Rule 8(a) and *Schirro v. Landrigan*, 550 U.S. 465, 474 (2007). For the reasons set forth below, the §2254 Petition is **DENIED** and this matter will be **DISMISSED**.

I. PROCEDURAL HISTORY

In 1994, a Hamilton County jury convicted Petitioner of first-degree murder for shooting and killing his wife [Doc. 14 Attachment 1 at 24]. Petitioner appealed on several grounds including that the evidence was insufficient to support the finding of guilt by the jury, that the trial court erred in allowing

and disallowing various pieces of evidence, and that the State had violated *Brady v. Maryland* by failing to disclose exculpatory information [Doc. 14 Attachment 9]. The Tennessee Court of Criminal Appeals ("TCCA") affirmed his conviction [Doc. 14 Attachment 11]. Petitioner then applied for permission to appeal to the Tennessee Supreme Court, but his application was denied [Doc. 14 Attachments 12, 15]. **[*2]**

Next, Petitioner filed a motion for post-conviction relief alleging various grounds of ineffective assistance of counsel and various instances of prosecutorial misconduct [Doc. 14 Attachment 15 at 3 – 12]. His petition was summarily dismissed [Doc. 14 Attachment 16 at 63 – 64]. Thereafter, Petitioner amended his petition for post-conviction relief which was dismissed as untimely filed [Doc. 14 Attachment 16 at 65 – 81; 84]. Petitioner immediately appealed and the TCCA reversed in part and remanded for further proceedings on Petitioner's ineffective assistance of counsel claims, with specific instructions for the post-conviction court to allow Petitioner to amend his petition [Doc.14 Attachment 20].

Petitioner filed an amended petition in 2000, and over the next several years filed various amendments, with and without the assistance of counsel [Doc. 14 Attachments 21 at 5 – 114; 21 at 115 – 131; 21, at 140 – 141; 22 at 127 – 23 at 87; 23 at 88 – 123; 28 at 71 – 106; 28 at 107 – 29 at 5[1]]. In 2011, after hearings

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[1] For the sake of brevity this includes only Petitioner's amended petitions and not his vast Memoranda of Law, spanning

spanning various days in February and March, the post-conviction court dismissed the petition [Doc. 14 Attachment 29 at 6 – 72]. Petitioner then appealed to the TCCA again, which resulted in the TCCA reversing the judgment of the post-conviction court, vacating Petitioner's conviction, and remanding for further proceedings, based on two of Petitioner's ineffective assistance of counsel claims: (1) failure to adduce expert proof about a defective trigger mechanism design in Petitioner's rifle, and (2) failure to use the excited utterance exception to hearsay to admit the prior statements of an officer in the case [Doc. 14 Attachment 48].

The State appealed to the Tennessee Supreme Court ("TSC"), which found no ineffective assistance of counsel on either claim, reversed the TCCA's judgment, and remanded the case to the TCCA to address Petitioner's pretermitted claims [Doc. 14 Attachments 49, 60]. Petitioner [***3]** then moved for a rehearing in the TSC which was denied [Doc.14 Attachments 61, 62]. He also filed a writ of certiorari with the United States Supreme Court which was also denied [Doc. 14 Attachments 63, 64]. Later, the TCCA evaluated Petitioner's remaining claims as directed by the TSC and affirmed the judgment denying petitioner post-conviction relief [Doc. 14 Attachment 72]. Petitioner filed an application for permission to appeal with the TSC, which was denied [Doc. 14 Attachments 73, 75]. Finally, in 2016 Petitioner filed for a writ of habeas corpus with this Court [Doc.1].

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hundreds of pages, which accompanied them and are separately labeled in the record.

II. BACKGROUND

A. Trial

On Direct Appeal, the TCCA summarized the facts of this case as follows:

> On March 6, 1994, at approximately 10:00 p.m., the defendant drove to the gas station at which Lisa Kendrick, his wife and the victim, worked. With him in the car were their four-year-old daughter and three-year-old son. These children were sitting in car seats in the back seat of the station wagon the defendant was driving. Also in the car, on the front passenger floorboard, was the defendant's loaded 30.06 hunting rifle.
>
> The defendant pulled into the station, parked, and went into the market portion of the station where his wife worked as a cashier. He asked her to come outside, which she did. She and the defendant went to the car where she spoke briefly to the children. The defendant retrieved the rifle from the front passenger floorboard and carried it to the back of the car. At that point, the weapon fired once, the bullet striking the victim in her chest and killing her almost instantly.
>
> After the victim fell to the parking lot, the defendant briefly bent over her body, put the gun back in the car, and drove toward the airport a short distance away. On the way, he threw the rifle out of the car. Once he arrived at the airport, he called 911 and reported that he had shot his wife. Before the defendant left the gas station, he took no action to assist the victim in any way. **[*4]**

Timothy Shurd Benton, a customer, was in the market when the defendant entered. He testified that the defendant had asked the cashier "to step outside, he had something to show her." Benton left the market, got in his car and started to leave the parking lot. He testified that, as he had begun to leave, he heard an "explosion." He looked over his shoulder out the window of his car and saw the defendant holding a rifle "pointed straight up in the air." He also saw the victim lying on her back on the parking lot. After deciding that another person in the market was aware of the situation and would call for help, Benton followed the defendant to the airport, where he contacted an airport police officer.

Lennell Shepheard was also in the market at the time the defendant entered. He testified that he had seen the defendant and his wife leave the store, that the defendant had not appeared angry or hostile, and that the victim had shown no signs of fear when she went outside at the defendant's request. Shepheard remained in the store until he heard the rifle shot. At that point, he opened the market door and looked outside to see what had happened. He testified that he had seen the defendant shut the back passenger door and then lean over the victim's body and state, "I told you so" approximately six times.

Endia Kendrick, the defendant's four-year-old daughter, testified on direct examination that she had seen her father shoot her mother and

that her mother had had her arms up at the time. However, on cross-examination, Endia admitted that she hadn't actually seen the shooting.

Dr. Frank King, the Hamilton County Medical Examiner, testified that the victim had died of a single gunshot wound to the chest that entered her body in the left chest at forty-nine inches above the heel and exited her body at the left back at forty-nine and one-half inches above the heel.

The defendant testified that he had been moving the rifle from the front of the car to the back at the request of the victim and that it had discharged accidentally. He testified that he had been shifting it from one hand to the other when it went off. He testified that he had not pulled the trigger. He steadfastly denied that he had intended to shoot the victim, and claimed that he had been carrying the rifle in the car because he sometimes cleaned apartments near an area where he felt a gun was necessary for personal protection. He also denied making any statements as he bent over the victim, and testified that he had taken no action to assist her because he knew she was dead. The defendant also testified that he and the victim had agreed on an [***5]** irreconcilable differences divorce, that an attempted reconciliation had recently failed, and that he suspected that she had had or was having an affair. He denied that he was upset or angry at his wife about the status of their relationshiat [*sic*]

In support of his contention that the rifle fired accidentally, the defendant relied on the testimony of Officer Steve W. Miller. Officer Miller testified that he had shot himself in the foot with the rifle when he was removing it from the trunk of his car after recovering it from where the defendant had thrown it. Officer Miller testified that he had shot himself accidentally. He further testified that he could not recall whether or not his finger had been on the trigger of the gun when it fired.

[The state's expert witness,] Kelly Fite, a firearms examiner, testified that he had examined and tested the rifle and that, in his opinion, "[t]he only way that you can fire this rifle without breaking it is by pulling the trigger."

After the defense closed its proof, the State called Martha Kay Maston as a "rebuttal" witness. Maston testified that she had been working as a public safety officer for the Chattanooga Metropolitan Airport Police on the night of the shooting. On finding the defendant at the airport, she saw the two children in the back seat of the car. She testified that she had gotten the children out and that they were both "very upset and hysterical." She further testified that "when I got [the little girl] out of the car, she just put her arms around me and she stated that she had told daddy not to shoot mommy but he did and she fell." Maston testified that the defendant's daughter had not made any other

> statements and that his son had not said anything.

State v. Kendricks, 947 S.W.2d 875, 878 – 79 (Tenn. Crim. App. 1996).

B. Post – Conviction

As stated above, the post-conviction trial court conducted hearings over several days in February and March of 2011. In its second opinion addressing the dismissal of Petitioner's post-conviction petition, the TCCA summarized the evidence adduced at these hearings as follows:

> Henry Jackson Belk, Jr., a gunsmith, testified that, earlier that morning in the clerk's office, he examined the gun, a Remington Model 7400 30.06 autoloading rifle, that shot and killed the victim. He stated that he was familiar with the trigger mechanism inside the rifle, describing it as "a common trigger mechanism that is [***6]** contained within a wide variety of firearms, shotguns, rim fires and center fire rifles." He added, "Generally speaking, all pumps and automatics manufactured after 1948 by Remington contain this trigger mechanism." Belk testified that the trigger mechanism is referred to as the "Remington Common Fire Control" ("the Common Fire Control").
>
> Belk stated that the Common Fire Control was first used in the automatic shotgun in 1948, then in the pump shotgun in 1950, and then in the automatic rifle in 1951. The Common Fire Control is currently used in 23 million firearms. Because the Common Fire Control is used in

different firearms, any "issue" with the trigger mechanism would not be limited to one specific type of firearm. According to Belk, the Common Fire Control is a "defective mechanism."

As to the rifle in this case, Belk stated that it had "the normal dirt, dried oil and residue common to a gun that has not been cleaned." After removing the trigger mechanism while he was on the witness stand, Belk examined the rifle and stated that "the action spring is sticky." He explained that the "action spring . . . supplie[d] the energy for the bolt to return back forward." Because the action spring was "sticky," the bolt was "not going forward as freely as it should." Belk explained that the action spring's condition was consistent with a firearm that had not been cleaned.

Turning his attention to the trigger mechanism, Belk testified about how it could malfunction:

> The general description here is this is a swing hammer mechanism; in other words, it fires by a hammer going forward and hitting a firing pin that's contained in the bolt inside the housing. The sear is the part that retains the hammer. The sear is what holds the hammer back, does not fire. On this particular mechanism, on all these Remington mechanisms, that sear is an independent part, is right here. That is an independent part, not on the end of the trigger like a Browning design is.

> For that reason, and the fact that the safety only blocks the trigger, it does not block the action of the sear or the hammer, it only blocks the trigger, any debris that is captured between the sear and the slot that it is housed in, which is the housing, any debris that is caught between the bottom or the tail of [***7]** the sear and the stock surface inside the housing, any debris that gathers there, any debris that gathers between the trigger yoke and the rear pivot pin and the trigger pusher arm and the bottom of the sear, any debris in any of those places, alone or in concert, can cause an insecure engagement between the hammer and the sear itself.
>
> So even with a gun on safe, which it is now, it can still fire, which it just did. Without pulling the trigger, on safe.

Responding to questions by the court, Belk clarified: "I can pull the trigger and make it fire, just like that (indicating), or I can put it on safe without the trigger being pulled and fire it just by manipulation of the sear."

Belk continued:

> The notch in the hammer determines how much debris it takes to make it fail. The notch in the hammer is about 18,000 of an inch deep, about the thickness of a matchbook cover. . . . [A]nything that totals that amount of distance can make a gun fail. . . . .

> Any of those other locations, it takes about 18,000ths in order to interfere with the secure engagement of the hammer and the sear.

Belk clarified that there were five locations in the trigger mechanism that made the mechanism "weak" and that could collect the requisite amount of debris to cause a misfire. Moreover, of the five "weak spots," "the clearance between the sear and the housing itself is usually about 4,000ths, so it would take less debris captured between those places to retard the proper motion of the sear and would also cause it to fail. So it wouldn't necessarily take as much as 18,000ths."

Belk also testified that "[t]he Remington Common Fire Control has a history of firing under outside influences other than a manual pull of the trigger. Vibration is one way that can happen. Impact. Even in one case the simple act of grabbing the gun by [the forward part of the stock] caused it to fire." Belk reiterated that the Common Fire Control "fires without the control of the trigger. It can fire out of the control of the shooter. It can discharge without any hand being on the stock." **[*8]**

Belk stated that, if debris caused the gun to fire unintentionally, the debris could be dislodged during the discharge. He added,

> On this semi-automatic, each time the gun is fired, the hammer goes forward, and then under great pressure and speed, the hammer is forced back again into position. So there's a lot of cycling going on.

> There's also the disconnector here, there's a lot of movement in the mechanism itself during firing and during manipulation after firing. And that movement, many times, dislodges the debris that actually was the causation.

Belk acknowledged that debris also can be dislodged through a gun being dropped or "banged around." He acknowledged that a drop test "many times[] destroys any evidence that was there." He explained that the standardized tests of dropping a firearm "on a hundred durometer rubber pad from a certain distance in certain orientations . . . does nothing whatsoever to analyze the mechanism and how it can fail. So the . . . drop test in itself can be destructive [by dislodging debris] without actually showing anything." He added, "[T]his particular mechanism has what is called a recapture angle. So, impact, as in dropping it on the floor, will actually recapture the sear engagement rather than dislodge it. So the . . . drop test on this particular gun is pretty much useless."

Belk opined that the rifle which shot and killed the victim "is capable of firing without a pull of the trigger, whether the safety is on or off."

Belk testified that he was first hired to work on a case involving the Common Fire Control in 1994, and he agreed that, "if someone had done some research, they would have potentially been able to find [him]." He also testified that problems with Remington firearms could be

reported to the manufacturer, which maintained "some" records of complaints. According to Belk, people were complaining prior to his initial involvement. He testified that he "first identified the problem with the Remington Common Fire Control in 1970." When a "co-shooter" on a skeet-range complained of trigger problems, Belk disassembled the trigger mechanism and "found a section of lead shot debris stuck in the sear notch of the hammer." He added, "That was the first identification that [he] had of a bad mechanism, that it could fire without a trigger being [***9]** pulled." Since then, he had consulted with "many, many attorneys." One case involved a Remington 7400 that fired while it was being cleaned with an air hose. The safety on that gun had been engaged. Another gun fired while being wiped with a rag. Another gun fired when the butt-end of the stock was placed on the floor.

On cross-examination, Belk admitted that, while the trigger assembly was in the Petitioner's rifle, the rifle had not misfired during Belk's handling of it. He also admitted that he could not opine about the cleanliness of the gun in March 1994. He stated that he testified in a case involving a Remington 7400 in 1997 or 1998.

On redirect examination, Belk testified that he was familiar with a case in which a Remington shotgun containing the Common Fire Control fired while it was in a locked case and with the safety engaged. The gun was strapped to the handlebars of an ATV that had been left idling.

The vibrations caused the gun to fire. Belk stated that he had been consulted on "probably two dozen" cases involving the Common Fire Control in which the gun discharged and injured someone.

On re-cross examination, Belk maintained that he had previously been able to induce a misfire by "artificially introducing" debris in "any" of the previously identified "weak spots." He clarified that he induced these misfires in "cutaway" guns.

Sergeant Steve Miller of the Chattanooga Police Department ("CPD") testified that, on the night the victim was killed, he was assigned to the case as a crime scene investigator. He testified that the firearm was not located at the scene of the shooting. When a "[c]all came across the police radio that a gun had been located down Airport Road," Sgt. Miller went to locate the firearm. He located the rifle on the side of Airport Road and noted that there was no clip in it. He photographed the rifle and collected it for evidence, placing it in the trunk of his patrol car. Sgt. Miller transported the rifle back to the police service center on Amnicola Highway.

Sgt. Miller agreed that he was handling the rifle carefully in order to preserve fingerprints. He also acknowledged that he testified at trial that he had a jacket in his left hand and that he "grabbed" the rifle from the trunk of his patrol car with his right hand and "pointed it in a downward motion" towards the pavement. When

Sgt. Miller pointed it in the downward motion, the rifle discharged, injuring his left foot. Sgt. Miller testified that he "can't say with a hundred percent accuracy" whether his fingers were [***10]** anywhere near the trigger but stated that "[t]hey shouldn't have been."

Sgt. Miller acknowledged his signature on the bottom of a report prepared by Michael Taylor on March 7, 1994 ("the Taylor report"). The Taylor report, admitted into evidence, reflected that James Gann was the first officer to respond to Sgt. Miller's injury, and Sgt. Miller's recollection at the post-conviction hearing was consistent: that Officer James Gann came out of the service building to see what had happened after Sgt. Miller shot himself. Sgt. Miller also acknowledged that the Taylor report indicated that he told the "initial officer that he had both hands on the rifle and did not have his finger near the trigger." Sgt. Miller testified that he suffered "a massive foot injury" that was "extremely painful." Sgt. Miller agreed that the wound also was stressful.

On cross-examination, Sgt. Miller agreed that he was called by the State as a witness at the Petitioner's trial. He agreed that defense counsel questioned him at the trial and asked questions about where his fingers were with respect to the trigger when he shot himself. He also remembered that defense counsel's cross-examination was "tough."

On redirect examination, Sgt. Miller testified that defense counsel did not interview him prior to the trial.

Glenn Sims, retired from the CPD, acknowledged that he prepared a police report in connection with Sgt. Miller's incident, but he did not recall speaking with Sgt. Miller. He acknowledged that, according to his report, Sgt. Miller "was taking the firearm . . . that he had collected into evidence, out of the truck of the vehicle [and] it discharged[.]" The report further reflected that "the rifle swung down, [Sgt. Miller] wasn't sure if it hit his foot or the ground, but it went off, hitting Miller in the left inside foot." Sims agreed that the report reflected that the rifle "just went off."

James A. Gann testified that he was employed by the CPD in 1994 and that he was one of the officers who investigated Sgt. Miller's incident. He stated that he was in the office when he heard "a loud recoil of a gun." Gann went outside to investigate and saw that Sgt. Miller was shot in the foot. Gann radioed for an ambulance and alerted the appropriate people who "had to be advised on a shooting." Gann stated that Sgt. Miller was "in a lot of pain, bleeding, and starting to go into shock." Gann could not recall whether he spoke to Sgt. Miller about what had happened, explaining that he "was more concerned with his foot, he was [***11]** bleeding." Referring to a police report that Sgt. Glenn Sims had prepared, Gann acknowledged that Sgt. Miller had told Gann

that, while Sgt. Miller was taking the rifle out of the trunk, the gun "just went off." Gann also testified that he was not contacted by anyone from the public defender's office before the Petitioner's trial.

Officer Michael Holbrook of the CPD testified that he was dispatched to Erlanger Hospital to respond to an accident involving Sgt. Miller. Officer Holbrook spoke to Sgt. Miller at the hospital and prepared a report regarding their conversation. Officer Holbrook testified that Sgt. Miller told him that "as he was taking the rifle out of the trunk of his patrol car, the rifle went off and shot him in the foot." Sgt. Miller also told Officer Holbrook that his hands were not on the rifle's trigger. Officer Holbrook's report was consistent with his testimony and contained the following narrative: "As he was lifting out the rifle, the weapon went off and struck him in the left foot. [Sgt.] Miller states that he picked it up with both hands and his finger was not near the trigger." Officer Holbrook's report, dated March 7, 1994, was admitted as an exhibit.

The Petitioner's trial lawyer ("Trial Counsel") testified that he worked for the public defender's office in 1994 and represented the Petitioner at trial. He stated that two investigators assisted him in investigating the case. Trial Counsel agreed that the Petitioner's appointed counsel in general sessions waived the preliminary hearing in exchange for "an open file policy."

Trial Counsel testified that, from the beginning, the Petitioner maintained that the rifle accidentally discharged. He also testified that Sgt. Miller had made statements indicating that "he was not holding the gun anywhere near the trigger housing and it discharged, shooting him in the foot." Trial Counsel stated that he never looked for an expert witness to support the Petitioner's accidental discharge claim. He testified that the public defender's office informally consulted with a gunsmith who was a former Red Bank police officer, but he did not remember whether he spoke to him about this case. Trial Counsel also agreed that he performed no research regarding the trigger mechanism in the Remington 7400 rifle. He added, "[a]s a matter of fact, when I heard on NPR, a year or so ago, that the Remington trigger mechanism was faulty and [there had] been several apparent accidental deaths as a result of it, you're the first person I contacted, because I thought, I remembered it was a Remington and I thought it was something very important." Trial Counsel generally recalled that the State's expert, Kelly Fite, performed a "drop test" on the rifle. He agreed that Fite's report did not indicate that Fite inspected the trigger mechanism.

[*12] Asked whether it would have been beneficial for an expert to testify on the Petitioner's behalf about the trigger mechanism, Trial Counsel answered, "In hindsight, especially with the knowledge now that there have been so

many problems with the Remington trigger mechanism, yeah." Asked about his knowledge of any discussions in the industry regarding the trigger mechanism misfiring, Trial Counsel responded:

> I wasn't aware of any. And I will point out, at the time, I was the only public defender in Division II, and in that period of time in little over four years, I probably tried, literally, 40 first degree murder cases, settled another 40 to 50, and I will concede I didn't put nearly as much time in on his case or any other cases that I tried as I do now in my private practice, because I've got a lot more time. My average caseload every Thursday for settlement day was between 20 and 30 defendants. My average month included at least 2 if not 3 trials. So I wasn't aware of the issue with the trigger pull.

Trial counsel also added that, although he had "a fundamental knowledge of firearms, [he] was not aware of it and . . . [he] didn't know it and [he] didn't get an expert." He also explained,

> I thought [Sgt.] Miller would testify consistently with what I knew to be his statements, and I thought that would come in and I thought that when that did come in, I could use that very effectively to say, okay, if [the Petitioner] can't accidentally have that gun [go] off, neither can [Sgt.] Miller, so, therefore, you got to presume that [Sgt.] Miller shot himself in the foot on purpose.

> That was my whole line of reasoning in this case.

Trial Counsel testified that he "was not prepared for [Sgt.] Miller to say he couldn't remember, because there was not any doubt in [Trial Counsel's] mind, at least, when [they] started trying this case, that he was going to stick to his prior statements." Accordingly, Trial Counsel had no "backup plan" to call other officers to testify about what Sgt. Miller had told them after he shot himself. Trial counsel felt "sandbagged" by Sgt. Miller's trial [***13]** testimony. He recalled the trial court refusing to allow him to introduce one of the reports generated about Sgt. Miller's injury in which Sgt. Miller reported that his hands had not been near the rifle's trigger when it misfired. He did not request to make an offer of proof. He also did not attempt to introduce Sgt. Miller's statements as excited utterances, explaining, "[i]n the heat of the trial, I didn't see that."

Trial Counsel agreed that both Lennell Shepheard and Sgt. Miller's testimony at trial differed from their statements that the State provided the defense during discovery. Trial Counsel stated that the first time he heard Shepheard claim the Petitioner stated "I told you so" was during Shepheard's testimony. Trial Counsel agreed that he was never provided notice by the State prior to these two witnesses testifying that the substance of their pretrial statements had changed materially. Trial

counsel also stated that, although he was not the Petitioner's counsel at the preliminary hearing stage, he would expect "in exchange for the waiver of a preliminary hearing, especially in a first degree murder case, that there would be some extra benefit to come to the defendant through the discovery process." He added, "if [Sgt.] Miller was going to change his story, we should have been made aware of that, if Mr. Shepheard was going to add to his story, we should have been made aware of that."

On cross-examination, Trial Counsel stated that he began practicing law in Tennessee in April 1978 and had been in continuous practice since that time. At the time of the Petitioner's trial, Trial Counsel had been practicing law for sixteen years, primarily in criminal defense. Trial Counsel also stated that he was employed at the public defender's office at the time of the Petitioner's trial and had worked in that capacity for approximately five years. Trial Counsel had tried at least sixty to seventy cases by 1994, including murder cases, less-serious cases, and death penalty cases. He stated that he tried in excess of forty murder cases prior to this case. Trial Counsel testified that he was assigned this case at arraignment.

Before meeting with the Petitioner, Trial Counsel stated that the Petitioner completed an "intake sheet" wherein he wrote out his "side of the story." Trial Counsel testified that the Petitioner was on bond when he was assigned to

the Petitioner's case and that he [***14]** remained on bond throughout his representation of him. The offense occurred in March 1994, and the Petitioner's trial was in November 1994. Trial Counsel agreed that this was a "little quick." Trial Counsel could not recall whether the Petitioner had desired that the case proceed to trial quickly.

Trial Counsel acknowledged that he and the Petitioner discussed the strategy in the case. He stated, again, that the Petitioner maintained from the beginning that the rifle accidentally discharged and that there was "no real animosity" between him and the victim. Trial Counsel also stated that, in his preparation for the trial, he reviewed documents provided to the defense by the State. Trial Counsel testified that he typically would meet at the district attorney's office to review documents the State provided him in a case. He could not recall particularly whether he had a meeting in the district attorney's office in this case but stated that was his "standard operating procedure." He added, "I'm sure we met on it several times, not just one time." Trial Counsel stated that he was "confident" that the standard discovery motions were filed in this case although he could not specifically recall filing them. He stated that he filed the "standard motions" with every appointment he received. Pursuant to those discovery motions, Trial Counsel stated that he received documents from the State in this case

and that he reviewed them to prepare for the trial. He also stated that the documents included the names of witnesses, and he agreed that the documents also included witness statements "in theory."

Trial Counsel recalled discussing the Petitioner's testimony with him prior to trial. He was "pretty confident" that he and the Petitioner "went through sit-downs where [Trial Counsel] cross-examined" the Petitioner. He added that, for every trial in which the defendant was going to testify, he would "sit down and grill them" so that they could anticipate what cross-examination would be like.

Trial Counsel did not recall specifically "familiarizing [him]self with the schematic of the [rifle]" prior to the trial, but stated that he was "relatively familiar with guns." Although Trial Counsel could not recall specifically looking at the rifle before the trial, he stated, "I'm sure I did. . . . I'm sure I looked at it in your office too." Trial Counsel also could not recall specifically his cross-[***15]**examination of Sgt. Miller. However, he stated, "I try to be vigorous [in cross-examination] especially when I think somebody's not telling the truth, and I thought that he wasn't telling the truth." He also recalled calling Sgt. Miller to testify during the defense's proof. He acknowledged that he recalled Sgt. Miller with the purpose of trying to impeach him with prior inconsistent statements.

Richard Mabee testified that, as of the time of the post-conviction hearing, he had been an assistant public defender for approximately nineteen years. He represented the Petitioner at the Petitioner's preliminary hearing. Mabee testified regarding the "one-time sheet" for the Petitioner's case, which was admitted as an exhibit at the hearing. According to Mabee, a one-time sheet lists basic information about the defendant, identifies the judge and the charges, and the disposition of the case at the general sessions level. According to Mabee, the disposition on the Petitioner's one-time sheet provided, "waived to grand jury, $50,000 bond. DA agreed to show everything." Mabee testified that this latter notation indicated that he had talked to the district attorney assigned to the case, and the district attorney had said, "[I]f you'll waive preliminary hearing, we'll show you everything in our file." Mabee stated that he then would have presented this information to the Petitioner and that it would have been up to the Petitioner to decide whether to waive the preliminary hearing.

On cross-examination, Mabee agreed that the notations on the Petitioner's one-time sheet appeared to be his handwriting. Mabee explained that, when public defenders get appointed in general sessions, they "open up a one-time sheet" which means that the public defender represented that defendant one time at the preliminary hearing. Mabee also clarified that

the judge previously would have signed the order of appointment at the bottom of the one-time sheet prior to the public defender's notations regarding the disposition of the case.

On re-direct examination, Mabee stated that he made the notation, "[W]e'll show you everything in our file," because "that's exactly the words the [district attorney] said to [him]." Mabee added that, after his representation of someone, he would take the one-time sheet back to the public defender's office where it was placed in a "big drawer of one-time sheets." He stated, "[A]fter someone [was] [***16]** appointed in a higher court, they may or may not get that one-time sheet."

The Petitioner testified that the first time Trial Counsel met with him was at the county jail. During this initial meeting, the Petitioner completed an "intake sheet" and told Trial Counsel that the rifle had "accidentally discharged." Trial Counsel informed the Petitioner that Sgt. Miller had shot himself with the Petitioner's rifle and told the Petitioner that Sgt. Miller's incident supported the Petitioner's account of what had occurred.

The Petitioner recalled only two meetings with Trial Counsel after he was released on bond: one meeting occurred on or around June 1, 1994, and the second meeting occurred two or three months before trial. The Petitioner agreed that they discussed "trial strategy" during these meetings and their defense that the rifle

> accidentally discharged. During one of their meetings, Trial Counsel asked the Petitioner what had happened on the day of the incident, and the Petitioner informed him what he did that day. The Petitioner denied that Trial Counsel ever told him "that any evidence in this case would be damning to [him]," including the fact that he threw the rifle out of his car window. He also did not recall that Trial Counsel "went through a cross-examination of [him]."
>
> The Petitioner stated that he got the rifle at least ten years before the killing and that he had shot it numerous times. The Petitioner testified that, although he wiped down the outside of the rifle, he never did "any maintenance in regards to the inside" of it because he did not know he was supposed to. He agreed that he testified at trial that he had never had a problem with the rifle accidentally discharging during the time he owned it.
>
> The State asked the Petitioner whether it was Trial Counsel's "idea to use accidental discharge as the theory of the case[.]" The Petitioner responded, "I mean he's the lawyer, I mean he makes the ultimate decision, so I guess I have to say so, yes, based upon . . . his investigation and everything, yeah, I'd say it was." [***17]**

Kendrick[2] v. State, No. E2011-02367-CCA-R3-PC, 2013 Tenn. Crim. App. LEXIS 539, at *7 – 31 (Tenn.

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[2] In his habeas petition, Petitioner lists his name as Edward Thomas Kendricks, III, but in many pleadings lists his last name

Crim. App. 2013). Due to the extraordinary length of the record in this case, many of the facts relevant to Petitioner's claims are not discussed here and will instead be addressed in the analysis below.

III. STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), codified in 28 U.S.C. §2254, a district court may not grant habeas corpus relief for a claim that a state court adjudicated on the merits unless the state court's adjudication of the claim:

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

28 U.S.C. § 2254(d)(1) and (2). This standard is intentionally difficult to meet. *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (quotation marks omitted). Under the unreasonable application clause, the proper inquiry is whether the state court's decision was "objectively unreasonable," and not simply erroneous or incorrect. *Williams v. Taylor*, 529 U.S. 362, 409 – 11 (2000). The AEDPA likewise requires heightened respect for state factual findings. *Herbert v. Billy*, 160 F.3d 1131, 1134 (6th Cir. 1998). Where

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as Kendrick. The state courts vary in which name is they adopt, this Court will use Kendricks.

the record supports the state court's findings of fact, those findings are entitled to a presumption of correctness which may be rebutted only by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). **[*18]**

IV. ANALYSIS

A. Exhaustion and Procedural Default

In his §2254 petition, Petitioner raises forty-eight claims for relief that he classifies in five broad categories: (1) ineffective assistance of counsel, (2) ineffective assistance of new trial and appellate counsel, (3) prosecution suppression of evidence, (4) new evidence, and (5) a singular claim that the AEDPA is an unconstitutional extension of Congressional power. Respondent argues that many of the claims set forth in Petitioner's federal habeas corpus petition have been procedurally defaulted and may not now be addressed on the merits. Petitioner first suggests that his claims have not been procedurally defaulted, and second offers multiple alternative grounds for which to excuse any procedural default. This Court finds that Petitioner's claims raised only in his pro se briefs were abandoned on appeal and have been procedurally barred. As there is no valid cause for the court to address these claims, the Court will only address the eighteen claims, spanning eleven issues, Petitioner now raises which were properly included in the appellate briefs filed by counsel.

Before a federal court may grant habeas relief to a state prisoner, the prisoner must first exhaust the remedies available in state courts. 28 U.S.C. § 2254(b)(1); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842

(1999). Exhaustion requires a petitioner to "fairly present" federal claims to state courts to ensure states have a "full and fair opportunity to rule on the petitioner's claims." *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990); *see O'Sullivan*, 526 U.S. at 842. Generally, to fulfill the exhaustion requirement, each claim must have been presented to all levels of the state appellate system, including the state's highest court. *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995); *Wagner v. Smith*, 581 F.3d 410, 414 (6th Cir. 2009). The Tennessee Supreme Court has established, however, that when the Tennessee Court of Criminal Appeals has denied [***19]** relief on a claim, it is exhausted regardless of appeal to the Tennessee Supreme Court. Tenn. S. Ct. Rule 39 (Supp. 2001). Nevertheless, if there are no further state court remedies available to the petitioner, lack of exhaustion will not foreclose merits review. *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994).

When a claim was never presented to the highest available state court and is now barred from such presentation by a state procedural rule, the claim may be considered "exhausted, but procedurally barred from habeas review." *Wallace v. Sexton*, 570 Fed. Appx. 443, 449 (6th Cir. 2014). Procedural default may also occur when a state court is prevented from "reaching the merits of the petitioner's claim" because petitioner failed to comply with an applicable state procedural rule, which is regularly enforced and is an "adequate and independent" state ground, and Petitioner "cannot show cause and prejudice to excuse his failure to

comply." *Id.* at 449 (citing *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986)); *Seymour v. Walker*, 224 F.3d 542, 549-550 (6th Cir. 2000) (citing *Wainwright v. Sykes*, 433 U.S. 72, 80, 84 87 (1977)). In determining whether a state procedural rule was applied to bar a claim, a reviewing court looks to the last reasoned state-court decision disposing of the claim. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803; *Guilmette v. Howes*, 624 F.3d 286, 291 (6th Cir. 2010).

On Petitioner's direct appeal, he raised twelve issues, three pertaining to the sufficiency of the evidence, eight questions of trial court error, and one question of prosecution suppression regarding the testimony of Martha Maston as a surprise witness [Doc. 14 Attachment 9]. Later, on his first appeal of the dismissal of his state petition for post-conviction relief, Petitioner raised six issues of trial court error, all relating to the summary dismissal of his post-conviction petition [Doc. 14 Attachment 17]. On his second appeal, in an opening brief appealing the denial of post-conviction relief, Petitioner's counsel raised two issues – (1) that the post-conviction trial court **[*20]** had used the wrong standard in evaluating Petitioner's claims, and (2) that the cumulative effect of trial counsel's deficient performance was sufficiently prejudicial to warrant relief [Doc. 14 Attachment 45].[3] After what appears to be a significant amount of tension between counsel

[3] This claim encompassed both a legal and factual analysis of several of the claims of ineffective assistance of trial counsel and appellate counsel Petitioner litigated in the post-conviction trial court below and raises now in his federal habeas corpus petition.

and Petitioner regarding counsel's filing of the brief prior to Petitioner's approval and Petitioner's concern that counsel had waived many of his issues by omission, counsel attempted to withdraw from representation and asked the TCCA to issue a new briefing schedule, both of which were denied [Doc. 1 Attachments 1, 4]. At this time, counsel attempted to incorporate Petitioner's previously raised claims by reference in the reply brief [Doc. 14 Attachment 47]. In its opinion, the TCCA briefly outlined Petitioner's issues but did not expressly state which it would be considering; instead, it granted Petitioner relief on two sub-issues included within the claim of ineffective assistance of trial counsel – counsel's failure to adduce proof regarding a defective trigger mechanism design related to the propensity of Petitioner's rifle for accidental discharge, and counsel's failure to introduce the testimony of Officer Steve Miller's pretrial statements as excited utterances – and noted that it was pretermitting others [Doc.14 Attachment 48].

The State appealed to the TSC, claiming error by the TCCA regarding both of the findings that Petitioner was entitled to post-conviction relief [Doc. 14 Attachment 52]. In a pro-se response, Petitioner attempted to include most, if not all, of the claims he had previously litigated in the post-conviction trial court, including those not addressed or outlined by the TCCA [Doc. 14 Attachments 56, 57]. Counsel filed a supplemental brief responding only to the two issues set out by the State in their opening brief [Doc. 14 Attachment 58]. The TSC addressed only the two

issues identified by the State and reversed on both grounds, remanding the case to the TCCA to **[*21]** address Petitioner's remaining claims [Doc. 14 Attachment 60]. Petitioner filed a motion for supplemental briefing before his pretermitted claims were considered, which the TCCA denied [Doc. 14 Attachments 65, 70]. In its opinion on remand, the TCCA clarified the pretermitted issues as: (1) ineffective assistance of trial counsel for waiving Petitioner's attorney-client privilege with his divorce attorney, (2) ineffective assistance of trial counsel for failing to call the Petitioner's cousin as a witness, (3) ineffective assistance of trial counsel for "opening the door" to Petitioner's prior convictions, (4) ineffective assistance of trial counsel for failing to adequately challenge Lennell Shepheard's testimony, (5) ineffective assistance of trial counsel for failing to call Officer Lapointe to testify to Petitioner's state of mind after the crime, (6) ineffective assistance of trial and appellate counsel for failure to object to Detective Rawlston's use of Petitioner's volunteered testimony after arrest, (7) ineffective assistance of trial counsel for failure to seek curative measures for the surprise testimony of Martha Maston, and (8) whether the cumulative impact of counsels' errors entitle him to relief. The TCCA stated that all other claims had been abandoned on appeal [Doc. 14 Attachment 72 at 5].[4]

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[4] "While it is true that the Petitioner raised an additional forty-one issues of ineffective assistance of trial counsel, twenty-two claims of ineffective assistance of appellate counsel on direct appeal, and twelve claims of prosecutorial misconduct, many of

Due to Tennessee's one-year statute of limitations and one petition rule, state remedies are foreclosed to Petitioner and lack of exhaustion will not prevent federal habeas review of his claims. *Rust*, 17 F.3d at 160; *see* Tenn. Code Ann. § 40-30-102. However, while Petitioner posits that all of his current claims have been fairly presented to either the TCCA or the TSC, presumably relying first on the incorporation by reference in his reply brief presented to the TCCA on his second-appeal of the dismissal of his post-conviction relief, and second on his "unchallenged" pro se **[*22]** response brief to the TSC [Doc. 2 at 8], a majority of the claims he now raises were procedurally defaulted and will not be reviewed on their merits.[5] The state courts were prevented from reaching the merits of Petitioner's claims because they found that his claims were abandoned on appeal [Doc. 14 Attachment 72 at 5]. Petitioner appears to argue that this finding is the result of the misapplication or arbitrary application of procedural law [Doc. 2 at 11]. However, although the state court

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these claims have been abandoned on appeal. Accordingly, we will focus only on those issues raised by the Petitioner in his appellate brief. *See* Tenn. R. App. P. 13(b) ('Review generally will extend only to those issues presented for review.')" *Kendrick*, 2015 Tenn. Crim. App. LEXIS 887, at *10 – 11.

[5] In the event that Petitioner also intends to allege that the presentation of his claims in his Application for Permission to Appeal or Motion to Rehear satisfy exhaustion requirements, we note that raising a claim "for the first and only time in a procedural context in which its merits will not be considered unless there are special and important reasons therefor, [does not] constitute fair presentation." *Olson*, 604 Fed. Appx. 387, 402 (6th Cir. 2015) (quoting *Castille v. Peoples*, 489 U.S. 346, 351 (1989)).

offered no explanation for its finding of abandonment, this Court finds that it had adequate and independent, regularly enforced, state grounds to find that Petitioner's claims had not been fairly presented. *See Wallace*, 570 Fed. Appx. at 449 (6th Cir. 2014) (citing *Maupin*, 785 F.2d at 138 (6th Cir. 1986)).

Specifically, Petitioner's claims were not fairly presented to an appropriate state court because a Tennessee procedural rule barred consideration of his pro se briefs.[6] "In Tennessee, a petitioner represented by either retained or appointed counsel may not file pro se briefs." *Wallace*, 570 Fed. Appx. at 451 (*citing State v. Burkhart*, 451 S.W.2d 365, 371 (Tenn. 1976)); *Williams v. State*, 44 S.W.3d 464, 469 (Tenn. 2001) (barring defendants from "representing themselves while simultaneously being represented by counsel")). This rule is an adequate and independent state ground, regularly enforced, sufficient to foreclose state review of Petitioner's claims and procedurally default said claims before a federal court. *See Wallace*, 570 Fed. Appx. at 451. Further, in *Wallace,* the petitioner argued that his claims were fairly presented because counsel **[*23]** *attached* his claims as an appendix to his own brief,

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[6] As in *Wallace*, "the state post-conviction appellate court did not explicitly state that it declined to consider [Petitioner]'s supplemental pro se brief. However, it responded in detail to claims raised by [] counsel, […] without even mentioning [Petitioner's] supplemental brief or any of the claims raised therein. We can infer only that the court applied the Tennessee procedural rule barring consideration of pro se filings made by represented petitioners." 570 Fed. Appx. 443, 452 (6th Cir. 2014).

yet the Court still found that Tennessee was within its discretion to decline to address such claims. *Id*. at 452.

Here, counsel did not attach Petitioner's claims but rather tried to incorporate them by reference in her reply brief. Not only would the state court have been prevented from addressing the pro se brief in conjunction with counsel's brief, but this also improperly expanded counsel's reply brief. In Tennessee, "[a] reply brief is limited in scope to a rebuttal of the argument advanced in the appellee's brief." *Caruthers v. State*, 814 S.W.2d 64, 69 (Tenn. Crim. App. 1991). Counsel could not add new arguments in her reply brief, by reference or otherwise, because to do so "would be fundamentally unfair as the appellee may not respond to a reply brief." *Caruthers*, 814 S.W.2d at 69; *see also Flinn v. Sexton*, 2018 U.S. Dist. Lexis 36927 (E.D. Tn. 2018). Petitioner has not demonstrated, and this Court cannot find, that the state courts arbitrarily enforced these rules to find that Petitioner did not fairly present his claims.

Like the reply brief discussed above, Petitioner's response brief on appeal to the TSC involved issues of Petitioner's brief being filed alongside a brief filed by counsel, although admittedly Petitioner's brief was filed first and counsel's as a supplement. Again, the TSC did not address Petitioner's additional claims, but did consider the arguments made in counsel's brief, leading us to infer that Tennessee was enforcing its own procedural rule regarding pro se

filings from represented petitioners. *Kendrick v. State*, 454 S.W.3d 450, 475 – 76 (Tenn. 2015).

Moreover, even if Tennessee courts had looked to Petitioner's brief, Petitioner did not properly raise each of his previously litigated claims in his response. Petitioner correctly points to case law that asserts that appellees may include issues in response briefs not included by the appellant, as long as such is done in conjunction with the Tennessee Rules of Appellate Procedure. *See Mobley v. State*, 397 S.W.3d 70, 103 – 104 (Tenn. 2013); *Hodge v. Craig*, 382 S.W.3d 325, **[*24]** 334 (Tenn. 2012). However, in *Hodge*, which Petitioner points to, the TSC clarified that TN. R. App. P. 27(b) limits such new issues to those in which the appellee is "seeking relief from the judgment" of the Court of Appeals. *Hodge*, 382 S.W.3d at 336 (Tenn. 2012). Petitioner cannot be claiming to seek relief from the judgment of the TCCA on his additional claims when no such judgment was made. *See Id*. Again, Petitioner has not demonstrated, and this Court cannot find, that the state court arbitrarily enforced these rules to find that Petitioner did not fairly present these claims.

Because Petitioner did not comply with various regularly-enforced state procedural rules, which are adequate and independent grounds, the claims he presented only in his pro se briefs are procedurally defaulted and may not now be addressed on the merits absent Petitioner's demonstration of cause and prejudice sufficient to excuse such default.

