No. _____

In The

Supreme Court of the United States

MICHAEL D. RIMMER,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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Supreme Court of Tennessee.

STATE of Tennessee
v.
Michael RIMMER

No. W2017-00504-SC-DDT-DD
|
November 4, 2020 Session[1]
|
FILED 04/16/2021
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Rehearing Denied May 21, 2021

Synopsis
Background: Following initial murder conviction, 250 S.W.3d 12, and grant of post-conviction relief, defendant was convicted on retrial in the Criminal Court, Shelby County, Chris Craft, J., of first degree premeditated murder, murder in the perpetration of robbery, and aggravated robbery and was sentenced to death plus a consecutive 18 years of incarceration. Defendant appealed, and the Court of Criminal Appeals affirmed. Defendant appealed.

Holdings: The Supreme Court, Kirby, J., held that:

double jeopardy did not prevent the State from prosecuting defendant for felony murder in second trial;

State did not have a duty to preserve maroon vehicle for later production to defendant;

probative value of evidence of defendant's prior convictions for rape and aggravated assault of victim were not outweighed by danger of unfair prejudice;

evidence of defendant's escape attempts was not unduly prejudicial;

imposition of death penalty was not arbitrary;

evidence supported finding that defendant was previously convicted of one or more felonies whose statutory elements involved the use of violence, and thus that aggravating circumstance existed; and

death sentence for murder was not excessive or disproportionate.

Affirmed.

Lee, J., concurred with opinion.

***240 Automatic Appeal from the Court of Criminal Appeals, Criminal Court for Shelby County, Nos. 98-01033, 98-01034, Chris Craft, Judge**

Attorneys and Law Firms

Paul Bruno (on appeal and at trial), Murfreesboro, Tennessee, and Robert Parris (on appeal and at trial), Memphis, Tennessee, for the appellant, Michael Dale Rimmer.

Herbert H. Slatery III, Attorney General and Reporter; Andrée Sophia Blumstein, Solicitor General; Andrew C. Coulam, Senior Counsel; Pamela Anderson and Rachel Sobrero, District Attorneys General Pro Tem, for the appellee, State of Tennessee.

Michael J. Passino, Nashville, Tennessee, for Amicus Curiae Amnesty International, Nashville.

Holly Kirby, J., delivered the opinion of the court, in which Jeffrey S. Bivins, C.J., Cornelia A. Clark, and Roger A. Page, JJ., joined. Sharon G. Lee, J., filed a concurring opinion.

OPINION

Holly Kirby, J.

***241** This is a direct appeal in a capital case. The defendant had one prior trial. In the second trial, a Shelby County jury found the defendant guilty of first degree premeditated murder, murder in the perpetration of robbery, and aggravated robbery. He was sentenced to death plus a consecutive eighteen years of incarceration. The Court of Criminal Appeals affirmed the convictions and the sentence. We now consider the appeal on automatic review pursuant to Tennessee Code Annotated section 39-13-206(a)(1). We hold the following: (1) based on sequential jury instructions given in the first trial, the

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first jury did not have a full opportunity to consider the felony murder count, so double jeopardy principles did not bar retrial on the felony murder count; (2) alleged prosecutorial misconduct in the first trial did not trigger double jeopardy protections and did not bar retrial of the defendant; (3) because the State did not have a duty to preserve the defendant's vehicle, the trial court did not err in denying the defendant's motion to suppress DNA evidence from the vehicle; (4) the trial court did not err under Tennessee Rule of Evidence 404(b) in admitting evidence of the defendant's prior convictions for rape and assault of the victim; and (5) the trial court did not err under Rule 404(b) in admitting evidence of the defendant's escape attempts and corroborating evidence of homemade shanks in his cell. We hold further that imposition of the death penalty is not arbitrary, given the circumstances of the crime; that the evidence supports the jury's finding that the State proved one aggravating circumstance beyond a reasonable doubt; that the evidence supports the jury's conclusion that the aggravating circumstance outweighed any mitigating circumstances beyond a reasonable doubt; and that the sentence of death is neither excessive nor disproportionate to the penalty imposed in similar cases. As to the remaining issues raised by the defendant, we agree with the conclusions of the Court of Criminal Appeals and attach as an appendix to this opinion the relevant portions of the intermediate court's decision. We affirm the convictions and the sentence.

Factual and Procedural History

On February 8, 1997, the victim in this case, Ricci Lynn Ellsworth, disappeared from the Memphis Inn in Shelby County. She left behind her purse, her wedding band, her car, and a chaotic and bloody crime scene. Although the victim was a dependable employee and devoted wife, grandmother, mother, and daughter, neither her employer nor her family ever heard from her again. The victim's body was never located, and she is presumed dead.

The lengthy procedural history in this case includes two trials and three sentencing hearings. At the first trial in 1998, a jury convicted the Defendant, Michael Dale Rimmer, of first degree murder, aggravated robbery, and theft of property. The Defendant received a sentence of death. The State had also charged the Defendant with first degree felony murder during the perpetration of a robbery (felony murder), but the jury did not return a verdict on that count.

On appeal, the Court of Criminal Appeals affirmed the convictions, but it reversed the death sentence due to numerous errors related to the aggravating circumstances considered by the jury. It remanded the case for a new sentencing hearing. *See State v. Rimmer*, No. W1999-00637-CCA-R3-DD, 2001 WL 567960, at *23 (Tenn. Crim. App. May 25, 2001).

On remand, a second jury imposed the death penalty. On direct appeal, the Court ***242** of Criminal Appeals affirmed the sentence. *State v. Rimmer*, No. W2004-02240-CCA-R3-DD, 2006 WL 3731206, at *28 (Tenn. Crim. App. Dec. 15, 2006), *perm. app. granted*, (Tenn. Aug. 13, 2007). This Court affirmed the sentence as well. *See State v. Rimmer*, 250 S.W.3d 12, 18 (Tenn. 2008).

The Defendant then sought post-conviction relief, alleging ineffective assistance of counsel and prosecutorial misconduct. The post-conviction trial court concluded the Defendant was not entitled to relief on his claims of prosecutorial misconduct. However, it granted post-conviction relief on the ineffective assistance of counsel claims and ordered a new trial and sentencing hearing. The State did not appeal.

In advance of the Defendant's second trial, he filed a number of pretrial motions. They included a motion to dismiss the felony murder count, which the trial court denied; a motion to suppress DNA evidence, which the trial court partially denied; and a motion to suppress Rule 404(b) evidence, which the trial court partially denied.

The second trial commenced on April 28, 2016.[2] The jury heard evidence that, years earlier, the Defendant and the victim had been in a tumultuous romantic relationship. Though it ended, they remained in contact. In 1989, the Defendant assaulted and raped the victim inside her home. He eventually pled guilty to burglary in the first degree, aggravated assault, and rape. He received a lengthy prison sentence. According to the victim's daughter, Tracye Ellsworth Brown,[3] and the victim's mother, Marjorie Floyd, the victim was too forgiving toward the Defendant after the rape. She continued to interact with him and even visited him in prison.

During his incarceration for rape and assault of the victim, the Defendant met William Conaley. Mr. Conaley was a childhood friend of the victim's niece. The Defendant learned the victim and her son had received a sum of money in settlement of a personal injury claim. The Defendant was angry at the victim and felt entitled to a portion of the settlement. The Defendant told Mr. Conaley to tell the victim's niece to let the victim know that if he, the Defendant, did not get the settlement money to which

he felt entitled, he would kill the victim upon his release from prison. Mr. Conaley relayed the message by letter and in person. According to Mr. Conaley, whenever the Defendant talked about the victim, he would get agitated, sweat, work himself up, wring his hands, and saliva would build up in the corners of his mouth.

During this same incarceration, the Defendant also met Roger Lescure. In 1996, while he and Mr. Lescure were working together in the prison, the Defendant talked to Mr. Lescure about the victim and said he was going to "kill the funky bitch" after his release. The Defendant described to Mr. Lescure how to get rid of dead bodies: "Put them in a barrel and put lime in them, it eats the bones and all up." Mr. Lescure said that, when the Defendant talked about killing the victim, he got "high strung" and "into talking about it" and would "sort of foam at the mouth."

After he was released from prison, the Defendant and the victim continued to interact. One afternoon, the Defendant's father came home from work to find the Defendant changing the oil in the victim's vehicle. The Defendant's father got angry that the Defendant was maintaining a relationship ***243** with the victim because he felt it would lead to more problems.

In 1997, the Defendant worked at Ace Automotive Collision Center[4] with Howard Featherston[5] and James Wilcox. During that time, he commonly wore a baseball cap. According to Mr. Featherston, the Defendant also had a tattoo on his arm.[6] In addition to working with Mr. Featherston at the collision center, the Defendant worked on vehicles with Mr. Featherston at Mr. Featherston's home. At the time, Mr. Featherston owned a maroon Honda Accord. On January 4, 1997, the Accord was driven away from Mr. Featherston's home and was never returned.[7]

On Friday, February 7, 1997, the Defendant did not have enough money for gas. His coworker at the Collision Center, Mr. Wilcox, followed the Defendant to the gas station and put five dollars' worth of gas in his car so the Defendant could cash his February 6, 1997 paycheck. On that day, Mr. Wilcox recalled, the Defendant was driving a maroon Honda. He expected the Defendant to repay him the five dollars when he came to work the following Monday, since the Defendant was scheduled to work the week of February 10. However, the Defendant never returned to the Collision Center, not even to pick up his paycheck for the shift he worked on February 7.

Also on Friday February 7, after he left work at the Collision Center, the Defendant went to the home of his brother, Richard Rimmer, in Mississippi. He drank some beer and talked about a date he had planned later that night.

The same night, the victim left the home she shared with her husband, Donald Eugene Ellsworth,[8] for her work as a night clerk at the Memphis Inn. She was scheduled to work from 11:00 p.m. to 7:00 a.m. The victim parked her vehicle in the motel parking lot and began her shift, working in an enclosed office in the motel lobby behind a locked door. Her interactions with guests were from behind protective glass, and monetary transactions occurred via a drawer under the glass window; money and credit cards were placed in the drawer and slid under the glass. In the same vicinity, the motel had change and vending machines.

Devata Brown was a guest at the Memphis Inn the night of February 7, 1997. She described the motel as being in a "high traffic" location where drug dealing and prostitution may have occurred.

Around 1:40 a.m. that same night, another motel guest, Dr. Ronald King, went to the vending machine area. He noticed a maroon car pull up and park close to the night entrance. A white man wearing a baseball cap with a scraggly beard and unkempt hair walked into the area behind him and approached the motel's check-in ***244** area. The night clerk appeared to know this individual and walked to the night entrance door toward him. Once Dr. King finished getting his snacks from the vending machine, he nodded to the desk clerk and left.

Another guest at the Memphis Inn the evening of February 7, Natalie Doonan, came downstairs to buy cigarettes from a vending machine. She noticed a female night clerk working at a counter behind glass. Around 2 a.m., one or two men walked into the motel lobby where the night clerk's office was located; one of the men had a dark complexion and wore his hair in a ponytail. Ms. Doonan finished buying her cigarettes and went back to her room. About thirty minutes later, Ms. Doonan called the night clerk to request a wake-up call. She let the phone ring for ten to fifteen minutes but never got an answer. Ms. Doonan later identified one of the men she saw in the motel lobby as Billy Wayne Voyles.

Around 1:30 or 2:00 a.m. that same night, James Darnell and Dixie Presley drove to the Memphis Inn. Mr. Darnell parked close to the night entrance. He saw a man with a beard and wearing a baseball cap standing behind a maroon Honda parked about four spaces away. In his arms, the man cradled something thick that had been rolled up in a blanket. When the man placed the item in

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the trunk of the car, the vehicle sank from the weight of the object.

As Mr. Darnell walked toward the night entrance, the man began walking quickly behind him. They approached the night entrance at the same time, so Mr. Darnell opened the door, said "after you," and let the man go through the door first. As he did, Mr. Darnell noticed the man smelled like alcohol and had blood on his hands. Mr. Darnell walked in behind the man and saw the night clerk's door wide open. As Mr. Darnell walked toward the night clerk's window, he saw another man standing on the other side of the glass pushing cash out through the drawer under the window. The other man also had blood on his hands. Mr. Darnell quickly turned around and left.

Mr. Darnell later identified a photo of Billy Wayne Voyles as one of the men at the Memphis Inn that night. Mr. Darnell could not positively identify the Defendant's photo from a photo lineup.

During that time, Raymond Summers was a yard master with CSX Transportation ("CSX"). Under an agreement between CSX and the Memphis Inn, CSX employees stayed at the motel during layovers. Mr. Summers was working early the morning of February 8, and the CSX crew staying at the motel was needed back at the train yard for departure. He called the Memphis Inn night desk around 3:00 a.m. to get in touch with the crew members. When the clerk did not answer, Mr. Summers drove to the motel.

When he arrived, Mr. Summers saw that the night entrance double doors, typically closed and locked, were open. He walked into the office and noticed the register drawer was out and papers were scattered on the floor. He called out and got no answer. He then walked toward the sound of running water. As he went into the employee bathroom, Mr. Summers saw water running in the bathroom sink, blood on the sink basin, and that the toilet seat had been removed. There was blood on the toilet and a bloody towel on the floor.

Mr. Summers left immediately to find help. As he was driving to a nearby service station to notify the police, he saw two Shelby County Sheriff's Office ("SCSO") patrol cars leaving a nearby parking lot. He got the officers' attention and told ***245** them something strange had happened at the Memphis Inn. They went to the scene.

When they arrived at the motel, the SCSO officers secured the scene and contacted Memphis Police Department ("MPD") dispatch. SCSO officers then notified the motel manager, Linda Spencer, that there was no night clerk at the motel. Ms. Spencer resided in an apartment on the property. She walked to the front of the motel and noticed the night entrance door, normally locked, was open. She went into the employee bathroom and saw blood all over the floor and walls. The toilet lid had been ripped from the toilet. There was an out-of-place glass on the sink, a flashlight in the sink, and a crack in the sink. Once MPD officers arrived, the SCSO officers left.

Ms. Spencer and the MPD officers looked for the victim inside the motel, to no avail. The victim's car, however, was still parked in the same spot in the parking lot where it had been all night. Ms. Spencer noticed that all the money had been taken from the register, as well as the money in the lockbox. In total, about $600 was missing. There was blood on the floor of the office and a trail of blood leading from the office to the bathroom. There was a towel on the office floor that did not belong there, and about four or five sets of sheets were missing from a cabinet in the office. The motel office had a security camera, but because there was no videotape in it, Ms. Spencer did not check to see if anyone had tampered with it.

MPD officers took photographs of the crime scene, dusted for fingerprints, collected and tagged evidence, and completed paperwork. The items they collected included the victim's wedding band, which she normally wore every day. All items with blood on them were gathered as evidence. Samples were taken from blood on the bathroom floor, the top of the commode, the frame of the door to the snack room, the frame of the door to the west exit, and the door facing the security window. The lid of the toilet was covered in blood and damaged as though it had been used to beat somebody; the toilet lid and a few other items were chemically processed for fingerprints.

Mark Goforth worked as a security guard at the neighboring Super 8 Motel. Like Ms. Brown, Mr. Goforth described the Memphis Inn as a place known for prostitution and drugs. In his work as a security guard, Mr. Goforth often walked the perimeter of the Super 8 property, and in doing so he had gotten to know the victim. Working early the morning of February 8, Mr. Goforth saw MPD officers at the Memphis Inn, so he walked over to the motel. Once he got there, he observed a lot of blood, including a bloody handprint on the counter. Mr. Goforth briefly spoke with the officers and left.

While working at the Super 8 Motel, Mr. Goforth sometimes saw a white man in his early thirties with brownish-blonde hair and stubble at the Memphis Inn

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talking and laughing with the victim inside her office. He last saw the man a couple days before the victim's disappearance.

Mr. Goforth was shown a composite sketch of two suspects, one wearing a baseball hat and one without a hat. Mr. Goforth identified the man in the hat as a construction worker who frequently stayed at the Memphis Inn while in town to work on a nearby highway construction project.

Around 2:30 a.m. the night of the victim's disappearance, MPD officers went to the victim's home and awakened her husband, Donald Eugene Ellsworth, to see if the victim was there. He told them he had not seen the victim since she left for work earlier that night, so the officers asked him to give a statement. Mr. Ellsworth then ***246** accompanied the officers first to the crime scene, where he stayed in the patrol car, and then to the station. While at the crime scene, he noticed the victim's car in the parking lot.

The morning of February 8, the Defendant returned to the home of his brother, Richard Rimmer. He was driving a wine-colored Honda Accord.[9] The brother's home was in a wooded area, close to a pond. When he arrived, the Defendant was wearing muddy white **tennis** shoes; Richard Rimmer made him remove the shoes and wash them in the bathroom. The Defendant seemed tired and unfocused, "like he was out in left field." The Defendant asked his brother Richard if he could lay on his floor to rest; Richard said no and asked him to leave.

The Defendant's brother Richard worked as a carpet and upholstery cleaner. The Defendant asked his brother to clean the interior of the Honda, including mud on the floorboard and blood in the backseat. The Defendant explained the blood resulted from his having had sex in the backseat with a woman who was menstruating. Richard Rimmer looked inside the car and thought part of the back seat looked dark, like there could have been a bloodstain. He noticed mud in the car and a new-looking shovel on the rear floorboard. When the Defendant left his brother's house, he left the shovel leaning against the house.

That night, Richard Rimmer saw news reports on the victim's disappearance. He recalled the condition of the Defendant's car and panicked because he suspected his brother was involved. At the suggestion of their father, Richard Rimmer put a towel on the handle of the shovel the Defendant had left and disposed of it in a nearby dumpster.

Law enforcement investigation never yielded any indication the victim was still alive. Officers conducted at least twenty searches for the victim in the vicinity of the property rented by the Defendant's brother, in Mississippi around Plantation Point, near Arkabutla Lake, and in Arkabutla Lake itself. Her body was never found.

Mary Ann Whitlock also saw news reports about the disappearance of the victim, and she saw the same composite sketches Mr. Goforth was shown. She recognized the men as Billy Wayne Voyles and Raymond Cecil; Ms. Whitlock knew both because they were all from the same small town. She identified Mr. Voyles as the suspect in the baseball cap. She reported this information to law enforcement.

In early March, Michael Adams was working as a road deputy on traffic patrol in Johnson County, Indiana. He stopped the Defendant for speeding. The Defendant was driving a maroon Honda with a license plate that matched the plate on the maroon Honda owned by Mr. Featherston. When he ran the plate numbers, the deputy realized the MPD had an interest in the vehicle as part of an ongoing investigation. He contacted the Johnson County Sheriff's Office, and an officer and an evidence technician went to the scene. The Defendant was taken into custody.

The Johnson County Sheriff's Office contacted the MPD, and MPD detectives flew into Indiana that night. In the meantime, ***247** the Johnson County evidence technician followed a wrecker towing the Honda to the intake bay at the sheriff's office and secured the vehicle inside the bay.

The next morning, MPD detectives watched as the Johnson County evidence technician processed the maroon Honda. The technician found reddish-brown stains in the back seat of the vehicle. A presumptive blood test confirmed the substance on the back seat was blood.

The evidence technician took ninety-six photographs of the vehicle and its contents. The photographs included images of: the interior left driver's side door; the right front floorboard; the interior trunk lid; the contents of the trunk; the rear compartment of the back seat; blood stains on the fabric upholstery in the back seat; a hole in the fabric upholstery in the back seat cut to obtain a sample for use in the presumptive blood test; a second hole in the fabric upholstery toward the bottom of the back seat, also cut for the presumptive blood test; and a baggie and envelope containing the presumptive blood test.

The evidence technician also removed and inventoried the contents of the maroon Honda. Each item removed was

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either sealed and stored in envelopes and paper bags or placed in the trunk of the vehicle, which was sealed prior to transport to Memphis. The individually secured items included: a white towel with red stains; three additional white towels; various receipts from Mississippi, Florida, Missouri, Montana, Wyoming, California, Arizona, and Texas dated February 8 through March 3, 1997; water; Holiday Inn stationery and other miscellaneous papers; maps; duct tape with hair attached; a plastic spray bottle; a glass jar; a pillow with blood spatter; a black baseball cap; a pair of Spalding **tennis** shoes; faded blue jeans; and a steel hammer. All of these items were released to the MPD detectives prior to their return to Memphis. The Johnson County Sheriff's Office also released the items on the Defendant's person at the time of his arrest, including a men's watch.

Once the search of the maroon Honda was completed, the vehicle was resealed. Arrangements were made to transport the vehicle to Memphis. It was loaded onto a tow truck, covered with a tarp, and driven to Memphis, where an MPD officer met the wrecker and securely stored the vehicle in the MPD's crime scene tunnel until it could be transported to the **Tennessee** Bureau of Investigation ("TBI") lab in Nashville.

The MPD detectives flew back to Memphis. They carried the individually sealed items taken from the vehicle onto the plane and stored the evidence in the cockpit for the duration of the flight. The evidence was then stored in the evidence room of the MPD homicide office until it was transmitted to the TBI for DNA analysis.

A few days later, the MPD's case coordinator asked the TBI to run a DNA comparison of the blood samples collected from the hotel to those obtained from the vehicle. The maroon Honda was also sent to the TBI lab in Nashville for processing. An MPD detective supervised the transport of the vehicle by wrecker from Memphis to the TBI lab in Nashville. At the same time, he transported the evidence previously taken from the vehicle to the TBI for testing. When he arrived, the detective signed over the vehicle and the box of evidence to the TBI experts. He asked them to vacuum the vehicle and collect hair and fiber samples to be sent to the FBI. In addition to the maroon Honda, the evidence deposited with the TBI included the following items collected from the vehicle and the Defendant's person after the stop in Indiana: a blood-soaked patch of upholstery cut from the back seat of the ***248** vehicle; a swab of blood from the back seat of the vehicle; a pair of K-Swiss **tennis** shoes; a pair of faded blue jeans; a steel hammer; a pillow with blood spatter; a white towel with blood spatter; a white towel with stains; a roll of duct tape with hair on it; a plastic spray bottle with clear liquid contents; a glass jar; and a men's watch with stains.

After the Honda arrived at the TBI, agents processed it for microanalysis. In doing so, an agent took photographs, inventoried the contents of the vehicle, vacuumed the vehicle to collect any hair or fiber, and took samples of the seats and carpets. At that point, the agent did not analyze any hair or fibers because she did not have anything to compare to them. Instead, she preserved the evidence collected so a comparison could be done later if needed.

Another TBI agent tested the items in the two sealed boxes received from the MPD for the presence of blood. The towels from the crime scene and a pillow in the maroon Honda both tested positive for the presence of human blood. The test for blood was negative as to the hammer, another towel in the vehicle, and the watch.

The TBI agent also conducted a serological analysis on the maroon Honda. She inspected the vehicle for blood stains, took photographs of the stains, tested the stains for the presence of blood, and then cut samples or swabbed the areas so she could conduct a human blood confirmation test. The agent also made four sketches of the interior of the vehicle to document her findings. The buckle on the back-seat passenger-side seatbelt tested positive for the presence of human blood. The inside of the rear driver-side door had stains that tested positive for the possible presence of blood, but the agent did not remember conducting a follow-up test to determine whether it was human blood. The center back seatbelt buckle tested positive for the possible presence of blood, but the agent did not conduct a follow-up test to determine whether it was human blood. The back seat of the vehicle had blood stains, so the agent cut a large square of upholstery from the center of the back seat; it tested positive for the presence of human blood. The agent memorialized her findings in a report.

Once the analysis was complete, MPD released the maroon Honda to Mr. Featherston because the police department did not have the storage capacity to keep it longer. Mr. Featherston viewed it at the impound lot and saw that the liner inside the trunk was missing, the floor mats were missing, and there were stains in the back of the car. The items found in the car when the Defendant was pulled over in Indiana did not belong to Mr. Featherston. When the vehicle was in his possession, Mr. Featherston said, it was clean and did not have stains on the upholstery.

From the evidence taken from the maroon Honda and

collected at the crime scene, an FBI forensic examiner determined the DNA of the blood at the crime scene matched the blood found inside the vehicle. The forensic examiner also compared the DNA from the blood collected at the scene and from the vehicle to the DNA of the victim's mother, Marjorie Floyd. The examiner determined the blood was consistent with belonging to a daughter of Ms. Floyd. The DNA type from the blood on the towel collected from the scene matched the DNA type extracted from the victim's pap smear sample. To obtain DNA samples from the victim, investigators collected the victim's toothbrush, sweatpants, and makeup sponge from her home. The DNA extracted from these items was consistent with the DNA from the blood at the motel and inside the maroon Honda.

***249** After his arrest for the murder of the victim, the Defendant participated in at least three escape attempts. The Defendant was initially incarcerated in Franklin, Indiana. While there, he shared a cell with James Douglas Allard, Jr. and told Mr. Allard about his various plans to escape the jail. By the time the Defendant approached Mr. Allard about escape plans, the Defendant had taken concrete steps toward attempting escape by cutting clips along the bottom of the fence in the prison recreation yard with large nail clippers so the fence could be lifted away from the ground. The Defendant also talked with Mr. Allard about escaping through a window, escaping through the block wall inside the cell, killing a guard, or taking a guard hostage and walking out the front door of the jail.[10] According to Mr. Allard, the Defendant kept "shanks," homemade knives made of flattened bucket handles, in his cell. Authorities later found shanks hidden in the Defendant's cell.

Initially, Mr. Allard did not want to hear anything about the Defendant's plans for escape. Over the course of several weeks, in an apparent attempt to gain Mr. Allard's confidence, the Defendant talked to him a number of times about how he had murdered the victim. The Defendant told Mr. Allard he murdered his "wife" at the motel where she was employed. At one point, he told Mr. Allard he shot the victim twice; then he said he beat her in a back room in the motel behind the service desk. The Defendant described the back room as "pretty bloody" after the beating. The Defendant told Mr. Allard he took the motel's security camera tape, erased it, put the victim's body in his car, and buried her in a wooded area close to a lake or pond. Later, when the Defendant received a letter informing him of the MPD's search for the body, he told Mr. Allard he could not believe the body had not been located.

During his conversations about the victim's murder, Mr. Allard said, the Defendant's countenance changed. He became a "different person" from his everyday demeanor. His eyes got "real shiny," he started sweating a lot, and he frequently went to the sink to wash his hands.

On October 23, 1997, while awaiting his first trial for murdering the victim, the Defendant made a second attempt to escape incarceration. The Defendant was one of four prisoners being transported in a federal prisoner transport van. All the prisoners were held in cages inside the van. When the drivers stopped to eat lunch, they left the keys in the ignition, the engine running, and a loaded shotgun inside the van. The Defendant managed to get out of his cage. He released the other inmates and drove off in the van.

Officers with the Bowling Green, Ohio police department spotted the prisoner transport van. They initiated a traffic stop, but the Defendant did not stop. A high-speed chase ensued. For approximately thirteen miles, during rush hour, officers from several jurisdictions pursued the Defendant, driving at speeds that sometimes reached ninety miles an hour. Eventually, a road block forced the Defendant to stop. Officers ordered the driver out of the van over a loudspeaker. After a couple of minutes, the Defendant exited the van and was taken into custody.

The third escape attempt occurred on October 16, 1998, while the Defendant was housed in the Shelby County Jail. The Defendant and another inmate used hard ***250** objects to break the concrete around a second story window; they then removed the window and dropped a handmade rope out the opening. When they realized a jail employee had spotted them, the Defendant returned to his cell and pretended to be asleep. His cohort inmate dove out the window opening.[11]

At trial, the State called Jerry Findley as an expert in blood stain pattern analysis. To prepare his opinion, Mr. Findley reviewed the crime scene photographs taken on February 8, 1997 by MPD officers. Based on the patterns of blood observed in the photographs, Mr. Findley opined the victim sustained either five blows with blunt force or four blows with a sharp object. Mr. Findley saw no evidence in the photographs that the blood stains resulted from a gunshot; instead, he believed they arose from repeated hits with a toilet lid, fist, or hammer. The photographs documented a large amount of blood, consistent with blows to the head, face, and nose. He acknowledged that, without a body to examine, he could not know the true placement and extent of the victim's injuries.

The Defendant called two expert witnesses at trial. The

first was Marilyn Miller, Ph.D., an expert in crime scene investigation and reconstruction, forensic science and serology, and blood spatter pattern analysis. Dr. Miller criticized the quality of the photographs taken of the blood at the scene, including the lack of scale and the angle at which they were taken. She said it was difficult to conduct an adequate blood spatter analysis based on the images in the photographs. From those images, Dr. Miller said, she could only opine that blood was shed and could not determine whether a death had occurred. As a further complication, the blood was diluted with water in a possible attempt to clean; this made it impossible for her to ascertain the quantity of blood present at the scene. Dr. Miller agreed with Mr. Findley that there was no evidence the blood stains were caused by a gunshot. Dr. Miller also agreed with Mr. Findley that the blood stains on the walls of the bathroom could have resulted from either blunt or sharp force. Any object, like a fist, the flashlight found in the bathroom, or the lid to the toilet, could have caused blunt force injuries to the victim. Dr. Miller maintained there was no way to know whether all of the blood came from the same source because not all of it was tested.

Dr. Miller also criticized the lack of security at the crime scene. There were sixteen people present at the scene, she pointed out, which could have resulted in contamination. Further, she said the MPD should have processed more of the high-touch areas, such as the cabinet, the purse, and the entrance and exit, for fingerprints. Lastly, Dr. Miller contended the MPD should have used amino black or luminal[12] to identify the presence of otherwise hidden bodily fluids.

In addition, Dr. Miller found fault with the processing of the maroon Honda. She testified she was never given the opportunity to see an unobstructed photograph of the back seat of the vehicle taken while the bloodstains were fresh. She explained it ***251** would have been helpful to her analysis to see the stains in their entirety. Looking at the hole in the back seat where investigators cut the three-inch sample from the upholstery, Dr. Miller pointed out that the blood did not soak into the foam under the upholstery. She said this indicated weight was not placed on the bloodstain.

According to Dr. Miller, the MPD did not adequately test the trunk of the maroon Honda for the presence of blood before it released the vehicle. The liner inside the lid of the trunk had been removed, so it could not be examined. Dr. Miller also maintained that all of the items in the car's trunk should have been tested for blood, not just the few items selected for processing. Also, given the amount of blood at the scene and the apparent attempt to clean it, she thought there would have been blood in the front seat of the vehicle, but there were no positive presumptive tests for any blood on the surfaces she tested in the front area.

Next, the Defendant called an expert in DNA analysis and serology, William Joseph Watson, Ph.D. Dr. Watson had no issue with the results of the tests performed in this case but felt more testing could have been done. Dr. Watson acknowledged that when the original case was worked, it was unusual to have certain types of DNA testing done on things like hair. Nevertheless, he pointed out, the TBI collected hair and fiber evidence but did not test it. Even though no hair samples from the victim were available, a comparison test with family members could have been performed. Dr. Watson also noted it would have been helpful to determine the type of body hair found in the vehicle, but this was not done.

Dr. Watson opined the presumptive and confirmatory blood tests conducted by the TBI did not actually confirm the presence of blood. He explained that the serologist conducted a presumptive blood test followed by a test for human protein. Human protein can be present from saliva or other bodily fluids, not just blood, said Dr. Watson, so the positive result for each test did not necessarily mean the substance was human blood. He said current tests can determine the presence of blood with more certainty.

Dr. Watson commented on the DNA tests showing that the blood inside the maroon Honda could not be excluded as having come from a female offspring of the victim's mother, Ms. Floyd. Dr. Watson agreed with this conclusion but did not agree that the DNA from the blood in the car "matched" Ms. Floyd's DNA. He explained the term "match" was not used in this context; it could at best be only a partial match because offspring receive DNA from both the mother and father.

Regarding the DNA test performed on the victim's pap smear, Dr. Watson observed that the forensic examiner was limited by the technology available at that time. By the time of Dr. Watson's testimony, there were tests that could use less DNA and obtain a better answer. Regardless, he said, when the forensic examiner found two sources of DNA in the pap smear, he should not have assumed the second DNA source came from a minor contributor such as the victim's husband. Dr. Watson testified that lab conditions in the 1990s were often more lax, and he opined that the additional DNA could have instead come from contamination such as the examiner's ungloved hand. Instead of assuming the minor contributor was the victim's husband, Dr. Watson said, the examiner should have tested the husband's DNA as well.

Finally, Dr. Watson noted that the State tested items

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collected from the car for the presence of blood twice; because of the intervening appeals and remands, the two ***252** tests were eighteen years apart. The first time, the tests resulted in positive findings. The results were negative when the tests were performed again eighteen years later. Dr. Watson opined that the forensic examiner should have looked into the reason for the differing results, and he commented that the manner in which the evidence was stored could have been a factor.

After considering all of the evidence, the jury convicted the Defendant of first degree premeditated murder, first degree felony murder, and aggravated robbery. The trial court merged the first degree premeditated murder and first degree felony murder convictions.

The trial then went into the penalty phase. Against the advice of counsel, the Defendant waived his right to present mitigating evidence. The Defendant testified that he understood he had the right to put on mitigating evidence, knew a mitigation investigation had been done on his behalf, understood the importance of defending against a death sentence, but nevertheless freely and voluntarily waived his right to present mitigating evidence. The Defendant asked his family and friends not to attend the penalty phase of the trial. He directed defense counsel to refrain from giving an opening statement, giving a closing statement, or cross-examining witnesses. The trial court noted the Defendant's decisions were not in his best interest but accepted the Defendant's waiver.

The State first presented victim impact evidence. Previous victim impact testimony from the victim's mother was read to the jury. She testified about the grief she and the victim's children had endured. Their collective grief was compounded, she said, by having to mourn the victim's death without ever having found her body.

The proof then moved to the aggravating circumstances. The first aggravating circumstance the State asked the jury to consider was that "[t]he defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person," as set forth in **Tennessee** Code Annotated section 39-13-204(i)(2). In support, the State introduced evidence of the Defendant's violent criminal history and relied on his prior convictions of assault with intent to commit robbery with a deadly weapon in violation of **Tennessee** Code Annotated section 39-2-104[13] (case number 85-00448); aggravated assault in violation of **Tennessee** Code Annotated section 39-2-101[14] (case number 85-00449); another aggravated assault in violation of **Tennessee** Code Annotated section 39-2-101 (case number 89-02737); and rape in violation of **Tennessee** Code Annotated section 39-2-604[15] (case number 89-02738). In addition, the State asked the jury to consider two other aggravating circumstances: the murder was committed for the purpose of avoiding, interfering with, or preventing the lawful arrest of the defendant or another, under **Tennessee** Code Annotated section 39-13-204(i)(6); and the murder was knowingly committed, solicited, directed, or aided by the defendant while he had a substantial role in committing or attempting to commit robbery, under **Tennessee** Code Annotated section 39-13-204(i)(7).

***253** The jury found one statutory aggravating circumstance beyond a reasonable doubt, namely, previous convictions for felonies of which the statutory elements involved the use of violence. The jury found beyond a reasonable doubt that this aggravating circumstance outweighed any mitigating circumstances. It imposed a sentence of death.

After a separate sentencing hearing on the aggravated robbery conviction, the trial court imposed an additional eighteen years of confinement running consecutively to the death sentence. The Defendant later filed motions for judgment of acquittal and for a new trial. The trial court denied both motions.

The Defendant then filed a direct appeal to the Court of Criminal Appeals, which affirmed the judgment of the trial court. *See State v. Rimmer*, No. W2017-00504-CCA-R3-DD, 2019 WL 2208471 (**Tenn**. Crim. App. May 21, 2019). This appeal followed.

Analysis

I. Double Jeopardy

Initially, we consider separate double jeopardy arguments raised by the Defendant and by amicus Amnesty International, Nashville ("Amnesty International"). We address the Defendant's double jeopardy argument first.

A. Standard of Review

Questions of constitutional interpretation are reviewed de novo, with no presumption of correctness afforded to the conclusions of the trial court. *State v. Feaster*, 466

S.W.3d 80, 83 (Tenn. 2015).

B. Defendant's Motion to Dismiss

The Defendant asserts the trial court erred by denying his motion to dismiss the felony murder charge on double jeopardy grounds because the jury verdict in the first trial operated as an implied acquittal of the felony murder charge. The State counters that double jeopardy did not attach because the trial court instructed the jury not to consider felony murder if it found the Defendant guilty of first degree premeditated murder. We agree with the State.

The United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Similarly, the Tennessee Constitution states that "no person shall, for the same offence, be twice put in jeopardy of life or limb." Tenn. Const. art. 1, § 10. The federal and state prohibitions against double jeopardy have been construed as providing the same protections; these include: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against a second prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989); *State v. Watkins*, 362 S.W.3d 530, 541 (Tenn. 2012).

Often, when a jury considers a multi-count charge and returns a guilty verdict on one count but does not return a verdict on the remaining counts, the jury's silence on the remaining counts serves as an implied acquittal on them. Double jeopardy prevents retrial on the remaining counts. *State v. Burns*, 979 S.W.2d 276, 290–91 (Tenn. 1998).

This is not the case, however, when a jury has received sequential or "acquittal first" jury instructions, in which the jury is told to consider the lesser counts only if it ***254** first finds the defendant not guilty of the greater offense. *See id.* at 291 (citing *State v. Arnold*, 637 S.W.2d 891, 895 (Tenn. Crim. App. 1982)). When a jury returns a guilty verdict on a greater offense after it has received such an instruction, it does not get a full opportunity to consider and return a verdict on the lesser counts. Under those circumstances, if the conviction on the greater offense is later overturned due to a procedural technicality, double jeopardy does not bar retrial on the lesser-included offenses. *See State v. Madkins*, 989 S.W.2d 697, 699 (Tenn. 1999) (noting that after sequential jury instructions, a "verdict of guilty as to attempted felony murder necessarily means that the jury did not consider the charge of attempted second degree murder," so on remand, prosecution could proceed on that charge); *State v. Vann*, No. E2009-01721-CCA-R9-CD, 2011 WL 856967, at *8 (Tenn. Crim. App. Mar. 11, 2011) (noting that with acquittal-first jury instructions, the jury would not have deliberated as to the lesser included offenses after it convicted the defendant of the charged offense).

In this case, at the Defendant's first trial in 1998, the trial court instructed the jury as follows:

> When you retire to consider your verdict in indictment number 98-01034, you will first inquire, is the defendant guilty of Murder in the First Degree as charged in the First Count of the indictment? If you find the defendant guilty of this offense, beyond a reasonable doubt, your verdict should be,
>
> > "We, the Jury, find the defendant guilty of Murder in the First Degree as charged in the First Count of the indictment."
>
> If you find the defendant not guilty of this offense, or if you have a reasonable doubt of his guilt of this offense, you will acquit him thereof and then proceed to inquire whether or not he is guilty of Murder in the First Degree During the Perpetration of a Robbery as charged in the Second Count of the indictment.[16]

Thus, the Defendant's first jury was given sequential or "acquittal first" jury instructions. The jury convicted the Defendant of first degree murder, aggravated robbery, and theft of property. Having returned a guilty verdict on the first degree murder count, the jury in the first trial did not consider the felony murder count.

In advance of the second trial, the Defendant filed a motion to dismiss the felony murder charge on double jeopardy grounds. In support, the Defendant argued the jury's failure to return a verdict on the felony murder count in the first trial amounted to an acquittal, which prevented a second trial on that charge. The trial court denied the motion. It noted that the trial court in the first trial gave a sequential jury instruction in which it instructed the jury to first render a verdict on the first degree murder charge (Count 1), and then on the felony murder charge (Count 2) or a lesser included offense. On this basis, the trial court in the second trial concluded that the double jeopardy protections of the United States Constitution and Tennessee Constitution did not apply. The Defendant raised this issue again in his ***255** motion for a new trial, and the trial court denied it for the same reason.

On direct appeal, the Court of Criminal Appeals considered the same issue. It reached the same conclusion as the trial court:

> The jury at the Defendant's first trial was instructed to consider the felony murder charge only if it returned a not guilty verdict for premediated murder. A jury is presumed to follow the trial court's instructions. We conclude that in this case the lack of a jury verdict on the felony murder count at the first trial was not an implicit acquittal and that double jeopardy principles were not violated at the second trial. The Defendant is not entitled to relief on this basis.

Rimmer, 2019 WL 2208471, at *9 (citation omitted).

We agree with the lower courts. Based on the sequential jury instructions given in the 1998 trial and the subsequent verdict, once the jury found the defendant guilty of first degree premeditated murder (Count 1), we presume it stopped its deliberations without considering the felony murder charge (Count 2). Thus, the jury in the first trial did not have a full opportunity to consider the felony murder count before it rendered its verdict, so double jeopardy did not prevent the State from prosecuting the Defendant for felony murder in the second trial. *See, e.g.*, *Price v. Georgia*, 398 U.S. 323, 329, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970) (holding double jeopardy prevents retrial on the greater charge when the first jury "was given a full opportunity to return a verdict" on the greater charge and returned a verdict on the lesser charge instead (quoting *Green v. United States*, 355 U.S. 184, 191, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957))). Accordingly, we affirm the trial court's denial of the Defendant's motion to dismiss the felony murder count.

C. Amnesty International Double Jeopardy Argument

Amicus Amnesty International argues the Double Jeopardy Clauses of the United States Constitution and the Tennessee Constitution barred the Defendant's second trial because of alleged prosecutorial misconduct in the first trial and sentencings. The State argues, and we agree, that the Defendant waived this double jeopardy argument by failing to raise it in his motion for new trial and on appeal. *See State v. Harbison*, 539 S.W.3d 149, 164 (Tenn. 2018) ("To preserve the double jeopardy issue, [the defendant] had to raise it in his motion for new trial and appellate brief."). Nevertheless, because this is a capital case, we conduct a plain error review of this issue. *See State v. Odom*, 336 S.W.3d 541, 555 n.9 (Tenn. 2011) (applying a plain error standard of review but noting the issue could also be reviewed pursuant to Tennessee Code Annotated section 39-13-206(b)'s mandate that a court reviewing a capital case "shall first consider *any errors assigned* and then ... shall review the sentence of death" and the outcome would be the same).[17]

In order for an appellate court to conclude that plain error has occurred, all of the following factors must be present: (1) the record must clearly establish what occurred in the trial court; (2) a clear and unequivocal rule of law must have been breached; (3) a substantial right of the accused must have been violated; (4) the accused must not have waived the issue for ***256** tactical reasons; and (5) consideration of the error is necessary to achieve substantial justice. *State v. Martin*, 505 S.W.3d 492, 504 (Tenn. 2016). Here, the retrial of the Defendant did not violate a clear and unequivocal rule of law.

Double jeopardy does not preclude "the government from retrying a defendant who succeeds in getting his first conviction set aside, through direct appeal or collateral attack, because of some error in the proceedings leading to conviction." *Lockhart v. Nelson*, 488 U.S. 33, 38, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988); *see also State v. Harris*, 919 S.W.2d 323, 328 (Tenn. 1996) ("[N]o constitutional provision prevents retrial after a reversal for legal error."). Moreover, despite Amnesty International's arguments to the contrary, prosecutorial misconduct prevents retrial only when, through the misconduct, the prosecutor intended to force the defendant into moving for a mistrial and succeeded in doing so. *State v. Tucker*, 728 S.W.2d 27, 31 (Tenn. Crim. App. 1986). The alleged prosecutorial misconduct in this case did not involve forcing the Defendant into moving for a mistrial.[18]

The proper remedy for any alleged prosecutorial misconduct in this case was a new trial, which the Defendant requested and received.[19] *See, e.g.*, *State v. Honeycutt*, 54 S.W.3d 762, 769 (Tenn. 2001) (new trial for ineffective assistance of counsel); *State v. Goltz*, 111 S.W.3d 1, 10 (Tenn. Crim. App. 2003) (new trial for prosecutorial misconduct that did not involve forcing the defendant into a mistrial). The Defendant is not entitled to relief on grounds of double jeopardy.

II. Motion to Suppress DNA Evidence

Next, the Defendant asserts the trial court erred by denying his request to dismiss the indictments or suppress DNA evidence collected from the maroon Honda because evidence was destroyed when the MPD released the vehicle before the defense had an opportunity to inspect

it. In response, the State equates the vehicle to a crime scene and argues the MPD did not have a duty to retain the vehicle for years, particularly when it properly collected and preserved the evidence contained inside the car before releasing it. Again, we agree with the State.

A. Standard of Review

To review a trial court's decision regarding the fundamental fairness of a trial conducted despite missing or destroyed evidence, we apply a de novo standard. *State v. Merriman*, 410 S.W.3d 779, 791 (Tenn. 2013). If we conclude the trial would be fundamentally unfair without the missing or destroyed evidence, then we review the remedy imposed by the trial court for an abuse of discretion. *Id.* at 791–92.

B. Ferguson Analysis

The Due Process Clause in the United States Constitution and its counterpart in the Tennessee Constitution both give every criminal defendant the right to a fair trial. U.S. Const. amend. XIV, § 1; Tenn. Const. art. I, § 8. "To facilitate this ***257** right, a defendant has a constitutionally protected privilege to request and obtain from the prosecution evidence that is either material to guilt or relevant to punishment." *State v. Ferguson*, 2 S.W.3d 912, 915 (Tenn. 1999) (citing *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)). This right imposes a duty on the State to produce all evidence that raises reasonable doubt as to the guilt of the defendant. *Id.* (citing *United States v. Agurs,* 427 U.S. 97, 110–11, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)). In *Ferguson*, the Court considered the course of action to take when allegedly exculpatory evidence is lost or destroyed before it is produced to the defense. *See id. Ferguson* held that, as an element of due process, fundamental fairness requires review of the entire record to ascertain the effect of the destroyed or missing evidence. *Id.* at 914. It adopted a balancing test for determining whether the defendant can have a trial that is fundamentally fair in the absence of that evidence. *Id.* at 917.

Under the *Ferguson* balancing test, the reviewing court first considers whether the State had a duty to preserve the missing evidence. *Id.* Subject to Rule 16 of the Tennessee Rules of Criminal Procedure and other applicable laws, including *Brady*, the State has a duty to preserve potentially exculpatory evidence that cannot be obtained by other reasonably available means. *Id.*; *Merriman*, 410 S.W.3d at 792. The *Ferguson* Court explained:

> Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

2 S.W.3d at 917 (quoting *California v. Trombetta*, 467 U.S. 479, 488–89, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)).