B. Cause and Prejudice

Petitioner next contends that any procedural default is excused for cause; specifically, he alleges as cause: (1) the ineffective assistance of post-conviction counsel; (2) state court action or inaction, including the arbitrary application of procedural law; (3) the respondent's continued failure to disclose exculpatory information; and (4) that equitable principles, as well as the due process clause of the 14th Amendment and/or 6th Amendment demand that this Court can and should hear critical constitutional claims [Doc. 2 at 3 – 11]. None of these are sufficient cause to excuse Petitioner's procedural default, and his defaulted claims will not be reviewed on their merits.

The Courts have carved out a narrow set of circumstances in which procedural default may be excused and defaulted claims may be evaluated on their merits. Procedurally barred claims may be considered on their "merits only if the petitioner establishes (1) cause for his failure to **[*25]** comply with the state procedural rule and actual prejudice from the alleged violation of federal law or (2) demonstrates that his is 'an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" *Wallace*, 570 Fed. Appx. at 452 (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)"; *see House v. Bell*, 547 U.S. 518, 536 (2006). To show sufficient "cause," Petitioner must point to "some objective factor external to the defense" that prevented him from raising the issue in his first appeal. *Murray*, 477 U.S. at 488. Where petitioner fails to show cause, the court need not consider

whether he has established prejudice. *See Engle v. Isaac*, 456 U.S. 107, 134 n.43 (1982); *Leroy v. Marshall*, 757 F.2d 94, 100 (6th Cir. 1985).

In order to warrant review under the "actual innocence" prong, which is reserved for fundamental miscarriages of justice, a habeas petitioner must demonstrate that a constitutional error resulted in the conviction of one who is "actually innocent." *Dretke v. Haley*, 541 U.S. 386, 388 (2004). A habeas petitioner asserting a claim of actual innocence must establish that in light of new, reliable evidence – either eyewitness accounts, physical evidence, or exculpatory scientific evidence – that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt. *House*, 547 U.S. 518, 536 (2006) (citing *Schlup v. Delo* , 513 U.S. 298, 327 (1995)).

1. Ineffective Assistance of Counsel as Cause

Petitioner alleges the ineffectiveness of post-conviction counsel as a ground on which to excuse the procedural default of his ineffective assistance of trial counsel and ineffective assistance of counsel on motion for new trial and appellate counsel claims.

Ordinarily, there is "no constitutional right to an attorney in state post-conviction proceedings," so ineffective assistance in post-conviction proceedings does not qualify as "cause" **[*26]** to excuse procedural default of constitutional claims. *Coleman v. Thompson*, 501 U.S. 722, 725, 755 (1991). However, the Supreme Court has carved out an exception to this rule for claims of ineffective assistance of counsel when those claims may be raised for the first time in

post-conviction proceedings or "where a state procedural framework… makes it highly unlikely… that a defendant [had] a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal." *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013) (citing *Martinez v. Ryan*, 132 S. Ct. 1309, 1320 (2012)). This exception applies in Tennessee. *See Sutton v. Carpenter*, 745 F.3d 787, 795 – 96 (6th Cir. 2014).

However, claims of ineffectiveness of post-conviction *appellate* counsel cannot constitute cause to excuse procedural default because it is not an initial-review collateral proceeding. *Martinez*, 132 S. Ct. at 1320.

> Although *Martinez* and *Trevino* expanded the class of cases in which a petitioner can establish cause to excuse the procedural default of ineffective-assistance claims, the Supreme Court cautioned that the rule 'does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial.'

Wallace, 570 Fed. Appx. at 453 *(quoting Martinez*, 132 S. Ct. at 1320). The Sixth Circuit has only applied the *Martinez* exception to claims of ineffective assistance of counsel, and declined to apply it to suppressed evidence, prosecutorial misconduct, trial error, ineffective assistance of appellate counsel, and

cumulative error. *See Abdur-Rahman v. Carpenter*, 805 F.3d 710, 714, 716 (6th Cir. 2015).[7]

Petitioner's procedural default relates to his abandonment on appeal of the claims he now raises, which were previously raised at the post-conviction trial court level. The ineffective **[*27]** assistance of counsel at the post-conviction trial level cannot logically constitute cause for this procedural default. The *Martinez* exception applies to ineffective assistance of counsel claims which were not able to be pursued on direct appeal, and due to the ineffective assistance of counsel, were not properly raised at the initial-review collateral proceeding. *Martinez*, 132 S.Ct. at 1309; *see also Wallace*, 570 Fed. Appx. at 453. Here, Petitioner's claims were in fact raised at the initial-review post-conviction proceeding and the ineffective assistance of post-conviction counsel on appeal cannot excuse default. Petitioner expressly notes in his reply that he did not raise "the application of *Martinez* to post-conviction appellate counsel" [Doc. 30 at22 ¶ 3].[8] Regardless of Petitioner's intent, *Wallace* makes it clear that the *Martinez* exception does not apply to post-conviction

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[7] The Supreme Court likewise reiterated in *Davila v. Davis*, 137 S.Ct. 2058, 2062 (2017) that the *Martinez* exception does not extend beyond claims of ineffective assistance of trial counsel, and specifically declined to apply it to ineffective assistance of appellate counsel.

[8] Petitioner does argue other claims regarding the performance and decision-making of his post-conviction appellate counsel, but rather than framing them as ineffective assistance of counsel claims raises that her actions were such that equity demands this Court to address Petitioner's procedurally defaulted claims.

appellate counsel. *Wallace*, 570 Fed. Appx. at 453. Petitioner has not established cause for which to excuse his procedural default under this theory.

2. State Court Inaction or Arbitrary Application of Law

Petitioner asserts inaction of the state courts as cause to excuse procedural default, stating "the Supreme Court has long found state action and/or inaction of the state courts as being cause to excuse [procedural default]" [Doc. 2 at 7]. Petitioner does not elaborate on this except to cite to a myriad of cases, many of which are not jurisdictionally appropriate, and most of which relate to the prosecution's suppression of exculpatory evidence [Doc. 2 at 7 – 8]. Petitioner does not alert the Court to any facts demonstrating how in this instance the state court would be responsible for any such withholding. Petitioner later alleges the following of the state court's behavior:

> The Tennessee Courts further, through essentially a sham post-conviction process, failed to apply, simply fabricated, arbitrarily applied and/or simply ignored facts, interpretations and application of state and federal evidentiary, procedural and governing law, i.e. law of the case doctrine, conflict of interest relative post-conviction appellate attorneys, pro se representation and/or waiver and previous **[*28]** determination, proper standards of review, concessions and objections on proof, cumulative error review, and/or de novo review etc., as well as that relative other positions set forth therein,

> in order to deny claims and/or otherwise procedurally entrap the Petitioner.

[Doc. 2 at 11]. This is a lengthy and weighty set of accusations against the state courts, yet Petitioner offers essentially no facts under which to evaluate these claims. The only actions, or inactions, Petitioner seemingly points to on behalf of the state courts are the court's denial of post-conviction appellate counsel's Motion to Withdraw as Counsel and denials of additional briefing.

As stated above, after significant disagreement between post-conviction appellate counsel and Petitioner on how to proceed, counsel attempted to withdraw from her representation of Petitioner, which the State did not oppose [Doc. 1 Attachments 1, 3, and 5]. Although criminal defendants do have a right to self-representation under 28 U.S.C. § 1654, courts have broad authority over who practices before them and are not required to permit hybrid representation, representation both pro se and by counsel. *United States v. Mosely*, 810 F.2d 93, 98 (6th Cir. 1987). "When counsel has 'performed in a highly competent and professional manner' and the defendant has been 'given ample time to consult with his counsel over strategy,' it is not an abuse of a court's discretion to prohibit hybrid representation." *Miller v. United States*, 561 Fed. Appx. 485, 488 – 89 (6th Cir. 2014) (quoting *Mosely*, 810 F.2d at 98). In its order denying the motion to withdraw, the TCCA found that counsel had substantially invested in her appellate brief and in preparing for oral argument [Doc. 1 Attachment 4]. Because counsel had already

filed briefs and prepared for this case and would in the future be responsible for oral argument, the court was not required to allow Petitioner "hybrid representation" and Petitioner cannot demonstrate cause for his procedural default. *See Id*. Moreover, even if the TCCA's action could constitute cause, it would be exceedingly difficult for Petitioner to prove prejudice for the TCCA's prohibition of **[*29]** counsel's withdrawal, when counsel was in fact successful in having Petitioner's sentence vacated by the same court. *Kendrick*, 2013 Tenn. Crim. App. Lexis 539.

Regarding Petitioner's allegations that the TCCA's denial of additional briefing or a new briefing schedule constituted cause for his procedural default, again, the court holds broad discretion over whether to allow additional briefing. It is apparent that Petitioner was seeking to include his procedurally defaulted claims in his new brief and in some sense, the denial of additional briefing kept him from doing so. However, to demonstrate cause in this regard by clear and convincing evidence, Petitioner must show an external factor which "prevented him from raising the issue in his first appeal." *Murray*, 477 U.S. at 488. It was the decision of defense counsel, attributable to Petitioner, to winnow his claims and she did so on Petitioner's third trip through the TCCA. The court was not required to permit additional briefing, in an already long and procedurally complex case, to counteract the defense's decision and this will not constitute cause to excuse Petitioner's procedural default.

3. Respondent's Failure to Disclose Exculpatory Information

Petitioner also relies on the "continued failure of the Respondent to disclose… exculpatory evidence" as cause to excuse his procedural default [Doc. 2 at 10]. Presumably, Petitioner relies on this ground to excuse his procedural default of his "prosecution suppression" claims.

Prosecution suppression can serve as a ground to excuse procedural default when the ongoing suppression sufficiently frustrates a petitioner's ability to bring the claim and the cumulative effect of the suppressed evidence was reasonably likely to have produced a different result. *See Kyles v. Whitley*, 514 U.S. 419 (1995). However, as clarified above, Petitioner's claims are procedurally defaulted because he failed to raise them on appeal; he was, however, able to raise these claims at the trial court level. While prosecution suppression may provide cause in some **[*30]** cases, it does not logically follow that a Petitioner who did successfully raise his claims at the trial court level was impeded by the prosecution from raising his claims on appeal. Further, Petitioner has not established the factual basis for his claim that the prosecution did suppress substantial cumulative evidence by clear and convincing evidence. Petitioner has not established cause to excuse his procedural default.

4. Equitable Principles

Lastly, Petitioner argues that equitable principles, as well as Due Process, requires this Court to hear critical constitutional claims [Doc. 2 at 4].

Under this theme, and given the leniency granted to pro se petitioners, Petitioner appears to raise two issues for which to find cause: (1) that he was extraordinarily prevented from raising his claims due to the actions of post-conviction appellate counsel, and (2) that he is actually innocent [Doc. 2 at 4 – 6, 9 – 10].[9]

Petitioner notes that he does not raise the actions of post-conviction appellate counsel as ineffective assistance of counsel[10], rather he attempts to frame her actions as subjecting him to a "particular injustice" which warrants court intervention [*Id.*]. Specifically, Petitioner argues that post-conviction appellate counsel had a conflict of interest due to representation of another client in a time-consuming case, such that she effectively abandoned of Petitioner and ceased to be his agent, and that she, along with Respondent and the state court, actively misled Petitioner regarding the raising of his claims [*Id.*].[11] These claims are seemingly related to counsel's decision to winnow Petitioner's claims on appeal and the court's resulting decision to treat

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[9] To the extent that he is instead attempting to state that this Court should circumvent the recognized rules established by the Supreme Court regarding habeas petitions in order to hear his claims, such an action is beyond the purview of this Court.

[10] As set forth above, this claim would not provide cause to excuse his procedural default. *Wallace*, 570 Fed. Appx. at 453.

[11] Although Petitioner claims he was actively misled, the record and Petitioner's own actions belie this allegation. Petitioner's intent to have counsel removed based on her waiver of his claims and continued requests for additional briefing demonstrate that he was likely well aware that his claims had been abandoned on appeal.

them as abandoned. **[*31]** While Petitioner does point to *Maples v. Thomas*, which holds that procedural default may be excused when counsel has actually abandoned petitioner, Petitioner has not demonstrated by clear and convincing evidence that counsel actually or effectively abandoned him where she filed a timely, thorough 83-page brief on his behalf and is not alleged to have missed court appearances or been otherwise unprepared. *See Maples v. Thomas*, 565 U.S. 266 (2012). This Court declines to hold that counsel's professional judgment that her client would be better served by winnowing his claims constitutes abandonment in this context. *See Jones v. Barnes*, 463 U.S. 745 (1983).

Second, Petitioner cites to *McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013), which recognizes "actual innocence as a gateway through which a petitioner may pass whether the impediment is a procedural bar or expiration of a limitations period" [Doc. 2 at6]. This Court assumes that by doing so Petitioner is suggesting that his new evidence claims should be admitted under the "fundamental miscarriage of justice" exception to procedural default. *Dretke*, 541 U.S. at 388. Petitioner raises two claims of new evidence: (1) new scientific evidence of actual innocence regarding evidence of the common fire control mechanism's ability to accidentally discharge, and (2) evidence that the Petitioner was denied his 14th Amendment Right to Due Process because the post-conviction process discriminates against "Afro American" petitioners [Doc. 1].

A habeas petitioner asserting a claim of actual innocence must establish that "in light of new [credible] evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 329. The Court must determine whether Petitioner has shown actual innocence, by clear and convincing evidence, such that his conviction represents a "fundamental miscarriage of justice." *See Sawyer v. Whitley*, 505 U.S. 333, 339 (1992). Here, the Court is concerned with "factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998).

[*32] Petitioner first alleges that the evidence adduced at post-conviction hearings by Mr. Belk is new scientific evidence of his actual evidence [Doc. 1]. While Petitioner did raise new evidence, which was not raised at trial, and there are no issues alleged regarding the reliability of this evidence, Petitioner cannot show that no reasonable juror would have found him guilty beyond a reasonable doubt if provided with Mr. Belk's testimony. *See House*, 547 U.S. at 536. Mr. Belk's testimony that the common fire control mechanism was defective in design did not definitively establish that Petitioner's gun discharged without a trigger pull; he merely suggested that it was possible. Even given this information, the jury would have had to believe the testimony of Petitioner that accidental discharge is factually what happened, and discredit the contradicting proof presented by Agent Fite and even the testimony of Mr. Belk that he was not able to induce Petitioner's rifle to fire without a trigger pull.

Both credibility determinations and determinations of value are questions for the jury and this Court will not now speculate that no reasonable juror could have found the State's evidence more credible than the testimony of Mr. Belk. *See United States v. Griffin*, 382 F.2d 823, 829 (6th Cir. 1967).

With regards to Petitioner's second new-evidence claim, the Court finds that even if Petitioner's information regarding systematic discrimination in the post-conviction process was determined to be "new evidence" and presented to be reliable, this would not be evidence of Petitioner's factual innocence. In other words, Petitioner could not show that because some habeas petitioners face discrimination within the justice system, that no reasonable juror could have found him guilty beyond a reasonable doubt.

Petitioner has failed to establish cause to excuse procedural default on this ground or any other and his procedurally defaulted claims will not now be considered on their merits. Accordingly, only Petitioner's non-defaulted claims will be discussed in turn. **[*33]**

C. Merits Analysis

If a claim is exhausted before the state courts, and not procedurally defaulted, the federal court may then evaluate the merits. Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), codified in 28 U.S.C. §2254, *et. seq.,* a district court may not grant habeas corpus relief for a claim that a state court adjudicated on the merits unless the state court's adjudication of the claim:

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

28 U.S.C. § 2254(d)(1) and (2). This standard is "intentionally difficult to meet." *Woods*, 135 S. Ct. at 1376 (quotation marks omitted).

"A state court's decision is 'contrary to' clearly established law 'if the state court arrives at a conclusion opposite to that reached by the Court on a question of law or if the state court decides a case differently than the Court has on a set of materially indistinguishable facts." *Wallace*, 570 Fed. Appx. at 450 (quoting *Williams*, 529 U.S. at 413). Under the "unreasonable application clause," the proper inquiry is whether the state court's decision was "objectively unreasonable," and not simply erroneous or incorrect. *Williams*, 529 U.S. at 409 – 11. As to a claim that the state court's decision was based on an unreasonable determination of the facts, the AEDPA requires heightened respect for state factual findings. *Herbert v. Billy*, 160 F.3d 1131, 1134 (6th Cir. 1998). Where the record supports the state court's findings of fact, those findings are presumed to be correct unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). **[*34]**

All of Petitioner's remaining claims are based on the ineffective assistance of trial or appellate counsel. The Sixth Amendment entitles criminal defendants to the "reasonably effective assistance" of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish that counsel's assistance was constitutionally ineffective, a defendant must prove (1) that counsel's performance was sufficiently deficient that he was no longer "functioning as the 'counsel' guaranteed under the Sixth Amendment[,]" and (2) that his "deficient performance prejudiced the defense… so as to deprive the defendant of a fair trial" and undermined the reliability of trial results. *Id.* To prove deficiency, the defendant must show "that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. To prove prejudice, the defendant must show that he has been prejudiced by his counsel's deficiencies by showing "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

The Supreme Court has clarified that when a federal court reviews a state court's application of *Strickland*, which sets its own high bar for claims, "establishing that a state court's application was unreasonable under §2254(d) is all the more difficult." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)). "In those circumstances, the question before the habeas court is 'whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard.'" *Id.*; *see Jackson v.*

Houk, 687 F.3d 723, 740-41 (6th Cir. 2012) (stating the "Supreme Court has recently again underlined the difficulty of prevailing on a *Strickland* claim in the context of habeas and AEDPA . . . .").

1. Weapons Expert Testimony

Petitioner alleges that his trial counsel was ineffective for failing to adduce expert testimony relating to a defective firing mechanism design, present in Petitioner's rifle, that could **[*35]** have caused the gun to discharge accidentally [Doc. 3 at 6 – 25]. Respondent contends that trial counsel was not ineffective because he did plan and employ tactics to introduce evidence on this point and to controvert the evidence offered by the State [Doc. 15 at20 – 23]. The Court finds that trial counsel was not ineffective in this respect.

The central theory of the defense was that the Petitioner's rifle malfunctioned and fired without Petitioner pulling the trigger. The State presented a firearms expert, Agent Fite, who stated that after testing Petitioner's rifle he concluded that the gun could not possibly fire without the trigger being pulled or the gun being broken [Doc. 14 Attachment 60 at13]. Trial counsel attempted to counter this testimony by first, discrediting Agent Fite as someone who believed himself infallible and second, by attempting to cross-examine Agent Fite on issues present with the Remington Model 742, a precursor to Petitioner's rifle, although the trial court prohibited this line of questioning. *Kendrick*, 454 S.W.3d at 475 – 476.

At post-conviction, trial counsel conceded that he did not interview the State's firearms expert prior to trial and did not recall conducting any legal or factual investigation into the gun's propensity to fire without the trigger being pulled and did not look for an expert on this matter. *Id.* at 476. Instead, counsel planned to rely on the expected testimony of Officer Steve Miller to contradict the proof presented by the State. *Id.* at 477. Officer Miller testified that he retrieved the rifle from where Petitioner had thrown it and, when later removing the gun from the trunk of his police vehicle, shot himself in the foot. *Id.* Before trial, Officer Miller made definitive statements that his finger was not on the trigger, but at trial testified that he could not recall where his finger had been, although he did physically demonstrate how he believed himself to be holding the gun, notably without his finger on the trigger, and stated that officers are thoroughly trained to not touch triggers of weapons they are not intending to shoot. *Id.* **[*36]** At the post-conviction hearings, Petitioner presented the testimony of Henry Belk, Jr., a firearms expert who testified that the common fire control mechanism, a trigger mechanism in the Remington 7400 model weapon in question, had malfunctioned in several cases and caused guns to fire without the trigger being pulled. *Id.* at 464. Mr. Belk testified that he first became aware of the problem in 1970, but did not first serve as an expert on this issue until 1994, and had since provided expert testimony in several courts regarding this defect, both in Remington 7400 models and other models containing the defective mechanism. *Id.* He also testified that he

had been unable to cause Petitioner's rifle to malfunction. *Id*. Still, the post-conviction trial court noted that his testimony would have lent credence to Petitioner's case at trial. *Id*. at 476.

On Petitioner's second appeal of the denial of his post-conviction petition, the TCCA reversed the post-conviction trial court's holding on this issue. *Kendrick*, 2013 Tenn. Crim. App. LEXIS 539. The TCCA found that trial counsel's performance fell "below an objective standard of reasonableness when trial counsel failed to adduce expert testimony about the rifle's defective trigger mechanism, which was known to cause accidental shootings, to rebut the State's expert testimony that the rifle could only be fired by pulling the trigger[.]" *Kendrick*, 454 S.W.3d at 476 (citing *Kendrick*, 2013 Tenn. Crim. App. LEXIS 539). The TCCA found this issue prejudicial, particularly because they found that it was reasonably likely that the jury would have convicted Petitioner of a lesser degree of homicide, which satisfied the test for prejudice. *Kendrick*, 2013 Tenn. Crim. App. LEXIS 539 at *51.

The TSC, however, later reversed the TCCA's holding, finding that counsel's decision to "construct his 'accidental firing' defense" around anticipated testimony from Officer Miller claiming that the specific gun in question did actually accidentally discharge was reasonable. *Kendrick*, 454 S.W.3d at 477. The TSC went through a lengthy analysis of both *Harrington* and **[*37]** *Hinton,* each of which apply the *Strickland* test for ineffective assistance of counsel. *Kendrick v. State*, 454 S.W.3d at 468 – 475 (analyzing

Harrington, 562 U.S. 86; *Hinton v. Alabama*, 571 U.S. 263 (2014); *Strickland* 466 U.S. 668). The court notes that *Harrington* held that defense counsel was not deficient for failing to hire expert testimony, even though such testimony may have been useful, when counsel had a reasonable strategic reason for doing so and took other measures to counteract the State's evidence. *Id*. Notably here, the court points out that in *Harrington,* counsel's defense strategy not working as well as planned does not prove counsel incompetent. *Id*.

The court then discussed *Hinton* which found that in some cases, the defense strategy relies on expert evidence and hiring one will be necessary. *Id*. However, the court notes that even in *Hinton*, counsel was held deficient for failing to appropriately research his ability to hire an expert, not for failing to hire an expert. *Id*. The TSC found that "[d]espite Sergeant Miller's memory lapse, defense counsel's performance on this issue indicated 'active and capable advocacy,'" under *Harrington v. Richter*, because at the time counsel was forming his trial strategy it was reasonable to rely on this testimony, which was "not speculative[] and… did not involve other weapons" to refute Agent Fite and cast reasonable doubt on Petitioner's guilt. *Id*. at 477. The TSC further stated that while it was likely best practice for trial counsel to seek out expert proof, failing to do so was not objectively unreasonable when the defense did not hinge on expert proof. *Id*. Additionally, the TSC pointed out that although Mr. Belk's testimony may have been helpful, it is doubtful

that in 1994 counsel would have been given permission to hire an expert,[12] that it remained unclear whether Mr. Belk could have been found at the time of Petitioner's trial, and **[*38]** lastly that even if Mr. Belk had been called, his testimony would not have been as useful when he had not yet testified about the three instances of the 7400 model rifle misfiring. *Id*. at 476. The Court cannot find that the TSC unreasonably applied federal law on this claim. The TSC reasonably applied *Harrington* and *Hinton* to find that counsel was not constitutionally deficient, because he had a reasonable strategy to introduce proof regarding Petitioner's rifle's capacity for accidental discharge and did attempt to undermine the expert proof presented by the State. Petitioner has also not demonstrated by clear and convincing evidence that Mr. Belk's testimony could have been found at the time of his trial. Because the case here did not rely solely on expert testimony where the State presented much additional evidence, including eyewitness testimony, counsel was not ineffective for failing to hire an expert. While Mr. Belk's testimony would certainly have been useful at trial, this Court does not find that it was unreasonable for the TSC to conclude counsel was not deficient for failing to raise it. Petitioner is therefore not entitled to §2254 relief on this claim.

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[12] Tennessee did not recognize until 1995 "that indigent non-capital criminal defendants had a constitutional right to expert psychiatric assistance," and even then it was limited to psychiatric experts. *Kendrick v. State*, 454 S.W.3d 450, 476 (Tenn. 2015) (citing *State v. Barnett*, 909 S.W.2d at 430 n.7).

2. Excited Utterances Exception for Officer Miller's Testimony

Petitioner claims that trial counsel was ineffective for failing to utilize the Tennessee Rule of Evidence regarding excited utterance hearsay exceptions to introduce the prior statements of Officer Steve Miller [Doc. 3 at 25 – 40].[13] Respondent contends that even if Officer Miller's statements were excited utterances, it does not necessarily follow that counsel was ineffective for failing to introduce them under this theory [Doc. 15, at 23]. Because counsel was thorough in his attempts to introduce Officer Miller's prior statements and impeach the witness, counsel's representation at trial was not deficient. **[*39]** When attempting to remove Petitioner's rifle from the trunk of his vehicle, Officer Steve Miller shot himself in the foot. *Kendrick*, 2013 Tenn. Crim. App. LEXIS 539, at *16. After the accident, Officer Miller made statements to Officers Holbrook, Sims, and Gann that he knew his finger was not near the trigger when the gun discharged. *Id*. at *16 – 20. However, at trial, Officer Miller testified that he could not recall where his finger was. *Id*. at *39 – 40. On cross-examination, trial counsel attempted to elicit from Officer Miller that his finger was not on the trigger. *Kendrick*, 454 S.W.3d at 460 – 461. While Officer Miller never used those words, and his answers did seem less than cooperative, trial counsel had him demonstrate how

[13] Petitioner also claims that this is in violation of the Sixth Amendment right to present a defense and a violation of the confrontation clause, however, those claims are amongst those procedurally defaulted, and will not be considered.

he recalled picking up the gun, where Officer Miller demonstrated that his finger was not near the trigger. *Id*. Counsel also led Officer Miller to concede that he knew the weapon was likely loaded, and had been trained for many years to not pick up any gun with his finger near the trigger, much less a loaded one. *Id*. Trial counsel also attempted to introduce Officer Miller's prior statements under the "prior inconsistent statements" rule, although the trial court did not allow him to do so. *Kendrick*, 2013 Tenn. Crim. App. LEXIS 539, at *9 – 12.

Petitioner contends that because Officer Miller's statements were made while "under the stresses-pain of the event … [and] bear their own indicia of reliability," they could have been introduced under the excited utterances exception to hearsay and "been used as truth of the matter asserted" [Doc. 3 at 26]. He claims that failure to include this information was prejudicial because the statement that Officer Miller's hands were nowhere near the trigger was crucial for the defense [Doc. 3 at 27]. Because the theory of defense was accident, Petitioner contends that the gun had discharged without Petitioner's finger on the trigger and without any intent or action on his part, and the only evidence outside of Petitioner's word that could have controverted the proof of the State's expert were the words of Officer Miller [Doc. 3 at 27]. **[*40]** Both the TCCA and TSC addressed this claim. On his second appeal of the dismissal of his post-conviction petition, the TCCA found that trial counsel's performance fell below an objective standard of reasonableness when he failed

to seek the admission of Officer Miller's statements under the excited utterance hearsay exception. *Kendrick*, 2013 Tenn. Crim. App. LEXIS 539, at *50. They found that this error was prejudicial as it was reasonably likely that given this statement, the jury would have convicted Petitioner of a lesser degree of homicide. *Kendrick*, 2013 Tenn. Crim. App. LEXIS 539, at *50. Accordingly, the TCCA used this as the second ground on which to reverse the holding of the post-conviction trial court and vacate Petitioner's sentence. *Id*.

However, the TSC reversed, concluding that although the statements may have been admissible under excited utterance doctrine, Petitioner could not establish that trial counsel was deficient for failing to admit them under this rule because counsel took several alternative measures to demonstrate that Officer Miller had not pulled the trigger. *Kendrick*, 454 S.W.3d, 480 – 81. The court noted that, in this context, the question was not whether the statements were admissible, but rather whether counsel was objectively unreasonable under *Strickland*, given the presumption that counsel was adequate. *Id*. at 480 (citing *Strickland*, 466 U.S. at 688 and *Mobley*, 397 S.W.3d at 80 – 81). The court found that while in some circumstances the "lack of familiarity with court rules may provide grounds for a finding of ineffective assistance of counsel," here, counsel closely cross-examined Officer Miller, attempted to refresh his memory, attempted to use the incident

reports to impeach his testimony,[14] emphasized during both cross-examination and closing argument that Officer Miller's finger was not near the trigger when he demonstrated his own posturing with the rifle, and elicited from Officer Miller that he was unlikely to pick up a rifle with **[*41]** his finger on the trigger, due to his training. *Id*. at 480 – 481. The TSC found that Petitioner being able to point to one tactic counsel did not employ to introduce this evidence would not overcome the presumption that counsel's representation was adequate. *Id*. at 481. The TSC further clarified that even if it had found deficiency by counsel, there was such sufficient other evidence, both for the defense and the prosecution, that it could not determine that this one deficiency would undermine confidence in the verdict. *Id*. at 481 (citing *Strickland*, 466 U.S. at 694). As with all issues of ineffective assistance of counsel on habeas, there is double deference here. *Harrington*, 562 U.S. at 105. The Court presumes both that counsel's representation was adequate and that the court's finding of such is reasonable. *Id*. Even if Officer Miller's statements were admissible under the excited utterances exception, such failure on behalf of trial counsel must be weighed against the many other actions counsel took to introduce this same testimony. Claims of ineffective assistance of counsel are reserved for those errors so clear and egregious that counsel was no longer functioning as guaranteed under the Sixth Amendment. *Strickland*, 466 U.S. at

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[14] The TSC noted that these attempts failed due to the trial court's error, not counsel's.

687. As detailed above, counsel took painstaking measures to introduce this important defense evidence to the jury and to undermine the proof adduced by the State. Petitioner cannot then show that counsel deficiently served his adversarial function, for failing to use one tactic, such that the results of trial are undermined. *See Id*. The Court does not find that the state courts unreasonably applied federal law to this claim; therefore, Petitioner is not entitled to §2254 relief on this claim.

3. Prior Convictions

Petitioner contends that counsel was ineffective because he "opened the door" to Petitioner's prior convictions, which were otherwise inadmissible, and failed to request a limiting instruction after having done so [Doc. 3 at 40 – 46]. Respondent holds out that although this was likely error on behalf of trial counsel, Petitioner cannot establish prejudice [Doc. 15 at 35 – 39]. **[*42]**

At trial, counsel questioned Petitioner regarding his criminal history. He asked Petitioner:

> Q. Do you have any history of violent crime?
>
> A. No, sir.
>
> Q. I almost forgot – do you have any history of any convictions for any kind of crime?
>
> A. Returned checks.

Kendrick v. State, No. E2011-02367-CCA-R3-PC, 2015 Tenn. Crim. App. LEXIS 887, at *68. Before trial, counsel had prepared Petitioner for his testimony and told Petitioner that only his conviction for writing bad checks was admissible. *Id*. Then on

cross-examination, the State asked Petitioner about an additional conviction for driving under the influence, which Petitioner admitted to, as well as a conviction for possession of marijuana arising from the same incident. *Id*. at *69. The State through cross-examination also established for the jury that as a result of these convictions, Petitioner was driving without a valid driver's license the night of the shooting. *Id*. Trial counsel objected to this line of questioning but was overruled by the trial court. *Id*. Petitioner likewise complained about the trial court's allowance of this line of questioning on direct appeal, but the TCCA held that trial counsel "opened the door" to this type of impeachment given the form of his question and Petitioner's response regarding only some of his prior convictions. *Id*. at *69 – 70.

Petitioner raised this issue on post-conviction as an ineffective assistance of counsel claim, both for opening the door to the prior convictions and failing to request a limiting instruction after doing so [Doc. 3 at 40 – 46]. The TCCA held that although counsel was deficient with regards to the form of the question and should have requested a limiting instruction, it agreed with the post-conviction court that these errors did not prejudice Petitioner. *Id*. at *71. The TCCA noted that trial counsel attempted to limit the damage during closing arguments by explaining that the convictions do not contribute to Petitioner's honesty and truthfulness and alerting the jury to the **[*43]** fact that Petitioner actually volunteered testimony about an additional charge. *Id*. at *71 – 72. Additionally, the TCCA found that Petitioner's

defense did not rely solely on his own credibility, rather it was better supported by the fact that Officer Miller also had an incident with the same rifle that strongly indicated the rifle misfired. *Id*. at *72. Citing *Strickland*, the TCCA held that because there was substantial other evidence against Petitioner, including eyewitness testimony, the TCCA could not find that there was a reasonable possibility but for this error that the result of the proceeding would have been different. *Id*. at *75.

The Court cannot find that the TCCA unreasonably applied *Strickland* with regard to this error and Petitioner is not entitled to relief on this claim. While Petitioner correctly points to case law that finds that counsel may be deficient for introducing inadmissible prior convictions, here the state court did not find that counsel was not deficient, but rather that petitioner was not sufficiently prejudiced by counsel's error. *See Byrd v. Trombley*, 352 Fed. Appx. 6 (6th Cir. 2009). Petitioner must show more than that counsel's error has "some conceivable effect on the outcome," he must show that but for counsel's error, it is reasonably likely that the outcome may have been different. *Strickland*, 466 U.S. at 694. The TCCA held that although Petitioner's credibility may have been damaged, neither his defense, nor the prosecution, relied only on his credibility or lack thereof. *See Byrd*, 352 Fed. Appx. 6. There was ample evidence in this case, both for and against Petitioner, that did not turn on Petitioner's credibility and the Court cannot find that there was no reasonable basis on which the state

court could determine that Petitioner was not sufficiently prejudiced to undermine the reliability of the results of his trial. *See Harrington*, 562 U.S. at 105.

4. Testimony of Martha Maston

Petitioner claims that trial counsel was deficient for failing to properly object, request curative instructions, or seek other curative measures in relation to the prosecution's use of Martha **[*44]** Maston as a rebuttal witness, without having provided notice, and for failing to offer surrebuttal to Ms. Maston's testimony [Doc. 3 at 46 – 59].

At trial the prosecution called Martha Maston, an airport security officer, to testify. *Kendrick*, 2015 Tenn. Crim. App. LEXIS 887, at *100. Ms. Maston attested that she arrived at the scene and removed Petitioner's children from their car seats and when she did Petitioner's four-year old daughter wrapped her arms around Maston's neck and while crying said that she "told daddy not to shoot mommy but he did and she fell." *Id*.

Petitioner complains that counsel did not properly object or request curative measures regarding: (1) that he was not provided notice of Ms. Maston's testimony in violation of the parties' open file policy agreement and (2) that her testimony was offered in rebuttal. He also alleges that counsel was deficient for failing to raise surrebuttal testimony on this point [Doc. 3 at 46 – 59].[15] Under these complaints,

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[15] Petitioner also attempts to raise that this testimony was brought after a violation of the sequestration order, but that

Petitioner appears to argue not that counsel did not object to this testimony, which would be factually incorrect, but instead argues that counsel's ineffectiveness was undergirded by a misunderstanding of the law that led counsel to incorrectly and ineffectively challenge this testimony [*Id.*]. He argues that counsel demonstrated a misunderstanding of the law when he: attempted to claim that the testimony did not fall within the excited utterances hearsay exception, argued that the testimony was not proper rebuttal, argued the prejudice presented by the testimony and not the prejudice created by the lack of notice, and suggested to the jury that they could discredit this testimony without the court offering a similar instruction. Petitioner further submits that trial counsel was ineffective for failing to move for various curative measures, particularly "specific performance of the prosecution's twenty-two year plea offer" [*Id.*]. **[*45]**

Regarding the "surprise" nature of Ms. Maston's testimony, the TCCA on direct appeal found that Petitioner was not prejudiced by the late notice, that the State was not granted undue advantage, and that because Ms. Maston's testimony had been discovered late, the State had not acted in bad faith. *Kendricks*, 947 S.W.2d at 883. The TCCA agreed with Petitioner, however, that Maston should have been called as part of the State's case-in-chief and not in rebuttal, yet still found that Petitioner was not prejudiced by the order in which Ms. Maston's testimony was adduced.

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claim is among his procedurally defaulted claims and will not be considered here.

Id. Finally, the court determined that because this testimony should have been part of the State's case-in-chief, no limiting instruction regarding the use of this testimony was needed. *Id*. On post-conviction appeal, the TCCA held that the issues regarding Martha Maston's testimony had been addressed on direct appeal, and were therefore not the proper subject for post-conviction relief. *Kendrick*, 2015 Tenn. Crim. App. LEXIS 887, at *103.

The TCCA went on to note that although Petitioner alleges that trial counsel was deficient for failing to request the State be ordered to execute specific performance of the plea agreement for the violation of the open-file agreement, Petitioner pointed to no case law, and the court found none, "where specific performance of a rejected plea offer was ordered following a breach of the prosecution's open-file discovery agreement." *Id*. at *104. The TCCA also determined that the post-conviction court had credited trial counsel's testimony that the statement of Petitioner's daughter was "ambiguous and not necessarily inconsistent with a theory of accident," and thus declined to reweigh or reevaluate this issue to establish prejudice. *Id*.

The TCCA also found that Petitioner appears to argue that trial counsel should have called him to testify to contradict Ms. Maston's testimony and minimize the damage done by her statement. *Id*. at *104 – 105. However, it determined the testimony given by Petitioner's daughter was already questionable and Petitioner had already contradicted her statements with his own **[*46]** testimony. *Id*. at

105. The TCCA found that they could not say that trial counsel was deficient for failing to call Petitioner to testify to a "fairly innocuous statement in surrebuttal." *Id.*

Petitioner points to state cases pertinent to the principle that Tennessee disfavors "surprise" witnesses [Doc. 3 at 49]. However, the question before us is whether there is any reasonable argument by which the state court could have determined that trial counsel was not deficient in his handling of Ms. Maston's testimony. *See Harrington*, 562 U.S. at 105. The TCCA found that trial counsel did challenge the lack of notice of this testimony, but the court did not find prejudice resulting from Petitioner's lack of notice or the fact that Maston's testimony was characterized as rebuttal. Without more, the Court will not hold that counsel is objectively unreasonable, here, for making a losing argument.

Under the Tennessee Rules of Criminal Procedure, Petitioner was not entitled to discovery of the contents of Ms. Maston's expected statement and he fails to show how he was prejudiced by not knowing her identity. Tenn. R. Crim. P. 16(a)(2). He likewise fails to show how he was prejudiced by Ms. Maston's testimony being provided in rebuttal. When faced with the surprise witness, allowed by the court, counsel cross-examined her and sought to undermine her testimony. The Court will likewise not find that counsel was no longer functioning as counsel within the adversarial process for failing to request an order for specific performance of the plea deal. Petitioner points to no case law ordering such performance for a

breach of open file policy and counsel is not deficient for failing to file a motion or assert a claim which has no merit. *See O'Hara v. Brigano*, 499 F.3d 492, 506 (6th Cir. 2007). Because counsel was not deficient and Petitioner has not demonstrated prejudice, he is not entitled to relief on this claim. **[*47]**

5. Testimony of Lennell Shepheard

Petitioner argues that trial counsel was ineffective for failing to object to Lennell Shepheard's testimony as a discovery violation, failing to impeach Shepheard, and failing to object to Shepheard's reference of information outside the record or request a limiting instruction regarding the testimony of Lennell Shepheard [Doc. 3 at 67 – 75]. The Court finds that trial counsel was not ineffective.

At trial, Lennell Shepheard, an eyewitness who was acquainted with the victim through their respective jobs, testified that after hearing the gunshot, he looked outside and saw Petitioner standing over the victim's body shouting "I told you so" roughly six times. *Kendrick*, 2015 Tenn. Crim. App. LEXIS 887, at *76. Mr. Shepheard's previous statements provided in discovery did not contain this "I told you so" language. *Id*. Mr. Shepheard then stated that he made eye contact with the Petitioner and saw the Petitioner reach for the rear passenger-side car door as if to go for the rifle inside. *Id*. Trial counsel cross-examined Mr. Shepheard on these statements and elicited Mr. Shepheard's agreement that during a conversation prior to trial, Mr. Shepheard did not tell trial counsel about any threats and stated that he did not view any aggressive

behavior, that the victim was not in fear of the Petitioner, and that he did not hear the couple arguing. *Id*. at 76 – 77.

Petitioner claims that Mr. Shepheard's change in testimony was a violation of the rules of discovery or the open file policy put into place by the parties and that trial counsel erred in failing to object or request curative measures [Doc. 3 at 67 – 75].[16] Trial counsel testified at post-conviction hearings that he had not been made aware of Mr. Shepheard's material change in testimony as he would have expected, given the open file agreement in place, and that the first **[*48]** time he heard about Petitioner's "I told you so" statements was during the direct examination of Mr. Shepheard. *Id*. at 78. The TCCA held that under the Tennessee Rules of Criminal Procedure, defendants are not entitled to the statements of state witnesses and that even if counsel had objected to his lack of notice with regards to this testimony, there is no guarantee that the trial court would have issued curative measures. *Id*. at *79. The court further noted that counsel thoroughly cross-examined Mr. Shepheard on this variation in testimony and ensured that the jury knew that the "I told you so" statement was not included in Mr. Shepheard's prior statements. *Id*. at *80. The court held that Petitioner did not demonstrate what more counsel could have done to discredit Mr. Shepheard had he been given more time. *Id*. at *81 – 82.

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[16] Petitioner's claims regarding the "breach" of the open-file policy are discussed in section (IV)(C)(6) below, his claims regarding the discovery violations will be discussed here.

Petitioner next claims that trial counsel erred in not using Detective Mathis's interview of Lennell Shepheard, which was transcribed, to contradict the evidence offered by Shepheard at trial [Doc. 3 at 67 – 75]. Trial counsel attempted to read part of Mr. Shepheard's previous statement during cross-examination, presumably to highlight the inconsistencies between his trial testimony and the statements he made to Detective Mathis. *Id*. at *84. The State objected and claimed that the statements were "consistent," the trial court made no ruling, and defense counsel continued to read from the statement. *Id*. When directly asked, Mr. Shepheard said that he did tell Detective Mathis about the "I told you so" statement and counsel again tried to either impeach or "refresh Shepheard's memory" to which the State again objected. *Id*. at *84 – 85. During a bench conference on this issue, the trial court said that the failure to make a statement is not "inconsistent" to making that statement later and defense counsel said he would simply call Detective Mathis regarding the statement. *Id*. at *86. However, he never called Detective Mathis to testify on this point. *Id*. at *87. **[*49]**

On post-conviction, the TCCA points out first that trial counsel did attempt to impeach Mr. Shepheard with his prior statement, but was not allowed to by the trial court. *Id*. at *87 – 88. The TCCA found that even after this tactic was prohibited, counsel performed a thorough cross-examination and even noted the deficiencies with the testimony in his closing arguments. *Id*. at *88 – 90. Petitioner argues

that counsel should have called Detective Mathis to contradict Shepheard and was ineffective for failing to do so, and also argues, in the alternative, that counsel should have obtained the Mathis report for impeachment purposes and was ineffective for failing to do so [Doc. 3 at 67 – 75]. However, the TCCA noted that Mathis was not even called to the post-conviction hearings and had still given no testimony. *Id*. at *88. It applied Tennessee law to clarify that it could not speculate on the potential contents of Mathis's testimony and whether it would have been favorable to petitioner and thus found that Petitioner had not established that trial counsel was deficient. *Id*. at *90 – 91. The TCCA then ruled that Detective Mathis's report was redundant given Detective Rawlston's testimony about the same information, and that counsel was not deficient for seeking it out. *Id*. at *90.

Finally, Petitioner complains that trial counsel erred when he did not object or request curative measures, including a limiting instruction, when Mr. Shepheard testified that he spoke to Investigator Legg, and testified to the substance of that conversation, when such was outside of evidence [Doc. 3 at 67 – 75]. At trial, Mr. Shepheard testified that he spoke to Mr. Legg, an investigator from the district attorney's office, roughly one week before trial and that he told Mr. Legg about the "I told you so" remarks. *Id*. at *93. Counsel did object based on the Jenck's Act, which requires the government to produce written reports on statements made by government witnesses, because the State had not provided any such statement to the defense. *Id*. at

*94. Mr. Shepheard said that Mr. Legg took notes during his statement but he was not sure whether the **[*50]** interview had been transcribed in writing or otherwise recorded. *Id*. Later, Investigator Legg testified outside of the jury's hearing that there were no written or recorded notations of his interview, which ended the discussion as the Jenck's Act was no longer applicable. *Id*. at *94 – 95.

Petitioner alleges that trial counsel was ineffective for failing to request a limiting instruction, instructing the jury that as a prior consistent statement, "the week-old statement [to Mr. Legg] could only be used in connection with credibility" [Doc. 3 at 67 – 75]. The TCCA held that Mr. Shepheard's testimony was a prior consistent statement and served permissible rehabilitation purposes, however, it also noted that the deficiencies with this statement, including the fact that it was only made one week before trial, were also made clear to the jury. *Id*. at *96 – 97.

The trial court did not issue specific jury instructions on prior consistent statements, but the jury did receive instructions on prior statements generally, outlining their impact on credibility and thus the weight the jury can give, or not give, to testimony. *Id*. at *97 – 99. The TCCA found that to hold that trial counsel's failure to request a limiting instruction on this matter was deficient would be impermissibly judging counsel's representation in hindsight. *Id*. at *99. The TCCA held that counsel was not deficient, because requesting this instruction could have emphasized the testimony, to the

detriment of Petitioner, and counsel took many other measures to introduce the evidence that Mr. Shepheard's "I told you so" testimony was only delivered at the eleventh hour. *Id.*

To prevail on these claims, Petitioner would have to demonstrate that the State court's finding that counsel was not constitutionally ineffective, even given the deference granted to counsel's actions, was not simply incorrect, but objectively unreasonable. *Harrington*, 562 U.S. at 105. Mr. Shepheard's testimony did indeed raise many issues for the defense, both in its **[*51]** unexpected nature and through the difficulties counsel faced in impeaching Mr. Shepheard. However, it is evident from the record that trial counsel diligently attempted to advocate for his client in this regard, even though many of his attempts were thwarted. As clarified above, counsel had no legal basis to argue a discovery violation based on this change in testimony, he diligently attempted to impeach even after an incorrect ruling by the court, and attempted to limit Mr. Shepheard's testimony and his credibility. The Court will not find that counsel failed to serve his adversarial role where he took extensive measures to introduce evidence and contradict the proof offered by the State merely because such attempts were unsuccessful. Petitioner is not entitled to relief under §2254(d) on this set of claims.

6. Bad Faith Use of Open File Policy

Petitioner alleges that both trial and appellate counsel were ineffective for failing to object or request curative measures, again including specific

performance of the State's previous plea deal,[17] regarding the State's "bad faith" use of its open file policy, intended to induce him to waive his preliminary hearing, which he did, and to interfere with his trial [Doc. 3 at 59 – 67]. Petitioner claims that the State withheld the identity of Ms. Maston, whose name was not on the State's witness list, and the changes in the statements or expected testimony by Officer Miller and Mr. Shepheard, which led to the ineffective assistance of his counsel at trial, appeal, and during his plea deal, as counsel did not have all of the facts necessary to prepare for trial or to properly advise Petitioner on the favorability of the plea deal [*Id.*].[18] Petitioner argues that whenever evidence **[*52]** came in that was not included in the open file discovery, counsel should have moved for specific performance of the plea deal or other curative measures [Doc. 3 at 66]. As set forth above, on direct appeal, the TCCA concluded that Petitioner failed to show that he was prejudiced through the lack of disclosure of Maston as a witness because trial counsel was able to thoroughly cross-examine Ms. Maston and Petitioner did not indicate what more trial counsel could have done if he had known about

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[17] As discussed above, specific performance of a plea agreement has been used in Tennessee as a remedy, but Petitioner has not demonstrated that it has been used for a breach of open-file discovery.

[18] Petitioner likewise attempts to raise that the prosecution executed its open file policy in bad faith where it did not include "documentary x-ray and 7400 schematic evidence" but these are amongst his procedurally defaulted claims and will not be considered.

her testimony earlier. *Kendricks*, 947 S.W.3d at 883. The TCCA also noted that it did not find bad faith or undue advantage on the State's part, because it credited the State's version of events that they did not know about Ms. Maston's potential testimony earlier. *Id*. at 884.

On post-conviction, the TCCA held that Petitioner had not pointed to any legal authority supporting that sanctions were required for the State's violation of the open-file policy. *Kendrick*, 2015 Tenn. Crim. App. LEXIS 887, at *79. The court, instead, applied Tennessee Rule of Criminal Procedure 16(d)(2), which provides that when a party fails to comply with discovery rules, the trial court has discretion to enter an order it deems just. *Id*. However, it also noted that Rule 16(a)(2) clarifies that statements made by state witnesses are not discoverable material. *Id*. The court cited a Tennessee case which held that even though a prosecutor had promised information and failure to supply it was "likely a breach of decorum," it was "not within the purview of the rules of procedure governing the practice of criminal law in Tennessee." *Id*. (citing *Matrin Becton v. State*, No. W2014-00177-CCA-R3-PC, 2015 Tenn. Crim. App. LEXIS 303, at *79 – 80.) With regards to the change in Mr. Shepheard's testimony not being disclosed to the defense before trial, the TCCA held that "[e]ven if trial counsel had objected to Mr. Shepheard's testimony on direct examination, there was no guarantee that the trial court would have issued any curative measures **[*53]** at all." *Id*. at 80. Neither the TCCA or the TSC analyzed the changes in Officer

Miller's testimony and counsel's effectiveness or ineffectiveness resulting from them under this framework.

Under the Tennessee Rules of Criminal Procedure, Petitioner was not entitled to the discovery of the statements of state witnesses or prospective witnesses. Tenn. R. Crim. P. Rule 16(a)(2). Although the state promised the entirety of its information, it is not a settled matter that the state courts would have sanctioned the State in any form for failing to provide it, particularly when these statements are not alleged to have been reduced to writing, and Tennessee jurisprudence seems to indicate they would not. *See Matrin Becton*, 2015 Tenn. Crim. App. LEXIS 303, at *79 – 80. Petitioner can show neither deficiency nor prejudice for counsel's failure to object to Petitioner not receiving information he was not legally entitled to. The Court cannot find that the state courts were unreasonable for failing to find counsel deficient for choosing not to make an argument with no clear basis in law. *See O'Hara*, 499 F.3d at 506. Petitioner additionally alleged prejudice because he claims he would have accepted the plea deal if given these pieces of State evidence. However, such prejudice would only be attributable to the State's withholding, not counsel where he likewise had no knowledge of the additional testimony that would be offered at trial. Even if counsel had objected, there was no legal basis, under similar facts, for reinstatement of the plea deal. For these reasons, the Court will not find that "there is [no] reasonable argument that counsel satisfied

Strickland's deferential standard." *Harrington*, 562 U.S. at 105.

7. Fifth Amendment Silence

Petitioner claims that counsel was ineffective for failing to object or request other curative measures for the prosecution's improper use of Petitioner's Fifth Amendment silence [Doc. 3 at 75 – 79]. Respondent holds out that Petitioner voluntarily agreed to speak with Detective **[*54]** Rawlston, which the detective was properly permitted to comment on, and that neither trial nor appellate counsel should be faulted for failing to bring a meritless claim [Doc. 15 at 55 – 60]. Neither trial nor appellate counsel were deficient on this issue.

On cross-examination, trial counsel attempted to elicit testimony from Detective Rawlston to suggest that the detective performed an inadequate and less than thorough investigation because he made up his mind on the scene about what had occurred. *Kendrick*, 2015 Tenn. Crim. App. 887, at *110. He asked Detective Rawlston whether he ever considered if the Petitioner's rifle was fired or discharged accidentally, and the Detective said no. *Id*. After which trial counsel went through the following line of questioning:

> Q. What about when the crime scene technician lifted the gun out of the trunk of his car and shot himself in the foot with it, saying all the time that his finger was nowhere near the trigger, what about that, that wasn't an issue you thought worthy of investigation?
>
> A. It has been investigated. . . .

Q. And there was never an issue as to whether or not the gun - that nobody fired the gun, that it went off accidentally?

A. No, sir. . . .

Q. Okay. Had you had your mind - you had your mind made up out there that night what happened didn't you?

A: I had, from the investigation received on the scene and from my investigation, had concluded what occurred, yes, sir.

Q. Okay. On the scene?

A. On the scene, the airport, forensics.

Q. So by the airport your mind was made up?

A. At that point, yes, sir.

Id. at 110 – 111. On redirect examination, Rawlston stated that the statements of the witnesses and "[Petitioner's] response… in the case after advising him of his rights" contributed to his decision. *Id.* at 111. Trial counsel objected that they had not been made aware of any such statement and the prosecutor stated that Detective Rawlston was planning to "say something to the effect of I hope this is a dream or something like that." *Id.* at 111 – 112. Trial counsel **[*55]** acknowledged he was aware of this statement. *Id.* at 112. Detective Rawlston then testified that after he advised Petitioner of his rights and Petitioner indicated that he understood, Petitioner agreed to speak with him and stated "I hope this is only a dream," but never indicated at that time that this was an accidental discharge. *Id.* Petitioner conceded both that he made this statement

and that he never told anyone at the airport that the shooting was an accident, but insisted he did not discuss anything else because of the "racial tension" at the airport. *Id*. at *113.

During closing arguments, the State highlighted Petitioner's failure to tell anyone that the shooting was an accident. *Id*. at *113 – 114. Specifically, the prosecutor said:

> Given the opportunity, did he tell anybody that it was an accident? He makes the [9-1-1] call. I think the testimony came in it's four minutes later… But when he does, what's the first communication? He knows he has been caught. I want to turn myself in, I just shot my wife. That's consistent with guilt. When asked why did you shoot your wife, finally, he didn't say it was an accident.
>
> Mark Rawlston, talked to Mark Rawlston, he said he hoped it was only a dream. It definitely wasn't a dream. Didn't say an accident. He didn't tell anybody it was an accident, didn't present it.

Id. Trial counsel then in his own closing tried to highlight both that Detective Rawlston had his mind made up by the time he reached the airport, and that while Petitioner did not tell the officers that the shooting was an accident, he also did not state that it was not and that his statement "I hope this is all a dream," is not actually inconsistent with the theory of accident. *Id*. at *114.

The TCCA held that while the "constitutional right to remain silent after arrest may not be exploited by the prosecution at trial[,]" Petitioner's

claim fails because he failed to establish by clear and convincing evidence that he invoked his right to remain silent after *Miranda* warnings. *Id.* at *115 – 116 (citing *Doyle v. Ohio*, 426 U.S. 610, 618 (1976)). The TCCA said that although Petitioner was under arrest, Detective Rawlston testified that Petitioner voluntarily agreed to speak with him, making Rawlston's statement a comment on Petitioner's decision to make a voluntary statement, rather than his silence. *Id.* at *116. The TCCA held that because there was no error, **[*56]** there was no deficient performance by trial counsel. The TCCA likewise held that there was no prejudice because the State did not overly emphasize Detective Rawlston's testimony during closing and the jury heard the 9-1-1 call where Petitioner did not say the shooting was an accident. *Id.* The TCCA also provided that because there was no error here, appellate counsel will also not be faulted for failing to raise this issue on appeal. *Id.*

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Criminal defendants have a right to remain silent and doing so cannot be used as substantive evidence of guilt. *Griffin v. California*, 380 U.S. 609, 615 (1965). Likewise, a defendant's silence during custodial interrogation may not be used to impeach the defendant's testimony at trial. *Doyle*, 426 U.S. 610 at 619. However, the *Doyle* rule does not apply where defendant waives his right to silence, expressly or implicitly, after *Miranda* warnings.

United States v. Lawson, 476 F. App'x 644, 650 (citing *United States v. Crowder*, 719 F.2d 166, 172 (6th Cir.1983) (en banc)); *see North Carolina v. Butler*, 441 U.S. 369, 373 (1979) (holding that a waiver may be inferred "from the actions and words of the person interrogated"). Relying on *Butler*, the Supreme Court has held that an uncoerced statement following *Miranda* warnings may constitute a valid waiver of the right to remain silent, when the accused understood his rights. *Berghuis v. Thompkins* ,560 U.S. 370, 385 – 86 (2010).

The Court cannot find that the TCCA unreasonably applied *Strickland* when it found that Petitioner's counsel was not deficient in this regard. Petitioner and the Respondent seem to be in accord that Petitioner was under arrest, had been advised of his rights, and understood those rights. Petitioner does not contest that he made a statement after that point, but seems to imply that anything he did not say during that statement could not be used in trial. To hold so would be a logical fallacy. Because Petitioner's statements were made after valid and understood *Miranda* **[*57]** warnings, they constitute an implicit waiver of his right to remain silent and do not fall within the *Doyle* prohibition. *See Berghuis*, 560 U.S. at 385 – 386. As such, Detective Rawlston was permitted to comment on the entirety of what Petitioner did say. Even without explicit comment by Detective Rawlston, anything Petitioner did not say could have been logically inferred. Even if counsel was found deficient, the Court could not find

prejudice sufficient to undermine the reliability of the trial.

Even without comments by Detective Rawlston or the prosecution about what Petitioner did not say, the jury was quite capable of discerning it on their own, particularly when the tape recorded 9-1-1 call made by Petitioner where he also did not indicate that the shooting was an accident, was before them. Neither trial nor appellate counsel will be faulted for failing to raise this meritless claim.

8. Calling of Divorce Attorney

Petitioner alleges that counsel was deficient for failing to make a reasonable decision in the calling of Petitioner's divorce attorney, Ken Lawson, and for failure to request a jury-out hearing regarding the waiver of attorney-client privilege regarding this witness [Doc. 3 at 79 – 82]. Respondent characterizes this claim as involving a credibility dispute between Petitioner, who claims he was not consulted on the decision to call Ken Lawson or on the waiver of attorney-client privilege, and trial counsel, who claimed that the calling of this witness and the waiver were a result of client's own decision [Doc. 15 at 29 – 32]. The Court cannot find that the TCCA's holding that trial counsel was not deficient was an unreasonable application of *Strickland*, or based on an arbitrary finding of fact, therefore Petitioner is not entitled to habeas relief on this claim.

At trial, counsel called Mr. Lawson who testified on direct-examination that the parties were divorcing amicably, and that it was a mutual decision based on irreconcilable differences. **[*58]** *Kendrick*, 2015 Tenn.

Crim. App. 887, at *54 – 55. He likewise testified that under the terms of the divorce Petitioner would be receiving child support from his wife, that he would have primary custody of the couple's children, and would retain most of the marital property. *Id*. at *55, *58. He likewise served as a character witness, stating that he believed Petitioner to be a "truthful and honest" person. *Id*. at *55.

Petitioner's complaints regarding Mr. Lawson's testimony began at cross-examination, where the State asked Mr. Lawson if he had discussed adultery or other grounds for divorce with the couple. *Id*. at *55. Mr. Lawson then asserted attorney-client privilege. *Id*. After his assertion, the parties held a bench conference at which trial counsel, prior to the court's ruling on privilege, stated "I'll make this easy for everybody. As long as I can do it in front of the jury, we'll waive the privilege. As long as I can announce it when counsel does it." *Id*. at *56. He then stated that he was comfortable doing so after conferring with Petitioner, at which point the court allowed counsel to waive privilege and the testimony to proceed. *Id*. at *56 – 57. At this point, Mr. Lawson admitted that he had discussed adultery grounds with Petitioner, who suspected that his wife was having an affair, although Lawson could not recall specifics about this conversation. *Id*. at *57. After this conversation, the couple attempted to reconcile, but their attempts failed and the couple agreed to file for divorce on the basis of irreconcilable differences. *Id*. at *57. Mr. Lawson testified that "[h]er affair had nothing to do with it at that point." Mr. Lawson

stated that although in initial conversations Petitioner's mood was "more of a combination of anger and discouragement[,]" that later on the Petitioner "seemed more resigned to it" and told Mr. Lawson that he did not harbor any "aggressive feelings" towards the victim. *Id.* at 57 – 58.

Petitioner first alleges counsel's deficiency in calling this witness, because had counsel performed better pre-trial investigation, he would have either not called Mr. Lawson, or limited **[*59]** his testimony to character only [Doc. 3 at 80]. Next, Petitioner claims that trial counsel waived his attorney client privilege without consulting him and erred in doing so, as it allowed the State to insinuate the shooting was motivated by suspicions of adultery, and that counsel should have requested a jury out hearing before agreeing to waive privilege [Doc. 3 at 80 – 82].

The TCCA first found that regardless of Petitioner's contentions, Mr. Lawson's testimony actually corroborated Petitioner's testimony regarding the divorce and the couple's accord in the matter, and further demonstrated that the death of his wife would be tangibly detrimental to Petitioner under the terms of the divorce. *Id.* at *60. The court clarified that the fact that some elements of this witness's testimony were less than favorable did not amount to the deficiency of counsel. *Id.* Further, the court noted that post-conviction hearings established that the calling of the divorce attorney and the waiving of attorney-client privilege was a strategic decision at least partially directed by Petitioner. *Id.* at *61. The TCCA then found that Petitioner failed to

demonstrate either deficiency of counsel or prejudice. *Id.*

The Court does not find that the TCCA unreasonably applied *Strickland* to determine that counsel was not deficient or made an arbitrary finding of fact in this regard. Counsel made a strategic decision to call this witness and to waive privilege. Due to the couple being in the process of divorce, motive could have been implied or naturally inferred with or without the testimony of Mr. Lawson. This witness had pertinent and useful information regarding lack of contention in the divorce, and thus lack of motive, which was important to the defense. Even if counsel knew of the prior adultery conversation between Petitioner and Mr. Lawson, the Court could not say that his professional decision that the benefit of this testimony outweighed any potential negatives is objectively unreasonable. Much less could the Court find that the state court had no reasonable basis for deciding so. Once Mr. Lawson had asserted privilege, it could have seemed to the jury **[*60]** that he was hiding something and counsel again made a strategic decision in order to soften any suspicions. Although Petitioner claims he was not consulted about such decisions, he has not demonstrated so by clear and convincing evidence. Petitioner is not entitled to habeas relief on this claim.

9. Calling Randall Leftwich

Petitioner claims that counsel was ineffective because he failed to fully investigate, interview, or call Randall Leftwich, Petitioner's cousin, to testify

[Doc. 3 at 82 – 86]. Respondent states that although Leftwich's testimony may have provided useful corroboration, it does not necessarily follow that counsel was deficient for failing to call him as a witness [Doc. 15 at 32 – 35]. The Court cannot find that the TCCA's finding that counsel was not deficient for failing to call this singular witness is an unreasonable application of *Strickland*.

Petitioner first raised this claim in his state post-conviction petition. At post-conviction hearings, Mr. Leftwich stated that he would have been available to testify at trial, that he did not recall being contacted by trial counsel or an investigator prior to trial, and then summarized information he had that may have been useful to present to the jury. *Kendrick*, 2015 Tenn. Crim. App. 887, at *61 – 62. Leftwich testified that his parents owned the home that the couple lived in at the time of the shooting, which they remained in even during their divorce proceedings. *Id.* He saw the couple interact on the day of the shooting when Petitioner's car broke down and Leftwich went to assist; Petitioner called the victim who then bought needed car parts and delivered them to Petitioner and Leftwich. *Id.* at *62. Leftwich indicates that there was no indication of a problem between the couple at that time. *Id.* After learning of the shooting, Leftwich's mother asked him to go secure Petitioner's residence where he discovered cabbage that had been left simmering on the stove. *Id.* At post-conviction hearings, trial counsel testified that he could not recall whether **[*61]** he or anyone else contacted Mr. Leftwich, but did note that Petitioner was very

engaged in the direction of his trial and that counsel frequently consulted with Petitioner on which witnesses to call. *Id*. at *63. Petitioner rebutted that Leftwich logically should have been interviewed to corroborate Petitioner's testimony because Petitioner informed trial counsel that he was with Leftwich on the day of the shooting and that the calling of witnesses was a decision for counsel. *Id*.

The TCCA agreed that Leftwich could have provided corroborating testimony, but declined to find counsel deficient for failing to interview and call him as a corroborating witness. *Id*. at *64 – 65. First, the TCCA noted one small discrepancy between Petitioner's testimony and Leftwich's, regarding the victim's mood upon having to deliver car parts to Petitioner, and second noted that as Petitioner was very involved with the direction of his case, he could have informed trial counsel of his desire to have Leftwich testify and counsel was likely to have complied, as he did in other circumstances. *Id*. at *65. Further the Court found no prejudice from the absence of this testimony because the testimony was largely cumulative or corroborative. *Id*. at *66 – 67. As to the non-corroborative evidence, regarding the cabbage simmering on the stove, the TCCA found that Petitioner did not demonstrate by clear and convincing evidence that he knew about or alerted trial counsel to Leftwich's discovery of the cabbage, which Petitioner alleges undermines premeditation, before or at the time of trial. *Id*. at *67.

Petitioner raises two distinct claims here: the failure to investigate Randall Leftwich as a witness

and the failure to call Randall Leftwich as witness. *See English v. Romanowski*, 602 F.3d 714, 726 (6th Cir. 2010). To determine if counsel was ineffective for failing to investigate, the Court must assess the reasonableness of counsel's "investigation or lack thereof." *English v. Romanowski*, at 726. As with all ineffective assistance claims, Petitioner must still demonstrate **[*62]** prejudice resulting from this action. *Strickland*, 466 U.S. at 687. To show that counsel was ineffective for failing to call witnesses, Petitioner must establish that the witness had favorable information and the lack of that witness's testimony prejudiced his defense. *Pillette v. Berghuis*, 408 Fed. Appx. 873, 882–83 (6th Cir. 2010) (citing *Towns v. Smith*, 395 F.3d 251, 258 – 60 (6th Cir. 2005)). However, "defense counsel has no obligation to call or even interview a witness whose testimony would not have exculpated the defendant." *Millender v. Adams*, 376 F.3d 520, 527 (6th Cir. 2004).

Here, the Court cannot find the TCCA's holding that counsel was not deficient for failing to investigate or call Randall Leftwich to testify is based on an unreasonable finding of fact or application of law. The TCCA considered Leftwich's potential testimony in two categories: first, corroborative evidence regarding Petitioner's account of the day of the shooting and good relationship with the victim and second, evidence of cabbage simmering at Petitioner's home that could have showed a lack of premeditation. Counsel was not deficient for failing to investigate or call Leftwich when he had no indication that Leftwich had potentially exculpatory

information and only knew of Leftwich's potentially corroborative testimony. Petitioner did not establish by clear and convincing evidence that counsel had any indication of the "cabbage simmering" testimony, the only piece of Leftwich's testimony that was not merely cumulative. The Court cannot say that the TCCA had no reasonable basis for their decision that counsel was not constitutionally ineffective. Petitioner is not entitled to relief on this claim.

10. Calling Officer Lapoint

Petitioner alleges that counsel was deficient in failing to investigate, call, or otherwise seek to introduce the information available through Officer William Lapoint, as such would have communicated Petitioner's state of mind to the jury [Doc. 3 at 86 – 88]. Respondent states that **[*63]** the TCCA found that the jury had other evidence from which it could discern Petitioner's demeanor and in addition notes that Officer Lapoint's testimony was only relevant to Petitioner's state of mind after the event, while the TCCA focused only on his calmness before as indicative of premeditation and deliberation [Doc. 15 at 53 – 55]. Because Petitioner cannot show that this witness had favorable information, the TCCA's holding that counsel was not deficient in this regard is not unreasonable.

Officer Lapoint was present at the airport where Petitioner was arrested. *Kendrick*, 2015 Tenn. Crim. App. 887, at *106. At that time, he went to the police vehicle Petitioner was in to talk to the Petitioner. *Id*. At post-conviction hearings, Officer Lapoint described Petitioner as "very distraught" and noted

that he was rocking his body, crying, and that he stated "I can't believe I did that." *Id*. Officer Lapoint testified that he put a tape recorder in the patrol car set to record Petitioner, but did not check that the tape recorder was working before doing so. *Id*. When the recorder was returned, it did not work because the batteries had corroded; other officers told Officer Lapoint there was nothing on the tape contained in the recorder. *Id*. The Petitioner noted at trial that the tape recorder was placed in the patrol car with him and that he believed that there must have been evidence favorable to him on the tape because the prosecution did not play it. *Id*. at *107.

On motion for new trial, counsel raised the State's failure to include the tape in discovery, but as the court denied the motion, appellate counsel chose not to raise it on appeal. *Id*. at *107. Trial counsel testified at post-conviction that he did not recall ever hearing about the tape recorder and did not recall speaking to Officer Lapoint. *Id*.

The TCCA held that counsel was not deficient in this regard for multiple reasons. First, Petitioner only alleged that this tape could have had evidence relevant to his mental state after the **[*64]** shooting, an issue which the jury had substantial alternative evidence on: testimony from Ms. Maston stating that Petitioner was crying, the tape of Petitioner's 9-1-1 call, and Petitioner's own testimony. Second, Petitioner's state of mind post-shooting was not used as evidence of premeditation and deliberation, but rather his calmness before the shooting. *Id*. at *107 – 109. Lastly, the tape has never been found and there

is no indication of what was on it, not even by Petitioner.[19]*Id*. The TCCA held that for all these reasons, Petitioner failed to establish either deficient performance or prejudice in this regard. *Id*.

This Court does not find that the state courts unreasonably applied *Strickland* to find that counsel was not deficient. Petitioner has not proven the factual basis of this claim by clear and convincing evidence – he has not demonstrated whether trial counsel ever heard about the tape or knew of Lapoint's existence as his name was not provided in discovery. This court likewise finds no prejudice where there is no indication as to the contents of the tape on which to assess their potential outcome on the verdict. Petitioner is not entitled to relief on this claim.

11. Improper Jury Promise in Opening Argument

Although neither the state courts nor the Respondent address this issue, the Court finds that it was properly presented in Petitioner's brief to the TCCA appealing the second dismissal of his post-conviction petition [Doc. 14 Attachment 47 at 82 – 83]. As such, this claim will be reviewed de novo. *See Johnson v. Williams*, 133 S. Ct. 1088, 1096 (2013). Petitioner raises here that counsel was ineffective

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[19] Petitioner seems to contend throughout the record that there must have been information useful to his defense on the tape and that provided motivation for the State to suppress it. However, he has not offered any evidence of what is on the tape and this Court is not in the position of assuming such malintent without proof.

because, in his opening statement, counsel made an unfulfilled promise to the jury that irreparably damaged Petitioner's credibility [Doc. 3 at 94 – 106]. In opening statement, counsel informed the jury that Petitioner's wife was killed by a faulty rifle and that the jury would **[*65]** hear from Officer Miller that the firearm discharged, shooting him in the foot, without his hands anywhere near the trigger [Doc. 14 Attachment 47 at 82 – 83]. As detailed above, Officer Miller did not expressly testify that his finger was not on the trigger during his accident, but rather that he could not recall his posture. However, counsel did elicit some proof from Officer Miller indicating that his finger was not near the trigger. Petitioner alleges that counsel did not have a proper basis for this claim because he had not interviewed Officer Miller and that he should have realized by the State's plan to call Officer Miller and Agent Fite that Officer Miller's testimony had changed [Doc. 3 at 94 – 106].[20]

"It is unreasonable for counsel to promise testimony to the jury without first examining the availability and soundness of such testimony where counsel could, and should, have discovered these details prior to trial." *Plummer v. Jackson*, 491 Fed. Appx. 671 (6th Cir. 2012) (citing *English v. Romanowski*, 602 F.3d 714, 728 (6th Cir. 2010)). Such

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[20] Petitioner seems to allege that because Agent Fite testified that the gun could not fire without the trigger being pulled or the gun being broken, and Officer Miller's statement declared that the gun had fired without his finger on the trigger, that counsel should have deduced that there was a change in Officer Miller's testimony because the State would not put contradicting witnesses on the stand.

an unfulfilled promise can create a negative inference in the mind of the jury, who may wonder why the promised testimony was not proffered. *See English*, 602 F.3d at 729. However, *English* makes clear that the ineffective assistance of counsel is formed by the lack of a reasonably investigated basis for the promise, not just the unfulfilled promise itself. *English* 729. While counsel generally has a duty to make reasonable investigation, *Strickland* clarifies that counsel can also reasonably determine that certain investigations are unnecessary. *Strickland*, 466 U.S. 668, n. 19.

In Petitioner's case, it was a reasonable decision for counsel to rely on previous signed statements by Officer Miller to inform his expectations for Officer Miller's trial testimony and his opening argument. Regardless of Petitioner's contention that counsel should have anticipated the **[*66]** change in testimony, this was an unforeseeable alteration, by a witness that counsel had no reason to presume was unreliable. Given his limited time and resources, it was reasonable for counsel to focus on other investigation rather than calling Officer Miller and every other officer to verify their sworn, written statements. Additionally, even if Petitioner had demonstrated deficiency, he cannot demonstrate prejudice. As *English* notes, the damage from such unfulfilled promises occurs when the jury is left to infer why such testimony was not raised or believes that counsel lied. *English*, 602 F.3d at 729. Here, counsel took or attempted to take measures to make it abundantly clear to the jury that he proposed that

Officer Miller would say his finger was not on the trigger because he had said so before. Petitioner cannot show that this error, after being explained to the jury, was sufficient to undermine the reliability of the results of his trial.

V. CONCLUSION

For the reasons set forth above, Petitioner's petition for a writ of habeas corpus [Doc. 1] will be **DENIED** and this action will be **DISMISSED**.

VI. CERTIFICATE OF APPEALABILITY

The Court must now consider whether to issue a certificate of appealability ("COA"), should Petitioner file a notice of appeal. Under 28 U.S.C. § 2253(a) and (c), a petitioner may appeal a final order in a habeas proceeding only if he is issued a COA, and a COA may only be issued where a Petitioner has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). When a district court denies a habeas petition on a procedural basis without reaching the underlying claim, a COA should only issue if "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Where the court dismissed a claim on the merits, but **[*67]** reasonable jurists could conclude the issues raised are adequate to deserve further review, the petitioner has made a substantial showing of the denial of a constitutional right. *See Miller-El v. Cockrell*, 537 U.S. 322, 327, 336 (2003); *Slack*, 529 U.S. at 484.

Reasonable jurists would not disagree that Petitioner procedurally defaulted his claims, nor would they disagree that neither Petitioner's trial nor appellate counsel was constitutionally ineffective. Accordingly, a **COA SHALL NOT ISSUE.**

AN APPROPRIATE ORDER WILL ENTER.

ENTER:

s/J. RONNIE GREER

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

EDWARD THOMAS KENDRICKS, Petitioner,	)	
v.	)	No. 1:16-CV-00350
SHAWN PHILLIPS, Respondent.	)	-JRG-SKL

ORDER

In accordance with the accompanying memorandum opinion, Petitioner's pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 [Doc. 1] is **DENIED** and this action is **DISMISSED.** The Clerk is **DIRECTED** to close the civil file.

Also, for the reasons set forth in the accompanying memorandum opinion, a COA will **NOT ISSUE** and the Court will therefore **DENY** Petitioner leave to proceed *in forma pauperis* on appeal. 28 U.S.C. § 2253; Rule 22(b) of the Federal Rules of Appellate Procedure.

So ordered.

ENTER:

s/J. RONNIE GREER
UNITED STATES DISTRICT JUDGE

ENTER AS A JUDGMENT:
s/ *John L. Medearis*
District Court Clerk

[Filed 09/30/19]

IN THE SUPREME COURT OF TENNESSEE, AT KNOXVILLE

May 28, 2014, Session Heard at Cookeville[1]; January 16, 2015, Filed

No. E2011-02367-SC-R11-PC

EDWARD THOMAS KENDRICK, III v. STATE OF TENNESSEE

Appeal by Permission; Judgment of the Court of Criminal Appeals Reversed; Case Remanded. Appeal by Permission from the Court of Criminal Appeals Criminal Court for Hamilton County. No. 220622. Don W. Poole, Judge.

Counsel: Robert E. Cooper, Jr., Attorney General and Reporter; Gordon W. Smith, Associate Solicitor General; John H. Bledsoe, Senior Counsel; Bill Cox, District Attorney General; and Lance Pope, Assistant District Attorney General, for the appellant, State of Tennessee.

Edward T. Kendrick, III, Pro se, and Ann C. Short, Knoxville, Tennessee, for the appellee, Edward Thomas Kendrick, III.

Stephen Ross Johnson and W. Thomas Dillard, Knoxville, Tennessee, for the Amici Curiae National Association of Criminal Defense Lawyers and Tennessee Association of Criminal Defense Lawyers.

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[1] Oral argument was heard in this case on May 28, 2014, at Tennessee Technological University in Cookeville, Putnam County, Tennessee, as part of this Court's S.C.A.L.E.S. (Supreme Court Advancing Legal Education for Students) project.

Judges: WILLIAM C. KOCH, JR., J., delivered the opinion of the Court, in which SHARON G. LEE, C.J., JANICE M. HOLDER, CORNELIA A. CLARK, and GARY R. WADE, JJ., joined.

Opinion by: WILLIAM C. KOCH, JR.

[*454] This post-conviction appeal involves ineffective assistance of counsel claims made by a prisoner who fatally shot his wife. A Hamilton County jury, rejecting the prisoner's **[**2]** defense that his rifle had malfunctioned and fired accidentally, convicted him of first degree premeditated murder. The Court of Criminal Appeals affirmed his conviction on direct appeal. *State v. Kendricks*, 947 S.W.2d 875 (Tenn. Crim. App. 1996). The prisoner later filed a petition for post-conviction relief in the Criminal Court for Hamilton County alleging, among other things, that his trial counsel had been ineffective because he decided not to seek an expert to rebut the anticipated testimony of the prosecution's expert and because he did not attempt to use an exception to the hearsay rule to introduce statements favorable to the prisoner. The post-conviction court conducted a hearing and denied the petition. The Court of Criminal Appeals reversed the post-conviction court and granted the prisoner a new trial after concluding that trial counsel's representation had been deficient and that, but for these deficiencies, the jury might have convicted the prisoner of a lesser degree of homicide. *Kendrick v. State*, No. E2011-02367-CCA-R3-PC, 2013 Tenn. Crim. App. LEXIS 539, **[*455]** 2013 WL 3306655 (Tenn. Crim. App. June 27, 2013). We granted the State's application for

permission to appeal. Trial counsel's decisions not to consult an expert to rebut the anticipated testimony of a prosecution expert and not to attempt to introduce **[**3]** a potentially favorable hearsay statement did not amount to deficient performance that fell below the standard of reasonableness. Accordingly, we reverse the decision of the Court of Criminal Appeals and remand for consideration of the prisoner's remaining claims.

OPINION

I.

Edward T. Kendrick, III and Lisa Kendrick were married and had two children, a three-year-old son and a four-year-old daughter. Their marriage had failed, but they were continuing to live together while they pursued an irreconcilable differences divorce. Mr. Kendrick was angry because he suspected that Ms. Kendrick was having an affair.

Ms. Kendrick worked at a gas station in Chattanooga. At approximately 10:00 p.m. on March 6, 1994, Mr. Kendrick drove the couple's station wagon to the gas station. Their two children were in car seats in the station wagon's rear seat. On the floorboard of the front passenger seat was a loaded Remington Model 7400 .30-06 caliber hunting rifle.

Mr. Kendrick entered the gas station and asked Ms. Kendrick to come out to the car because he had something to show her. When she finished waiting on another customer, Ms. Kendrick followed Mr. Kendrick to the automobile. As Ms. Kendrick approached **[**4]** the automobile, Mr. Kendrick opened the back passenger door and spoke briefly to

the children. Then, he opened the front passenger door, picked up the loaded rifle from the floorboard, and walked to the back of the automobile carrying the rifle.

The rifle fired, and a single bullet struck Ms. Kendrick in the chest. She fell backward onto the pavement and died almost instantly. Mr. Kendrick stated later that he stood over Ms. Kendrick's body for a few seconds, looking into her eyes as she died. Then, he got back into the automobile and drove toward the airport.

A bystander followed Mr. Kendrick. At some point during the relatively short drive to the airport, Mr. Kendrick threw his rifle out of the window of the moving automobile. Upon arriving at the airport, Mr. Kendrick used his cellular telephone to call 9-1-1. He told the operator that he had shot his wife. During the same time frame, the bystander who had followed Mr. Kendrick to the airport told a police officer standing outside the airport what had happened at the gas station. Mr. Kendrick was taken into custody.

Early the following morning, Steve Miller, a crime scene investigator, found Mr. Kendrick's rifle on the side of the **[**5]** road. He placed the rifle in the trunk of his automobile and drove to the police station. The rifle fired while Sergeant Miller was[2] removing it from the trunk of his automobile, striking his left foot.

In November 1994, Mr. Kendrick was tried for the murder of his wife in the Criminal Court for Hamilton

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[2] We will refer to this officer as "Sergeant Miller" because that was his title at the time of the postconviction hearings.

County. The State presented twelve witnesses, including Sergeant Miller, the Kendricks' four-year-old daughter, and an expert firearms examiner. Mr. Kendrick presented four witnesses and testified on his own behalf. The State called one rebuttal witness. **[*456]** The jury convicted Mr. Kendrick of premeditated first degree murder, which carried an automatic life sentence. On direct appeal, the Court of Criminal Appeals upheld the conviction. *State v. Kendricks*,[3] 947 S.W.2d 875 (Tenn. Crim. App. 1996), *perm. app. denied* (Tenn. 1997).

Mr. Kendrick filed a petition for post-conviction relief in April 1998. The postconviction court dismissed the petition after deciding that the issues it raised were either waived or previously determined. However, **[**6]** after finding that Mr. Kendrick's ineffective assistance of counsel claims had not been waived, the Court of Criminal Appeals reversed the post-conviction court and remanded the case for further proceedings. *Kendricks v. State*, 13 S.W.3d 401, 405 (Tenn. Crim. App. 1999) (No Tenn. R. App. P. 11 application filed).

In March 2000, Mr. Kendrick, aided by counsel, filed an amended petition for postconviction relief. At a series of hearings in February and March 2011 — almost sixteen years after his original trial — Mr. Kendrick raised forty-three claims of ineffective assistance of trial counsel, twenty-two claims of ineffective assistance of appellate counsel on direct appeal, and twelve claims of prosecutorial

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[3] Several of the early documents in this case misspelled Mr. Kendrick's name as "Kendricks."

misconduct. He supported these claims with a 631-page memorandum of law.

The post-conviction court declined to grant Mr. Kendrick relief in an order filed on October 13, 2011. On appeal, the Court of Criminal Appeals reversed the post-conviction court's dismissal of Mr. Kendrick's petition but limited its decision to only two of the forty-three claims of ineffective assistance of trial counsel. The appellate court determined that trial counsel's performance had fallen below an objective standard of reasonableness when counsel failed to obtain expert evidence to **[**7]** rebut Mr. Fite's testimony that Mr. Kendrick's rifle could only be fired by pulling the trigger and when counsel failed to attempt to introduce hearsay evidence regarding Sergeant Miller's initial explanation about how he came to be shot by Mr. Kendrick's rifle. *Kendrick v. State*, No. E2011-02367-CCA-R3-PC, 2013 Tenn. Crim. App. LEXIS 539, 2013 WL 3306655, at *13-14 (Tenn. Crim. App. June 27, 2013). The appellate court also determined that these errors prejudiced Mr. Kendrick because had it heard such evidence, "it is reasonably likely the jury would have accredited the Petitioner's version of events and convicted him of a lesser degree of homicide." *Kendrick v. State*, 2013 Tenn. Crim. App. LEXIS 539, 2013 WL 3306655, at *17. Based on these conclusions, the Court of Criminal Appeals pretermitted its consideration of Mr. Kendrick's remaining claims. *Kendrick v. State*, 2013 Tenn. Crim. App. LEXIS 539, 2013 WL 3306655, at *18.

II.

This claim has been brought under Tennessee's Post-Conviction Procedure Act.[4] The Act directs Tennessee's courts to grant post-conviction relief to a person "in custody" whose "conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Tenn. Code Ann. §§ 40-30-102,-103. The prisoner seeking post-conviction relief bears "the burden of proving the allegations of fact by clear and convincing evidence." Tenn. Code Ann. § 40-30-110(f) (2012); *see also* Tenn. Sup. Ct. R. 28, § 8(D)(1); *Nesbit v. State*, 452 S.W.3d 779, 786, 2014 Tenn. LEXIS 917, 2014 WL 5901964, at *2 (Tenn. 2014).

[*457] Appellate courts review a post-conviction court's conclusions of law, decisions involving mixed questions of law and fact, and its application of law to its factual findings de novo without a presumption of correctness. *Nesbit v. State*, 2014 Tenn. LEXIS 917, 2014 WL 5901964, at *1; *Whitehead v. State*, 402 S.W.3d 615, 621 (Tenn. 2013). However, appellate courts are bound by the post-conviction court's underlying findings of fact unless the evidence preponderates against them. *Arroyo v. State*, 434 S.W.3d 555, 559 (Tenn. 2014); *Dellinger v. State*, 279 S.W.3d 282, 294 (Tenn. 2009). Accordingly, appellate courts are not free to re-weigh or re-evaluate the evidence, nor are they free to substitute their own inferences for those drawn by the post-conviction

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[4] The **[**8]** Tennessee Post-Conviction Procedure Act is presently codified at Tenn. Code Ann. §§ 40-30-101 to -122 (2012 & Supp. 2014).

court. *State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001). Appellate courts must generally defer to a post-conviction court's findings concerning witness credibility, the weight and value of witness testimony, and the resolution of factual issues presented by the evidence. *Whitehead v. State*, 402 S.W.3d at 621; *Momon v. State*, 18 S.W.3d 152, 156 (Tenn. 1999).

Mr. Kendrick's substantive allegation is that he was denied his constitutional right to effective assistance of counsel. Article I, Section 9 of the Constitution of Tennessee establishes that every criminal defendant has "the right to be heard by himself and his counsel." Likewise, the Sixth Amendment to the United States Constitution guarantees that all criminal defendants "shall enjoy the right . . . to have the [a]ssistance of [c]ounsel." These constitutional **[**9]** provisions have been interpreted to guarantee a criminal defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975).

To prevail on a claim of ineffective assistance of counsel, a petitioner must prove both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. at 687; *Felts v. State*, 354 S.W.3d 266, 276 (Tenn. 2011). A court need not address both elements if the petitioner fails to demonstrate either one of them. *Strickland v. Washington*, 466 U.S. at 697; *Garcia v. State*, 425 S.W.3d 248, 257 (Tenn. 2013). Each element of the

Strickland analysis involves a mixed question of law and fact - a question this Court will review de novo without a presumption that the courts below were correct. *Williams v. Taylor*, 529 U.S. 362, 419, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000); *Strickland v. Washington*, 446 U.S. at 698; *Davidson v. State*, 453 S.W.3d 386, 393, 2014 Tenn. LEXIS 918, 2014 WL 6645264, at *3 (Tenn. 2014); *Calvert v. State*, 342 S.W.3d 477, 485 (Tenn. 2011).