If the reviewing court concludes the State had a duty to preserve the evidence in question and failed to do so, then it must determine whether destruction of the evidence violated the defendant's due process rights. This determination is made by balancing the following factors: (1) the degree of negligence involved in the destruction or loss of the evidence; (2) the significance of the destroyed evidence, considered in light of its probative value and the reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence used at trial to support the conviction. *Id.*; *Merriman*, 410 S.W.3d at 785.[20] If the reviewing court decides a trial without the evidence would be fundamentally unfair, the remedies may include dismissal of the charges or a jury instruction explaining how the jury is to consider the lost or destroyed evidence. *Ferguson*, 2 S.W.3d at 917.

***258** *Ferguson* was applied by our Court of Criminal Appeals in *State v. Hollingsworth*, in which the intermediate appellate court considered a trial court's denial of a motion to dismiss an indictment. No. E2015-01463-CCA-R3-CD, 2017 WL 111331, at *14 (Tenn. Crim. App. Jan. 11, 2017), *perm. app. denied*, (Tenn. May 24, 2017). In that case, the victim's car was collected as evidence after her death in 1997. The car was processed by police and then released to the victim's family. *Id.* The defendant was not charged with the victim's murder until 2014, long after the vehicle was released. *Id.* The defendant moved for dismissal of the indictment for murder on grounds that the release of the vehicle deprived him of the right to a fair trial. The trial court denied the motion. *Id.*

On appeal, the intermediate appellate court in *Hollingsworth* first observed that the vehicle was not lost or destroyed; the State released it to the victim's family after processing pursuant to police department policy. *See*

id. (explaining that *Ferguson* does not impose a duty on the police to collect evidence in a particular manner). Moreover, samples taken from the vehicle as part of the investigation were preserved as evidence and available to the defendant for analysis. *Id.* The appellate court held that the State did not have a duty to retain and preserve the vehicle itself, particularly over the many years of trial, retrials, and resentencing. *Id.* at *15.

In the alternative, the *Hollingsworth* court reasoned that, even if the State had a duty to preserve the vehicle, its absence did not deprive the defendant of a fundamentally fair trial. *Id.* The vehicle was released pursuant to an established policy, not through negligence or bad faith. Given police department storage limitations, the department was not required to hold the vehicle from 1997 until 2014. *Id.* Moreover, the amount of evidence taken from the vehicle and preserved was significant. It included photographs of the vehicle's interior and exterior; photographs and measurements of tire tracks found in the defendant's backyard; samples taken from the vehicle that were tested by the TBI and the results of those tests; and samples of foliage taken from the vehicle and the defendant's backyard. In light of all of this evidence, the vehicle itself would not have been particularly significant. *Id.* Finally, the evidence presented at trial was sufficient to convict the defendant of second degree murder, so "[e]ven if third party DNA was found inside the victim's car, it would not have explained the other substantial evidence of the [d]efendant's guilt." *Id.* In those circumstances, the Court of Criminal Appeals concluded, the defendant's trial was fundamentally fair, so the trial court did not err in denying the defendant's motion to dismiss the indictment. *Id.*

In the case at bar, the Defendant moved to dismiss the indictments or suppress DNA evidence collected from the maroon Honda because the vehicle was released before the Defendant had the opportunity to inspect and independently test it. According to the Defendant, the fact that no blood from the victim was found in the car's trunk, even after a witness testified he saw someone at the Memphis Inn place a large object in the trunk, would have been exculpatory. Depriving him of the ability to inspect and independently test the vehicle, the Defendant argued, deprived him of the right to a fundamentally fair trial.

In its denial of the motion, the trial court held that the State did not have a duty to retain the vehicle. Under *Ferguson*, the trial court could have stopped there, but it went further. The trial court also found that, apart from the cuttings and other items collected from the Honda, ***259** the vehicle itself constituted material evidence because it "potentially" had "exculpatory value" and comparable evidence could not be obtained by other means. However, in balancing the three *Ferguson* factors, the trial court concluded the Defendant could receive a fundamentally fair trial in the absence of the Honda. It found the first factor weighed in the Defendant's favor because the release of the vehicle was intentional. However, the trial court found in favor of the State as to the other two factors: the significance of the lost or destroyed evidence in contrast to the secondary or substitute evidence and the sufficiency of the remaining evidence. The trial court noted that the evidence from the interior of the car connected the Defendant to the victim's murder and that any exculpatory value potentially gleaned by testing the trunk was speculative. It found that the evidence without the vehicle was sufficient for conviction. Under *Ferguson*, then, the trial court held that the release of the maroon Honda did not violate the Defendant's due process rights, so it denied the motion.

The Court of Criminal Appeals likewise concluded that the State did not have a duty to preserve the vehicle. Consequently, it found no error in the trial court's denial of the Defendant's motion to dismiss the indictments or suppress the DNA evidence collected from the maroon Honda. *Rimmer*, 2019 WL 2208471, at *11. The Defendant argued further that the trial court erred in declining to give a *Ferguson* jury instruction concerning the State's release of the vehicle. The Court of Criminal Appeals rejected this argument as well on the basis that the State had no duty to preserve the vehicle. *Id.*

After review of the record, we agree with the lower courts that the State did not have a duty to preserve the maroon Honda for later production to the Defendant. The efforts to retrieve evidence from the vehicle before its release were thorough and extensive. After the Defendant was pulled over in Indiana, Johnson County Sheriff's Office employees searched the vehicle and inventoried evidence in the presence of MPD officers. A positive presumptive blood test was conducted and preserved as to at least one of the reddish-brown stains in the vehicle's back seat. Investigators took ninety-six photographs of the vehicle and its contents, including photographs of the trunk after the inside cover was removed. The vehicle and items taken from it were then securely transported for processing, first to Memphis and later to the TBI. Once at the TBI, the maroon Honda was photographed, inventoried, and vacuumed for hair and fiber samples. Upholstery and carpet samples were cut for fiber analysis, and items taken from the vehicle were tested for the presence of human blood. Investigators conducted serological analysis of the interior of the vehicle to confirm the presence of human blood in the back seat.

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The items taken from the vehicle, the bloody patches of upholstery cut from the back seat of the vehicle, and the abundant photographs of the vehicle were all preserved and available to the Defendant for analysis. Under these circumstances, the vehicle itself had little apparent exculpatory value, and its release back to the owner did not leave the Defendant unable to obtain comparable evidence through the investigatory materials that remained available to the defense. *See Ferguson*, 2 S.W.3d at 917. The State had no duty to retain the vehicle.

In the alternative, even if the State had a duty to preserve the vehicle, the release of the maroon Honda back to the owner did not violate the Defendant's due process rights. First, there was no ***260** negligence involved in the State's failure to retain the vehicle. *Id.* As in *Hollingsworth*, the Honda in this case was released pursuant to policy because law enforcement authorities did not have the storage capacity to retain it indefinitely. 2017 WL 111331, at *14.

Second, the vehicle itself had little significance as evidence; the Defendant offers only speculation as to the probative value of being able to physically inspect the trunk. Per the DNA tests, the blood at the crime scene matched the blood found inside the Honda, and both were consistent with being the blood of the victim. The existence of blood of a third party or the absence of any blood whatsoever in the trunk would not negate this evidence.

Finally, the other evidence used at trial was overwhelming. *See Ferguson*, 2 S.W.3d at 917. As summarized above, while incarcerated for rape of the victim, the Defendant expressed a desire to kill her. A witness described seeing a maroon Honda parked close to the night entrance of the Memphis Inn around 1:40 a.m. the night the victim disappeared, and saw a man place something heavy and wrapped in a blanket into the vehicle's trunk. DNA tests determined blood found at the scene and inside the Honda the Defendant drove was consistent with that of the victim. Immediately after the victim disappeared, the Defendant went to see his brother to get assistance cleaning blood from the Honda's interior, stopped going to work, and embarked on a cross-country trip, leaving behind his last paycheck. The Defendant later confessed to the murder in conversations with a fellow inmate, complete with accurate descriptions of the crime scene. Finally, the Defendant tried to escape custody on multiple occasions.

Consequently, even if the State had a duty to preserve the Honda, which it did not, the release of the vehicle did not result in a fundamentally unfair trial. Accordingly, we affirm the trial court's denial of the Defendant's motion to dismiss the indictments or suppress DNA evidence.

III. Rule 404(b) Evidence

The Defendant next asserts the trial court erred under Tennessee Rule of Evidence 404(b) in admitting evidence of his prior convictions and escape attempts because the danger of unfair prejudice outweighed the probative value of the evidence. As a result, the Defendant contends, the jury was permitted to convict him based on his bad character rather than the circumstantial evidence presented at trial.

In response, the State argues the prior crimes against the victim were relevant to establish the Defendant's motive and intent, and the prior escape attempts indicated the Defendant's consciousness of guilt. It maintains that the related jury instructions minimized the prejudicial impact of the evidence. We agree with the State.

A. Standard of Review

The parties agree that, before it admitted the evidence at issue, the trial court substantially complied with the procedural safeguards in Rule 404(b), so we review its decision for an abuse of discretion. *State v. Jones*, 450 S.W.3d 866, 891 (Tenn. 2014); *State v. DuBose*, 953 S.W.2d 649, 652 (Tenn. 1997). Trial judges abuse their discretion when they cause injustice to the complaining party by applying an incorrect legal standard, reaching an illogical conclusion, or basing a decision on an erroneous assessment of the evidence. *State v. McCaleb*, 582 S.W.3d 179, 186 (Tenn. 2019) (citing *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010)). In applying the abuse of discretion standard, appellate courts should not substitute ***261** their judgment for that of the trial court. *Id.* Rather, appellate courts should determine whether the evidence supports the factual basis for the trial court's decision, whether the trial court properly applied the pertinent law, and whether the trial court's decision was within the range of acceptable alternatives. *Id.*

B. Tennessee Rule of Evidence 404(b)

Rule 404(b) of the Tennessee Rules of Evidence provides that evidence of other crimes, wrongs, or acts is not admissible to show conformity with the character trait at issue but may be admissible for other purposes, such as motive, intent, or identity. *See State v. Berry*, 141 S.W.3d 549, 582 (Tenn. 2004). Rule 404(b) seeks to prevent convictions based on mere propensity evidence. To that end, before a trial court may admit evidence of other crimes, wrongs, or acts, Rule 404(b) requires it to utilize the following procedural safeguards:

> (1) The court upon request must hold a hearing outside the jury's presence;
>
> (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
>
> (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
>
> (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Tenn. R. Evid. 404(b)(1)–(4); *State v. James*, 81 S.W.3d 751, 758 (Tenn. 2002).

In the context of Rule 404(b), this Court has defined "unfair prejudice" as an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *DuBose*, 953 S.W.2d at 654 (quoting *State v. Banks*, 564 S.W.2d 947, 951 (Tenn. 1978)). Rule 404(b) analysis of material evidence requires trial courts to balance probative value against the danger of unfair prejudice; the more probative the evidence, the lower the chance of unfair prejudice becomes. *State v. Mallard*, 40 S.W.3d 473, 488 (Tenn. 2001).

C. Convictions for Rape and Assault

In this case, the Defendant filed a motion to suppress evidence admitted in his first trial relating to his convictions for rape and aggravated assault. Pursuant to Rule 404(b), the State then filed notice of its intent to introduce certain evidence at the retrial, including: (1) evidence of the Defendant's January 1989 assault and rape of the victim, the Defendant's guilty plea, and the sentence imposed by the trial court; and (2) evidence of the Defendant's attempts to escape jail after his arrest for first degree murder and burglary.[21]

Prior to trial, the trial court held a Rule 404(b) hearing at which it heard testimony from two witnesses—the victim's daughter, Tracye Ellsworth Brown, and the MPD officer who responded to the victim's call for help during the attack, Clifford Freeman. Ms. Brown was six years old at the time of the attack in January 1989. She was at home when the Defendant assaulted ***262** and raped her mother, and she testified about her recollection of the events. Officer Freeman testified about the victim's state when he arrived at the scene, statements the victim made about the attack, and the subsequent apprehension of the Defendant.

The trial court held that the Defendant's guilty plea, conviction, and incarceration for the 1989 rape and assault of the victim were admissible under Rule 404(b). It found the State had proven the rape and assault by clear and convincing evidence. The trial court noted that the evidence included proof of the relationship between the Defendant and the victim as well as proof of the Defendant's malice and hostility toward the victim. This evidence was probative of identity, motive, intent, and premeditation, all non-propensity reasons for its admission. The trial court then held that the danger of unfair prejudice to the Defendant did not outweigh the probative value of the evidence.

Likewise, after reviewing the initial trial testimony of Mr. Lescure and Mr. Conaley, the trial court found their statements about the Defendant's intent to harm the victim after his release from prison were probative of intent, motive, identity, and premeditation. It held that the danger of unfair prejudice to the Defendant did not outweigh the probative value of the statements. The trial court ruled the testimony of Mr. Lescure and Mr. Conaley would be admissible under Rule 404(b) so long as it was consistent with the evidence presented at the first trial.

Nevertheless, the trial court excluded proffered evidence of the details of the Defendant's attack on the victim. It decided that evidence of those details presented a strong risk of inflaming the passions of the jury and a danger of unfair prejudice to the Defendant. The trial court also excluded the testimony of Ms. Brown as to the underlying events because she was a young child at the time of the rape and her recollection was hazy; the trial court held it did not meet the clear and convincing standard.

The Court of Criminal Appeals affirmed the trial court's admission of evidence relating to the rape and assault of the victim. It concluded the trial court had properly found the evidence was probative of issues other than the Defendant's bad character or propensity to commit murder and had carefully balanced the probative value of

the evidence against the danger of unfair prejudice. *Rimmer*, 2019 WL 2208471, at *15.

As noted, the Defendant does not contend the trial court failed to follow the procedural requisites of Rule 404(b). Instead, he maintains the trial court erred in holding that the probative value of this evidence outweighed the danger of unfair prejudice. *See* **Tenn**. R. Evid. 404(b)(4).

This Court has previously held that prior instances of domestic abuse by a defendant against a victim can be admissible under Rule 404(b). *See, e.g.*, *State v. Jarman*, 604 **S.W.3d** 24, 51 (**Tenn**. 2020) (affirming admissibility of evidence of defendant's prior alleged assault of victim to show defendant's intent and state of mind); *State v. Smith*, 868 S.W.2d 561, 574 (**Tenn**. 1993) (in capital murder case, affirming admissibility of evidence of defendant's prior assaults of two of the victims, his estranged wife and her son, to show defendant's hostility, malice, intent, and settled purpose to harm them). *But see State v. Gilley*, 173 **S.W.3d** 1, 7 (**Tenn**. 2005) (noting "there is no *per se* rule of admissibility under Rule 404(b) for prior acts of abuse committed by a defendant against a victim").

In this case, the evidence at issue includes: Ms. Brown's reference to the Defendant's ***263** rape and assault of her mother and her mother's visits with the Defendant in jail afterwards; Richard Rimmer's statement that his brother pled guilty to raping the victim; judgment forms documenting the Defendant's guilty pleas to aggravated assault and rape; Mr. Conaley's testimony about anger the Defendant expressed toward the victim; Mr. Conaley's testimony regarding the Defendant's threat to kill the victim if she did not share unrelated personal injury settlement money with him; Mr. Conaley's observations about the Defendant's demeanor when he talked about the victim; Mr. Lescure's testimony about the Defendant's threat to "kill the funky bitch" after his release from prison; and Mr. Lescure's observations about the Defendant's demeanor when he talked about the victim.

Clearly the evidence at issue has probative value and also presents potential for unfair prejudice. The trial court found explicitly that the evidence was probative of identity, motive, intent, and premeditation and held that its probative value outweighed the danger of unfair prejudice to the Defendant. The trial court also acted to mitigate the risk of unfair prejudice by excluding evidence of the details of the 1989 rape and assault. The trial court then took a further step by giving the following limiting instruction to the jury:

> If from the proof you find that the defendant has been convicted of Rape or Aggravated Assault, you may not consider such evidence to prove his disposition to commit such a crime as that on trial. The evidence may only be considered by you for the limited purpose of determining whether it proves motive; that is, such evidence may be considered by you if it tends to show a motive of the defendant for the commission of the offenses for which he is presently on trial.
>
> ....
>
> Such evidence of other crimes, if considered by you for any purpose, must not be considered for any purpose other than those specifically stated in this instruction.

We presume the jury followed these instructions. *See State v. McKinney*, 74 **S.W.3d** 291, 310 (**Tenn**. 2002) (presuming the jury followed the trial court's limiting instructions regarding the consideration of victim impact evidence).

Considering the entire record, we must conclude the trial court did not abuse its discretion. We affirm its decision to admit evidence of the Defendant's prior convictions for rape and aggravated assault, including the statements made to Mr. Conaley and Mr. Lescure during his subsequent incarceration for those offenses.

D. Escape Attempts

The State also sought to introduce evidence of the Defendant's escape attempts in Indiana, Ohio, and **Tennessee** for the purpose of showing consciousness of guilt. The Defendant moved to exclude this evidence under Rule 404(b) as well.

The trial court reviewed the prior trial testimony of James Allard, Richard Skaggs, Tony Lomax, and Dennis Tillman about the Defendant's escape attempts. After performing the balancing required under Rule 404(b), it ruled their testimony would be admissible in the second trial. The trial court noted that defense counsel had ample opportunity to cross-examine these witnesses at the first trial, and it held that the evidence was clear and convincing. It determined that the evidence was relevant to establish consciousness of guilt. In light of the dissimilarity of the crime of escape and the crime of murder, it found that a jury would be unlikely to use the evidence of escape as propensity evidence. To diminish the potential for unfair ***264** prejudice, the trial court indicated it would give a limiting instruction to the jury and ultimately did so.

The Court of Criminal Appeals reviewed the testimony at

issue, as well as evidence of homemade "shanks" found in the Defendant's cell in Indiana which served to corroborate the evidence of his plans to escape. *Rimmer*, 2019 WL 2208471, at *15. It held the trial court did not abuse its discretion in admitting evidence regarding the Defendant's escape attempts. *Id.*

It is well established that evidence of escape or attempted escape after the commission of a crime can be relevant and admissible at trial to show guilt, knowledge of guilt, and consciousness of guilt. *State v. Burton*, 751 S.W.2d 440, 450 (**Tenn**. Crim. App. 1988); *see also Craig v. State*, 2 Tenn.Crim.App. 510, 455 S.W.2d 190, 193 (**Tenn**. Crim. App. 1970) (citing 22A C.J.S. *Criminal Law* § 631) (affirming admission of testimony about defendant's escape from custody when brought to the courthouse for a preliminary hearing as evidence of guilt, knowledge of guilt, or consciousness of guilt); *State v. Taylor*, 661 S.W.2d 695, 698 (**Tenn**. Crim. App. 1983) ("It is universally recognized that testimony as to flight, attempted flight or concealment after the commission of an offense or after one is accused of a crime is relevant evidence which may be shown as a criminating circumstance...."). The stage of the proceedings in which the escape attempt occurs is of no consequence; it is admissible regardless of the time that passed since the defendant's arrest. *Burton*, 751 S.W.2d at 450.

The evidence at issue concerned the Defendant's flight in a prisoner transport van, his attempted escape in Indiana, homemade shanks found in his cell,[22] and his attempted escape in **Tennessee**. After reviewing the record, we agree with the Court of Criminal Appeals that the trial court properly analyzed this evidence under Rule 404(b). We note as well that the trial court mitigated any potential for unfair prejudice by giving the jury two limiting instructions. The first:

> If from the proof you find that the defendant has committed any escape or plan or attempt to commit an escape, you also may not consider any such evidence to prove his disposition to commit such a crime as that on trial. This evidence may only be considered by you for the limited purpose of determining whether it tends to prove flight. The fact of flight alone does not allow you to find that the defendant is guilty of the crimes for which the defendant is now on trial, but if flight is proven, you may consider the fact of flight with all of the other evidence when you decide the guilt or innocence of the defendant. The rules for this consideration are set out in the following instruction on flight.
>
> Such evidence of other crimes, if considered by you for any purpose, must not be considered for any purpose other than those specifically stated in this instruction.

And the second:

> The flight of a person accused of a crime is a circumstance which, when considered with all the facts of the case, may justify an inference of guilt. Flight is the voluntary withdrawal of oneself for the purpose of evading arrest or prosecution for the crime charged. Whether the evidence presented proves ***265** beyond a reasonable doubt that a Defendant fled is a question for your determination.
>
> The law makes no precise distinction as to the manner or method of flight; it may be open, or it may be a hurried or concealed departure, or it may be a concealment within the jurisdiction. However, it takes both a leaving the scene of the difficulty and a subsequent hiding out, evasion, or concealment in the community, or a leaving of the community for parts unknown, to constitute flight.
>
> If flight is proved, the fact of flight alone does not allow you to find that a defendant is guilty of the crime alleged. However, since flight by a Defendant may be caused by a consciousness of guilt, you may consider the fact of flight, if flight is so proven, together with all of the other evidence when you decide the guilt or innocence of a defendant. On the other hand, an entirely innocent person may take flight and such flight may be explained by proof offered, or by the facts and circumstances of the case.
>
> Whether there was flight by a Defendant, the reasons for it, and the weight to be given to it, are questions for you to determine.

Again, we presume the jury followed these instructions. *McKinney*, 74 **S.W.3d** at 310.

Under all of these circumstances, we conclude the trial court's decision to admit evidence of the Defendant's escape attempts was not an abuse of its discretion.

IV. Mandatory Review of Death Sentence

This Court is statutorily required to review the Defendant's death sentence. *See* **Tenn**. Code Ann. § 39-13-206(a)(1) (2018). Our review must include whether (1) the death sentence was imposed in an arbitrary fashion; (2) the evidence supports the jury's findings of statutory aggravating circumstances; (3) the evidence supports the jury's finding that the aggravating circumstances outweighed any mitigating circumstances;

and (4) the capital sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant. *Id.* § 39-13-206(c)(1)(A)–(D).

A. Arbitrariness in Imposition of Death Penalty

In his supplemental brief to this Court, the Defendant does not seek modification of his sentence. Rather, he asks the Court to vacate his convictions and order another new trial. In his supplemental brief, the Defendant also raises, for the first time, a general arbitrariness challenge to his death sentence, presumably because this Court ordered the parties to brief the issue for oral argument. Regardless of the Defendant's failure to raise this issue before now, we are statutorily required to consider whether his death sentence was imposed in an arbitrary manner. *Id.* § 39-13-206(c)(1)(A).

After considering the arguments made by the Defendant and analyzing all pertinent law, we conclude the jury in this case did not render an arbitrary verdict of death. Our review reveals that the trial court conducted both the guilt and penalty phases of trial in accordance with the applicable statutes and procedural rules. The evidence was more than sufficient to support the guilty verdict. The jury sentenced the Defendant to death after it found beyond a reasonable doubt one aggravating circumstance—one or more convictions for a felony with statutory elements involving violence to a person—and also found beyond a reasonable doubt that this aggravating circumstance outweighed any mitigating circumstances. The State presented certified copies of four judgments of conviction for prior violent felonies committed ***266** by the Defendant, and the Defendant waived his right to present mitigating evidence. The imposition of the death penalty was not arbitrary.[23]

B. Aggravating Circumstance

Before imposing the death penalty or life imprisonment, juries must unanimously find the existence of at least one aggravating circumstance beyond a reasonable doubt. *See* Tenn. Code Ann. § 39-13-204(i) (2018 & Supp. 2020).

In this case, the jury found beyond a reasonable doubt one aggravating circumstance: "The defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person." *Id.* § 39-13-204(i)(2). In this context, "violence" is defined as "physical force unlawfully exercised so as to injure, damage, or abuse." *State v. Jones*, 568 S.W.3d 101, 139 (Tenn. 2019) (quoting *State v. Fitz*, 19 S.W.3d 213, 217 (Tenn. 2000)). If the elements of the felonies on which the State relies in support of aggravated circumstance (i)(2) can be satisfied without proof of violence, then the trial court must examine the facts underlying the convictions before it allows the State to present evidence of use of violence. *State v. Sims*, 45 S.W.3d 1, 12 (Tenn. 2001).

Here, to support its contention that the Defendant was previously convicted of one or more felonies whose statutory elements involved the use of violence, the State relied on the Defendant's convictions of assault with intent to commit robbery with a deadly weapon (case number 85-00448); aggravated assault (case number 85-00449); aggravated assault (case number 89-02737); and rape (case number 89-02738). Aggravated assault can be proven without evidence of violence. *See id.* at 10–11 (noting the trial court properly found that aggravated assault "does not necessarily involve the use of violence to another person" in that the offense "may be committed by intentionally or knowingly causing the victim to reasonably fear imminent bodily injury by use or display of a deadly weapon" (footnote omitted)). The trial court below was already familiar with the facts underlying the Defendant's 1989 aggravated assault conviction from reviewing the lengthy pretrial testimony related to it. It also reviewed the indictment for ***267** the Defendant's 1985 conviction for aggravated assault, which stated the Defendant "[d]id unlawfully, knowingly, willfully cause, or attempt to cause serious bodily injury." Based on this, the trial court held the underlying facts involved the use of violence. Only then did the trial court allow the State to present evidence of the aggravated assault conviction to the jury.

During the guilt phase of the trial, the State submitted evidence of the Defendant's 1989 aggravated assault and rape convictions, including certified copies of those judgments. In the penalty phase of the trial, the State entered into evidence certified copies of judgments reflecting the Defendant's 1985 guilty pleas to assault with intent to commit robbery with a deadly weapon and aggravated assault. The State argued all four convictions should be considered in support of the aggravating circumstance. The jury unanimously agreed.

The Defendant does not challenge the underlying felony convictions presented by the State, nor does he dispute that they involve an element of violence.

The record in this case shows the trial court followed the proper procedures in admitting the evidence relating to the Defendant's violent felony convictions. The record contains certified judgments for all four convictions. We hold that the evidence fully supports the jury's finding that the State proved aggravating circumstance (i)(2) beyond a reasonable doubt.

C. Aggravating Circumstances Outweigh Mitigating Circumstances

Tennessee law also requires us to assess whether "[t]he evidence supports the jury's finding that the aggravating ... circumstances outweigh any mitigating circumstances." Tenn. Code Ann. § 39-13-206(c)(1)(C). The Defendant waived his right to present mitigating evidence during the penalty phase of the trial, and the trial court found his waiver was knowing and voluntary. Despite the waiver, the trial court instructed the jury that it could consider any mitigating evidence presented during the course of trial. After considering all of the evidence, in returning a verdict of death, the jury found beyond a reasonable doubt that the aggravating circumstance outweighed any mitigating circumstances.

From our review, the record contains little if any mitigating evidence to weigh against the aggravating circumstance. We hold that the evidence fully supports the jury's finding that the aggravating circumstance in this case outweighed any mitigating circumstances.

D. Proportionality Review

Finally, Tennessee law requires the Court to determine whether the sentence of death in this case is excessive or disproportionate to the penalty imposed in similar cases. *Id.* § 39-13-206(c)(1)(D). In doing so, we consider whether the death sentence in this case is aberrant, arbitrary, or capricious in that it is "disproportionate to the punishment imposed on others convicted of the same crime." *State v. Bland*, 958 S.W.2d 651, 662 (Tenn. 1997) (quoting *Pulley v. Harris*, 465 U.S. 37, 43, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984)).

To perform this review, we employ a precedent-seeking method of comparative proportionality review, in which we compare this case with other cases involving similar crimes and similar defendants. The pool of cases to be compared consists of "first degree murder cases in which the State sought the death penalty, a capital sentencing hearing was held, and the jury determined whether the sentence should be life imprisonment, life imprisonment without possibility of parole, or ***268** death," without regard to the sentence that was imposed. *State v. Rice*, 184 S.W.3d 646, 679 (Tenn. 2006) (citing *State v. Godsey*, 60 S.W.3d 759, 783 (Tenn. 2001); *Bland*, 958 S.W.2d at 666).

The death sentence for the Defendant must be deemed disproportionate if this case is "plainly lacking in circumstances consistent with those in cases where the death penalty has been imposed." *Bland*, 958 S.W.2d at 668. Thus, in our proportionality review, we examine "the facts and circumstances of the crime, the characteristics of the defendant, and the aggravating and mitigating circumstances involved." *State v. Stevens*, 78 S.W.3d 817, 842 (Tenn. 2002). Specifically, we consider:

> (1) the means of death; (2) the manner of death; (3) the motivation for the killing; (4) the place of death; (5) the victim's age, physical condition, and psychological condition; (6) the absence or presence of premeditation; (7) the absence or presence of provocation; (8) the absence or presence of justification; and (9) the injury to and effect upon non-decedent victims.

State v. Reid, 164 S.W.3d 286, 316 (Tenn. 2005) (citing *Bland*, 958 S.W.2d at 667). We also consider several factors about the Defendant, including his (1) record of prior criminal activity; (2) age, race, and gender; (3) mental, emotional, and physical conditions; (4) role in the murder; (5) cooperation with authorities; (6) level of remorse; (7) knowledge of the victim's helplessness; and (8) potential for rehabilitation. *Id.* at 316–17.

Here, the evidence indicates that the means of death was a violent and bloody attack involving blunt or sharp force. The manner of death could not be confirmed because authorities were never able to locate the victim's body.

As to the motivation for the killing, the evidence shows that the Defendant and the victim had a tumultuous off-and-on romantic relationship that included the Defendant's assault and rape of the victim and his 1989 guilty plea to the same. The evidence shows that, while he was incarcerated for these offenses, the Defendant repeatedly blamed the victim for his incarceration, expressed anger toward her, and told fellow inmates he planned to kill the victim upon his release.

The evidence indicates the place of death was the victim's place of employment. The Defendant went there the night of February 7, 1997 while the victim worked the overnight shift as a motel night clerk in a high crime area to support her family. The motel lobby office where the

victim worked was secure; the door remained locked at night and the victim interacted with customers through a clear shield with a drawer. Despite the Defendant's past brutalization of the victim, she maintained a relationship with him. The Defendant took advantage of the victim's trust; when the Defendant came to the motel with at least one other male, the victim let them in. The evidence indicated the victim was killed in a bloody, violent encounter there at the motel, and her body was placed in the maroon Honda.

At the time of her death, the victim was forty-five years old. As to the victim's physical condition and psychological condition, the evidence indicated she was leading a productive life with a happy marriage and a close relationship with her mother and her teenage daughter. The victim was also close to her son, who depended on the victim for support and care regarding conditions arising out of severe burns he had sustained as a child. At the time of her death, the victim babysat her son's daughter, the victim's granddaughter, multiple times a week.

***269** The evidence of the Defendant's conversations with Mr. Lescure and Mr. Conaley indicates the murder was premeditated. When the Defendant spoke to them about his anger at the victim and his intent to kill her once he got out of prison, the subject matter of the conversation caused him to foam at the mouth and sweat as he spoke. Approximately a year later, the Defendant followed through on his threat.

The record does not contain any evidence of provocation or justification for the murder.

The evidence shows that the effect of the victim's murder on the non-decedent victims—her family—was profound. Her husband, mother, daughter, and son all enjoyed a close and loving relationship with the victim, and they were greatly affected by her absence from their lives. During the penalty phase of the trial, the victim's mother testified that the fact that the victim's body was never found made closure for the family all the more difficult. The family was forced to have a memorial service for the victim without a body. The victim's mother testified about the mental and emotional effect of not knowing exactly how her daughter died and whether she was in pain or fear at the time of her death.

We next consider several factors about the Defendant. A white male who was thirty-one years old at the time of the offenses, the Defendant had a significant record of violent crime, including assault with the intent to commit robbery with a deadly weapon, rape, and two counts of aggravated assault. As to the Defendant's mental, emotional, and physical conditions, the evidence shows he had an emotional and physical reaction when he talked about his anger at the victim and his intent to kill her. Although there was proof at trial that potentially two other males accompanied the Defendant to the Memphis Inn the night the victim disappeared, the testimony of the Defendant's fellow inmates about the Defendant's descriptions of the murder indicates that he played an active role in killing the victim. This is consistent with the proof about the Defendant's past relationship with the victim, the proof of his motive, the evidence of premeditation, and his decision to leave immediately afterward on a cross-country trip, driving a vehicle stained with the victim's blood.

The evidence shows the Defendant did not cooperate with authorities. After the murder, the victim's body was never located. The Defendant's conversations with other inmates indicated he disposed of the body, but instead of directing authorities to the body, the Defendant marveled that they had never found it. Moreover, after the murder, the Defendant attempted to escape from custody on three occasions. His plan to escape custody in Indiana, as described to a fellow inmate, included "grabbing a guard," and homemade shanks were later found in his cell. After he stole a prisoner transport van in Ohio, the Defendant put public lives in danger by engaging in an extended high-speed chase. All told, the evidence indicates the Defendant has no remorse and no potential for rehabilitation.

Based on our thorough review of the record and Supreme Court Rule 12 reports,[24] we conclude that the death sentence imposed in this case is neither excessive nor disproportionate to the penalty imposed in similar cases. We previously affirmed the death sentence rendered following ***270** the Defendant's first trial and second sentencing hearing, citing a string of decisions upholding the death penalty where the defendant's violent felony history is the sole aggravating circumstance. *Rimmer*, 250 S.W.3d at 36 (citing *State v. Copeland*, 226 S.W.3d 287, 306–07 (Tenn. 2007); *State v. Cole*, 155 S.W.3d 885, 907–09 (Tenn. 2005); *State v. Dellinger*, 79 S.W.3d 458, 475–77 (Tenn. 2002); *McKinney*, 74 S.W.3d at 314; *State v. Chalmers*, 28 S.W.3d 913, 920 (Tenn. 2000); *State v. Keough*,[25] 18 S.W.3d 175, 184 (Tenn. 2000)).

There are other cases in which this Court has affirmed the death sentence based on the sole aggravating circumstance of the defendant's violent felony history. *See, e.g.*, *State v. Thomas*, 158 S.W.3d 361, 382 (Tenn. 2005); *State v. Smith*, 993 S.W.2d 6, 21 (Tenn. 1999); *State v. Adkins*, 725 S.W.2d 660, 662 (Tenn. 1987).

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In this Court's review of Mr. Rimmer's first capital conviction, we also cited prior cases in which the jury imposed the death penalty after a conviction for the murder of a current or estranged significant other. *Rimmer*, 250 S.W.3d at 36 (citing *State v. Stephenson*, 195 S.W.3d 574, 596 (Tenn. 2006), *abrogated on other grounds by Watkins*, 362 S.W.3d 530; *State v. Ivy*, 188 S.W.3d 132, 157 (Tenn. 2006); *State v. Faulkner*, 154 S.W.3d 48, 63 (Tenn. 2005); *Stevens*, 78 S.W.3d at 822–23; *State v. Suttles*, 30 S.W.3d 252, 255 (Tenn. 2000); *State v. Hall,* 8 S.W.3d 593, 595–96 (Tenn. 1999); *State v. Porterfield*, 746 S.W.2d 441, 443–44 (Tenn. 1988)).

There are additional cases in which this Court has affirmed the death penalty for murder involving estranged lovers and other domestic disputes. *See, e.g.*, *State v. Clayton*, 535 S.W.3d 829, 836–37 (Tenn. 2017) (defendant lethally shot his girlfriend and her parents); *Smith*, 868 S.W.2d at 583 (defendant murdered his estranged wife and her two sons from a prior marriage); *State v. Johnson*, 743 S.W.2d 154, 155–56 (Tenn. 1987) (defendant suffocated his wife with a plastic bag); *State v. Cooper*, 718 S.W.2d 256, 256 (Tenn. 1986) (defendant shot his estranged wife four times at her place of employment).

This Court has also affirmed the death penalty in cases where the circumstances of the murder involved severe beating. *See, e.g.*, *State v. Nichols*, 877 S.W.2d 722, 725 (Tenn. 1994) (victim, discovered in a pool of blood, died two days after the defendant repeatedly hit her in the head with a piece of lumber while he raped her); *State v. Barber*, 753 S.W.2d 659, 660 (Tenn. 1988) (defendant murdered the victim by beating her multiple times in the head during a burglary); *State v. McNish*, 727 S.W.2d 490, 491 (Tenn. 1987) (victim died after being severely beaten with a vase).

Combining these two circumstances, as in the instant case, at least three death penalty cases have involved the brutal beating of a significant other. *See, e.g.*, *Faulkner*, 154 S.W.3d at 62–63 (defendant killed his wife by hitting her in the head and face with a skillet and a metal horseshoe; the sole aggravating circumstance was subsection (i)(2)); *Hall*, 8 S.W.3d at 597 (victim, the estranged ex-wife of the defendant, sustained at least eighty-three separate wounds, including several blows to head, before she drowned in a pool); *Porterfield*, 746 S.W.2d at 444–45 (defendant, hired by the victim's wife to murder her husband, killed him by beating him in the head with a tire iron twenty-one times).

No two cases are identical, and we need not find an identical comparative ***271** case. *Ivy*, 188 S.W.3d at 158. We need only analyze similar first degree murder cases in which the State sought the death penalty, there was a capital sentencing hearing, and the sentencing jury decided whether the sentence should be life imprisonment, life imprisonment without the possibility of parole, or death, "regardless of the sentence actually imposed," to determine whether the punishment here is disproportionate to the punishment of others convicted of the same crime. *Godsey*, 60 S.W.3d at 783; *Bland*, 958 S.W.2d at 662. It is not.

Based on our review of the record in this case and our review of other cases in which the death penalty was sought, we hold that the sentence of death imposed in this case is not disproportionate to the penalty imposed for similar crimes under similar circumstances. The Defendant is not entitled to relief on this basis.

Conclusion

For the reasons set forth above, we hold: (1) in light of sequential jury instructions given in the first trial, double jeopardy principles did not bar retrial on the felony murder count; (2) alleged prosecutorial misconduct in the first trial did not trigger double jeopardy protections; (3) the State did not have a duty to preserve the maroon Honda, so the trial court did not err in denying the Defendant's motion to suppress DNA evidence from the vehicle; (4) under Tennessee Rule of Evidence 404(b), the trial court did not err in admitting evidence of the Defendant's prior convictions for rape and aggravated assault and his subsequent sentence, including the statements made to Mr. Conaley and Mr. Lescure; (5) the trial court did not err under Rule 404(b) in admitting evidence of the Defendant's escape attempts, including the corroborating evidence of homemade shanks found in his cell; (6) imposition of the death penalty is neither arbitrary nor disproportionate given the circumstances of the crime; (7) the evidence supports the jury's finding that the State proved beyond a reasonable doubt aggravating circumstance (i)(2) under Tennessee Code Annotated section 39-13-204; (8) the evidence supports the jury's finding beyond a reasonable doubt that the aggravating circumstance outweighed any mitigating circumstances; and (9) the sentence of death is neither excessive nor disproportionate to the penalty imposed in similar cases. We agree with the conclusions of the Court of Criminal Appeals as to the remaining issues and have included the relevant portions of its opinion in the attached appendix. We affirm the convictions and the sentence.

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The sentence of death shall be carried out as provided on the 10th day of May, 2022, unless otherwise ordered by this Court or other proper authority. It appearing that the Defendant, Michael Rimmer, is indigent, the costs of this appeal are taxed to the State of Tennessee.

Sharon G. Lee, J., filed a concurring opinion.

APPENDIX

(EXCERPTS FROM THE DECISION OF THE COURT OF CRIMINAL APPEALS)

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

September 5, 2018 Session

STATE OF TENNESSEE v. MICHAEL RIMMER

Appeal from the Criminal Court for Shelby County

***272 No. 98-01033, 98-01034, Chris Craft, Judge**

No. W2017-00504-CCA-R3-DD

[Introduction omitted]

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

Robert H. Montgomery, Jr., J., delivered the opinion of the court, in which Thomas T. Woodall and Norma McGee Ogle, JJ., joined.

Paul Bruno, Nashville, Tennessee; and Robert Parris, Memphis, Tennessee, for the appellant, Michael Rimmer

Herbert H. Slatery III, Attorney General and Reporter; Andrée Sophia Blumstein, Solicitor General; Andrew C. Coulam, Senior Counsel; Rachel M. Stephens and Pamela S. Anderson, District Attorneys General Pro Tem, for the appellee, State of Tennessee.

OPINION

PROCEDURAL BACKGROUND

[Omitted]

ANALYSIS

I. Sufficiency of the Evidence and Indictments

The Defendant contends that no evidence connected him to the crimes, but his argument focuses on whether the indictments provided him with adequate notice that other persons could have been involved in the crimes. The Defendant argues that the evidence showed that two other men committed the murder and that no evidence supports a theory of criminal responsibility. The State responds that ample evidence connected the Defendant to the murder and to the robbery and that "the fact that others might have been involved was not an element of the charged offenses." Further, the State argues that criminal responsibility is a theory of guilt and need not be stated in an indictment.

A. Sufficiency of the Evidence

In determining the sufficiency of the evidence, the standard of review is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *see State v. Vasques*, 221 S.W.3d 514, 521 (Tenn. 2007). The State is "afforded the strongest legitimate view of the evidence and all reasonable inferences" from that evidence. *Vasques*, 221 S.W.3d at 521. The appellate courts do not "reweigh or reevaluate the evidence," and questions regarding "the credibility of witnesses [and] the weight and value to be given the evidence ... are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *see State v. Sheffield*, 676 S.W.2d 542, 547 (Tenn. 1984).

"A crime may be established by direct evidence, circumstantial evidence, or a combination of the two." *State v. Hall*, 976 S.W.2d 121, 140 (Tenn. 1998); *see State v. Sutton*, 166 S.W.3d 686, 691 (Tenn. 2005). "The standard of review 'is the same whether the conviction is based upon direct or circumstantial evidence.' " *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011) (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)). A conviction may be based upon circumstantial evidence alone. *See Dorantes*, 331 S.W.3d at 380-81.

First degree murder is the unlawful, intentional, and premeditated killing of another. T.C.A. §§ 39-13-201 (2014), 39-13-202(a)(1). In the context of first degree murder, intent is shown if the defendant has the conscious objective or desire to cause the victim's death. ***273** *State v. Page*, 81 S.W.3d 781, 790-91 (Tenn. Crim. App. 2002); T.C.A. § 39-11-106(a)(18) (2010) (amended 2011, 2014) (defining intentional as the "conscious objective or desire to engage in the conduct or cause the result"). A premeditated act is one which is

> done after the exercise of reflection and judgment. "Premeditation" means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill preexist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.

Id. § 39-13-202(d). The question of whether a defendant acted with premeditation is a question of fact for the jury to be determined from all of the circumstances surrounding the killing. *State v. Davidson*, 121 S.W.3d 600, 614 (Tenn. 2003). Proof of premeditation may be shown by direct or circumstantial evidence. *State v. Brown*, 836 S.W.2d 530, 541 (Tenn. 1992).

As relevant here, first degree felony murder is "[a] killing of another committed in the perpetration of or attempt to perpetrate any ... robbery[.]" T.C.A. § 39-13-202(a)(2) (2014).

Aggravated robbery is defined, in relevant part, as "the intentional or knowing theft of property from the person of another by violence or putting the person in fear," "where the victim suffers serious bodily injury." *Id.* §§ 39-13-401(a) (2014), -402(a)(1). Theft of property occurs when "with the intent to deprive the owner of property, [a] person knowingly obtains or exercises control over the property without the owner's effective consent." T.C.A. § 39-14-103(a) (2014).

There was strong direct and circumstantial evidence establishing that the Defendant participated in the victim's murder and the aggravated robbery of the victim. The Defendant discussed his plan to kill the victim and to hide her body when he was previously incarcerated for assaulting the victim. Witnesses testified that a maroon car was seen at the motel, and the Defendant was seen with a maroon Honda the day after the victim's disappearance. The Defendant was driving the maroon Honda at the time of his arrest, and the car contained blood and DNA consistent with that of the victim. The motel bathroom contained the victim's blood and DNA, and the victim was never seen after the early morning hours of February 8, 1997. Testimony established that $600 and several sets of bed sheets were missing from the motel office. Some of the missing money was from a lockbox kept in a back room, and the victim kept the key to the box on her person. The Defendant told another inmate that he had been in the back room "doing something" after he shot the victim in the chest, that she "got up," and he shot her in the head. One of the witnesses saw a man place an object rolled up in a blanket in the trunk of a maroon car that was backed into a parking place with its open trunk facing toward the building. The car sank when the object was placed in the trunk.

Witnesses and investigators described a bloody scene indicative of a violent struggle, supporting the conclusion that the victim suffered serious bodily injury. Witness testimony also established that two perpetrators participated in the offenses. Mr. Allard testified that the Defendant confessed to being present at the motel and to actively participating in the attack against the victim. Several hours after the victim disappeared, the Defendant arrived at his brother's home Mississippi in a maroon Honda, which was muddy. The Defendant's ***274** shoes were muddy, and he asked his brother to dispose of a shovel and to assist him in cleaning blood from the backseat of the car.

Following the victim's disappearance, the Defendant also disappeared for approximately one month. He stopped going to work and did not pick up his last paycheck, although his supervisor described the Defendant as reliable. Receipts found in the Honda showed that the Defendant had traveled throughout the country before his arrest in Indiana. After his arrest, he told Mr. Allard that he had murdered the victim and hid her body. The Defendant also attempted to escape from police custody on three occasions. We conclude that sufficient evidence supports the first degree premeditated murder, first degree felony murder, and aggravated robbery convictions.

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B. Sufficiency of the Indictments

An individual accused of a crime has the right to be informed of the nature and cause of an accusation against him. U.S. Const. amend. XI, XIV; **Tenn**. Const. art. 1, § 9. Pursuant to **Tennessee** Code Annotated section 40-13-202 (2012), an indictment

> must state the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in such a manner as to enable a person of common understanding to know what is intended and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment....

Our supreme court has said that an indictment is sufficient if it provides adequate information to enable the defendant to know the accusation against which he must defend, furnishes the trial court with an adequate basis for entry of a proper judgment, and protects the defendant from double jeopardy. *See State v. Hill*, 954 S.W.2d 725, 727 (**Tenn**. 1997); *see also Wyatt v. State*, 24 **S.W.3d** 319, 324 (**Tenn**. 2000). The supreme court has held that "indictments which achieve the overriding purpose of notice to the accused will be considered sufficient to satisfy both constitutional and statutory requirements." *State v. Hammonds*, 30 **S.W.3d** 294, 300 (**Tenn**. 2000). In this regard, "specific reference to a statute within the indictment may be sufficient to place the accused on notice of the charged offense." *State v. Sledge*, 15 **S.W.3d** 93, 95 (**Tenn**. 2000). The indictment "need not allege the specific theory or means by which the State intends to prove each element of an offense to achieve the overriding purpose of notice to the accused." *Hammonds*, 30 **S.W.3d** at 300. Thus, the State is not required to assert a theory of criminal responsibility in the charging instrument. *State v. Lemacks*, 996 S.W.2d 166, 172-73 (**Tenn**. 1999).