Deficient performance means that "counsel's representation fell below an objective standard of reasonableness." To determine whether counsel performed reasonably, a reviewing court must measure counsel's performance under "all the circumstances" against the professional norms prevailing at the time of the representation. *Strickland v. Washington*, 466 U.S. at 688; *see also Baxter v. Rose*, 523 S.W.2d at 932-33. Counsel's performance is not deficient if the advice given or the services rendered "are within the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d at 936; *see also Harrington v. Richter*, 562 U.S. 86, __, 131 S. Ct. 770, 778, 178 L. Ed. 2d 624 (2011) ("The question is whether an attorney's representation amounted to incompetence under **[**10]** 'prevailing professional norms,' not whether it deviated from best practices or most common custom." (quoting *Strickland v. Washington*, 466 U.S. at 690)); **[*458]** *Padilla v. Kentucky*, 559 U.S. 356, 366, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010) ("[Deficient performance] is necessarily linked to the practice and expectations of the legal

community: 'The proper measure of attorney performance remains simply reasonableness under prevailing professional norms' [considering all the circumstances]." (internal citations omitted)).

In *Strickland v. Washington*, the United States Supreme Court discussed the interaction between counsel's duty to investigate and counsel's freedom to make reasonable strategic choices:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy **[**11]** measure of deference to counsel's judgments.

Strickland v. Washington, 466 U.S. at 690-91.

A *Strickland* analysis, therefore, begins with the strong presumption that counsel provided adequate assistance and used reasonable professional judgment to make all significant decisions. *Strickland v. Washington*, 466 U.S. at 689. The petitioner bears the burden of overcoming this presumption.

Strickland v. Washington, 466 U.S. at 687; *see also Burt v. Titlow*, 571 U.S. __, __, 134 S. Ct. 10, 17 (2013); *Nesbit v. State*, 2014 Tenn. LEXIS 917, 2014 WL 5901964, at *3; *State v. Burns*, 6 S.W.3d 453, 461-62 (Tenn. 1999). Reviewing courts should resist the urge to judge counsel's performance using "20-20 hindsight." *Mobley v. State*, 397 S.W.3d 70, 80 (Tenn. 2013) (quoting *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982)); *see also Strickland v. Washington*, 466 U.S. at 689 (instructing reviewing courts to try "to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time").

The second element of the *Strickland* analysis focuses on whether counsel's deficient performance "prejudiced" the defendant. *Strickland v. Washington*, 466 U.S. at 687. The question at this juncture is "whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993) (citing *Strickland v. Washington*, 466 U.S. at 687). To prove prejudice, the petitioner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. at 694. A "reasonable probability" is a lesser burden of proof than "a preponderance **[**12]** of the evidence." *Williams v. Taylor*, 529 U.S. at 405-06; *Pylant v. State*, 263 S.W.3d 854, 875 (Tenn. 2008). A reasonable probability is "a probability sufficient to

undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. at 694; *see also Vaughn v. State*, 202 S.W.3d 106, 116 (Tenn. 2006); *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996).

[*459] III.

Mr. Kendrick's claims regarding the ineffectiveness of his trial counsel necessitate a careful review of his November 1994 trial. Each side clearly presented their theory of the case in their opening statements to the jury. The State told the jury:

> It's the State's theory that Edward Kendrick escorted his wife outside [of the gas station where she worked] to execute her and that's what he did. He took her outside, removed his Remington 7400 .30-06 hunting rifle from the back of his car and in front of his two small children, leveled the weapon, pointed it at his wife and shot her at point-blank range one time, dead center in the chest.

In his opening statement, Mr. Kendrick's trial counsel told the jury the State would not be able to prove "intent" or "premeditation":

> Lisa Kendrick was killed but not by Edward Kendrick. Lisa Kendrick was killed by a faulty rifle that was being transferred from the front of [their station wagon] to the back, . . . and the gun went off. The State would have you believe there is no merit . . . to that defense, but because **[**13]** [a crime scene investigator] picked up this gun at the

> scene they are going to have to put him on. You can ask yourself . . . why [that crime scene investigator] was shot in the foot with his hand nowhere near the trigger with the very same weapon. I'll ask him that for you.

The State's first witnesses were persons who were at the gas station when Ms. Kendrick was shot. Timothy Benton, the person who followed Mr. Kendrick from the gas station to the airport following the shooting, testified that he heard an explosion as he was pulling out of the gas station and that when he turned around, he saw Mr. Kendrick holding a rifle with the barrel pointed straight up in the air. He stated that Mr. Kendrick's "right hand was on the pistol grip area around the trigger and [his] left hand was up near the stock." Mr. Benton also testified that Mr. Kendrick was standing over Ms. Kendrick's motionless body.

The State then called Lennell Shepheard, a friend of Ms. Kendrick who was talking with Ms. Kendrick in the gas station when Mr. Kendrick arrived. Mr. Shepheard testified that Mr. Kendrick asked his wife to come outside because he had something to show her. He also testified that when he heard the **[**14]** shot, he walked from the counter to the door of the gas station and, when he opened the door, he saw Mr. Kendrick standing over his wife's body. Mr. Shepheard testified that he heard Mr. Kendrick "yelling 'I told you so' . . . about six times." He also stated that he went back inside the gas station after he and Mr. Kendrick made eye contact.

On cross-examination, Mr. Kendrick's lawyer suggested that Mr. Shepheard had not mentioned in his earlier statements that he heard Mr. Kendrick say "I told you so" and insinuated that Mr. Shepheard had fabricated this portion of his testimony. Mr. Shepheard responded that he had reported Mr. Kendrick's statement to an officer at the scene and later to one of the district attorney's investigators. The lead investigator, Detective Mark Rawlston, later testified that an audio recording of Mr. Shepheard's statement at the scene contained no reference to Mr. Kendrick's saying "I told you so."

The jury heard the 9-1-1 telephone calls made by two witnesses at the scene, as well as the call Mr. Kendrick made from the airport. "I want to turn myself in," Mr. Kendrick said, "My wife, I just shot my wife . . . I'm parked at the airport." When the 9-1-1 operator **[**15]** asked, "Why did **[*460]** you shoot her?" Mr. Kendrick only responded, "Yes." Thereafter, the conversation turned to where Mr. Kendrick was located at the airport.

Mr. Kendrick's trial counsel made sure that the jury heard early and often that Sergeant Miller, one of the crime scene investigators, had been shot in the foot while handling Mr. Kendrick's rifle. During cross-examination by Mr. Kendrick's lawyer, Detective Rawlston testified that he did not consider the possibility that Mr. Kendrick's rifle had accidentally discharged. This answer prompted Mr. Kendrick's lawyer to ask, "What about when the crime scene technician lifted the gun out of the trunk of his car and shot himself in the foot with it, saying all the time

that his finger was nowhere near the trigger, what about that, that wasn't an issue you thought worthy of investigation?" Detective Rawlston responded that he did not consider the possibility of an accidental discharge because when he first interviewed Mr. Kendrick following his arrest, Mr. Kendrick "never at any time indicated to me that this was an accidental discharge." To the contrary, Mr. Kendrick told him, "I hope this is only a dream."

Testifying after Detective Rawlston, **[**16]** Sergeant Miller explained that after he retrieved the rifle from the side of the road and drove it to the police service center, "the weapon discharged and it struck [him] in the left foot" as he was removing it from the trunk of his automobile. Sergeant Miller said that he was holding a coat in his left hand and that he picked up the weapon with his right hand with the barrel "pointed down towards the pavement." He also testified that he had "no recollection of how the weapon discharged."

When asked to demonstrate for the jury how he was holding the rifle when it fired, Sergeant Miller held the weapon without putting his finger on the trigger. However, when the prosecutor specifically asked him if he remembered whether his finger was on the trigger when the rifle discharged, Sergeant Miller stated that he did not remember.

Mr. Kendrick's trial counsel continued this line of questioning when he crossexamined Sergeant Miller, even though Sergeant Miller insisted that he did not recall whether his finger touched the trigger when the rifle discharged. The following colloquy took place:

Q: Did you ever have your finger on the trigger when it discharged?

A: I don't recall.

Q: Well, didn't you, **[**17]** in fact, tell - there is an investigation and review of any time an officer is shot, is that correct?

A: I don't remember anybody coming, you know, the people that generally do that, I don't believe they came.

Q: You never made any statement to those people that your finger was not on the trigger?

A: Not that I recall because most of my statement was made when I was in the hospital and what we do is fill out what's called an EOF, if something that happens to you on duty and when you get injured. And that was made when I was in the hospital.

Q: Well, you wouldn't shoot yourself in the foot intentionally, would you?

A: No, sir.

Q: How long have you been a police officer?

A: Going on 22 years.

Q: When you picked up the gun and you showed the jury how you turned, you had your hand just like that?

A: Right.

Q: You don't put your finger on the trigger, do you?

[*461] A: No, sir.

Q: Okay. So when you turned the gun around is when it went off?

A: That's what I've described.

Q: As you swung around the gun swung around with you and your hand just like that and the gun went off, is that correct?

A: But I can't say that night that was the exact position of my hand, is what I'm saying.

Q: Well, in 22 years as a police **[**18]** officer, have you ever discharged a gun before accidentally into your foot?

A: No, sir.

Q: Okay. Or in any other part of your body?

A: No, sir.

Q: Or any other way?

A: No, sir.

Q: And you've been [a crime scene investigator] since 1988, some six years. Have you ever had a gun accidentally discharge as you — at the crime scene or anything else?

A: No, sir.

Q: Okay. How many times a day is it drilled into you at the police academy don't ever put your hand on the trigger unless you're going to shoot the gun, that's pretty standard, isn't it?

A: Yes, sir.

Q: Would you ever put your finger on the trigger of a gun you're lifting out of your car, especially when, as you say, you knew the gun was loaded?

A: Not knowingly, no.

Q: Well, now come on, you're waffling aren't you?

A: No.

Q: Well, you told them that you never had your finger on the trigger, you didn't shoot the gun, did you not tell them that?

A: I didn't intentionally shoot the gun, no.

Q: Okay. And you know not to put your finger on the trigger of a loaded gun unless you want to shoot it, don't you?

A: That's correct.

Q: And you've practiced that rule for the past 22 years, have you not?

A: Yes.

During his recross-examination of Sergeant Miller, Mr. **[**19]** Kendrick's trial counsel returned to the manner in which Sergeant Miller picked up and carried the rifle:

Q: So [to] the best of your recollection your finger was not on the trigger?

A: That night I can't say, I showed you how I thought I took it out.

Q: Well, you just said to the best of your recollection you showed us how you took it out of the trunk of the car.

A: Right.

Q: And to the best of your recollection, since you showed us, when you showed us, you showed us having the gun like this, finger off the trigger.

A: Right.

Q: To the best of your recollection, your finger was not on the trigger was it?

A: I might -

Q: Did you show us to the best of your recollection?

A: Yes, I did.

Q: Was your finger on the trigger when you showed us?

A: Not in this courtroom, no.

Q: Is that to the best of your recollection how it happened?

A: Yes.

Q: Thank you.

The Kendricks' four-year-old daughter testified on direct examination that she **[*462]** saw Ms. Kendrick "standing with her hands up." She also demonstrated how Mr. Kendrick was holding his rifle and testified that she saw Mr. Kendrick shoot Ms. Kendrick. During cross-examination, the child was questioned closely about whether her maternal grandparents had coached **[**20]** her to say "bad things" about Mr. Kendrick. Thereafter, she gave ambiguous answers regarding whether she had seen her mother with her hands up or whether she had "actually see[n] what happened."

Following the child's testimony, the State called the Hamilton County Medical Examiner who gave an opinion about how Ms. Kendrick was standing at the time she was shot. The medical examiner testified (1) that Ms. Kendrick sustained a high velocity, fatal gunshot wound in the left chest that caused massive internal injuries, (2) that Ms. Kendrick's wound was a "near gunshot wound" which meant that Mr. Kendrick's rifle was close enough to Ms. Kendrick that the muzzle blast contacted Ms. Kendrick's body causing stipple injuries on the back of both of her forearms, (3) that Ms. Kendrick was leaning slightly

away from Mr. Kendrick when she was shot, and (4) that the stipple injuries on the back of Ms. Kendrick's forearms indicated that Ms. Kendrick's forearms were raised and facing the direction of fire when she was shot.

The State then called Kelly Fite, a firearms examiner employed by the Georgia Bureau of Investigation who had examined Mr. Kendrick's rifle at the request of the Chattanooga Police Department. **[**21]** Agent Fite explained how the rifle's firing mechanism worked. He also testified that he had performed tests, including drop tests, to determine whether the rifle could fire without the trigger being pulled and that he had been unable to make the rifle fire without the safety being disengaged and pulling the trigger. When asked to give an opinion regarding whether the Remington Model 7400 was "susceptible to accidental misfire," Agent Fite stated: "The only way that you can fire this rifle without breaking it is by pulling the trigger."

Mr. Kendrick's trial counsel requested a jury-out hearing regarding the scope of his cross-examination of Agent Fite. He asked the trial court whether he could question Agent Fite about the Remington Model 742 rifle, a precursor to the Model 7400 rifle. In response to the State's objection, the trial court held that this line of questioning was irrelevant because it concerned a model of rifle that was different from Mr. Kendrick's rifle.

During the same jury-out hearing, Mr. Kendrick's trial counsel asked the trial court to permit him to use an official incident report relating to Sergeant Miller's

injury prepared by Detective Glenn Sims to refresh Sergeant **[**22]** Miller's memory. This report attributed a statement to Sergeant Miller that "he picked the gun up with both hands and that his finger was not near the trigger[.] [A]s he lifted the weapon out [of the trunk], the rifle went off." When Sergeant Miller was recalled to the stand, he stated that he had never seen Detective Sims's report before and that he did not recall speaking to Detective Sims about the incident. The jury did not hear the contents of Detective Sims's report.[5]

[*463] After the State completed its case-in-chief, Mr. Kendrick's lawyer called Detective Sims. In response to the State's objection to this witness, Mr. Kendrick's lawyer explained that he was attempting to impeach Sergeant Miller with Detective Sims's report in accordance with **[**23]** Tenn. R. Evid. 613(b). However, the trial court sustained the State's objection, and Detective Sims did not take the stand.[6]

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[5] During closing arguments, the State characterized Sergeant Miller's accident as the only "accidental discharge" in the case:

> An accidental discharge of a weapon is when you take it out of the trunk of your car, it's late at night, you are overworked, you might get a little bit sloppy, and you shoot yourself in the foot. Okay? That's accidental discharge. That's what we had in this case. It wasn't the weapon that was an accident, it was the officer. . . .

[6] On direct appeal, the Court of Criminal Appeals held that the trial court erred by refusing to permit Detective Sims to testify regarding the substance of the statements Sergeant Miller gave to the officers investigating his injury. However, the appellate court also decided that this error was harmless because Mr. Kendrick's lawyer had elicited testimony from Sergeant Miller during cross-examination that would have permitted the jury to conclude that Sergeant Miller's memory at the time of trial was

The attorney who had been representing Mr. Kendrick in the Kendricks' divorce proceeding testified that Mr. Kendrick suspected that his wife was having an affair and that he was "angry and discouraged" about it. However, the attorney also testified that Mr. Kendrick appeared to harbor no "aggressive feelings" toward Ms. Kendrick. Thereafter, two character witnesses testified on Mr. Kendrick's behalf.

At this point, Mr. Kendrick took the stand. He explained that he had owned the Remington **[**24]** Model 7400 rifle for eleven years and that it had never malfunctioned before. He explained that Ms. Kendrick carried a handgun and that he often kept a rifle with him because the Kendricks had a side job cleaning apartments at night in an area where they felt unsafe. He testified that he was moving the rifle to the back of the automobile at his wife's request when it discharged and that he was "almost positive" that he did not pull the trigger.

With reference to his conduct after Ms. Kendrick was shot, Mr. Kendrick stated that he did not attempt to assist his wife because he knew she was already dead. He explained that he left the gas station because "he wanted to get the kids away." He also testified that he threw the rifle out of the front passenger window because he was scared and that he "just wanted to get it out of the car." Mr. Kendrick

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faulty and that Sergeant Miller knew Mr. Kendrick had not caused the rifle to fire by pulling the trigger. *State v. Kendricks*, 947 S.W.2d at 881-82.

denied saying "I told you so" as he watched his wife die.

In rebuttal, the State called Officer Martha Matson, a security officer working at the airport on the night of the incident who removed the Kendricks' children from their car seats. Invoking the excited utterance exception to the hearsay rule in Tenn. R. Evid. 803(2), the trial court permitted Officer Matson **[**25]** to testify that "[t]he little girl, when I got her out of the car, she just put her arms around me and she stated that she had told daddy not to shoot mommy but he did and she fell."

After closing arguments and deliberation, the jury found Mr. Kendrick guilty of first degree premeditated murder — a verdict that carries an automatic life sentence when the State has not sought the death penalty. *See* Tenn. Code Ann. § 39-13-202(c) (2014). Mr. Kendrick moved for a new trial. Following a hearing on May 15, 1995, the trial court entered an order denying the motion on June 19, 1995. The Court of Criminal Appeals upheld Mr. Kendrick's conviction and sentence. *State v. Kendricks*, 947 S.W.2d at 886. This Court denied Mr. Kendrick's Tenn. R. App. P. 11 application for permission to appeal.

IV.

The condition of Mr. Kendrick's Remington Mode 7400 rifle and the manner in **[*464]** which Sergeant Miller handled it were the focus of the hearing on Mr. Kendrick's petition for post-conviction relief, conducted almost sixteen years after his original trial. Mr. Kendrick presented Henry Jackson Belk, Jr., a gunsmith and former deputy sheriff, as a firearms

expert. Mr. Belk testified that the Remington Model 7400 rifle contained the same trigger mechanism that was found in at least fourteen different models **[**26]** of Remington "pumps and automatics manufactured after 1948."[7]

Mr. Belk had examined Mr. Kendrick's rifle prior to testifying. He found that the rifle was dirty on the inside, but he did not find any debris in the trigger mechanism that could cause it to misfire.[8] Mr. Belk was unable to make the trigger mechanism fire without pulling the trigger, except when he removed the trigger mechanism from the rifle. Nonetheless, Mr. Belk testified that the firing mechanism in Mr. Kendrick's rifle was a "defective mechanism" because these mechanisms have "a history of firing under outside influences other than a manual pull of the trigger."

Mr. Belk testified that he first became suspicious about the trigger mechanism in 1970, but that it was not until 1994 — the same year as Mr. Kendrick's trial — that he served as an expert in a civil case involving the trigger mechanism in a Remington 700 rifle. In response to the State's questioning, Mr. Belk concurred **[**27]** that, if someone had done research at the time of Mr. Kendrick's 1994 trial, they would have potentially been able to find him.

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[7] Mr. Belk stated that this trigger mechanism could be found in approximately 23 million weapons.

[8] Mr. Belk speculated that there could have been debris in the firing mechanism of Mr. Kendrick's rifle and that Agent Fite's drop tests could have dislodged it.

Mr. Belk described several instances in which a malfunction caused a similar Remington rifle to fire. In one instance, a Model 1100 shotgun fired when a man grabbed it while it was falling. In another case, a Model 870 shotgun fired while it sat, with the safety on, inside a locked box that was mounted on an ATV with its engine running. Mr. Belk also recalled testifying about the Model 7400 rifle in two civil cases and one criminal case. In the "late nineties," he testified in a civil case involving a Model 7400 that allegedly misfired when a man was wiping it with a rag. In another case, which he did not date, Mr. Belk testified about a Model 7400 that allegedly misfired while it was being cleaned with an air hose. Mr. Belk also recalled "sign[ing] affidavits about a 7400 criminal case in Washington State," but he did not testify when he signed the affidavits.

Sergeant Miller also testified at the post-conviction hearing. He maintained that he still could not remember whether his finger touched the trigger of Mr. Kendrick's rifle when he shot himself in the foot and **[**28]** that he had no recollection of talking with other officers about the incident. He added that he had sustained a "massive foot injury" and that he was on pain medication. Sergeant Miller also testified that he spent over three weeks in the hospital and that he had had seven surgeries on his foot.

Mr. Kendrick also called the three officers who talked with Sergeant Miller after he shot himself in the foot. Officer Michael Holbrook, who prepared a report about Sergeant Miller's injury after visiting him the hospital, testified that Sergeant Miller told

him that "his finger was not near the trigger" when the rifle fired. Detective Sims, now retired, testified that he did not recall the circumstances surrounding **[*465]** his report concerning Sergeant Miller's injury. Finally, Officer James Gann, the first officer to render assistance to Sergeant Miller, testified that Sergeant Miller "was in a lot of pain, bleeding and starting to go into shock" after the accident.

The assistant public defender who represented Mr. Kendrick during his November 1994 trial also testified at the hearing on Mr. Kendrick's post-conviction petition. He testified that Mr. Kendrick did not tell the police that the shooting **[**29]** had been accidental before he began representing Mr. Kendrick. He also confirmed that his theory of defense from the outset was that the shooting was an accident caused by a defective weapon and that he considered Sergeant Miller's mishap to be the key fact establishing that Mr. Kendrick's rifle could have been defective.

Counsel testified that he was somewhat knowledgeable about guns because he owned a number of them. He also stated that the public defender's office occasionally consulted a former police officer who was a gunsmith but that he could not remember whether this office consulted this gunsmith in Mr. Kendrick's case. He added that gun owners in 1994 were not aware of any inherent defects in Remington's trigger mechanism because "there was no discussion in the industry about the trigger mechanism on the Remington being potentially able

to malfunction." Counsel also pointed out that "you couldn't Google Remington trigger mechanisms back then" and that the "body of evidence" concerning the Remington trigger mechanism that eventually came to light "wasn't available at that point in time [the time of Mr. Kendrick's trial in November 1994]."

The assistant public defender also testified **[**30]** that he knew that Agent Fite would be called to testify that Mr. Kendrick's rifle was working properly. He explained that he never looked for an expert witness to rebut Agent Fite because he believed that he could use Sergeant Hill's statements "very effectively." Counsel believed that Sergeant Miller's testimony about his accidental injury would "trump[]" Agent Fite's testimony. He also believed "that [Sergeant] Miller shooting himself in the foot accidentally, without his hands near the trigger, was enough for a reasonable doubt as to anything."[9]

While Mr. Kendrick's trial counsel had not personally interviewed Sergeant Miller, he was aware of the interview that one of the public defender's investigators had conducted. He testified that he "thought [Sergeant] Miller would testify consistently with what [he] knew to be his statements" and that he "presumed [that he] would be able to get [Sergeant] Miller's testimony that he was not holding **[**31]** the trigger and the gun discharged" before the jury to

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[9] Mr. Kendrick's trial counsel testified that years after Mr. Kendrick's trial, he telephoned Mr. Kendrick's post-conviction counsel as soon as he heard a radio program discussing several accidental deaths associated with Remington's trigger mechanism.

bolster his theory that the shot that killed Ms. Kendrick was fired accidentally.

Counsel also testified that he felt "sandbagged" and "overwhelmed" when Sergeant Miller testified that he could not remember where his finger was when he was shot. He added that "I was not prepared for [Sergeant] Miller to say that he couldn't remember, because there was not any doubt in my mind, at least, when we started trying this case, that he was going to stick to his prior statements."

The assistant public defender also testified that he did not recall whether he considered attempting to admit Sergeant Miller's statements as excited utterances **[*466]** after his attempt to use them to impeach Sergeant Miller failed. He testified initially that he did not know when the reports were taken and that he was unsure about whether Sergeant Miller's statements were sufficiently "contemporaneous" to qualify as excited utterances. Later in his testimony, counsel agreed that, "in hindsight," the statements might have been admissible as excited utterances. However, he added that "in the heat of trial, I didn't see that."

The post-conviction court denied Mr. Kendrick's **[**32]** petition for post-conviction relief. In its 66-page order, the court determined that Mr. Kendrick had not been prejudiced by his counsel's decision not to call an expert witness to rebut Agent Fite. The court reasoned:

> Even if one disregards Mr. Fite's trial testimony suggesting that accidental discharge was impossible and accepts Mr.

Belk's testimony indicating that, because of the trigger mechanism in the gun, accidental discharge was possible, significant weaknesses in the theory of the defense, specifically, unfavorable eyewitness evidence and the petitioner's own ambiguous actions in leaving the scene and discarding the gun, still remain.

* * *

Although Mr. Belk's post-conviction testimony reveals apparent gaps in Agt. Fite's knowledge about defects in the common trigger mechanism and the inutility of drop tests, the jury did not require Mr. Belk or another expert witness to make them aware of the possibility of accident. Off. Miller's injury was an immediate reminder, if any was necessary, that accident is always a possibility.

Furthermore, because Mr. Belk did not explain his dismissal of drop tests, his testimony on this issue is relatively weak. In any event, the effect of Agt. **[**33]** Fite's trial testimony was not to exclude the possibility of accident but to limit it to a particular circumstance, a triggered discharge. Although Mr. Belk's testimony raises the possibility of an untriggered discharge, even the petitioner at trial was not entirely certain whether, at the time of discharge, his finger or hand was on the trigger.

In addition, the post-conviction court declined to grant post-conviction relief with regard to the "excited utterance" issue. The court first decided that the statements were not excited utterances, but rather were "post-accident statements in the course of internal and defense investigations." The court also decided that Mr. Kendrick had not been prejudiced because the Court of Criminal Appeals had already determined on direct appeal that the trial court's decision to disallow the use of Sergeant Miller's post-accident statements as impeachment evidence was harmless error.

V.

The Court of Criminal Appeals reversed the post-conviction court's denial of Mr. Kendrick's petition. The appellate court decided that Mr. Kendrick's counsel was deficient in two respects and that, absent these deficiencies, it was reasonably likely that the jury would **[**34]** have convicted Mr. Kendrick of a lesser degree of homicide. *Kendrick v. State*, No. E2011-02367-CCA-R3-PC, 2013 Tenn. Crim. App. LEXIS 539, 2013 WL 3306655, at *13-14, 17 (Tenn. Crim. App. June 27, 2013).

The appellate court began its analysis by pointing out that Mr. Kendrick had three types of evidence available to him to establish his accidental shooting defense. The first was his own testimony — the effectiveness of which hinged on his own credibility. The second was evidence that Sergeant Miller had shot himself with the rifle without touching the trigger, which would have bolstered not only Mr. Kendrick's **[*467]** defense but also his credibility.

The third type of evidence would have been expert testimony that the trigger mechanism on his rifle was defective and that the rifle could fire without the trigger being pulled. This evidence would likewise have bolstered Mr. Kendrick's defense and his credibility. *Kendrick v. State*, 2013 Tenn. Crim. App. LEXIS 539, 2013 WL 3306655, at *13.

The Court of Criminal Appeals then held that Mr. Kendrick's trial counsel was "deficient in failing to adduce expert proof about the trigger mechanism in the rifle." *Kendrick v. State*, 2013 Tenn. Crim. App. LEXIS 539, 2013 WL 3306655, at *13. In the court's view, Mr. Belk's testimony was "absolutely crucial" to the "key question" of whether Mr. Kendrick's rifle fired without the trigger being pulled. *Kendrick v. State*, 2013 Tenn. Crim. App. LEXIS 539, 2013 WL 3306655, at *13. Because Mr. Belk testified about the problems with **[**35]** the "Common Fire Control" in 1994 and was aware of these problems before that date, the court decided that Mr. Kendrick's trial counsel should have worked harder to find Mr. Belk or presumably an equivalent expert prior to the trial in November 1994. *Kendrick v. State*, 2013 Tenn. Crim. App. LEXIS 539, 2013 WL 3306655, at *13.

The Court of Criminal Appeals also decided that Mr. Kendrick's trial counsel was "deficient in failing to adduce, as substantive evidence, Sgt. Miller's pretrial statements that the rifle had fired while he was handling it and while his hands were not near the trigger." *Kendrick v. State*, 2013 Tenn. Crim. App. LEXIS 539, 2013 WL 3306655, at *14. The appellate court believed the "crucial" statements Sergeant

Miller made both in the parking lot and in the hospital were admissible hearsay under the "excited utterance" exception.[10] Thus, "when Sgt. Miller's memory proved unreliable at the trial," counsel should have called the officers who heard Sergeant Miller's statements. Moreover, the appellate court decided that Mr. Kendrick's trial counsel "should have anticipated a forgetful witness and been prepared to adduce the proof, of which he was aware, in another manner." *Kendrick v. State*, 2013 Tenn. Crim. App. LEXIS 539, 2013 WL 3306655, at *14.

Turning to the prejudice prong of *Strickland v. Washington*, the Court of Criminal Appeals addressed whether the post-conviction court had applied an incorrect legal standard in its assessment of the adequacy of Mr. Kendrick's proof supporting his ineffective assistance of counsel claim. The appellate court focused on the following two portions of the post-conviction court's October 13, 2011 order:

> The Court agrees with [Mr. Kendrick] that this new evidence is favorable to the defense. The petitioner, however, must prove more than this; he must prove by clear and convincing evidence that the new evidence is so favorable that counsel's failure to present it at trial had an effect on the verdict. This, the Court finds, he does not do.
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[10] *See* Tenn. R. Evid. 803(2) ("Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused **[**36]** by the event or condition [is not excluded by the hearsay rule].").

> The standard for post-conviction relief is high: clear and convincing evidence. On appeal, there was sufficient evidence to support the conviction. Now, after the post-conviction hearing, the Court cannot say that there is clear and convincing evidence that the victim's death was an accident or even that it was only knowing, not premeditated.

The appellate court correctly pointed out that **[**37]** the Post-Conviction Procedure Act requires petitioners to prove their allegations of fact by clear and convincing evidence. Tenn. Code Ann. § 40-30-110; Tenn. Sup. Ct. R. 28, § 8. Once the facts **[*468]** are established, the postconviction court should conduct a straightforward *Strickland v. Washington* analysis to reach the legal conclusion of whether deficient performance and prejudice existed. *Kendrick v. State*, 2013 Tenn. Crim. App. LEXIS 539, 2013 WL 3306655, at *15-16; *see also Dellinger v. State*, 279 S.W.3d at 293-94.

Having already decided that Mr. Kendrick's trial counsel's failure to retain the expert assistance of Mr. Belk or his equivalent was deficient performance, the Court of Criminal Appeals decided that this failure prejudiced Mr. Kendrick "in a number of ways." *Kendrick v. State*, 2013 Tenn. Crim. App. LEXIS 539, 2013 WL 3306655, at *16. First, Mr. Belk's testimony would have corroborated Mr. Kendrick's version of events and thereby enhanced his credibility. *Kendrick v. State*, 2013 Tenn. Crim. App. LEXIS 539, 2013 WL 3306655, at *16. Second, Mr. Belk's testimony could have discredited the testimony of the State's firearms

expert, Agent Fite. *Kendrick v. State*, 2013 Tenn. Crim. App. LEXIS 539, 2013 WL 3306655, at *17. Third, Mr. Belk's expert testimony would have given the jury "an additional reason to suspect [Mr.] Shepheard's testimony" that Mr. Kendrick said "I told you so" to his dying wife. Instead, the jury was "deprived of this critical choice" to accept or reject the fact, supported by expert testimony, that the rifle was defective. *Kendrick v. State*, 2013 Tenn. Crim. App. LEXIS 539, 2013 WL 3306655, at *17.

The Court of Criminal **[**38]** Appeals also decided that Mr. Kendrick's trial counsel's failure to introduce Sergeant Miller's statements as substantive evidence deprived the jury of evidence that was "critical to the defense." *Kendrick v. State*, 2013 Tenn. Crim. App. LEXIS 539, 2013 WL 3306655, at *17. Particularly in light of the trial judge's post-trial statement that he thought the case was "awfully close" on the facts, the appellate court found it "reasonably likely" that, had the jury heard Mr. Belk's testimony and Sergeant Miller's excited utterances, they would have convicted Mr. Kendrick of a lesser degree of homicide. *Kendrick v. State*, 2013 Tenn. Crim. App. LEXIS 539, 2013 WL 3306655, at *17.

The Court of Criminal Appeals noted that Mr. Kendrick had alleged other deficiencies on the part of his trial and appellate counsel. However, after deciding that the two foregoing deficiencies were, by themselves, enough to require a new trial, the court deemed it unnecessary to address Mr. Kendrick's remaining claims. *Kendrick v. State*, 2013 Tenn. Crim. App. LEXIS 539, 2013 WL 3306655, at *18.

VI.

We now turn to the first of the two grounds for the Court of Criminal Appeals' conclusion that Mr. Kendrick's trial counsel's performance was sufficiently deficient and prejudicial to warrant granting Mr. Kendrick a new trial. The court decided that counsel's failure to find and present a firearms expert to testify that the trigger mechanism **[**39]** on Mr. Kendrick's rifle was defective fell below the range of competence demanded of attorneys trying criminal cases in Tennessee.

A.

Two recent opinions of the United States Supreme Court addressing the duty of defense counsel to procure expert testimony to rebut the State's expert testimony are germane to the question of whether Mr. Kendrick's counsel's decision not to seek and retain a firearms expert warrants post-conviction relief.

The first opinion is *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). This case stemmed from the shooting of Joshua Johnson and Patrick Klein in Mr. Johnson's home. When the police arrived, they found Mr. Klein lying on a couch in the living room and Mr. Johnson in the bedroom. Mr. Klein later died, but Mr. Johnson survived and identified **[*469]** Joshua Richter and Christian Branscombe, who earlier had been smoking marijuana with Messrs. Johnson and Klein, as the shooters. Messrs. Richter and Branscombe were charged with the murder of Mr. Klein, the attempted

murder of Mr. Johnson, and related charges. *Harrington v. Richter*, 562 U.S. at __, 131 S. Ct. at 781.

Mr. Richter argued self-defense at trial. He asserted that he and Mr. Branscombe were in a bedroom with Messrs. Johnson and Klein when Messrs. Johnson and Kline attacked them. He insisted that he and Mr. Branscombe **[**40]** fired in self-defense and that Mr. Johnson must have dragged Mr. Klein from the bedroom to the couch where the police found him. *Harrington v. Richter*, 562 U.S. at __, 131 S. Ct. at 782.

While the State made reference in its opening statement to the ballistics evidence it planned to introduce, it made no reference to blood-related evidence because the State did not plan to introduce evidence regarding the blood found in the house. However, the State changed its strategy after Mr. Richter's trial counsel claimed in his opening statement that the State's investigation had been deficient. Without advance notice, and over defense counsel's objection, the State called two additional experts — one an expert in blood spatter evidence and the other a serologist. The blood spatter expert testified that the blood spatters at the crime scene indicated that Mr. Klein had been shot on or near the couch where he was discovered. The serologist testified that the blood taken from the bedroom door could not have come from Mr. Klein. Defense counsel cross-examined both witnesses and exposed weaknesses in their analyses. Nevertheless, the jury convicted Mr. Richter of all charges, and his

convictions were upheld on direct appeal. *Harrington v. Richter*, 562 U.S. at __, 131 S. Ct. at 782.

Mr. Richter petitioned the **[**41]** California Supreme Court for a writ of habeas corpus. He claimed that his trial counsel had been deficient by failing to present expert testimony regarding "serology, pathology, and blood spatter." To buttress his claim, he offered affidavits of two serologists, a pathologist, and an expert in blood stain analysis, each of whom offered an interpretation of the crime scene evidence that was at odds with the testimony of the experts the State had called at trial. The California Supreme Court denied Mr. Richter's petition.

The United States District Court for the Eastern District of California and a threejudge panel of the United States Court of Appeals for the Ninth Circuit found Mr. Richter's federal petition for writ of habeas corpus to be without merit. *Harrington v. Richter*, 131 S. Ct. at 783. However, the United States Court of Appeals for the Ninth Circuit, sitting en banc, found that Mr. Richter was entitled to federal habeas corpus relief. Presumably applying the standard of review required by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the court decided that Mr. Richter's counsel had been deficient because he should have consulted experts on blood evidence (1) to determine an effective trial **[**42]** strategy and (2) to rebut the State's potential expert evidence. *Harrington v. Richter*, 131 S. Ct. at 783 (citing *Richter v. Hickman*, 578 F.3d 944 (9th Cir. 2009)).

The United States Supreme Court granted California's petition for writ of certiorari and held that the Ninth Circuit had failed to give proper deference under the AEDPA to the California Supreme Court's decision. The Court held that under 28 U.S.C. 2254(d) (West 2012), the"pivotal question is whether the state **[*470]** court's application of the *Strickland* standard was unreasonable" and that this question required a higher degree of deference than the related question of "whether defense counsel's performance fell below *Strickland*'s standard." *Harrington v. Richter*, 562 U.S. at __, 131 S. Ct. at 785. Accordingly, the Court held that the Ninth Circuit had erred when it "explicitly conducted a *de novo* review" under the *Strickland v. Washington* standard. Even had there been "a strong case for relief," this would not mean the state court's contrary conclusion was "unreasonable." *Harrington v. Richter*, 562 U.S. at __, 131 S. Ct. at 786.

The Court then turned its attention to Mr. Richter's *Strickland v. Washington* claim. It stressed that "[s]urmounting *Strickland*'s high bar is never an easy task." *Harrington v. Richter*, 562 U.S. at __, 131 S. Ct. at 788 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371, 130 S. Ct. 1473, 176 L. Ed. 2d 284). Because it is "all too tempting" for a reviewing court to "second-guess" a defense attorney's trial decisions, "the *Strickland* standard must be applied with **[**43]** scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve." *Harrington v. Richter*, 562 U.S. at __, 131 S. Ct. at 788

(quoting *Strickland v. Washington*, 466 U.S. at 689-90). The question under *Strickland v. Washington*'s deficient performance prong is "whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." *Harrington v. Richter*, 562 U.S. at __, 131 S. Ct. at 788 (quoting *Strickland Washington*, 466 U.S. at 690). According to the Court, *Strickland v. Washington's* prejudice prong requires that counsel's error be "so serious as to deprive the defendant of a fair trial," meaning "a trial whose result is reliable." *Harrington v. Richter*, 562 U.S. at __, 131 S. Ct. at 787-88 (quoting *Strickland v. Washington*, 466 U.S. at 687).

The United States Supreme Court's discussion of counsel's performance concerning expert testimony is particularly germane to Mr. Kendrick's case:

> The Court of Appeals first held that Richter's attorney rendered constitutionally deficient service because he did not consult blood evidence experts in developing the basic strategy for Richter's defense or offer their testimony as part of the principal case for the defense. *Strickland*, however, permits counsel to "make a reasonable decision that makes particular investigations unnecessary." [*Strickland*, 466 U.S. at 691]. It was at least arguable **[**44]** that a reasonable attorney could decide to forgo inquiry into the blood evidence in the circumstances here.
>
> Criminal cases will arise where the only reasonable and available defense strategy

> requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both. There are, however, "countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." [*Strickland v. Washington*, 466 U.S. at 689]. Rare are the situations in which the "wide latitude counsel must have in making tactical decisions" will be limited to any one technique or approach. [*Strickland v. Washington*, 466 U.S. at 689]. It can be assumed that in some cases counsel would be deemed ineffective for failing to consult or rely on experts, but even that formulation is sufficiently general that state **[*471]** courts would have wide latitude in applying it. Here it would be well within the bounds of a reasonable judicial determination for the state court to conclude that defense counsel could follow a strategy that did not require the use of experts regarding the pool [of blood] in the doorway to [the] bedroom.

Harrington v. Richter, 562 U.S. at __, 131 S. Ct. at 788-89.

The Court noted that before trial, counsel could have considered "any number **[**45]** of hypothetical experts — specialists in psychiatry, psychology, ballistics, fingerprints, tire treads, physiology, or numerous other disciplines and subdisciplines — whose insight might possibly have been useful." But

pursuing these experts could have distracted counsel from "more important duties." *Harrington v. Richter*, 562 U.S. at __, 131 S. Ct. at 789 (quoting *Bobby v. Van Hook*, 558 U.S. 4, 11, 130 S. Ct. 13, 175 L. Ed. 2d 255 (2009) (per curiam)). "Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies." *Harrington v. Richter*, 562 U.S. at __, 131 S. Ct. at 789. "Even if it had been apparent that expert blood testimony could support Richter's defense, it would be reasonable to conclude that a competent attorney might elect not to use it." *Harrington v. Richter*, 562 U.S. at __, 131 S. Ct. at 789.

The Court also observed that the Ninth Circuit's theory of the defense "overlooks the fact that concentrating on the blood pool carried its own serious risks." *Harrington v. Richter*, 562 U.S. at __, 131 S. Ct. at 789. The Court noted that defense counsel had good reason to question his client's truthfulness regarding the details of the crime and that they could have ended up undercutting their client's defense had they hired their own forensic experts. *Harrington v. Richter*, 562 U.S. at __, 131 S. Ct. at 789-90. "Even apart from this danger," the Court said, "there was the possibility that expert testimony could shift attention to **[**46]** esoteric matters of forensic science, distract the jury from whether [the surviving victim] was telling the truth, or transform the case into a battle of the experts." *Harrington v. Richter*, 562 U. S. at __, 131 S. Ct. at 790. In sum, the Court concluded that the Ninth Circuit erred by relying on

"'the harsh light of hindsight' to cast doubt on a trial that took place now more than 15 years ago . . . precisely what *Strickland v. Washington* and AEDPA seek to prevent." *Harrington v. Richter*, 562 U.S. at __, 131 S. Ct. at 789 (quoting *Bell v. Cone*, 535 U.S. 685, 702, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002)).

Although Mr. Richter's counsel's opening statement apparently prompted the State to introduce expert forensic blood evidence, the Court decided that "the prosecution's response shows merely that the defense strategy did not work out as well as counsel had hoped, not that counsel was incompetent." *Harrington v. Richter*, 562 U.S. at __, 131 S. Ct. at 790. Although the Court came close to saying that counsel's representation was not deficient, it did not need to go that far:

> If this case presented a *de novo* review of *Strickland*, the foregoing might well suffice to reject the claim of inadequate counsel, but that is an unnecessary step. The Court of Appeals must be reversed if there was a reasonable justification for the state court's decision. In light of the record here[,] there was no basis to rule that the state court's **[**47]** determination was unreasonable.

Harrington v. Richter, 562 U.S. at __, 131 S. Ct. at 790.

The Court then turned to the Ninth Circuit's second finding — that Mr. Richter's counsel was deficient "because he had **[*472]** not expected the prosecution to offer expert testimony and therefore was unable to offer expert testimony of his own in

response." *Harrington v. Richter*, 562 U.S. at __, 131 S. Ct. at 790-91. The Court decided that the Ninth Circuit erred by holding that "counsel had to be prepared for 'any contingency.'" *Harrington v. Richter*, 562 U.S. at __, 131 S. Ct. at 791 (quoting *Richter v. Hickman*, 578 F.3d at 946).

The Court noted that "[j]ust as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." *Harrington v. Richter*, 562 U.S. at __, 131 S. Ct. at 791. Even if counsel had foreseen that the State would offer expert evidence, Mr. Richter would still be required to show that a reasonable attorney would have acted on that knowledge. In the Court's words: "*Strickland* does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense." *Harrington v. Richter*, 562 U.S. at __, 131 S. Ct. at 791. Rather, "[i]n many instances cross-examination will be sufficient to expose defects in an expert's presentation." *Harrington v. Richter*, 562 U.S. at __, 131 S. Ct. at 791. Indeed,

> it is difficult to establish **[**48]** ineffective assistance when counsel's overall performance indicates active and capable advocacy. Here Richter's attorney represented him with vigor and conducted a skillful cross-examination. As noted, defense counsel elicited concessions from the State's

> experts and was able to draw attention to weaknesses in their conclusions stemming from the fact that their analyses were conducted long after investigators had left the crime scene. For all of these reasons, it would have been reasonable to find that Richter had not shown his attorney was deficient under *Strickland*.

Harrington v. Richter, 562 U.S. at __, 131 S. Ct. at 791.

The United States Supreme Court also held that, assuming counsel was deficient, the Ninth Circuit erred by finding prejudice. *Harrington v. Richter*, 562 U.S. at __, 131 S. Ct. at 792. Justice Ginsburg concurred separately. Although she believed counsel had been deficient "[i]n failing even to consult blood experts in preparation for the murder trial," she did not believe this prejudiced Mr. Richter. *Harrington v. Richter*, 562 U.S. at __, 131 S. Ct. at 793 (Ginsburg, J., concurring).

The second opinion is *Hinton v. Alabama*, 571 U.S. __, 134 S. Ct. 1081, 188 L. Ed. 2d 1 (2014). This case arose from a series of deadly restaurant robberies in Birmingham, Alabama. The managers in each of the three restaurants were shot twice with .38 caliber bullets. Two of the managers died, but the third survived. The **[**49]** authorities recovered all six bullets. After Anthony Ray Hinton was arrested for these crimes, the authorities also recovered a .38 caliber revolver from his house. Examiners from Alabama's Department of Forensic Services used

"toolmark" evidence[11] to conclude that all six **[*473]** bullets had been fired from Mr. Hinton's gun. *Hinton v. Alabama*, 571 U.S. at __, 134 S. Ct. at 1083-84.

Mr. Hinton was tried for capital murder for the first two robberies. The State's strategy was to use the surviving victim's eyewitness testimony to link Mr. Hinton to the third robbery, and then to use the toolmark evidence to link Mr. Hinton to the earlier robberies by showing that all six bullets had been fired from the same gun. In his defense, Mr. Hinton argued misidentification and presented alibi witnesses who claimed he was at work at the time of the third robbery. The six bullets and Mr. Hinton's revolver were the only physical evidence. As the United States Supreme Court later observed, "The State's case turned on whether its expert witnesses could convince the jury that the six recovered bullets

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[11] Toolmarks are the impressions that are created when a hard object (a "tool" such as the firing pin of a gun or the rifling in a gun barrel) comes into contact with a relatively softer object (such as a bullet casing). The brass exterior of a cartridge case receives toolmarks when a gun fires because "the firing pin dents the soft primer surface at the base of the cartridge to commence firing." Extractors and ejectors also leave marks on used cartridges as they expel those cartridges from the gun. Firearms and toolmark examiners believe individual guns exhibit physical heterogeneities, and that a bullet may properly be traced to the gun from which it was fired by virtue of the unique imprints left by the gun's firing pin and related parts. National Academy of Sciences, *Strengthening Forensic Science in the United States: A Path Forward* 150-51 (2009), https://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf (hereinafter NAS Report). **[**50]**

had indeed been fired by the Hinton revolver." *Hinton v. Alabama*, 571 U.S. at __, 134 S. Ct. at 1084.

Mr. Hinton's attorney realized that he needed to retain his own forensic expert because the State's case hinged on forensic evidence. Accordingly, the attorney filed a motion requesting funding for a rebuttal expert. Both the trial court and Mr. Hinton's counsel believed that $500 was the maximum amount that could be approved in each case. Accordingly, the trial court authorized $1,000 for Mr. Hinton to retain an expert in both cases. **[**51]** However, the trial court also told Mr. Hinton's attorney, "if you need additional experts I would go ahead and file on a separate form and I'll have to see if I can grant additional experts." *Hinton v. Alabama*, 571 U.S. at __, 134 S. Ct. at 1084.

Regrettably, both the trial court and Mr. Hinton's attorney were mistaken about that maximum amount that Alabama law permitted for experts in cases such as Mr. Hinton's.[12] As it turned out, Mr. Hinton's attorney was unable to retain a reputable firearm and toolmark expert for $1,000. Accordingly, he settled on a witness with expertise in military ordinance whom he believed would be "usable." This witness had no training in firearm or toolmark identification and had testified as an expert only twice during the prior eight years. The prosecution severely discredited this

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[12] More than one year earlier, Alabama had amended its indigent defense statutes to provide that attorneys representing indigent defendants were "entitled to be **[**52]** reimbursed for any expenses reasonably incurred in such defense." *Hinton v. Alabama*, 571 U.S. at __, 134 U.S. at 1084-85.

witness during cross-examination, even soliciting his concessions that he was visually impaired and that he had to seek assistance from one of the prosecution's experts to operate a microscope at the state forensic laboratory. Mr. Hinton was convicted and sentenced to death. *Hinton v. Alabama*, 571 U.S. at __, 134 S. Ct. at 1085-86.

Mr. Hinton filed a petition for post-conviction relief, alleging his counsel was ineffective for failing to seek additional funds for expert testimony. Even though Mr. Hinton produced three credentialed experts who testified that they could not conclude that any of the six bullets had been fired from Mr. Hinton's revolver, the post-conviction court decided that Mr. Hinton was not entitled to post-conviction relief. The post-conviction court reasoned that Mr. Hinton had not been prejudiced because the testimony of the three new experts tracked the testimony of the "expert" **[*474]** called by Mr. Hinton at trial. The Alabama Court of Criminal Appeals affirmed.[13] The Alabama Supreme Court reversed the intermediate appellate court and remanded the case to the post-conviction court to determine whether the "expert" Mr. Hinton had called at his original trial had been qualified to testify as an expert witness.[14] On remand, the post-conviction court held that the trial expert had been qualified to testify under the standards in place at the

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[13] *Hinton v. State*, No. CR-04-0940, 2006 Ala. Crim. App. LEXIS 72, 2006 WL 1125605 (Ala. Crim. App. Apr. 28, 2006).

[14] *Ex Parte Hinton*, No. 1051390, 2008 Ala. LEXIS 215, 2008 WL 4603723 (Ala. Oct. 17, 2008).

time. The intermediate appellate court affirmed, and the Alabama Supreme Court denied review.[15]

The United States Supreme Court granted Mr. Hinton's petition for writ of certiorari and applied a "straightforward" *Strickland v. Washington* analysis. *Hinton v. Alabama*, 571 U.S. at __, 134 S. Ct. at 1087. The Court found that Mr. Hinton's counsel had performed deficiently. It held that it was "unreasonable" for Mr. Hinton's lawyer "to fail to seek additional funds to hire an expert where that failure was based not on any strategic choice but on a mistaken belief that available funding was capped at $1,000." *Hinton v. Alabama*, 571 U.S. at __, 134 S. Ct. at 1088. The attorney knew that "effectively rebutting" the State's theory — which relied on toolmark evidence — "required a competent expert on the defense side." But defense counsel felt he was "stuck" with the only witness he could afford at that price. *Hinton v. Alabama*, 571 U.S. at __, 134 S. Ct. at 1088.

As it had noted in *Harrington*, the Court stated that "[c]riminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence." *Hinton v. Alabama*, 571 U.S. at __, 134 S. Ct. at 1088 (quoting *Harrington v. Richter*, 131 S. Ct. at 788). The Court found that Mr. Hinton's case "was such a case." *Hinton v. Alabama*, 571 U.S. at __, 134 S. Ct. at 1088. While Mr. Hinton's attorney "knew that he needed more funding to present an effective

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[15] *Hinton v. State*, No. CR-04-0940, 2013 Ala. Crim. App. LEXIS 10, 2013 WL 598122 (Ala. Crim. App. Feb. 15, 2013) **[**53]** .

defense," he "failed to make even the cursory investigation of the state statute providing for defense funding for indigent defendants." **[**54]** *Hinton v. Alabama*, 571 U.S. at __, 134 S. Ct. at 1089.

The Court was careful to state precisely why the attorney's performance was constitutionally deficient:

> An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*.
>
> * * *
>
> We wish to be clear that the inadequate assistance of counsel we find in this case does not consist of the hiring of an expert who, though qualified, was not qualified enough. The selection of an expert witness is a paradigmatic example of the type of "strategic choic[e]" that, when made "after thorough investigation of [the] law and facts," is "virtually unchallengeable." *Strickland*, [466 U.S. at 690]. We do not today launch federal courts into examination of the relative qualifications of experts hired and experts that might have been hired. The only inadequate assistance of counsel here was the inexcusable mistake of law — the unreasonable failure to **[*475]** understand the resources that state law made available to him — that caused counsel to employ an expert that *he himself* deemed inadequate.

Hinton v. Alabama, 571 U.S. at __, 134 S. Ct. at 1089.

Harrington and *Hinton* provide a useful lens for assessing allegations of ineffective assistance that **[**55]** relate to the failure to investigate or retain expert testimony. There are cases, such as *Hinton*, in which a defense attorney bears an affirmative duty to consult an expert, and perhaps to call an expert as a rebuttal witness. From *Hinton*, we learn that when the prosecution's theory of the case hinges on expert forensic science testimony, the acquisition of an expert witness for the defense may be exactly what professional norms under *Strickland v. Washington* require.

In most cases, however, the decision to select an expert, or which expert to select, constitutes one of the "strategic" defense decisions that *Strickland v. Washington* shields from scrutiny. In many cases, cross-examining the prosecution's expert will be just as effective as, and less risky than, utilizing a rebuttal expert. Each case must stand on its own facts.

B.

Expert testimony and forensic science evidence, in particular, have become crucial to many criminal cases. Many cases hinge on DNA evidence, blood toxicology reports, the identification of latent fingerprints, voice recognition, handwriting analysis, toolmark evidence, the analysis of bite marks, shoe prints and tire tracks, and other evidence that falls under **[**56]** the broad umbrella of "forensic science." The use of forensic science evidence has blossomed over recent decades, but in this century, forensic science practitioners have faced criticism from attorneys, scientists, legislators, and others. *See*

generally NAS Report. As the Innocence Project reports, 316 prisoners have been exonerated by post-conviction DNA testing, and approximately half of these wrongful convictions can be attributed, in some way, to deficiencies and errors in forensic science.[16]

Due to the ubiquity and persuasive power of forensic science evidence, it has become necessary for defense counsel to be conversant with forensic science and to be prepared to challenge forensic science testimony — either through effective cross-examination or by marshaling expert testimony for the defense.

In this case, the scientific testimony at issue was not of the "individualization" variety, such as fingerprint, bite mark, or toolmark evidence.[17] Instead, the **[**57]** State presented a firearms expert who testified that Mr. Kendrick's rifle appeared to operate properly. Agent Fite performed "drop tests" designed to make the rifle misfire, but the rifle did not malfunction. Agent Fite concluded that no one could fire the rifle without pulling the trigger or breaking it.

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[16] DNA Exonerations Nationwide, Innocence Project, http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php (last visited July 1, 2014); *see also* Sarah Lucy Cooper, *The Collision of Law and Science: American Court Responses to Developments in Forensic Science*, 33 Pace L. Rev. 234, 300 (2013).

[17] The goal of many forensic science methods is "individualization," which means using the unique markings on an object (markings such as fingerprints or toolmarks) to determine the source of those markings, to the exclusion of all other possible sources. *See NAS Report*, at 43-44.

Defense counsel employed two strategies to counteract this testimony. First, he tried to discredit Agent Fite by characterizing **[*476]** him as someone who believed he never made mistakes. Second, he attempted to cross-examine Agent Fite about the Remington Model 742 rifle, the precursor model to the rifle Mr. Kendrick owned. The trial court overruled this line of questioning as irrelevant and permitted Agent Fite to discuss only the Remington model that Mr. Kendrick owned.

At the post-conviction hearing, Mr. Kendrick presented Mr. Belk as a firearms expert. Like Agent Fite, Mr. Belk was unable to cause Mr. Kendrick's **[**58]** rifle to malfunction. However, Mr. Belk testified that the trigger mechanism — found in Mr. Kendrick's rifle and millions of other Remingtons of various types and models — had malfunctioned on occasion. The post-conviction court observed that Mr. Belk's testimony would have been "helpful" to Mr. Kendrick at trial.

The post-conviction court's observation that expert testimony regarding the occasional failure of the trigger mechanism would have been helpful at Mr. Kendrick's original trial comes with three significant qualifications. First, it is doubtful that Mr. Kendrick's trial counsel would have obtained permission to hire a firearms expert in 1994, even if he had requested one. It was not until 1995 that this Court recognized that indigent non-capital criminal defendants had a constitutional right to expert psychiatric assistance. *State v. Barnett*, 909 S.W.2d 423, 424 (Tenn. 1995). In doing so, we expressly limited the holding of the case

to psychiatric experts. *State v. Barnett*, 909 S.W.2d at 430 n.7.

Second, even after briefing and oral argument in this case, it remains entirely uncertain that Mr. Kendrick's trial counsel could have located and hired a firearm expert in 1994 who could have testified concerning the potential defects of the Remington Model 7400's trigger **[**59]** mechanism.[18] Mr. Belk told the post-conviction court that he first testified about the trigger mechanism in 1994. The record does not indicate the existence of any other such experts who were available at that date. Mr. Kendrick's trial counsel said that he considered himself knowledgeable about firearms and that he was unaware of any discussion in the industry concerning defective Remington trigger mechanisms.

Even though the public defender's office had often consulted a local gunsmith, Mr. Kendrick's trial counsel could not recall whether he or anyone else in the office talked to the gunsmith in conjunction with Mr. Kendrick's case. As trial counsel pointed out, "[Y]ou couldn't Google Remington trigger mechanisms back then." In short, the record does not contain clear and convincing evidence that trial counsel could have found Mr. Belk or his equivalent, or that the sort of testimony **[**60]** Mr. Belk provided

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[18] The civil cases cited in Mr. Kendrick's supplemental reply brief all involved the Remington Model 700 rifle, not the Model 7400. In one of the cases, the United States Court of Appeals noted that the District Court had erred by admitting evidence regarding the trigger mechanism of the Remington Model 600 rifle. *Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1109 (8th Cir. 1988).

at the post-conviction hearing would have been available or admissible at trial.

Third, even if Mr. Kendrick's trial counsel had been able to find and retain Mr. Belk for the original trial in 1994, Mr. Belk would not have been able to testify, as he did during the post-conviction hearing, about the three instances of the Remington Model 7400's malfunctioning. The record reflects that one, if not all, of these instances occurred, according to Mr. Belk, in the "late nineties, probably '97 or '98."

Even if we were to disregard these difficulties in Mr. Kendrick's argument, we are **[*477]** unable to conclude that Mr. Kendrick's trial counsel's performance was deficient. The best evidence that Mr. Kendrick's Model 7400 was capable of misfiring is the undisputed fact that Sergeant Miller was shot in the foot by the very same rifle. Sergeant Miller's injury was not speculative, and it did not involve other weapons. Trial counsel had a reasonable basis to believe Sergeant Miller would testify that he had not touched the trigger, and that this testimony would be "enough for a reasonable doubt as to anything."

In light of defense counsel's testimony, we find that Mr. Kendrick's trial **[**61]** counsel made a reasonable tactical decision to construct his "accidental firing" defense around Sergeant Miller's mishap with Mr. Kendrick's rifle. While counsel knew the substance of Agent Fite's impending testimony, defense counsel reasonably calculated that the incident involving Sergeant Miller would "trump[]" anything Agent Fite could say. In hindsight, Sergeant Miller's testimony deviated from what trial counsel

expected. But at the time defense counsel was forming his trial strategy, it was reasonable to anticipate that he could "use [Sergeant Miller's testimony] very effectively" to elicit an acquittal. Despite Sergeant Miller's memory lapse, defense counsel's performance on this issue indicated "active and capable advocacy." *Harrington v. Richter*, 562 U.S. at __, 131 S. Ct. at 791. It was not constitutionally deficient.

This was not a case that hinged on expert testimony. The bulk of the State's case consisted of eyewitnesses. Although there are cases in which defense counsel must summon expert testimony — and we encourage defense attorneys to be vigilant in this regard — this is not such a case. Surely it would have been "best practices" for trial counsel to consult a firearms expert before trial, but in this case the failure to **[**62]** do so was not objectively unreasonable. *Harrington v. Richter*, 562 U.S. at __, 131 S. Ct. at 788-89.

VII.

The second basis for the Court of Criminal Appeals' decision that Mr. Kendrick's trial counsel's performance was deficient and prejudicial involved his failure to place before the jury hearsay evidence that would have benefitted his client. Specifically, the appellate court took Mr. Kendrick's trial counsel to task for not attempting to use the excited utterance exception to the hearsay rule to place before the jury the statements Sergeant Miller made to fellow officers after Mr. Kendrick's rifle shot him in the foot.

A.

Officers Holbrook, Sims, and Gann each took statements from Sergeant Miller after he was wounded in the foot when Mr. Kendrick's rifle discharged. Had these officers related Sergeant Miller's statements to the jury at Mr. Kendrick's trial, these statements would have been hearsay because they were "statement[s], other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). Here, the truth being asserted was the alleged fact that Sergeant Miller's finger was not on the trigger when Mr. Kendrick's rifle discharged. While hearsay statements are generally inadmissible, **[**63]** Tenn. R. Evid. 802, the Tennessee Rules of Evidence include several well-defined exceptions to Tenn. R. Evid. 802. *See* Tenn R. Evid. 803.

One exception to the hearsay rule involves excited utterances. Under Tenn. R. Evid. 803(2), "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is **[*478]** not excluded by the hearsay rule. The two-fold premise underlying this exception is (1) that shocking circumstances may produce a condition of excitement in a person which temporarily stills the person's capacity of reflection and produces utterances free of conscious fabrication, *State v. Gordon*, 952 S.W.2d 817, 819 (Tenn. 1997); Kenneth S. Braun, 2 *McCormick on Evidence* § 272, at 365 (7th ed. 2013) ("McCormick"), and (2) that excited utterances may be more accurate than much a later

in-court description of the event because they are made when the memory of the event is fresh on the declarant's mind. *State v. Gordon*, 952 S.W.2d at 819-20; Neil P. Cohen, Sarah Y. Sheppeard & Donald F. Paine, *Tennessee Law of Evidence* § 807[2][a], at 8-85 (6th ed. 2013) ("Tennessee Law of Evidence").

Against this backdrop, this Court has developed a three-part test to determine the admissibility of an alleged excited utterance. All three prongs must be satisfied. *See generally* Tennessee Law of Evidence **[**64]** § 8.07[3], at 8-86 to 8-90.

First, there must be a startling event or condition. While "any event deemed startling" may be sufficient to meet this requirement, the event must be "sufficiently startling to suspend the normal, reflective thought process of the declarant." The startling event need not be the act that gave rise to the legal controversy. Furthermore, "a subsequent startling event or condition which is related to the prior event" can also produce an excited utterance. *State v. Gordon*, 952 S.W.2d at 820.

The second broad requirement is that the statement must "relate to" the startling event or condition. A statement relates to the startling event when it describes all or part of the event or condition, or deals with the effect or impact of that event or condition. *State v. Stout*, 46 S.W.3d 689, 699 (Tenn. 2001); *see also State v. Gilley*, 297 S.W.3d 739, 761 (Tenn. Crim. App. 2008) ("[T]here must be a nexus between the statement and the startling event[.]").

The third requirement for admission of an excited utterance is that the statement must have been made

"while the declarant is under the stress or excitement from the event or condition." The "ultimate test" under this prong is whether the statement suggests "spontaneity" and whether the statement has a "logical relation" to the shocking event. When "an act or declaration springs **[**65]** out of the transaction while the parties are still laboring under the excitement and strain of the circumstances and at a time so near it as to preclude the idea of deliberation and fabrication," this prong may be satisfied. *State v. Gordon*, 952 S.W.2d at 820; *State v. Smith*, 857 S.W.2d 1, 9 (Tenn. 1993); *Garrison v. State*, 163 Tenn. 108, 116, 40 S.W.2d 1009, 1011 (1931).

One consideration for determining whether a statement was made under the stress and excitement of a shocking event is the time interval between the event and the statement. *Garrison v. State*, 40 S.W.2d at 1011. But the time interval is not dispositive; other factors must be considered. *State v. Gordon*, 952 S.W.2d at 820 & n.3; *see also State v. Stout*, 46 S.W.3d at 700. In addition to the time interval, other relevant circumstances include the nature and seriousness of the event or condition; the appearance, behavior, outlook, and circumstances of the declarant (including such characteristics as age and physical or mental condition); and the contents of the statement itself, which may indicate the presence or absence of stress. *State v. Gordon*, 952 S.W.2d at 820.

[*479] The excited utterance exception carries a competency requirement. The declarant must have had an opportunity to observe the facts contained in the extrajudicial statement. *State v. Franklin*, 308

S.W.3d 799, 823 n.28 (Tenn. 2010); *State v. Land*, 34 S.W.3d 516, 529 (Tenn. Crim. App. 2000). This requirement is an extension of Tenn. R. Evid. 602, which states, "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that **[**66]** the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony." Personal knowledge may be inferred from the statements themselves and the surrounding facts and circumstances. *State v. Land*, 34 S.W.3d at 529. While "personal knowledge" does not require "absolute certainty" on the declarant's part, the declarant's statement may not be based on "mere speculation." *State v. Land*, 34 S.W.3d at 529.

The Tennessee Rules of Evidence do not require the declarant to be an actual participant in the precipitating event. *State v. Gordon*, 952 S.W.2d at 820. It is also worth noting that statements made in response to questions may be admissible as excited utterances if the declarant is still under the excitement or stress of the event during questioning. *State v. Gordon*, 952 S.W.2d at 820-21. On the other hand, other courts have observed that when a statement is made in response to an inquiry or when the statement is self-serving, these factors may show the statement was the result of reflective thought. *See* 2 McCormick § 272, at 370-72 & nn. 32-33.

The standard of review for rulings on hearsay evidence has multiple layers. Initially, the trial court must determine whether the statement is hearsay. If the statement is hearsay, then the trial court

must **[**67]** then determine whether the hearsay statement fits within one of the exceptions. To answer these questions, the trial court may need to receive evidence and hear testimony. When the trial court makes factual findings and credibility determinations in the course of ruling on an evidentiary motion, these factual and credibility findings are binding on a reviewing court unless the evidence in the record preponderates against them. *State v. Gilley*, 297 S.W.3d at 759-61. Once the trial court has made its factual findings, the next questions — whether the facts prove that the statement (1) was hearsay and (2) fits under one the exceptions to the hearsay rule — are questions of law subject to de novo review. *State v. Schiefelbein*, 230 S.W.3d 88, 128 (Tenn. Crim. App. 2007); *Keisling v. Keisling*, 196 S.W.3d 703, 721 (Tenn. Ct. App. 2005).

If a statement is hearsay, but does not fit one of the exceptions, it is inadmissible, and the court must exclude the statement. But if a hearsay statement does fit under one of the exceptions, the trial court may not use the hearsay rule to suppress the statement. However, the statement may otherwise run afoul of another rule of evidence. *State v. Gilley*, 297 S.W.3d at 760-61. For example, a trial court may decline to admit an excited utterance if it finds the utterance lacks relevance under Tenn. R. Evid. 401 & 402 or if it finds the utterance's "probative value is substantially **[**68]** outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of

cumulative evidence." Tenn. R. Evid. 403. If a trial court excludes otherwise admissible hearsay on the basis of Rule 401, 402, or 403, this determination is reviewed for abuse of discretion. *State v. Harris*, 839 S.W.2d 54, 73 (Tenn. **[*480]** 1992); *State v. Gilley*, 297 S.W.3d at 759-61; *see also* 1 McCormick § 185, at 1010.

B.

In this case, Mr. Kendrick's trial counsel did not attempt to introduce Sergeant Miller's statements as excited utterances. Accordingly, like the courts below, we have no trial court ruling to review. Both the trial court and the Court of Criminal Appeals approached the question of the admissibility of Sergeant Miller's statements as a question of law. Accordingly, we will address this question de novo.

For the purposes of this opinion, we will deem Sergeant Miller's statements to Officer Gann in the parking lot of the police service center and to Officer Holbrook in the hospital to be excited utterances. However, even if Sergeant Miller's statements were properly admissible under Tenn. R. Evid. 803(2), it does not necessarily follow that Mr. Kendrick's trial counsel was ineffective because he did not seek to admit them under Tenn. R. Evid. 803(2).

The question **[**69]** at this juncture is whether counsel's actions were objectively unreasonable under all the circumstances in light of the professional norms that prevailed in 1994. *Strickland v. Washington*, 466 U.S. at 688. We must undertake this analysis with the presumption that counsel's representation was adequate, and we must also do

our best to eliminate the distorting effects of hindsight. *Mobley v. State*, 397 S.W.3d at 80-81.

Mr. Kendrick's trial counsel candidly admitted at the post-conviction hearing that it did not occur to him during the heat of the trial to attempt to introduce Sergeant Miller's statements to the other officers as excited utterances under Tenn. R. Evid. 803(2). While lack of familiarity with relevant court rules might in some cases provide grounds for a finding of ineffective assistance of counsel, this record reflects that Mr. Kendrick's trial counsel labored to convince the jury that Sergeant Miller's finger was not on the trigger of the rifle when it fired into his foot.

Counsel closely cross-examined Sergeant Miller regarding the incident and his loss of memory of the particulars. He also recalled Sergeant Miller to the stand and attempted to refresh his memory with the incident reports. Counsel attempted to use the incidents reports as impeachment evidence in accordance **[***70]** with Tenn. R. Evid. 613(b). In addition,[19] he pointed out during his cross-examination of Sergeant Miller and his closing argument, that when Sergeant Miller demonstrated how he was holding the rifle, his finger was not near the trigger and that Sergeant Miller stated during cross-examination that he was holding the rifle in the

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[19] The Court of Criminal Appeals found that the trial court erred by preventing Mr. Kendrick's trial counsel from impeaching Sergeant Miller based on his prior inconsistent statements. *State v. Kendricks*, 947 S.W.2d at 881-82. Mr. Kendrick's trial counsel pursued a proper basis for the admission of the reports and failed only because of the trial court's error.

courtroom in the same way he was holding it when he was shot. Finally, during his cross-examination of Sergeant Miller about his training and experience with firearms, Mr. Kendrick's trial counsel elicited answers strongly suggesting that Sergeant Miller would not have picked up the rifle with his finger on the trigger.

In short, trial counsel did almost everything at his disposal to prove that Sergeant Miller had not pulled the trigger, with the exception that he did not offer the statements as substantive evidence under Tenn. R. Evid. 803(2). As the Court of Criminal Appeals noted on direct **[**71]** appeal, **[*481]** counsel's "thorough cross-examination of Officer Miller . . . provided the jury ample evidence from which it could have concluded that Officer Miller's memory was faulty and that he knew he had not caused the gun to fire by pulling the trigger." *State v. Kendricks*, 947 S.W.2d at 882.

The "circumstances" surrounding this evidentiary issue reflect that Mr. Kendrick's trial counsel adduced evidence that would have supported the jury's conclusion that Sergeant Miller was not touching the trigger when Mr. Kendrick's rifle discharged into his foot. The fact that counsel failed to go one step further by pursuing the excited utterance exception does not overcome the presumption that trial counsel gave Mr. Kendrick adequate representation. Although the excited utterance exception slipped his mind, trial counsel took great pains to inform the jury that the weapon apparently misfired for Sergeant Miller. This was the best evidence that the trigger mechanism on

Mr. Kendrick's rifle might have been defective. Counsel's representation was not deficient in this regard.

Even if we determined that trial counsel's representation was deficient, the other "ample evidence" summarized above would mitigate against finding that Mr. Kendrick **[**72]** was prejudiced. The defense theory was that the rifle malfunctioned both for Mr. Kendrick and Sergeant Miller. The jury heard evidence to support that theory, including Sergeant Miller's cross-examination and Mr. Kendrick's statement that he was "almost positive" his finger was not on the trigger. However, the jury also heard evidence suggesting that Mr. Kendrick pulled the trigger. Mr. Benton testified that he saw Mr. Kendrick's "right hand was on the pistol grip area around the trigger and the left hand was up near the stock." Other evidence suggested a premeditated murder, including Mr. Kendrick's flight from the scene, his failure to give or ask for assistance, the fact that he discarded the weapon, and the testimony of his daughter and Mr. Shepheard. The fact that the jury was not able to see or hear the incident reports does not, by itself, undermine our confidence in the verdict. *See Strickland v. Washington*, 466 U.S. at 694.

VIII.

We conclude that Mr. Kendrick did not receive ineffective assistance from his trial counsel with regard to the two issues before the Court on this appeal. Accordingly, the judgment of the Court of Criminal Appeals is reversed. In light of the fact that

the appellate court did not consider **[**73]** the remaining issues raised by Mr. Kendrick, we remand this case to the Court of Criminal Appeals with directions to consider the issues that it pretermitted in its earlier decision. Because Mr. Kendrick appears indigent, we assess the costs of this appeal to the State of Tennessee.

WILLIAM C. KOCH, JR., JUSTICE

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT KNOXVILLE

January 29, 2013 Session

EDWARD THOMAS KENDRICK, III v. STATE OF TENNESSEE

Appeal from the Criminal Court for Hamilton County

No. 220622 Don W. Poole, Judge

No. E2011-02367-CCA-R3-PC - Filed June 27, 2013

Edward Thomas Kendrick, III ("the Petitioner")[1] was convicted by a jury of first degree premeditated murder. This Court affirmed the Petitioner's conviction on direct appeal. The Petitioner filed for post-conviction relief, alleging ineffective assistance of counsel. After a hearing, the post-conviction court denied relief, and this appeal followed. Upon our thorough review of the record and the applicable law, we are constrained to **[*2]** conclude that the Petitioner established that he received the ineffective assistance of counsel at trial, because it is reasonably likely that a jury would have convicted him of a lesser degree of homicide absent the deficiencies in his trial counsel's performance. Accordingly, we must reverse

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[1] The Petitioner identifies himself as "Edward Thomas Kendrick, III" in his petition for post-conviction relief filed on April 15, 1998. We note that this Court's opinion addressing the Petitioner's direct appeal from his conviction identifies the Petitioner as "Edward Thomas Kendricks, III, alias Edward Thomas Kendrick, III."

the Petitioner's conviction and remand this matter for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment

of the Criminal Court Reversed; Remanded

JEFFREY S. BIVINS, J., delivered the opinion of the Court, in which ALAN E. GLENN and

ROGER A. PAGE, JJ., joined.

Ann C. Short (on appeal), Knoxville, Tennessee; Jeffrey Schaarschmidt and Jason Demastus

(at post-conviction hearing), Chattanooga, Tennessee, for the Appellant, Edward Thomas

Kendrick, III. Robert E. Cooper, Jr., Attorney General & Reporter; Lacy Wilbur, Assistant Attorney

General; Bill Cox, District Attorney General; and Lance Pope, Assistant District Attorney

General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background

Trial

On March 6, 1994, the Petitioner shot and killed his wife. A jury subsequently convicted the Petitioner of first degree premeditated murder, and the Petitioner was sentenced to life imprisonment. This Court affirmed the Petitioner's conviction on direct appeal. See State v. Kendricks, 947 S.W.2d 875, 886 (Tenn. Crim. App. 1996). To assist in the resolution of this proceeding, we repeat here the summary of the facts set forth in this Court's opinion resolving **[*3]** the Petitioner's direct appeal:

On March 6, 1994, at approximately 10:00 p.m., the [Petitioner] drove to the gas station at which Lisa Kendrick, his wife and the victim, worked. With him in the car were their four-year-old daughter and three-year-old son. These children were sitting in car seats in the back seat of the station wagon the [Petitioner] was driving. Also in the car, on the front passenger floorboard, was the [Petitioner's] loaded 30.06 hunting rifle.

The [Petitioner] pulled into the station, parked, and went into the market portion of the station where his wife worked as a cashier. He asked her to come outside, which she did. She and the [Petitioner] went to the car where she spoke briefly to the children. The [Petitioner] retrieved the rifle from the front passenger floorboard and carried it to the back of the car. At that point, the weapon fired once, the bullet striking the victim in her chest and killing her almost instantly.

After the victim fell to the parking lot, the [Petitioner] briefly bent over her body, put the gun back in the car, and drove toward the airport a short distance away. On the way, he threw the rifle out of the car. Once he arrived at the airport, **[*4]** he called 911 and reported that he had shot his wife. Before the [Petitioner] left the gas station, he took no action to assist the victim in any way.

Timothy Shurd Benton, a customer, was in the market when the [Petitioner] entered. He testified that the [Petitioner] had asked the

cashier "to step outside, he had something to show her." Benton left the market, got in his car and started to leave the parking lot. He testified that, as he had begun to leave, he heard an "explosion." He looked over his shoulder out the window of his car and saw the [Petitioner] holding a rifle "pointed straight up in the air." He also saw the victim lying on her back on the parking lot. After deciding that another person in the market was aware of the situation and would call for help, Benton followed the [Petitioner] to the airport, where he contacted an airport police officer.

Lennell Shepheard was also in the market at the time the [Petitioner] entered. He testified that he had seen the [Petitioner] and his wife leave the store, that the [Petitioner] had not appeared angry or hostile, and that the victim had shown no signs of fear when she went outside at the [Petitioner's] request. Shepheard remained **[*5]** in the store until he heard the rifle shot. At that point, he opened the market door and looked outside to see what had happened. He testified that he had seen the [Petitioner] shut the back passenger door and then lean over the victim's body and state, "I told you so" approximately six times.

Endia Kendrick, the [Petitioner's] four-year-old daughter, testified on direct examination that she had seen her father shoot her mother and that her mother had had her arms up at the time.

However, on cross-examination, Endia admitted that she hadn't actually seen the shooting.

Dr. Frank King, the Hamilton County Medical Examiner, testified that the victim had died of a single gunshot wound to the chest that entered her body in the left chest at forty-nine inches above the heel and exited her body at the left back at forty-nine and one-half inches above the heel.

The [Petitioner] testified that he had been moving the rifle from the front of the car to the back at the request of the victim and that it had discharged accidentally. He testified that he had been shifting it from one hand to the other when it went off. He testified that he had not pulled the trigger. He steadfastly denied that he had **[*6]** intended to shoot the victim, and claimed that he had been carrying the rifle in the car because he sometimes cleaned apartments near an area where he felt a gun was necessary for personal protection. He also denied making any statements as he bent over the victim, and testified that he had taken no action to assist her because he knew she was dead. The [Petitioner] also testified that he and the victim had agreed on an irreconcilable differences divorce, that an attempted reconciliation had recently failed, and that he suspected that she had had or was having an affair. He denied that he was upset or angry at his wife about the status of their relationship.

In support of his contention that the rifle fired accidentally, the [Petitioner] relied on the

testimony of Officer Steve W. Miller. Officer Miller testified that he had shot himself in the foot with the rifle when he was removing it from the trunk of his car after recovering it from where the [Petitioner] had thrown it. Officer Miller testified that he had shot himself accidentally. He further testified that he could not recall whether or not his finger had been on the trigger of the gun when it fired.

Kelly Fite, a firearms examiner, **[*7]** testified that he had examined and tested the rifle and that, in his opinion, "[t]he only way that you can fire this rifle without breaking it is by pulling the trigger."

After the defense closed its proof, the State called Martha Kay Maston as a "rebuttal" witness. Maston testified that she had been working as a public safety officer for the Chattanooga Metropolitan Airport Police on the night of the shooting. On finding the [Petitioner] at the airport, she saw the two children in the back seat of the car. She testified that she had gotten the children out and that they were both "very upset and hysterical." She further testified that "when I got [the little girl] out of the car, she just put her arms around me and she stated that she had told daddy not to shoot mommy but he did and she fell." Maston testified that the [Petitioner's] daughter had not made any other statements and that his son had not said anything.

Kendricks, 947 S.W.2d at 878-79.

Post-Conviction

After the direct appeal, the Petitioner, pro se, timely filed a petition for post-conviction relief in April 1998.[2] The post-conviction court summarily dismissed the petition on the basis that the issues raised were either waived **[*8]** or previously determined. See Kendricks v. State, 13 S.W.3d 401, 403 (Tenn. Crim. App. 1999). On appeal, this Court held that "the post-conviction court erred in holding that the petitioner's ineffective assistance of counsel claims were barred for failure to raise them on direct appeal." Id. at 405. Accordingly, this Court reversed the post-conviction court in part and remanded the case for further proceedings, noting specifically that the Petitioner should be allowed the opportunity to amend his petition. Id. On March 16, 2000, the Petitioner filed an amended petition with the assistance of counsel. The Petitioner also filed multiple amended petitions with and without the assistance of counsel. The hearing on the Petitioner's post-conviction petitions and amended petitions ultimately occurred on multiple days in February and March 2011[3] during which the following proof was adduced:[4]

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[2] The Tennessee Supreme Court denied the Petitioner's application for permission to appeal from this Court's decision on May 5, 1997.

[3] It is unclear from the record why over ten years elapsed between this Court's prior opinion and the hearing on the Petitioner's amended petitions.

[4] Although there was a great **[*9]** deal of testimony adduced at the post-conviction hearing, we have limited our recitation of the evidence to that which is necessary for our resolution of this case.

Henry Jackson Belk, Jr., a gunsmith, testified that, earlier that morning in the clerk's office, he examined the gun, a Remington Model 7400 30.06 autoloading rifle, that shot and killed the victim. He stated that he was familiar with the trigger mechanism inside the rifle, describing it as "a common trigger mechanism that is contained within a wide variety of firearms, shotguns, rim fires and center fire rifles." He added, "Generally speaking, all pumps and automatics manufactured after 1948 by Remington contain this trigger mechanism." Belk testified that the trigger mechanism is referred to as the "Remington Common Fire Control" ("the Common Fire Control").

Belk stated that the Common Fire Control was first used in the automatic shotgun in 1948, then in the pump shotgun in 1950, and then in the automatic rifle in 1951. The Common Fire Control is currently used in 23 million firearms. Because the Common Fire Control is used in different firearms, any "issue" with the trigger mechanism would not be limited to one specific **[*10]** type of firearm. According to Belk, the Common Fire Control is a "defective mechanism."

As to the rifle in this case, Belk stated that it had "the normal dirt, dried oil and residue common to a gun that has not been cleaned." After removing the trigger mechanism while he was on the witness stand, Belk examined the rifle and stated that "the action spring is sticky." He explained that the "action spring . . . supplie[d] the energy for the bolt to return back forward." Because the action spring was "sticky," the bolt was "not going forward as freely as

it should." Belk explained that the action spring's condition was consistent with a firearm that had not been cleaned.

Turning his attention to the trigger mechanism, Belk testified about how it could malfunction:

> The general description here is this is a swing hammer mechanism; in other words, it fires by a hammer going forward and hitting a firing pin that's contained in the bolt inside the housing. The sear is the part that retains the hammer. The sear is what holds the hammer back, does not fire. On this particular mechanism, on all these Remington mechanisms, that sear is an independent part, is right here. That is an independent part, **[*11]** not on the end of the trigger like a Browning design is.
>
> For that reason, and the fact that the safety only blocks the trigger, it does not block the action of the sear or the hammer, it only blocks the trigger, any debris that is captured between the sear and the slot that it is housed in, which is the housing, any debris that is caught between the bottom or the tail of the sear and the stock surface inside the housing, any debris that gathers there, any debris that gathers between the trigger yoke and the rear pivot pin and the trigger pusher arm and the bottom of the sear, any debris in any of those places, alone or in concert, can cause an insecure engagement between the hammer and the sear itself.

> So even with a gun on safe, which it is now, it can still fire, which it just did. Without pulling the trigger, on safe.

Responding to questions by the court, Belk clarified: "I can pull the trigger and make it fire, just like that (indicating), or I can put it on safe without the trigger being pulled and fire it just by manipulation of the sear."

Belk continued:

> The notch in the hammer determines how much debris it takes to make it fail. The notch in the hammer is about 18,000 of an inch **[*12]** deep, about the thickness of a matchbook cover. . . . [A]nything that totals that amount of distance can make a gun fail.
>
> ....
>
> Any of those other locations, it takes about 18,000ths in order to interfere with the secure engagement of the hammer and the sear.

Belk clarified that there were five locations in the trigger mechanism that made the mechanism "weak" and that could collect the requisite amount of debris to cause a misfire. Moreover, of the five "weak spots," "the clearance between the sear and the housing itself is usually about 4,000ths, so it would take less debris captured between those places to retard the proper motion of the sear and would also cause it to fail. So it wouldn't necessarily take as much as 18,000ths."

Belk also testified that "[t]he Remington Common Fire Control has a history of firing under outside influences other than a manual pull of the trigger.

Vibration is one way that can happen. Impact. Even in one case the simple act of grabbing the gun by [the forward part of the stock] caused it to fire." Belk reiterated that the Common Fire Control "fires without the control of the trigger. It can fire out of the control of the shooter. It can discharge without **[*13]** any hand being on the stock."

Belk stated that, if debris caused the gun to fire unintentionally, the debris could be dislodged during the discharge. He added,

> On this semi-automatic, each time the gun is fired, the hammer goes forward, and then under great pressure and speed, the hammer is forced back again into position. So there's a lot of cycling going on.
>
> There's also the disconnector here, there's a lot of movement in the mechanism itself during firing and during manipulation after firing. And that movement, many times, dislodges the debris that actually was the causation.

Belk acknowledged that debris also can be dislodged through a gun being dropped or "banged around." He acknowledged that a drop test "many times[] destroys any evidence that was there." He explained that the standardized tests of dropping a firearm "on a hundred durometer rubber pad from a certain distance in certain orientations . . . does nothing whatsoever to analyze the mechanism and how it can fail. So the . . . drop test in itself can be destructive [by dislodging debris] without actually showing anything." He added, "[T]his particular mechanism has what is called a recapture angle. So,

impact, as in dropping **[*14]** it on the floor, will actually recapture the sear engagement rather than dislodge it. So the . . . drop test on this particular gun is pretty much useless."

Belk opined that the rifle which shot and killed the victim "is capable of firing without a pull of the trigger, whether the safety is on or off."

Belk testified that he was first hired to work on a case involving the Common Fire Control in 1994, and he agreed that, "if someone had done some research, they would have potentially been able to find [him]." He also testified that problems with Remington firearms could be reported to the manufacturer, which maintained "some" records of complaints. According to Belk, people were complaining prior to his initial involvement. He testified that he "first identified the problem with the Remington Common Fire Control in 1970." When a "co-shooter" on a skeet-range complained of trigger problems, Belk disassembled the trigger mechanism and "found a section of lead shot debris stuck in the sear notch of the hammer." He added, "That was the first identification that [he] had of a bad mechanism, that it could fire without a trigger being pulled." Since then, he had consulted with "many, **[*15]** many attorneys." One case involved a Remington 7400 that fired while it was being cleaned with an air hose. The safety on that gun had been engaged. Another gun fired while being wiped with a rag. Another gun fired when the butt-end of the stock was placed on the floor.

On cross-examination, Belk admitted that, while the trigger assembly was in the Petitioner's rifle, the rifle had not misfired during Belk's handling of it. He also admitted that he could not opine about the cleanliness of the gun in March 1994. He stated that he testified in a case involving a Remington 7400 in 1997 or 1998.