The indictments were not included in the appellate record, but they were read into evidence at the trial. The aggravated robbery indictment in No. 98-01033 read as follows:

> Count 1, The grand jurors of the State of **Tennessee** ... present that [the Defendant], during the period of time between February 7th 1997, and February 8th, 1997, in Shelby County, **Tennessee**, and before the finding of this indictment, intentionally or knowingly did take from [the victim] a sum of money of value by violence or putting [the victim] in fear. And the victim ... suffered serious bodily injury, in violation of **Tennessee** Code Annotated 39-13-402....

The murder indictment in No. 98-01034 stated:

> Count 1, The grand jurors of the [S]tate of **Tennessee** ... present that [the Defendant] during the period of time between February 7th 1997, and February 8th, 1997, in [C]ounty of Shelby, **Tennessee**, and before the finding of ***275** this indictment did unlawfully, intentionally, and with premeditation kill [the victim] in violation of **Tennessee** Code Annotated 39-13-202....
>
> Count 2[,] The grand jurors of the State of **Tennessee** ... present that [the Defendant], during the period of time between February 7th, 1997, and February 8th, 1997, in Shelby County, **Tennessee**, did unlawfully, with the intent to commit robbery, kill [the victim] during the perpetration of or attempt to perpetrate robbery, in violation of **Tennessee** Code Annotated 39-13-202....

The elements of aggravated robbery, premeditated murder, and felony murder were clearly set forth in the indictment, along with the statutes for each. The Defendant contends that the State's rebuttal closing argument included statements that other persons were involved in the crimes and that these assertions "surprised" him. However, the State is not required to set forth its theory of guilt in the indictment. The State's argument was based on the proof submitted at trial, including witness testimony that more than one person was participated in the crimes at the motel on the night the victim disappeared. The Defendant is not entitled to relief on this basis.

II. Double Jeopardy

[Omitted]

III. Motion to Suppress DNA Evidence

[Omitted]

A. Collateral Estoppel

[Omitted]

B. Due Process Violation

[Omitted]

IV. State's Opening Statement

The Defendant next asserts that the trial court erred in not striking the State's opening statement or in not declaring a mistrial when the prosecutor said that the car had been "taken." The Defendant argues that the State's reference to the car implied it had been stolen, which violated the court's pretrial order prohibiting the State from referring to the car as stolen, pursuant to Tennessee Rule of Evidence 404(b), and due process. The State disagrees, arguing that reference to the car as "taken" did not violate the court's pretrial ruling, that Rule 404(b) does not apply to opening statements, and that any due process violation was by failing to object at the trial and in the motion for new trial.

In addition to the aggravated robbery and murder charges, the Defendant was indicted for the theft of the Featherstons' maroon Honda. However, the trial court severed the theft charge prior to trial. The court determined that the theft was not part of the same criminal transaction as the murder and aggravated robbery. It also prohibited the State from eliciting evidence that the car had been stolen. However, the court permitted the State to show that the Defendant had control of the car before and after February 7, 1997, in order to establish that he was the perpetrator of the aggravated robbery and murder. It recognized that the Defendant's possession of the car before and after the victim's disappearance was "very material" to his identity as the perpetrator.

In the opening statement, the prosecutor said the following:

> [F]rom February 8th through March 5th, [the Memphis Police Department] had been looking for [the Defendant] everywhere they could. They also knew that there was, obviously, some interest in this vehicle, maroon vehicle, and they ***276** ended up locating that -- a friend that had worked with [the Defendant] owned a vehicle matching that description. And learned that that vehicle had been taken from outside [the Featherstons'] home. And so the police are going to be on the lookout for this tag number and this vehicle.

At the conclusion of the statement, the Defendant objected to the State's use of the word "taken," moved to have the statement stricken, and argued that it was grounds for a mistrial. According to the Defendant, the State's words gave a "clear implication" that he had stolen the car, violating the court's order. The State argued that its statement did not violate the court's ruling because the car could have been borrowed or have been missing due to a misunderstanding.

The trial court determined that the State did not violate its order or necessitate a mistrial. The court found that the State had a right to show that the Defendant took the car and that the car was missing but not that any crime was committed when the car was taken. The court emphasized that the State would not be allowed to elicit testimony about whether the Defendant had permission to take the car or whether the police were called in response.

Opening statements "are intended merely to inform the trial judge and jury, in a general way, of the nature of the case and to outline, generally, the facts each party intended to prove." *State v. Reid*, 164 S.W.3d 286, 343 (Tenn. 2005). Opening statements are not evidence. *State v. Thompson*, 43 S.W.3d 516, 523 (Tenn. Crim. App. 2000). Trial courts should allow the parties to present "a summary of the facts supportive of the respective theories of the case, only so long as those 'facts are deemed likely to be supported by admissible evidence.' " *State v. Sexton*, 368 S.W.3d 371, 415 (Tenn. 2012) (quoting *Stanfield v. Neblett*, 339 S.W.3d 22, 41-42 (Tenn. Ct. App. 2010)). Therefore, opening statements should "be predicated on evidence introduced during the trial" and should never refer "to facts and circumstances which are not admissible in evidence." *Sexton*, 368 S.W.3d at 415.

A trial judge should declare a mistrial if manifest necessity arises. *Arnold v. State*, 563 S.W.2d 792, 794 (Tenn. Crim. App. 1977). Manifest necessity occurs when "no feasible alternative to halting the proceedings" exists. *State v. Knight*, 616 S.W.2d 593, 596 (Tenn. 1981). "The granting or denial of a mistrial is within the sound discretion of the trial court." *State v. McKinney*, 929 S.W.2d 404, 405 (Tenn. Crim. App. 1996); *see State v. Jones*, 802 S.W.2d 221, 222 (Tenn. Crim. App. 1990). This court will only disturb that decision if the trial court abused its discretion. *State v. Adkins*, 786 S.W.2d 642, 644 (Tenn. 1990).

The Defendant cites to a single authority to support his argument that the use of the word taken during the opening statement was improper. In *State v. James C. Greene, Jr.*, the defendant challenged his conviction on the basis that the State referred to inadmissible hearsay in

its opening statement. No. 03C01-9407CR00247, 1995 WL 564939, at *1 (Tenn. Crim. App. Sept. 26, 1995). The trial court prohibited the State from introducing evidence that the police had conducted surveillance on the defendant based on information that he was involved in illegal activity. During the opening statement, the prosecutor said, "[T]he Third Judicial Drug Task Force had information that [the defendant was] dealing drugs." The defendant immediately objected to relevance and requested a mistrial. The court overruled the motion ***277** for a mistrial but sustained the objection and advised the jury to disregard the statement and not consider it for any purpose. *Id.* at *3.

On appeal, this court held that the defendant was not harmed by the prosecutor's statement and that a mistrial was not required. *Id.* at *4. The proof adduced at the trial showed that the defendant was an admitted drug abuser but was not a seller. The court concluded that the proof offered at the trial was not affected by the opening statement and that the jury acquitted the defendant of possession with intent to sell or deliver. *Id.*

James C. Greene, Jr. is distinguishable from the present case because in *James C. Greene, Jr.*, the prosecutor explicitly defied the trial court's order. However, in the present case, the trial court concluded that the State's comment did not run afoul of the pretrial order and reiterated that the State was allowed to show that the Defendant had possession of the car before and after the victim's disappearance to establish his identity as the perpetrator. The court attempted to balance the State's right to use the evidence to prove the perpetrator's identity and the Defendant's right to fairness by excluding evidence of the theft. We conclude that the court did not abuse its discretion in refusing to strike the opening statement or to grant a mistrial. The Defendant is not entitled to relief on this basis.

The Defendant also contends that the use of the word taken was a Fifth Amendment due process violation. He did not object on this basis at the trial, and the general contention is the extent of his argument on appeal. "In this jurisdiction, a party is bound by the ground asserted when making an objection. The party cannot assert a new or different theory to support the objection ... in the appellate court." *State v. Adkisson*, 899 S.W.2d 626, 634 (Tenn. Crim. App. 1994). When a party asserts new grounds in the appellate court, the issue is treated as waived. *Id.* at 635. Furthermore, "[i]ssues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court." Tenn. Ct. Crim. App. R. 10(b). The Defendant's failure to object on this basis at the trial or to adequately address the issue in his brief qualifies the issue for waiver. However, we will review this issue for plain error.

Five factors are relevant

> when deciding whether an error constitutes "plain error" in the absence of an objection at trial: "(a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is 'necessary to do substantial justice.' "

State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (quoting *Adkisson*, 899 S.W.2d at 641-42). All five factors must exist in order for plain error to be recognized. *Id.* at 283. "[C]omplete consideration of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established." *Id.* In order for this court to reverse the judgment of a trial court, the error must be "of such a great magnitude that it probably changed the outcome of the trial." *Id.*; *Adkisson*, 899 S.W.2d at 642. A defendant carries the burden of proving that the trial court committed plain error. *See State v. Bledsoe*, 226 S.W.3d 349, 355 (Tenn. 2007).

The Defendant has not shown that the State's use of the word taken amounted to a violation of due process that adversely ***278** affected a substantial right. "For a 'substantial right' of the accused to have been affected, the error must have prejudiced the appellant. In other words, it must have affected the outcome of the trial court proceedings." *State v. Maddin*, 192 S.W.3d 558, 562 (Tenn. Crim. App. 2005). The State's single use of the word taken in its opening statement comported with the trial court's previous ruling and with the evidence presented at trial. The Defendant is not entitled to relief on this issue.

V. Evidence of Prior Assault on Victim and Escape Attempts

[Omitted]

VI. William Baldwin's Testimony

The Defendant asserts that the trial court erred in

prohibiting William Baldwin from testifying about a statement made by an MPD detective. The Defendant argues that exclusion of this evidence violated Tennessee Rules of Evidence 401 and 402. He also asserts that the MPD lost a video recording made by Mr. Baldwin, which violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The State asserts that the court did not err because the proffered testimony was hearsay from an unknown police officer and was irrelevant. The State further responds that the *Brady* issue has been waived because it was not raised in the motion for new trial.

William Baldwin was an evidence technician for the Johnson County, Indiana Sheriff's Department. Before Mr. Baldwin testified at the trial, the Defendant sought permission to question Mr. Baldwin outside the presence of the jury regarding a statement he overheard when he processed the car. According to the Defendant, Mr. Baldwin overheard an MPD detective say, "Well, it looks like the n----r did it." The State opposed admission of the statement, arguing that Mr. Baldwin could not identify the person who allegedly made the statement and that it was inadmissible hearsay. The Defendant admitted that there was never an African-American suspect and that the evidence would not be offered to prove that an African-American committed the crime. However, he argued that the evidence was exculpatory. The Defendant surmised that if he could prove Detective Shemwell made the statement, the statement was relevant to Detective Shemwell's credibility. The trial court ruled that the evidence was irrelevant and inadmissible. The court further expressed skepticism that Mr. Baldwin heard what he thought he heard, noting that "Rimmer did it" sounded very similar and made more sense in context.

Evidence is relevant and generally admissible when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401, 402. Questions regarding the admissibility and relevancy of evidence generally lie within the discretion of the trial court, and the appellate courts will not "interfere with the exercise of that discretion unless a clear abuse appears on the face of the record." *State v. Franklin*, 308 S.W.3d 799, 809 (Tenn. 2010) (citing *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007)).

A trial court abuses its discretion when it applies an incorrect legal standard or reaches a conclusion that is "illogical or unreasonable and causes an injustice to the party complaining." *State v. Ruiz*, 204 S.W.3d 772, 778 (Tenn. 2006). Relevant evidence, however, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, ***279** or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. R. Evid. 403.

We conclude that the trial court did not abuse its discretion by determining that the proffered evidence was not relevant. The Defendant admitted there was never an African-American suspect. The Defendant is not entitled to relief on this basis.

The Defendant also argues that the exclusion of this evidence "violated the Fifth Amendment to the United States Constitution." This general contention is the extent of his argument. Although the Defendant raised the issue in his motion for a new trial, he did not contemporaneously object at the trial. *See Adkisson*, 899 S.W.2d at 634; Tenn. Ct. Crim. App. R 10(b); Tenn. R. Evid. 103(a), (b). In any event, we will review the issue for plain error.

"An evidentiary ruling ordinarily does not rise to the level of a constitutional violation." *State v. Powers*, 101 S.W.3d 383, 397 (Tenn. 2003) (citing *Crane v. Kentucky*, 476 U.S. 683, 689, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986)). To determine whether the exclusion of evidence rises to the level of a constitutional violation, courts consider the following: (1) whether the evidence is critical to the defense, (2) whether it bears sufficient indicia of reliability, and (3) whether the interest supporting exclusion is substantially important. *State v. Brown*, 29 S.W.3d 427, 433-34 (Tenn. 2000).

The excluded evidence in this case was not critical to the defense because the Defendant conceded that there was never an African-American suspect. A substantial right of the Defendant was not adversely affected. *See Smith*, 24 S.W.3d at 282. The Defendant is not entitled to relief on this issue.

Finally, the Defendant alleges that law enforcement's failure to preserve the videotape and to provide it to the defense violated *Brady*. The Defendant did not raise this issue at the trial or include the issue in his motion for new trial and his appellate argument is limited to one sentence. *See Adkisson*, 899 S.W.2d at 634; Tenn. Ct. Crim. App. R 10(b). Our review is limited to plain error.

Mr. Baldwin testified that he videotaped his inventory of the car and that the recording contained audio. The recording allegedly captured the statement, "[T]he n----r did it." Mr. Baldwin testified that he thought he provided the recording to the MPD but that he was not sure. Mr.

Baldwin explained that the recording was not listed on the computer inventory list of all the items turned over to the MPD. He thought that he gave "everything" to the MPD and said that he had no reason to retain the recording. However, he had no record of providing it to MPD.

The defense argued that Mr. Baldwin's testimony supported its theory that the MPD intentionally destroyed the recording because the recording pointed to someone other than the Defendant as a suspect and that the MPD, and Detective Shemwell in particular, had "tunnel vision" in investigating the Defendant.

The trial court found that no evidence supported the Defendant's theory that Detective Shemwell intentionally destroyed the recording. The court noted that the detective had no reason to destroy the recording to cover up the possible identity of an African American suspect because there was no indication that an African-American suspect existed. The court concluded that the "whole thing is just an absolute nonissue." However, the court allowed the defense to ask Mr. Baldwin whether a videotape was made, whether he ***280** remembered giving it to MPD, and whether it was available at the time of trial.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution and article I, section 8 of the **Tennessee** Constitution afford every criminal defendant the right to a fair trial. *See Johnson v. State*, 38 **S.W.3d** 52, 55 (**Tenn**. 2001). As a result, the State has a constitutional duty to furnish a defendant with exculpatory evidence pertaining to his guilt or lack thereof or to the potential punishment faced by a defendant. *See Brady*, 373 U.S. at 87, 83 S.Ct. 1194.

In order to show a due process violation pursuant to *Brady*, the defendant must prove by a preponderance of the evidence that (1) he requested the information, unless it is obviously exculpatory, (2) the State must have suppressed the information, (3) the information must be favorable to the accused, and (4) the information must be material. *State v. Edgin*, 902 S.W.2d 387, 389 (**Tenn**. 1995). Favorable evidence includes that which "challenges the credibility of a key prosecution witness." *Johnson*, 38 **S.W.3d** at 56-57 (internal quotation marks and citation omitted). Evidence is material when " '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 (quoting *Edgin*, 902 S.W.2d at 390).

The Defendant has not shown that a clear and unequivocal rule of law was breached because the evidence does not show that the recording was material. A recording of one of the investigating detectives stating "the n----r did it" would not have cast doubt on the Defendant's identity as the perpetrator. Although the recording would have established that a detective engaged in unprofessional conduct, there is no reasonable probability that the jury would have acquitted the Defendant based upon the comment. The Defendant is not entitled to relief on this issue.

VII. Drawing of the Honda Backseat

The Defendant alleges that the trial court erred when it allowed into evidence a drawing of the backseat of the car. According to the Defendant, the drawing did "not reflect the true condition of the backseat" and was admitted in violation of **Tennessee** Rule of Evidence 403. The State disagrees, claiming that the court's determination that the drawing would assist the jury was reasonable.

Tennessee Rule of Evidence 403 states that, "although relevant, evidence may be excluded if its probative value is substantially 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." The decision to admit evidence will be reversed "only when the court applied an incorrect legal standard, or reached a decision which is against logic or reasoning" and the admission of the evidence "caused an injustice to the party complaining." *State v. Gilliland*, 22 **S.W.3d** 266, 270 (**Tenn**. 2000) (quoting *State v. Shirley*, 6 **S.W.3d** 243, 249 (**Tenn**. 1999)).

TBI agent and forensic serologist Samera Zavaro testified that she processed the car for blood evidence. When she located a reddish-brown stain, she conducted a presumptive blood field test. If the surface was fabric and resulted in a positive presumptive test, she took cuttings of the stained area and later conducted tests of the cuttings to determine whether they contained human blood. If the stain was found on a hard surface, she swabbed the surface and performed a second test using the swab. She identified photographs of the car, including the backseat. She testified ***281** that because the interior fabric was also a reddish-brown color, it was difficult to discern stains from the photographs alone. However, she said that it was easier to see the stains when personally viewing the evidence. Accordingly, she made several drawings of the car in which she depicted the areas where stains were found, including the backseat.

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When the State attempted to introduce the backseat drawing, the Defendant objected on the basis that the drawing was not the best evidence and was not accurate. He claimed that the drawing depicted more blood than the photographs. The trial court overruled the objection, pointing to Agent Zavaro's testimony that the stains were difficult to see in the photographs alone. The court found that the drawing would assist the jury's understanding and admitted the evidence. The court noted that the accuracy of the drawing could be challenged on cross-examination.

Although the Defendant does not elaborate in his brief about how admission of the evidence violated Rule of Evidence 403, his objection at the trial was based on the danger of misleading the jury. The trial court admitted the evidence based upon a finding that the drawing would assist the jury in understanding where in the backseat the blood was located. The Defendant did not ask Agent Zavaro questions challenging the accuracy of the drawing. The court did not abuse its discretion in admitting the evidence, and the Defendant is not entitled to relief on this basis.

The Defendant also asserts that admission of the backseat drawing violated the Fifth Amendment of the United States Constitution. He did not object on this basis at the trial and did not adequately address the issue in his appellate brief. *See Adkisson*, 899 S.W.2d at 634; **Tenn**. Ct. Crim. App. R 10(b). As such, our review is limited to plain error.

An evidentiary ruling rarely rises to the level of a constitutional violation. *See Powers*, 101 **S.W.3d** at 397. Furthermore, we have already determined that admission of the backset drawing was proper under the Rules of Evidence. We conclude that the Defendant's allegation of constitutional error is without merit, and he has not established that admission was plain error. *See, e.g.*, *State v. Dustin Dwayne Davis*, No. 03C01-9712-CR-00543, 1999 WL 135054, at *5 (**Tenn**. Crim. App. Mar. 15, 1999); *State v. Allan Brooks*, No. 01C01-9510-CC-00324, 1998 WL 754315, at *11 (**Tenn**. Crim. App. Oct. 29, 1998). He is not entitled to relief on this issue.

VIII. Admission of James Allard's Previous Testimony

The Defendant contends that the trial court erred in finding James Allard was unavailable and in allowing the State to present Mr. Allard's testimony through a transcript of the previous trial. He asserts that the State's efforts to locate Mr. Allard were "wholly insufficient" and that the prior testimony should have been excluded. The State responds that its efforts to locate Mr. Allard were reasonable and that the court did not err in declaring Mr. Allard unavailable and in admitting his previous testimony.

TBI Agent Charles Baker testified that he attempted to locate Mr. Allard through law enforcement databases as well as Google searches. He consulted "CLEAR," which searched real estate records, criminal information, and both criminal and civil records. He also searched the State of **Tennessee** Justice Portal, which contained driver's license information, vehicle information, criminal histories, and **Tennessee** Department of Correction information. He further searched the National Crime Information ***282** Center (NCIC) which he characterized as a national search through the FBI. Finally, he searched death records. He found a potential phone number but, after calling the number, determined it was a "dead end."

On cross-examination, Agent Baker said that he did not attempt to contact Mr. Allard's family because he did not have information about any family members. Agent Baker admitted that he was not aware Mr. Allard had been previously incarcerated in Indiana and said that he did not search for him through the Indiana Department of Correction.

The Defendant argued that the State's efforts were insufficient. He asserted that Mr. Allard had a long criminal history and that if the right methods had been utilized, the State should have been able to identify his family members and gain more information about his whereabouts. The trial court found that the State's efforts were reasonable. The court stated that it did not "know how else [the State] can go about finding a witness, if they don't know who the family members are, other than Google searches and database searches." The court noted that Mr. Allard's imprisonment in Indiana nearly twenty years ago did not mean he was still in the state. The court found that the State was not required to send an investigator to every state in search of a witness.

The Constitution of the United States provides the accused in a criminal prosecution the right "to be confronted with witnesses." U.S. Const. amend. VI. The **Tennessee** Constitution similarly provides the right "to meet witnesses face to face." **Tenn**. Const. art. I, § 9. However, the right of confrontation is not absolute and must occasionally give way to considerations of public policy and necessities of the case. *State v. Kennedy*, 7 **S.W.3d** 58, 65 (**Tenn**. Crim. App. 1999) (citing *Jenkins v. State*, 627 N.E.2d 789, 793 (Ind. 1993)). Thus, the United States Supreme Court has refused to apply a literal interpretation of the Confrontation Clause which would

bar the use of any hearsay. *Idaho v. Wright*, 497 U.S. 805, 814, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990).

In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court announced the test to determine admissibility under the Confrontation Clause of hearsay offered against an accused. Testimonial statements may not be offered into evidence unless two requirements are satisfied: (1) the declarant/witness must be unavailable and (2) the defendant must have had a prior opportunity to cross-examine the declarant/witness. *Id.* at 68, 124 S.Ct. 1354. "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 68-69, 124 S.Ct. 1354.

Mr. Allard's previous testimony was testimonial; thus, the pertinent consideration is whether the State proved that the witness was unavailable. To accomplish this, "the State must prove that it made a good faith effort to secure the presence of the witness in question." *State v. Sharp*, 327 **S.W.3d** 704, 712 (**Tenn**. Crim. App. 2010). "The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness. As with other evidentiary proponents, the prosecution bears the burden of establishing this predicate." *Crawford*, 541 U.S. at 74-75, 124 S.Ct. 1354. Good faith refers to the extent to which the State must attempt to produce the witness and is a question of reasonableness. *Sharp*, 327 **S.W.3d** at 712 (citing ***283** *Ohio v. Roberts*, 448 U.S. 56, 74, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980)). The trial court's decision will be affirmed absent an abuse of discretion. *Hicks v. State*, 490 S.W.2d 174, 179 (**Tenn**. Crim. App. 1972).

Our supreme court considered what constitutes a good faith effort in *State v. Armes*, 607 S.W.2d 234 (**Tenn**. 1980). In *Armes*, the State attempted to subpoena the witness before trial and discovered that the witness had disappeared. *Id.* at 236. This disappearance resulted in a mistrial. *Id.* One week before the second trial and again one day before the second trial, the State attempted to subpoena the witness, but the State was unable to locate the witness. *Id.* At the trial the State attempted to present the witness's preliminary hearing testimony. *Id.* The State failed to provide any independent evidence of an attempt to locate the witness to prove the witness's unavailability other than a statement by the prosecutor. The supreme court held that "[t]he prosecuting attorney's statement to the Court concerning the efforts of the State's investigator to locate the witness cannot be considered as evidence of proof on the issue of the State's good faith effort." *Id.* at 237. Our supreme court also determined that the State was on notice that extra effort would be required to locate the witness because he did not appear for the first trial date. *Id.*

Unlike *Armes*, the State in the present case produced independent evidence of its efforts to locate Mr. Allard. Nearly twenty years had passed between the first trial and the State's attempts to locate Mr. Allard before the second trial. Agent Baker attempted to locate the witness using numerous search tools, including the NCIC database, which he explained was a national search through the FBI. Agent Baker developed one unsuccessful lead through a telephone number. The agent said he did not have information about Mr. Allard's family members and was unable to contact them to gain more information. This evidence supports the trial court's determination that the State made good-faith, although ultimately unsuccessful, efforts to locate the witness.

Given the passage of time and the independent evidence produced by the State, we conclude that the trial court did not abuse its discretion in determining Mr. Allard was unavailable. The Defendant is not entitled to relief on this issue.

IX. Rhonda Ball Johnson's Testimony

The Defendant argues that the trial court erred in allowing Rhonda Ball Johnson to testify about conversations she had with William Conaley, alleging that it was inadmissible hearsay. He asserts that her testimony violated **Tennessee** Rules of Evidence 801 and 802. The State contends that the testimony was proper as prior consistent statements used to rehabilitate Mr. Conaley's credibility.

Mr. Conaley was incarcerated with the Defendant at Northwest Correctional Center in 1993. He testified that the Defendant expressed his discontent that the victim had put him in prison. The Defendant told Mr. Conaley that the victim's son, Chris Ellsworth, was going to receive money from a lawsuit and that the Defendant felt entitled to some of the money.

Mr. Conaley said that prior to his leaving on furlough, the Defendant asked him to relay a message to the victim. The Defendant wanted the victim to know that he expected to receive some of the money from the lawsuit and that if he did not get it, he would kill her. Mr. Conaley said that he relayed the threat to Ms. Johnson. However, Mr. Conaley did not report the threat to the authorities, and he was released on parole shortly

thereafter.

***284** In January 1996, Mr. Conaley returned to custody. In February 1997, Mr. Conaley read about the victim's disappearance in a newspaper and told family members about the Defendant's prior statements, but Mr. Conaley did not contact law enforcement. However, he said that approximately one week later, an MPD officer visited him in prison. He told the police about the Defendant's threatening the victim.

On cross-examination, Mr. Conaley admitted that when the Defendant made the statements in 1993, Mr. Conaley had already been granted parole and was awaiting release. However, he admitted that when he spoke with law enforcement in 1997, the information might have gained him an earlier release. Nevertheless, he denied contacting law enforcement, and he said that it was Ms. Johnson who told the police about the Defendant's threat after the victim disappeared. Mr. Conaley requested that he be transferred to the "annex" to finish his sentence, which he admitted was "easy time" in the prison system. He said that after talking to the police about the Defendant, he was moved to the annex.

Ms. Johnson testified that she was the victim's niece. She was also childhood friends with Mr. Conaley. She confirmed that in 1993, Mr. Conaley told her about the Defendant's threat against the victim.

Generally, out-of-court statements offered to prove the truth of the matter asserted are inadmissible evidence. *See* Tenn. R. Evid. 801, 802. However, when a defendant attacks a witness's credibility, the State may rehabilitate the witness by offering evidence of a prior consistent statement. *State v. Benton*, 759 S.W.2d 427, 433 (Tenn. Crim. App. 1988). Admission of prior consistent statements is authorized in two circumstances: (1) where the statement is offered to rebut the implication that the witness's testimony was a recent fabrication; and (2) when deliberate falsehood has been implied. *Id.* Prior consistent statements are not ordinarily admissible for the sole purpose of bolstering a witness's credibility. *State v. Braggs*, 604 S.W.2d 883, 885 (Tenn. Crim. App. 1980).

During Mr. Conaley's cross-examination, the defense implied that Mr. Conaley fabricated the Defendant's statement in 1997 because he faced years in prison and wanted to secure favorable treatment and early release. Thereafter, the State called Ms. Johnson, who testified that Mr. Conaley relayed the Defendant's threat to her in 1993, when Mr. Conaley had already been granted parole and had no motivation to lie in order to cut a deal with police. That testimony was properly admitted to rebut the Defendant's implication of recent fabrication, and this issue is without merit.

The Defendant also contends that admission of this evidence "was in violation of the Fifth Amendment of the United States Constitution." The Defendant did not object on this basis at the trial and did not elaborate in his appellate brief as to how admission violated his constitutional rights. *See Adkisson*, 899 S.W.2d at 634; Tenn. Ct. Crim. App. R 10(b). Accordingly, our review is limited to plain error.

Because we have already determined that admission of Ms. Johnson's statement was proper under the Rules of Evidence, we conclude that the evidence was not admitted in violation of the Defendant's constitutional rights and that the Defendant has not established plain error. He is not entitled to relief on this basis.

X. Chris Ellsworth's Testimony

The Defendant asserts that allowing Chris Ellsworth, the victim's son, to show the jury his scars violated Tennessee Rules of Evidence 401, 402, and 403. The State responds that the court acted within ***285** its discretion to allow the evidence, which demonstrated the victim was unlikely to abandon her son, who had been badly burned, and rebutted the defense's implication that the victim was not deceased. According to the State, the victim had provided extensive care to Mr. Ellsworth and would not have suddenly left.

At the trial, Mr. Ellsworth testified that he had been badly burned over 70% of his body in a water heater explosion and that he required extensive follow-up medical care. His mother was devoted to his care and frequently took him to LeBonheur Hospital as well as Shriners Hospital in Galveston, Texas, for treatment. She also worked with him daily on physical therapy for years after the accident. The State asked Mr. Ellsworth to show his scars to the jury. After the defense objected, the prosecutor explained that it wanted to show that the victim "was not the type of person that would have walked off without saying anything and leaving her children." The trial court agreed that the evidence was relevant, pointing out that the defense had said in its opening statement that the victim might not be deceased. The court agreed that the evidence did not have "a lot of probative value" under Rule 403 but that there was minimal danger of unfair prejudice. Thereafter, Mr. Ellsworth displayed the scars on his forearms to the jury.

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Evidence is relevant and generally admissible when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401, 402. Relevant evidence, however, "may be excluded if its probative value is substantially 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.

The evidence was minimally relevant to support Mr. Ellsworth's testimony about the severity of his injuries and to combat the defense's argument that the victim might still be alive. The scars were a visual representation of the injuries described in the witness's testimony, and no evidence showed that the Defendant had any involvement in Mr. Ellsworth's injury. Despite the minimal relevance of the evidence, the Defendant has not articulated any prejudice he suffered based on the evidence's admission. The trial court found that the probative value was not substantially outweighed by the danger of unfair prejudice, and the record supports its determination. The court did not abuse its discretion in allowing the jury to view the scars.

The Defendant asserts, in a cursory fashion, that admission of this evidence "was clearly done in violation of the Fifth Amendment of the United States Constitution," an assertion that he did not raise at trial. *See Adkisson*, 899 S.W.2d at 634; Tenn. Ct. Crim. App. R 10(b). We review this issue for plain error.

The Defendant has not established that admission of the evidence was prejudicial or improper. Likewise, we have considered his allegation of a constitutional error that violated his due process rights and have determined that it is without merit. The Defendant is not entitled to relief on this basis.

XI. Tim Helldorfer's Testimony Regarding William Conaley and James Allard

The Defendant alleges that the trial court erred in allowing Sergeant Tim Helldorfer to testify regarding statements made by Mr. Conaley and Mr. Allard, in ***286** violation of Rules of Evidence 801 and 802. The State contends that the testimony was prior consistent statements used to rebut implications on cross-examination about the Defendant's threat and confessions.

Sergeant Helldorfer testified that he interviewed Mr. Conaley in prison and that he obtained a statement from Mr. Allard in Johnson County, Indiana in 1997. Sergeant Helldorfer stated that Mr. Allard's previous testimony was consistent with the 1997 statement.

The Defendant objected, arguing that the statements were hearsay and were prior consistent statements. He contended that admitting the statements because a witness's credibility had been generally impeached was not the proper use of a prior consistent statement. The State asserted that the witness's credibility became an issue on cross-examination and that it was proper to show they had "previously made these statements" to different individuals. The Defendant argued that Mr. Conaley's 1997 statement was fabricated and that the State could not provide a statement he made to someone else as proof that it was not a fabrication.

The trial court stated that "the jury has a right to hear that [Mr. Allard and Mr. Conaley] gave consistent statements to ... the police...." It explained that the statements were being offered to bolster the witness's credibility. The court provided the following example to explain his ruling:

> If someone sees something, let's say they see someone run a light. And then they testify that they saw the person run the light.
>
> And the other side says, he didn't run the light, did he?
>
> Yes he did.
>
> And then [the witness] tells ten other people later on that he ran the light. I think the other side -- the first side has a right to put on the witnesses because he made that statement that he ran the light to many, many people over and over. To show his credibility on the stand, the credibility of his testimony.
>
> It's not being offered as substantive evidence. It's being offered to show his credibility, that he made that statement to several people.

The court allowed the officer to testify that Mr. Conaley's statements to police and at the trial were consistent. The court determined that the State could show Sergeant Helldorfer the transcript of Mr. Allard's trial testimony and ask whether it was consistent with Mr. Allard's statement to police. However, the contents of the transcript could not be admitted.

Out-of-court statements offered to prove the truth of the

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matter asserted are inadmissible at trial. *See* Tenn. R. Evid. 801, 802. However, when a defendant attacks a witness's credibility, the State may rehabilitate the witness by offering evidence of a prior consistent statement. *Benton*, 759 S.W.2d at 433. Admission of a prior consistent statement is authorized in two circumstances: (1) where the statement is offered to rebut the implication that the witness's testimony was a recent fabrication; and (2) when deliberate falsehood has been implied. *Id.* A prior consistent statement is not ordinarily admissible for the sole purpose of bolstering a witness's credibility. *Braggs*, 604 S.W.2d at 885.

Here, the trial court's comments reflect that the prior consistent statements were allowed merely to bolster the witness's credibility. The statements admitted through Sergeant Helldorfer were not made "before any improper influence or motive to lie existed." *State v. Herron*, 461 S.W.3d 890, 905 (Tenn. 2015) (citing *Sutton v. State*, 155 Tenn. 200, 291 S.W. 1069, 1070 (Tenn. 1927)). The defense's cross-examination ***287** of these witnesses implied that the statements about the Defendant's threat were fabricated in an effort to gain favorable treatment from the State. The statements to the police were not made before the purported motive to fabricate existed. Therefore, they were not prior consistent statements, and the court erred in admitting the statements.

Recognizing that all errors are not equal, our supreme court has established three categories of error—structural constitutional error, non-structural constitutional error, and non-constitutional error. *Powers*, 101 S.W.3d at 397; *State v. Garrison*, 40 S.W.3d 426, 433-34 (Tenn. 2000); *State v. Harris*, 989 S.W.2d 307, 314-15 (Tenn. 1999). The distinctions between these categories dictate the standards to be applied when determining whether a particular error is harmless. *State v. Rodriguez*, 254 S.W.3d 361, 371 (Tenn. 2008). A trial court's error in admitting evidence under the Tennessee Rules of Evidence falls into the category of non-constitutional error, and harmless error analysis under Tennessee Rule of Appellate Procedure 36(b) is appropriate. *See State v. Clark*, 452 S.W.3d 268, 287 (Tenn. 2014); *see also State v. James*, 81 S.W.3d 751, 763 (Tenn. 2002) (noting that "[h]armless error analysis applies to virtually all evidentiary errors other than judicial bias and denial of counsel"). Pursuant to Rule 36(b), the defendant bears the burden of showing that a non-constitutional error "more probably than not affected the judgment or would result in prejudice to the judicial process." T.R.A.P. 36(b); *Rodriguez*, 254 S.W.3d at 372.

The Defendant has not carried his burden in showing that he was prejudiced by admission of this evidence. Indeed, he has not offered any argument related to the prejudicial effect of this error. After considering the entirety of the evidence presented at the, we conclude that the error was harmless. The defense was able to cross-examine Mr. Conaley and Mr. Allard about their motivations to lie in exchange for more favorable treatment. The substance of the testimony was already in evidence, and the jury was instructed not to consider the consistent statements as substantive evidence. Further, overwhelming circumstantial evidence established the Defendant's guilt, including his previous relationship with the victim and motive for harming her, his threats to kill the victim, his confession to his cellmate, his possession of a car matching a description of the car seen at the motel, the presence in the car of blood and DNA matching the victim's, and his actions in the days following the victim's disappearance. Accordingly, the error was harmless, and the Defendant is not entitled to relief on this basis.

The Defendant also maintains that admission of this evidence violated the Fifth Amendment of the United States Constitution. He did not object on this basis at the trial and does not elaborate in his appellate brief as to how the Fifth Amendment was violated. *See Adkisson*, 899 S.W.2d at 634; Tenn. Ct. Crim. App. R 10(b). Our review is limited to plain error, and we conclude that the Defendant has not shown that the admission of this evidence affected a substantial right. The substantial right inquiry under the plain error doctrine mirrors the harmless error analysis under Rule 36(b). *See Maddin*, 192 S.W.3d at 562. Upon consideration, we conclude, as well, that admission of the evidence did not violate the Defendant's due process rights under the Fifth Amendment.

XII. Trial Court's Limitation of Sergeant Helldorfer's Testimony

The Defendant contends that the trial court erred in limiting the defense's questioning ***288** of Sergeant Helldorfer. He argues that the defense should have been allowed to ask during cross-examination whether Billy Wayne Voyles had been positively identified. The Defendant further asserts that Sergeant Helldorfer should have been allowed to testify about a document relating to the release of the maroon Honda. The State responds that the defense agreed to the limitation on testimony about the positive identification and cannot now claim error. Further, the State asserts that the document was inadmissible because it could not be authenticated by the witness.

A. Positive Identification

During its examination of Sergeant Helldorfer, the defense asked whether he was "aware that there was a positive identification made, that Billy Voyles was positively identified in the case." The prosecution objected to the question, arguing it was hearsay. The court overruled the objection because it was admissible as a prior identification but stated that there was a question as to whether a witness made a "positive" identification. Defense counsel then said, "I will take the word positive out if that is the problem." The court additionally noted that the Defendant needed to establish that the questioning was related to Mr. Darnell's identification of Mr. Voyles. The defense again agreed and asked Sergeant Helldorfer whether "Mr. Darnell had identified Billy Wayne Voyles as an eye witness as being on the scene at the time during [the] investigation." Sergeant Helldorfer answered affirmatively.

Tennessee Rule of Appellate Procedure 36(a) provides that "[n]othing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." The Defendant agreed to take the word positive out of the question posed to Sergeant Helldorfer, and he cannot now claim error on that basis. In any event, the Defendant has not explained how he was prejudiced by this limitation. Sergeant Helldorfer testified that Mr. Darnell identified Mr. Voyles as one of the men he saw in the motel office, and Mr. Darnell testified that he identified Mr. Voyles. The Defendant is not entitled to relief on this basis.

The Defendant also alleges that this limitation violated his Fifth Amendment rights under the United States Constitution. The Defendant did not raise this issue at the trial and does not provide any meaningful argument regarding this issue in his brief. *See Adkisson*, 899 S.W.2d at 634; **Tenn**. Ct. Crim. App. R 10(b). We review the issue for plain error and conclude that the Defendant has not proven this limitation amounted to a due process violation or that a substantial right was adversely affected. The defense sought to elicit testimony that Mr. Darnell identified Mr. Voyles as one of the men at the motel. The court did not allow the defense to use the word "positive" when pursuing this line of questioning because Mr. Darnell had not used the word when he testified about the identification. The Defendant agreed to remove the word "positive" from his question. Deleting the word from the question did not meaningfully change the witness's testimony and had no effect on the outcome of the trial. The Defendant is not entitled to relief on this basis.

B. Towing Slip

During cross-examination, the defense showed Sergeant Helldorfer three documents, one of which was a towing slip for the Honda. When asked whether he recognized them, he replied that he only recognized the towing slip. The Defendant questioned ***289** Sergeant Helldorfer about the two unidentified documents. The State objected, arguing that the witness had not authenticated the documents. In response, the defense asserted that the three documents were received together in discovery and that Sergeant Helldorfer's signature appeared on the towing slip. The defense asserted that one of the unidentified documents appeared to be the back of the towing slip, which had been authenticated by Sergeant Helldorfer. The defense explained that it was attempting to establish when the car was released and to whom, information that was reflected on one of the documents. However, Sergeant Helldorfer testified that the writing on the purported back of the towing slip was not his. He explained that he only wrote on the front of the towing slip and could not verify the information contained on the back. The trial court informed the Defendant that the witness had to authenticate the document purported to be the back of the towing slip before it could be admitted into evidence. Thereafter, the officer testified that his signature was on the towing slip, which reflected that the car was released on March 25. However, he did not have personal knowledge of where the car was taken after it was released. Because he could not identify the purported back of the towing slip, that document was not admitted into evidence.

Before a document is admitted into evidence, the party seeking admission generally must authenticate the document. *State v. Troutman*, 327 **S.W.3d** 717, 722 (**Tenn**. Crim. App. 2008); *See* **Tenn**. R. Evid. 901(a). Sergeant Helldorfer testified that he recognized the towing slip. However, he was unable to identify the document that the defense claimed was the back of the towing slip. The trial court did not abuse its discretion in refusing to admit the unauthenticated document, and this issue is without merit.

The Defendant again asserts a Fifth Amendment challenge to this issue, which was not a basis for objection at trial and is not adequately argued in his brief. *See Adkisson*, 899 S.W.2d at 634; **Tenn**. Ct. Crim. App. R 10(b). We review the issue for plain error and conclude that the Defendant has not established that the trial court's

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decision violated a clear and unequivocal rule of law. Because there was no error in the court's decision to exclude this evidence based on a lack of authentication, the allegation of a constitutional error is without merit. The Defendant is not entitled to relief on this basis.

XII[I]. Joyce Carmichael's Testimony

Joyce Carmichael is the official records officer for the Tennessee Department of Correction. Ms. Carmichael testified that Tommy Voyles and the Defendant were both incarcerated at Lake County Regional Correctional Facility during a five-month period in 1992. Later in the trial, another witness testified that Tommy and Billy Voyles were related and that the witness had seen them together, although the witness did not specify how they were related. Before her testimony, the defense objected to the relevance of evidence that Tommy Voyles had been incarcerated with the Defendant previously. The prosecutor argued that there was more than one person involved in the victim's disappearance and that Tommy Voyles might have been involved. Thus, the State wanted to show the connection between the Defendant and Tommy Voyles. The defense pointed out that the only testimony regarding Tommy Voyles was that he had been previously married to the victim. The State further explained that "there appear to be multiple people involved in this" and that one of the individuals involved was identified by a ***290** witness as Billy Voyles. Thus, argued the State, "the fact that [the Defendant] has a close connection with a Tommy Voyles would be relevant." The trial court admitted the testimony, noting that it was "not extremely probative but there's absolutely no unfair prejudice."

The evidence does not support the trial court's determination that evidence attempting to connect the Defendant with Tommy Voyles was relevant. The evidence was too remote to be relevant to a material issue in the case. Tenn. R. Evid. 401 and 402. There was testimony that Tommy Voyles and the Defendant had been incarcerated in the same facility but not that they knew each other, were housed together, or interacted in any capacity during that time. Even if a "close connection" between the Tommy Voyles and the Defendant were proved, that connection does not result in a conclusion that a connection existed between the Defendant and Billy Voyles. The court's admission of this irrelevant evidence was error, but we conclude that the error was harmless based upon the overwhelming circumstantial evidence of the Defendant's guilt. *See* Tenn. R. App. P. 36(b). The Defendant is not entitled to relief on this basis.

XIV. Prior Testimony of Unavailable Witnesses

The Defendant contends that the trial court erred in allowing previous testimony from witnesses, along with related exhibits, who were unavailable at the second trial. He alleges that the admission of this testimony was unfair because the witnesses were questioned by his previous counsel, who were found to be constitutionally ineffective. The State responds that each of the unavailable witnesses was subject to cross-examination and that counsel from the Defendant's first trial were not ineffective in questioning witnesses.

Pursuant to Tennessee Rule of Evidence 804(b), the former testimony of a declarant who is currently unavailable to testify is admissible. "Former testimony" is "[t]estimony given as a witness at another hearing of the same or a different proceeding ..., if the party against whom the testimony is now offered had both an opportunity and a similar motive to develop the testimony by direct, cross, or redirect examination." Tenn. R. Evid. 804(b)(1). The similar motive requirement is met when the issues in the present case are "sufficiently similar" to the issues in the case in which the prior testimony was given. *See State v. Howell*, 868 S.W.2d 238, 252 (Tenn. 1993). The Constitution of the United States provides the accused in a criminal prosecution the right "to be confronted with witnesses." U.S. Const. amend. VI.; *see also* Tenn. Const. art. I, § 9. However, "the Confrontation Clause only guarantees 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' " *Pennsylvania v. Ritchie*, 480 U.S. 39, 53, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 88 L.Ed.2d 15 (1985)). Our courts have upheld the admission of prior testimony given at a preliminary hearing, *see State v. Bowman*, 327 S.W.3d 69, 88-89 (Tenn. Crim. App. 2009), and in another state, *see Howell*, 868 S.W.2d at 252.

The prior testimony of eight witnesses was read into evidence at the Defendant's trial. With the exception of one witness, the prior testimony was from either the Defendant's preliminary hearing or his first trial. The exception was the testimony of Dixie Presley, who testified at the previous trial and at the Defendant's post-conviction evidentiary hearing. The post-conviction ***291** court determined that trial counsel were ineffective for failing to cross-examine Ms. Presley about the two

men she saw at the motel on the night of the victim's disappearance. However, she was specifically questioned about this matter at the post-conviction hearing, and this testimony was read into evidence at the Defendant's second trial. Therefore, any failure to effectively cross-examine Ms. Presley at the first trial was satisfied by her questioning at the post-conviction hearing and the subsequent introduction of this evidence at the second trial.

The record reflects that the Defendant had an opportunity to, and in fact did, cross-examine each witness. The Defendant had a similar motive to develop the testimony of these witnesses during examination in the prior proceedings in which he was facing the same charges. Other than the exception discussed above, the Defendant was granted post-conviction relief on the basis that his counsel were ineffective in investigating the case, not in examining witnesses. The Defendant has not cited any cases holding that prior testimony is inadmissible when post-conviction relief is granted for a reason unrelated to counsel's examination of witnesses. Accordingly, he is not entitled to relief on this basis.

The Defendant also argues that admission of this prior testimony violated his Fifth Amendment rights. He did not object on this basis at trial and does not elaborate on this issue in his brief. *See Adkisson*, 899 S.W.2d at 634; **Tenn**. Ct. Crim. App. R 10(b). We review the issue for plain error.