On redirect examination, Belk testified that he was familiar with a case in which a Remington shotgun containing the Common Fire Control fired while it was in a locked case and with the safety engaged. The gun was strapped to the handlebars of an ATV that had been left idling. The vibrations caused the gun to fire. Belk stated that he had been consulted on "probably two dozen" cases involving the Common Fire Control in which the gun discharged and injured someone.

On re-cross examination, Belk maintained that he had previously been able to induce a misfire by "artificially introducing" debris in "any" **[*16]** of the previously identified "weak spots." He clarified that he induced these misfires in "cutaway" guns.

Sergeant Steve Miller of the Chattanooga Police Department ("CPD") testified that, on the night the victim was killed, he was assigned to the case as a crime scene investigator. He testified that the firearm was not located at the scene of the shooting. When a "[c]all came across the police radio that a gun had been located down Airport Road," Sgt. Miller went to locate the firearm. He located the rifle on the side of Airport Road and noted that there was no clip in it. He photographed the rifle and collected it for

evidence, placing it in the trunk of his patrol car. Sgt. Miller transported the rifle back to the police service center on Amnicola Highway.

Sgt. Miller agreed that he was handling the rifle carefully in order to preserve fingerprints. He also acknowledged that he testified at trial that he had a jacket in his left hand and that he "grabbed" the rifle from the trunk of his patrol car with his right hand and "pointed it in a downward motion" towards the pavement. When Sgt. Miller pointed it in the downward motion, the rifle discharged, injuring his left foot. Sgt. Miller **[*17]** testified that he "can't say with a hundred percent accuracy" whether his fingers were anywhere near the trigger but stated that "[t]hey shouldn't have been."

Sgt. Miller acknowledged his signature on the bottom of a report prepared by Michael Taylor on March 7, 1994 ("the Taylor report"). The Taylor report, admitted into evidence, reflected that James Gann was the first officer to respond to Sgt. Miller's injury, and Sgt. Miller's recollection at the post-conviction hearing was consistent: that Officer James Gann came out of the service building to see what had happened after Sgt. Miller shot himself. Sgt. Miller also acknowledged that the Taylor report indicated that he told the "initial officer that he had both hands on the rifle and did not have his finger near the trigger." Sgt. Miller testified that he suffered "a massive foot injury" that was "extremely painful." Sgt. Miller agreed that the wound also was stressful.

On cross-examination, Sgt. Miller agreed that he was called by the State as a witness at the

Petitioner's trial. He agreed that defense counsel questioned him at the trial and asked questions about where his fingers were with respect to the trigger when he shot himself. **[*18]** He also remembered that defense counsel's cross-examination was "tough."

On redirect examination, Sgt. Miller testified that defense counsel did not interview him prior to the trial.

Glenn Sims, retired from the CPD, acknowledged that he prepared a police report in connection with Sgt. Miller's incident, but he did not recall speaking with Sgt. Miller. He acknowledged that, according to his report, Sgt. Miller "was taking the firearm . . . that he had collected into evidence, out of the truck of the vehicle [and] it discharged[.]" The report further reflected that "the rifle swung down, [Sgt. Miller] wasn't sure if it hit his foot or the ground, but it went off, hitting Miller in the left inside foot." Sims agreed that the report reflected that the rifle "just went off."

James A. Gann testified that he was employed by the CPD in 1994 and that he was one of the officers who investigated Sgt. Miller's incident. He stated that he was in the office when he heard "a loud recoil of a gun." Gann went outside to investigate and saw that Sgt. Miller was shot in the foot. Gann radioed for an ambulance and alerted the appropriate people who "had to be advised on a shooting." Gann stated that Sgt. **[*19]** Miller was "in a lot of pain, bleeding, and starting to go into shock." Gann could not recall whether he spoke to Sgt. Miller about what had

happened, explaining that he "was more concerned with his foot, he was bleeding." Referring to a police report that Sgt. Glenn Sims had prepared, Gann acknowledged that Sgt. Miller had told Gann that, while Sgt. Miller was taking the rifle out of the trunk, the gun "just went off." Gann also testified that he was not contacted by anyone from the public defender's office before the Petitioner's trial.

Officer Michael Holbrook of the CPD testified that he was dispatched to Erlanger Hospital to respond to an accident involving Sgt. Miller. Officer Holbrook spoke to Sgt. Miller at the hospital and prepared a report regarding their conversation. Officer Holbrook testified that Sgt. Miller told him that "as he was taking the rifle out of the trunk of his patrol car, the rifle went off and shot him in the foot." Sgt. Miller also told Officer Holbrook that his hands were not on the rifle's trigger. Officer Holbrook's report was consistent with his testimony and contained the following narrative: "As he was lifting out the rifle, the weapon went off and **[*20]** struck him in the left foot. [Sgt.] Miller states that he picked it up with both hands and his finger was not near the trigger." Officer Holbrook's report, dated March 7, 1994, was admitted as an exhibit.

The Petitioner's trial lawyer ("Trial Counsel") testified that he worked for the public defender's office in 1994 and represented the Petitioner at trial. He stated that two investigators assisted him in investigating the case. Trial Counsel agreed that the Petitioner's appointed counsel in general sessions

waived the preliminary hearing in exchange for "an open file policy."

Trial Counsel testified that, from the beginning, the Petitioner maintained that the rifle accidentally discharged. He also testified that Sgt. Miller had made statements indicating that "he was not holding the gun anywhere near the trigger housing and it discharged, shooting him in the foot." Trial Counsel stated that he never looked for an expert witness to support the Petitioner's accidental discharge claim. He testified that the public defender's office informally consulted with a gunsmith who was a former Red Bank police officer, but he did not remember whether he spoke to him about this case. Trial Counsel **[*21]** also agreed that he performed no research regarding the trigger mechanism in the Remington 7400 rifle. He added, "[a]s a matter of fact, when I heard on NPR, a year or so ago, that the Remington trigger mechanism was faulty and [there had] been several apparent accidental deaths as a result of it, you're the first person I contacted, because I thought, I remembered it was a Remington and I thought it was something very important." Trial Counsel generally recalled that the State's expert, Kelly Fite, performed a "drop test" on the rifle. He agreed that Fite's report did not indicate that Fite inspected the trigger mechanism.

Asked whether it would have been beneficial for an expert to testify on the Petitioner's behalf about the trigger mechanism, Trial Counsel answered, "In hindsight, especially with the knowledge now that there have been so many problems with the

Remington trigger mechanism, yeah." Asked about his knowledge of any discussions in the industry regarding the trigger mechanism misfiring, Trial Counsel responded:

> I wasn't aware of any. And I will point out, at the time, I was the only public defender in Division II, and in that period of time in little over four years, I **[*22]** probably tried, literally, 40 first degree murder cases, settled another 40 to 50, and I will concede I didn't put nearly as much time in on his case or any other cases that I tried as I do now in my private practice, because I've got a lot more time. My average caseload every Thursday for settlement day was between 20 and 30 defendants. My average month included at least 2 if not 3 trials. So I wasn't aware of the issue with the trigger pull.

Trial counsel also added that, although he had "a fundamental knowledge of firearms, [he] was not aware of it and . . . [he] didn't know it and [he] didn't get an expert." He also explained,

> I thought [Sgt.] Miller would testify consistently with what I knew to be his statements, and I thought that would come in and I thought that when that did come in, I could use that very effectively to say, okay, if [the Petitioner] can't accidentally have that gun [go] off, neither can [Sgt.] Miller, so, therefore, you got to presume that [Sgt.] Miller shot himself in the foot on purpose. That was my whole line of reasoning in this case.

Trial Counsel testified that he "was not prepared for [Sgt.] Miller to say he couldn't remember, because there was not any **[*23]** doubt in [Trial Counsel's] mind, at least, when [they] started trying this case, that he was going to stick to his prior statements." Accordingly, Trial Counsel had no "backup plan" to call other officers to testify about what Sgt. Miller had told them after he shot himself. Trial counsel felt "sandbagged" by Sgt. Miller's trial testimony. He recalled the trial court refusing to allow him to introduce one of the reports generated about Sgt. Miller's injury in which Sgt. Miller reported that his hands had not been near the rifle's trigger when it misfired. He did not request to make an offer of proof. He also did not attempt to introduce Sgt. Miller's statements as excited utterances, explaining, "[i]n the heat of the trial, I didn't see that."

Trial Counsel agreed that both Lennell Shepheard and Sgt. Miller's testimony at trial differed from their statements that the State provided the defense during discovery. Trial Counsel stated that the first time he heard Shepheard claim the Petitioner stated "I told you so" was during Shepheard's testimony. Trial Counsel agreed that he was never provided notice by the State prior to these two witnesses testifying that the substance of their pretrial **[*24]** statements had changed materially. Trial counsel also stated that, although he was not the Petitioner's counsel at the preliminary hearing stage, he would expect "in exchange for the waiver of a preliminary hearing, especially in a first degree murder case, that there would be some extra benefit

to come to the defendant through the discovery process." He added, "if [Sgt.] Miller was going to change his story, we should have been made aware of that, if Mr. Shepheard was going to add to his story, we should have been made aware of that."

On cross-examination, Trial Counsel stated that he began practicing law in Tennessee in April 1978 and had been in continuous practice since that time. At the time of the Petitioner's trial, Trial Counsel had been practicing law for sixteen years, primarily in criminal defense. Trial Counsel also stated that he was employed at the public defender's office at the time of the Petitioner's trial and had worked in that capacity for approximately five years. Trial Counsel had tried at least sixty to seventy cases by 1994, including murder cases, less-serious cases, and death penalty cases. He stated that he tried in excess of forty murder cases prior to this **[*25]** case. Trial Counsel testified that he was assigned this case at arraignment.

Before meeting with the Petitioner, Trial Counsel stated that the Petitioner completed an "intake sheet" wherein he wrote out his "side of the story." Trial Counsel testified that the Petitioner was on bond when he was assigned to the Petitioner's case and that he remained on bond throughout his representation of him. The offense occurred in March 1994, and the Petitioner's trial was in November 1994. Trial Counsel agreed that this was a "little quick." Trial Counsel could not recall whether the Petitioner had desired that the case proceed to trial quickly.

Trial Counsel acknowledged that he and the Petitioner discussed the strategy in the case. He stated, again, that the Petitioner maintained from the beginning that the rifle accidentally discharged and that there was "no real animosity" between him and the victim. Trial Counsel also stated that, in his preparation for the trial, he reviewed documents provided to the defense by the State. Trial Counsel testified that he typically would meet at the district attorney's office to review documents the State provided him in a case. He could not recall particularly **[*26]** whether he had a meeting in the district attorney's office in this case but stated that was his "standard operating procedure." He added, "I'm sure we met on it several times, not just one time." Trial Counsel stated that he was "confident" that the standard discovery motions were filed in this case although he could not specifically recall filing them. He stated that he filed the "standard motions" with every appointment he received. Pursuant to those discovery motions, Trial Counsel stated that he received documents from the State in this case and that he reviewed them to prepare for the trial. He also stated that the documents included the names of witnesses, and he agreed that the documents also included witness statements "in theory."

Trial Counsel recalled discussing the Petitioner's testimony with him prior to trial. He was "pretty confident" that he and the Petitioner "went through sit-downs where [Trial Counsel] cross-examined" the Petitioner. He added that, for every trial in which the defendant was going to testify, he would "sit down

and grill them" so that they could anticipate what cross-examination would be like.

Trial Counsel did not recall specifically "familiarizing **[*27]** [him]self with the schematic of the [rifle]" prior to the trial, but stated that he was "relatively familiar with guns." Although Trial Counsel could not recall specifically looking at the rifle before the trial, he stated, "I'm sure I did. . . . I'm sure I looked at it in your office too." Trial Counsel also could not recall specifically his cross-examination of Sgt. Miller. However, he stated, "I try to be vigorous [in cross-examination] especially when I think somebody's not telling the truth, and I thought that he wasn't telling the truth." He also recalled calling Sgt. Miller to testify during the defense's proof. He acknowledged that he recalled Sgt. Miller with the purpose of trying to impeach him with prior inconsistent statements.

Richard Mabee testified that, as of the time of the post-conviction hearing, he had been an assistant public defender for approximately nineteen years. He represented the Petitioner at the Petitioner's preliminary hearing. Mabee testified regarding the "one-time sheet" for the Petitioner's case, which was admitted as an exhibit at the hearing. According to Mabee, a one-time sheet lists basic information about the defendant, identifies the judge and **[*28]** the charges, and the disposition of the case at the general sessions level. According to Mabee, the disposition on the Petitioner's one-time sheet provided, "waived to grand jury, $50,000 bond. DA agreed to show everything." Mabee testified that this latter notation

indicated that he had talked to the district attorney assigned to the case, and the district attorney had said, "[I]f you'll waive preliminary hearing, we'll show you everything in our file." Mabee stated that he then would have presented this information to the Petitioner and that it would have been up to the Petitioner to decide whether to waive the preliminary hearing.

On cross-examination, Mabee agreed that the notations on the Petitioner's one-time sheet appeared to be his handwriting. Mabee explained that, when public defenders get appointed in general sessions, they "open up a one-time sheet" which means that the public defender represented that defendant one time at the preliminary hearing. Mabee also clarified that the judge previously would have signed the order of appointment at the bottom of the one-time sheet prior to the public defender's notations regarding the disposition of the case.

On re-direct examination, **[*29]** Mabee stated that he made the notation, "[W]e'll show you everything in our file," because "that's exactly the words the [district attorney] said to [him]." Mabee added that, after his representation of someone, he would take the one-time sheet back to the public defender's office where it was placed in a "big drawer of one-time sheets." He stated, "[A]fter someone [was] appointed in a higher court, they may or may not get that one-time sheet."

The Petitioner testified that the first time Trial Counsel met with him was at the county jail. During this initial meeting, the Petitioner completed an

"intake sheet" and told Trial Counsel that the rifle had "accidentally discharged." Trial Counsel informed the Petitioner that Sgt. Miller had shot himself with the Petitioner's rifle and told the Petitioner that Sgt. Miller's incident supported the Petitioner's account of what had occurred.

The Petitioner recalled only two meetings with Trial Counsel after he was released on bond: one meeting occurred on or around June 1, 1994, and the second meeting occurred two or three months before trial. The Petitioner agreed that they discussed "trial strategy" during these meetings and their defense that **[*30]** the rifle accidentally discharged. During one of their meetings, Trial Counsel asked the Petitioner what had happened on the day of the incident, and the Petitioner informed him what he did that day. The Petitioner denied that Trial Counsel ever told him "that any evidence in this case would be damning to [him]," including the fact that he threw the rifle out of his car window. He also did not recall that Trial Counsel "went through a cross-examination of [him]."

The Petitioner stated that he got the rifle at least ten years before the killing and that he had shot it numerous times. The Petitioner testified that, although he wiped down the outside of the rifle, he never did "any maintenance in regards to the inside" of it because he did not know he was supposed to. He agreed that he testified at trial that he had never had a problem with the rifle accidentally discharging during the time he owned it.

The State asked the Petitioner whether it was Trial Counsel's "idea to use accidental discharge as the theory of the case[.]" The Petitioner responded, "I mean he's the lawyer, I mean he makes the ultimate decision, so I guess I have to say so, yes, based upon . . . his investigation and **[*31]** everything, yeah, I'd say it was."

After considering the proof, the post-conviction court denied relief, and this appeal followed. Initially, the Petitioner contends that the post-conviction court utilized an incorrect analysis in concluding that the Petitioner failed to demonstrate that he received the ineffective assistance of counsel at trial. The Petitioner also contends that he received the ineffective assistance of counsel at trial in the following particulars: (1) Trial Counsel failed to adduce expert testimony about the rifle's defective trigger mechanism which causes accidental shootings; and (2) Trial Counsel performed deficiently vis-a-vis Sgt. Miller. The Petitioner also raises several other issues which, given our disposition of this matter, we decline to address.

Standard of Review

Relief pursuant to a post-conviction proceeding is available only where the petitioner demonstrates that his or her "conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Tenn. Code Ann. § 40-30-203 (1997). To prevail on a post-conviction claim of a constitutional violation, the petitioner **[*32]** must prove his or her "allegations of

fact by clear and convincing evidence." Tenn. Code Ann. § 40-30-210(f) (1997). See Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999). This Court will not overturn a post-conviction court's findings of fact unless the preponderance of the evidence is otherwise. Pylant v. State,263 S.W.3d 854, 867 (Tenn. 2008); Sexton v. State, 151 S.W.3d 525, 531 (Tenn. Crim. App. 2004). We will defer to the post-conviction court's findings with respect to the witnesses' credibility, the weight and value of their testimony, and the resolution of factual issues presented by the evidence. Momon, 18 S.W.3d at 156. With respect to issues raising mixed questions of law and fact, however, including claims of ineffective assistance of counsel, our review is de novo with no presumption of correctness. See Pylant, 263 S.W.3d at 867-68; Sexton, 151 S.W.3d at 531.

Analysis

Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel at trial.[5] Both the United States Supreme Court and the Tennessee Supreme Court have recognized **[*33]** that this right is to "reasonably effective" assistance, which is assistance that falls "within the range of competence

[5] The Sixth Amendment right to counsel is applicable to the States through the Fourteenth Amendment to the United States Constitution. See Gideon v. Wainwright, 372 U.S. 335, 342, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); State v. Howell, 868 S.W.2d 238, 251 (Tenn. 1993).

demanded of attorneys in criminal cases." Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). The deprivation of effective assistance of counsel at trial presents a claim cognizable under Tennessee's Post-Conviction Procedure Act. See Tenn. Code Ann. § 40-30-203; Pylant, 263 S.W.3d at 868.

In order to prevail on a claim of ineffective assistance of counsel, the petitioner must establish two prongs: (1) that counsel's performance was deficient; and (2) that the deficient performance prejudiced the defense. See Strickland, 466 U.S. at 687; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996). The petitioner's failure to establish either prong is fatal to his or her claim of ineffective assistance of counsel. Goad, 938 S.W.2d at 370. Accordingly, if we determine that either prong is **[*34]** not satisfied, we need not consider the other prong. Id.

To establish the first prong of deficient performance, the petitioner must demonstrate that his lawyer's "acts or omissions were so serious as to fall below an objective standard of 'reasonableness under prevailing professional norms.'" Vaughn v. State, 202 S.W.3d 106, 116 (Tenn. 2006) (quoting Strickland, 466 U.S. at 688). Our supreme court has explained that:

> [T]he assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance. It is a violation of this standard for defense counsel to deprive a criminal defendant

> of a substantial defense by his own ineffectiveness or incompetence. Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest, undeflected by conflicting considerations.

Baxter, 523 S.W.2d at 934-35 (quoting Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974)). When a court reviews a lawyer's performance, it "must make every effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's **[*35]** conduct, and to evaluate the conduct from the perspective of counsel at that time." Howell v. State, 185 S.W.3d 319, 326 (Tenn. 2006) (citing Strickland, 466 U.S. at 689). Additionally, a reviewing court "must be highly deferential and 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" State v. Honeycutt, 54 S.W.3d 762, 767 (Tenn. 2001) (quoting Strickland, 466 U.S. at 689). We will not deem counsel to have been ineffective merely because a different strategy or procedure might have produced a more favorable result. Rhoden v. State, 816 S.W.2d 56, 60 (Tenn. Crim. App. 1991). We recognize, however, that "deference to tactical choices only applies if the choices are informed ones based upon adequate preparation." Cooper v. State, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992) (citing Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982)).

As to the prejudice prong, the petitioner must establish a "reasonable probability that but for counsel's errors the result of the proceeding would have been different." Vaughn, 202 S.W.3d at 116 (citing Strickland, 466 U.S. at 694). "A reasonable probability is a probability sufficient **[*36]** to undermine confidence in the outcome." Strickland, 466 U.S. at 694. "That is, the petitioner must establish that his counsel's deficient performance was of such a degree that it deprived him of a fair trial and called into question the reliability of the outcome." Pylant, 263 S.W.3d at 869 (citing State v. Burns, 6 S.W.3d 453, 463 (Tenn. 1999)). "A reasonable probability of being found guilty of a lesser charge . . . satisfies the second prong of Strickland." Id.

Alleged Deficiencies

In assessing the Petitioner's claims, we turn first to whether he established that Trial Counsel was deficient in representing him at trial. To make this determination, we consider both the trial record and the post-conviction record in light of the Petitioner's defense at trial: that the rifle fired accidentally. In seeking to establish this defense, the Petitioner had available three types of proof. First, the Petitioner had his own testimony. To be effective, however, the Petitioner's testimony had to be perceived as credible by the jury. Second, Sgt. Miller had made pretrial statements indicating that the rifle fired while he was handling it without his finger on the trigger. This proof was crucial **[*37]** to bolster both the substance of the Petitioner's defense and the Petitioner's own

credibility. Third, expert testimony was available to prove that the trigger mechanism in the rifle was defective and could have caused the rifle to fire without the trigger being pulled. This proof was also crucial to the substance of the Petitioner's defense, as well as to both bolstering the Petitioner's credibility and challenging the State's expert proof.

The Petitioner contends that Trial Counsel was deficient in failing to adduce expert proof about the trigger mechanism in the rifle. We agree. There is no question in this case that the Petitioner shot and killed his wife with the rifle admitted into evidence. The key question was whether the Petitioner deliberately pulled the trigger or whether the gun discharged accidentally. In our view, the expert testimony adduced at the post-conviction hearing on this issue was absolutely crucial to this inquiry. The fact that the post-conviction court described this evidence as "favorable to the defense" implies that Belk was a credible witness. Belk testified that he was hired in 1994 to work on another case involving the Common Fire Control and that, if **[*38]** Trial Counsel had done the research, Trial Counsel could have found him. Belk also testified that problems with the Common Fire Control had been reported prior to his initial involvement in the 1994 case. Indeed, Belk first discovered the problem with the Remington trigger mechanism in 1970. Trial Counsel testified that he did not investigate whether there was expert proof available about the gun misfiring.[6]

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[6] We note that, according to a "Chattanooga Police Supplement Report" prepared by Sgt. Rawlston, Sgt. Rawlston "contacted

Accordingly, while the post-conviction court did not make a specific finding about whether Trial Counsel's performance in this regard was deficient, we hold that Trial Counsel was deficient in failing to adduce this proof at trial.

The Petitioner also contends that Trial Counsel was deficient in failing to adduce, as substantive evidence, Sgt. Miller's **[*39]** pretrial statements that the rifle had fired while he was handling it and while his hands were not near the trigger. Again, we must agree that Trial Counsel's performance was deficient in this respect. The Petitioner established at the post-conviction hearing that, immediately after being shot by the rifle while he was handling it, Sgt. Miller told Gann that he "did not have his finger near the trigger" of the gun at the time the gun fired. A short time later, while Sgt. Miller was in the hospital, Sgt. Miller told Holbrook that, at the time the rifle fired and struck him in the foot, Sgt. Miller's "finger was not near the trigger." Again, this proof was crucial to the Petitioner's defense. As Trial Counsel acknowledged during the post-conviction hearing, proof of Sgt. Miller's statements at the time he was shot, both in the parking lot and at the hospital, were "excited utterances" and, as such, were admissible as exceptions to the hearsay rule. See Tenn. R. Evid. 803(2) ("A statement relating to a startling event or condition made while the declarant was under the

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Special Agent Jack Scott of the U. S. Treasury Bureau of Alcohol Tobacco and Firearms" on March 8, 1994, and that Sp. Agent Scott would "conduct research into the history of the Remington Model 7400 Rifle which was utilized in this incident." The State did not call Sp. Agent Scott to testify at the Petitioner's trial.

stress of excitement caused by the event or condition."); see also State v. Banks, 271 S.W.3d 90, 116-18 (Tenn. 2008) **[*40]** (holding that statement made approximately six hours after declarant was shot was admissible as an excited utterance); State v. Stout, 46 S.W.3d 689, 700 (Tenn. 2001) (holding that declarant's statements made twelve hours after the event were admissible as excited utterances); Rickey Williams v. State, No. W2006-00605-CCA-R3-PC, 2007 Tenn. Crim. App. LEXIS 590, 2007 WL 2120174, at *7 (Tenn. Crim. App. July 24, 2007) (recognizing that "the length of time between a startling event and the statement does not automatically preclude the statement's being admissible as an excited utterance").

Accordingly, when Sgt. Miller's memory proved unreliable at the trial, Trial Counsel should have called the persons to whom Sgt. Miller had made the statements and adduced the necessary proof in that manner. Although Trial Counsel testified at the post-conviction hearing that, in the "heat" of the trial, this approach did not occur to him, we hold that Trial Counsel should have anticipated a forgetful witness and been prepared to adduce the proof, of which he was aware, in another manner. Trial Counsel's performance was deficient in this regard. See, e.g., Timothy Flood v. State, No. E2009-00294-CCA-R3-PC, 2010 Tenn. Crim. App. LEXIS 251, 2010 WL 1068184, at *9 (Tenn. Crim. App. Mar. 24, 2010) **[*41]** (holding in post-conviction case that "counsel was deficient for failing to comply with the Tennessee Rules of Evidence"), perm. app. denied

(Tenn. Aug. 25, 2010); People v. Cortez, 296 A.D.2d 465, 466, 745 N.Y.S.2d 467 (N.Y. App. Div. 2002) (holding that counsel was deficient due, in part, to her "lack of familiarity with the rules of evidence").

The Petitioner contends that both Trial Counsel and appellate counsel performed deficiently in other respects. However, given our disposition of this case on the basis of the above-identified deficiencies, we deem it unnecessary to address these remaining claims of deficient performance. Accordingly, we turn now to the question of whether Trial Counsel's deficient performance was prejudicial to the Petitioner.

Prejudice

Initially, the Petitioner contends that the post-conviction court utilized an erroneous legal analysis in determining that he failed to establish that he received ineffective assistance of counsel at trial. We agree. Of particular concern is the post-conviction court's analysis of Trial Counsel's failure to adduce expert proof about the possibility that the Petitioner's rifle discharged without his pulling the trigger:

> The [P]etitioner alleges **[*42]** that counsel was ineffective in not consulting or calling a firearms expert to rebut the state's theory and Mr. Fite's testimony that the rifle did not accidentally discharge. In support of the allegation, he submits expert evidence that trigger mechanisms like the one in the gun in issue present a risk of accidental discharge and, contrary to Mr. Fite's apparent belief, the

existence of the risk is not subject to proof or disproof by means of drop tests.

The Court agrees with the [P]etitioner that this new evidence is favorable to the defense. *The [P]etitioner, however, must prove more than this; he must prove by clear and convincing evidence that the new evidence is so favorable that counsel's failure to present it at trial had an effect on the verdict. This, the Court finds, he does not do*. Even if one disregards Mr. Fite's trial testimony suggesting that accidental discharge was impossible and accepts Mr.Belk's testimony indicating that, because of the trigger mechanism in the gun, accidental discharge was possible, significant weaknesses in the theory of the defense, specifically, unfavorable eyewitness evidence and the [P]etitioner's own ambiguous actions in leaving the scene **[*43]** and discarding the gun, still remain. The Court therefore finds no prejudice in counsel's performance in this respect.

The post-conviction court's use of an incorrect analytical framework is further demonstrated in the "Conclusion" section of its memorandum denying relief:

The standard for post-conviction relief is high: clear and convincing evidence. On appeal, there was sufficient evidence to support the conviction. Now, after the post-conviction hearing, the Court cannot say that there is clear and convincing evidence that the victim's death was an accident

> or even that it was only knowing, not premeditated.

As set forth above, a post-conviction petitioner's burden of proof in a claim that he is entitled to a new trial due to the ineffective assistance of counsel at trial is to establish, by clear and convincing evidence, *allegations of fact* supporting his claim that trial counsel's assistance at trial was ineffective. Allegations of fact include the actions that trial counsel did and did not take in preparing for and conducting the petitioner's defense at trial. If those allegations of fact are supported by clear and convincing evidence, and if the clear and convincing evidence establishes **[*44]** that trial counsel performed deficiently — a conclusion of law — then the petitioner has satisfied the first prong of his ineffective assistance of counsel claim.

As our supreme court has explained, this first prong includes both proof and then a legal analysis of the significance of that proof:

> Tennessee Code Annotated section 40-30-110(f) (2006) provides that the "petitioner shall have the burden of proving the *allegations of fact* by clear and convincing evidence." (emphasis added). This inquiry does not implicate the Strickland inquiry. Pursuant to section 40-30-110(f), the petitioner is required to prove the *fact* of counsel's alleged error by clear and convincing evidence. If that burden of proof is met, the court then must assess under Strickland whether that error "fell below an objective standard of reasonableness," Strickland, 466 U.S. at 687-88,

> and whether the error raised "a reasonable probability . . . that the result of the proceedings would have been different," id. at 694.

Dellinger v. State, 279 S.W.3d 282, 293-94 (Tenn. 2009) (citations omitted).

Once the post-conviction court assesses the proof and draws the legal conclusion that trial counsel's performance was deficient, **[*45]** the post-conviction court must turn to the second prong: prejudice. As to this second prong, the relevant inquiry is "whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993) (citing Strickland, 466 U.S. at 687). As our supreme court has recognized, "'a court making the prejudice inquiry must ask if the [petitioner] has met the burden of showing that the decision reached [by the jury] would *reasonably likely* have been different absent the errors.'" Pylant, 263 S.W.3d at 874 (quoting Strickland, 466 U.S. at 696) (emphasis added in Pylant). Significantly, it is not the petitioner's burden to establish by clear and convincing evidence that his lawyer's deficient performance actually *had* an effect on the verdict. See id. at 875 n.30. Nor, contrary to the post-conviction court's approach in this case, should the post-conviction court analyze this prejudice prong through an inquiry into the sufficiency of the evidence adduced at trial. Id. at 875. Rather, as our supreme court has recognized, "'[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself **[*46]** unfair, even if the

errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.'" Id. (quoting Strickland, 466 U.S. at 694). Accordingly, we hold that the post-conviction court failed to apply the correct analysis to the Petitioner's claims.

We also hold that, under the proper Strickland analysis, Trial Counsel's deficient performance in failing to adduce expert proof about the faulty trigger mechanism in the rifle was prejudicial to the defense in a number of ways. First, Belk's testimony would have corroborated the Petitioner's explanation of the shooting. At trial, the jury had no definitive account other than the Petitioner's that the gun fired accidentally. While Trial Counsel assumed that he would be able to prove an accidental discharge through Sgt. Miller, Trial Counsel's assumption was wrong. Moreover, Trial Counsel did not make a strategic decision to rely solely on Sgt. Miller's testimony after investigating the possibility of expert testimony. Rather, Trial Counsel simply did not investigate the possibility of expert testimony in support of the defense. Given the other evidence in the case that circumstantially was very damaging to **[*47]** the Petitioner's account, Belk's corroborative testimony was critical to bolstering the Petitioner's credibility. Indeed, the post-conviction court noted that the Petitioner's testimony at trial "was critical to the defense, *it being the only direct evidence supporting the theory of accident*." (Emphasis added). Belk's testimony would have been additional direct evidence that the rifle fired accidentally.

Second, Belk's testimony would have provided an alternative expert opinion to Fite's. Moreover, Belk testified that Fite's opinion was suspect because the drop tests that Fite performed were, according to Belk, essentially useless in evaluating whether the trigger mechanism in the rifle had caused it to misfire.[7] Without Belk, the jury had no scientific or mechanical explanation sufficient to discredit Fite's expert opinion.

Finally, Belk's testimony would have provided the jury with an additional reason to suspect Shepheard's testimony about the Petitioner's declarations of "I told you so" after the victim was shot.[8] Thus, Belk's testimony would have assisted the Petitioner's defense on multiple levels.

Certainly, had the jury heard and rejected Belk's testimony, the proof would have supported its decision that the Petitioner shot and killed his wife deliberately and with premeditation. But the jury was deprived of this critical choice by Trial Counsel's

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[7] Fite testified at trial that the rifle was "not broken," that it was "in good operating condition," and that the trigger safety functioned. To determine if the rifle would fire accidentally, he dropped the rifle with the hammer cocked several times. He also checked the rifle to determine if it would "slam fire," which involved a malfunction of the bolt. He testified **[*48]** that the rifle did not "slam fire." He also tested the trigger safety which he described as blocking the trigger when engaged. He concluded that the "only way [he] can get this rifle to fire was by pulling the trigger." Fite did not testify that he removed and evaluated the trigger mechanism.

[8] Trial Counsel established at trial that Shepheard had not reported the Petitioner's alleged declarations in Shepheard's statement to the police shortly after the shooting.

deficient performance. The jury also was deprived by Trial Counsel's deficient performance of substantive evidence concerning Sgt. Miller's initial explanations of how he came to be shot by the rifle, **[*49]** i.e., without his having touched the trigger. Again, this proof was critical to the theory of the defense.[9]

> The prejudicial effect of these deficiencies is clear when considered in light of the trial court's comments at the conclusion of the motion for new trial:
>
> It was a remarkable case. I've never had another case quite like it where the evidence — I've commented on this before — where the evidence seesawed back and forth. For example, the evidence about the weapon where the State proved that the gun would not go off accidentally and then the property officer shot himself in the foot with it; and where the [Petitioner] proved good character which is, as we used to say, good character is a **[*50]** witness[.]
>
> ....
>
> It was an awfully close question on the facts. During the trial I found myself going back and forth. After the trial I kept thinking was I

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[9] We acknowledge that, in the direct appeal of this matter, this Court concluded that the trial court's erroneous exclusion of Officer Sims' testimony about Sgt. Miller's prior inconsistent statement was harmless error. Kendricks, 947 S.W.2d at 882. However, this Court was considering this testimony as impeachment evidence relevant to demonstrate to the jury that Sgt. Miller's memory was faulty, and not as substantive evidence that the gun had misfired. We consider the distinction to be significant.

> satisfied with the verdict of the jury or I guess more to the point did I under the law. . . . I found that to be an extremely close question, difficult question.

We hold that, had Trial Counsel put on expert proof about the Common Fire Control, and had Trial Counsel elicited admissible substantive evidence about Sgt. Miller's initial explanations of how he came to be shot by the rifle, it is reasonably likely that the jury would have accredited the Petitioner's version of events and convicted him of a lesser degree of homicide. Thus, we hold that these deficiencies in Trial Counsel's performance cast the jury's verdict into sufficient doubt as to render it unreliable. Accordingly, we conclude that the Petitioner established both that Trial Counsel performed deficiently and that Trial Counsel's deficient performance rendered the jury's verdict unreliable. Therefore, we are constrained to conclude that the Petitioner is entitled to post-conviction relief in the form of a new trial.

As set forth above, the Petitioner contends that Trial **[*51]** Counsel was ineffective in numerous other ways, as well. Given our holdings with respect to Trial Counsel's failure to adduce expert proof about the Common Fire Control and his failure to adduce Sgt. Miller's excited utterances, we decline to address these remaining assertions. We also decline to address the Petitioner's claim of ineffective assistance of counsel on direct appeal.

Conclusion

The Petitioner established that he received the ineffective assistance of counsel at trial. Accordingly, the Petitioner is entitled to a new trial. We reverse the judgment of the post-conviction court, vacate the Petitioner's conviction, and remand this matter for further proceedings consistent with this opinion.

JEFFREY S. BIVINS, JUDGE

COURT MET PURSUANT TO ADJOURNMENT, PRESENT AND PRESIDING THE HONORABLE DON W POOLE, JUDGE, THIRD DIVISION OF CRIMINAL COURT, HAMILTON COUNTY, WHEN THE FOLLOWING PROCEEDINGS WERE HAD, TO-WIT:

IN THE CRIMINAL COURT FOR HAMILTON COUNTY, TENNESSEE

EDWARD THOMAS	:	
KENDRICKS, III,	:	No. 220622
Petitioner,	:	Division III
v.	:	FILED IN OFFICE 11 OCT 13 PM 4:01 GWEN TIDWELL, CLERK BY _____D.C.
	:	
STATE OF	:	
TENNESSEE,	:	
Respondent.	:	

ORDER

Before the Court are the amended petition of Edward Thomas Kendricks, III ("the petitioner"), by and through counsel, for relief from his conviction or life sentence for first-degree murder in case 201138 and the answer of the state. The matter was heard on 7, 10, 11, and 21 February and 4,8, and 22 March 2011. For the reasons set forth in the accompanying memorandum, the Court finds that the petition should be dismissed.

The Court therefore ORDERS as follows:

(1) that the subject petition be dismissed and

(2) that the petitioner, post-conviction advisory counsel for the petitioner, Jeffrey S. Schaarschmidt, Esq., and Jason D. Demastus, Esq., former trial

counsel, Hiram G. Hill, Jr., Esq., former appellate counsel, Jerry G. Summers, Esq., executive assistant district attorney general Neal Pinkston, Esq., assistant district attorney general Lance Pope, Esq., the state attorney general and reporter, and the department of correction be promptly provided with a copy of this order.

SO ENTER on this 13 day of October, 2011.

/s Don W. Poole
Don W. Poole
Criminal Court Judge

IN THE CRIMINAL COURT FOR HAMILTON COUNTY, TENNESSEE

EDWARD THOMAS	:	
KENDRICKS, III,	:	
Petitioner,	:	
v.	:	No. 220622
	:	Division III
STATE OF	:	
TENNESSEE,	:	[Filed Oct. 13, 2011]
Respondent.	:	

MEMORANDUM

Before the Court, on remand from the Court of Criminal Appeals, are the amended petition of Edward Thomas Kendricks, III ("the petitioner"), by and through counsel, for relief from his conviction or life sentence for first-degree murder in case 201138 1 and the answer of the state. The matter was heard on various days in February 2011. For the reasons set forth herein, the Court finds that the petition should be dismissed.

I. Procedural history

The record in case 201138[1] reflects that, on 8 July 1995, following a jury trial before the Honourable Russell C. Hinson, the petitioner was convicted of first-degree murder and sentenced to life

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[1] The Court notes that the petitioner's family name appears variously herein as Kendricks and Kendrick. The Court -uses Kendricks, that being the name that appears on the original petition herein and, as the caption in the direct appeal, *State v. Kendricks,* 947 S.W.2d 875,878 (Tenn. Crim. App. 1996), reflects, Kendrick being an alias.

imprisonment. On appeal, he alleged that the evidence was insufficient, the trial court erred in allowing a child to testify, limiting his attempt to: introduce a witness's prior statements, allowing the prosecution to cross-examine him about prior convictions, allowing the prosecution to produce a surprise witness, admitting hearsay under the excited-utterance exception, not giving a limiting instruction on excited utterance, and giving an instruction on flight, and the prosecution did not disclose exculpatory information in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). On 25 September 1996, the Court of Criminal Appeals affirmed the judgment. On 5 May 1997, in the Supreme Court denied permission to appeal.

On 16 April 1998, the petitioner, *pro se,* filed the original petition herein. Finding that the claims in the petition had been previously determined or waived, the Honourable Stephen M. Bevil summarily dismissed the petition. One week later, the petitioner, *pro se,* filed an amended petition. Judge Bevil summarily dismissed this petition as untimely.

On 27 August 1999, the Court of Criminal Appeals, agreeing that some issues had been previously determined but disagreeing that the claim of ineffective assistance of counsel had been waived by the omission of post-trial counsel; affirmed the judgment in part, reversed it in part, and remanded the case for further proceedings.

The petitioner has been before six judges, including the trial judge. Since the remand, counsel

has been substituted several times. In addition, the petitioner, by and through counsel, has filed amendments to the petition, the last of which was filed on 13 January 2011.

On 20 May 2010, the state filed an answer. On 14 June, the state filed a motion to set the case for a pre-hearing hearing. On 23 July, the Court denied the motion.

Thereafter, the petitioner moved to clarify the order.

The Court understands the petitioner to allege in the amended petition as follows:

(1) that his trial counsel, Hiram G. Hill, Esq., was ineffective in various particulars ;

(2) that his appellate counsel, Jerry H. Summers, Esq., was ineffective in various particulars;

(3) that the prosecution did not disclose material, favorable evidence; and

(4) that there is new scientific evidence of his actual innocence.

On 7, 10, 11, 21 February and 4, 8, and 22 March 2011, the matter was heard. There were fourteen witnesses and thirteen exhibits:

Witness	*Exhibit*
Off. Michael Holbrook	Transcript of the trial
	Report from the investigation of Off. Miller's self-inflected injury
Mr. Jack Belk	Mr. Belk's resume
	Petitioner's rifle

Sgt. Steve Miller	Off. Michael Taylor's report
Off. Glen Sims	
Mr. Randall Leftwich, Sr.	
Agt. James Russell Davis, III	
Mrs. Dorothy Grisham	
Mr. William Lapoint	
Hiram G. Hill, Esq.	Tape of Mr. Hill's interview of Ms. Evans
	Take of Mr. Hill's interview of petitioner's four-year-old daughter
	Tape of a prosecutor's interview of Ms. Evans
	Pages 1-177 of the appendix
Mr. James Gann	
Jerry H. Summers, Esq.	
Rick Mabee, Esq.	
Ms. Angela Evans	
The petitioner	Mssrs. Hill's and Summers' files
	Agt. Davis' report
	Det. Mathis' supplemental report
	Copies of the 1989 versions of Tenn. Code Ann. §§ 39 13 202,204, and 208 and 40 35 201 and 501

During the hearing, the petitioner moved to proceed *pro se* and waived his right to counsel and post-conviction counsel withdrew.

II. Summary of evidence

Off. Holbrook testified that he has been with the Chattanooga Police Department ("CPD") for eighteen years. He was summoned to Erlanger Hospital to investigate an accident involving Off. Steve Miller, who had suffered a bullet wound in his foot while handling the petitioner's gun. Off. Miller told Off. Holbrook that his hands were not on the trigger when the gun discharged and shot him in the foot.

Mr. Belk testified that he lives in southern Idaho and is a high-school graduate. He became interested in weaponry when he was young. In 1969, he completed a training course in weaponry and received a certificate of completion. For five years, he was a deputy sheriff. Since 1993, he has consulted in many cases and testified in civil cases about the design and function of weapons. On average, he consults on twelve cases per year. In the last three years, he has testified for the defense in two criminal cases, one in Montana and one in Wyoming. He has also taught a course in weaponry.

Mr. Belk receives no compensation for his testimony in this case. The defense did, however, pay his fare from Idaho.

Mr. Belk inspected the petitioner's gun in the clerk's office. The gun is a Remington 30.06 7400 with a trigger mechanism that is common in a wide array of firearms. It was manufactured in February 1982.

Early Remington trigger mechanisms were designed by Browning. In 1950, the design was changed to correct some defects. In Mr. Belk's opinion, defects in the design remain.

Most weapons require a specific trigger mechanism. At one time, manufacturers tried to make weapons that did not require a specific trigger mechanism. In 1948, Remington changed this approach for economic reasons. The present trigger mechanism is called "Remington Common Fire Control".

Mr. Belk examined the gun on the stand and identified it as the one in issue. He extracted the trigger mechanism and observed that the action spring was sticking, which indicates that the weapon is in need of cleaning. He measured the amount of debris in the mechanism at eighteen hundredths of an inch.

Any debris can cause a weapon to fail, or misfire. After a weapon is fired, the debris does not necessarily remain. In the late 1940s, Remington introduced a hole for removing debris.

A trigger mechanism may fail at one of five different points. One of them is the swing hammer, which holds the trigger back. Insecure engagement of the swing hammer may cause a weapon to discharge accidentally.