Because we have determined that admission of the prior testimony was proper, we conclude that the Defendant has not shown that his due process rights were violated in this respect. No clear and unequivocal rule of law was breached, and the Defendant is not entitled to relief on this basis.

XV. Admission of Richard Rimmer's Prior Inconsistent Statements

The Defendant alleges that the trial court should not have admitted Richard Rimmer's prior inconsistent statements and related exhibits as substantive evidence. The State asserts that this evidence was properly admitted as a prior inconsistent statement and as past recollection recorded.

At trial the Defendant's brother, Richard Rimmer, testified that he could not recall giving a statement to the police in 1997. The State showed Mr. Rimmer a copy of a statement dated February 18, 1997, and although he recognized his signature on the statement, he did not remember giving the statement. The prosecutor asked Mr. Rimmer about each question and answer provided in the statement. In two instances, he denied providing a particular answer, but he mostly stated that he had no memory of the statement. He testified that he had suffered several head injuries, which impacted his memory. The State also showed him drawings he allegedly made, but he denied making the drawings.

The State sought to have the statement and drawings admitted as substantive evidence under **Tennessee** Rule of Evidence 803(26). The trial court found that for the statements Mr. Rimmer denied making, they were prior inconsistent statements under **Tennessee** Rule of Evidence 613(b) and were admissible, if the court found they were trustworthy, pursuant to Rule 803(26), providing a hearsay exception for prior inconsistent statements. For the statements Mr. Rimmer did not remember making, the court found that he was an unavailable witness pursuant to Rule of Evidence 804(a)(3), and those questions ***292** and answers could be read to the jury. Both sides presented testimony relevant to competency at the time the statement was given.

The defense called Mr. Rimmer's mother, Sandra Rimmer, who testified that Mr. Rimmer had received disability benefits since 1990 or 1991 due to a head injury that caused brain damage. She stated that his daily activities were impacted and that he "sometimes ... thinks things are happening [that were] not happening." Ms. Rimmer admitted that in 1997, Mr. Rimmer was capable of living on his own, managed daily activities without assistance, and worked to support himself. She also said he was competent to enter into a lease agreement.

The State called Sergeant Helldorfer, who testified that he met with Mr. Rimmer on February 13 and 18, 1997. His impression was that Mr. Rimmer fully understood the questions asked and answered them appropriately. Sergeant Helldorfer said that he did not ask leading questions and that Mr. Rimmer provided the details. The February 18 conversation was memorialized in a written statement. The officer also testified about Mr. Rimmer's drawings. One drawing depicted the location of the blood in the backseat, and the other was a drawing of the shovel, of which the Defendant asked Mr. Rimmer to dispose. Sergeant Helldorfer confirmed that the statement and drawings about which Mr. Rimmer had been questioned were those obtained by Sergeant Helldorfer on February 18, 1997.

In assessing whether the evidence was trustworthy, the trial court noted the level of detail contained in Mr. Rimmer's answers. The court further found that the

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statement appeared to come from a competent person and not from someone who was intellectually disabled. The court determined that the statement was given under circumstances indicating its trustworthiness.

The trial court determined that the statements Mr. Rimmer denied making were admissible pursuant to Rule 803(26). The court further ruled that the drawings could be admitted into evidence, as Mr. Rimmer had denied making them. However, as to the statements for which Mr. Rimmer claimed a lack of memory, the court found those were not inconsistent statements and could not be admitted under 803(26). Rather, the court found that portions of the statement qualified as a past recollection recorded pursuant to Rule 803(5). Thus, those portions could be read into evidence but not admitted as an exhibit.

Hearsay is defined as "a statement, 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). As a general rule, hearsay is not admissible during a trial, unless the statement falls under one of the exceptions to the rule against hearsay. **Tenn**. R. Evid. 802. However, many exceptions to the rule against hearsay exist. **Tennessee** Rule of Evidence 803(26) provides that a prior inconsistent statement that is otherwise admissible under Rule 613(b) is admissible as substantive evidence if the following prerequisites are met:

> (A) The declarant must testify at the trial or hearing and be subject to cross-examination concerning the statement.
>
> (B) The statement must be an audio or video recorded statement, a written statement signed by the witness, or a statement given under oath.
>
> (C) The judge must conduct a hearing outside the presence of the jury to determine by a preponderance of the evidence that the prior statement was ***293** made under circumstances indicating trustworthiness.

This rule has been interpreted to apply when a testifying witness claims a lack of memory. *State v. Davis*, 466 **S.W**.**3d** 49, 64 (**Tenn**. 2015).

Tennessee Rule of Evidence 613(b) permits the use of extrinsic evidence of prior inconsistent statements for the purpose of impeachment. The Rule provides that "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless and until the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require."

Additionally, Rule 803(5) provides another exception to the hearsay rule, which is commonly referred to as past recollection recorded. That rule deems admissible

> [a] memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

The Defendant alleges that Mr. Rimmer's prior statement should have been considered by the jury for impeachment purposes only. However, Rule 803(26) provides that an inconsistent statement may be admitted as substantive evidence when certain conditions are satisfied. Mr. Rimmer testified at the trial that the statement was written and signed by him, and the trial court conducted a jury-out hearing during which it determined the statement was trustworthy. The court did not err by admitting the prior statement pursuant to Rules 613(b) and 803(26). Additionally, the statement was properly admitted as a recorded recollection under Rule 803(5). The statement was taken shortly after the events in question, and Mr. Rimmer no longer remembered the statement. Further, the court allowed the statement to be read into evidence but did not admit it as an exhibit. Accordingly, Mr. Rimmer's prior statement was admissible under 803(26) and 803(5), and the Defendant is not entitled to relief on this issue.

The Defendant again asserts a general Fifth Amendment challenge to the admission of this evidence, although he did not object on that basis at trial and does not provide meaningful argument on the issue in his brief. *See Adkisson*, 899 S.W.2d at 634; **Tenn**. Ct. Crim. App. R 10(b). Our review is limited to plain error. In that regard, we conclude that the Defendant has not established that he is entitled to plain error relief.

XVI. Kenneth Falk's Testimony

The Defendant argues that the trial court erred in prohibiting the testimony of attorney Kenneth Falk regarding the success of a lawsuit concerning conditions at the Johnson County Jail in Indiana. The State responds that the evidence was properly excluded as it was irrelevant.

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The Defendant offered the testimony of Mr. Falk to establish that the Defendant's escape attempts were related to the conditions at the jail and did not reflect a consciousness of guilt. The State objected on relevancy grounds. The trial court allowed the testimony to rebut the implication that his escapes were based on guilt. However, the court prohibited Mr. Falk from testifying about any details the Defendant discussed with him.

***294** Mr. Falk testified that was legal director of the American Civil Liberties Union (ACLU) of Indianapolis, Indiana. He said that in 1997, the Defendant contacted his office concerning the conditions at the Johnson County Jail. His office filed a lawsuit based on the Defendant's complaints, although it was filed on behalf of other inmates because the Defendant was no longer confined in the jail by the time the lawsuit was filed. When the defense asked Mr. Falk whether the lawsuit was successful, the State objected. The trial court sustained the objection, stating there was no need "to talk about what happened in the lawsuit."

The trial court did not abuse its discretion in limiting Mr. Falk's testimony. The defense's stated purpose in offering the evidence was to provide a reason, other than guilt, for the Defendant's escape attempts. Mr. Falk established that the Defendant complained about the conditions and that a lawsuit was filed as a result. The court did not abuse its discretion in limiting the details of the lawsuit, including whether it was successful. The Defendant is not entitled to relief on this basis.

The Defendant maintains that excluding this evidence violated the Fifth Amendment of the United States Constitution. He did not object on this basis at trial and does not elaborate on the issue in his brief. *See Adkisson*, 899 S.W.2d at 634; **Tenn**. Ct. Crim. App. R 10(b). Thus, our review is limited to plain error.

To determine whether the exclusion of this testimony to the level of a constitutional violation, we consider the following: (1) whether the evidence is critical to the defense, (2) whether it bears sufficient indicia of reliability, and (3) whether the interest supporting exclusion is substantially important. *See Brown*, 29 **S.W. 3d** at 433-34.

The Defendant has not proven that the evidence was critical to his defense, and therefore, no substantial right was adversely affected. As noted above, the Defendant was able to establish through Mr. Falk's testimony that conditions at the jail led the ACLU to file a lawsuit, which provided an alternative reason for the Defendant's escape attempt. We cannot conclude that additional testimony that the lawsuit was successful would have changed the outcome of the trial. Accordingly, plain error relief is not warranted.

XVII. Marilyn Miller's Testimony

The Defendant asserts that the trial court erred in not allowing Marilyn Miller to give an opinion on the length of time that the maroon Honda should have been kept by law enforcement. He alleges that her testimony would have supported his request for a *Ferguson* jury instruction. He claims that exclusion of this testimony violated Rules of Evidence 401 and 402. The State contends that the exclusion was proper and argues that the decision to provide a *Ferguson* instruction was a question of law for the court and that Dr. Miller's testimony would not have assisted the jury. The State further responds that the proffered testimony was outside the scope of Dr. Miller's expertise.

Dr. Miller testified that she was an associate professor of forensic science at Virginia Commonwealth University. She had a bachelor's degree in chemistry, a master's degree in forensic chemistry, and a doctorate in education. Before teaching, she spent fourteen years working as a forensic scientist and a crime scene investigator for three law enforcement agencies. Her duties included responding to and investigating crime scenes and analyzing evidence in a laboratory. She had taught for twenty-two years in the field of forensic science and crime scene investigation. The ***295** trial court admitted Dr. Miller as an expert in crime scene investigation, crime scene reconstruction, forensic science, and serology and blood spatter analysis.

The defense asked Dr. Miller whether she had an opinion regarding the length of time the maroon Honda should have been retained by law enforcement. The State objected, and the trial court sustained the objection. The court acknowledged that Dr. Miller was a crime scene expert but found that it was improper for her to give an opinion about the duty to preserve evidence as it related to *Ferguson*.

The Defendant asserts that this limitation violated Rules of Evidence 401 and 402. As previously discussed, **Tennessee** Rule of Evidence 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 402 provides, in part, that "[e]vidence which is not relevant is

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not admissible."

The Defendant contends that Dr. Miller's testimony would have assisted the jury in understanding "that the defense was not given ample opportunity to inspect and test the maroon Honda." However, we agree with the State that this matter was relevant to whether there was a duty to preserve, and that was an issue solely within the purview of the trial court. Accordingly, the court did not abuse its discretion in ruling the testimony was inadmissible.

The Defendant contends that exclusion of this evidence violated the Fifth Amendment. Because he did not raise this issue at trial and does not provide argument regarding this issue in his appellate brief, our review is limited to plain error. *See Adkisson*, 899 S.W.2d at 634; **Tenn**. Ct. Crim. App. R 10(b). We conclude that the Defendant failed to meet his burden in proving that exclusion of Dr. Miller's testimony violated a clear and unequivocal rule of law. The evidence was not critical to the defense because the issue of the duty to preserve evidence is a matter of law for the trial court's determination. Dr. Miller's testimony would not have assisted the jury in its resolution of any issue in the case. The Defendant is not entitled to relief on this basis.

XVIII. Documents Related to Lawsuit against Shelby County Jail

Next, the Defendant asserts that the trial court should have admitted into evidence another prisoner's affidavit about the prisoner's experiences in the Shelby County Jail and about a 2000 contempt order. The State disagrees, arguing that these documents lacked probative value because they related to the jail's conditions when the Defendant was no longer confined there and that the affidavit was inadmissible hearsay.

Attorney Robert Hutton testified that in 1996 or 1997 he filed a lawsuit against the Shelby County Jail, alleging that jail conditions violated the Eighth Amendment to the United States Constitution. Shelby County stipulated that the conditions were unconstitutional and agreed to make changes to the facility. The defense attempted to admit several documents related to the lawsuit, and the State objected. One of the documents was described as a contempt order, which contained "graphic, specific instances, everything from smack down tournaments ... to gang rapes." The State argued that no evidence reflected that the Defendant had personal knowledge of these activities and that it was irrelevant to show why he attempted to escape. The State also noted that several of the documents pertained to times when ***296** the Defendant was no longer confined at the jail. The defense argued that the documents described the jail as a "hell hole" and that the documents were relevant to establishing the Defendant's state of mind at the time of the attempted escape.

The trial court found that the general information relating to the conditions at the jail and the county's admission that they were unconstitutional were admissible. It excluded evidence of specific instances of conduct at the jail, unless the Defendant could establish a link between himself and the conduct. The court stated that the Defendant had "a right to show that the jail conditions were bad, as a possible reason that he might escape, but as far as showing that some gang member raped some other gang member in the jail, ... that is far [afield]." Thus, the court permitted the defense to present the consent order in which Shelby County admitted the conditions were unconstitutional but not the additional litigation documents because "the majority of which took place when [the Defendant] was not in [the] jail."

The purpose of the evidence was to provide a reason for the Defendant's attempted escape other than a consciousness of guilt. Mr. Hutton's testimony and the consent order established that conditions at the jail were unconstitutional and that the County agreed to make changes. The excluded documents generally detailed specific instances of violence and sexual assault, but the incidents were not connected to the Defendant, and he did not establish the excluded documents relevance. Therefore, the trial court did not abuse its discretion by prohibiting the admission of the relevant documents, and the Defendant is not entitled to relief on this basis.

The Defendant asserts that the exclusion of this evidence was a violation of the Fifth Amendment of the United States Constitution. He did not assert that issue at trial, and his cursory treatment of the issue in his brief qualifies it for waiver. *See Adkisson*, 899 S.W.2d at 634; **Tenn**. Ct. Crim. App. R 10(b). Our review is limited to plain error. We conclude that the specific instances of conduct the Defendant sought to introduce were not critical to the defense because nothing connected the Defendant's experience at the jail to the unconstitutional conduct. Accordingly, the trial court's exclusion did not affect the outcome of the trial. The Defendant has not established plain error and is not entitled to relief on this basis.

XI[X]. Non-Capital Sentencing

Finally, the Defendant raises one sentencing issue related to the application of an aggravating factor relative to his aggravated robbery conviction. He asserts that proof did not support a finding that he was a leader in the offense and that the trial court erred by applying this factor and ordering the sentence for aggravated robbery to be served consecutively to the death sentence. The State responds that the Defendant has waived this issue for failing to include a transcript from this portion of the penalty phase. Alternatively, the State asserts that the evidence supported application of the enhancing factor.

As the appellant, it was the Defendant's burden to prepare an adequate record for appellate review. *See State v. Ballard*, 855 S.W.2d 557, 560 (**Tenn**. 1993). In the absence of an adequate record, this court must presume that the trial court's ruling was correct. *See State v. Richardson*, 875 S.W.2d 671, 674 (**Tenn**. Crim. App. 1993); *see also State v. Ivy*, 868 S.W.2d 724, 728 (**Tenn**. Crim. App. 1993) (holding that when the appellant contends that the sentence is excessive but does not include a transcript from the sentencing hearing, the ***297** issue of excessive sentences will be considered waived); **Tenn**. R. App. P. 24(b).

Without a transcript of the non-capital sentencing hearing, this court cannot evaluate the trial court's application of the enhancement factor, and we presume the court's action was correct. The Defendant is not entitled to relief on this basis.

X[X]. Mandatory Review

[Omitted]

[CONCLUSION]

[Omitted]

Sharon G. Lee, J., concurring.

I concur in the Court's opinion except for the analysis of the proportionality review. In 1997, this Court narrowed the scope of the proportionality review required by **Tennessee** Code Annotated section 39-13-206(c)(1)(D) (2018 & Supp. 2020) by limiting consideration to only those cases in which the State sought the death penalty. *State v. Bland*, 958 S.W.2d 651, 666 (**Tenn**. 1997). A majority of this Court reaffirmed this truncated approach in *State v. Pruitt*, 415 **S.W**.**3d** 180, 217 (**Tenn**. 2013).

In *Pruitt*, I joined Justice William C. Koch, Jr. in dissenting from the Court's decision to continue following the *Bland* approach, as it improperly narrowed the proportionality review required by **Tennessee** Code Annotated section 39-13-206(c)(1)(D). *Pruitt*, 415 **S.W**.**3d** at 230 (Koch and Lee, JJ., concurring and dissenting). We determined that the Court should return to its pre-*Bland* proportionality analysis by considering "all first-degree murder cases in which life imprisonment or a sentence of death has been imposed" and focusing on whether the case under review is more like cases in which the State sought the death penalty than those in which the death penalty was not sought. *Id*. at 226, 230–31.[1] By considering only cases in which the State sought a death sentence, the *Bland* approach "hides the full picture" from view. *Id.* at 230.

Thus, after reviewing similar first-degree murder cases, including those in which the State did not seek the death penalty, I conclude that Mr. Rimmer's personal background and the nature of the crimes he committed are more like the personal backgrounds and the crimes committed by other persons who have received a death sentence than those who have not. Based on **Tennessee** Code Annotated section 39-13-206(c)(1)(D) and the evidence, I find that Mr. Rimmer's death sentence is neither excessive nor disproportionate to the penalty imposed in similar cases.

All Citations

623 S.W.3d 235

Footnotes

1 We heard oral argument through videoconference under this Court's emergency orders restricting court proceedings because of the COVID-19 pandemic.

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2 The facts and evidence summarized in this opinion are from the April 2016 trial.

3 The victim's daughter is also referred to in the record as Tracye Ellsworth, and at times her first name is spelled "Tracy" or "Tracey."

4 At trial, the Defendant's prior employer was also referred to as Adesa.

5 The last name of Howard and Cheryl Featherston is at times referred to in the record as "Featherstone."

6 The Defendant revealed tattoo-free arms to the jury at trial.

7 In addition to the charges at issue, the grand jury indicted the Defendant for theft of Mr. Featherston's maroon Honda. This charge was originally consolidated with the Defendant's indictments for aggravated robbery and first degree murder. Prior to the second trial, on the Defendant's motion, the trial court severed the theft charge, so the jury in the second trial did not hear proof related to it.

8 The trial transcript identifies the husband as "Eugene Donald Ellsworth," but he states in his testimony that his name is Donald Eugene Ellsworth.

9 Several weeks earlier, the Defendant told his brother that the victim bought the Honda for him but did not want her husband to know. At that time, the Defendant enlisted his brother to help him "pick up" the car from the home of a Collision Center coworker who was supposedly storing it for the Defendant. They pulled up to the coworker's home with no lights on and took the car without going to the house, purportedly so they would not "disturb" the coworker's wife.

10 While incarcerated in the Johnson County Jail, the Defendant reported subpar jail conditions to the American Civil Liberties Union of Indianapolis, Indiana, and eventually filed a related civil rights lawsuit. At the trial in this case, the Defendant argued his attempt to escape the Johnson County Jail was related to poor jail conditions.

11 Around the same time, a local attorney, Robert Hutton, filed a lawsuit alleging unconstitutional conditions in the Shelby County Jail due to gang violence. For purposes of injunctive relief, Shelby County admitted the level of violence in the jail violated the Eighth Amendment. At the trial in this case, the Defendant presented evidence of the lawsuit and the County's subsequent admission in support of his contention that this escape attempt was related to jail conditions.

12 The reference in the transcript to "amino black and luminal" was likely intended to refer to Amido black and Luminol.

13 This statute was repealed in 1989. *See generally* Act of June 12, 1989, ch. 591, § 1, 1989 **Tenn**. Pub. Acts 1169. Currently, assault offenses are found at **Tennessee** Code Annotated sections 39-13-101 to -116.

14 *See supra* note 13.

15 This statute was repealed in 1989. *See generally* Act of June 12, 1989 § 1. Rape is currently found at **Tennessee** Code Annotated section 39-13-503.

16 Since the Defendant's 1998 trial, the practice as to sequential jury instructions on counts of first degree premediated murder and felony murder has changed. Now, when a defendant faces charges of both first degree premeditated murder and felony murder, trial courts have been advised to instruct the jury to return a verdict on both charges. If the jury returns a guilty verdict on both, the convictions are merged, as they are alternative methods of committing the same offense—first degree murder. *See State v. Cribbs*, 967 S.W.2d 773, 788–89 (**Tenn**. 1998).

17 The outcome of our review would be the same under **Tennessee** Code Annotated section 39-13-206(b).

18 The Defendant alleged that the prosecutor in the first trial committed misconduct by: withholding exculpatory evidence;

destroying exculpatory evidence; filing motions that contained misrepresentations; knowingly directing a witness to provide false testimony; and failing to inform the Defendant about a possible conflict of interest. As noted above, the post-conviction court rejected these claims.

19 Again, the post-conviction court granted the Defendant relief based on ineffective assistance of counsel, not the alleged prosecutorial misconduct.

20 In *Merriman*, we noted that a *Ferguson* analysis may be conducted pre-trial. We cautioned, however, that evidence to be presented at trial is reviewed only to put the missing evidence into context and allow the court to craft the appropriate remedy, if necessary. It is not reviewed for the purpose of determining the defendant's guilt or innocence beyond a reasonable doubt. The trial court retains discretion to reserve its ruling on a *Ferguson* motion until the evidence has been presented at trial. *Merriman*, 410 S.W.3d at 789–90. In the instant case, because this was the Defendant's second trial, the trial court was able to view evidence that had substantially been presented to jurors in the previous trial and reviewed by appellate courts.

21 The State also sought to introduce evidence the Defendant engaged in other domestic abuse of the victim. As to this evidence, the trial court held the State failed to meet the clear and convincing standard of Rule 404(b), so it denied the request. This ruling was not challenged on appeal. The State also sought to introduce evidence that the maroon Honda the Defendant was driving when he was arrested in Indiana had been reported stolen. At the Rule 404(b) hearing, the parties agreed to draft a stipulation explaining the defendant was pulled over and detained in Indiana for a reason unrelated to the disappearance of the victim, so the trial court dismissed this portion of the State's motion as moot.

22 The Defendant also argues the evidence regarding the shanks was admitted in violation of the Fifth Amendment of the United States Constitution and Tennessee Rules of Evidence 401, 402, and 403. The Defendant references no caselaw and makes only a skeletal argument. This argument is without merit.

23 The Defendant claims his death sentence was arbitrary because the decision to seek the death penalty is left to the whim of a prosecutor and is often a product of outside pressures, like the media. Both the United States Supreme Court and this Court have concluded that the discretion afforded to prosecutors in deciding whether to seek the death penalty does not render the penalty arbitrary or capricious. *Gregg v. Georgia*, 428 U.S. 153, 199, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *State v. Brimmer*, 876 S.W.2d 75, 86 (Tenn. 1994). The Defendant further contends it was arbitrary because the guilty verdict in this case was based on circumstantial evidence. This argument is counter to well-established Tennessee precedent. "[T]he cases have long recognized that the necessary elements of first-degree murder may be shown by circumstantial evidence." *State v. Brown*, 836 S.W.2d 530, 541 (Tenn. 1992). Finally, the Defendant asserts the death penalty should not be an option in a trial with errors. We have held repeatedly that defendants, even in capital cases, are not entitled to a perfect trial. *See, e.g.*, *State v. Hutchison*, 482 S.W.3d 893, 921 (Tenn. 2016) ("[T]he Constitution entitles a criminal defendant to a fair trial, not a perfect one." (alteration in original) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986))); *State v. Hawkins*, 519 S.W.3d 1, 38 (Tenn. 2017) (affirming a death sentence despite harmless error in admitting the defendant's statement); *State v. Willis*, 496 S.W.3d 653, 730 (Tenn. 2016) (affirming a death sentence despite harmless error in double-counting a single felony-murder aggravating circumstance). We respectfully reject these arguments.

24 Tennessee Supreme Court Rule 12 requires trial courts to file extensive reports in all cases in which the defendant is convicted of first degree murder. These reports include data about the crime, the defendant, and the punishment imposed. *See* Tenn. Sup. Ct. R. 12(1) & app.

25 *Keough* involved a defendant who murdered his estranged ex-wife.

1 *See also State v. Jones*, 568 S.W.3d 101, 146–47 (Tenn. 2019) (Lee, J., concurring) (applying this broader comparative approach); *State v. Clayton*, 535 S.W.3d 829, 863–64 (Tenn. 2017) (Lee, J., concurring) (same); *State v. Hawkins*, 519 S.W.3d 1, 54–55 (Tenn. 2017) (Lee, J., concurring) (same); *State v. Willis*, 496 S.W.3d 653, 762 (Tenn. 2016) (Lee, J., concurring) (same); *State v. Hall*, 461 S.W.3d 469, 504–05 (Tenn. 2015) (Lee, J., concurring) (same); *State v. Dotson*, 450 S.W.3d 1, 84–85 (Tenn. 2014) (Koch and Lee, JJ., concurring) (same); *State v. Freeland*, 451 S.W.3d 791, 826–27 (Tenn. 2014) (Koch and Lee, JJ., concurring) (same).

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2019 WL 2208471
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Court of Criminal Appeals of Tennessee,
AT JACKSON.

STATE of Tennessee
v.
Michael RIMMER

No. W2017-00504-CCA-R3-DD
|
September 5, 2018 Session
|
FILED 05/21/2019

Appeal from the Criminal Court for Shelby County, No. 98-01033, 98-01034, Chris Craft, Judge

Attorneys and Law Firms

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Robert H. Montgomery, Jr., J., delivered the opinion of the court, in which Thomas T. Woodall and Norma McGee Ogle, JJ., joined.

OPINION

Robert H. Montgomery, Jr., J.

The Defendant, Michael Rimmer, was convicted by a Shelby County jury of first degree premeditated murder, first degree felony murder, and aggravated robbery. T.C.A. § 39-13-202(1), (2) (Supp. 1998) (first degree murder), § 39-13-402 (1997) (aggravated robbery). The trial court merged the felony murder conviction into the premeditated murder conviction. The jury sentenced the Defendant to death for the first degree murder conviction, and the trial court sentenced him to eighteen years for the aggravated robbery conviction and ordered it to be served consecutively to the sentence for the murder conviction. On appeal, the Defendant contends that: (1) the evidence is insufficient to support his convictions for first degree murder and aggravated robbery; (2) the trial court erred in denying his motion to dismiss the felony murder charge; (3) the trial court erred in denying his motion to suppress DNA evidence; (4) the trial court erred in not striking the State's opening statement or declaring a mistrial based on a comment made by the State; (5) the trial court erred in admitting evidence of the Defendant's prior convictions; (6) the trial court erred in limiting the testimony of William Baldwin; (7) the trial court erred in admitting a drawing of the backseat of the Honda the Defendant was driving when he was arrested; (8) the trial court erred in finding James Allard was unavailable and allowing his testimony from the previous trial to be entered into evidence; (9) the trial court erred in admitting hearsay testimony through witness Rhonda Bell; (10) the trial court erred in allowing Chris Ellsworth to display his scars to the jury; (11) the trial court erred in allowing hearsay testimony through witness Tim Helldorfer; (12) the trial court erred in limiting the testimony of Tim Helldorfer regarding a photograph identification and the release of the Honda from police custody; (13) the trial court erred in allowing Joyce Carmichael to testify about Tommy Voyles; (14) the trial court erred in admitting previous testimony of deceased or otherwise unavailable witnesses; (15) the trial court erred in admitting Richard Rimmer's prior statement and related exhibits as substantive evidence; (16) the trial court erred in limiting the testimony of Kenneth Falk; (17) the trial court erred in limiting the testimony of Marilyn Miller; (18) the trial court erred in excluding documents relating to a lawsuit involving the Shelby County Jail; and (19) the trial court erred in applying an aggravating factor and imposing a consecutive sentence for the aggravated robbery conviction. Following our review, we affirm the judgments of the trial court.

PROCEDURAL BACKGROUND

***1** On November 7, 1998, the Defendant, Michael Rimmer, was convicted by a Shelby County jury of first degree premeditated murder, first degree felony murder, aggravated robbery, and theft of property valued at $ 1,000 or more but less than $ 10,000. The jury imposed a sentence of death. On

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appeal, this court affirmed his convictions but reversed the sentence of death and remanded the case to the trial court for a new sentencing hearing. *See State v. Michael D. Rimmer*, No. W1999-00637-CCA-R3-DD, 2001 WL 567960, at *1 (Tenn. Crim. App. May 25, 2001).

At the conclusion of the January 2004 resentencing hearing, the jury again imposed a sentence of death. On appeal, this court affirmed. *See State v. Michael Dale Rimmer*, No. W2004-002240-CCA-R3-CD, 2006 WL 3731206, at *1 (Tenn. Crim. App. Aug. 13, 2007). The Tennessee Supreme Court, likewise, affirmed. *See State v. Rimmer*, 250 S.W.3d 12, 18 (Tenn. 2008).

Thereafter, the Defendant filed a petition for post-conviction relief alleging that he received the ineffective assistance of counsel. Following an evidentiary hearing, the post-conviction court granted relief. The court found that defense counsel's "overburdened case load caused both counsel and the auxiliary members of the defense team to conduct a seriously deficient investigation of petitioner's case." In particular, counsel did not discover that a witness identified a man other than the Defendant as the person he saw at the scene of the crime. Although the court acknowledged that the State's evidence against the Defendant was strong, it found that the undiscovered evidence called into question the reliability of the jury's verdict. The post-conviction court concluded that the Defendant was entitled to a new trial. The State did not appeal. Prior to the retrial, the trial court severed the theft charge.

At the subsequent trial in April 2016, the evidence showed that the Defendant and the victim had an on-and-off relationship in the late 1970s and early 1980s. In 1989, the Defendant pleaded guilty to burglary in the first degree, aggravated assault, and rape of the victim. While serving his sentence, the Defendant threatened to kill the victim to fellow inmates Roger Lescure and William Conaley. Both inmates testified that the Defendant became very agitated when discussing the victim. The Defendant also discussed methods for disposing of a body.

The Defendant was released from prison in January 1997 and began working for an automobile repair shop. Through his work, he met Steve and Cheryl Featherston after the Defendant assisted in repairing a car at their home. Later that month, the Featherstons reported to the police that a 1998 maroon Honda Accord disappeared from their driveway. Mr. Featherston testified that at the time the car disappeared, it was very clean and did not have any upholstery stains.

During this time, the victim worked as a night clerk at a Memphis motel. She reported to work on the night of February 7, 1997, and guests at the motel established that she was present until approximately 1:45 a.m. on February 8. However, after that time, the victim disappeared from the office, and she had no further communication with anyone. Her body has never been found.

***2** James Defevere checked into the motel between 1:00 and 1:15 a.m. on February 8. When guest Natalie Doonan went to the vending area adjacent to the front office between 1:30 and 1:45 a.m., she saw a man enter the lobby. The victim was behind the desk at this time. Dr. Ronald King was in the vending area around 1:40 a.m. and saw the victim allow a man into the office through the locked security door. Dr. King said the man drove a maroon car. Twenty to thirty minutes after Ms. Doonan left the vending area, she called the front desk but received no answer. Mr. Defevere returned to the office to check out around 2:25 a.m., but the victim was not in the office.

James Darnell and Dixie Presley stopped at the motel between 1:30 and 2:00 a.m. to pick up a map, parking a few spaces from the night entrance. Ms. Presley waited in the car while Mr. Darnell went inside. She saw a maroon car parked in front of the office entrance with its trunk open. She thought this was odd because there was light rain. Mr. Darnell noticed a man standing next to the trunk of a maroon car, which had been backed into a parking spot with the trunk closest to the building. The man "had something rolled up in his arms," which the man placed in the trunk. Mr. Darnell said that the object was rolled up in a "blanket" and that the car sank when it was placed in the trunk.

Mr. Darnell proceeded to the motel entrance, and the man who had been standing by the car quickly walked to the entrance, as well. Mr. Darnell opened the door and allowed the man to enter first. Mr. Darnell noticed the man had blood on his hands. When Mr. Darnell entered the lobby, he saw that the office door was open and that a different man was at the desk, pushing money under the window. Although Mr. Darnell could not identify the man who was outside and followed him into the office, Mr. Darnell identified the man behind the window as Billy Wayne Voyles.

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Raymond Summers, CSX Railroad yardmaster, testified that CSX housed its crews at the motel in February 1997. On February 7, Mr. Summers attempted to call the front desk between 2:45 and 3:00 a.m., but no one answered. He then drove to the motel, arriving approximately ten minutes later, and he found the night clerk's office abandoned. The secured door leading into the office was open, and Mr. Summers entered the office looking for a motel employee. He heard running water and followed the sound into the employee bathroom. In the bathroom, he saw blood on the sink basin and toilet and bloody towels on the floor, and the toilet seat was missing. He immediately left the motel in search of help. He encountered two Shelby County Sheriff deputies in a restaurant parking lot near the motel. The deputies immediately went to the motel, secured the scene, and called the Memphis Police Department (MPD).

MPD crime scene investigators found large amounts of blood, a cracked sink, bloody towels, and a broken toilet seat. A bloody trail led from the bathroom, through the office, and to the curb outside the motel's night entrance. The motel manager testified that approximately $ 600 was missing from the office as well as several sets of sheets. Approximately $ 400 was missing from the register drawer and another $ 200 was missing from a lockbox kept in a backroom. The victim kept a key in her pocket in order to access the lockbox. The victim's purse was in the office, her car was in the parking lot, and her wedding ring, which she always wore, was found on the bathroom floor.

Between 8:30 and 9:00 on the morning of February 8, the Defendant arrived at his brother's home in Mississippi. The Defendant drove a maroon Honda, and his shoes and the car were muddy. He claimed that he drove into a ditch. He carried a shovel to his brother and asked his brother to dispose of it. The Defendant also asked his brother to help him clean blood out of the backseat of the Honda. His brother allowed the Defendant to clean his shoes but declined the Defendant's request to stay at the home. After the Defendant left, his brother disposed of the shovel.

***3** Although the Defendant had only worked at the repair shop for approximately three weeks, his supervisor described him as a reliable worker. However, on February 10, the Defendant failed to report to work, and he was not seen again until March 5, when he was stopped for speeding in Johnson County, Indiana. Authorities in Indiana discovered that the car the Defendant drove was the Featherstons' missing Honda and that the Defendant was wanted for questioning in connection with the victim's disappearance.

Receipts found in the car showed that the Defendant had traveled throughout the country since the victim's disappearance. He traveled through Mississippi, Florida, Missouri, Wyoming, Montana, California, Arizona, Texas, and Indiana. Investigators found large blood stains in the back seat of the car. A DNA sample collected from the victim's mother, Marjorie Floyd, was compared with forensic evidence found in the car and in the motel bathroom. DNA testing showed that the blood from the back seat was consistent with a daughter of Ms. Floyd and that blood from the motel bathroom and the car were consistent with the victim's DNA.

While incarcerated in Indiana, the Defendant told his cellmate, James Allard, Jr., that he killed his “wife” in the motel where she worked. According to Mr. Allard, the Defendant told him that “he went to [the victim's] place of business, ... that she let him in there” and that he attacked her “in a back room behind the service desk or whatever in the office part.” The Defendant told Mr. Allard that he shot the victim in the chest. The Defendant stated that he had been “doing something” in the back room, that the victim “got up,” and that he shot her a second time in the head. The Defendant described the scene as bloody, said he had “dumped the body,” and expressed surprise that the body had not been found.

Following his arrest, the Defendant participated in several escape attempts. The Defendant used toenail clippers to cut an opening in the recreation-yard fence. The Defendant discussed his plans with Mr. Allard, which included taking a guard hostage and killing a guard if necessary. Two “shanks,” described as homemade knives, were located in the Defendant's Indiana cell. The Defendant attempted to escape again during his transport from Indiana to Tennessee. The Defendant obtained control of the van and led local law enforcement on a twenty-mile chase in Bowling Green, Ohio. Police stopped the van at a roadblock and apprehended the Defendant. After arriving at the Shelby County Jail, the Defendant and another inmate attempted to escape by sawing through the bars of their cell, breaking a window, and repelling down the building using a homemade rope.

Upon this evidence, the jury convicted the Defendant of first degree premeditated murder, first degree felony murder, and aggravated robbery. The trial court merged the felony murder conviction into the premeditated murder conviction.

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At the bifurcated sentencing hearing, the victim's mother's previous victim impact testimony was read to the jury. As an aggravating factor, the State introduced certified copies of the Defendant's four prior felony convictions involving the use of violence against a person. The Defendant chose not to present any mitigating evidence. The jury sentenced the Defendant to death.

ANALYSIS

I. Sufficiency of the Evidence and Indictments

The Defendant contends that no evidence connected him to the crimes, but his argument focuses on whether the indictments provided him with adequate notice that other persons could have been involved in the crimes. The Defendant argues that the evidence showed that two other men committed the murder and that no evidence supports a theory of criminal responsibility. The State responds that ample evidence connected the Defendant to the murder and to the robbery and that "the fact that others might have been involved was not an element of the charged offenses." Further, the State argues that criminal responsibility is a theory of guilt and need not be stated in an indictment.

A. Sufficiency of the Evidence

***4** In determining the sufficiency of the evidence, the standard of review is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see State v. Vasques*, 221 S.W.3d 514, 521 (Tenn. 2007). The State is "afforded the strongest legitimate view of the evidence and all reasonable inferences" from that evidence. *Vasques*, 221 S.W.3d at 521. The appellate courts do not "reweigh or reevaluate the evidence," and questions regarding "the credibility of witnesses [and] the weight and value to be given the evidence ... are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *see State v. Sheffield*, 676 S.W.2d 542, 547 (Tenn. 1984).

"A crime may be established by direct evidence, circumstantial evidence, or a combination of the two." *State v. Hall*, 976 S.W.2d 121, 140 (Tenn. 1998); *see State v. Sutton*, 166 S.W.3d 686, 691 (Tenn. 2005). "The standard of review 'is the same whether the conviction is based upon direct or circumstantial evidence.' " *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011) (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)). A conviction may be based upon circumstantial evidence alone. *See Dorantes*, 331 S.W.3d at 380-81.

First degree murder is the unlawful, intentional, and premeditated killing of another. T.C.A. §§ 39-13-201 (2014), 39-13-202(a)(1). In the context of first degree murder, intent is shown if the defendant has the conscious objective or desire to cause the victim's death. *State v. Page*, 81 S.W.3d 781, 790-91 (Tenn. Crim. App. 2002); T.C.A. § 39-11-106(a)(18) (2010) (amended 2011, 2014) (defining intentional as the "conscious objective or desire to engage in the conduct or cause the result"). A premeditated act is one which is

> done after the exercise of reflection and judgment. "Premeditation" means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill preexist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.

Id. § 39-13-202(d). The question of whether a defendant acted with premeditation is a question of fact for the jury to be determined from all of the circumstances surrounding the killing. *State v. Davidson*, 121 S.W.3d 600, 614 (Tenn. 2003). Proof of premeditation may be shown by direct or circumstantial evidence. *State v. Brown*, 836 S.W.2d 530, 541 (Tenn. 1992).

As relevant here, first degree felony murder is "[a] killing of another committed in the perpetration of or attempt to perpetrate any ... robbery[.]" T.C.A. § 39-13-202(a)(2) (2014).

Aggravated robbery is defined, in relevant part, as "the intentional or knowing theft of property from the person of another by violence or putting the person in fear," "where the victim suffers serious bodily injury." *Id.* §§ 39-13-401(a) (2014), -402(a)(1). Theft of property occurs when "with the intent to deprive the owner of property, [a] person knowingly obtains or exercises control over the property without the owner's effective consent." T.C.A. § 39-14-103(a) (2014).

There was strong direct and circumstantial evidence establishing that the Defendant participated in the victim's murder and the aggravated robbery of the victim. The Defendant discussed his plan to kill the victim and to hide

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her body when he was previously incarcerated for assaulting the victim. Witnesses testified that a maroon car was seen at the motel, and the Defendant was seen with a maroon Honda the day after the victim's disappearance. The Defendant was driving the maroon Honda at the time of his arrest, and the car contained blood and DNA consistent with that of the victim. The motel bathroom contained the victim's blood and DNA, and the victim was never seen after the early morning hours of February 8, 1997. Testimony established that $ 600 and several sets of bed sheets were missing from the motel office. Some of the missing money was from a lockbox kept in a back room, and the victim kept the key to the box on her person. The Defendant told another inmate that he had been in the back room "doing something" after he shot the victim in the chest, that she "got up," and he shot her in the head. One of the witnesses saw a man place an object rolled up in a blanket in the trunk of a maroon car that was backed into a parking place with its open trunk facing toward the building. The car sank when the object was placed in the trunk.

***5** Witnesses and investigators described a bloody scene indicative of a violent struggle, supporting the conclusion that the victim suffered serious bodily injury. Witness testimony also established that two perpetrators participated in the offenses. Mr. Allard testified that the Defendant confessed to being present at the motel and to actively participating in the attack against the victim. Several hours after the victim disappeared, the Defendant arrived at his brother's home Mississippi in a maroon Honda, which was muddy. The Defendant's shoes were muddy, and he asked his brother to dispose of a shovel and to assist him in cleaning blood from the backseat of the car.

Following the victim's disappearance, the Defendant also disappeared for approximately one month. He stopped going to work and did not pick up his last paycheck, although his supervisor described the Defendant as reliable. Receipts found in the Honda showed that the Defendant had traveled throughout the country before his arrest in Indiana. After his arrest, he told Mr. Allard that he had murdered the victim and hid her body. The Defendant also attempted to escape from police custody on three occasions. We conclude that sufficient evidence supports the first degree premeditated murder, first degree felony murder, and aggravated robbery convictions.

B. Sufficiency of the Indictments

An individual accused of a crime has the right to be informed of the nature and cause of an accusation against him. U.S. Const. amend. XI, XIV; Tenn. Const. art. 1, § 9. Pursuant to Tennessee Code Annotated section 40-13-202 (2012), an indictment

> must state the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in such a manner as to enable a person of common understanding to know what is intended and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment ....

Our supreme court has said that an indictment is sufficient if it provides adequate information to enable the defendant to know the accusation against which he must defend, furnishes the trial court with an adequate basis for entry of a proper judgment, and protects the defendant from double jeopardy. *See State v. Hill*, 954 S.W.2d 725, 727 (Tenn. 1997); *see also Wyatt v. State*, 24 S.W.3d 319, 324 (Tenn. 2000). The supreme court has held that "indictments which achieve the overriding purpose of notice to the accused will be considered sufficient to satisfy both constitutional and statutory requirements." *State v. Hammonds*, 30 S.W.3d 294, 300 (Tenn. 2000). In this regard, "specific reference to a statute within the indictment may be sufficient to place the accused on notice of the charged offense." *State v. Sledge*, 15 S.W.3d 93, 95 (Tenn. 2000). The indictment "need not allege the specific theory or means by which the State intends to prove each element of an offense to achieve the overriding purpose of notice to the accused." *Hammonds*, 30 S.W.3d at 300. Thus, the State is not required to assert a theory of criminal responsibility in the charging instrument. *State v. Lemacks*, 996 S.W.2d 166, 172-73 (Tenn. 1999).

The indictments were not included in the appellate record, but they were read into evidence at the trial. The aggravated robbery indictment in No. 98-01033 read as follows:

> Count 1, The grand jurors of the State of Tennessee ... present that [the Defendant], during the period of time between February 7th 1997, and February 8th, 1997, in Shelby County, Tennessee, and before the finding of this indictment, intentionally or knowingly did take from [the victim] a sum of money of value by violence or putting [the victim] in fear. And the victim ... suffered serious bodily injury, in violation of Tennessee Code Annotated 39-13-402 ....

***6** The murder indictment in No. 98-01034 stated:

> Count 1, The grand jurors of the [S]tate of Tennessee ... present that [the Defendant] during the period of time between February 7th 1997, and February 8th, 1997, in

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> [C]ounty of Shelby, Tennessee, and before the finding of this indictment did unlawfully, intentionally, and with premeditation kill [the victim] in violation of Tennessee Code Annotated 39-13-202 ....
>
> Count 2[,] The grand jurors of the State of Tennessee ... present that [the Defendant], during the period of time between February 7th, 1997, and February 8th, 1997, in Shelby County, Tennessee, did unlawfully, with the intent to commit robbery, kill [the victim] during the perpetration of or attempt to perpetrate robbery, in violation of Tennessee Code Annotated 39-13-202 ....

The elements of aggravated robbery, premeditated murder, and felony murder were clearly set forth in the indictment, along with the statutes for each. The Defendant contends that the State's rebuttal closing argument included statements that other persons were involved in the crimes and that these assertions "surprised" him. However, the State is not required to set forth its theory of guilt in the indictment. The State's argument was based on the proof submitted at trial, including witness testimony that more than one person was participated in the crimes at the motel on the night the victim disappeared. The Defendant is not entitled to relief on this basis.

II. Double Jeopardy

The Defendant asserts that the trial court erred in denying his motion to dismiss Count 2 of the indictment charging him with felony murder. He argues that the felony murder charge violated double jeopardy principles because a verdict was not returned on that count in his first trial. The State responds that the failure to return a verdict was not an implicit acquittal because the court had instructed the jury not to consider felony murder if it found the Defendant guilty of first degree premeditated murder.

The double jeopardy clause of the Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb ...." Article 1, Section 10 of the Tennessee Constitution provides that "no person shall, for the same offense, be twice put in jeopardy of life or limb." The clause has been interpreted to offer the following protections: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *see State v. Phillips*, 924 S.W.2d 662, 664 (Tenn. 1996). The principle applies in cases in which "no final determination of guilt or innocence has been made" and in which a jury has been given the opportunity to return a verdict on a charge in one trial but failed to do so, impliedly acquitting the defendant of that charge. *United States v. Scott*, 437 U.S. 82, 92 (1978); *Price v. Georgia*, 398 U.S. 323, 329 (1970).

***7** During the Defendant's November 1998 trial, the trial court instructed the jury in pertinent part:

> Indictment number 98-01034 charges the defendant with the offense of MURDER IN THE FIRST DEGREE. This indictment is in two (2) counts.
>
> The First Count of indictment number 98-01034 charge that the defendant did unlawfully, intentionally and with premeditation kill RICCI LYNN ELLSWORTH. This offense embarces and includes the lesser offenses of MURDER IN THE SECOND DEGREE, and VOLUNTARY MANSLAUGHTER.
>
> The Second Count of indictment number 98-01034 charges that the defendant did unlawfully, and with the intent to commit robbery, kill RICCI LYNN ELLSWORTH during the perpetration of ROBBERY.
>
> Indictment number 98-01033 charges the defendant with the offense of AGGRAVATED ROBBERY. This offense embraces and includes the lesser offenses of ROBBERY and THEFT OF PROPERTY OVER $ 500.
>
> Indictment number 97-02819 is in two (2) counts. Both counts charge the defendant with the offense of THEFT OF PROPERTY.
>
> These three indictments have been consolidated for trial at one time, but it must be remembered at all times that even though the indictments are being tried together, they are separate and distinct cases and must be treated by the Jury as such.
>
> ....
>
> You may convict the defendant on all indictments, or acquit him on all indictments; or convict on one and acquit on the others. If you find from the evidence, beyond a reasonable doubt, the defendant guilty [sic] of each indictment, you should convict on each. If you find from the evidence,

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beyond a reasonable doubt, one indictment guilty [sic] and have a reasonable doubt as to the guilt of the other indictments, you should convict on the one you are satisfied beyond a reasonable doubt of, and acquit on all the others. If you have a reasonable doubt as to the guilt on all, you should acquit on all.