Trigger mechanisms like the one in the gun in issue have a history of discharging even when the trigger has not been pulled. According to the ten commandments of the National Sports Foundation, no gun should ever do so. A gun with such a

mechanism may discharge when the trigger has not been pulled whether the safety is on or off.

In 1993, Mr. Belk was hired in a Remington case. Counsel could have identified him as an expert.

Mr. Belk had a difficult time reassembling the gun on the stand. He noted that, even before he began consulting in cases, there were complaints that the model "shoots a lot" and, even with a clearance of two inches, "gets both hands dirty."

Mr. Belk "dry fired" the weapon without a cartridge and the firing mechanism.

Except to pull the trigger, he did not test the gun or observe it fire.

A variety of debris enters guns. It is common for them to become extremely dirty just from being fired. Mr. Belk admitted that he did not inspect the gun in issue in 1994 and cannot testify about its cleanliness then. The amount of debris in it, however, indicates multiple firings.

Mr. Belk had but did not review a transcript of the trial. His role in the case is to testify about the trigger mechanism.

In 1994, Mr. Belk was hired in a case involving a Remington 7400 and, probably in 1997 or 1998, he testified. Since then, he has been involved in different cases in which misfiring was an issue. A drop test on the gun is "pretty much useless" and could dislodge debris. In neither the gun in issue nor in any Remington 7400 has Mr. Belk reproduced an inadvertent discharge.

Sgt. Miller testified that he has been with the CPD for thirty-seven years and, since March 1988, has investigated crime scenes. He investigated the crime scene in the petitioner's case, which involved retrieving evidence and taking photographs. He did not recover the gun in issue from the crime scene but from another location, where it had been found. There was no clip in the gun, and he photographed it, collected evidence, and then put it in the trunk of his car. At the police center on Arnnicola Highway, he carefully removed the gun from the trunk, pointing it toward the ground as he did so.

Despite his care, the gun discharged, striking him or causing debris from the asphalt to strike him in his left foot.

Sgt. Miller cannot say whether his finger was on the trigger when the gun discharged. It has been sixteen years.

The injury required medical attention. Sgt. Miller does not recall speaking to Off. Holbrook and thinks that another officer, Off. Gann, who retired in 2002, probably "came out".

Sgt. Miller does not remember signing anything but admits that he was on medication. His injury was extremely painful and stressful. He was taken to hospital, where he remained for three to four weeks and underwent seven surgeries.

Before trial, defense counsel did not interview Sgt. Miller. At trial, defense counsel subjected him to a "tough" cross-examination about whether, at the time of his accident, his finger was on the trigger. He does not remember whether he was shown his statement

to Off. Holbrook but knows that, after trial, in the motion for a new trial, the statement was an issue.

Mr. Sims testified that he retired from the CPD in 2001. In March 1994, while still employed by the department, he reported to Arnnicola Highway to investigate the shooting of Off. Miller. He made a report, which simply stated that the gun "just went off'. He was "approached" about the report but does not recall speaking to defense counsel before trial. He testified at trial but his testimony' was "cut off', though defense counsel may have questioned him outside the presence of the jury.

Mr. Leftwich testified that he is the petitioner's first cousin, his father being the petitioner's uncle, and his parents owned the house where the petitioner and the victim lived. He was born on 1 November 1964 and has no convictions. In 1994, he was married, had two children, and was working as an auto mechanic.

On the day of the shooting, Mr. Leftwich was with the petitioner in the Orchard Knob area. The petitioner had called to tell him that his car had broken down. They worked on the car on the side of the road. He needed parts, and the victim brought parts and tools. He does not remember the vehicle she was driving. She and the petitioner, though divorced, apparently lived together and shared vehicles. Everything seemed normal between them.

When Mr. Leftwich learned later what had happened, he was astounded. He went to the house where the family lived and secured it. There was cabbage on the range.

Mr. Leftwich cannot recall speaking to defense counsel and was not called as a witness. He attended the trial and could have testified. He may have told his father that he was with the petitioner before the shooting.

Agt. Davis testified that he is in his thirtieth year as a forensic scientist for the Tennessee Bureau of Investigation. He has a B.S. in chemistry and other qualifications, including additional training and some masters-level courses, and has taught a course in trace evidence. He has testified in Tennessee in two hundred twenty-one cases and in other states in four cases.

When Agt. Davis tests for gunshot residue, he is testing for the presence and amounts of three metals. When a gun fires, the hammer strikes a firing pin. The size of the gun and the distance from it affect the amount of residue on a shooter's hands. A 22- caliber gun is the smallest primer; a 30.06 is the larger primer. Most of the residue comes from the end of the barrel. Guns have openings where debris can enter. If the trigger mechanism is not airtight, debris would or could enter there.

Off. Rawlston submitted a sample collected from the petitioner's hand in a gun shot residue test kit. From the information sheet, it appears that the sample was collected about five hours after the weapon was fired. Agt. Davis tested the sample and obtained inconclusive results, meaning that he could not rule out that the petitioner had fired the gun but he did not find enough to prove that the petitioner had fired the gun. He was not subpoenaed and, at this late

date, has no recollection of being contacted. He does not know whether the parties stipulated the results.

Agt. Davis noted that material on the hands disappears rapidly and the amount of material is affected by handwashing and other things. For instance, it is possible to fire a new gun or to fire a gun outside and not to have residue on one's hands. Outside, residue may blow away. In addition, very dry hands will not hold residue. Time is important because the more one uses one's hands, the less residue will remain. Clothing, if collected, can also be examined for residue. Mrs. Grisham testified that, in 1994, she was summoned to jury duty. Panelists were questioned about the murder and their eligibility to serve on the jury and names were announced. She does not remember the name of the prosecutor.

Mrs. Grisham was an insurance agent for the Leftwiches. She was vaguely aware of the possible involvement of her lawyer husband in a civil proceeding involving the petitioner. Since September 1990, she had attended church at New City Fellowship on Third Street. She knew an assistant prosecutor, Ms. Irwin, from there and was aware that Mr. Kellogg and someone else attended there, too, though she does not recall that it was the victim. She had seen Ms. Broom at the church with two children, one of whom, Ms. Groggins, at some point worked at the church.

Mr. Lapoint testified that, on 6 March 1994, he was employed by CPD and was dispatched to the airport in connection with a shooting. He filed a report about the incident. When he arrived, Off. Whitfield

and airport police were already on the scene and the petitioner, whose children were in a blue Ford Taurus, was in custody in front of the terminal.

Mr. Lapoint placed the petitioner in the back of a police car and left a tape recorder there with him, telling him that it was there and he could say anything that he wished to say. The petitioner was very distraught and was crying and rocking back and forth. He said, "I can't believe I did that."

Mr. Lapoint gave the tape recorder and tape to Off. Whitfield. Several months later, the recorder was returned to him. When it was returned, it was not operable. Whether it was operable when he left it with the petitioner, he does not know. He did not examine it at the time. The file, however, should indicate whether it was operable.

Mr. Lapoint was told that there was nothing on the tape. The tape should have gone to the detective in charge of the investigation and would have been discoverable if an open-file policy was in effect.

In November 1994, Mr. Lapoint left the CPD for "a lot of reasons." He had been undercover and was then on patrol.

Counsel testified that, in April 1978, he began practicing law. First he was in private practice, then he was in the office of the district public defender for five years, and now he is again in private practice. He primarily practices criminal defense. By 1994, he had been in practice for sixteen years and had tried in excess of sixty to seventy cases, including capital cases. Since 1994, he has had one capital case.

Altogether, he has probably tried forty murder cases. He admits that good lawyers can make mistakes.

From page 13 of the appendix, it appears that the general sessions court appointed the district public defender to represent the petitioner. The petitioner waived a preliminary examination in exchange for open access to the prosecutor's file.

While in the office of the district public defender, counsel was assigned to general sessions court for one-half year and to Division II of this Court for four and one-half years. He was not assigned to the petitioner's case in the general sessions court; he would have been assigned to the case at the arraignment in Division II of this Court.

When counsel went to see the petitioner before his release from jail, the petitioner gave him notes. After the petitioner's release on bond, counsel would have had him complete an intake form and include his account of events and would then have talked to him. The petitioner's intake form states in part as follows: "When I picked up the rifle, a child said, 'Daddy, don't shoot my Mommy.' I replied, 'Sweetheart, I'm not going to shoot your Mommy.'" Counsel and the petitioner talked at length. The petitioner said that the gun had discharged accidentally when his finger was not on the trigger and, despite the divorce, there was no animosity between the victim and him.

The petitioner is very bright and communicates well. He is also pleasant, was an "easy" client, and "got along" well with counsel. Counsel thinks he was also a caring father.

There being no blanket discovery order in Division II of the Court, counsel filed discovery motions. He did not request radio traffic about Off. Miller's injury. Nor does he recall requesting fingerprints, though, according to an initial police report, latent fingerprints were developed and he concedes that a trigger print could have been important, even if the petitioner had fired the weapon before.

Counsel reviewed all discovery and statements, and an investigator would have interviewed witnesses. Counsel used two investigators in the petitioner's case, Mr. Millsaps and Mr. Jacks. They were full-time employees of the office of the district public defender and worked at his direction. Both of them met with the petitioner and interviewed and took statements from witnesses. In addition, Mr. Millsaps also sat with counsel during the trial.

The petitioner was provided with discovery, and he and counsel reviewed it together. They had several meetings and discussed strategy, in which the petitioner had input.

The state disclosed the original statements of Off. Miller and Mr. Shepheard. It did not, however, disclose the existence of changes in the statements. In his original statement, Off. Miller had indicated that his hand was not near the trigger at the time of discharge. In his original statement, Mr. Shepheard had not said that the petitioner had said, "I told you so."

The petitioner was offered twenty-two years. He rejected it, though, in counsel's view, "it was a pretty good offer." He was adamant that the victim's death

was an accident and he would not plead guilty. Usually, a plea offer is withdrawn once trial begins. Counsel does not remember that the petitioner's case was unusual in this respect.

The theory of the defense was that the victim was shot when she emerged from the station and the gun accidentally discharged. Counsel clearly remembers Off. Miller telling him or his investigator that, when he was injured, his hands were nowhere near the trigger.

Counsel recognized that there were weaknesses in the theory of the defense. The petitioner had gone to the scene with his children and a loaded weapon, had called the victim out of the station, and, after she was shot, had left the scene, discarded the gun, and never told officers that the shooting was an accident. Counsel prepared the petitioner for these weak points.

Counsel also explained inconsistent defenses to the petitioner. It would have been inconsistent to argue accident and second-degree murder, though not to argue accident and reckless or criminally negligent homicide. After consulting with the petitioner, he decided not to argue any alternative theories.

Counsel discussed gunshot residue with the petitioner. The presence of residue on a hand indicates that the hand was close to the chamber at the time of discharge.

Counsel understood that the petitioner was holding the weapon near the trigger. In the petitioner's case, the gunshot residue test was inconclusive and would not have been helpful. That

the gun had been fired and then discarded were not in dispute.

Many gunshot residue tests are inconclusive for various reasons. The test is most effective with revolvers, where the distance between hand and chamber is relatively small, and big guns, where the amount of powder is relatively large.

Counsel did not call anyone to testify about gunshot residue or request a mistrial when Off. Rawlston was asked about it. It is not unusual for a party to introduce evidence relating to gunshot residue through a detective.

Counsel did not move for and does not think that he looked for a firearms expert. Sometimes, he used a Red Bank officer as an expert; apparently, in the petitioner's case, he did not. He thought that Off. Miller would testify and attribute his accident to accidental discharge. He does not recall whether the prosecutor told him of the officer's memory lapse.

In hindsight, counsel realizes that he should have had an expert inspect the trigger mechanism. He was not aware of any discussion in the firearms industry about the condition of the gun on the likelihood of accidental discharge. After the trial, on National Public Radio, he heard a report about the accidental discharge of a Remington and contacted Mr. Schaarschmidt, one of the petitioner's post-conviction lawyers at the time.

Counsel examined the gun before trial. He is relatively familiar with guns and has several, though he has never had a firearm that discharged when a finger was not on the trigger. He believes that debris

could prevent a gun from firing but does not know when the petitioner claimed the gun had last been cleaned.

Presumably, the state called Mr. Fite, a bureau witness. Counsel did not call an independent expert. Mr. Fite is not easily swayed and would give his opinion as he saw it.

Counsel cross-examined Mr. Fite, who had done drop and other tests, about his report. The report did not indicate that Mr. Fite had inspected the trigger mechanism, though it did indicate that he had checked the trigger pull.

Counsel reviewed Off. Miller's trial testimony and everything else he needed to review to refresh his recollection. He was shown exhibit 2, Off. Sims' report of his investigation of the accidental shooting of Off. Miller, which states that the officer's hands were 'not near the trigger at the time of discharge. He does not recall seeing exhibit 5, which is exculpatory evidence. He did try to introduce the reports but did not make an offer of proof. Although Off. Sims had spoken to Off. Miller at the scene before the latter was transported to hospital, he did not try to offer Off. Miller's statement to Off.

Sims at the scene as an excited utterance, *i.e.,* substantive evidence, only as a prior inconsistent statement, *i.e.,* impeachment evidence. The issue may have been addressed on appeal.

Counsel used Mr. Millsaps to interview witnesses and investigate the theory of accidental discharge. He does not remember whether Mr. Millsaps talked to Off. Miller. Counsel was "dead wrong" about what Off.

Miller's testimony would be. He was not aware that the officer's testimony would change. If that makes him unprepared, then he was unprepared.

Counsel thought that Off. Miller's testimony and the admission of his prior statements were critical. He was mad at the officer, whom he believed was being unfair. He cross-examined him and tried to do so vigorously and then recalled him for the defense and tried to impeach him with his prior inconsistent statements.

Throughout counsel's representation of the petitioner, they discussed potential defense witnesses, including the petitioner himself. Counsel prepared the petitioner by conducting "sit-downs" and cross-examining him. The petitioner made a good witness.

The petitioner had prior convictions for driving under the influence and writing bad checks. Despite the failure of the prosecution to notify the defense of its intent to use the prior convictions, counsel mentioned the bad checks in his opening statement and questioned the petitioner about them on direct examination, thereby opening the door to cross-examination of the petitioner about all the prior convictions. Counsel admits that he should not have done so and did not request a limiting instruction.

Counsel does not remember whether he talked to Mr. Mowrer, who telephoned 9-1-1 for emergency services. He knew of his statement and an investigator may have talked to him. He did not use the statement at trial because his testimony was completely accurate and consistent with the

petitioner's testimony. Nor did he recall Mr. Mowrer to rebut Mr. Shepheard's testimony.

Counsel does not recall talking to Mr. Benton, who was in the parking lot of the station when the victim was shot. Nor does he recall talking to Off. Sims or Off. Lapoint.

Counsel does not recall anything about Off. Lapoint's tape recorder. He believes that a tape demonstrating the petitioner's state of mind immediately after the event would have been important but admits that he does not know the law on this point. Off. Lapoint's statement that he frisked the petitioner and placed him in a police car and the petitioner said, "I can't believe I just did that" was excluded at the instance of the state.

Counsel did not talk to Ms. Maston, who was involved in airport security and called by the state in rebuttal. He did not think that she was a rebuttal witness, though the transcript would reveal whose testimony she was rebutting.

Counsel objected to a rebuttal witness but does not remember all the bases for the objection. He does remember that the rule of sequestration had been requested.

Counsel testified that he does not recall talking to Mr. Shepheard, who was in the shop at the station when the victim was shot. He also testified, however, that he had questioned Mr. Shepheard on the telephone about his statement. At trial, he tried to impeach Mr. Shepheard but now believes that he should have cross-examined him about his prior inconsistent statement.

Counsel presumes that he talked to Off. Huggins and thinks that he talked to Off. Rawlston. He did talk to Off. Miller, whose testimony he regarded as the most important evidence in the trial, and the petitioner's young daughter as well as to Dr. King and Mr. Fite, whose reports he had.

On 17 August 1994, counsel and Ms. Evans, the mother of the petitioner's oldest daughter, talked on the telephone.[2] She said that the petitioner had always been good to her and she did not believe that he would kill the victim intentionally. Counsel wanted her to be on their side but told her that it was not a clear case. The petitioner was remorseful, and Off. Miller had shot himself, perhaps accidentally. Counsel told her to call him or Mr. Millsaps.

Thereafter, the district attorney general interviewed Ms. Evans about her relationship with the petitioner, which was on and off. Counsel obtained but did not listen to a recording of the interview.

At some point, counsel decided not to call Ms. Evans. She was a former girlfriend and had had no relationship with the petitioner during his marriage. That the petitioner was always armed was a two-edged sword.

On 22 June 1994, at the office and in the presence of the district attorney general, counsel interviewed the petitioner's four-year-old daughter. Also present were the defense investigators. Counsel wanted to test the child and discover whether he could lead her

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[2] In his testimony, counsel referred to Ms. Evans by her name at the time of the events he describes.

to agree with him. Basically, she did not disagree with him. She had not seen the shot and did not say much more than that her parents were fighting. Counsel concluded that he could probably lead her to support or at least not to contradict the theory of the defense.

The petitioner's three-year-old son was not called as a witness. The prosecution tried to prove from the child's demeanor how upset he was. Counsel should have filed a motion *in limine* or asked for a mistrial based on the prosecutor's characterization of the child as upset.

Counsel does not know whether he or an investigator interviewed Mr. Leftwich. Counsel did not subpoena Mr. Leftwich to testify about the petitioner's car trouble.

The petitioner thought that his divorce lawyer would be a good witness. At his instance, counsel called the lawyer to testify that, even though the victim and the petitioner were divorced, their relationship was amicable.

Counsel also called character witnesses to bolster the petitioner's testimony. He does not think that the prior convictions or jury instructions caused their testimony to lose all its value.

Counsel would have liked to have known that the victim's family attended church with an assistant district attorney general, even though the only interaction there was between the assistant and one of the children in kindergarten. Counsel should have questioned panelists about whether they knew that the victim's family attended church with the assistant.

Counsel should have requested that the verdict form include the punishment for first-degree murder. The jury thought it had a verdict when it did not. Counsel argued for reconsideration of the life sentence.

Throughout the trial, counsel consulted with the petitioner, who remained on bond until the morning after the verdict, when he turned himself in. The petitioner was very actively involved in the trial.

The petitioner did not give a statement to police. The basis for conviction was the proof at trial. Det. Rawlston never indicated that the victim was shot accidentally. He was in law enforcement and had nothing to rebut. Counsel's tactic was to suggest to the jury that the officer made up his mind before he arrived at the airport. There was, however, no rebuttal to Ms. Maston's testimony. When asked whether it was a close case and whether the state should have made the defense aware of witnesses, counsel said that he would never have waived the preliminary examination.

Counsel was not involved in the motion for a new trial. Mr. Summers was retained.

Mr. Gann testified that he was with the CPD between 6 March and November 1994. After hearing a gun recoil and going to investigate, he found Off. Miller shot in the foot. He called for an ambulance and notified others that there had been a shooting. He does not remember what Off. Miller said. Someone else would have made a report. Off. Miller was in a little pain and started to go into shock.

Mr. Summers testified that he finished law school and passed the bar in 1966. From September 1966 to January 1969, he was an assistant district attorney general. In July 1969, after six months in a firm, he went into solo practice. At this time, there are six lawyers in his firm.

For the most part, Mr. Summers confines his practice to personal injury and criminal defense. He has tried many cases, filed many motions for a new trial, and, since he entered private practice, filed many appeals. In the early 1970s, more than two hundred of his cases were reported. Now, he tries two to three cases a year and appears in various courts, from city courts to the United States Supreme Court.

Mr. Summers continues to try and appeal cases. He does not believe that he has ever been found to be ineffective.

The petitioner and his family contacted Mr. Summers in 1994, after the trial, and retained him to pursue two appeals. Mr. Hill had filed a motion for a new trial. Mr. Summers is uncertain whether he received Mr. Hill's entire file. The office of the district attorney general claimed to have provided everything that it had.

After reading the transcript of the trial and reviewing the file, Mr. Summers filed a supplemental motion for a new trial, which was denied. Thereafter, he filed a notice of appeal, argued the case before the Court of Criminal Appeals, and was overruled. After reading the appellate court's opinion, he filed, with a supplemental brief identifying the appellate court's errors, an application for permission to appeal to the

Supreme Court, which was denied, ending his representation of the petitioner.

At any time, the Court of Criminal Appeals has many, probably two or three hundred, arguments before it. Generally, on appeal, it is better to emphasize two to four of the most meritorious issues, depending on the length of the trial, and to combine similar issues. Mr. Summers does not raise non-meritorious issues, unless he thinks there is a possibility of changing the law.

Mr. Summers usually informs clients that he will pursue fewer issues on appeal than he raises in the motion for a new trial. He thinks he did so in the petitioner's case, and he did, in fact, pursue fewer issues on appeal than he raised in the supplemental motion for a new trial.

Among the nine issues Mr. Summers pursued on appeal, the Court of Criminal Appeals found two errors, the admission of the mother's testimony of prior inconsistent statements and the treatment of Ms. Maston as a rebuttal witness. It also found that neither error was prejudicial and the petitioner was treated fairly. In the supplemental brief for the Supreme Court, he pursued both issues.

Mr. Summers raised several issues in the motion for a new trial, some of which, his best arguments, he also pursued on appeal. At the hearing on the motion for a new trial, he questioned Mr. Hill about the rebuttal witness, who should have been named by the prosecution and called in its case in chief. The Court of Criminal Appeals did not agree with him that the failure to name the witness was prejudicial.

Mr. Summers also raised the issue of plea negotiations and, in briefs, the twenty first issue. He raised the issue of the prosecution's failure to disclose certain statements that apparently the police did not disclose to it, arguing that it was prejudicial, though not that it was in bad faith.

Mr. Summers raised the issue of the cross-examination of Off. Miller about the injury to his foot and believes that he raised the issue of Off. Miller's impeachment and excited utterance, though his brief will reveal whether he did so. He raised the issue of

Mr. Shepheard's statement "I told you so". Although Mr. Hill had cross-examined Mr. Shepheard numerous times and, despite the open-file policy, had filed pre-trial motions, he could not sufficiently explore what was only presented to the office of the district attorney general a week before trial. The Court of Criminal Appeals held that the trial court should have given a limiting instruction without request.

Mr. Summers did not raise the issue of ineffective assistance of counsel in the motion for a new trial or on appeal. He has done so in occasional cases, including in federal court. He recognizes that even the best lawyers make mistakes. He also recognizes, however, that different lawyers have different styles of trying cases. In any event, he did not think that Mr. Hill was ineffective.

Because Mr. Summers did not see any egregious ineffectiveness, he did not raise the issue of ineffective assistance of counsel. He thought that any such issue should be raised in a post-conviction proceeding and

would not be waived. Even if a motion for a new trial was the only way to raise the issue and even though Mr. Hill had tried the case as if it were different than what it was, it was not a meritorious issue.

Mr. Summers disagrees that he should have "laid the groundwork" for the petitioner's post-convictions claims in the trial court. He called Mr. Hill to testify at the hearing on the supplemental motion for a new trial and questioned him about prejudice.

He thought he covered the issue for appellate review, and his statements to the Supreme Court about the issue were very strong. He argued, in essence, that late revelations compromised counsel's effectiveness.

Mr. Summers did not raise other issues in the supplemental motion for a new trial or pursue them on appeal. He was unaware that the district attorney general was present during Mr. Hill's interview of the petitioner's daughter. He did not challenge the prosecutor's references to the petitioner's crying, three-year-old son. He did not challenge Ms. Maston's sequestration violation. He did not pursue the prosecutor's comments on the petitioner's silence or failure to make an immediate claim of accident.

Although counsel thinks that everyone is entitled to a fair trial, the prosecutor pointing a pointer at the petitioner was not going to get him a new trial.

The prosecutor failed to disclose the recording of the exculpatory statements he made in the police car. In the motion for a new trial, counsel did go into the tape recording and was satisfied that the prosecution did not have such a recording. For that reason and

because any such statement was self-serving and therefore inadmissible, he did not pursue the issue on appeal.

It became apparent that Art Grisham, Esq., and an assistant district attorney general attended the same church. One of the prospective jurors was Mrs. Grisham, who was aware of her husband's involvement in the case. In counsel's view, the mere fact that an assistant district attorney general knew Mrs. Grisham's family did not disqualify her. Mr. Summers was unaware that the prosecutor went to church with the victim's family.

Nor did Mr. Summers pursue the issue of the belated disclosure of the gunshot residue test on appeal. The report should have been provided to Mr. Hill, who only learned of it when Det. Rawlston testified. Instead of challenging the report, however,

Mr. Hill used it effectively, going into detail. Mr. Summers does not know that Mr. Hill could have done anything more with it than he did had he had it before, though it is possible that the agent who did the test could have provided exculpatory evidence. In any event, the appellate court would not have regarded the belated disclosure as prejudicial. Sometimes it is better to let sleeping dogs lie.

The petitioner's prior convictions should not have been introduced. Nor would Mr. Summers have put on character witnesses if, as the petitioner claimed, they had not been asked. Nor did Mr. Hill request a limiting instruction. Mr. Summers did not regard these errors as prejudicial.

The trial court described the case as extremely close and difficult. Mr. Summers acknowledged that, in such a case, a series of small errors could make a difference. Mr. Mabee testified that he has been an assistant district public defender for nineteen years. In the petitioner's case, he waived the preliminary examination in exchange for a fifty-thousand-dollar bond and an agreement from the prosecutor, whose name he did not note, that the prosecution would show the defense everything. He did so after informing the petitioner of the proposal and letting him decide whether to waive the examination. Usually, by the time of a preliminary examination, all the information is available.

There is a big drawer of time sheets in the office of the district public defender. Trial counsel would not necessarily have seen the time sheet showing Mr. Mabee's work in the petitioner's case.

Ms. Evans, whose name, in 1994, was different, testified that, on 17 August 1994, she gave a telephone interview to Mr. Hill, whom she knew represented the petitioner. At some point, at the office of the district public defender, she also gave a statement to the prosecutor. She answered Mr. Hill's and the prosecutor's questions. She did not know what was important. She would have testified if called but is not sure what value her testimony would have had. She knew nothing of the homicide and does not remember when she last saw the victim.

Although Ms. Evans was never married to the petitioner, in 1989, they had a child together. While she was pregnant with his child, the petitioner met

the victim. She told the prosecutor that, during the petitioner's marriage to the victim, she and the petitioner were "mainly friends" . She and the victim "talked a lot", though they were not close friends. She knew that the petitioner and the victim, who had had children together, were divorcing.

When Ms. Evans heard about the charges *[sic]* , she wrote to the petitioner, who replied from jail that he had been framed. She does not have his letter. She remained in contact with the petitioner throughout the pre-trial period, during which he was in custody for some time, and they talked about the accident. She has been in and out of the post-conviction hearing.

The petitioner testified that he has drafted every document that has been filed in this case. He has never tried or appealed a case or observed a criminal or civil trial but has "handled" many applications for the writ of *habeas corpus* and has read about juries and American Bar Association standards.

The subject petition contains three claims: ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and prosecutorial misconduct. The petitioner's memorandum in support of the petition consists of seven bound volumes.

Mr. Hill visited the petitioner at the county jail. Initially, he knew little about the case, though he knew that the petitioner claimed that the shooting was accidental. He had the petitioner complete an intake form. They discussed Off. Miller's accident, and Mr. Hill told the petitioner that it supported his, the petitioner's, account of events.

After the petitioner's release from jail, he had a couple of meetings with Mr. Hill. Mr. Hill asked him what had happened and "put forward" the defense of accident. The petitioner "guess[es]" that it was counsel's idea to adopt an accident theory.

Mr. Hill knew that the petitioner had left the scene and discarded the weapon before telephoning 9-1-1 but never indicated that any of the proof would be damaging.

The petitioner planned to testify and understood that he would be cross-examined. He also understood that he had a right not to testify. He wished to testify and did not think that anything would hurt him. He and Mr. Hill had talked about the check cases, but they were inadmissible. Mr. Hill did not prepare him for cross-examination. He does not remember a practice cross-examination.

About the weapon, the petitioner testified that it was a 7400 rifle with a Remington Common Fire Control Mechanism that he had had since he was fourteen. In 1994, the mechanism was inside the rifle.

The petitioner was twenty-seven when the victim was killed. He had never had a problem with the weapon discharging accidentally in the thirteen years that he had had it until it discharged in his hands and shot his wife in the chest. Every-thing was organized at home, and there was proof that the gun was already loaded.

Mr. Hill claimed that latent fingerprints were developed. The petitioner asks, "Where are the results?" No fingerprint evidence was disclosed during discovery or introduced at trial. The petitioner

acknowledges that the gun was his weapon and, though he did clean it occasionally, his prints would have been all over it. After the shooting, all he did was wipe the gun. Several members of the jury chambered and pulled the trigger.

The petitioner does not remember what he said in the back of the police car, the tape of which is missing. He did not tell counsel about the possible existence of a recording and counsel did not ask. Nor did the prosecution disclose the identity of Off. Lapoint before trial. The recording was an issue at trial. At the post-conviction hearing, Off. Lapoint testified that he did not know whether anything was recorded. Off. Whitfield, whose car it was, took the recorder.

At trial, a recording of the petitioner's 9-1-1 call reporting that he had "just shot his wife" was played. Counsel did not remark on how upset the petitioner sounded.

The record will reflect that Mr. Hill did not investigate the case. Despite the open file, Mr. Hill did not obtain Ms. Evans's statement or call her to testify about the petitioner's habit of carrying a gun.

There was a plea offer of second-degree murder. The decision to reject the offer was difficult. Mr. Hill said, as he did in opening statement, that the shooting was not an intentional act., though, as the petitioner now acknowledges, he is the only one who knew his own state of mind at the time of the shooting. Had Mr. Hill received the entire prosecution file, his advice about the offer could have been better. Had the petitioner known of all the proof, he would have

accepted the offer. During trial, there were no plea discussions.

The petitioner did not attend church with the victim. He did not know prosecutor Irwin.

In opening statement, counsel made some inappropriate remarks. While he understands the importance of stating the theory of the defense, counsel's theory was not infom1ed and the judge did not instruct the jury about the purpose of opening statements and closing arguments.

Mr. Hill overstated or misstated the theory of the defense. In opening statement, he said that the victim was killed by a faulty firearm and the act was not intentional; he failed to say that the act was not premeditated. In closing argument, after Det. Miller's surprise testimony, he said that it did not matter whether the weapon was faulty and "Off. Miller was a train wreck waiting to happen."

Mr. Shepheard was the most indispensable witness for the prosecution. He testified that, after the shooting, he heard the petitioner tell the victim, "I told you so." Because Mr. Hill did not investigate the open file, he did not discover that this testimony was not consistent with Mr. Shepheard's statement to Off. Rawlston. Mr. Hill did not attack the credibility of Off. Rawlston or use the officer's affidavit in support of the search warrant to cross-examine Mr. Shepheard. Nor did Mr. Hill request an instruction limiting the jury's consideration of Mr. Shepheard's prior inconsistent statements to police and an investigator from the office of the district attorney general.

Mr. Fite was another critical witness for the prosecution and his unhelpfulness was foreseeable. He said that he could not or tried and failed to reproduce an accidental discharge. Mr. Hill did not consult a firearms expert to help him cross-examine Mr. Fite or testify about the defective trigger mechanism. Nor did Mr. Hill cross-examine Mr. Fite extensively on the weapon or the mechanism. Mr. Hill tried unsuccessfully to introduce evidence about a model with the same trigger mechanism, the 742 Remington. A diagram or schematic of the weapon or the trigger mechanism would have been helpful.

Mr. Hill was unaware of Off. Miller's prior inconsistent statements. The officer's initial statement about his accident should have been admitted as an excited utterance.

He should not have been allowed to testify regarding what he told an investigator from the office of the district attorney general a couple of weeks before trial.

Mr. Hill talked to the petitioner's daughter and said that she would not hurt him, though she had seen the gun. Mr. Hill did not inform1 the petitioner of his daughter's statement, to which, the petitioner says, the Court should listen. The petitioner knew that he would have to address her testimony at trial. Had he known that she claimed to have said to him, "Don't kill Mommy," he would have testified about it and his response and state of mind. Nor did Mr. Hill recall him for rebuttal or try to show bad faith on the part of the prosecution.

The prosecution should have disclosed that Ms. Maston's presence at the airport. The petitioner was unaware that there were witnesses of events at the airport. He entered the airport and talked to a uniformed security officer. He may have seen Ms. Maston there. Mr. Hill did not address Ms. Maston's testimony. Had the petitioner known that Ms. Maston would testify, he would have addressed her testimony during his own testimony.

The petitioner gave counsel his divorce lawyer's name, thinking that the lawyer could testify that the divorce was amicable and the petitioner had custody of the children.

He now thinks that it was a mistake to call the lawyer. Three to four months after the victim's death, the petitioner had a child with another woman.

Mr. Hill's closing argument was improper. Mr. Meyer testified that he heard shots and the proof showed that he saw the weapon. He did not note how upset the petitioner was during the 9-1-1 call, as evidenced by the recording of the call. Considering everything that went wrong at trial, Mr. Hill should have argued for a lesser, included offense. He should also have requested a sentencing instruction.

Mr. Hill did not talk to all the witnesses. Mr. Meyer testified that he heard shots and the proof showed that he saw the weapon. Mr. Hill did not use his statement that he looked across the street and saw something.

Mr. Hill did not pursue the results of the gunshot-residue test. He did not move for a mistrial when Off. Rawlston testified about the results.

The petitioner has nothing to add to his claim of ineffective assistance of appellate counsel. Mr. Summers was retained by his family to pursue an appeal to the Supreme Court, if necessary. He approved the decision. Mr. Summers was a good lawyer.

When Mr. Summers filed the motion for a new trial, Mr. Hill filed a conditional motion for a new trial. Mr. Summers forwarded a letter to him with the supplemental motion. The petitioner always asked about Off. Lapoint's recording.

The petitioner did not ask Mr. Summers to add any issues. He would not have known what to ask for. He was present at the hearing on the motion for a new trial, at which Mr. Summers presented proof. He now complains that Mr. Summers did not challenge the prosecutor's use of a pointer to point at him from a distance of two-and one-half feet and ridicule of the accident theory.

After the hearing on the motion for a new trial, the petitioner had no meetings with Mr. Summers. He was sent a copy of the appellate briefs and informed when the case would be heard.

The petitioner says that he did not make any comments to anyone at the BP station; his first comments were at the airport. He did not mention to the 9-1-1 dispatcher or to Off. Rawlston, who read him his rights while they were in the car, that the shooting was accidental. Off. Lapoint, whose identity the prosecution suppressed, testified that he was distraught. His distress should have been evident on

the tape, if one existed, and would have been exculpatory.

The petitioner was aware of the one-year deadline for filing post-conviction petitions. On 8 April 1998, he filed the original, *pro se* petition. Thereafter, he delivered a motion for an extension of time to prison officials. The judge summarily dismissed the petition. Apparently, the order of dismissal was in the mail when he filed the amendment to the petition.

In post-conviction discovery, the petitioner obtained Agt. Davis' report on the gunshot-residue test and Det. Mathis' supplemental report. The agent's post-conviction testimony that the results of the gunshot-residue test were inconclusive corroborates Off. Rawlston's trial testimony.

The petitioner does not know why Mr. Belk testified free of charge. He does not know if he has a pending case.

During the post-conviction hearing, the parties tried to find the tape from Mr. Lapoint's recorder, officers' field notes, and a fingerprint report. For that purpose, counsel met at the police center. Although they had the assistance of the person in charge of the major-crimes division and both the property room and a storage facility were searched, nothing else was found. Both lawyers have contacted former Det. Mathis, who was subpoenaed to bring the recording.

The transcript of the trial contains the evidence that supports the finding of premeditation. In its opinion affirming the judgment of conviction, the Court of Criminal Appeals summarizes that evidence as follows:

> The State argues that the defendant's intent to kill the victim is proved by the defendant's actions in bringing the gun to the station, calmly requesting his wife to come outside, repeatedly stating "I told you so" while standing over her body, and failing to render any assistance following the shooting. The State also points out that the defendant and the victim had been in the midst of divorce proceedings and that the defendant had suspected his wife of having an affair. While the defendant denied that he had been angry at his wife, denied that he had brought the gun to the station with the intent of shooting her with it, and denied that he had said "I told you so" to her as she lay on the parking lot, the jury chose not to believe the defendant's version of the facts. This, the jury had the right to do. Giving the State the strongest legitimate view of this evidence, as we must, these facts are sufficient to prove the element of intent.

State v. Kendricks, 947 S.W.2d 875, 880 (Tenn. Crim. App. 1996).

The transcript of the trial contains some other revelations. In opening statement, the prosecutor refers to the victim's death as an execution, despite prosecution evidence of an argument. In addition, the petitioner was not entirely certain whether, at the time of discharge, his hand or finger was on the trigger.

At the time of the victim's death, there was a gun in her purse in the shop. According to the petitioner, he had bought the gun for her and, because of their

interracial marriage and the conditions of their work, they both carried guns. Finally, despite its open-file agreement with the petitioner as well as its open-file policy, the prosecution did not disclose changes in Off. Miller's account of his accident, changes, one week before trial, in Mr. Shepheard's account of events, or Ms. Maston's existence.

II. Law and analysis

To obtain post-conviction relief, a petitioner must allege and, by clear and convincing evidence, prove that his conviction or sentence is void or voidable because of the abridgement ofa constitutional right. Tenn. Code Ann. §§ 40 30 103, 1l0(f).

Ineffective assistance of trial counsel

The petitioner claims that he did not receive effective assistance of counsel. If a petitioner complains of the abridgement of his rights to effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 9 of the Tennessee Constitution, then he must prove that his counsel's performance was deficient and that the deficiency was prejudicial. *Strickland v. Washington,* 466 U.S. 668,687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *Powers v. State,* 942 S.W.2d 551, 558 (Tenn. Crim. App. 1996). If he fails to prove one element, then the court need not consider the other. *Henley* v. *State,* 960 S.W.2d 572,580 (Tenn. 1997).

Counsel's performance is deficient if it is not "within the range of competence" applicable to attorneys in criminal cases. *Baxter* v. *Rose,* 523 S.W.2d 930, 936 (Tenn. 1975). A court "must indulge

a strong presumption that counsel's conduct falls within the range of reasonable professional assistance and must evaluate [that conduct] from counsel's perspective at the time of the alleged error and in light of the totality of the evidence." *Hicks* v. *State,* 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998) (citing *Strickland,* 466 U.S. at 695). A deficiency in counsel's performance is prejudicial if there is a reasonable probability that the outcome of a proceeding is unreliable. *Strickland, 466* U.S. at 687.

"'[S]trategic and tactical decisions should be made by defense counsel after consultation with the client. . .. Such decisions include what witnesses to call, whether and how to conduct cross-examination, ... and what evidence should be introduced.'" *Pylant* v. *State,* 263 S.W.3d 854, 873-74 (Tenn. 2008) (quoting A.B.A. Standards for Criminal Justice § 4-5.2(b) (3d ed. 1993) and also citing the comment on § 4-5.2 and *Baxter,* 523 S.W.2d at 936). "'[1]f a disagreement on significant matters of tactics or strategy arises between defense counsel and the client, defense counsel should make a record of the circumstances, counsel's advise *[sic]* and reasons, and the conclusion reached.'" *Id.* at 874 n.29 (quoting A.B.A. Standards for Criminal Justice § 4-5.2(c)). The courts "will not second-guess trial counsel's informed tactical and strategic decisions." *See id.* (stating that "this Court", meaning the Supreme Court, will not do so) (citing *Henley,* 960 S.W.2d at 579).

1. The petitioner complains that counsel did not interview prosecution witnesses and, in opening statement, diminished the credibility of the defense

by promising to ask Off. Miller to explain the officer's handless discharge of the petitioner's gun and describing the prosecution's proof. It is true that the defense was surprised by some of the evidence at trial. It is also true, however, that, despite its open-file agreement and policy, before trial, the state did not disclose changes in Off. Miller's or Mr. Shepheard's statement or Ms. Maston's existence. Considering that counsel reviewed all discovery and statements, had an investigator interview witnesses, and clearly remembers Off. Miller telling him or his investigator that the officer's hands were nowhere near the trigger at the time of the officer's injury, the Court does not attribute the surprises at trial to any deficiency in counsel's performance. Nor does it find any deficiency in counsel's opening statement.

2. The petitioner complains that counsel did not familiarize himself fully with the file or utilize Det. Rawlston's affidavit to impeach Mr. Shepheard's statement and testimony that he did not see a weapon, though Mr. Shepheard's testimony on premeditation was critical to the prosecution. Counsel reviewed all discovery and statements. Certainly, as the cross-examinations of Mr. Shepheard and Det. Rawlston reflect, he was aware of the inconsistencies in Mr. Shepheard's statement and testimony. There was no apparent reason, however, for him to impeach Mr. Shepherd's prior, consistent statement that he did not see a weapon. The Court therefore finds no deficiency in counsel's performance in this respect.

3. The petitioner complains that counsel did not cross-examine or impeach Mr. Shepheard, through

his own statement or Det. Rawlston, with inconsistencies regarding the petitioner's companions and movements. The transcript of the trial reflects that counsel's cross-examination of Mr. Shepheard was thorough and explored what Mr. Shepheard could and could not see or hear, did and did not see or hear, and had and had not said. The Court therefore finds no deficiency in counsel's performance in this respect.

4. The petitioner complains that counsel did not know, argue, or present the law regarding prior, inconsistent statements, object to Mr. Shepheard's surprise testimony that he had heard the petitioner tell the fallen victim, "I told you so," or request a mistrial. For the reasons set forth in the Court's response to the third allegation in support of this claim, the Court finds no deficiency in counsel's performance in this respect.

5. The petitioner complains that counsel did not investigate the case fully, capitalize on the state's open file, or discover Det. Mathis' supplemental report regarding Mr. Shepheard's statement. Counsel, however, reviewed all the information available to him and used or tried to use the evidence favorable to the defense. As for Det. Mathis' supplemental report, despite the parties' joint efforts, it is still not in evidence. In any event, presumably, Det. Rawlston's trial testimony about Mr. Shepheard's statement makes Det. Mathis' supplemental report redundant. The Court therefore finds no prejudice in counsel's performance in this respect.

6. The petitioner complains that counsel did not request an instruction limiting consideration of another witness's account of Mr. Shepheard's prior, consistent statement that he heard the petitioner say, while standing over the victim's body, "I told you so", to the issue of credibility. Considering the admissibility of Mr. Shepheard's testimony on the same point on the issue of guilt, the Court finds no prejudice in counsel's performance in this respect.

7. The petitioner complains that counsel did not utilize his rights to present a defense and confront his accusers to question or challenge Agt. Fite's reliability on the ground that, despite the manufacturer's replacement of the model, the expert believed that the rifle was as safe as any other firearm or operator. At the post-conviction hearing, however, he did not introduce evidence of the manufacturer's replacement of the model before or after the manufacture of his weapon in 1982. Apparently, the only replacement in the weapon's history was in 1950, long before the manufacture of the petitioner's rifle, when there was a redesign of the trigger mechanism to correct some defects. The Court therefore finds no prejudice in counsel's performance in this respect.

8. The petitioner complains that counsel did not establish, through Agt. Fite or another expert, that debris inside the firing pin channel or other places can cause a semi-automatic weapon to discharge accidentally. For the reasons set forth in its analysis of the thirty-ninth allegation in support of this claim, the Court finds no prejudice in counsel's performance in this respect.