As to the Theft indictment only, 97-02817, you may convict the defendant on both counts; or convict on one and acquit on the other. If you find from the evidence, beyond a reasonable doubt, the defendant of both counts guilty [sic], you should convict on both. If you find from the evidence, beyond a reasonable doubt, one count guilty [sic], and have a reasonable doubt as to the guilt of the other count, you should convict on the one you are satisfied beyond a reasonable doubt as to the guilt of, and acquit on the other. If you have a reasonable doubt as to the guilt on both, you should acquit on both.

....

When you retire to consider your verdict in indictment number 98-01034, you will first inquire, is the defendant guilty of Murder in the First Degree as charged in the First Count of the indictment? If you find the defendant guilty of this offense, beyond a reasonable doubt, your verdict should be,

"We the Jury, find the defendant guilty of Murder in the First Degree as charged in the First Count of the Indictment."

If you find the defendant not guilty of this offense, or if you have a reasonable doubt of his guilt of this offense, you will acquit him thereof and then proceed to inquire whether or not he is guilty of Murder in the First Degree During the Perpetration of a Robbery as charged in the Second Count of the indictment.

***8** If you find, beyond a reasonable doubt, that the defendant is guilty of this offense, your verdict should be,

"We the Jury, find the defendant guilty of Murder in the First Degree During the Perpetration of a Robbery as charged in the Second Count of the indictment."

If you find the defendant not guilty of this offense, or if you have a reasonable doubt of his guilt of this offense, you will acquit him thereof and then proceed to inquire whether or not he is guilty of Murder in the Second Degree as included in the First Count of the Indictment.

If you find, beyond a reasonable doubt, that the defendant is guilty of this offense, your verdict should be,

"We, the Jury, find the defendant guilty of Murder in the Second Degree as included in the First Count of the Indictment."

If you find the defendant not guilty of this offense, or if you have a reasonable doubt of his guilt of this offense, you will acquit him thereof and then proceed to inquire whether or not he is guilty of Voluntary Manslaughter as included in the First Count of the indictment.

If you find, beyond a reasonable doubt, that the defendant is guilty of this offense, your verdict should be,

"We, the Jury, find the defendant guilty of Voluntary Manslaughter as included in the First Count of the Indictment."

If you do find the defendant guilty, you can convict him of only one of the above named offenses charged and included in this indictment ....

Next, the trial court instructed the jury as to the single count of aggravated robbery charged in indictment 98-01034 and as to the two counts of theft charged in indictment 97-02817.

The jury convicted the Defendant of first degree premeditated murder and returned the verdict for Count 1 without returning a verdict for felony murder in Count 2, as instructed by the court. The jury also returned guilty verdicts for aggravated robbery and theft. *See State v. Michael Dale Rimmer*, No. W2004-02240-CCA-R3-DD, 2006 WL 3731206, slip op. at 1 (Tenn. Crim. App. Dec. 15, 2006), *aff'd*, 205 S.W.3d 12. This type of jury instruction, in which the jury is told to consider a lesser included offense only when it acquits of the greater offense, has been referred to as a "sequential" or "acquittal first" instruction. *See Harris v. State*, 947 S.W.2d 156, 175-76 (Tenn. Crim. App. 1996). Our supreme court has upheld the validity of such instructions, while also cautioning that their use could potentially give rise to a double jeopardy problem. *State v. Howard*, 30 S.W.3d 271, 274 n.4 (Tenn. 2000) ("While it was not error for the trial court to deliver sequential jury instructions, we have previously urged trial courts to allow juries to consider all theories of first-degree murder.") (internal citations omitted). Despite this potential problem, both this court and the supreme court have allowed new trials of charges for which no verdicts were reached

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and in which sequential instructions were given. *See State v. Madkins*, 989 S.W.2d 697, 699 (Tenn. 1999); *State v. Burns*, 979 S.W.2d 276, 291 (Tenn. 1998); *State v. John E. Parnell*, No. W1999-00562-CCA-R3-CD, 2001 WL 124526, at *6 (Tenn. Crim. App. Feb. 6, 2001); *State v. David William Smith*, No. 03C01-9809-CR-00344, 2000 WL 210378, at *6 (Tenn. Crim. App. Feb. 24, 2000).

***9** This court previously ordered a new trial under circumstances almost identical to those in this case. In *State v. Antonio Saulsberry*, the defendant was indicted for one count of premeditated murder, two counts of felony murder, and one count each of especially aggravated robbery and conspiracy to commit a felony. No. 2005-00316-CCA-R9-CD, 2006 WL 2596771, at *2 (Tenn. Crim. App. Sept. 11, 2006), *perm. app. denied* (Tenn. Jan. 29, 2007). He was convicted of first degree premeditated murder, especially aggravated robbery, and conspiracy to commit aggravated robbery. His conviction for premeditated murder was reversed on appeal, and his remaining convictions were affirmed. Thereafter, the State sought a new trial on the two counts of felony murder. The defendant filed a motion to dismiss the indictment, arguing that the new trial violated principles of double jeopardy. *Id.* at *1-3. This court concluded that double jeopardy principles did not preclude a subsequent trial of the felony murder charges. *Id.* at *5. The court noted that the sequential jury instructions, as provided in this case, led to a presumption that the jury never considered the felony murder charges after reaching a guilty verdict on premeditated murder. *Id.*

The jury at the Defendant's first trial was instructed to consider the felony murder charge only if it returned a not guilty verdict for premeditated murder. A jury is presumed to follow the trial court's instructions. *Nesbit v. State*, 452 S.W.3d 779, 799 (Tenn. 2014). We conclude that in this case the lack of a jury verdict on the felony murder count at the first trial was not an implicit acquittal and that double jeopardy principles were not violated at the second trial. The Defendant is not entitled to relief on this basis.

III. Motion to Suppress DNA Evidence

The Defendant contends that the trial court erred in denying his motion to suppress DNA evidence. He asserts that the State destroyed the maroon Honda without affording the defense an opportunity to inspect it. The State avers that consideration of this issue is barred by the doctrine of collateral estoppel because it was previously determined by the post-conviction court. Alternatively, the State asserts that the issue is without merit because it was not obligated to preserve an entire automobile indefinitely when the State had documented the car and its contents and preserved evidence obtained from it.

A. Collateral Estoppel

In his petition for post-conviction relief, the Defendant contended that the State's failure to preserve the Honda for inspection by the defense violated his right to due process under the law. The post-conviction court rejected this argument, concluding that the State did not have a duty to preserve the car.

The doctrine of collateral estoppel has been applied infrequently in criminal cases. *See State v. David Scarbrough*, No. E2003-02850-CCA-R9-CD, 2004 WL 2280423, at *8 (Tenn. Crim. App. Oct. 11, 2004) (noting that, at the time, no Tennessee appellate court had considered the issue of offensive collateral estoppel in criminal cases). Our supreme court has acknowledged that the doctrine's application may be appropriate in some criminal cases. *See State v. Flake*, 114 S.W.3d 487, 507 (Tenn. 2003) (choosing to address a suppression issue on the merits even though the State argued collateral estoppel applied because a court had previously rejected the issue in a petition to rehear). We address this issue on the merits and decline to apply the doctrine of collateral estoppel.

B. Due Process Violation

The Defendant filed a motion to suppress DNA evidence gathered from the maroon Honda, arguing that the State's failure to preserve the car deprived the defense of its ability to perform its own testing and violated his right to due process. The Defendant asserts he was prejudiced in two ways: (1) he was unable to inspect the back seat upon which blood was located, noting "a continuing dispute as to the amount of blood" on the back seat and (2) he was unable to inspect the trunk to determine whether any blood was inside, noting that a witness testified that someone placed a large object rolled up in a "sheet" into the trunk, causing the trunk to sink. The Defendant argues that the testimony implied the victim's body was placed in the trunk and that, based on the amount of blood found in the bathroom, the trunk likely contained blood evidence. At the pretrial hearing, the trial court repeatedly pressed the Defendant to explain what benefit the defense could have derived from the

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destroyed evidence. The Defendant argued it would have been exculpatory if the trunk did not contain blood.

***10** The trial court determined that the State had no duty to preserve the Honda. The court concluded that the Defendant could receive a fundamentally fair trial without having the car for inspection. The court noted that even if no blood were found in the trunk, or someone else's blood were found there, it would not exculpate the Defendant given the other evidence in the car connecting him to the victim's disappearance.

At the trial, Linda Littlejohn testified that she was employed by the Tennessee Bureau of Investigation (TBI), and that in 1997, she worked as a forensic scientist in the microanalysis unit processing trace evidence. She processed the maroon Honda, which included taking photographs, obtaining an inventory of the car's contents, and vacuuming the car to capture hair and fibers. She also removed portions of the carpet and cloth seats. After the car was processed, it was released by the police department.

TBI forensic scientist Samera Zavaro testified that she conducted serological analysis on evidence obtained from the crime scene and the maroon Honda. She collected samples from the car that appeared to be blood, which included taking swabs of hard surfaces and cuttings from fabric. She did not take samples from the trunk.

Our supreme court has "explained that the loss or destruction of potentially exculpatory evidence may violate a defendant's right to a fair trial." *State v. Merriman*, 410 S.W.3d 779, 784 (Tenn. 2013) (citing *State v. Ferguson*, 2 S.W.3d 912 915-16 (Tenn. 1999)). The court observed that "the due process required under the Tennessee Constitution was broader than the due process required under the United States Constitution" and rejected the "bad faith" analysis espoused by the United States Supreme Court in favor of "a balancing approach in which bad faith is but one of the factors to be considered in determining whether the lost or destroyed evidence will deprive a defendant of a fundamentally fair trial." *Merriman*, 410 S.W.3d at 784-85; *see Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) (holding that "[u]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law"). Our supreme court "observed that fundamental fairness, as an element of due process, requires a review of the entire record to evaluate the effect of the State's failure to preserve evidence." *Merriman*, 410 S.W.3d at 784-85 (citing *Ferguson*, 2 S.W.3d at 914, 917).

To facilitate this "balancing approach," our supreme court stated that the trial court must first "determine whether the State had a duty to preserve the evidence," observing that the State's duty to preserve was "limited to constitutionally material evidence." *Id.* at 785. The court held that to be "constitutionally material," the evidence "must potentially possess exculpatory value and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* (citing *Ferguson*, 2 S.W.3d at 915, 918). "If the trial court determines that the State had a duty to preserve the evidence, the court must determine if the State failed in its duty." *Id.* (citing *Ferguson*, 2 S.W.3d at 917). If the trial court concludes that the State lost or destroyed evidence that it had a duty to preserve, the trial court must consider three factors to determine the appropriate remedy for the State's failure: " '(1)[t]he degree of negligence involved; (2)[t]he significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and (3)[t]he sufficiency of the other evidence used at trial to support the conviction.' " *Id.* (quoting *Ferguson*, 2 S.W.3d at 917). "If the trial court concludes that a trial would be fundamentally unfair without the missing evidence, the trial court may then impose an appropriate remedy to protect the defendant's right to a fair trial, including, but not limited to, dismissing the charges or providing a jury instruction." *Id.* at 785-86.

***11** This court reviews a trial court's decision concerning the fundamental fairness of a trial conducted without the destroyed evidence under a de novo standard of review. *Id.* at 791. If this court concludes that the trial would be fundamentally unfair in the absence of the lost evidence, this court will apply an abuse of discretion standard to review the appropriateness of the remedy imposed by the trial court. *Id.* at 792.

Our analysis begins by considering whether the State had a duty to preserve the car. The duty to preserve arises only when the evidence is constitutionally material. The Defendant contends that the evidence is material because a lack of blood in the trunk would have undermined witness testimony implying that the victim's body was placed in the trunk. He asserts that this would have allowed him to argue that the maroon Honda he drove was not the same car seen at the motel and, by implication, used in the crimes. However, the Defendant has not articulated how evidence from the trunk would have been exculpatory. As the trial court noted, a lack

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of blood in the trunk would not have negated the evidence that a large blood stain, which matched the victim's DNA, was found in the backseat of the car. We conclude that any evidence that no blood was found in the trunk would not have been exculpatory. Consequently, the State did not have a duty to preserve the car because the trunk evidence was not constitutionally material.

The Defendant further contends that the trial court erred in refusing to provide a jury instruction relative to the State's release of the car. However, a jury instruction is a remedy to be employed only after the court determines that the State had a duty to preserve evidence. Because the court did not err in finding that the State did not have a duty to preserve the car, a jury instruction was not required. The Defendant is not entitled to relief on this issue.

IV. State's Opening Statement

The Defendant next asserts that the trial court erred in not striking the State's opening statement or in not declaring a mistrial when the prosecutor said that the car had been "taken." The Defendant argues that the State's reference to the car implied it had been stolen, which violated the court's pretrial order prohibiting the State from referring to the car as stolen, pursuant to Tennessee Rule of Evidence 404(b), and due process. The State disagrees, arguing that reference to the car as "taken" did not violate the court's pretrial ruling, that Rule 404(b) does not apply to opening statements, and that any due process violation was by failing to object at the trial and in the motion for new trial.

In addition to the aggravated robbery and murder charges, the Defendant was indicted for the theft of the Featherstons' maroon Honda. However, the trial court severed the theft charge prior to trial. The court determined that the theft was not part of the same criminal transaction as the murder and aggravated robbery. It also prohibited the State from eliciting evidence that the car had been stolen. However, the court permitted the State to show that the Defendant had control of the car before and after February 7, 1997, in order to establish that he was the perpetrator of the aggravated robbery and murder. It recognized that the Defendant's possession of the car before and after the victim's disappearance was "very material" to his identity as the perpetrator.

***12** In the opening statement, the prosecutor said the following:

> [F]rom February 8th through March 5th, [the Memphis Police Department] had been looking for [the Defendant] everywhere they could. They also knew that there was, obviously, some interest in this vehicle, maroon vehicle, and they ended up locating that - - a friend that had worked with [the Defendant] owned a vehicle matching that description. And learned that that vehicle had been taken from outside [the Featherstons'] home. And so the police are going to be on the lookout for this tag number and this vehicle.

At the conclusion of the statement, the Defendant objected to the State's use of the word "taken," moved to have the statement stricken, and argued that it was grounds for a mistrial. According to the Defendant, the State's words gave a "clear implication" that he had stolen the car, violating the court's order. The State argued that its statement did not violate the court's ruling because the car could have been borrowed or have been missing due to a misunderstanding.

The trial court determined that the State did not violate its order or necessitate a mistrial. The court found that the State had a right to show that the Defendant took the car and that the car was missing but not that any crime was committed when the car was taken. The court emphasized that the State would not be allowed to elicit testimony about whether the Defendant had permission to take the car or whether the police were called in response.

Opening statements "are intended merely to inform the trial judge and jury, in a general way, of the nature of the case and to outline, generally, the facts each party intended to prove." *State v. Reid*, 164 S.W.3d 286, 343 (Tenn. 2005). Opening statements are not evidence. *State v. Thompson*, 43 S.W.3d 516, 523 (Tenn. Crim. App. 2000). Trial courts should allow the parties to present "a summary of the facts supportive of the respective theories of the case, only so long as those 'facts are deemed likely to be supported by admissible evidence.' " *State v. Sexton*, 368 S.W.3d 371, 415 (Tenn. 2012) (quoting *Stanfield v. Neblett*, 339 S.W.3d 22, 41-42 (Tenn. Ct. App. 2010)). Therefore, opening statements should "be predicated on evidence introduced during the trial" and should never refer "to facts and circumstances which are not admissible in evidence." *Sexton*, 368 S.W.3d at 415.

A trial judge should declare a mistrial if manifest necessity arises. *Arnold v. State*, 563 S.W.2d 792, 794 (Tenn. Crim. App. 1977). Manifest necessity occurs when "no feasible alternative to halting the proceedings" exists. *State v. Knight*, 616 S.W.2d 593, 596 (Tenn. 1981). "The granting or denial

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of a mistrial is within the sound discretion of the trial court." *State v. McKinney*, 929 S.W.2d 404, 405 (Tenn. Crim. App. 1996); *see State v. Jones*, 802 S.W.2d 221, 222 (Tenn. Crim. App. 1990). This court will only disturb that decision if the trial court abused its discretion. *State v. Adkins*, 786 S.W.2d 642, 644 (Tenn. 1990).

The Defendant cites to a single authority to support his argument that the use of the word taken during the opening statement was improper. In *State v. James C. Greene, Jr.*, the defendant challenged his conviction on the basis that the State referred to inadmissible hearsay in its opening statement. No. 03C01-9407CR00247, 1995 WL 564939, at *1 (Tenn. Crim. App. Sept. 26, 1995). The trial court prohibited the State from introducing evidence that the police had conducted surveillance on the defendant based on information that he was involved in illegal activity. During the opening statement, the prosecutor said, "[T]he Third Judicial Drug Task Force had information that [the defendant was] dealing drugs." The defendant immediately objected to relevance and requested a mistrial. The court overruled the motion for a mistrial but sustained the objection and advised the jury to disregard the statement and not consider it for any purpose. *Id.* at *3.

***13** On appeal, this court held that the defendant was not harmed by the prosecutor's statement and that a mistrial was not required. *Id.* at *4. The proof adduced at the trial showed that the defendant was an admitted drug abuser but was not a seller. The court concluded that the proof offered at the trial was not affected by the opening statement and that the jury acquitted the defendant of possession with intent to sell or deliver. *Id.*

James C. Greene, Jr. is distinguishable from the present case because in *James C. Greene, Jr.,* the prosecutor explicitly defied the trial court's order. However, in the present case, the trial court concluded that the State's comment did not run afoul of the pretrial order and reiterated that the State was allowed to show that the Defendant had possession of the car before and after the victim's disappearance to establish his identity as the perpetrator. The court attempted to balance the State's right to use the evidence to prove the perpetrator's identity and the Defendant's right to fairness by excluding evidence of the theft. We conclude that the court did not abuse its discretion in refusing to strike the opening statement or to grant a mistrial. The Defendant is not entitled to relief on this basis.

The Defendant also contends that the use of the word taken was a Fifth Amendment due process violation. He did not object on this basis at the trial, and the general contention is the extent of his argument on appeal. "In this jurisdiction, a party is bound by the ground asserted when making an objection. The party cannot assert a new or different theory to support the objection ... in the appellate court." *State v. Adkisson*, 899 S.W.2d 626, 634 (Tenn. Crim. App. 1994). When a party asserts new grounds in the appellate court, the issue is treated as waived. *Id.* at 635. Furthermore, "[i]ssues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court." Tenn. Ct. Crim. App. R. 10(b). The Defendant's failure to object on this basis at the trial or to adequately address the issue in his brief qualifies the issue for waiver. However, we will review this issue for plain error.

Five factors are relevant

> when deciding whether an error constitutes "plain error" in the absence of an objection at trial: "(a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is 'necessary to do substantial justice.' "

State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (quoting *Adkisson*, 899 S.W.2d at 641-42). All five factors must exist in order for plain error to be recognized. *Id.* at 283. "[C]omplete consideration of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established." *Id.* In order for this court to reverse the judgment of a trial court, the error must be "of such a great magnitude that it probably changed the outcome of the trial." *Id.*; *Adkisson*, 899 S.W.2d at 642. A defendant carries the burden of proving that the trial court committed plain error. *See State v. Bledsoe*, 226 S.W.3d 349, 355 (Tenn. 2007).

The Defendant has not shown that the State's use of the word taken amounted to a violation of due process that adversely affected a substantial right. "For a 'substantial right' of the accused to have been affected, the error must have prejudiced the appellant. In other words, it must have affected the outcome of the trial court proceedings." *State v. Maddin*, 192 S.W.3d 558, 562 (Tenn. Crim. App. 2005). The State's single use of the word taken in its opening statement comported with the trial court's previous ruling and with the evidence presented at trial. The Defendant is not entitled to relief on this issue.

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V. Evidence of Prior Assault on Victim and Escape Attempts

***14** The Defendant contends that the trial court erred in admitting evidence related to his prior convictions for aggravated assault and rape of the victim. He asserts that the prior convictions are propensity evidence, the admission of which was prohibited by Tennessee Rule of Evidence 404(b). He also claims that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. *See* Tenn. R. Evid. 403. He further contends that the court erred in admitting evidence of his escape attempts, including testimony that two "shanks" were found in his cell. The State responds that the court correctly admitted the evidence of the prior assault because it was highly probative to show motive, intent, and premeditation. The State argues that the court gave extensive jury instructions relative to the intended use of the evidence. Similarly, the State argues that the escape attempts were properly admitted to show consciousness of guilt.

The Defendant filed a pretrial motion pursuant to Tennessee Rule of Evidence 404(b) to exclude evidence of his prior convictions for the aggravated assault and rape and of his escape attempts. After a hearing, the trial court determined that the "extremely" high probative value of the prior convictions outweighed their prejudicial effect. In particular, the court found that the victim in the present case was also the victim of the aggravated assault and rape, which evidenced the Defendant's motive, intent, premeditation, and identity in the present case. Further, the court found that admission of the escape attempts was proper to show consciousness of guilt.

Tennessee Rule of Evidence 404(b) prohibits the admission of evidence related to other crimes, wrongs, or acts offered to show a character trait in order to establish that a defendant acted in conformity with the trait. Tenn. R. Evid. 404(b). Such evidence, though, "may ... be admissible for other purposes," including, but not limited to, establishing identity, motive, common scheme or plan, intent, or absence of mistake. *Id.*; *see State v. McCary*, 119 S.W.3d 226, 243 (Tenn. Crim. App. 2003). Before a trial court determines the admissibility of such evidence,

> (1) The court upon request must hold a hearing outside the jury's presence;
>
> (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
>
> (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
>
> (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Tenn. R. Evid. 404(b)(1)-(4). The standard of review is for an abuse of discretion, provided a trial court substantially complied with the procedural requirements. *State v. DuBose*, 953 S.W.2d 649, 652 (Tenn. 1997); *see State v. Electroplating, Inc.*, 990 S.W.2d 211 (Tenn. Crim. App. 1998).

The rationale behind the general rule of inadmissibility in Rule 404(b) is that the admission of evidence of other wrongs poses a substantial risk that the trier of fact may convict a defendant based upon the defendant's bad character or propensity to commit criminal offenses, rather than upon the strength of the evidence of guilt on the specific offense for which the defendant is on trial. *State v. Dotson*, 254 S.W.3d 378, 387 (Tenn. 2008); *State v. James*, 81 S.W.3d 751, 758 (Tenn. 2002).

Evidence of other crimes, wrongs, or acts may be admitted as relevant to issues of "identity (including motive and common scheme or plan), intent, or rebuttal of accident or mistake." Tenn. R. Evid. 404(b), Advisory Comm'n Cmts.; *see Burch v. State*, 605 S.W.2d 227, 229 (Tenn. 1980). To minimize the risk of unfair prejudice in the introduction of evidence of other acts, however, Rule 404(b) establishes protective procedures that must be followed before the evidence is admissible. *See* Tenn. R. Evid. 404(b); *James*, 81 S.W.3d at 758. Upon request, the trial court must hold a hearing outside the jury's presence to determine whether the evidence of the other acts is relevant to prove a material issue other than the character of the defendant. *James*, 81 S.W.3d at 758. The trial court must state on the record the specific issue to which the evidence is relevant and find the evidence of the other crime or act to be clear and convincing. *Id.* If the trial court substantially follows the procedures in Rule 404(b), the court's decision will be given great deference on appeal and will be reversed only if the trial court abused its discretion. *Id.* The Defendant acknowledges that the trial court followed the procedures required by Rule 404(b).

***15** With respect to the prior convictions, the record reflects that the trial court carefully weighed the probative value against the danger of unfair prejudice. The relevant convictions were for violent offenses and involved the victim

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in the present case. The Defendant had been incarcerated for these crimes, and other evidence showed he made incriminating statements to a fellow inmate about his desire to kill the victim. The record supports the court's conclusion that the evidence had high probative value of showing motive, intent, premeditation, and identity, and the probative value of the evidence outweighed the danger of unfair prejudice. The court followed the prerequisites for admission under Rule 404(b), and we conclude that the court did not abuse its discretion in admitting this evidence.

Similarly, the record supports the trial court's admission of the evidence of the Defendant's prior escape attempts, including testimony that two shanks were found in his jail cell. "[E]vidence that an accused has escaped from custody, or attempted to escape from custody, after being charged with a criminal offense is admissible for the purpose of establishing the accused's guilt, consciousness of guilt, or knowledge of guilt." *State v. Burton*, 751 S.W.2d 440, 450 (Tenn. 1988). The evidence of the shanks corroborated details of the Defendant's escape plan that he intended to take a guard hostage and to kill a guard if necessary. The court instructed the jury that it was only to consider this evidence to determine the Defendant's consciousness of guilt. The court did not abuse its discretion in finding that the probative value of this evidence outweighed the danger of unfair prejudice. The Defendant is denied relief on this issue.

VI. William Baldwin's Testimony

The Defendant asserts that the trial court erred in prohibiting William Baldwin from testifying about a statement made by an MPD detective. The Defendant argues that exclusion of this evidence violated Tennessee Rules of Evidence 401 and 402. He also asserts that the MPD lost a video recording made by Mr. Baldwin, which violated *Brady v. Maryland*, 373 U.S. 83 (1963). The State asserts that the court did not err because the proffered testimony was hearsay from an unknown police officer and was irrelevant. The State further responds that the *Brady* issue has been waived because it was not raised in the motion for new trial.

William Baldwin was an evidence technician for the Johnson County, Indiana Sheriff's Department. Before Mr. Baldwin testified at the trial, the Defendant sought permission to question Mr. Baldwin outside the presence of the jury regarding a statement he overheard when he processed the car. According to the Defendant, Mr. Baldwin overheard an MPD detective say, "Well, it looks like the n----r did it." The State opposed admission of the statement, arguing that Mr. Baldwin could not identify the person who allegedly made the statement and that it was inadmissible hearsay. The Defendant admitted that there was never an African-American suspect and that the evidence would not be offered to prove that an African-American committed the crime. However, he argued that the evidence was exculpatory. The Defendant surmised that if he could prove Detective Shemwell made the statement, the statement was relevant to Detective Shemwell's credibility. The trial court ruled that the evidence was irrelevant and inadmissible. The court further expressed skepticism that Mr. Baldwin heard what he thought he heard, noting that "Rimmer did it" sounded very similar and made more sense in context.

Evidence is relevant and generally admissible when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401, 402. Questions regarding the admissibility and relevancy of evidence generally lie within the discretion of the trial court, and the appellate courts will not "interfere with the exercise of that discretion unless a clear abuse appears on the face of the record." *State v. Franklin*, 308 S.W.3d 799, 809 (Tenn. 2010) (citing *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007)).

***16** A trial court abuses its discretion when it applies an incorrect legal standard or reaches a conclusion that is "illogical or unreasonable and causes an injustice to the party complaining." *State v. Ruiz*, 204 S.W.3d 772, 778 (Tenn. 2006). Relevant evidence, however, "may be excluded if its probative value is substantially 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.

We conclude that the trial court did not abuse its discretion by determining that the proffered evidence was not relevant. The Defendant admitted there was never an African-American suspect. The Defendant is not entitled to relief on this basis.

The Defendant also argues that the exclusion of this evidence "violated the Fifth Amendment to the United States Constitution." This general contention is the extent of his argument. Although the Defendant raised the issue in his motion for a new trial, he did not contemporaneously object

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at the trial. *See Adkisson*, 899 S.W.2d at 634; Tenn. Ct. Crim. App. R 10(b); Tenn. R. Evid. 103(a), (b). In any event, we will review the issue for plain error.

"An evidentiary ruling ordinarily does not rise to the level of a constitutional violation." *State v. Powers*, 101 S.W. 3d 383, 397 (Tenn. 2003) (citing *Crane v. Kentucky*, 476 U.S. 683, 689 (1986)). To determine whether the exclusion of evidence rises to the level of a constitutional violation, courts consider the following: (1) whether the evidence is critical to the defense, (2) whether it bears sufficient indicia of reliability, and (3) whether the interest supporting exclusion is substantially important. *State v. Brown*, 29 S.W. 3d 427, 433-34 (Tenn. 2000).

The excluded evidence in this case was not critical to the defense because the Defendant conceded that there was never an African-American suspect. A substantial right of the Defendant was not adversely affected. *See Smith*, 24 S.W.3d at 282. The Defendant is not entitled to relief on this issue.

Finally, the Defendant alleges that law enforcement's failure to preserve the videotape and to provide it to the defense violated *Brady*. The Defendant did not raise this issue at the trial or include the issue in his motion for new trial and his appellate argument is limited to one sentence. *See Adkisson*, 899 S.W.2d at 634; Tenn. Ct. Crim. App. R 10(b). Our review is limited to plain error.

Mr. Baldwin testified that he videotaped his inventory of the car and that the recording contained audio. The recording allegedly captured the statement, "[T]he n----r did it." Mr. Baldwin testified that he thought he provided the recording to the MPD but that he was not sure. Mr. Baldwin explained that the recording was not listed on the computer inventory list of all the items turned over to the MPD. He thought that he gave "everything" to the MPD and said that he had no reason to retain the recording. However, he had no record of providing it to MPD.

The defense argued that Mr. Baldwin's testimony supported its theory that the MPD intentionally destroyed the recording because the recording pointed to someone other than the Defendant as a suspect and that the MPD, and Detective Shemwell in particular, had "tunnel vision" in investigating the Defendant.

The trial court found that no evidence supported the Defendant's theory that Detective Shemwell intentionally destroyed the recording. The court noted that the detective had no reason to destroy the recording to cover up the possible identity of an African American suspect because there was no indication that an African-American suspect existed. The court concluded that the "whole thing is just an absolute nonissue." However, the court allowed the defense to ask Mr. Baldwin whether a videotape was made, whether he remembered giving it to MPD, and whether it was available at the time of trial.

***17** The Due Process Clause of the Fourteenth Amendment to the United States Constitution and article I, section 8 of the Tennessee Constitution afford every criminal defendant the right to a fair trial. *See Johnson v. State*, 38 S.W.3d 52, 55 (Tenn. 2001). As a result, the State has a constitutional duty to furnish a defendant with exculpatory evidence pertaining to his guilt or lack thereof or to the potential punishment faced by a defendant. *See Brady*, 373 U.S. at 87.

In order to show a due process violation pursuant to *Brady*, the defendant must prove by a preponderance of the evidence that (1) he requested the information, unless it is obviously exculpatory, (2) the State must have suppressed the information, (3) the information must be favorable to the accused, and (4) the information must be material. *State v. Edgin*, 902 S.W.2d 387, 389 (Tenn. 1995). Favorable evidence includes that which "challenges the credibility of a key prosecution witness." *Johnson*, 38 S.W.3d at 56-57 (internal quotation marks and citation omitted). Evidence is material when " '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 (quoting *Edgin*, 902 S.W.2d at 390).

The Defendant has not shown that a clear and unequivocal rule of law was breached because the evidence does not show that the recording was material. A recording of one of the investigating detectives stating "the n----r did it" would not have cast doubt on the Defendant's identity as the perpetrator. Although the recording would have established that a detective engaged in unprofessional conduct, there is no reasonable probability that the jury would have acquitted the Defendant based upon the comment. The Defendant is not entitled to relief on this issue.

VII. Drawing of the Honda Backseat

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The Defendant alleges that the trial court erred when it allowed into evidence a drawing of the backseat of the car. According to the Defendant, the drawing did "not reflect the true condition of the backseat" and was admitted in violation of Tennessee Rule of Evidence 403. The State disagrees, claiming that the court's determination that the drawing would assist the jury was reasonable.

Tennessee Rule of Evidence 403 states that, "although relevant, evidence may be excluded if its probative value is substantially 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." The decision to admit evidence will be reversed "only when the court applied an incorrect legal standard, or reached a decision which is against logic or reasoning" and the admission of the evidence "caused an injustice to the party complaining." *State v. Gilliland*, 22 S.W.3d 266, 270 (Tenn. 2000) (quoting *State v. Shirley*, 6 S.W.3d 243, 249 (Tenn. 1999)).

TBI agent and forensic serologist Samera Zavaro testified that she processed the car for blood evidence. When she located a reddish-brown stain, she conducted a presumptive blood field test. If the surface was fabric and resulted in a positive presumptive test, she took cuttings of the stained area and later conducted tests of the cuttings to determine whether they contained human blood. If the stain was found on a hard surface, she swabbed the surface and performed a second test using the swab. She identified photographs of the car, including the backseat. She testified that because the interior fabric was also a reddish-brown color, it was difficult to discern stains from the photographs alone. However, she said that it was easier to see the stains when personally viewing the evidence. Accordingly, she made several drawings of the car in which she depicted the areas where stains were found, including the backseat.

***18** When the State attempted to introduce the backseat drawing, the Defendant objected on the basis that the drawing was not the best evidence and was not accurate. He claimed that the drawing depicted more blood than the photographs. The trial court overruled the objection, pointing to Agent Zavaro's testimony that the stains were difficult to see in the photographs alone. The court found that the drawing would assist the jury's understanding and admitted the evidence. The court noted that the accuracy of the drawing could be challenged on cross-examination.

Although the Defendant does not elaborate in his brief about how admission of the evidence violated Rule of Evidence 403, his objection at the trial was based on the danger of misleading the jury. The trial court admitted the evidence based upon a finding that the drawing would assist the jury in understanding where in the backseat the blood was located. The Defendant did not ask Agent Zavaro questions challenging the accuracy of the drawing. The court did not abuse its discretion in admitting the evidence, and the Defendant is not entitled to relief on this basis.

The Defendant also asserts that admission of the backseat drawing violated the Fifth Amendment of the United States Constitution. He did not object on this basis at the trial and did not adequately address the issue in his appellate brief. *See Adkisson*, 899 S.W.2d at 634; Tenn. Ct. Crim. App. R 10(b). As such, our review is limited to plain error.

An evidentiary ruling rarely rises to the level of a constitutional violation. *See Powers*, 101 S.W.3d at 397. Furthermore, we have already determined that admission of the backset drawing was proper under the Rules of Evidence. We conclude that the Defendant's allegation of constitutional error is without merit, and he has not established that admission was plain error. *See, e.g.*, *State v. Dustin Dwayne Davis*, No. 03C01-9712-CR-00543, 1999 WL 135054, at *5 (Tenn. Crim. App. Mar. 15, 1999); *State v. Allan Brooks*, No. 01C01-9510-CC-00324, 1998 WL 754315, at *11 (Tenn. Crim. App. Oct. 29, 1998). He is not entitled to relief on this issue.

VIII. Admission of James Allard's Previous Testimony

The Defendant contends that the trial court erred in finding James Allard was unavailable and in allowing the State to present Mr. Allard's testimony through a transcript of the previous trial. He asserts that the State's efforts to locate Mr. Allard were "wholly insufficient" and that the prior testimony should have been excluded. The State responds that its efforts to locate Mr. Allard were reasonable and that the court did not err in declaring Mr. Allard unavailable and in admitting his previous testimony.

TBI Agent Charles Baker testified that he attempted to locate Mr. Allard through law enforcement databases as well as Google searches. He consulted "CLEAR," which searched real estate records, criminal information, and both criminal and civil records. He also searched the State of

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Tennessee Justice Portal, which contained driver's license information, vehicle information, criminal histories, and Tennessee Department of Correction information. He further searched the National Crime Information Center (NCIC) which he characterized as a national search through the FBI. Finally, he searched death records. He found a potential phone number but, after calling the number, determined it was a "dead end."

On cross-examination, Agent Baker said that he did not attempt to contact Mr. Allard's family because he did not have information about any family members. Agent Baker admitted that he was not aware Mr. Allard had been previously incarcerated in Indiana and said that he did not search for him through the Indiana Department of Correction.

***19** The Defendant argued that the State's efforts were insufficient. He asserted that Mr. Allard had a long criminal history and that if the right methods had been utilized, the State should have been able to identify his family members and gain more information about his whereabouts. The trial court found that the State's efforts were reasonable. The court stated that it did not "know how else [the State] can go about finding a witness, if they don't know who the family members are, other than Google searches and database searches." The court noted that Mr. Allard's imprisonment in Indiana nearly twenty years ago did not mean he was still in the state. The court found that the State was not required to send an investigator to every state in search of a witness.

The Constitution of the United States provides the accused in a criminal prosecution the right "to be confronted with witnesses." U.S. Const. amend. VI. The Tennessee Constitution similarly provides the right "to meet witnesses face to face." Tenn. Const. art. I, § 9. However, the right of confrontation is not absolute and must occasionally give way to considerations of public policy and necessities of the case. *State v. Kennedy*, 7 S.W.3d 58, 65 (Tenn. Crim. App. 1999) (citing *Jenkins v. State*, 627 N.E.2d 789, 793 (Ind. 1993)). Thus, the United States Supreme Court has refused to apply a literal interpretation of the Confrontation Clause which would bar the use of any hearsay. *Idaho v. Wright*, 497 U.S. 805, 814 (1990).

In *Crawford v. Washington*, 541 U.S. 36 (2004), the United States Supreme Court announced the test to determine admissibility under the Confrontation Clause of hearsay offered against an accused. Testimonial statements may not be offered into evidence unless two requirements are satisfied: (1) the declarant/witness must be unavailable and (2) the defendant must have had a prior opportunity to cross-examine the declarant/witness. *Id.* at 68. "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 68-69.

Mr. Allard's previous testimony was testimonial; thus, the pertinent consideration is whether the State proved that the witness was unavailable. To accomplish this, "the State must prove that it made a good faith effort to secure the presence of the witness in question." *State v. Sharp*, 327 S.W.3d 704, 712 (Tenn. Crim. App. 2010). "The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness. As with other evidentiary proponents, the prosecution bears the burden of establishing this predicate." *Crawford*, 541 U.S. at 74-75. Good faith refers to the extent to which the State must attempt to produce the witness and is a question of reasonableness. *Sharp*, 327 S.W.3d at 712 (citing *Ohio v. Roberts*, 448 U.S. 56, 74 (1980)). The trial court's decision will be affirmed absent an abuse of discretion. *Hicks v. State*, 490 S.W.2d 174, 179 (Tenn. Crim. App. 1972).

Our supreme court considered what constitutes a good faith effort in *State v. Armes*, 607 S.W.2d 234 (Tenn. 1980). In *Armes*, the State attempted to subpoena the witness before trial and discovered that the witness had disappeared. *Id.* at 236. This disappearance resulted in a mistrial. *Id.* One week before the second trial and again one day before the second trial, the State attempted to subpoena the witness, but the State was unable to locate the witness. *Id.* At the trial the State attempted to present the witness's preliminary hearing testimony. *Id.* The State failed to provide any independent evidence of an attempt to locate the witness to prove the witness's unavailability other than a statement by the prosecutor. The supreme court held that "[t]he prosecuting attorney's statement to the Court concerning the efforts of the State's investigator to locate the witness cannot be considered as evidence of proof on the issue of the State's good faith effort." *Id.* at 237. Our supreme court also determined that the State was on notice that extra effort would be required to locate the witness because he did not appear for the first trial date. *Id.*

***20** Unlike *Armes*, the State in the present case produced independent evidence of its efforts to locate Mr. Allard. Nearly twenty years had passed between the first trial and the State's attempts to locate Mr. Allard before the second

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trial. Agent Baker attempted to locate the witness using numerous search tools, including the NCIC database, which he explained was a national search through the FBI. Agent Baker developed one unsuccessful lead through a telephone number. The agent said he did not have information about Mr. Allard's family members and was unable to contact them to gain more information. This evidence supports the trial court's determination that the State made good-faith, although ultimately unsuccessful, efforts to locate the witness.

Given the passage of time and the independent evidence produced by the State, we conclude that the trial court did not abuse its discretion in determining Mr. Allard was unavailable. The Defendant is not entitled to relief on this issue.

IX. Rhonda Ball Johnson's Testimony

The Defendant argues that the trial court erred in allowing Rhonda Ball Johnson to testify about conversations she had with William Conaley, alleging that it was inadmissible hearsay. He asserts that her testimony violated Tennessee Rules of Evidence 801 and 802. The State contends that the testimony was proper as prior consistent statements used to rehabilitate Mr. Conaley's credibility.

Mr. Conaley was incarcerated with the Defendant at Northwest Correctional Center in 1993. He testified that the Defendant expressed his discontent that the victim had put him in prison. The Defendant told Mr. Conaley that the victim's son, Chris Ellsworth, was going to receive money from a lawsuit and that the Defendant felt entitled to some of the money.

Mr. Conaley said that prior to his leaving on furlough, the Defendant asked him to relay a message to the victim. The Defendant wanted the victim to know that he expected to receive some of the money from the lawsuit and that if he did not get it, he would kill her. Mr. Conaley said that he relayed the threat to Ms. Johnson. However, Mr. Conaley did not report the threat to the authorities, and he was released on parole shortly thereafter.

In January 1996, Mr. Conaley returned to custody. In February 1997, Mr. Conaley read about the victim's disappearance in a newspaper and told family members about the Defendant's prior statements, but Mr. Conaley did not contact law enforcement. However, he said that approximately one week later, an MPD officer visited him in prison. He told the police about the Defendant's threatening the victim.

On cross-examination, Mr. Conaley admitted that when the Defendant made the statements in 1993, Mr. Conaley had already been granted parole and was awaiting release. However, he admitted that when he spoke with law enforcement in 1997, the information might have gained him an earlier release. Nevertheless, he denied contacting law enforcement, and he said that it was Ms. Johnson who told the police about the Defendant's threat after the victim disappeared. Mr. Conaley requested that he be transferred to the "annex" to finish his sentence, which he admitted was "easy time" in the prison system. He said that after talking to the police about the Defendant, he was moved to the annex.

Ms. Johnson testified that she was the victim's niece. She was also childhood friends with Mr. Conaley. She confirmed that in 1993, Mr. Conaley told her about the Defendant's threat against the victim.

Generally, out-of-court statements offered to prove the truth of the matter asserted are inadmissible evidence. *See* Tenn. R. Evid. 801, 802. However, when a defendant attack's a witness's credibility, the State may rehabilitate the witness by offering evidence of a prior consistent statement. *State v. Benton*, 759 S.W.2d 427, 433 (Tenn. Crim. App. 1988). Admission of prior consistent statements is authorized in two circumstances: (1) where the statement is offered to rebut the implication that the witness's testimony was a recent fabrication; and (2) when deliberate falsehood has been implied. *Id.* Prior consistent statements are not ordinarily admissible for the sole purpose of bolstering a witness's credibility. *State v. Braggs*, 604 S.W.2d 833, 885 (Tenn. Crim. App. 1980).

***21** During Mr. Conaley's cross-examination, the defense implied that Mr. Conaley fabricated the Defendant's statement in 1997 because he faced years in prison and wanted to secure favorable treatment and early release. Thereafter, the State called Ms. Johnson, who testified that Mr. Conaley relayed the Defendant's threat to her in 1993, when Mr. Conaley had already been granted parole and had no motivation to lie in order to cut a deal with police. That testimony was properly admitted to rebut the Defendant's implication of recent fabrication, and this issue is without merit.

The Defendant also contends that admission of this evidence "was in violation of the Fifth Amendment of the United

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States Constitution." The Defendant did not object on this basis at the trial and did not elaborate in his appellate brief as to how admission violated his constitutional rights. *See Adkisson*, 899 S.W.2d at 634; Tenn. Ct. Crim. App. R 10(b). Accordingly, our review is limited to plain error.

Because we have already determined that admission of Ms. Johnson's statement was proper under the Rules of Evidence, we conclude that the evidence was not admitted in violation of the Defendant's constitutional rights and that the Defendant has not established plain error. He is not entitled to relief on this basis.

X. Chris Ellsworth's Testimony

The Defendant asserts that allowing Chris Ellsworth, the victim's son, to show the jury his scars violated Tennessee Rules of Evidence 401, 402, and 403. The State responds that the court acted within its discretion to allow the evidence, which demonstrated the victim was unlikely to abandon her son, who had been badly burned, and rebutted the defense's implication that the victim was not deceased. According to the State, the victim had provided extensive care to Mr. Ellsworth and would not have suddenly left.

At the trial, Mr. Ellsworth testified that he had been badly burned over 70% of his body in a water heater explosion and that he required extensive follow-up medical care. His mother was devoted to his care and frequently took him to LeBonheur Hospital as well as Shriners Hospital in Galveston, Texas, for treatment. She also worked with him daily on physical therapy for years after the accident. The State asked Mr. Ellsworth to show his scars to the jury. After the defense objected, the prosecutor explained that it wanted to show that the victim "was not the type of person that would have walked off without saying anything and leaving her children." The trial court agreed that the evidence was relevant, pointing out that the defense had said in its opening statement that the victim might not be deceased. The court agreed that the evidence did not have "a lot of probative value" under Rule 403 but that there was minimal danger of unfair prejudice. Thereafter, Mr. Ellsworth displayed the scars on his forearms to the jury.

Evidence is relevant and generally admissible when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401, 402. Relevant evidence, however, "may be excluded if its probative value is substantially 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.

The evidence was minimally relevant to support Mr. Ellsworth's testimony about the severity of his injuries and to combat the defense's argument that the victim might still be alive. The scars were a visual representation of the injuries described in the witness's testimony, and no evidence showed that the Defendant had any involvement in Mr. Ellsworth's injury. Despite the minimal relevance of the evidence, the Defendant has not articulated any prejudice he suffered based on the evidence's admission. The trial court found that the probative value was not substantially outweighed by the danger of unfair prejudice, and the record supports its determination. The court did not abuse its discretion in allowing the jury to view the scars.

***22** The Defendant asserts, in a cursory fashion, that admission of this evidence "was clearly done in violation of the Fifth Amendment of the United States Constitution," an assertion that he did not raise at trial. *See Adkisson*, 899 S.W.2d at 634; Tenn. Ct. Crim. App. R 10(b). We review this issue for plain error.

The Defendant has not established that admission of the evidence was prejudicial or improper. Likewise, we have considered his allegation of a constitutional error that violated his due process rights and have determined that it is without merit. The Defendant is not entitled to relief on this basis.

XI. Tim Helldorfer's Testimony Regarding William Conaley and James Allard

The Defendant alleges that the trial court erred in allowing Sergeant Tim Helldorfer to testify regarding statements made by Mr. Conaley and Mr. Allard, in violation of Rules of Evidence 801 and 802. The State contends that the testimony was prior consistent statements used to rebut implications on cross-examination about the Defendant's threat and confessions.

Sergeant Helldorfer testified that he interviewed Mr. Conaley in prison and that he obtained a statement from Mr. Allard in Johnson County, Indiana in 1997. Sergeant Helldorfer stated that Mr. Allard's previous testimony was consistent with the 1997 statement.

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The Defendant objected, arguing that the statements were hearsay and were prior consistent statements. He contended that admitting the statements because a witness's credibility had been generally impeached was not the proper use of a prior consistent statement. The State asserted that the witness's credibility became an issue on cross-examination and that it was proper to show they had "previously made these statements" to different individuals. The Defendant argued that Mr. Conaley's 1997 statement was fabricated and that the State could not provide a statement he made to someone else as proof that it was not a fabrication.

The trial court stated that "the jury has a right to hear that [Mr. Allard and Mr. Conaley] gave consistent statements to ... the police ...." It explained that the statements were being offered to bolster the witness's credibility. The court provided the following example to explain his ruling:

> If someone sees something, let's say they see someone run a light. And then they testify that they saw the person run the light.
>
> And the other side says, he didn't run the light, did he?
>
> Yes he did.
>
> And then [the witness] tells ten other people later on that he ran the light. I think the other side -- the first side has a right to put on the witnesses because he made that statement that he ran the light to many, many people over and over. To show his credibility on the stand, the credibility of his testimony.
>
> It's not being offered as substantive evidence. It's being offered to show his credibility, that he made that statement to several people.

The court allowed the officer to testify that Mr. Conaley's statements to police and at the trial were consistent. The court determined that the State could show Sergeant Helldorfer the transcript of Mr. Allard's trial testimony and ask whether it was consistent with Mr. Allard's statement to police. However, the contents of the transcript could not be admitted.

Out-of-court statements offered to prove the truth of the matter asserted are inadmissible at trial. *See* Tenn. R. Evid. 801, 802. However, when a defendant attacks a witness's credibility, the State may rehabilitate the witness by offering evidence of a prior consistent statement. *Benton*, 759 S.W.2d at 433. Admission of a prior consistent statement is authorized in two circumstances: (1) where the statement is offered to rebut the implication that the witness's testimony was a recent fabrication; and (2) when deliberate falsehood has been implied. *Id.* A prior consistent statement is not ordinarily admissible for the sole purpose of bolstering a witness's credibility. *Braggs*, 604 S.W.2d at 885.

***23** Here, the trial court's comments reflect that the prior consistent statements were allowed merely to bolster the witness's credibility. The statements admitted through Sergeant Helldorfer were not made "before any improper influence or motive to lie existed." *State v. Herron*, 461 S.W.3d 890, 905 (Tenn. 2015) (citing *Sutton v. State*, 291 S.W. 1069, 1070 (Tenn. 1927)). The defense's cross-examination of these witnesses implied that the statements about the Defendant's threat were fabricated in an effort to gain favorable treatment from the State. The statements to the police were not made before the purported motive to fabricate existed. Therefore, they were not prior consistent statements, and the court erred in admitting the statements.

Recognizing that all errors are not equal, our supreme court has established three categories of error—structural constitutional error, non-structural constitutional error, and non-constitutional error. *Powers*, 101 S.W.3d at 397; *State v. Garrison*, 40 S.W.3d 426, 433-34 (Tenn. 2000); *State v. Harris*, 989 S.W.2d 307, 314-15 (Tenn. 1999). The distinctions between these categories dictate the standards to be applied when determining whether a particular error is harmless. *State v. Rodriguez*, 254 S.W.3d 361, 371 (Tenn. 2008). A trial court's error in admitting evidence under the Tennessee Rules of Evidence falls into the category of non-constitutional error, and harmless error analysis under Tennessee Rule of Appellate Procedure 36(b) is appropriate. *See State v. Clark*, 452 S.W.3d 268, 287 (Tenn. 2014); *see also State v. James*, 81 S.W.3d 751, 763 (Tenn. 2002) (noting that "[h]armless error analysis applies to virtually all evidentiary errors other than judicial bias and denial of counsel"). Pursuant to Rule 36(b), the defendant bears the burden of showing that a non-constitutional error "more probably than not affected the judgment or would result in prejudice to the judicial process." T.R.A.P. 36(b); *Rodriguez*, 254 S.W.3d at 372.

The Defendant has not carried his burden in showing that he was prejudiced by admission of this evidence. Indeed, he has not offered any argument related to the prejudicial effect of this error. After considering the entirety of the evidence presented at the, we conclude that the error was harmless. The defense was able to cross-examine Mr. Conaley and

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Mr. Allard about their motivations to lie in exchange for more favorable treatment. The substance of the testimony was already in evidence, and the jury was instructed not to consider the consistent statements as substantive evidence. Further, overwhelming circumstantial evidence established the Defendant's guilt, including his previous relationship with the victim and motive for harming her, his threats to kill the victim, his confession to his cellmate, his possession of a car matching a description of the car seen at the motel, the presence in the car of blood and DNA matching the victim's, and his actions in the days following the victim's disappearance. Accordingly, the error was harmless, and the Defendant is not entitled to relief on this basis.

The Defendant also maintains that admission of this evidence violated the Fifth Amendment of the United States Constitution. He did not object on this basis at the trial and does not elaborate in his appellate brief as to how the Fifth Amendment was violated. *See Adkisson*, 899 S.W.2d at 634; Tenn. Ct. Crim. App. R 10(b). Our review is limited to plain error, and we conclude that the Defendant has not shown that the admission of this evidence affected a substantial right. The substantial right inquiry under the plain error doctrine mirrors the harmless error analysis under Rule 36(b). *See Maddin*, 192 S.W.3d at 562. Upon consideration, we conclude, as well, that admission of the evidence did not violate the Defendant's due process rights under the Fifth Amendment.

XII. Trial Court's Limitation of Sergeant Helldorfer's Testimony

***24** The Defendant contends that the trial court erred in limiting the defense's questioning of Sergeant Helldorfer. He argues that the defense should have been allowed to ask during cross-examination whether Billy Wayne Voyles had been positively identified. The Defendant further asserts that Sergeant Helldorfer should have been allowed to testify about a document relating to the release of the maroon Honda. The State responds that the defense agreed to the limitation on testimony about the positive identification and cannot now claim error. Further, the State asserts that the document was inadmissible because it could not be authenticated by the witness.

A. Positive Identification

During its examination of Sergeant Helldorfer, the defense asked whether he was "aware that there was a positive identification made, that Billy Voyles was positively identified in the case." The prosecution objected to the question, arguing it was hearsay. The court overruled the objection because it was admissible as a prior identification but stated that there was a question as to whether a witness made a "positive" identification. Defense counsel then said, "I will take the word positive out if that is the problem." The court additionally noted that the Defendant needed to establish that the questioning was related to Mr. Darnell's identification of Mr. Voyles. The defense again agreed and asked Sergeant Helldorfer whether "Mr. Darnell had identified Billy Wayne Voyles as an eye witness as being on the scene at the time during [the] investigation." Sergeant Helldorfer answered affirmatively.

Tennessee Rule of Appellate Procedure 36(a) provides that "[n]othing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." The Defendant agreed to take the word positive out of the question posed to Sergeant Helldorfer, and he cannot now claim error on that basis. In any event, the Defendant has not explained how he was prejudiced by this limitation. Sergeant Helldorfer testified that Mr. Darnell identified Mr. Voyles as one of the men he saw in the motel office, and Mr. Darnell testified that he identified Mr. Voyles. The Defendant is not entitled to relief on this basis.

The Defendant also alleges that this limitation violated his Fifth Amendment rights under the United States Constitution. The Defendant did not raise this issue at the trial and does not provide any meaningful argument regarding this issue in his brief. *See Adkisson*, 899 S.W.2d at 634; Tenn. Ct. Crim. App. R 10(b). We review the issue for plain error and conclude that the Defendant has not proven this limitation amounted to a due process violation or that a substantial right was adversely affected. The defense sought to elicit testimony that Mr. Darnell identified Mr. Voyles as one of the men at the motel. The court did not allow the defense to use the word "positive" when pursuing this line of questioning because Mr. Darnell had not used the word when he testified about the identification. The Defendant agreed to remove the word "positive" from his question. Deleting the word from the question did not meaningfully change the witness's testimony and had no effect on the outcome of the trial. The Defendant is not entitled to relief on this basis.

B. Towing Slip

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During cross-examination, the defense showed Sergeant Helldorfer three documents, one of which was a towing slip for the Honda. When asked whether he recognized them, he replied that he only recognized the towing slip. The Defendant questioned Sergeant Helldorfer about the two unidentified documents. The State objected, arguing that the witness had not authenticated the documents. In response, the defense asserted that the three documents were received together in discovery and that Sergeant Helldorfer's signature appeared on the towing slip. The defense asserted that one of the unidentified documents appeared to be the back of the towing slip, which had been authenticated by Sergeant Helldorfer. The defense explained that it was attempting to establish when the car was released and to whom, information that was reflected on one of the documents. However, Sergeant Helldorfer testified that the writing on the purported back of the towing slip was not his. He explained that he only wrote on the front of the towing slip and could not verify the information contained on the back. The trial court informed the Defendant that the witness had to authenticate the document purported to be the back of the towing slip before it could be admitted into evidence. Thereafter, the officer testified that his signature was on the towing slip, which reflected that the car was released on March 25. However, he did not have personal knowledge of where the car was taken after it was released. Because he could not identify the purported back of the towing slip, that document was not admitted into evidence.

***25** Before a document is admitted into evidence, the party seeking admission generally must authenticate the document. *State v. Troutman*, 327 S.W.3d 717, 722 (Tenn. Crim. App. 2008); *See* Tenn. R. Evid. 901(a). Sergeant Helldorfer testified that he recognized the towing slip. However, he was unable to identify the document that the defense claimed was the back of the towing slip. The trial court did not abuse its discretion in refusing to admit the unauthenticated document, and this issue is without merit.

The Defendant again asserts a Fifth Amendment challenge to this issue, which was not a basis for objection at trial and is not adequately argued in his brief. *See Adkisson*, 899 S.W.2d at 634; Tenn. Ct. Crim. App. R 10(b). We review the issue for plain error and conclude that the Defendant has not established that the trial court's decision violated a clear and unequivocal rule of law. Because there was no error in the court's decision to exclude this evidence based on a lack of authentication, the allegation of a constitutional error is without merit. The Defendant is not entitled to relief on this basis.

XII. Joyce Carmichael's Testimony

Joyce Carmichael is the official records officer for the Tennessee Department of Correction. Ms. Carmichael testified that Tommy Voyles and the Defendant were both incarcerated at Lake County Regional Correctional Facility during a five-month period in 1992. Later in the trial, another witness testified that Tommy and Billy Voyles were related and that the witness had seen them together, although the witness did not specify how they were related. Before her testimony, the defense objected to the relevance of evidence that Tommy Voyles had been incarcerated with the Defendant previously. The prosecutor argued that there was more than one person involved in the victim's disappearance and that Tommy Voyles might have been involved. Thus, the State wanted to show the connection between the Defendant and Tommy Voyles. The defense pointed out that the only testimony regarding Tommy Voyles was that he had been previously married to the victim. The State further explained that "there appear to be multiple people involved in this" and that one of the individuals involved was identified by a witness as Billy Voyles. Thus, argued the State, "the fact that [the Defendant] has a close connection with a Tommy Voyles would be relevant." The trial court admitted the testimony, noting that it was "not extremely probative but there's absolutely no unfair prejudice."

The evidence does not support the trial court's determination that evidence attempting to connect the Defendant with Tommy Voyles was relevant. The evidence was too remote to be relevant to a material issue in the case. Tenn. R. Evid. 401 and 402. There was testimony that Tommy Voyles and the Defendant had been incarcerated in the same facility but not that they knew each other, were housed together, or interacted in any capacity during that time. Even if a "close connection" between the Tommy Voyles and the Defendant were proved, that connection does not result in a conclusion that a connection existed between the Defendant and Billy Voyles. The court's admission of this irrelevant evidence was error, but we conclude that the error was harmless based upon the overwhelming circumstantial evidence of the Defendant's guilt. *See* Tenn. R. App. P. 36(b). The Defendant is not entitled to relief on this basis.

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XIV. Prior Testimony of Unavailable Witnesses

***26** The Defendant contends that the trial court erred in allowing previous testimony from witnesses, along with related exhibits, who were unavailable at the second trial. He alleges that the admission of this testimony was unfair because the witnesses were questioned by his previous counsel, who were found to be constitutionally ineffective. The State responds that each of the unavailable witnesses was subject to cross-examination and that counsel from the Defendant's first trial were not ineffective in questioning witnesses.

Pursuant to Tennessee Rule of Evidence 804(b), the former testimony of a declarant who is currently unavailable to testify is admissible. "Former testimony" is "[t]estimony given as a witness at another hearing of the same or a different proceeding ..., if the party against whom the testimony is now offered had both an opportunity and a similar motive to develop the testimony by direct, cross, or redirect examination." Tenn. R. Evid. 804(b)(1). The similar motive requirement is met when the issues in the present case are "sufficiently similar" to the issues in the case in which the prior testimony was given. *See State v. Howell*, 868 S.W.2d 238, 252 (Tenn. 1993). The Constitution of the United States provides the accused in a criminal prosecution the right "to be confronted with witnesses." U.S. Const. amend. VI.; *see also* Tenn. Const. art. I, § 9. However, "the Confrontation Clause only guarantees 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' " *Pennsylvania v. Ritchie*, 480 U.S. 39, 53 (1987) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)). Our courts have upheld the admission of prior testimony given at a preliminary hearing, *see State v. Bowman*, 327 S.W.3d 69, 88-89 (Tenn. Crim. App. 2009), and in another state, *see Howell*, 868 S.W.2d at 252.

The prior testimony of eight witnesses was read into evidence at the Defendant's trial. With the exception of one witness, the prior testimony was from either the Defendant's preliminary hearing or his first trial. The exception was the testimony of Dixie Presley, who testified at the previous trial and at the Defendant's post-conviction evidentiary hearing. The post-conviction court determined that trial counsel were ineffective for failing to cross-examine Ms. Presley about the two men she saw at the motel on the night of the victim's disappearance. However, she was specifically questioned about this matter at the post-conviction hearing, and this testimony was read into evidence at the Defendant's second trial. Therefore, any failure to effectively cross-examine Ms. Presley at the first trial was satisfied by her questioning at the post-conviction hearing and the subsequent introduction of this evidence at the second trial.

The record reflects that the Defendant had an opportunity to, and in fact did, cross-examine each witness. The Defendant had a similar motive to develop the testimony of these witnesses during examination in the prior proceedings in which he was facing the same charges. Other than the exception discussed above, the Defendant was granted post-conviction relief on the basis that his counsel were ineffective in investigating the case, not in examining witnesses. The Defendant has not cited any cases holding that prior testimony is inadmissible when post-conviction relief is granted for a reason unrelated to counsel's examination of witnesses. Accordingly, he is not entitled to relief on this basis.

***27** The Defendant also argues that admission of this prior testimony violated his Fifth Amendment rights. He did not object on this basis at trial and does not elaborate on this issue in his brief. *See Adkisson*, 899 S.W.2d at 634; Tenn. Ct. Crim. App. R 10(b). We review the issue for plain error.

Because we have determined that admission of the prior testimony was proper, we conclude that the Defendant has not shown that his due process rights were violated in this respect. No clear and unequivocal rule of law was breached, and the Defendant is not entitled to relief on this basis.

XV. Admission of Richard Rimmer's Prior Inconsistent Statements

The Defendant alleges that the trial court should not have admitted Richard Rimmer's prior inconsistent statements and related exhibits as substantive evidence. The State asserts that this evidence was properly admitted as a prior inconsistent statement and as past recollection recorded.

At trial the Defendant's brother, Richard Rimmer, testified that he could not recall giving a statement to the police in 1997. The State showed Mr. Rimmer a copy of a statement dated February 18, 1997, and although he recognized his signature on the statement, he did not remember giving the statement. The prosecutor asked Mr. Rimmer about each question and answer provided in the statement. In two

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instances, he denied providing a particular answer, but he mostly stated that he had no memory of the statement. He testified that he had suffered several head injuries, which impacted his memory. The State also showed him drawings he allegedly made, but he denied making the drawings.

The State sought to have the statement and drawings admitted as substantive evidence under Tennessee Rule of Evidence 803(26). The trial court found that for the statements Mr. Rimmer denied making, they were prior inconsistent statements under Tennessee Rule of Evidence 613(b) and were admissible, if the court found they were trustworthy, pursuant to Rule 803(26), providing a hearsay exception for prior inconsistent statements. For the statements Mr. Rimmer did not remember making, the court found that he was an unavailable witness pursuant to Rule of Evidence 804(a)(3), and those questions and answers could be read to the jury. Both sides presented testimony relevant to competency at the time the statement was given.

The defense called Mr. Rimmer's mother, Sandra Rimmer, who testified that Mr. Rimmer had received disability benefits since 1990 or 1991 due to a head injury that caused brain damage. She stated that his daily activities were impacted and that he "sometimes ... thinks things are happening [that were] not happening." Ms. Rimmer admitted that in 1997, Mr. Rimmer was capable of living on his own, managed daily activities without assistance, and worked to support himself. She also said he was competent to enter into a lease agreement.

The State called Sergeant Helldorfer, who testified that he met with Mr. Rimmer on February 13 and 18, 1997. His impression was that Mr. Rimmer fully understood the questions asked and answered them appropriately. Sergeant Helldorfer said that he did not ask leading questions and that Mr. Rimmer provided the details. The February 18 conversation was memorialized in a written statement. The officer also testified about Mr. Rimmer's drawings. One drawing depicted the location of the blood in the backseat, and the other was a drawing of the shovel, of which the Defendant asked Mr. Rimmer to dispose. Sergeant Helldorfer confirmed that the statement and drawings about which Mr. Rimmer had been questioned were those obtained by Sergeant Helldorfer on February 18, 1997.

***28** In assessing whether the evidence was trustworthy, the trial court noted the level of detail contained in Mr. Rimmer's answers. The court further found that the statement appeared to come from a competent person and not from someone who was intellectually disabled. The court determined that the statement was given under circumstances indicating its trustworthiness.

The trial court determined that the statements Mr. Rimmer denied making were admissible pursuant to Rule 803(26). The court further ruled that the drawings could be admitted into evidence, as Mr. Rimmer had denied making them. However, as to the statements for which Mr. Rimmer claimed a lack of memory, the court found those were not inconsistent statements and could not be admitted under 803(26). Rather, the court found that portions of the statement qualified as a past recollection recorded pursuant to Rule 803(5). Thus, those portions could be read into evidence but not admitted as an exhibit.

Hearsay is defined as "a statement, 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). As a general rule, hearsay is not admissible during a trial, unless the statement falls under one of the exceptions to the rule against hearsay. Tenn. R. Evid. 802. However, many exceptions to the rule against hearsay exist. Tennessee Rule of Evidence 803(26) provides that a prior inconsistent statement that is otherwise admissible under Rule 613(b) is admissible as substantive evidence if the following prerequisites are met:

> (A) The declarant must testify at the trial or hearing and be subject to cross-examination concerning the statement.
>
> (B) The statement must be an audio or video recorded statement, a written statement signed by the witness, or a statement given under oath.
>
> (C) The judge must conduct a hearing outside the presence of the jury to determine by a preponderance of the evidence that the prior statement was made under circumstances indicating trustworthiness.

This rule has been interpreted to apply when a testifying witness claims a lack of memory. *State v. Davis*, 466 S.W.3d 49, 64 (Tenn. 2015).

Tennessee Rule of Evidence 613(b) permits the use of extrinsic evidence of prior inconsistent statements for the purpose of impeachment. The Rule provides that "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless and until the witness is afforded an opportunity to explain or deny the same and the opposite party

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is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require."

Additionally, Rule 803(5) provides another exception to the hearsay rule, which is commonly referred to as past recollection recorded. That rule deems admissible

> [a] memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

The Defendant alleges that Mr. Rimmer's prior statement should have been considered by the jury for impeachment purposes only. However, Rule 803(26) provides that an inconsistent statement may be admitted as substantive evidence when certain conditions are satisfied. Mr. Rimmer testified at the trial that the statement was written and signed by him, and the trial court conducted a jury-out hearing during which it determined the statement was trustworthy. The court did not err by admitting the prior statement pursuant to Rules 613(b) and 803(26). Additionally, the statement was properly admitted as a recorded recollection under Rule 803(5). The statement was taken shortly after the events in question, and Mr. Rimmer no longer remembered the statement. Further, the court allowed the statement to be read into evidence but did not admit it as an exhibit. Accordingly, Mr. Rimmer's prior statement was admissible under 803(26) and 803(5), and the Defendant is not entitled to relief on this issue.

***29** The Defendant again asserts a general Fifth Amendment challenge to the admission of this evidence, although he did not object on that basis at trial and does not provide meaningful argument on the issue in his brief. *See Adkisson*, 899 S.W.2d at 634; Tenn. Ct. Crim. App. R 10(b). Our review is limited to plain error. In that regard, we conclude that the Defendant has not established that he is entitled to plain error relief.

XVI. Kenneth Falk's Testimony

The Defendant argues that the trial court erred in prohibiting the testimony of attorney Kenneth Falk regarding the success of a lawsuit concerning conditions at the Johnson County Jail in Indiana. The State responds that the evidence was properly excluded as it was irrelevant.

The Defendant offered the testimony of Mr. Falk to establish that the Defendant's escape attempts were related to the conditions at the jail and did not reflect a consciousness of guilt. The State objected on relevancy grounds. The trial court allowed the testimony to rebut the implication that his escapes were based on guilt. However, the court prohibited Mr. Falk from testifying about any details the Defendant discussed with him.

Mr. Falk testified that was legal director of the American Civil Liberties Union (ACLU) of Indianapolis, Indiana. He said that in 1997, the Defendant contacted his office concerning the conditions at the Johnson County Jail. His office filed a lawsuit based on the Defendant's complaints, although it was filed on behalf of other inmates because the Defendant was no longer confined in the jail by the time the lawsuit was filed. When the defense asked Mr. Falk whether the lawsuit was successful, the State objected. The trial court sustained the objection, stating there was no need "to talk about what happened in the lawsuit."

The trial court did not abuse its discretion in limiting Mr. Falk's testimony. The defense's stated purpose in offering the evidence was to provide a reason, other than guilt, for the Defendant's escape attempts. Mr. Falk established that the Defendant complained about the conditions and that a lawsuit was filed as a result. The court did not abuse its discretion in limiting the details of the lawsuit, including whether it was successful. The Defendant is not entitled to relief on this basis.

The Defendant maintains that excluding this evidence violated the Fifth Amendment of the United States Constitution. He did not object on this basis at trial and does not elaborate on the issue in his brief. *See Adkisson*, 899 S.W.2d at 634; Tenn. Ct. Crim. App. R 10(b). Thus, our review is limited to plain error.

To determine whether the exclusion of this testimony to the level of a constitutional violation, we consider the following: (1) whether the evidence is critical to the defense, (2) whether it bears sufficient indicia of reliability, and (3) whether the interest supporting exclusion is substantially important. *See Brown*, 29 S.W. 3d at 433-34.

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The Defendant has not proven that the evidence was critical to his defense, and therefore, no substantial right was adversely affected. As noted above, the Defendant was able to establish through Mr. Falk's testimony that conditions at the jail led the ACLU to file a lawsuit, which provided an alternative reason for the Defendant's escape attempt. We cannot conclude that additional testimony that the lawsuit was successful would have changed the outcome of the trial. Accordingly, plain error relief is not warranted.

XVII. Marilyn Miller's Testimony

***30** The Defendant asserts that the trial court erred in not allowing Marilyn Miller to give an opinion on the length of time that the maroon Honda should have been kept by law enforcement. He alleges that her testimony would have supported his request for a *Ferguson* jury instruction. He claims that exclusion of this testimony violated Rules of Evidence 401 and 402. The State contends that the exclusion was proper and argues that the decision to provide a *Ferguson* instruction was a question of law for the court and that Dr. Miller's testimony would not have assisted the jury. The State further responds that the proffered testimony was outside the scope of Dr. Miller's expertise.

Dr. Miller testified that she was an associate professor of forensic science at Virginia Commonwealth University. She had a bachelor's degree in chemistry, a master's degree in forensic chemistry, and a doctorate in education. Before teaching, she spent fourteen years working as a forensic scientist and a crime scene investigator for three law enforcement agencies. Her duties included responding to and investigating crime scenes and analyzing evidence in a laboratory. She had taught for twenty-two years in the field of forensic science and crime scene investigation. The trial court admitted Dr. Miller as an expert in crime scene investigation, crime scene reconstruction, forensic science, and serology and blood spatter analysis.

The defense asked Dr. Miller whether she had an opinion regarding the length of time the maroon Honda should have been retained by law enforcement. The State objected, and the trial court sustained the objection. The court acknowledged that Dr. Miller was a crime scene expert but found that it was improper for her to give an opinion about the duty to preserve evidence as it related to *Ferguson*.

The Defendant asserts that this limitation violated Rules of Evidence 401 and 402. As previously discussed, Tennessee Rule of Evidence 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 402 provides, in part, that "[e]vidence which is not relevant is not admissible."

The Defendant contends that Dr. Miller's testimony would have assisted the jury in understanding "that the defense was not given ample opportunity to inspect and test the maroon Honda." However, we agree with the State that this matter was relevant to whether there was a duty to preserve, and that was an issue solely within the purview of the trial court. Accordingly, the court did not abuse its discretion in ruling the testimony was inadmissible.

The Defendant contends that exclusion of this evidence violated the Fifth Amendment. Because he did not raise this issue at trial and does not provide argument regarding this issue in his appellate brief, our review is limited to plain error. *See Adkisson*, 899 S.W.2d at 634; Tenn. Ct. Crim. App. R 10(b). We conclude that the Defendant failed to meet his burden in proving that exclusion of Dr. Miller's testimony violated a clear and unequivocal rule of law. The evidence was not critical to the defense because the issue of the duty to preserve evidence is a matter of law for the trial court's determination. Dr. Miller's testimony would not have assisted the jury in its resolution of any issue in the case. The Defendant is not entitled to relief on this basis.

XVIII. Documents Related to Lawsuit against Shelby County Jail

Next, the Defendant asserts that the trial court should have admitted into evidence another prisoner's affidavit about the prisoner's experiences in the Shelby County Jail and about a 2000 contempt order. The State disagrees, arguing that these documents lacked probative value because they related to the jail's conditions when the Defendant was no longer confined there and that the affidavit was inadmissible hearsay.

***31** Attorney Robert Hutton testified that in 1996 or 1997 he filed a lawsuit against the Shelby County Jail, alleging that jail conditions violated the Eighth Amendment to the United States Constitution. Shelby County stipulated that the conditions were unconstitutional and agreed to make

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changes to the facility. The defense attempted to admit several documents related to the lawsuit, and the State objected. One of the documents was described as a contempt order, which contained "graphic, specific instances, everything from smack down tournaments ... to gang rapes." The State argued that no evidence reflected that the Defendant had personal knowledge of these activities and that it was irrelevant to show why he attempted to escape. The State also noted that several of the documents pertained to times when the Defendant was no longer confined at the jail. The defense argued that the documents described the jail as a "hell hole" and that the documents were relevant to establishing the Defendant's state of mind at the time of the attempted escape.

The trial court found that the general information relating to the conditions at the jail and the county's admission that they were unconstitutional were admissible. It excluded evidence of specific instances of conduct at the jail, unless the Defendant could establish a link between himself and the conduct. The court stated that the Defendant had "a right to show that the jail conditions were bad, as a possible reason that he might escape, but as far as showing that some gang member raped some other gang member in the jail, ... that is far [afield]." Thus, the court permitted the defense to present the consent order in which Shelby County admitted the conditions were unconstitutional but not the additional litigation documents because "the majority of which took place when [the Defendant] was not in [the] jail."

The purpose of the evidence was to provide a reason for the Defendant's attempted escape other than a consciousness of guilt. Mr. Hutton's testimony and the consent order established that conditions at the jail were unconstitutional and that the County agreed to make changes. The excluded documents generally detailed specific instances of violence and sexual assault, but the incidents were not connected to the Defendant, and he did not establish the excluded documents relevance. Therefore, the trial court did not abuse its discretion by prohibiting the admission of the relevant documents, and the Defendant is not entitled to relief on this basis.

The Defendant asserts that the exclusion of this evidence was a violation of the Fifth Amendment of the United States Constitution. He did not assert that issue at trial, and his cursory treatment of the issue in his brief qualifies it for waiver. *See Adkisson*, 899 S.W.2d at 634; Tenn. Ct. Crim. App. R 10(b). Our review is limited to plain error. We conclude that the specific instances of conduct the Defendant sought to introduce were not critical to the defense because nothing connected the Defendant's experience at the jail to the unconstitutional conduct. Accordingly, the trial court's exclusion did not affect the outcome of the trial. The Defendant has not established plain error and is not entitled to relief on this basis.

XIV. Non-Capital Sentencing

Finally, the Defendant raises one sentencing issue related to the application of an aggravating factor relative to his aggravated robbery conviction. He asserts that proof did not support a finding that he was a leader in the offense and that the trial court erred by applying this factor and ordering the sentence for aggravated robbery to be served consecutively to the death sentence. The State responds that the Defendant has waived this issue for failing to include a transcript from this portion of the sentencing phase. Alternatively, the State asserts that the evidence supported application of the enhancing factor.

As the appellant, it was the Defendant's burden to prepare an adequate record for appellate review. *See State v. Ballard*, 855 S.W.2d 557, 560 (Tenn. 1993). In the absence of an adequate record, this court must presume that the trial court's ruling was correct. *See State v. Richardson*, 875 S.W.2d 671, 674 (Tenn. Crim. App. 1993); *see also State v. Ivy*, 868 S.W.2d 724, 728 (Tenn. Crim. App. 1993) (holding that when the appellant contends that the sentence is excessive but does not include a transcript from the sentencing hearing, the issue of excessive sentences will be considered waived); Tenn. R. App. P. 24(b).

***32** Without a transcript of the non-capital sentencing hearing, this court cannot evaluate the trial court's application of the enhancement factor, and we presume the court's action was correct. The Defendant is not entitled to relief on this basis.

XV. Mandatory Review

When reviewing a conviction for first degree murder and an accompanying sentence of death, Tennessee Code Annotated section 39-13-206(c)(1)(2018) requires this court to review the record to determine whether:

(A) The sentence of death was imposed in any arbitrary fashion;

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(B) The evidence supports the jury's finding of statutory aggravating circumstance or circumstances;

(C) The evidence supports the jury's finding that the aggravating circumstance or circumstances outweigh any mitigating circumstances; and

(D) The sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant.

A. Arbitrariness of Death Sentence

In accordance with the trial court's instructions, the jury unanimously determined that the State proved beyond a reasonable doubt that an aggravating circumstance applied to the murder committed by the Defendant and that the aggravating circumstance outweighed the mitigating circumstances. The record reveals that the penalty phase was conducted pursuant to the applicable statutory provisions and to the rules of criminal procedure. We conclude that the Defendant's sentence of death was not imposed in an arbitrary fashion.

B. Evidence Supporting Aggravating Circumstances

We next turn to the sufficiency of the evidence supporting the aggravating circumstances found by the jury. In considering whether the evidence supports the jury's findings of statutory aggravating circumstances, we must determine, after viewing the evidence in the light most favorable to the State, whether a rational trier of fact could have found the existence beyond a reasonable doubt of the aggravating circumstances. *State v. Rollins*, 188 S.W.3d 553, 571 (Tenn. 2006) (citing *Reid*, 164 S.W.3d at 314).

The jury applied one aggravating circumstance that the Defendant "was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person." T.C.A. § 39-13-204(i)(2)(Supp. 1998). Our supreme court has defined the word "violence" as "physical force unlawfully exercised so as to injure, damage or abuse." *State v. Fitz*, 19 S.W.3d 213, 217 (Tenn. 2000). "When the statutory elements of the prior felony ..., in and of themselves, do not necessarily involve the use of violence to the person," the trial court is required to examine the facts underlying the felony to determine whether the (i)(2) aggravating circumstance may properly be considered by the jury. *State v. Bell*, 512 S.W.3d 167, 204 (Tenn. 2015) (citing *State v. Sims*, 45 S.W.3d 1, 11-12 (Tenn. 2001)).

In support of the (i)(2) aggravating circumstance, the State relied upon four prior convictions: assault with the intent to commit robbery with a deadly weapon, rape, and two counts of aggravated assault. The trial court noted that aggravated assault could be accomplished with or without violence and, accordingly, would not always qualify as an aggravator under subsection (i)(2). The court reviewed the aggravated assault indictments and determined that the underlying facts involved the use of violence. *See State v. Young*, 196 S.W.3d 85, 111-12 (Tenn. 2006) (setting forth guidelines for determining whether a prior felony involves the use of violence against a person). Therefore, the court allowed the State to present these prior convictions to the jury for review. To establish the prior convictions, the State introduced judgments for each conviction. We conclude that the evidence is sufficient to support the jury's application of the (i)(2) aggravating factor.

C. Weighing Aggravating and Mitigating Circumstances

***33** We next consider whether the evidence supports the jury's finding that the aggravating circumstances outweighed any mitigating circumstances beyond a reasonable doubt. We must determine "whether a rational trier of fact could find that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt when the evidence is taken in the light most favorable to the State." *State v. Freeland*, 451 S.W.3d 791, 820 (Tenn. 2014).

At the sentencing hearing, the Defendant stated that he did not wish to present any mitigating evidence. The trial court noted that the Defendant would need to be questioned on the record about his decision to forego the presentation of mitigating evidence pursuant to *Zagorski v. State*, 983 S.W.2d 654, 660-61 (Tenn. 1998). The Defendant was placed under oath and testified unequivocally that he understood the importance of mitigating evidence and his right to present such evidence, that he had sufficiently discussed the matter with his attorneys, who strongly advised against his decision, and that he wished to forego presentation of the evidence. The court determined that the Defendant had freely and voluntarily waived his right to present mitigation evidence. The court stated that the Defendant had already been through two capital sentencing trials, one at which mitigation evidence was presented, and that the Defendant likely understood the consequences of his decision. In accordance with the Defendant's decision, the defense did not present mitigating evidence, although the court instructed the jury that it could

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consider any mitigating evidence raised by the evidence and produced by the prosecution or defense in the guilt and sentencing phases.

The record contained little, if any, evidence that could mitigate the Defendant's actions, and the State presented sufficient evidence of the Defendant's prior felonies as an aggravating factor. We therefore conclude that, viewing the evidence in the light most favorable to the State, a rational trier of fact could have found that the (i) (2) aggravating circumstance outweighed the mitigating circumstances beyond a reasonable doubt.

D. Proportionality Review

When this court conducts the proportionality review required by Tennessee Code Annotated section 39-13-206(c)(1)(D), we do not function as a "super jury" that substitutes our judgment for the judgment of the sentencing jury. *See State v. Godsey*, 60 S.W.3d 759, 782 (Tenn. 2001). Rather, we must take a broader perspective than the jurors to determine whether the defendant's sentences are " 'disproportionate to the sentences imposed for similar crimes and similar defendants.' " *State v. Thacker*, 164 S.W.3d 208, 232 (Tenn. 2005) (quoting *Bland*, 958 S.W.2d at 664). The pool of cases upon which we draw in conducting this analysis are "first degree murder cases in which the State sought the death penalty, a capital sentencing hearing was held, and the jury determined whether the sentence should be life imprisonment, life imprisonment without possibility of parole, or death." *State v. Rice*, 184 S.W.3d 646, 679 (Tenn. 2006).

The purpose of our review of other capital cases is not to identify cases that correspond precisely with the particulars of the case being analyzed. *State v. Copeland*, 226 S.W.3d 287, 306 (Tenn. 2007). Rather, our task is to "identify and invalidate the aberrant death sentence." *Thacker*, 164 S.W.3d at 233. A sentence is not disproportionate because other defendants have received a life sentence under similar circumstances. *State v. Carruthers*, 35 S.W.3d 516, 569 (Tenn. 2000). Rather, a death sentence is excessive or disproportionate where " 'the case taken as a whole is plainly lacking in circumstances consistent with those in cases where the death penalty has been imposed.' " *Thacker*, 164 S.W.3d at 233 (quoting *Bland*, 958 S.W.2d at 668).

***34** This court uses " 'the precedent-seeking method of comparative proportionality review, in which we compare a case with cases involving similar defendants and similar crimes.' " *Copeland*, 226 S.W.3d at 305 (quoting *State v. Davis*, 141 S.W.3d 600, 619-20 (Tenn. 2004)). We examine "the facts and circumstances of the crime, the characteristics of the defendant, and the aggravating and mitigating circumstances involved, and we compare this case with other cases in which the defendants were convicted of the same or similar crimes." *State v. Stevens*, 78 S.W.3d 817, 842 (Tenn. 2002).

In conducting this comparison with regard to the nature of the crime, we generally consider

> (1) the means of death; (2) the manner of death; (3) the motivation for the killing; (4) the place of death; (5) the victim's age, physical condition, and psychological condition; (6) the absence or presence of premeditation; (7) the absence or presence of provocation; (8) the absence or presence of justification; and (9) the injury to and effect upon non-decedent victims.

Rimmer, 250 S.W.3d at; *see Rollins*, 188 S.W.3d at 575. We also compare the defendant's "(1) prior criminal record, if any; (2) age, race, and gender; (3) mental, emotional, and physical condition; (4) role in the murder; (5) cooperation with authorities; (6) level of remorse; (7) knowledge of the victim's helplessness; and (8) potential for rehabilitation." *Rimmer*, 250 S.W.3d at 35; *see Rollins*, 188 S.W.3d at 575.

The evidence in the present case established that the victim was the Defendant's former girlfriend and that he had raped and assaulted her on a previous occasion. He blamed the victim for sending him to jail and threatened to kill her, suggesting premeditated murder motivated by revenge. Although her body has not been recovered, the evidence at the crime scene, including the amount of blood, suggested that the victim suffered a violent death. The evidence also established that the murder occurred during the perpetration of a robbery. The Defendant disposed of the victim's body. At the sentencing hearing, the victim's mother testified that not knowing exactly how the victim died and not being able to provide a proper burial was immensely hurtful to the victim's family.

The Defendant was thirty-one years old at the time of the instant offenses, and he had prior convictions for assault with intent to commit robbery with a deadly weapon, rape, and two counts of aggravated assault. He provided no assistance to the police during the investigation and expressed no remorse for his crimes.

We conclude that the death sentence in this case is not excessive nor disproportionate when compared to the death

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penalty imposed in similar cases. *See State v. Ivy*, 188 S.W.3d 132 (Tenn. 2006) (defendant shot his estranged girlfriend multiple times; prior violent felony aggravator applied); *State v. Faulkner*, 154 S.W.3d 48, 63 (Tenn. 2005) (defendant murdered his estranged wife after repeated threats to kill her); *State v. Keough,* 18 S.W.3d 175 (Tenn. 2000) (defendant stabbed wife after an argument in a bar and left her to bleed to death in a car; prior violent felony aggravator applied); *State v. Chalmers*, 28 S.W.3d 913 (Tenn. 2000) (sole aggravating factor was prior violent felony); *State v. Suttles*, 30 S.W.3d 252, 255 (Tenn. 2000) (defendant murdered his estranged girlfriend); *State v. Hall*, 8 S.W.3d 593 (Tenn. 1999) (defendant murdered his estranged wife); *State v. Smith*, 993 S.W.2d 6 (Tenn. 1999) (defendant murdered store owner in course of a robbery and prior violent felony aggravator applied); *State v. Johnson*, 743 S.W.2d 154 (Tenn. 1987) (defendant killed his estranged wife by suffocation and prior violent felony aggravator applied).

***35** In completing our review, we need not conclude that this case is identical to prior cases in every respect, nor must this court determine that this case is "more or less" like other death penalty cases. *See Thomas*, 158 S.W.3d at 383. Rather, this court need only identify aberrant death sentences by analyzing whether a capital case plainly lacks circumstances similar to those cases in the pool of cases in which a death sentence has been upheld. The penalty imposed by the jury in the present case is not disproportionate to the penalty imposed for similar crimes.

CONCLUSION

In consideration of the foregoing and the record as a whole, we affirm the judgments of the trial court.

All Citations

Slip Copy, 2019 WL 2208471

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W2017-00504-CCA-R3-DD

IN THE CRIMINAL COURT OF TENNESSEE AT MEMPHIS

THE THIRTIETH JUDICIAL DISTRICT

STATE OF TENNESSEE,)

ORIGINAL

)

vs.) Case Nos. 98-01033-34

MICHAEL RIMMER,)

Defendant.)

Filed 5-05-17
Richard DeSaussure, Clerk
BY _____ D.C.

TRANSCRIPT OF EVIDENCE

VOLUME THREE OF FIVE

APRIL 28-30, 2016

THE HONORABLE CHRIS CRAFT, PRESIDING JUDGE

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SHELBY COUNTY CRIMINAL COURT
INDICTMENT # 98-01033-34

STATE OF TENNESSEE
VS.
MICHAEL RIMMER

VOLUME 10 OF 23 VOLUMES
TRANSCRIPT OF EVIDENCE

FILED
JUL 03 2017
Clerk of the Courts
Rec'd By _____

Vol. 10

(Recess.)

(Jury in.)

THE COURT: Bring out Mr. Rimmer, please.

(Defendant enters courtroom.)

THE COURT: We had a discussion off the record about a search warrant and Officer Shemwell. And there are some issues about the search warrant. We're going to redact some language by consent from each party from the report. So once that is introduced, I am going to tell the jury that it can't be introduced at this time until it's testified to later for different reasons, and that some of it is redacted for hearsay rules. Because I always have to explain to the jury what "for identification purposes only" means anyway. So we'll just let that roll, so we'll have that exhibit, and it'll probably be two or three days before we do that. But we'll do that off the record.

All right. Are we ready for the jury?

MS. ANDERSON: If we could have a quick two-minute hearing with our TBI agent, Chris Baker.

THE WITNESS: Your Honor, I apologize I'm not in a suit, but I'm in training.

THE COURT: That's fine. I work for a living too.

CHARLES BAKER,

having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. ANDERSON:

Q. Please state your name and where you're employed for the record.

A. Charles Baker. I'm a special agent assigned to the Tennessee Bureau of Investigation.

Q. Back shortly before Attorney General Sobrero and I were appointed prosecutors in this case, was your agency asked to assist in the investigation as well as locate the witnesses in this particular case?

A. Yes.

Q. And did the TBI, in fact, open up a case file?

A. Yes.

Q. And have you, in fact, assisted in investigating and locating most of the witnesses in this particular case?

A. Yes.

Q. And one of those witnesses that you were asked to investigate and attempt to locate, was that of an individual by the name of James Douglas Allard (phonetic) with a date of birth of August 14th, 1961?

A. Yes.

Q. Do you have at your access at the Tennessee Bureau of Investigation any series of computer databases that assist you with your attempts to locate witnesses?

A. Yes. Numerous.

Q. And did you utilize those databases in an attempt to locate Mr. Allard?

A. Yes. Every one of them we had access to.

Q. Did you print out a copy of your computer research that you used to attempt to find Mr. Allard in this case?

A. Yes.

Q. And if you would, could you just describe some of the databases that were researched in an attempt to locate Mr. Allard?

A. One that the TBI uses is one that's called CLEAR. It will search untold amounts of different databases, whether it be real estate, criminal information, criminal records, civil law records. We use this in order to attempt to locate individuals a lot of times. And this will help us by using -- it'll show old addresses, possibly new addresses, possible telephone numbers, and so on. This is a really good tool.

THE COURT: Would you spell that?

THE WITNESS: It's C-L-E-A-R. However, it's all capital letters. We also use databases located in

the State Tennessee Justice Portal. That is a driver's license check, vehicle information, past criminal history, if they've ever been in the Tennessee Department of Corrections system. We'll also utilize this NCIC searches, which is a national search through the FBI. A lot of times we'll utilize Google, simple things. A lot of times you'll find newspaper articles on where individuals are. Death records -- a lot of times -- a lot of states do not report death records. This individual could be deceased. We just don't know a lot of times.

Q. Did you find out some of the State's witnesses are deceased?

A. I located several deceased, and some of those we located by other methods because those states do not report deaths.

Q. In addition to the conversations that you had, did you receive an email from me forwarding on to you computer database information that was researched by one of our investigators?

A. Yes.

Q. And was that information forwarded on to you for you to see if that would lead you or assist you in any way in finding Mr. Allard?

A. Yes.

MS. ANDERSON: If I may ask the witness be handed this document.

BY MS. ANDERSON:

Q. Do you recognize that to be the e-mail I sent with the information?

A. This is what's called a TLA report, which is exactly the same thing as a CLEAR report, but it's a different company. This information is basically what I was able to locate on the CLEAR information.

Q. I believe that there were some reports to some addresses that were located in North Carolina. Is that correct?

A. That's correct.

Q. Were you able to verify whether Mr. Allard was located at any of these addresses?

MS. ANDERSON: For the record, there's a phone number that is associated here. I would let the Court know that has been attempted, and that is not a good number for this particular witness.

Your Honor, at this time, we would introduce the exhibit documents that the TBI agent has documented the efforts and research that's gone into attempting Mr. Allard.

THE COURT: I know we had Exhibit A, which was the transcripts that we went through in our motions

earlier. Do we have an Exhibit B? If not, this will be Exhibit B. I don't think we have another one other than a copy of the transcripts. We're going to make this Exhibit B, please, James Allard.

(Exhibits A and B marked and filed.)

THE COURT: Any questions from the defense?

CROSS-EXAMINATION

BY MR. BRUNO:

Q. Mr. Baker, did you attempt to contact any of Mr. Allard's family members?

A. No, sir.

Q. I'm trying to determine what you did to try to find him --

A. I don't know who his family members were.

Q. Were you aware he had a long history in the state of Indiana?

A. I wasn't looking for all that. I wasn't looking at his criminal background.

Q. Were you told at the time he was in the state of Indiana in jail? Did you know that?

A. No.

Q. So did you look for any law enforcement database that would have detention facilities or detention centers for Indiana? Basically, did you look to see if he's locked up?