9. The petitioner complains that, in closing argument, counsel failed to emphasize Mr. Mowrer's testimony that the petitioner's car was parked at a gasoline pump and diminished the credibility of the defense by erroneously arguing that Mr. Mowrer saw a weapon and Det. Rawlston did not speak to a single witness at the scene. The petitioner testified at trial that his wife drove the wagon during the week and he drove it on the weekend and he would fuel it at the pump to which she directed him, which varied because the cost was deducted from her wages. Neither he nor anyone else testified at trial or at the post-conviction hearing that he had asked her to direct him to a pump or she had directed him to the pump where he was parked at the time of her death. To remind the jury of the favorable fact may have been to remind them of an unfavorable one. As for counsel's misstatements of the evidence, one, an apparent misstatement in the state's favor, arguably cancels the negative effect of the other, a misstatement in the petitioner's favor. The Court therefore finds no prejudice in counsel's performance in this respect.

10. The petitioner complains that counsel did not object to the prosecutor's commenting on his silence at trial or request a curative instruction or a mistrial. Under federal law, the prosecution may make impeachment use of any pre-caution silence, including post-arrest silence. *State* v. *Haire,* 2002 Tenn. Crim. App. LEXIS 39, * 44-45 (tracing the development of federal law from *Doyle v. Ohio,* 426 U.S. 610,96 S. Ct. 2240,49 L. Ed. 2d 91 (1976), to

Fletcher v. *Weir,* 455 U.S. 603, 102 S. Ct. 1309,71 L. Ed. 2d 490 (1982)). Under state law, the prosecution may make impeachment use of a defendant's pre-arrest silence and, if "patently or blatantly inconsistent with [the defendant's] trial testimony", of the defendant's post-arrest, pre-caution silence. *See id.* at * 48, 51 (conditioning impeachment use of post-arrest silence and finding the defendant's pre-arrest silence relevant and admissible). Considering that the prosecutor's arguments were not about any post-caution silence but about the petitioner's pre-arrest, pre-caution actions and failure to make any reference to accident in his pre-arrest, precaution admission, the Court finds no deficiency in counsel's performance in this respect.

11. The petitioner complains that counsel did not object to a prosecutor's vouching for the testimony and credibility of material witnesses, Mr. Shepheard, the petitioner's daughter, Det. Rawlston, and Agt. Fite, and insinuating the existence of evidence outside the record or request a curative instruction or a mistrial. He does not substantiate this complaint with a reference to the record. The transcript of the trial reflects that, in closing argument, counsel objected to the prosecutor's description of Mr. Mowrer's testimony regarding the position of the petitioner's weapon on the ground that it was outside the evidence and the prosecutor restated the testimony. Counsel objected and moved for a mistrial when the prosecutor addressed the petitioner directly and pointed at him. The objection was sustained but the motion denied. Counsel objected to the

prosecutor's suggestion that the jury could infer from Mr. Benton's testimony that the petitioner could see Mr. Benton chasing him on the ground that it was outside the evidence. The judge let the jury decide what was in evidence. Counsel objected to the prosecutor's statement that Off. Sims "came to testify", though Off. Sims did not testify. The prosecutor did not pursue the matter. The Court finds no deficiency in counsel's performance in these respects.

12. The petitioner complains that counsel did not object to the prosecutor's stating his personal opinion about the evidence, arguing from evidence outside the record, misrepresenting evidence in the record, eliciting inadmissible proof, including having the petitioner vouch for the credibility of the state's proof, and engaging in courtroom antics and failed to document the record or request curative instructions or a mistrial. He does not substantiate this complaint with references to the record. From the transcript of the trial, it appears that counsel did object to some or all of these actions and move for a mistrial in at least one instance. The Court finds no deficiency in counsel's performance in these respects.

13. The petitioner complains that, when counsel learned of the state's intent to introduce documentary x-rays of the victim and a schematic of the weapon, he did not properly object, request a continuance, establish prejudice, move for a mistrial, or request an order requiring the state to renew the plea offer of twenty-two years. Considering that, even now, many years after the trial, there is no evidence that the x-

ray, cumulative evidence, was not relevant or genuine or the schematic drawing, cumulative, demonstrative evidence, was not relevant or accurate, the Court finds no prejudice in counsel's failure to request a continuance or renewal of the plea offer on the ground of the belated disclosure of the state's intent to introduce the x-ray and the schematic drawing.

14. The petitioner complains that, when counsel learned of the state's intent to call a surprise witness, Ms. Maston, he did not properly object, request a continuance, establish prejudice, move for a mistrial, or request an order requiring the state to renew the plea offer of twenty-two years. The record reflects that counsel did object to Ms. Maston as a rebuttal witness on the grounds that she was a surprise witness and not a rebuttal witness. Although the Court of Criminal Appeals did not find that she was a rebuttal witness, it did not find reversible error or proof that the surprise, independent of the testimony, was prejudicial. Although the petitioner attributes his rejection of the plea offer to ignorance of Ms. Maston's testimony about his daughter's excited utterance at the airport, which, though not discoverable under Tenn. R. Crim. P. 16(a); was discoverable under the state's open-file agreement and policy, counsel, according to whom, the petitioner was adamant that the victim's death was an accident, doubts the plea-affecting nature of the testimony. Considering that the petitioner's daughter's excited utterance at the airport was ambiguous and not necessarily inconsistent with a theory of accident, the Court finds

no clear and convincing evidence of prejudice in counsel's performance in this respect.

15. The petitioner complains that counsel did not know the law, properly challenge the state's use of Ms. Maston as a rebuttal witness, or request a mistrial. The record belies the allegation. The Court of Criminal Appeals, while agreeing that she was not a rebuttal witness, did not find the error reversible. The Court therefore finds no prejudice in counsel's performance in this respect.

16. The petitioner complains that counsel did not properly object to Ms. Maston's testimony on the ground that his daughter's testimony was a ruse to introduce Ms. Maston's testimony. Presumably, the petitioner means that Ms. Maston's account of his daughter's excited utterance would not have been admissible had he not had the opportunity to confront his daughter. His trial, however, predates the decision in *Crawford* v. *Washington,* 541 U.S. 36, 124 S. Ct. 13154, 158 L. Ed. 2d 177 (2004), under which the right of confrontation limits the admissibility of testimonial hearsay, irrespective of the applicability of a hearsay exception, by almost ten years. Effective assistance of counsel does not require counsel "to anticipate changes in the law regarding the confrontation clause." *See Fleming* v. *State,* 2011 Tenn. Crim. App. LEXIS 29, * 22- 23 (rejecting post-conviction claims that trial and appellate counsel were ineffective in failing to anticipating a change in the law regarding the confrontation clause) (citations omitted). The Court therefore finds no deficiency in counsel's performance in this respect.

17. The petitioner complains that counsel did not introduce available evidence to rebut Ms. Maston's testimony that his daughter said, "I told Daddy not to shoot Mommy, but he did and she fell." Considering that, even now, there is no evidence rebutting Ms. Maston's testimony, though, according to him, his intake form reflects that his response to his daughter's statement, "Daddy, don't shoot my Mommy" was "Sweetheart, I'm not going to shoot your Mommy," and his daughter's statement was ambiguous and could mean "Don't accidentally shoot her" or "Don't accidentally or intentionally shoot her" as well as it could mean "Don't intentionally shoot her", the Court finds no prejudice in counsel's performance in this respect.

18. The petitioner complains that counsel did not properly challenge the trial court's limitation on the cross-examination of Off. Miller and exclusion of Off. Sims' testimony regarding Off. Miller's prior, inconsistent statement or request a mistrial. Considering that the Court of Criminal Appeals, though it did find the exclusion of Off. Sims' testimony erroneous, did not find the error reversible, the Court finds no prejudice in counsel's performance in this respect.

19. The petitioner complains that counsel did not interview his cousin, Mr. Leftwich, or subpoena him to testify about his activities on the day of the victim's death, which were inconsistent with premeditation. Mr. Leftwich's post-conviction testimony that, on the day of the victim's death, the petitioner had had to repair his car and had requested and received

assistance from his wife in doing so does corroborate the petitioner's trial testimony regarding those events as well perhaps as Mr. Lawson's trial testimony regarding the amicability of the divorce. According to counsel, however, it was the petitioner's wish that the divorce lawyer testify on the issue of the amicability of the divorce, presumably, because he was not a relative. Considering the petitioner's apparent lack of motive to kill the victim, the Court finds no deficiency in counsel's performance in this respect.

20. The petitioner complains that counsel did not fully investigate the case or obtain a copy of Off. Lapoint's tape recording. Considering that counsel was unaware of even the possible existence of a recording and there is no clear and convincing evidence of the existence of the recording, the Court finds neither deficiency nor prejudice in counsel's performance in this respect.

21. The petitioner complains that counsel did not research or know the law regarding sentencing in first-degree murder cases and did not request an instruction on the range of punishment and parole eligibility.

> The Tennessee Supreme Court dealt with the issue of improper jury instructions regarding the range of punishment in *State v. Cook,* 816 S. W.2d 322 (Tenn. 1991). In Cook, the issue before the Court was whether a trial judge committed prejudicial error by instructing the jury on the range of punishment for a Range I offender, where the sentence range which the defendant must be sentenced under is that of a Range II

offender. *ld.* at 324. The Court assumed that the trial court committed error when it instructed the jury and then turned to decide whether that error was harmless. *Id.* at 325. It concluded that Tennessee Code Annotated section 40-35-20 I *(b)* gave a defendant a claimable statutory right to have the jury know the range of punishment. The Court went on to conclude that the benefits that the Legislature had in mind for the defendant when it passed this statute would be lost if the defendant were "to be sentenced to punishments greater than what the jury finding guilt was instructed would be imposed." *Id.* at 327. Further, "to deny this defendant that statutory right constitutes prejudice to the judicial process, rendering the error reversible .... " *Id.*

Vaughn v. State, 2005 Tenn. Crim. App. LEXIS 423, *50-51 (footnote omitted).

[I]nstructions as to the penalty range are informational in nature and nonessential to the issue of guilt or innocence. *See State v. David H. Ooren,* no number in original (Tenn. Crim. App., Knoxville, May 26, 1989), *perm. to appeal denied,* (Tenn. 1989). Evidence that appellant was guilty of the aggravated forms of the crimes charged was ovenwhelming. Any possible error here was harmless and does not rise to the level of a constitutional violation. *See State v. Wilbert M. Phillips,* No. 203 (Tenn. Crim. App., Knoxville, April 26, 1989), *perm. to appeal denied,* (Tenn. 1989); T.RA.P. 36(b) ....

Sword v. Slate, 1994 Tenn. Crim. App. LEXIS 830, "' 9-10.

Although the record reflects that, after the jury returned a verdict of guilt, there was some confusion on the part of the Court and the jury about who was to impose sentence, the confusion is not attributable to the jury's belated discovery of and dismay about the punishment. Although counsel did not request an instruction on punishment in the guilt phase of the trial, in addition to referring to the seriousness of the charge, three times in closing argument, he referred to the sentence as life imprisonment. The Court therefore finds no prejudice in counsel's performance in this respect.

22. The petitioner complains that counsel did not object to the prosecution's non-disclosure of Mr. Shepheard's and Off. Miller's contradictory statements or move for a mistrial. For the reasons set forth in the Court's response to the third, eighteenth, and thirtieth allegations in support of this claim, the Court finds no prejudice in counsel's performance in this respect.

23. The petitioner complains that, in his cross-examination of Det. Rawlston, counsel opened the door to prejudicial opinion and vouching and did not object to or

request a curative instruction regarding the prosecutor's vouching for Mr. Shepheard and improperly insinuating that there was more evidence outside the record. On cross-examination of Det. Rawlston, counsel did try to demonstrate that the detective did not conduct the investigation with an

open mind. The focus of the prosecutor's re-direct examination was the bases for the detective's interpretation of the facts. Counsel did successfully object to a response indicating that the victim was in a defensive posture. As for Mr. Shepheard, presumably, what the petitioner finds objectionable is the prosecutor's redirect examination about a prior, consistent statement to an investigator. The Court finds no deficiency in counsel's performance in these respects.

24. The petitioner complains that counsel did not request the removal of potential jurors from open court to allow the defense to inquire into Ms. Grisham's knowledge of participants. At the beginning of *voir dire,* Ms. Grisham disclosed a vague awareness of her husband's involvement with the victim's family in a civil matter and knowledge of prosecutor Irwin and other persons from church. The Court finds no deficiency in counsel's performance in this respect.

25. The petitioner complains that counsel did not accurately advise him regarding his decision to testify, did open the door to cross-examination about prior convictions, and did not request a limiting instruction. The Court accredits counsel's testimony that he did prepare the petitioner to testify by identifying weaknesses in the defense and subjecting him to practice cross-examination. Considering that the petitioner's trial testimony was critical to the defense, it being the only direct evidence supporting the theory of accident, and his post-conviction testimony adds nothing to his trial testimony about

events before or after his departure from the scene, the Court finds no deficiency in counsel's performance in this respect.

It is true, however, that counsel did open the door to cross-examination about otherwise inadmissible prior convictions and did not request a limiting instruction. Nor did the final instructions include such a limiting instruction. It is reasonably probable that the verdict reflects in part the jury's assessment of the petitioner's credibility. The jury, however, was not deciding between the petitioner's account and another person's account so much as deciding between the petitioner's account and the petitioner's own prior accounts and actions and another person's account. The Court therefore finds no prejudice in counsel's performance in this respect.

26. The petitioner complains that, during plea negotiations, counsel did not inform him of the laws and facts relevant to guilt and sentencing and did not give him an opinion about the plea offer. He did not, however, question counsel on this point. Considering that he was at all times aware of his actions, the theory of the prosecution, and the dispositive issue, intent, and was insistent on his innocence and wish to go to trial and, though it is true that neither he nor counsel was. aware of all the evidence against him until the trial, the circumstance is not attributable to counsel, the Court finds neither deficiency nor prejudice in counsel's performance in this respect.

27. The petitioner complains that counsel did not inquire into whether he should waive his attorney-client privilege before calling and improperly cross-

examining Mr. Lawson, whose testimony was damaging. It was the petitioner's wish to call Mr. Lawson to establish his lack of motive. It is not clear that counsel was even aware of the victim's adultery or the witness's knowledge of it. From its review of the transcript of the trial, the Court respectfully disagrees with the petitioner's characterization of Mr. Lawson's testimony as damaging. It seems to the Court to have been loyal and honest, Mr. Lawson acknowledging the petitioner, despite the charge, as a friend as well as a client. Although, through Mr. Lawson, the prosecution did try to pursue proof of a possible motive, its subsequent argument that it did not have to prove motive was a tacit concession that the proof of motive was relatively weak. The Court therefore finds neither deficiency nor prejudice in counsel's performance in this respect.

28. The petitioner complains that counsel did not challenge the prosecution's refusal to allow him to have contact with his daughter or defense counsel to interview her outside the presence of a representative of the prosecution. From his pre-trial interview with the petitioner's daughter, counsel was of the opinion that her testimony would not be unfavorable and could be favorable to the defense. Considering that the petitioner's lack of contact with his daughter, irrespective of the reason(s), was not a ground for exclusion of her testimony, the Court finds no deficiency in counsel's performance in this respect.

29. The petitioner complains that counsel did not investigate or present alternative theories of the defense, such as fabrication of evidence, second-

degree murder, voluntary manslaughter, and reckless homicide. He submits, however, no evidence of fabrication of evidence. Because the theory of accident is inconsistent with second-degree murder and voluntary manslaughter, it was more logical for counsel to argue against intent and premeditation and leave the jury to its own conclusion than to argue for those offenses. Because the theory of accident is consistent with reckless homicide and criminally negligent homicide, it was unnecessary for counsel to argue those offenses, though he did mention them. Of course, the petitioner himself was the source of the theory of accident. The Court therefore finds no deficiency in counsel's performance in this respect.

30. The petitioner complains that counsel did not move to introduce Off. Miller's pre-trial statements under the excited-utterance exception to the hearsay rule. Apparently, the officer's prior, inconsistent statements about the location of his hands at the time of the accident were not excited utterances. They were post-accident statements in the course of internal and defense investigations. In any event, considering that, on direct appeal, the exclusion of the officer's prior, inconsistent statement to Off. Sims did not warrant relief, the Court finds no prejudice in counsel's performance in this respect.

31. The petitioner complains that counsel did not interview Off. Miller before trial and discover the contradictions in his account of his accident. Counselor his investigator did, however, question Off. Miller before trial. He did not then give the defense reason to believe that his account of his accident

would change. Considering that the officer was a witness for the prosecution and the inconsistency did not become apparent until trial, the Court finds no deficiency in counsel's performance in this respect.

32. The petitioner complains that counsel did not discover his statement indicating that the victim's death was unintentional, "I can't believe I just did that", or a police report indicating that he did not have permission to wash his hands. He does not, however, explain why he himself did not inform counsel of these matters, which were, presumably, within his knowledge. In any event, the statement is not a claim of accident and it and the petitioner's other admissions render the gunshot-residue test inconsequential. The Court therefore finds no prejudice in counsel's performance in this respect.

33. The petitioner complains that counsel did not discover or utilize other material in the file, including radio traffic, undermining the reliability of the prosecution's evidence. Counsel did, however, review all the information available to him and present evidence in the petitioner's behalf. Even now, there is no radio traffic in evidence. Considering that, presumably, Off. Sims' report about Off. Miller's accident renders such material, including any radio traffic, redundant, the Court finds neither deficiency nor prejudice in counsel's performance in this respect.

34. The petitioner complains that counsel did not discover or utilize exculpatory fingerprint and cell-phone evidence. At trial, the fingerprint analysis was inconclusive and there was no cell-phone evidence. Now, the fingerprint evidence is still inconclusive and

there is still no cell-phone evidence. Considering the history of the petitioner's weapon, including his attempt to rid himself of it after his departure from the scene, the Court finds no deficiency in counsel's performance in this respect.

35. The petitioner complains that counsel did not discover or utilize evidence negating premeditation. Of course, the petitioner was a witness. In addition, counsel, at the petitioner's instance, did call the petitioner's divorce lawyer to negate the suggestion that the petitioner was jealous, the divorce was acrimonious, or the terms of the divorce were unfavorable to the petitioner. Apparently, the only witnesses that counsel did not try to call were Off. Holbrook, Mr. Leftwich, and Ms. Evans, whose post-conviction testimony the Court addresses in the context of other, more specific allegations. Considering that it was not so much the facts that were in issue but the interpretation of the facts and therefore much of the evidence negating premeditation was apparent because it was the same as the evidence supporting premeditation, the Court finds no prejudice in counsel's performance in this respect.

36. The petitioner alleges that counsel did not obtain the taped statement of Ms. Evans or subpoena her to testify about his habit of keeping a firearm in the car and the prosecution's awareness of the unlikelihood of his having intentionally shot his wife in front of their children and interest in whether he had ever told her that the gun might be dangerous or accidentally discharge. Considering that he did not

give her the opportunity to testify about these matters at the post-conviction hearing, the Court finds no prejudice in counsel's perforn1ance in this respect.

37. The petitioner complains that counsel did not object to the prosecutor's description of his son's demeanor as unsworn evidence of premeditation or request a mistrial. Considering that the prosecutor was summarizing a witness's account of his son's demeanor, the Court finds no deficiency in counsel's performance in this respect.

38. The petitioner complains that counsel did not object to Ms. Maston's testimony on the ground of violation of the rule of sequestration. The rule of sequestration, Tenn. R. Evid. 615, "does not provide sanctions for its violation." Cohen, Shepheard, Paine, Tennessee Law of Evidence, § 615.4, p. 430 (3d ed. 1995).

> The choice of sanction should depend on at least three factors. First, the court should assess the harm caused by the sequestration violation. Did the witness hear testimony that could affect the witness's own testimony; or did the witness hear unrelated proof? Exclusion is inappropriate if there was no or little harm caused by the error. Second, the court should determine the importance of the testimony of the witness who ignored the sequestration decree. If the testimony is critical to a criminal accused, ordinarily the witness should be permitted to testify. Third, the judge should inquire about who was at fault in the violation. Was it an accident or intentional? If counsel offering the witness

> knew that the witness was in the courtroom in violation of a sequestration order, more drastic sanctions, such as barring the witness may be appropriate.

Id. at 431 (footnotes omitted).

The record does not establish that Ms. Maston violated the rule of sequestration. The Court therefore finds no deficiency in counsel's performance in this respect.

39. The petitioner alleges that counsel was ineffective in not consulting or calling a firearms expert to rebut the state's theory and Mr. Fite's testimony that the rifle did not accidentally discharge. In support of the allegation, he submits expert evidence that trigger mechanisms like the one in the gun in issue present a risk of accidental discharge and, contrary to Mr. Fite's apparent belief, the existence of the risk is not subject to proof or disproof by means of drop tests.

The Court agrees with the petitioner that this new evidence is favorable to the defense. The petitioner, however, must prove more than this; he must prove by clear and convincing evidence that the new evidence is so favorable that counsel's failure to present it at trial had an effect on the verdict. This, the Court finds, he does not do. Even if one disregards Mr. Fite's trial testimony suggesting that accidental discharge was impossible and accepts Mr. Belk's testimony indicating that, because of the trigger mechanism in the gun, accidental discharge was possible, significant weaknesses in the theory of the defense, specifically, unfavorable eyewitness evidence

and the petitioner's own ambiguous actions in leaving the scene and discarding the gun, still remain. The Court therefore finds no prejudice in counsel's performance in this respect.

40. The petitioner alleges that counsel was ineffective in not objecting to, moving to strike, or moving for a mistrial on the basis of Mr. Shepheard's testimony that, before the incident, the victim had told him that the petitioner had paged her and she had called him. The victim's statement to Mr. Shepheard, which, even under *Crawford,* which had not yet been decided and is therefore inapplicable, would be admissible, was not inconsistent with the petitioner's own testimony or the theory of the defense. The Court finds no deficiency in counsel's perfom1ance in this respect.

41. The petitioner alleges that counsel was ineffective in not using Mr. Mowrer's pre-trial statement to cross-examine him about Mr. Shepheard's testimony that he had seen the petitioner looking at him from and three times reaching for the back door of the car as if to come after him and to establish bias in the prosecution as well as the petitioner's confusion. Variation in eyewitness accounts of specific acts is common; variation in eyewitness interpretations of such acts is probably as or even more common. Considering that it is not clear that the witnesses were describing the same events or moments in time, the Court therefore finds no prejudice in counsel's performance in this respect.

42A. The petitioner alleges that counsel was ineffective in not investigating the results of the

gunshot-residue test or calling Agt. Davis to testify that the results were inconclusive. Agt. Davis' post-conviction testimony agreeing with Off. Rawlston's trial testimony about the inconclusive results of the gunshot-residue test and the defense not disputing that the victim was shot while the gun was in the petitioner's hands, the Court finds no prejudice in counsel's performance in this respect.

42B. The petitioner alleges that counsel was ineffective in not objecting to and requesting a mistrial on the basis of Off. Rawlston' s testimony regarding the results of the gunshot-residue test. The testimony in issue not having been inconsistent with the theory of the defense, the Court finds no prejudice in counsel's performance in this respect.

43. The petitioner alleges that counsel was ineffective in not fully investigating and obtaining communications regarding Off. Miller's accident. Considering that the record still contains no such communications, counsel was aware of the officer's prior inconsistent statements, and the exclusion of Off. Sims' testimony about one such statement was merely harmless error, the Court finds no prejudice in counsel's performance in this respect.

Ineffective assistance of appellate counsel

1. The petitioner complains that counsel did not properly challenge the admission of Ms. Maston's testimony on the ground of surprise. On direct appeal, the Court of Criminal Appeals did not find any evidence of prejudice attributable to the nondisclosure of Ms. Maston's existence independent of her inculpatory testimony itself. Although,

according to counsel, he did pursue the issues of plea negotiations and nondisclosure of certain statements, apparently, he did not try to demonstrate the effect of undisclosed evidence on the assessment of the plea offer or the theory of the defense, presumably, because the petitioner was not yet ready to abandon the theory of accident.

It is true that, without knowledge of inculpatory evidence, neither counsel nor defendant can fairly assess a plea offer or choose among possible theories of defense. It is also true that there is now some proof that the prosecutor's non-disclosure of inculpatory evidence did have an effect on the petitioner's assessment of the plea offer. The petitioner seems sincerely to believe that, but for the non-disclosures, he would have pled guilty to second-degree murder.

According to trial counsel, however, the petitioner was adamant that he was innocent. By the petitioner's own account, his intake form reflects that he was willing to go to trial, despite his awareness of his daughter's admonition that he not shoot her mother, and his reply to her was, "Sweetheart, I'm not going to shoot your Mommy."

The petitioner's apparent belief in the prejudicial effect of the prosecutor's nondisclosure is, without recourse to an objective standard, inseparable from hindsight. Some defendants, however, do not behave like reasonable persons or appreciate that innocence does not always prevail over apparent guilt. Gambling and losing at trial is not a sufficient ground for post-conviction relief, without proof by a preponderance of evidence of ineffective assistance of

counsel. *Russell v. State,* 1999 Tenn. Crim. App. LEXIS 385, * 26. In the absence of evidence that the petitioner was ready to abandon the theory of accident at or immediately after trial, the Court does not find the evidence that he is now ready to do so clear and convincing evidence of prejudice in counsel's performance in this respect.

2. The petitioner complains that counsel did not properly challenge the admission of Ms. Maston's testimony on the ground that it was not rebuttal evidence. The Court finds that the issue underlying this allegation was previously determined on direct appeal.

3. The petitioner complains that counsel did not properly challenge the admission of Ms. Maston's testimony on the ground that it was improper impeachment evidence introduced to bolster his daughter's testimony. Even though the petitioner is correct that Ms. Maston's testimony did not bolster his daughter's testimony, the Court of Criminal Appeals determined that her testimony was admissible as substantive evidence, thereby rendering its inadmissibility for other purposes moot.

4. The petitioner complains that counsel did not challenge the effectiveness of trial counsel. As the Court of Criminal Appeals remarks in the opinion reversing in part the summary dismissal of the original petition herein, "[w]e have previously warned defendants and their counsel of the dangers of raising the issue of ineffective assistance of trial counsel on direct appeal because of the significant amount of development and factfinding such an issue entails."

13 S.W.3d 401,405 (1999) (citations omitted). Considering that it did allow the petitioner to pursue the claim of ineffective assistance of trial counsel in this proceeding, the Court finds neither deficiency nor prejudice in counsel's performance in this respect.

5. The petitioner complains that counsel did not challenge the trial court's erroneous exclusion of Mr. Shepheard's prior inconsistent statement and admission of his prior consistent statement. The Court finds that the issue underlying this allegation was previously determined on direct appeal.

6. The petitioner complains that counsel did not challenge the prosecutor's use of a pointer to point in his face and make inflammatory comments. Trial counsel did object to the prosecutor's use of the pointer; counsel did not regard the matter as a ground for a new trial. It seems to the Court that the prosecutor's discourtesy would damage the prosecution more than the defense. As for his comments, it seems to the Court that they were prejudicial but not unfairly so. The Court therefore finds no deficiency in counsel's performance in this respect.

7. The petitioner complains that counsel did not challenge the prosecutor's misconduct in commenting on his silence, vouching for prosecution witnesses, stating his personal opinion of the evidence, arguing evidence outside the record, misrepresenting evidence in the record, eliciting inadmissible testimony, including having him vouch for the credibility of the proof, and engaging in improper courtroom antics. Noting that the petitioner was not silent at trial and

it was permissible to impeach his account with both his pre-arrest conduct and his post-arrest, pre-caution silence, which silence did not represent an assertion of the constitutional privilege against self-incrimination, the Court finds no deficiency in counsel's performance in this respect.

8. The petitioner complains that counsel did not challenge the prosecution's bad faith in not disclosing Mr. Shepheard's and Off. Miller's material statements in violation of its open-file policy and agreement with the defense. Mr. Shepheard's prior, inconsistent statement was disclosed at trial; Off. Miller's erroneously but harmlessly was not. The Court therefore finds no prejudice in counsel's performance in this respect.

9. The petitioner complains that counsel did not challenge the prosecution's failure to disclose Off Lapoint's identity or recording of exculpatory statements. There is no evidence that counsel, any more than trial counsel, knew or had reason to know of the possible existence or contents of any recording. The Court therefore finds no deficiency in counsel's performance in this respect.

10. The petitioner complains that counsel did not challenge the trial court's erroneous limitation of Off. Miller's cross-examination and exclusion of Off. Sims' testimony, thereby depriving him of his Sixth Amendment rights to effective assistance of counsel, confrontation, and presentation of a defense. The Court finds that the issues underlying this allegation were previously determined on direct appeal.

11. The petitioner complains that counsel did not challenge the actual or apparent conflict of interest of prosecutor Irwin or the trial court's error in not inquiring into the matter. Although there is evidence that prosecutor Irwin, who examined only one witness, the petitioner's daughter, and the victim were congregants at the same church, there is no evidence that the circumstance rendered her less than impartial or was exploited to make inappropriate contact with or exert undue influence on her, the lead prosecutor, or any other member of the office of the district attorney general. *See Muhammad v. State,* 2009 Tenn. Crim. App. LEXIS 122, * 17-18 (rejecting, on the grounds of lack of evidence of partiality, inappropriate contact, or undue influence, an argument that counsel was ineffective in not requesting the recusal of the trial judge and the office of the district attorney, where the victim was the daughter of a county commissioner) (citations omitted). The Court therefore finds no prejudice in counsel's performance in this respect.

12. The petitioner complains that counsel did not challenge the prosecution's suppression of evidence that prosecutor Irwin was close friends with the victim's family and their lawyer, Mr. Grisham, and attended the same church as they did. For the reasons set forth in the Court's response to the eleventh allegation in support of this claim, *supra,* the Court finds no prejudice in counsel's performance in this respect.

13. The petitioner complains that counsel did not challenge the prosecution's refusal to allow defense

counsel to interview his daughter outside the prosecutor's office or presence or to allow him to have contact with her. For the reasons set forth in the Court's response to the twenty-eighth allegation in support of the claim of ineffective assistance of trial counsel, the Court finds no deficiency in counsel's performance in this respect.

14. The petitioner complains that counsel did not challenge the trial court's error in allowing the prosecution to use his son's demeanor as evidence of premeditation. For the reasons set forth in the Court's response the thirty-seventh allegation in support of the claim of ineffective assistance of trial counsel, the Court finds no deficiency in counsel's performance in this respect.

15. The petitioner complains that counsel did not challenge the prosecution's violation of the rule of sequestration with respect to Ms. Maston. For the reasons set forth in response to the thirty-eighth allegation in support of the claim of ineffective assistance of trial counsel, the Court finds that no deficiency in counsel's performance in this respect.

16. The petitioner complains that counsel did not challenge the trial court's erroneous limitation of Off. Miller's cross-examination and exclusion of Off. Sims' testimony regarding the former's accident. The Court finds that, contrary to the petitioner's allegation, the issues underlying this complaint were previously determined on direct appeal.

17. The petitioner complains that counsel did not challenge the trial court's erroneous admission of Mr. Shepheard's prior consistent statement to prosecution

investigator Gary Legg a week before trial when that statement was not prior to his prior, inconsistent statements. A prior, consistent statement may be admissible to rebut an inference of recent fabrication. *State v. Bush,* 942 S. W.2d 489, 516 (Tenn. 1997). Because Mr. Shepheard's statement to Mr. Legg was much more recent than his initial statement to Det. Mathis, it was not an effective rehabilitation. The Court therefore finds no prejudice in counsel's performance in this respect.

18. The petitioner complains that counsel did not challenge the trial court's erroneous omission of a limiting instruction with respect to Mr. Shepheard's prior, consistent statement to Mr. Legg. Considering that the statement was consistent with Mr. Shepheard's trial testimony, the Court finds no prejudice in counsel's performance in this respect.

19. The petitioner complains that counsel did not challenge the trial court's erroneous omission of a limiting instruction with respect to his prior misdemeanor convictions and uncharged offense. The only apparent instruction on prior convictions was part of the final instructions. Although it did not explicitly limit the jury's consideration of a witness's prior convictions to the issue of credibility, it implicitly did so. The Court therefore finds no prejudice in counsel's performance in this respect.

20. The petitioner complains that counsel did not challenge the sufficiency of the evidence under the thirteenth-juror rule on the ground that the trial court found passion, an element that negates the *mens rea* elements of first- and second-degree murder.

The Court does not find the trial court's finding of passion in the record. In any event, the definition of premeditation in the final instructions states in part as follows:

> However, passion does not always reduce the crime below murder in the first degree, since a person may deliberate, may premeditate, and may intend to kill after premeditation and deliberation, although prompted and to a large extent controlled by passion at the time. If the design to kill was formed with deliberation and premeditation, it is immaterial that the accused may have been in a state of passion or excitement when the design was carried into effect.

The Court therefore finds neither deficiency nor prejudice in counsel's performance in this respect.

21. The petitioner alleges that counsel did not challenge the admissibility of Off. Rawlston's testimony that the results of the gunshot-residue test were inconclusive and, in some or all circumstances, such results are always inconclusive. Considering that Agt. Davis' post-conviction testimony agrees with Off. Rawlston's trial testimony about the results of the gunshot-residue test, the prosecution apparently did not withhold fingerprint evidence, and identity was not an issue, the Court finds no prejudice in counsel's performance in this respect.

22. The petitioner alleges that counsel did not challenge the prosecution's late disclosure of the results of the gunshot-residue test and non-disclosure of Agt. Davis' identity and report. For the reasons set forth in the Court's response to the twenty-first

allegation in support of this claim, the Court finds no prejudice in counsel's performance in this respect.

Prosecutorial misconduct

The petitioner claims that, in violation of *Brady v. Maryland,* 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the prosecutor did not disclose material, exculpatory evidence, including impeachment evidence. *Brady* interprets the constitutional right to due process generally to require prosecutorial disclosure of material information favorable to the defense. To prove a *Brady* violation, a defendant must prove by a preponderance of evidence as follows:

> (1) that he requested *Brady* information or the information was obviously exculpatory;
>
> (2) that the prosecution suppressed the information;
>
> (3) that the information was favorable to the defense; and
>
> (4) that the information was material.

State v. Edgin, 902 S.W.2d 387,389 (Tenn. 1995) (citation omitted). Information that is favorable to the defense includes exculpatory and impeachment information. *Johnson v. State,* 38 S.W.2d 52, 55-56 (Tenn. 2001). Information is material if "'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Id.* at 58 (citations omitted).

1. The petitioner complains that the prosecution did not disclose Off. Lapoint's identity or recording of

excited utterances reflecting his lack of intent to harm the victim. According to Off. Lapoint, the petitioner was distraught, rocking back and forth, and expressed disbelief at what he had done. From his inconclusive testimony and the lack of additional evidence, however, it appears that the recorder was not operable, at least upon its eventual return to him, and there was nothing on the recording.

Arguably, the petitioner's distress and expression of disbelief is more ambiguous than exculpatory. Thus, even were the Court to regard Off. Lapoint's testimony in these respects as favorable to the defense, it would not regard it as material.

As for the recording, at all relevant times, the petitioner was aware that there was a recorder in the police car with him and had reason to believe that there was a recording of anything he said there. Apparently, however, before trial, he did not regard the recording as favorable or material to the defense and did not inform counsel of its existence. The Court therefore does not find clear and convincing evidence that any such recording was favorable or material to the defense.

2. The petitioner complains that the prosecution did not disclose Ms. Evans's recorded statement establishing his habit of keeping a firearm in the car at all times and indicating the prosecution's awareness of the unlikelihood of its theory and interest in the weapon's history of damage or accidental discharge. He did not, however, question Ms. Evans about the matter or introduce her recorded

statement. The Court therefore finds no ground for relief in this respect.

3. The petitioner complains that the prosecution did not disclose an occupational safety and health report, a departmental personal-injury report, or a worker's compensation claim, the accounts of Off. Miller's accident in which were inconsistent with his trial testimony. He did not, however introduce the evidence in issue at the post-conviction hearing. The Court notes that the defense was aware of Offs. Holbrooks' and Sims' reports and, in an offer of proof, trial counsel even read from Off. Sims' report. Considering that the Court of Criminal Appeals determined that the exclusion of Off. Sims' testimony was harmless error and there is no new impeachment evidence, the Court finds no ground for relief in this respect.

4. The petitioner complains that the prosecution did not disclose his cell phone records, the fingerprints on the weapon, or the results of tests on the victim's blouse, all of which he describes as exculpatory. He did not, however, introduce the telephone records or test results and there is therefore no evidence that they were exculpatory. Nor, considering the theory of the defense, was the inconclusive fingerprint analysis exculpatory. The Court therefore finds no ground for relief in this respect.

5. The petitioner complains that the prosecution did not disclose the close relationship between prosecutor Irwin and the victim's family and its lawyer. For the reasons set forth in the Court's

response to the eleventh allegation in support of the claim of ineffective assistance of appellate counsel the Court finds no ground for relief in this respect.

6. The petitioner complains that the prosecution did not disclose Det. Mathis' supplemental report of Mr. Shepheard's statement, omissions in which were inconsistent with Mr. Shepheard's trial testimony. Contrary to the petitioner's allegation, trial counsel was aware of omissions in Mr. Shepheard's statement to Det. Mathis and was able to elicit those in his cross-examination of Det. Rawlston. The Court therefore finds no ground for relief in this respect.

7. The petitioner complains that the prosecution did not provide the defense with a copy of the amended indictment or witness list, thereby precluding him from challenging his daughter's testimony as a ruse. Considering the resolution of the issue of the admissibility of Ms. Maston's testimony on direct appeal, the Court finds no ground for relief in this respect.

8. The petitioner complains that the prosecution did not disclose the law enforcement bias against him arising from his wife's friendship with one or more officers. There is still no evidence of friendship between the victim and one or more officers. The Court therefore finds no ground for relief in this respect.

9. The petitioner complains that the prosecution did not disclose evidence that, in exchange for Off. Miller's trial testimony, the CPD did not object to his worker's compensation claim. There is no evidence that the CPD's treatment of Off. Miller's worker's

compensation claim was conditional on the content of the officer's trial testimony. The Court therefore finds no ground for relief in this respect.

10. The petitioner alleges that the prosecution did not disclose and knowingly introduced false and misleading testimony regarding the ability of the petitioner's gun in particular and the manufacturer's model in general to discharge accidentally. To the extent that the misconduct in issue is not non-disclosure, the Court finds that the issue has been waived by the petitioner's failure to present it on direct appeal. It notes, however, that it addresses the issue in the context of the petitioner's claim of ineffective assistance of trial or appellate counsel.

To the extent that the misconduct in issue is non-disclosure of contradictory evidence about the possibility of accidental discharge, the Court notes that the defense was aware of Off. Miller's accident and Offs. Holbrooks' and Sims' reports thereof. The defense was also aware of Mr. Fite's opinion. Considering that there is no evidence that there was any other contradictory evidence about the possibility of accidental discharge in the possession of the state, the Court finds no ground for relief in this respect.

11. The petitioner alleges that the prosecution did not disclose and knowingly introduced false and misleading testimony regarding gunshot residue. To the extent that the misconduct in issue is not non-disclosure, the Court finds that the issue has been waived by the petitioner's failure to present it on direct appeal. It notes, however, that it addresses the issue in the context of the petitioner's claim of

ineffective assistance of trial or appellate counsel. To the extent that the misconduct in issue is non-disclosure of the inconclusive results of the gunshot-residue test, noting that the defense was aware of the results of the test, the Court finds no ground for relief in this respect.

12. The petitioner alleges that the prosecution did not disclose and knowingly introduced false and misleading testimony regarding police communications about Off. Miller's accident. To the extent that the misconduct in issue is not non-disclosure, the Court finds that the issue has been waived by the petitioner's failure to present it on direct appeal. It notes, however, that it addresses the issue in the context of the petitioner's claim of ineffective assistance of trial or appellate counsel. To the extent that the misconduct in issue is non-disclosure of police communications about Off. Miller's accident, considering that the contents of the communications are not in evidence, the Court finds that the petitioner does not satisfy his burden of proving the exculpatory or material nature of the communications.

15. The petitioner alleges that the prosecutor used his exercise of the right to remain silent against him. The misconduct in issue not being non-disclosure, the Court finds that the issue has been waived by the petitioner's failure to present it on direct appeal. It notes, however, that it addresses the issue in the context of the petitioner's claim of ineffective assistance of trial or appellate counsel.

16. The petitioner alleges that the prosecutor did not correct false and misleading testimony and used perjured testimony. The misconduct in issue not being non-disclosure, the Court finds that the issue has been waived by the petitioner's failure to present it on direct appeal. It notes, however, that it addresses the issue in the context of the petitioner's claim of ineffective assistance of trial or appellate counsel.

New, scientific evidence of actual innocence

The petitioner claims that the opinion of his expert that the Remington 7400 rifle can and will discharge accidentally constitutes new, scientific evidence establishing his actual innocence of first-degree murder. Considering that evidence that accidental discharge is possible is not equivalent to evidence that a particular discharge was accidental, the Court respectfully rejects this claim.

IV. Conclusion

The standard for post-conviction relief is high: clear and convincing evidence. On appeal, there was sufficient evidence to support the conviction. Now, after the postconviction hearing, the Court cannot say that there is clear and convincing evidence that the victim's death was an accident or even that it was only knowing, not premeditated. The Court is perhaps less certain of premeditation now than the prosecutor, the jury, and the Court of Criminal Appeals were at or after the trial. Even the evidence most favorable to the prosecution belies the prosecutor's opening description of the victim's death as an execution. One of the witnesses on the scene apparently noticed nothing unusual in the petitioner's or the victim's

conduct until he heard the shot; the other described the petitioner and the victim as arguing for several minutes. Nor does Off. Lapoint's post-conviction testimony regarding the petitioner's distress at the airport suggest the coldness that one associates with an execution.

Although Mr. Belk's post-conviction testimony reveals apparent gaps in Agt. Fite's knowledge about defects in the common trigger mechanism and the inutility of drop tests, the jury did not require Mr. Belk or another expert witness to make them aware of the possibility of accident. Off. Miller's injury was an immediate reminder, if any was necessary, that accident is always a possibility.

Furthermore, because Mr. Belk did not explain his dismissal of drop tests, his testimony on this issue is relatively weak. In any event, the effect of Agt. Fite's trial testimony was not to exclude the possibility of accident but to limit it to a particular circumstance, a triggered discharge. Although Mr. Belk's testimony raises the possibility of an untriggered discharge, even the petitioner at trial was not entirely certain whether, at the time of discharge, his finger or hand was on the trigger.

It seems to the Court that, even now, the evidence that most strongly casts doubt on the premeditated nature of the petitioner's act is that both the petitioner and the victim were carrying weapons on the day of the victim's death and, apparently, because of their interracial marriage or the conditions of their work, believed that they had reason to do so. In such circumstances, that the petitioner was carrying a

weapon on the occasion of the victim's death loses some significance. This evidence, however, was before the jury.

The Court notes again that, despite an opportunity at the post-conviction hearing to ask Mr. Leftwich and Ms. Evans about the matter, the petitioner did not do so.

The Court concludes that the subject petition should be dismissed. An order will enter accordingly.

s/ Don W. Poole
Don W. Poole
Criminal Court Judge

THEREUPON, COURT ADJOURNED PENDING FURTHER BUSINESS OF THE COURT.

s/ DON W POOLE
JUDGE DON W POOLE