A. A lot of times, when someone's locked up in a system -- for example, I was looking for someone in Arkansas, and I had no way to tell they were located in a county jail in Arkansas. There's no way to tell in a database.

Q. If you did that for Indiana, did you go onto look for Indiana Department of Corrections --

A. No, sir.

Q. -- to see if he was there?

A. No, sir.

Q. Or any county facilities?

A. No.

Q. And you didn't attempt to get any family members to contact them and see where he is?

A. No, sir. I don't know who they are.

Q. All right. Did you attempt -- or any other officers attempt to go to the a last known address, knock on the door, and see if he's there, or contact anybody to see where he was?

A. I can't speak for someone.

Q. Did you look to see if he was on probation anywhere?

A. I'd have to look on the records. If it was in Tennessee, it would show if he had or had not been on probation.

Q. Did you check any other states?
A. I only have access to Tennessee, in certain circumstances.
Q. Do you have the ability to put out a witness warrant on people that you don't -- if you believe somebody might not show up for court? Do you have the ability to ask the Court to issue a material witness warrant?
A. I'd have to ask the prosecutor that. I honestly don't know if I have the ability to do that without going through the prosecutor.
Q. Do you have any idea whether that was done?
A. I have no idea.
THE COURT: Let me just say, I would have been the one to do it, and I cannot issue a material witness warrant, unless we have an address. Because no other address could certify that that person was needed as a witness in this case. And I was not asked to issue a warrant.
BY MR. BRUNO:
Q. Basically, what I hear you saying is you did a computer search?
A. Yes, to find information related to this James Douglas Allard.
Q. Was anything other than a telephone number and

health need a number that's no good?

A. The closest distance was out of my area. If I found Mississippi or somewhere close by, I would go search for them. But somewhere that far away, I'm not allowed to do that. Did anybody pick up the phone and call law enforcement or an investigator in those jurisdictions?

MR. BRUNO: I have no idea.

THE COURT: Any redirect examination?

MS. ANDERSON: No, Your Honor.

THE COURT: Thank you, sir. We appreciate you coming.

THE WITNESS: Yes, sir. Thank you.

Any other proof on this matter?

MS. ANDERSON: No.

THE COURT: Do you want to renew your motion?

MS. ANDERSON: The State would move to have Mr. Allard removed and seek to introduce his prior testimony.

MR. BRUNO: I think that's totally insufficient for somebody to say we looked on the computer and say we couldn't find anything on the computer that gave us a verifiable address, and we called one telephone number, and, therefore, he's

unavailable. I don't know that there's any information that he's ever been in the state of Tennessee. So at a minimum, you would need to contact another State and then say, "Can somebody go knock on the door or look for a court record?" I mean, he's got a long, criminal history. Go to court records and see if there's an identifiable mother, father, sister, brother, somebody. You do have to do what we have to do.

Quite frankly, if we said, "We can't find an address," they're unavailable, then we probably wouldn't find any witnesses. But just to do that and stop and have him incredibly prejudicial transcripts read into the jury, I think that's clearly insufficient. If they -- they should be required to do more than type up something on the computer, print it out, make one phone call to a number that's no good, and then stop at that point.

He's not unavailable, in my opinion, unless you can show more efforts to get on the ground and really find the guy. And given what his testimony would be in this case, this is not a chain of custody witness. This is an important witness, and for those reasons, I don't think that's admissible to have that transcript read.

MS. ANDERSON: The State would submit that

there are numerous witnesses in this case that the State has gone to great extents to find them. The other two inmate testimony persons, Mr. Conaley, lives in the local area. Mr. Lescure does not live in the local area. We've managed to locate both of them, to serve them, to have them available. We have located a doctor who did the original PAP smear in another state as well all by these same methods that have been used. The State does have finite resources and finite abilities to locate people. And I wish that I had an open purse and an open ability to have an investigator to travel the entire United States and check virtually every state to locate Mr. Allard -- but, frankly, that isn't a impossibility. The State has shown a very good faith effort in an attempt to find Mr. Allard through reasonable means, and we have not been able to locate them. And I believe that that is the standard, and we would ask to renew our motion.

THE COURT: Well, looking at a case I pulled on this, State versus Sharp 327 2wd.3d 704. It's a 2010 Court of Criminal Appeals case citing the Civil Supreme Court case on this, which was State versus Henderson, 554 2wd.2 117, 1977. In that Sharp case, the State was not allowed -- well, there was a reversal because the State did not sufficiently show -- think you'll find the

witness will quote from Sharp on page 712. "As stated above, our Supreme Court in Henderson, the State must prove that it made in a good faith effort to secure the witness in question. Good faith has been defined as the length the prosecution must go to locate a witness. It is a question of reasonableness."

My -- just in listening to what they did, you know we talk about Google search and stuff all the time, which wasn't true 19 years ago during these alleged events. I don't know how else we can go about finding a witness, if they don't know who the family members are, other than Google searches and database searches. It seems to me the State made a reasonable attempt to produce this witness. When would his testimony be put into place?

MS. ANDERSON: Depending on the length of time, it would be either later this afternoon or tomorrow. It could be moved if needed, but that is the time frame that we fall in normally.

THE COURT: I guess the question is going to be, what else could the State do? I'm sure they could send an investigator on the road to every state, to Hawaii and Alaska, but it would seem to me if they were going to have those records there, they would be able to search them on the computer. I don't know that there's

any proof that he's on parole or probation in any particular location. Just because he might have been in a state 19 years ago does not mean he's still there or still being supervised. It seems to me what the State's done, as far as their searching for witness. I'm going allow the testimony. If anyone wants to make a call to a family member if you know a family member, but I don't know who Mr. Allard is and I don't know if the State would have about his secured his family members.

MR. BRUNO: Mr. Allard has an extensive criminal history that I've been working on. I'm going to ask the Court to give me permission, either by stipulation or -- like I said, I've got hits on three different counties in Indiana, and I'm in the process of trying to get that information. I may not be able to get all of the judgments. But I'm going to ask the Court to allow me to put into proof his convictions that would be relevant that I could ask him live here on the stand. And if he denied them, I could just define them myself. The conviction are for five robberies and four either attempted escapes or escapes. So I think all those would be permissible dates, and the dates on them -- I believe it starts in 1998 up until about 2010, various dates for convictions.

So I would ask to be allowed to put into

evidence, for impeachment purposes, just as I would be able to do had he been on the stand and been here to get an admission; or if he denies it, to be able to submit it. I can do it by stipulation.

MS. ANDERSON: The State has no objections. I believe that's the law. The state has prior testimony that they would be allowed to bring in that evidence, as long as it fits within the parameters of had there had been live testimony.

THE COURT: If y'all can agree on these documents, then we don't have to worry about any hearsay problems. Plus, we need to remember that one of the reasons we're trying this case again is because the attorneys were found to be ineffective in certain aspects in the prior trial. If he were not cross-examined with that prior record, then, obviously, he would be able to do so now. My objection was going to be those authentications.

MS. ANDERSON: They do not have to be certified as long as Mr. Bruno and I can sit down and look at them, and they appear to be what they purport to be. The State does not have an objection, as long as they fall within the time period of the rule. The State has no opposition to that.

MR. BRUNO: As far as the timing goes, if I

could just have this evening to review the transcript again in detail if I had any objections.

THE COURT: We'll put it on tomorrow.

MS. ANDERSON: That's fine, Judge.

THE COURT: I appreciate y'all working together. I'm glad to hear that y'all couldn't find me either. It's tough to find people. I have a friend who can't find his son. He knows he's somewhere. He just can't locate him.

All right. It's noon. Lunch is not here. Do we have another witness?

MS. ANDERSON: We do, Your Honor. Deputy Adams.

THE COURT: Just wanted to make sure y'all were ready for the jury.

Bring the jury in, please.

(Jury in.)

THE COURT: All right. I told y'all we needed a break. We did a lot of good during the break. While y'all were sitting in a room with no windows, we were in here working. Whenever we take a break, there's some things that we have to do. We actually have made some agreements between the attorneys to help the evidence move along. So we've done some good. Obviously, y'all won't know what we talked about or

W2017-00502-CCA-R3-PD

IN THE CRIMINAL COURT OF SHELBY COUNTY, TENNESSEE

30TH JUDICIAL DISTRICT AT MEMPHIS

DIVISION 8

STATE OF TENNESSEE

)

VS.) No. 98-01033, 34

)

MICHAEL RIMMER

ORDER AUTHENTICATING EXHIBITS PURSUANT TO RULE 24(f)

This Court hereby authenticates the below exhibits in this cause for purpose of appeal.

EXHIBITS 1-39, 41-61, 66, 67, 70-76, 78, 79, 81-90, 108-122, 127, 128, 130, 132, 134-137, 139-157, 161-203, 205-222

EXHIBIT AA

ENTERED this 26 day of June, 2017

Trial Judge

FILED
JUL 03 2017
Clerk of the Courts
Rec'd By

Vol. 2

98-01033
CASE# 98-01034

EXHIBIT SHEET

COUNTY: SHELBY Division 8

STATE OF TENNESSEE

JUDGE: Chris Craft

REPORTER: Kimberly Kelsey Chris
CLERK: Frances Golden & Noah

vs. Michael D. Rimmer

CHARGE: murder - 1st degree

STATE'S ATTORNEY: Rachel M. Sobcero
Pam Anderson

DEFENSE ATTORNEY: Robert L. Parris
Paul Bruno

-EXHIBIT NO.- STATE	DEFENSE	TO WHOM	DESCRIPTION	
	1A-B	Tracy Ellsworth Brown	(Collective) photos of Ricci Ellsworth + Michael Rimmer	
	2	Tracy Ellsworth Brown	Polaroid picture of white car with open trunk	
	3	Tracy Ellsworth Brown	photocopy of driver's license of Ricci Lynn Ellsworth	
	4	the Court	Certificate of marriage - Donald Ellsworth + Ricci Morrison	4/18/75
	5	Court	Certificate of divorce - Donald E. Ellsworth + Ricci Lynn Ellsworth	3/16/77
	6	Court	cert. of marriage - Tommy Ray West + Ricci Lynn Ellsworth	5/14/80
	7	Court	Cert of divorce - Tommy Ray Vaughes West + Ricci Lynn Ellsworth	11/6/90
	8	Court	Cert. of marriage - Donald E. Ellsworth + Ricci Lynn Morrison	Certificate of 4
	9	Court	Certificate of death - Donald Eugene Ellsworth + Ricci Ellsworth	1/6/2011
	10	Court	judgement for aggravated assault - Michael Rimmer	
	11	Court	judgment of conviction for rape - Judge Hunt - Michael Rimmer	
	12	Raymond Summers	photo of Mrs. Ellsworth's wedding ring	
	13	Raymond Summers	photocopy 8x10 of "Night Entrance" door	
	14	Raymond Summers	photocopy 8x10 of Interior Room w/ open door	
	15	Linda Spencer	photocopy of computer counter + boxes underneath	
	16	Linda Spencer	photocopy 8x10 of red carpeted floor w/ coat hanger in floor	
	17	Linda Spencer	photocopy 8x10 of cabinet metal + adding machine on table	
	18	Linda Spencer	photocopy of sink w/ water running	
	19	Linda Spencer	photocopy of toilet seat	
	20	Linda Spencer	CSX Sign-in form	
	21	Linda Spencer	photocopy of Memphis Inn sign	
	22	Linda Spencer	photocopy of night entrance from both sides	
	23	Linda Spencer	photocopy of door ajar at crime scene	

5-9-16
2:55 p.m.
C. Johnson

5-9-16
2:55pm
L. Golden

CC7-10

CASE# 98-01033 98-01034

EXHIBIT SHEET

COUNTY: SHELBY Division 8

STATE OF TENNESSEE

JUDGE: Chris Craft

vs. Michael D. Rimmer

REPORTER: Kimberly Kelsey

CLERK: Frances Golden & Chris Noah

CHARGE: murder- 1st degree

STATE'S ATTORNEY: Rachel M. Sobrero
Pamela Anderson

DEFENSE ATTORNEY: Robert L. Parris
Paul Bruno

-EXHIBIT NO.- STATE	DEFENSE	TO WHOM	DESCRIPTION
	24	Linda Spencer	photocopy of computer
	25	Linda Spencer	photocopy of room showing copy machine
	26	Linda Spencer	photocopy from behind front counter desk of model looking out
	27	Linda Spencer	photocopy of door open leading to vending area inside office area
	28	Linda Spencer	photocopy of files next to computer
	29	Linda Spencer	photocopy of cash register open drawer
	30	Linda Spencer	close-up of cash register open drawer photocopy
	31	Linda Spencer	clipboard w/ CSX paperwork on it
	32	Linda Spencer	photocopy of metal drawers & computer directly behind front desk - (storage)
	33	Linda Spencer	close up picture of purse & driver's license of Riccie Haworth
	34	Linda Spencer	close up picture of office looking out
	35	Linda Spencer	close-up picture of key & the counter glass from
	36	Linda Spencer	photocopy of 35 from the other side of window
	37	Linda Spencer	photocopy of Ms. Spencer's office w/ desk & computer
	38	Linda Spencer	photocopy of same desk & Folger's coffee bags
	39	Linda Spencer	photocopy of Ms. Spencer's desk at crime scene
	40	Linda Spencer	sink from crime scene
	41	Linda Spencer	photocopy of entrance door w/ dobber RG [illegible] in it
	42	Linda Spencer	photocopy of tile floor looking in bathroom w/ blood on it
	43	Linda Spencer	photocopy of same tile floor
	44	Linda Spencer	photocopy of bloody toilet & floor & towel
	45	Linda Spencer	photocopy of bloody toilet, floor, garbage can, wall
	46	Linda Spencer	photocopy of bloody waste basket & bloody floor

CC7-10

CASE# 98-01033 98-01034

EXHIBIT SHEET

COUNTY: SHELBY Division 8

STATE OF TENNESSEE

JUDGE: Chris Craft

vs. Michael D. Rimmer

REPORTER: Kimberly Kelsey

CLERK: Frances Golden & Chris Noah

CHARGE: murder-1st degree

STATE'S ATTORNEY: Rachel M. Sobrero
Pamela Anderson

DEFENSE ATTORNEY: Robert L. Parris
Paul Bruno

-EXHIBIT NO.- STATE	DEFENSE	TO WHOM	DESCRIPTION
	47	Ronnie Weddle	photocopy of sink with water running
	48	Ronnie Weddle	diagram of reception area
	49	Ronnie Weddle	diagram 1- food area (crime scene sketch)
	50	Ronnie Weddle	photocopy of door threshold w/ blood on it
	51	Ronnie Weddle	diagram of motel bathroom & ~~desk & shelves~~ office area
	52	Ronnie Weddle	photocopy bloody towel and blood on floor & tile & toilet paper roll
	53	Ronnie Weddle	photocopy of bloody toilet towel
	54	Ronnie Weddle	photocopy of soap dispenser area
	55	Ronnie Weddle	photo of blood splats on the of bathroom
	56	Ronnie Weddle	crime scene sketch of night entrance to parking lot outside
	57	Ronnie Weddle	diagram of office equipment room & bathroom
	58	Ronnie Weddle	crime scene sketch
	59	Ronnie Weddle	photocopy of blood on curb outside motel
	60	Ronnie Weddle	photocopy of one small spot of blood
	61	Ronnie Weddle	photocopy of close-up of ER-60
	62	Ronnie Weddle	tagged trash can & lid w/ blood on it from crime scene
	63	Ronnie Weddle	bloody toilet seat & lid from crime scene (tagged)
	64	Ronnie Weddle	clipboard (bloody) lifted on diagram from crime scene
	65	Ronnie Weddle	coat hanger w/ blood stains from crime scene (tagged)
	66	Ronnie Weddle	photo of plug-ins near wall
	67	Ronnie Weddle	photo of blood on door frame
	68	Ronnie Weddle	5 tubes of blood in package
	69	Ronnie Weddle	red, bloody towel

CC7-10

98-01033

EXHIBIT SHEET

CASE# 98-01034 COUNTY: SHELBY Division 8

STATE OF TENNESSEE JUDGE: Chris Craft

REPORTER: Kimberly Kelsey

vs. Michael D. Rimmer CLERK: Frances Golden

CHARGE: First degree murder

STATE'S ATTORNEY: Rachel M. Sobrero, Pam Anderson

DEFENSE ATTORNEY: Robert L. Parris, Paul Bruno

-EXHIBIT NO.- STATE	DEFENSE	TO WHOM	DESCRIPTION
	(B)	Charles Baker	Paperwork research to locate Mr. Allard
	70	William Baldwin	photo of maroon Honda from front left side
	71	William Baldwin	photo of maroon Honda from front view
	72	William Baldwin	photo of back of maroon Honda
	73	William Baldwin	photo of close-up of tag of maroon Honda
	74	William Baldwin	photo of door sealed
	75	William Baldwin	photo of sealed evidence
	76	William Baldwin	photo of sealed evidence on car door
Judge	(77)	William Baldwin	ID only - (Search Warrant)
	78	William Baldwin	photo of inside of driver's side door
	79	William Baldwin	photo of front passenger floorboard of car
	(80)	William Baldwin	photo of trunk
	81	William Baldwin	photo of items in trunk
	82	William Baldwin	photo of opened trunk
	83	William Baldwin	photo of inside car door
	84	William Baldwin	photo of bag & pillow found in car
	85	William Baldwin	photo of items found in car back seat
	86	William Baldwin	photo of stained car seat
	87	William Baldwin	photo of stained car seat
	88	William Baldwin	photo of spot of stain on car seat
	89	William Baldwin	photo of cut taken from car seat stain
	90	William Baldwin	photo of Presumptive Blood test collections
	91	William Baldwin	Positive Presumptive Blood test of Mr. Rimmer

CC7-10

98-0033
CASE# 98-01034

EXHIBIT SHEET

COUNTY: SHELBY Division 8

STATE OF TENNESSEE

JUDGE: Chris Craft

vs. Michael D. Rimmer

REPORTER: Kimberly Kelsey
CLERK: Chris Noah

CHARGE:

STATE'S ATTORNEY: Pamela Anderson
Rachel Sobrero

DEFENSE ATTORNEY: Robert Farris
Paul Bruno

-EXHIBIT NO.- STATE	DEFENSE	TO WHOM	DESCRIPTION
	92	William Baldwin	White towel tagged #11
	93	William Baldwin	White towel tagged #10
	94	William Baldwin	White bath towel tagged #9
	95	William Baldwin	White bath towel tagged #8
	96	William Baldwin	receipt from Popeye's chicken
	97	William Baldwin	Holiday Inn stationary
	98	William Baldwin	stationary, maps, hotel receipts tagged #12
	99	William Baldwin	4 pieces of paper
	100	William Baldwin	trash, white bag, receipts & map tagged #22
	101	Wm Baldwin	misc. papers tagged #26
	102	Wm Baldwin	duct tape, plastic spray bottle, & glass jar tagged #17
	103	Wm Baldwin	pillow w/ blood stains tagged #7
	104	Wm Baldwin	Shoes from subject
	105	Wm Baldwin	pair of K-Swiss shoes
	106	Wm Baldwin	pair of blue jeans
	107	Wm Baldwin	hammer found in maroon Honda
	108	Wm Baldwin	receipt - Holiday Inn parking
	109	Wm Baldwin	receipt - In Casper, WY
	110	Wm Baldwin	Peabody parking receipt
	111	Wm Baldwin	receipts Scottish Inns
	112	Wm Baldwin	receipt
	113	Wm Baldwin	receipt, Crestwood Motel, Myrtle, NC
	114	Wm Baldwin	Photo of items in trunk of car

CC7-10

98-01033
CASE# 98-01034

EXHIBIT SHEET

COUNTY: SHELBY Division 8

STATE OF TENNESSEE

JUDGE: Chris Craft

vs. Michael D. Rimmer

REPORTER: Kimberly Kelsey
CLERK: Chris Noah

CHARGE: murder - 1st degree

STATE'S ATTORNEY: Pamela Anderson
Rachel Sobrero

DEFENSE ATTORNEY: Robert Parris
Paul Bruno

-EXHIBIT NO.- STATE	DEFENSE	TO WHOM	DESCRIPTION
	115	William Baldwin	photo of red bag found in car
	116	(Skipped)	
	117	Tony Hetrick	Ohio Scenic Highway map
	118	Tony Hetrick	photocopies of exit Mr. Rimmer took in fleeing area
	119	Tony Hetrick	(collective) photocopies of termination of pursuit
	120	Tony Hetrick	Photocopies of Mr. Rimmer's mug shot & Bowling Green, Ky
	121		receipt from Hunter's Auto Co. Inc.
	122		Vehicle to Vehicle Storage receipt
	123		facial sponge
judge	124		ID only (toothbrush)
	125		2 hairbrushes from
	126		PAP smear from Ellsworth
	127		cytology report of Ricci Ellsworth
	128		One glass slide containg cervical specimen for pt
	129		1 man's Wrangler watch
	130	Robert Shemwell	TBI Request for Examination
	131	Robert Shemwell	Blood Kit
	132	Robert Shemwell	TBI Receipt for Property received / Returned / Seized
	133	Jennifer Eakins	Pap Smear Sponge
judge	134	ID only	ID only
	135	Robert Shemwell	Pages of photo line-up
	136	Robert Shemwell	E.P. Kawa receipt
	137	Robert Shemwell	photo of Mr. Rimmer's SS

CC7-10

98-01033
CASE# 98-01034

STATE OF TENNESSEE

vs. Michael D. Rimmer

EXHIBIT SHEET

COUNTY: SHELBY Division 8

JUDGE: Chris Craft

REPORTER: Kimberly Kelsey

CLERK: Chris Noah

CHARGE:

STATE'S ATTORNEY: Pamela Anderson
Rachel Sobrero

DEFENSE ATTORNEY: Robert Farris
Paul Bruno

-EXHIBIT NO.- STATE	DEFENSE	TO WHOM	DESCRIPTION
✓	138	Robert Shemwell	Assorted papers
✓	139	Shemwell	FBI mug shot
	140	Shemwell	ADESA ID photo of Michael Rimmer
	141	Shemwell	photo of mug shot of Mr. Rimmer in Memphis
	142	Shemwell	receipt for Scottish Inns in FL
	143	Shemwell	Preffered Lime receipt
	144	Shemwell	motel 6 receipt
	145	Shemwell	Blythe Travel Lodge receipt
	146	Shemwell	Traveler's Inn receipt
	147	Shemwell	BelAire Hotel receipt
	148	Shemwell	Motel 6 receipt
	149	Shemwell	Scottish Inns receipt
	150	Shemwell	pawn receipt for guitar signed by Mr Rimmer
	151	Shemwell	map of where all Mr. Rimmer traveled since Feb. 8, 1993
	152	Shemwell	Composite sketch of man with a cap
	153	Shemwell	Comp sketch of a man w/out a cap
	154	Shemwell	composite sketch of two men
	155	Shemwell	Polaroid of pen pointing inside door
	156	Shemwell	Polaroid of pen pointing inside car door
	157	Shemwell	photo line-ups

continues Page 8 (5/2/16)

CASE# 98-01033; 34

EXHIBIT SHEET

COUNTY: SHELBY Division 8

STATE OF TENNESSEE

JUDGE: Chris Craft

vs. Michael D. Rimmer

REPORTER: Charrel Gambill

CLERK: Chris Noah

CHARGE: MD - 1st

STATE'S ATTORNEY: Pamela Anderson
Rachel Sobrero

DEFENSE ATTORNEY: Robert Farris
Paul Bruno

-EXHIBIT NO.- STATE	DEFENSE	TO WHOM	DESCRIPTION
158		Ryan Fletcher	Envelope (Buccal sample)
159			Sack (Spray bottle, duck tape)
160			Envelope (Buccal) Chris Ellsworth
161		Emily Jeskie	DNA test report
	162		Report (collective)
	163	James Darnell, Jr.	affadavit
164		Wm. Ashton	TBI submittal form
165		Linda Littlejohn	Photo driver's side Honda accord
166			Photo tarp removed
167			Photo tag # Honda
168			Photo passenger side
169			Photo
170			Photo front dashboard
171			Photo front seat
172			Photo open trunk
173			Photo rear-seat back
174			Photo rear-seat seat
175			Copy of Report
176			Photo - Driver side backseat
177			report
178			Photo - rear seat
179			Photo - seatbelt buckle
180			Diagram - back seat belt passenger side

CC

EXHIBIT SHEET

CASE# 98-01033; 34 COUNTY: SHELBY Division VIII 8

STATE OF TENNESSEE

vs. Michael Rimmer

JUDGE: Chris Craft

REPORTER: Carol Lambell

CLERK: Chris Noah

CHARGE: MD-1st

STATE'S ATTORNEY: Pamela Anderson, Rachel Sobrero

DEFENSE ATTORNEY: Robert Parris, Paul Bruno

-EXHIBIT NO.- STATE	DEFENSE	TO WHOM	DESCRIPTION
181		Linda Littlejohn	Diagram - back driver side door
182			Diagram - back seat buckle center
183			Diagram - back seat vehicle
184			Report
185		Wm. Ashton	Copy of employment
186			Map (Colored)
187			CD
188			5 photos (collective)
189			photo
190			photo
191			photo
192			photo
193		The Court	Stipulation Agreement
194		Howard Featherstone	Photo Honda ([redacted]) Maroon
195		Wm. Conley	Photo lineup
196			2 photos (collective)
	197		4 page document
198		Rhonda Jordan	Photo (Tammy West)
(134)		Roger Lescure	moved photo line up into evidence
199		Tim Hellendorfer	Drawing on Yellow Paper
200			Drawing on White Paper
201		Donna Nelson	Report
202			Report Oct/2015

CC7-10

agg Robb.; MD-1 Ct. Mope.; 1 Rob.

EXHIBIT SHEET

CASE# 98-01033; 34

COUNTY: SHELBY Division 8

STATE OF TENNESSEE

JUDGE: Chris Craft

REPORTER: Charrel Hambrice

vs. Michael Rimmer

CLERK: Chris Noah

CHARGE: MD-1st

STATE'S ATTORNEY: Pamela Anderson, Rachel Sobrero

DEFENSE ATTORNEY: Robert Harris, Paul Bruno

-EXHIBIT NO.- STATE	DEFENSE	TO WHOM	DESCRIPTION
203		Tim Helldorfer	Photo (shanks)
204		Tony Lomax	Rope
205		Joyce Carmichael	Cordless record
206			Lescure record
207			Voyles record
208			timeline
209			Visitation report record
E.D. 210		Richard Wayne Rimmer	Copy of statement (RWR)
E.D. 211			Copy of Statement (RWR)
(199)		Tim Helldorfer	moved into evidence
(200)			
212		The Court	Stipulation Agreement
E.D.	213	Marilyn Miller	Crime Scene diagram
E.D.	214	Dequita Simmons	Photo lineup
E.D.	215	Natalie Doonan	(Collective) Photo lineups
	216	Maryann Whitlock	Composite Sketch
	217		Photo lineup
	218	Richard Roleson	1 Page Sheet
	219	Robert Hutton	Finding of facts consent order
	220	The Court	Impound Lot Report, stipulations
221		The Court	Certified Copies of Convictions
222		The Court	of Agg assault

CC7-10

CASE# 98-D1033-34

EXHIBIT SHEET

COUNTY: SHELBY Division 8

STATE OF TENNESSEE

JUDGE: Chris Craft

vs. Michael D. Rimmer

REPORTER: Kerry Harper

CLERK:

CHARGE:

STATE'S ATTORNEY: Pamela Anderson
Rachel Stephens

DEFENSE ATTORNEY:

-EXHIBIT NO.- STATE	DEFENSE	TO WHOM	DESCRIPTION
AA		Court	Pre-Sent Report

CC7-10

FILED
05/21/2021
Clerk of the
Appellate Courts

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

STATE OF TENNESSEE v. MICHAEL RIMMER

Criminal Court for Shelby County
No. 98-01033, 98-01034

No. W2017-00504-SC-DDT-DD

ORDER

The Court has considered Appellant Michael Rimmer's petition to rehear and is of the opinion that the petition should be and hereby is DENIED.

However, we agree with Appellant Michael Rimmer that the opinion at pages 6, 25, and 37 does not align with the record. Accordingly, the opinion is corrected by withdrawing pages 6, 25, and 37, and substituting in their stead revised pages 6, 25, and 37, attached hereto. The revisions do not change the substantive analysis or the result of the opinion filed on April 16, 2021. Accordingly, the time for filing a petition to rehear does not begin anew.

PER CURIAM

IN THE CRIMINAL COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS
DIVISION X

MICHAEL DALE RIMMER	)	
Petitioner	)	
v.	)	**NO. 98-01034, 97-02817, 98-01033**
STATE OF TENNESSEE	)	
Respondent	)	

FILED 10/12/12
KEVIN P. KEY, CLERK
BY C. Chaul D.C.

ORDER

This matter came to be heard upon petitioner, Michael Dale Rimmer's, Motion for Post Conviction Relief. Petitioner asserts he received ineffective assistance of counsel at both his original trial; resentencing hearing and on direct appeal of his initial conviction and sentence and direct appeal of his resentence of death. Additionally, petitioner claims that the trial court committed errors requiring a new trial or at the very least a new sentencing hearing; the state committed *Brady* violations warranting a new trial; and, his death sentences violate both the state and federal constitutions. After a careful review of the post conviction record, the record of the original trial, the resentencing record and the evidence and testimony presented at the post conviction hearing, this court finds petitioner is entitled to relief. Thus, petitioner's petition for post conviction relief is hereby, **GRANTED**.

PROCEDURAL BACKGROUND

In November of 1998, petitioner was convicted of the first degree, aggravated robbery and theft and sentenced to death. On direct appeal of his conviction and sentence, the Court of Criminal Appeals affirmed the petitioner's convictions but reversed petitioner's sentence of death and remanded his case to the trial court for a new sentencing hearing. See State v. Rimmer (Rimmer I), No. W1998-00637-CCA-R3-DD, 2001 Tenn. Crim. App. LEXIS 399, (Tenn. Crim. App. May 25, 2001). At the conclusion of the new sentencing proceeding, a different jury imposed the death penalty based upon one statutory aggravating circumstance, i.e. that the defendant had a previous conviction for a felony with statutory elements involving violence to the person. Tenn. Code Ann. § 39-13-204(i)(2) (1997). This sentence was affirmed by the Court of Criminal Appeals. State v. Rimmer (Rimmer II), No. W2004-02240-CCA-R3-DD, 2006 Tenn. Crim. App. LEXIS 986 (Tenn. Crim. App. Dec. 15, 2006). The Tennessee Supreme Court affirmed the Court of Criminal Appeals decision, upholding petitioner's death sentence. State v. Rimmer 250 S.W.3d 12 (Tenn. 2008), *rehearing denied* by State v. Rimmer, 2008 Tenn. LEXIS 203 (Tenn., Mar. 26, 2008) (*certiorari denied* by Rimmer v. Tennessee., 129 S. Ct. 111, 172 L. Ed. 2d 88, 2008 U.S. LEXIS 6756 (U.S., Oct. 6, 2008)). Subsequently, on October 10, 2008, petitioner filed a *pro se* Petition for Post Conviction Relief; Motion for Stay of Execution and Motion for Appointment of Counsel.

In September 2009 petitioner also filed a motion asking this court to disqualify the entire Shelby County District Attorney General's Office from representing the State in his post conviction matter. Following an evidentiary hearing on petitioner's motion, this court denied petitioner's Motion to Disqualify the District Attorney's Office. Thereafter, petitioner filed a "*Motion to Reconsider Disqualification of District Attorney's Office*" and also submitted an

application for permission to appeal pursuant to Tennessee Rule of Appellate Procedure 9. This court denied the petitioner's motion to reconsider its previous ruling but granted petitioner permission to appeal. However, the Court of Criminal Appeals denied permission for interlocutory appeal finding that there was no need for an immediate review of the disqualification issue. Michael Dale Rimmer v. State of Tennessee, No. W2009-02371-CCA-R9-PD (filed June 14, 2010, at Jackson).

Following the Court of Criminal Appeals order, this court set a date for the post conviction hearing. Meanwhile, petitioner appealed the decision of the Court of Criminal Appeals regarding the issue of disqualification. Subsequently, the Tennessee Supreme Court issued the following unpublished order:

> Upon consideration of the *Tenn. R. App. P. 11* application for permission to appeal and the entire record in this case, the Court is of the opinion that the application should be, and is hereby, granted for the purpose of remanding the case to the Shelby County Criminal Court for the purpose of conducting an evidentiary hearing to determine whether the district attorney general should be disqualified from further participation in this case on the grounds asserted by the applicant. This hearing should occur, and a determination concerning whether disqualification is necessary should be made, before the hearing on the underlying post-conviction petition is conducted.

See Michael Dale Rimmer v. State of Tennessee, No. W2009-02371-SC-S09-PD, 2010 LEXIS 936 (Filed September 24, 2010, at Jackson). Despite having already provided petitioner with a hearing on this matter, given the Tennessee Supreme Court's mandate, this court again gave petitioner an opportunity to present evidence on the issue of disqualification. Following the January 2011 hearing, this court issued an order once again denying petitioner's Motion to Disqualify the District Attorney General's Office. A subsequent appeal followed. On November 8, 2011, the Court of Criminal Appeals denied petitioner's Rule 10 application.

An Amended Petition for Post Conviction Relief was filed in September 2011. A hearing on this matter was set for the week of December 12, 2012. Additional evidence was heard during the week of January 6, 2012; and March 2, 2012.

FACTUAL BACKGROUND

The following recitation of facts from the Tennessee Supreme Court's opinion on direct appeal of petitioner's original conviction and sentence of death sets forth the evidence presented at petitioner's initial trial:

> In 1989, the Defendant, Michael Rimmer, was convicted and incarcerated for burglary in the first degree, aggravated assault, and rape of his former girlfriend, who was also the victim in the instant case. While incarcerated at the Northwest Correctional Facility, the Defendant discussed the victim with fellow inmates, William Conaley and Roger Lescure, and threatened to kill the victim. Conaley was a friend of the victim's niece and told her of the Defendant's threats of killing the victim. . . . Lescure testified that the Defendant not only threatened to kill the victim, but discussed methods for disposing of a body so that it would not be found.
>
> After the Defendant's release from prison in January 1997, the Defendant secured employment working for an auto body shop. Cheryl Featherston met the Defendant when he came to help her husband do some auto framework at her home. That same month, Featherston reported her maroon 1988 Honda Accord stolen from her driveway. A bent ignition key that her 3-year-old son played with was not seen after the theft.
>
> On February 7, 1997, the victim went to work at her job as a night clerk at the Memphis Inn Motel. Guests of the motel established her presence in the locked front office between 1:00 a.m. and 1:45 a.m. on February 8, 1997. However, in those early morning hours, the victim disappeared from the office. She was never heard from again, and her body has never been found.
>
> The victim checked in guest James Defevere between 1:00 and 1:15 a.m. Guest Natalie Doonan testified that she was in the vending area adjacent to the front office between 1:30 and 1:45 a.m. and saw the victim on duty when a man entered the lobby area. Dr. Ronald King went to the vending area between 1:40 and 1:45 a.m. and witnessed the victim let a man through the locked security door in the office area. The man was driving a maroon automobile. Doonan called the office twenty to thirty minutes after leaving the vending area, but received no answer. When Defevere went to check out between 2:25 and 2:35 a.m., the victim was not in the office. Further, Dixie Roberts Presley and a companion

stopped to get a map between 1:30 and 2:00 a.m. Presley saw a maroon car directly in front of the office with its trunk open, which she considered odd since it was raining.

After CSX Railroad management was unable to contact the front desk to wake its crews housed at the Memphis Inn, yardmaster Raymond Summers drove to the motel where he found the victim's office empty and signs of a violent physical struggle. He immediately sought help. Deputies from the Shelby County Sheriff's Department secured the scene and called the Memphis Police.

The crime scene investigation revealed signs of a violent struggle in the employee bathroom, including large amounts of blood, a cracked sink, bloody towels, and a torn off commode seat. A trail of blood led from the bathroom, through the office, and to the curb outside the night entrance. Approximately $600 and several sets of sheets were missing from the office. The victim's billfold and identification were in the office, her car remained in the parking lot, and a ring she constantly wore was on the floor of the bathroom.

Sometime between 8:30 and 9:00 a.m. that morning, the Defendant arrived at his brother's home driving a maroon Honda. Joyce Frazier, his brother's girlfriend, described the Defendant as uncharacteristically dirty. His car and shoes were muddy, and he claimed to have driven into a ditch. The Defendant asked his brother to keep a shovel he was carrying and to help him clean blood from the backseat of the car. After cleaning his shoes in the shower the Defendant asked if he could stay and rest, but his request was denied. The Defendant's brother disposed of the shovel after the Defendant left.

Although his employer considered him to be a good, reliable worker, the Defendant failed to report for work on Monday, February 10, 1997. Nearly one month later, on March 5, 1997, a sheriff's deputy in Johnson County, Indiana, stopped the Defendant for speeding. A check of the license plate and driver's identification revealed that the car was Featherston's stolen maroon Honda and that the Defendant was wanted in Tennessee for questioning in conjunction with the victim's disappearance and suspected murder.

An inventory of the car yielded receipts that evidenced the Defendant's cross-country flight after the victim's murder. Until his arrest, he traveled through Mississippi, Florida, Missouri, Wyoming, Montana, California, Arizona, Texas, and Indiana. Also found were large blood stains in the car's back seat. DNA testing proved the blood was consistent with female offspring of the victim's mother. Additional testing revealed that blood from the crime scene and the car contained DNA that was consistent with the victim's.

While jailed in Indiana, the Defendant agreed to be questioned by officers from the Memphis Police Department. In the course of the questioning, the Defendant claimed to have been at a topless club in Memphis on the night of the victim's disappearance, that he left the club at about 3:00 a.m. and headed for Mississippi but was too tired to finish the drive, that the car he was driving got stuck in mud on the median and required rocking to get out, that he slept at a rest stop until about 8:00 a.m., after which he went to Arkabutla Lake, and then to his

brother's house. The Defendant claimed that he didn't know anything about the victim's disappearance, but speculated that she went to visit her mother in Mississippi. In response to the officers' claim that the victim might be dead, the Defendant responded that she could not be dead because the police did not have a body.

The Defendant's Indiana cell mate, James Allard, Jr., testified that the Defendant told him about killing his wife in a room behind the service desk at the motel where she worked. The Defendant described the scene as very bloody, described the location where he dumped the body, and expressed surprise that officials had not yet located it. . . .

At sentencing, the State offered two witnesses: the victim's mother who gave limited victim impact evidence and the criminal court clerk who gave proof of the defendant's prior convictions involving violence against the person. Over his counsel's objection, and in spite of the trial court's warning, the Defendant opted to present no mitigating evidence.

State v. Rimmer (Rimmer I), No. W1998-00637-CCA-R3-DD, 2001 Tenn. Crim. App. LEXIS 399, * 5-10 (Tenn. Crim. App. May 25, 2001).

The Tennessee Supreme Court opinion from petitioner's resentencing hearing sets forth the relevant facts which were presented during petitioner's second capital sentencing proceeding:

During the middle 1980's, the Defendant had an on-again-off-again romantic relationship with the victim. They started dating sometime after the victim obtained a divorce in 1977 from her first husband, Donald Eugene Ellsworth, by whom she had two children. At the time, the victim was apparently struggling with a drinking problem and Ellsworth was experiencing drug problems. Later, after his relationship with the victim had come to an end, the Defendant was indicted for the aggravated assault and rape of the victim and the first degree burglary of her residence. In 1989, he entered pleas of guilt to each charge and was sentenced to the Department of Correction.

During his incarceration, the victim often accompanied the Defendant's mother, Sandra Rimmer, on visits to the prison. Because the victim participated in a religious program that ministered to inmates from about 1988 to 1992, she saw the Defendant regularly. According to the Defendant's mother, the victim and the Defendant displayed affection for each other during the prison visits. Despite this purported renewal of their relationship, however, there was evidence that during this period of time, the Defendant informed two inmates, Roger LeScure and William Conaley, of his desire to kill the victim upon his release from the prison. He even described to LeScure how he intended to dispose of her body. The Defendant explained to the inmates that he blamed the victim for his incarceration and was entitled to money from her.

The Defendant was released by the Department of Correction in October of 1996 and began work at an auto body repair shop in Memphis. By that time, the victim, who was employed as a night auditor at the Memphis Inn, had remarried Donald Ellsworth and had experienced some success in controlling her alcohol problems.

On February 7, 1997, the victim was scheduled to begin her shift at 11:00 p.m. . . . She drove to the hotel in her 1989 Dodge Dynasty. The only access to her office was through a door, which was locked, or through a small opening in the glass security window. Several hotel guests saw the victim at her office desk between 1:00 and 2:00 a.m. Before 2:00 a.m., one of the guests noticed a "dark-maroonish brown" car that had been backed into an area near the hotel entrance. Although it was raining at the time, the trunk was open.

At about 2:30 a.m., Raymond Summers, a railroad supervisor with CSX Transportation, drove to the hotel when the management service was unable to make telephone contact with a work crew, which was staying there overnight. Because no one was at the front desk, Summers entered the office area. When he heard the sound of water running in the office restroom, he looked inside and discovered blood splatters on the sink, the wall, the toilet bowl, and some towels. He reported his findings to Shelby County officers who were leaving a nearby Denny's Restaurant. The officers notified Linda Spencer, the hotel manager, who lived on the premises. When they investigated, they discovered signs of a struggle in the office area. There were "puddles" of blood throughout the restroom. The sink was cracked, and the lid had been ripped off the commode. Police found the victim's purse. There was a trail of blood approximately thirty-nine feet long that led from the restroom, through the equipment room, office, reception area, and to the vending space. The trail ended on the curb outside the night entrance, indicating that the victim may have been dragged from the restroom to the curb. Some $600 in cash was missing from the register, and three sets of sheets had been taken from the equipment room. Officer Robert Moore of the Memphis Police found a green cigarette lighter under a bloody towel and discovered the victim's gold ring between the office and the bathroom.

Sergeant Robert Shemwell of the homicide department testified that during the investigation the police questioned Richard Rimmer, the Defendant's brother, and Richard Rimmer's ex-girlfriend, Joyce Frazier. According to Sergeant Shemwell, the Defendant appeared at his brother's house during the morning hours after the murder. The Defendant's car was muddy and so were his shoes. The back seat of the car appeared to be wet. There was a shovel inside. The Defendant had asked Richard Rimmer, who was a carpet cleaner, if he knew how to get blood out of carpet. Richard Rimmer admitted that sometime after he had learned of the victim's disappearance, he disposed of the shovel in a dumpster.

The police learned that the Defendant left Memphis without taking the last paycheck he was due from his employer. He gave no notice of his departure. He also left without taking his work tools or the clothing he had stored in the room he occupied.

On March 5, 1997, Michael Adams, a Johnson County, Indiana deputy, stopped the Defendant, checked the license plate number on the Honda, and determined that the vehicle had been reported as stolen in early January. The Defendant was arrested for possession of a stolen vehicle and public intoxication. . . . A receipt in the vehicle indicated that the Defendant was in Myrtle, Mississippi on the day after the victim's disappearance. Receipts from Florida, Missouri, Wyoming, Montana, California, Arizona, and Texas with dates ranging from February 13, five days after the police were alerted of the crime, to March 3, 1997, two days before the Defendant's arrest, were found in the vehicle.

There were blood stains on the carpet and on a seat belt in the back seat of the Honda. Subsequent testing of the stains in the car revealed that the DNA from the blood was consistent with the bloodline of the victim's mother, Marjorie Floyd. . . . It was also consistent with the blood type of the victim, as compared through a sample previously taken from a pap smear. Frank Baetchel, the FBI forensic expert who performed the tests, also examined a bloody hotel towel found at the Memphis Inn, concluding that the blood sample matched the stains found inside the Honda. . . .

During the course of the investigation, the police had explored numerous leads. One report indicated that between 1:45 and 2:00 a.m., James Darnell, along with Dixie Roberts, saw two white males at the Memphis Inn. It was dark and the weather was rainy. He said that both men had blood on their knuckles and appeared to have been fighting. Darnell told officers that one of the men, who he believed to be a clerk, was behind the hotel window and appeared to be giving change to the other. Darnell inferred that the clerk was trying to get the other man, who was "very drunk," to leave. D arnell also saw a dark-colored car "backed in front of the night entrance." Darnell, when shown a photographic line-up, was unable to identify the Defendant as one of the two men. Two composite drawings were made of these individuals, based on Darnell's descriptions. This evidence was not presented to the guilt-phase jury. Although Darnell's testimony was presented at the resentencing hearing through Officer Shemwell, the composite drawings were not.

The Defendant's mother, Sandra Rimmer, testified on his behalf, confirming that the victim had visited the Defendant while he was in prison. She claimed that the Defendant was innocent of the rape charge and contended that the victim admitted fabricating her claims, saying that her boyfriend at the time, Tommy Voyles, was pushing her to file the charges. Ms. Rimmer also testified that the victim sent photographs to the Defendant while he was in prison and "acted like" his girlfriend. Prison records indicated that the victim ceased visitation with the Defendant after her remarriage to Donald Ellsworth.

The defense also presented testimony by a sociologist and mitigation specialist, Dr. Ann Marie Charvat, who had interviewed the Defendant and had conducted a study of his background. She testified that she had learned that the Defendant's parents married very young and then had three children in quick succession, the Defendant being the middle child. Thereafter, the family moved from Memphis to Houston, where the father was arrested for a minor offense and

placed on probation, and then to Indianapolis, where the parents divorced. Later, the parents remarried and returned with the children to the Memphis area. The father worked for the city government and, when the mother left the residence to work full-time, the Defendant, at age eleven, first began to exhibit behavioral problems at school. The Defendant was a "C" student but, according to the mitigation expert, would have benefitted from special education classes. Dr. Charvat testified that the Defendant was hospitalized as an adolescent during a time his father was being treated for mental illness. Afterward, the Defendant was hospitalized on at least two other occasions, one of which was the direct result of his involvement with an older woman, possibly a teacher. The Defendant dropped out of school in the ninth grade and began working at a gas station and in his father's shop.

At eighteen, the Defendant was arrested and served a prison sentence. Although the incident came about when he and some friends attempted to purchase some marijuana, he was the only one involved to serve a term in prison. The others received jail terms or probationary sentences. D r. Charvat learned that while the Defendant was in prison, he met an inmate, Jimmy Watson, who had a relationship with the victim, Ricci Ellsworth. When the couple broke up, the Defendant became involved with the victim. Upon his release from prison, he lived with the victim and her children, describing this period as the happiest time in his life. Dr. Charvat also understood that the Defendant resumed his relationship with the victim, through prison visits, even after he had entered his guilty pleas to the burglary and to her assault and rape. The names of the victim's two children also were on the prison visitation list.

Barbara Dycus, a prison minister at the West Tennessee State Penitentiary, testified that the victim was engaged to the Defendant in 1993, a year before she remarried Donald Ellsworth. She stated that the Defendant played music, wrote gospel songs, and sang during their religious services. Thomas Mach, another prison minister, confirmed that the Defendant had encouraged other inmates to participate in the various programs, including Bible study.

State v. Rimmer, 250 S.W.3d 12, 18-22.

PETITIONER'S CLAIMS

Petitioner contends he received ineffective assistance of counsel at his initial trial and at his resentencing proceedings and on direct appeal of his conviction and sentence. Additionally, he asserts the trial court committed reversible error; the prosecution committed *Brady* violations

entitling him to a new trial; and his death sentence, as imposed, violates constitutional principles. As it relates to his claims of ineffective assistance of his trial counsel at his initial trial, petitioner specifically asserts counsel failed to:

1. maintain an appropriate caseload and assign two attorney to represent petitioner during the investigation and preparation of the case;
2. withdraw based upon a conflict of interest;
3. investigate the facts of the case;
4. develop a theory of the case;
5. challenge the State's ability to prove *corpus delicti;*
6. conduct an adequate *voir dire* of the jury;
7. challenge the introduction of improper evidence and preserve *Brady* claims;
8. present witness and subject the state's witnesses to cross examination;
9. rebut aggravating evidence;
10. present mitigating evidence;
11. preserve claims of ineffective assistance of counsel.

As to his claims of ineffective assistance of appellate counsel during his direct appeal of his conviction and sentence, petitioner specifically asserts counsel failed to preserve his claims relating to ineffective assistance of counsel; failed to challenge the prosecutions *Brady* violations; and failed to challenge the sufficiency of the State's evidence with regard to *corpus delicti.*

As to his second sentencing proceeding, petitioner asserts counsel provided ineffective assistance of counsel by failing to:

1. investigate the facts of the case;
2. challenge the state's ability to prove *corpus delicti*;
3. challenge the introduction of improper evidence;
4. present witnesses and challenge the state's proof; and
5. present mitigating evidence and challenge the state's aggravating circumstances.

Petitioner also contends appellate counsel on direct appeal of his second death sentence provided ineffective assistance of counsel by failing to challenge the sufficiency of the evidence and by failing to challenge the state's proof of *corpus delicti.*

In addition to his claims of ineffective assistance of counsel, petitioner asserts the prosecution, both at his initial trial and at his resentencing proceeding, committed various ethics and evidentiary violations entitling him to a new trial. Specifically he asserts the prosecution:

1. withheld material exculpatory evidence;
2. destroyed exculpatory evidence;
3. engaged in misconduct through motion practice;
4. engaged in misconduct at trial;
5. failed to bring to the court's attention trial counsel's caseload.

Additionally, petitioner asserts the following trial court errors warrant a new trial and/or sentencing hearing:

1. denial of 1998 counsels' motion for continuance;
2. refusal to appoint "un-conflicted" counsel and to consider *Brady* and ineffective assistance claims at the 1998 motion for new trial;
3. refusal to allow petitioner to sit at counsel table during trial.

Finally, petitioner raises the following claims and challenges relating to his first degree murder conviction and death sentence:

1. he was denied a fair trial based upon judicial bias;
2. claims of actually innocence;
3. there was insufficient evidence to support his conviction;
4. cumulative error warrants a new trial;
5. the selection process in capital cases is Tennessee is unconstitutional due to the unlimited and arbitrary discretion of prosecutors;
6. Shelby County routinely provides capital defendants with constitutionally inadequate counsel;
7. the Tennessee Supreme Court does not conduct adequate proportionality review;
8. Tennessee's lethal injection protocol constitutes cruel and unusual punishment;
9. petitioner's 1985 convictions for assault and aggravated assault and his 1989 convictions for aggravated assault, rape and assault with intent to commit robbery were unconstitutionally obtained; and,
10. the ongoing representation of the state by the Shelby County District Attorney General's' Office violates petitioner's due process rights.

TESTIMONY PRESENTED AT THE POST CONVICTION HEARING

The following testimony was presented during the week of December 12, 2011:

Tom Henderson:

Mr. Henderson testified that since July 16, 1976 he has been employed with the Shelby County District Attorney General's office as an assistant district attorney and currently has the supervisory title of "Administrative Assistant." Henderson testified that he has had continuing legal education in the areas of criminal law and the constitutional and ethical obligations of prosecutors. He further stated that he has conducted numerous training of other lawyers both in state and out of state. Henderson acknowledged that for a period of time he served as the training director for the Shelby County District Attorney General's Office. He stated that in February of 1997, he was one of two attorneys assigned to conduct "homicide screenings." He stated that he and the other prosecutor assigned this task would review homicides to determine what charges should be filed.

With regard to the instant case, Henderson testified that he first became aware of the case during one of his homicide reviews or "screenings." After reviewing documents that appeared to be from the District Attorney General's file, Henderson testified that on the morning of March 6, 1997 he met with Sgt. Heldorfer and advised him that he wanted to do a "walk through" indictment of petitioner for the charge of auto theft. Henderson explained that petitioner was apprehended in Johnson County, Indiana. He stated that petitioner was stopped in a stolen car and the owner of the car had verified that the petitioner had borrowed the car and failed to return it. Thus, he stated he was confident the state could support the auto theft charge. However, he stated that the murder investigation was on going and the Memphis police could not bring the

defendant back to Tennessee on a mere arrest warrant; rather, the petitioner could only be extradited if an actual indictment was filed. Therefore, in order to ensure that an indictment was in place prior to petitioner's release from Indiana custody, they chose to proceed with a "walk through" indictment on the auto theft charge.

Henderson identified the charging recommendation document submitted in petitioner's case and acknowledged that on November 10, 1997, he authorized the charge of first degree murder. He stated that typically, at the time that he authorizes a particular charge, the investigation is not yet complete. He further testified that he did not review the affidavit of complaint that was prepared by Sgt. Heldorfer in relation to the murder charge. He stated that once he approves the charges it is up to the officer to prepare the charging instrument. He stated that once the defendant was indicted on the murder charges and the case had been assigned to a specific criminal court division, he recruited assistant district attorney Julie Mosby to be his co-chair at trial. Henderson testified that the case was unusual in that there was no body and further testified that the case was difficult to prosecute logistically due to the many jurisdictions that were involved.

Henderson stated that he recalled the Memphis Police interviewing witness James Darnell who was at the Memphis Inn on the night of the murder. After reviewing a document which appears to be the statement of Darnell, Henderson acknowleged that Darnell had indicated that between 1:30 and 2:30 a.m. on the night the victim disappeared he and Dixie Roberts arrived at the Memphis Inn. Henderson acknowleged that Darnell stated he saw two men in the lobby of the motel, one behind the counter where the victim should have been and one on the other side of the glass partition. He further acknowleged that Darnell indicated that both men had blood on their hands and the man on the outside of the partition appeared to be inebriated. Henderson

testified that Darnell stated that the door to the night clerk's office was open and he felt something was wrong so he left.

Henderson further acknowledged that Darnell described the man he saw in the lobby of the Memphis Inn as having neck length light red hair. Darnell described the individual as a white male in his mid twenties who stood five feet, six inches tall, weighed approximately 150 pounds and had a mustache. He stated Darnell told police, the man wore an orange and white baseball cap, white t-shirt with torn left sleeve and blue jeans and tennis shoes. Darnell stated that the man's right hand was bleeding and indicated that it appeared the man would need stitches to close the wound. Henderson went on to testify about Darnell's description of the man behind the partition, the one he referred to as the "clerk." Darnell described the man as a white male in his mid thirties, standing 5 feet, 7 inches tall, weighing 160 pounds with collar length brown hair, thin mustache, dark blue jacket, black collared shirt. Darnell stated that the man was bleeding from the knuckles of his left hand.

Henderson testified that Darnell also described a vehicle which he noticed in the parking lot of the motel. Darnell stated the trunk of the vehicle was open. Henderson testified that Darnell described the vehicle as a gray, four-door car resembling a "Honda Civic." Henderson stated that Darnell indicated that upon learning of the possible abduction of Ellsworth, he contacted Lt. Shemwell with the Memphis Police Department. Henderson stated that he was aware that Darnell assisted officer's in preparing a composite sketch of the men he saw at the motel. However, when shown a copy of a composite sketch of two men purportedly prepared as a result of Darnell's statement, Henderson stated that he could not identify the documents as being a part of the district attorney's file. Henderson further testified that he did not recall the

composites appearing on February 28, 1997 as part of an article in the local newspaper, *The Commercial Appeal.*

Henderson testified that he was aware that on February 28, 1997 Jackie Clark, an Arkansas State Trooper, called the Memphis Police Department and indicated that an individual named Johnnie Whitlock had contacted the Arkansas authorities and stated he knew the two men who appeared in the composite sketch. Whitlock identified the men as Billy Wayne Voyles and Raymond Cecil. Henderson testified that he was not aware that Billy Wayne Volyes had previously been identified as being involved in the crime through a crime stoppers tip. However, he stated that he did recall that a booking photo of Voyles was included in a photo spread that was shown to several witnesses.

Henderson further testified that he recalled that a photo spread, which included a photo of Voyles, was sent to Hawaii by the F.B.I. and shown to James Darnell. Henderson testified that he has no independent recollection of results of those efforts; but, stated that he has since seen an F.B.I. memo which indicates Darnell identified Voyles as the red headed individual he saw at the motel on the night in question.[1] Although he could not recall the date, Henderson testified that he did recall being advised of Darnell's identification of Voyles. Henderson testified that based upon Darnell's identification of Voyles, on May 30, 1997, he authorized Voyles' extradition to Tennessee.

Henderson identified a police supplement taken from the district attorney general's file setting forth the details of a police interview with Voyles. Henderson acknowledged that Voyles had indicated he had not been in Tennessee for two years because he was "on the run" due to a

[11] It appears Volyes photograph was labeled in the photo array as AA number 5. See Exhibit 1 to Post Conviction Hearing.

violation of a parole warrant. Henderson testified that Voyles provided the names and contact information for numerous individuals who could verify his claims.

Henderson testified that he recalled Ron Johnson being appointed to represent petitioner. He further stated that he recalled petitioner's counsel filing a "form" motion for discovery, including a request for exculpatory evidence and a separate "form" Motion for Production of Exculpatory Evidence. Henderson acknowledged that the Motion for Production of Exculpatory Evidence specifically requested information relating to any witness' description of a perpetrator or perpetrators which did not match the defendant. Henderson further acknowleged that the Motion for Production of Exculpatory Evidence included a specific request for disclosure of information relating to identifications made from photo arrays and/or information relating to any witness' failure to identify defendant or other individual from a photo array. He acknowledged that on March 16, 1998, he filed a response to defense counsel's request for discovery and request for exculpatory information and indicated that he was unable to determine whether he was in possession of exculpatory evidence. The response indicated that the State was not aware of the defense theory of the case or basis for defense; thus, the State was unable to determine whether information in its possession would "exonerate" the defendant. However, the response indicated that the State would comply with its obligations under *Brady v. Maryland.* Henderson testified that typically after the defense motions are filed and the State responds the parties meet and go through the evidence to determine what evidence the defense may want to move to suppress. However, Henderson stated that he could not recall exactly when that meeting occurred in the instant case.

Henderson was shown property receipts from the Shelby Criminal Court Clerk's property room and testified that on March 13, 1998 certain signed photo spreads were logged into the

property room. He stated that the receipt indicated that the property was received "of the Memphis Police Department." However, he acknowledged that another statement on the form indicated that certain items were "received of the District Attorney General." He stated that typically the evidence does not come from the Shelby County District Attorney's Office. He explained that initially a piece of evidence gets tagged into the Memphis Police Department property room and when the case is indicted the items are then transferred to the Criminal Court Clerk's property room. He stated that the District Attorney General's office does not have a property room. He indicated that sometimes the prosecution will accompany defense counsel to the Clerk's property room and sometimes the prosecution will check the property out and review it with defense counsel at the District Attorney General's offices. He stated that the procedure followed in a particular case depends upon the type of evidence involved.

Henderson was shown documents from the District Attorney General's file entitled "Evidence –Witness."[2] The document was dated October 19, 1998. Henderson acknowledged that the document listed the name of a potential witness, Officer Shemwell and then listed to the right of the name pieces of evidence, including a photo spread. He stated that the document contained a notation with regards to the photo spread stating "location" with a question mark and reference to box "846 - #79." Henderson testified that he did not recall what the notation meant and did not recall anything about the box or item number. Henderson was shown another document which he stated appeared to be a list of state witnesses with addresses which he prepared for the trial of Michael Rimmer. He stated that he prepared the document and provided it to the defense to inform them of the potential witnesses at trial. Henderson was also shown a four page witness list with the names, addresses and phone numbers of witnesses and indicated

[2] Henderson testified that he did not recall seeing the document; but, acknowledged that the document contained his handwriting and testified that it appeared he had reviewed the document in preparation for trial. However, he stated that he did not believe he prepared the document.

that the list appeared to be a list of all potential witnesses. He stated that the list contained additional information about the witnesses and his personal remarks about the witness. He stated the document was likely prepared for use by him at trial; but, was not provided to defense counsel. Henderson testified that in the remarks column for potential witness, James Darnell, he wrote "saw two mw, id Voyles." He stated that he assumed "mw" stood for "male white."

Henderson was provided a large packet of documents with the word "discovery" handwritten on the first page. He stated that the handwriting on the document might be his own. He stated that it was his policy to keep a copy of the discovery provided to defense counsel in the District Attorney General's file. Henderson testified that the packet he was shown appeared to be a copy of the discovery provided to defense counsel in petitioner's case. On cross-examination he reviewed what appeared to be a copy of the same discovery packet he was shown on direct examination and stated that the document had a notation indicating it was provided to defense counsel, Ron Johnson, on October 27, 1998. Henderson did not recall defense counsel Dianne Thackery or Betty Thomas going to property room to look at the evidence. With regard to resentencing counsel, Henderson testified that he does not have any independent recollection of resentencing counsel asking him to go and look at the evidence. He does recall that resentencing counsel informed him that they had obtained the public defender's file from the 1998 trial.

Henderson was also provided two pages of handwritten notes dated October 28, 1998 along with a memo to Shelly McKee, a victim witness coordinator with the Shelby County District Attorney General's Office. He stated that the notes appeared to be in his handwriting. Henderson testified that, although the page of notes was dated October 28, 1998, he did not believe the attached memo to McKee was prepared on the same date. Henderson testified that

the purpose of the McKee memo was to set up interviews with potential witnesses in preparation for trial. He stated that James Darnell's name was on the list accompanied by the same comments noted above. Next, Henderson was shown another document which contained two pages of witnesses and handwritten notes. He stated he did not recognize the handwritten notes; but, stated, based upon the information contained in the document, he assumed the handwritten notations were the notes of Shelly McKee. Henderson testified that next to the name James Darnell, the following notation appeared: "754-2984-Army-Hawaii- waiting for father to call back with son's number. 1-808-692-3217. lm on a/m -10-14-98." He stated that he assumed "lm" means "left message" and "a/m" stands for "answering machine."

Henderson was shown another document which he identified as a trial "checklist" or to do list. He stated that he does not recall when the document was created. He acknowledged that the list contained a notation stating "get car located" and "look at car seat" with a checkmark beside them. However, he stated that he does not recall personally looking at the car or the car seat. Henderson testified that he did ascertain the location of the car. Although, at the time of his testimony, he could not recall where the car was located, he stated that typically impounded vehicles or vehicles obtained as evidence were held at either "*International Harvester*" or at the Memphis Police Department's impound lot. He explained that the Memphis Police Department crime scene lab has a facility at what used to be the old *International Harvester* plant.

On cross examination, Henderson was shown exhibit 27 and directed to bate stamped pages 202628 and 202629. He testified that the documents appeared to be part of the police reports. He stated they appeared to be the "state report." Henderson explained that the "state report" is the final report prepared by the detective bureau summarizing the case, the witnesses and the evidence. He stated that the report set forth how each lay witness and each officer was

involved in the case. Henderson testified that the first entry on the document is Billy Wayne Voyles, who is listed as possible suspect; the next name is James Douglas Allard, who is listed as witness/inmate from Indiana; the next name is Roger Lescure, who is listed as an inmate/witness located at the Northwest Correctional Center. Henderson testified that the document listed Dixie Lee Roberts and James Darnell, Jr. as eye witnesses and listed Cheryl and Steve Featherstone as the victim and witness to the alleged auto theft.

Henderson also testified that the discovery packet, Exhibit 27, contained a bate stamped page 202584, which is a police supplement outlining the efforts of the police to locate Billy Wayne Voyles and to secure an unlawful flight to avoid prosecution warrant for Voyles. Henderson testified that it was not clear who authored the document but stated that it was prepared on June 20, 1997. The document indicated police believed Voyles had an outstanding warrant for aggravated robbery; attempted theft and attempted first degree murder. It appears the police were having difficulty locating the warrant and having Voyles returned to Tennessee; therefore, they enlisted the assistance of District Attorney General Ken Roach. According to the document, officers eventually discovered there was no warrant for Voyles in the computer. However, Roach learned that Voyles was at the Shelby County Correctional Center. The document further indicates attempts to bring Voyles down to the homicide officer for an interview were unsuccessful.

Henderson identified another document from Exhibit 27, discovery packet, bate stamped 202590, which indicated Voyles was interviewed on July 14, 1997. It appears Voyles waived his rights a nd initially gave an oral statement and subsequent gave a signed statement to Sgt. Heldorfer. Voyles stated he was not involved in the kidnapping and murder of Ricky Ellsworth and stated he did not know the victim or the petitioner, Michael Rimmer. Voyles informed

Heldorfer he had never been to the Memphis Inn and, when shown photographs of Rimmer and Ellsworth, claimed he did not recognize them. Voyles claimed he had not been in Tennessee for some time because he had an outstanding warrant for a parole violation. He stated that at the time of the murder he was working for D&B Construction. Voyles provided police with the names and contact information of several individuals, including his boss, who he claimed could confirm his whereabouts on the dates in question. Henderson testified that the case generated a large number of crime stopper tips and a number of possible suspects were put forth as a result of those tips. He acknowledged that, as a result of these tips, approximately fifty photographs of potential suspects were included in the photo array shown to witnesses. Henderson testified that the discovery materials provided to defense included all the documents discussed above and the information relating to the crime stoppers tips.

In addition to the documents contained in Exhibit 27, on cross examination, the state introduced additional materials from the District Attorney General's file which Henderson stated had been provided in discovery. Henderson explained that he could identify the materials as a copy of part of the discovery provided to counsel because the material were copied on legal size paper. He stated that it was his practice to copy the discovery provided to counsel on legal size paper as a means of differentiating it from other materials in his file, so that it could be easily identified as the discovery materials which were provided to defense counsel. He stated that the documents were located in a subfolder of the file labeled "discovery" and contained a memo to defense counsel Ron Johnson. These materials were introduced as a packet as Exhibit 35 to the hearing. Henderson testified that one of the documents in Exhibit 35 is a copy of property receipt number 429623. He stated that the receipt was included in the state report. Henderson testified that the receipt was filled out by Detective Shemwell and the document indicated the

property was located at 201 Poplar. The receipt listed the following items: signed photo spreads; photo spread-vehicle photos; photo spread-weapons photos; photo spread-drawings.

Henderson testified that a copy of the receipt was turned over to defense counsel, Ron Johnson, as part of discovery. He indicated it was the state's way of letting defense counsel know what was in the property room so that they could view the items if they wanted to see them. Henderson once again explained that there is more than one property room. He stated that, when police first bring evidence in it goes to the Memphis Police Department or City property room. According to Henderson, once a case is indicted, a request is made to transfer all the applicable property to the Shelby County Criminal Court Clerk's office property room. He stated that, if defense counsel receives property receipts as part of discovery, then, in order to view the property, counsel usually informs the prosecutor assigned to the case that they would like to view the property. The property is then typically brought to the Assistant District Attorney General's office and viewed by counsel there. Other times the prosecutor and defense counsel will make an appointment to view the property in the Shelby County Criminal Court Clerk's property room. Henderson testified that he supposes counsel could go to the property room to view the evidence on their own. However, he stated that typically they request the prosecutor accompany them to view the evidence. Henderson testified that in the instant case he does not have any independent recollection of going with Ron Johnson to view the evidence in the property room or of Ron Johnson coming to the District Attorney General's office to view the evidence. However, he stated that if counsel did not view the evidence it would be the first time in the history of his practice where a member of the capital defense team did not request to view the evidence or did not view the evidence prior to trial.

Henderson identified a document which he stated appeared to be his outline for the testimony of Dixie Roberts. He acknowledged that it includes a reference to "two mws"- two male whites. Henderson stated he could not recall whether Roberts testified at trial about two male whites. Henderson acknowledged that his list of information about Roberts' testimony included the notation "looking for a map." He stated that it was his recollection that Roberts' statement may have included information that she and Darnell were looking for a map on the night of the murder. Henderson was asked about the fact that Roberts' statement indicated she and Darnell stopped at the motel to get a room; but, at trial she testified that the pair stopped at the motel to get a map. Henderson testified that he recalled that, during his pretrial interview with Roberts, Roberts told had told him she and Darnell stopped at the motel to get a map. Henderson acknowledged that he did not call James Darnell at the 1998 trial. He stated that he asked his investigator and victim witness coordinator to locate Darnell; however, his staff was unable to locate or even contact Darnell. Henderson testified that he did not ever speak with James Darnell. Henderson testified that Darnell was not called at the resentencing hearing because the State was merely presenting an outline of the evidence presented at the guilt phase of the initial trial.

Henderson testified that he was the prosecutor assigned to petitioner's resentencing proceeding. He stated that it is the practice of the District Attorney General's office in such cases to utilize the file from the original trial. He stated that all of the materials available to him at the initial trial should have been available to him at resentencing. Henderson identified a motion for exculpatory evidence filed by defense counsel November 10, 2003. He stated that it was the same exact motion filed in the original trial, and requested any information favorable to the defense including any evidence relating to identification from photos or line-ups. Henderson

testified that he filed a form response indicating the state was unable to determine whether he possessed exculpatory information until he learned what the defense theory of the case would be or what defenses the petitioner would be alleging at trial. Henderson acknowledged that the response he filed indicated the only identification witnesses were friends, co-workers, and acquaintances of petitioner. The state's response further indicated the state was not aware of any "misidentification" in the case or any witnesses who had provided "an erroneous description of the defendant or evidence" in this case.

Henderson testified that he would never intentionally withhold exculpatory evidence in a case regardless of the severity of the case. He stated that, in the instant case, there was no reason to hide Darnell's identification. Henderson testified that, even if Darnell had testified that he identified Voyles, the police had thoroughly checked Voyles alibi and ruled him out as a suspect. Moreover, he stated Voyles did not have the victim's blood and DNA all over the back seat of the stolen vehicle he was driving. Additionally, Henderson testified that the there was no attempt to hide the information relating to Voyles from defense counsel. He stated that Voyles was all over the files that the prosecution turned over to defense counsel and there was information that witnesses had stated they saw two individuals at the Memphis Inn on the night in question.

Henderson testified that the evidence against the defendant was particularly strong. He was previously involved in a tumultuous relationship with the victim, which culminated in him being sent to prison for her rape. He made statements in jail threatening to kill the victim and describing how he would dispose of the body. On the night of Ellsworth's disappearance he showed up at his brother's house with muddy clothes and a muddy car; a shovel; and blood on the back seat of his car. Henderson testified that the petitioner then disappeared on a cross

country trek and was later caught in the same car and the victim's DNA was found on the back seat of the car and when confronted about the murder petitioner suspiciously replied, "you can't have a murder because you don't have a body." Henderson testified that the prior violent felony aggravating circumstance was particular strong in this case because the murder essentially involved a revenge killing for Ellsworth's reporting of the prior rape.

With regard to the resentencing proceeding, Henderson testified that he would not have told Sgt. Shemwell to misstate the facts or evidence in the case and testified that Shemwell would not have done so even if asked to do so by the prosecution. Henderson testified that during the resentencing proceeding the court took a break and he and Shemwell went down to look through the file and did not find the documents referencing Darnell's identification. He stated that neither he nor Shemwell remembered Darnell having made an identification. Henderson testified that the pair looked as well as they could during the short break; but, indicated that the file contained approximately six thousand pages of documents. He acknowledged that there clearly was a document in the file referencing the identification; but, stated that, at the time, he and Shemwell were just unable to locate it. Henderson further testified that upon the filing of the petitioner's Petition for Post Conviction Relief, he again looked through the file and did not locate the document. He stated it was only after a second review of the file that he was able to locate the one page document in question.

On re-direct examination, Henderson testified that he did not recall that Ron Johnson was appointed as a judicial commissioner on October 1, 1998, approximately one month prior to the start of petitioner's trial. He stated that he did not recall Johnson's appointment affecting the trial.

Henderson further testified that the Federal Bureau of Investigation (F.B.I.) and the United States Attorney were initially involved in petitioner's case. He recalled that the federal government's involvement was related to DNA testing. He stated that he did not recall the U.S. attorney having an interest in prosecuting the case. Henderson explained that the Tennessee Bureau of Investigation (T.B.I.) would not do the DNA testing because of nuisances in the T.B.I. labs rules. In addition to assisting with the DNA analysis, Henderson testified that he was aware the F.B.I. assisted the prosecution by having Hawaii field agents show witness James Darnell a photo array. Henderson testified that Darnell, who was in the military, was stationed in Hawaii. Henderson testified that he did not recall meeting with the U.S. attorney about the federal government actually prosecuting the case and did not recall the U.S. attorney taking initial steps to empanel a federal grand jury to indict petitioner.

Regarding Billy Wayne Voyles' alibi, Henderson testified that he could not recall whether there were any police supplements or other documentation relating to interviews with the alibi witnesses provided by Voyles. He stated that he did not recall that Raymond Cecil, one of the alibi witnesses provided by Voyles, was identified as suspect number two by the same individual who identified Voyles as suspect number one based on the composite sketches prepared with the assistance of Darnell. Henderson stated that it is his understanding that the alibi provided by Voyles was "checked out."

Ralph Nally:

Nally testified that at the time of petitioner's initial trial he was employed by the Shelby County Public Defender's Office as a criminal investigator for the capital defense team. He stated that he assisted in the investigation of petitioner's case. He stated that defense counsel

Ron Johnson directed the investigation. Nally testified that he kept notes from his interviews with witnesses and prepared written memorandums outlining the substance of those interviews.

Nally identified his memorandum prepared on May 19, 1998 regarding his attempts to locate a witness with the first name "Cheryl" and an unknown last name. Nally also identified a document with the same date outlining a subsequent interview with Cheryl Featherstone; a May 20, 1998 memorandum outlining his attempts to interview Steve Featherstone; a June 14, 1998 memorandum outlining his interview with Charles Jordan; a July 20, 1998 memorandum outlining his interview with James Hawkins, who was located in Ohio; an October 27, 1998 memorandum outlining his attempt to interview Jackie Darion, who was found to have a disconnected phone. Nally testified that on October 27, 1998 he attempted to locate witness James Darnell; however, he was unable to contact Darnell. He stated that he was able to speak to someone at the number provided for Darnell; but, was not able to speak to the witness, James Darnell. Nally testified that on October 27, 1998 he interviewed Natalie Doonan. Nally testified that on October 29, 1998 he interviewed Linda Cook. He stated that after trial began he attempted to locate witness, Darlene Seals but was unable to locate Seals. Nally testified that on November 4, 1998 he interviewed Rita Hulley. Nally testified that generally he conducts interviews alone. He stated that after drafting a memorandum of the interview he would place the memorandum in the file.

On cross examination, Nally testified the capital team consists of himself, the fact investigator; a mitigation investigator; lead counsel; and second chair counsel. He stated that Ron Johnson was lead counsel. Nally testified that initially Betty Thomas was assigned as co-counsel; however, Thomas left the office and attorney Dianne Thackery was later appointed to assist Johnson. Nally testified that the entire team would have met with petitioner as a group.

Nally testified that attorney Johnson typically prepared the case on his own and directed the investigators to perform certain tasks. Nally stated that the individuals he contacted were the ones that Johnson directed him to interview. He stated that he was not aware whether Johnson had also interviewed the individuals. Nally testified that he and other members of the team met with petitioner and gathered information about the case. He stated that petitioner told him about an altercation at a strip club and Nally stated he attempted to locate the individuals involved. However, he stated that the witnesses could not recall whether the altercation occurred on a Saturday or Sunday night. Nevertheless, Nally issued a subpoena to "Rita." He stated he was not aware whether that person came to court.

Nally testified that he does not recall assisting the mitigation investigator; however, he stated that it is possible he did. Nally stated he did not recall doing a JSS investigation of certain individuals. However, he stated that if he did, for instance, do an investigation for Billy Wayne Voyles, then it was likely because he was directed to do so by Ron Johnson. He stated that on occasion he would run such a report based on information he reviewed in discovery. Nally testified that he did not recall seeing a JSS report on Voyles.

Nally testified that generally when Johnson received discovery, he would make a copy for the whole team. He stated that, at this date, he has no recollection of the discovery in this case and did not recall reviewing information relating to a large number of crime stopper tips in this case. Nally testified that typically the capital team would meet periodically and have a status discussion about the cases they were working on. He stated he remembered having such meeting with regard to petitioner's case but stated he does not recall the specific conversations that occurred during those meetings.

James Darnell:

James Darnell testified that on Saturday February 8, 1997 between 1:30 a.m. and 2:30 a.m. he witnessed a man in the parking lot putting something "rolled up" in a motel comforter in the trunk of a car. He stated that the object was heavy enough that the car "dropped a little bit" when the object was placed inside the trunk and indicated that the man appeared to be struggling. He stated that he turned and walked toward the clerk's office and by the time he reached the door the man he'd seen at the trunk of the car was beside him. Darnell stated he was uncomfortable having the man stand behind him, so he stopped, opened the door, and allowed the man to continue ahead of him. Darnell stated that the man smelled of alcohol and had blood on his hands. He described the man as having red hair and wearing a cut off t-shirt and baseball cap. He stated that the man had a tattoo on his left arm. Darnell testified that the door to the clerk's office was open. He stated that he felt that was unusual. Darnell testified that he walked to the clerk's window and witnessed another man with blood on his hands and stated that the man was shoving money under the window. He stated that, at that point, he thought the two men had been involved in some sort of altercation and thought the man behind the clerk's window was "cashing out" the man who had accompanied him into the lobby. Darnell stated that he felt something was wrong, so he left the motel.

Darnell stated that as a result of what he had witnessed he called crime stoppers and was told to come down to homicide division the next morning. Darnell was asked to review the statement he gave to police and indicated that he recognized the document; but, stated that his recollection was that he had given the statement to detective Kimmel and stated that Kimmel's name did not appear on the document. He further testified that the second page of the document indicates he told police that he observed a "mini-van type vehicle" parked outside the office door

and indicated that he did not recall making such a statement. Darnell testified that he described the car he witnessed as a Honda Accord. He acknowledged that page three of the document contained his signature and was dated February 13, 1997. He stated that at the time that he gave the statement he was stationed part time at Fort Bragg and stationed part time in Honolulu, Hawaii. He stated that on February 8, 1997 he was on leave and staying with his father in Germantown, Tennessee. He stated that on the date in question he was accompanied by Dixie Roberts.

Darnell stated that he recalled working with a sketch artist to create a rendering of the men he had seen at the Memphis Inn. He stated that shortly thereafter he returned to Honolulu. Darnell testified that a few months later the F.B.I. came to Hawaii and showed him pictures of vehicles. He stated that he did not specifically recall being shown photographs of potential suspects. Darnell was shown the June 21, 1997 photo spread and stated that it reflected he had identified photo AA- number 5. Darnell acknowledged that the document contained his signature. He stated that he thought he had viewed some photographs of suspects in Memphis prior to returning to Hawaii; but, again stated he did not recall viewing the photographs of suspects while living in Hawaii. Darnell testified that he informed police that he would be willing to return to Memphis to testify at trial; but, sated he was never asked to testify. He stated that, while he was still in Hawaii, the police came to his father's house in the middle of the night and tried to find him.

On cross examination, Darnell acknowledged that his statement to police does not mention him seeing the man place an object in the trunk of the car. However, he stated that he recalled telling police he saw the man put an object in the car. Darnell also acknowledged that his statement indicated that the man who accompanied him into the hotel had freckles on his arm

and further acknowledged that the statement does not mention the man having a tattoo on his arm. However, Darnell stated that he specifically recalled the man having a tattoo.

Darnell testified that on February 13, 1997 when he met with police he actually accompanied police to the crime scene. He stated that he was not aware of the murder until his friends brought it to his attention a few days after February 8, 1997. Darnell testified that he was stationed in Hawaii for three years. He stated that he did not recall anyone from the defense team contacting him while he was stationed in Hawaii. He further testified that he did not recall ever being contacted by Coleman Garrett or by Gerald Skahan or Paula Skahan.

Dixie Roberts-Presley[3]:

Dixie Roberts testified that on February 8, 1997 between 1:30 a.m. and 2:00 a.m. she was present at the Memphis Inn. She stated that on February 13, 1997 she gave a statement to police regarding what she had witnesses at the Memphis Inn on February 8, 1997. Roberts testified that she told police she observed a car with the trunk open. She told police the car was a "boxy Nissan, Toyota" type vehicle, dark in color with a tan interior. She stated she could see inside the vehicle because the dome light was on. Roberts stated that she told police the car could have been maroon, black or dark blue; however, she indicated her recollection was that the car was maroon in color.

Roberts testified that when they arrived at the Memphis Inn, James Darnell went to the office to get a room and a map. However, she stated that he Darnell returned to the car and told her that there were two men inside the lobby area and they were intoxicated and had blood on their hands. Roberts stated that she did not recall Darnell telling her where, inside the motel, the

[3] At the time of the murder, the witness was known as Dixie Roberts. Prior to the hearing in this matter the witness was married and subsequently changed her name to Dixie Presley. Since the witness is referenced in trial testimony, post conviction testimony and exhibits as Dixie Roberts, this court will also refer to the witness as Dixie Roberts.

men were located; however, she acknowledged that in her statement she told police one man was behind the counter in the clerk's office. On cross examination, Roberts testified that she stayed in the car and never saw the men Darnell had witnessed inside the motel. She stated that she had never been to the Memphis Inn prior to that night.

Roberts recalled testifying at petitioner's initial trial. She stated that she did not recall whether she was asked about the two men Darnell had seen inside the motel. However, she stated that if the trial transcript reflected that she was never asked about the men Darnell saw, she had no reason to disagree with its accuracy. She stated that she did not recall ever being contacted by defense counsel.

Ronald Johnson:

Ron Johnson testified that in January 1998 he was employed by the Shelby County Public Defender's Office as an attorney with the Capital Defense Unit. He stated that, at that time, he had been a member of the Capital Defense Unit for approximately eight years. Johnson testified that on February 6, 1998 he was appointed to represent petitioner. He stated that on March 4, 1998, he filed a series of motions in petitioner's case. Johnson stated that he sought notice of the state's intention to seek the death penalty and sought the production of exculpatory evidence. He stated that counsel filed additional motions relating to the death penalty. He stated he recalled receiving a response by the state on March 16, 1998 in which prosecutor Tom Henderson indicated he was unable to determine whether he was in possession of exculpatory evidence. He stated that trial was set for June 22, 1998.

Johnson testified that he recalled filing a motion for continuance on June 22, 1998 with an accompanying affidavit. He stated the motion asserted that the investigation in the case was

not complete due to the large number of witnesses in the case, some of whom were located out of state. Johnson testified that the motion also contained his affidavit which listed the cases in which he was currently serving as first chair counsel. He acknowledged that of the cases he listed, Derek Lucas was set for trial in October 1998; another case, Arnold Black, was set for trial on August 1, 1998; and Richard McKee was set for trial June 22, 1998. He further acknowledged that the affidavit listed numerous other cases that were pending; but, did not yet have a trial date and listed two cases which had either recently been tried or recently settled. Johnson stated that he also had responsibilities as second chair counsel in several other cases. Johnson testified that from February 1998 to November 1998 he was serving as first chair counsel for twenty-one clients who were charged with first degree murder. He could not specifically recall in how many cases he was assigned as second chair counsel but stated he was serving as second chair in at least ten first degree murder cases between the dates of February 1998 and November 1998. Johnson testified that some of cases were settled. He stated not all of the cases listed in his affidavit proceeded to trial. However, he testified that due to his case load it was impossible to adequately prepare for petitioner's case.

Johnson testified that his motion to continue was denied and that the trial began on June 22, 1998. Johnson stated that he told the court he intended to seek a Rule 10 appeal; but, the court insisted that the trial go forward. He stated that he informed the court that, if he was going to be forced to proceed to trial without having adequate time to prepare, then he would have to resign from the Shelby County Public Defender's Office. He stated that he was ordered by the court to remain on the case.

Johnson testified that he filed a Rule 10 application to the Tennessee Court of Criminal Appeals seeking review of the court's denial of his motion to continue. He acknowledged that

his Rule 10 application indicated the Shelby County Public Defender's Office is called upon to represent capital case loads far in excess of those approved and recommended by the American Bar Association standards for representation in capital cases. Johnson testified that it was his belief at the time that he was handling a case load that was far in excess of any ethical standard. Johnson testified that, after he sought the Rule 10 appeal, the case was continued until November 2, 1998. He stated there were no additional appearances or motion dates in the case between June 22, 1998 and November 2, 1998.

Johnson testified that his activity sheets from the period June15, 1997 to June 19, 1998 indicated that he was working from 8 a.m. to 5 p.m. five or six days a week. Johnson testified that from February 1998 to September 1998 he was the primary attorney working on petitioner's case; however, he stated that there were other attorneys assigned to the case as second chair counsel. He stated that initially Betty Thomas was assigned to the case. However, he could not specifically recall what work was performed by Thomas. Johnson testified that in September of 1998 Dianne Thackery was appointed as second chair counsel. He stated that prior to that date Thackery had not handled a capital case.

Johnson testified that in September 1998 he sought to be appointed to the newly created post of Judicial Commissioner and was appointed to the post October 1, 1998. He stated that his responsibilities as Judicial Commissioner included setting bonds; issuing search warrants; reviewing police paperwork to establish probable cause; and handled protective orders. He stated that Judicial Commissioners are employees of the Shelby County General Sessions Court and are bound by the Cannons of Judicial Ethics. He stated that, at the time of his appointment, there were three Judicial Commissioners and the work was distributed amongst the three Commissioners.

Johnson identified a document dated November 3, 1998, from Commissioner Rhoda Harris indicated that Harris would be able to "cover for" Johnson while he was in trial.[4] The note indicated Harris could cover Tuesday, Wednesday, and Thursday evenings but would be unable to cover Friday evening.[5] Johnson stated that the Rimmer trial continued into Friday November 6, 1998 and Saturday November 7, 1998. He stated that he did not recall if he was required to be on call on Friday November 6, 1998. Johnson stated that he did not recall asking the court to withdraw from petitioner's case once he was appointed Judicial Commissioner. He further stated that, if the record did not reflect petitioner had executed either an oral or written waiver of conflict of interest with regard to Johnson's continued representation, then he has no reason to dispute post conviction counsel's assertion that no waiver was ever executed.

Johnson testified that the fact investigator for petitioner's case was Ralph Nally and Elizabeth Benson was the mitigation investigator assigned to the case. Johnson testified that he visited petitioner in the jail on several occasions, including prior to his formal appointment in the case. Johnson testified that on April 1, 1997, the capital team performed the initial jail intake. Johnson stated that he was accompanied on that date by Benson and Nally. He stated that his notes from the meeting indicate petitioner told them that he did not commit the crimes for which he was charged. Johnson testified that petitioner consistently maintained his innocence throughout his representation of petitioner. He stated that at the initial intake petitioner provided information regarding an alibi.

Johnson stated that he visited petitioner again on December 11, 1997. He stated that, with regard to the auto theft charge, Rimmer stated that he had keys to the car as part of an "insurance ploy." He testified that his notes from the meeting further indicate that, during the

[4] See Exhibit 48 to Post Conviction Hearing.
[5] Id.

time that petitioner was in possession of the car, petitioner stated he was traveling and playing music. He stated that he recalled the car was owned by Steve and Cheryl Featherstone and that Steve Featherstone was a co-worker of petitioner's and that both men worked in the auto body industry. Johnson testified that he was aware that prior to leaving Memphis petitioner had been working for Ace Collision Center. He testified that the state provided him with a check in the amount of $363.67 addressed to Michael D. Rimmer and dated February 6, 1997.

Johnson testified that he again visited petitioner on June 17, 1998. He stated that on that date he had a discussion with petitioner regarding the continuance. He stated that his notes from that meeting contained the notation "parents home" and "Autozone." He stated that he recalled petitioner telling him about an event in which he was changing the oil on the victim's car at his parent's home with an air filter and oil he had purchased at Autozone and another incident in which the victim had visited him. He stated that these incidents occurred after petitioner was released from prison. Johnson further testified that his notes indicate petitioner told him the victim came to see him while he was incarcerated.

Johnson testified that his notes indicate petitioner needed medical attention after being assaulted in prison in Indiana. He did not recall the extent of petitioner's injuries. Johnson testified about various other notes from his file. One note referenced the state's lack of corpus and another note indicated that the transport van owned by the federal extradition company was the same company that had previously had a van burn up, killing prisoners trapped inside. He testified about notes dated October 21, 1998 which reference a change of venue. He stated that he did not recall the meaning of or reason for that notation. Johnson stated that he did not recall the meaning of another note referencing an individual named Joe Ball.

Johnson indentified a document dated June 1, 1998 written by him to Ralph Nally. He stated that on that date he requested Nally to check petitioner's alibi and to contact the petitioner's family to see if the victim had been "coming around."[6] He stated that another document dated October 20, 1998 instructed Nally to speak to witnesses Linda Cook, William Conley, Jackie Darien; James Darnell and Joyce Frazier and contained further instructions to contact all possible witnesses.[7] He stated that the State's witness list was attached to the document.

Johnson testified that as part of her duties as mitigation investigator Elizabeth Benson was responsible for collecting records. He identified a document identifying the items collected by Benson. He stated the document indicates Benson began collecting records on April 23, 1998 and made her last records request on October 1, 1998.

Johnson testified that information relating to James Darnell's descriptions of two individuals with blood on their hands was not provided to him in the state's initial discovery. He further testified that the state never informed him that James Darnell had identified one of the individuals as Billy Wayne Voyles. Johnson testified that he did not receive complete discovery in the case until October 27, 1998. He stated that it was not until this date that he received the supplement indicating James Darnell and Dixie Roberts were at the Memphis Inn at about 1:30 or 2:00 a.m. on the night of the murder and that Darnell had told police he saw two individuals with blood on their hands. Johnson testified he did not personally attempt to locate Darnell. He stated he could not recall whether Nally attempted to locate Darnell. He stated that Nally did contact Dixie Roberts. Johnson stated that it was his recollection that Roberts informed them that, at the time, she thought the two men had been involved in a fight. He stated that his

[6] See Exhibit 50 to Post Conviction Hearing.
[7] See Exhibit 51 to Post Conviction Hearing.

recollection was that Roberts had seen the men and was shown a photo spread but was unable to identify anyone. Johnson acknowledged that at trial, during his cross examination of Roberts, he did not ask her any questions about the two men.

Johnson acknowledged that his file contained a Commercial Appeal article related to the victim's disappearance. He stated that the article contained the composite drawings prepared by the police. Johnson further testified that his file contained a copy of the composite drawings. He stated that in late 1997 petitioner was balding with short brown hair. Johnson acknowleged that during his opening statement he agreed with the state that the murder was committed by a single perpetrator.

Johnson testified that the December 7, 1997 arrest report he was provided in discovery indicated that Darnell had seen one man at the Memphis Inn and made no mention of a second man. He further stated that the document indicated James Darnell provided a written statement. He stated that in March he had made a request to receive witness statements prior to trial but his request was denied. He stated that he never received James Darnell's statement.

Johnson stated he was provided with a copy of the probable cause search warrant from Indiana relating to a 1988 maroon Honda Accord and the affidavit in support of the warrant. He stated that he recalled petitioner was stopped in Indiana for intoxication and speeding. Johnson acknowledged that the affidavit in support of the warrant indicated officer Shemwell told the affiant that a witness named "Jim" Darnell saw a vehicle matching the description of the Honda Accord backed up to the office of the Memphis Inn in the time frame of the murder and the witness indicated the car's trunk and door were open. He further acknowleged that the affidavit indicated the witness gave a description of the two men that he saw and one of the descriptions matched that of Michael Rimmer. He stated that he did not consider filing a motion to suppress

the search of the vehicle on the basis that the affidavit supporting the warrant contained false information.

Johnson stated that prior to trial he became aware that Voyles was listed as a possible suspect based upon a crime stoppers tip. He stated Voyles was also listed on the state's witness list. He stated that inquiries into Voyles' criminal history are part of his file and testified that the documents indicate those inquiries were made on November 4, 1998. He stated that he did not recall which team member made those inquiries. He stated his file contained a document dated June 30, 1995 indicating Voyles received a six year probation sentence, which was subsequently revoked in June of 1997. He stated that one of the reasons for Voyles' parole violation was a subsequent arrest on November 21, 1995. Johnson acknowledged that Voyles was represented at his parole revocation hearing by a member of the Shelby County Public Defender's Office. However, he stated he did not move to withdraw from petitioner's case based upon a potential conflict of interest. He stated he was not aware of the conflict and did not inform petitioner of the potential conflict.

Johnson testified that he did not attack the evidence of petitioner's attempted escape from the Shelby County jail based upon a federal law suit challenging conditions at the Shelby County jail. He further stated he did not attack the evidence of petitioner's attempted escape based upon the fact that petitioner was never charged or prosecuted for the escape attempt. Johnson also testified that he did not investigate petitioner's attempts to escape from Indiana custody. He stated he was not aware petitioner was involved in a civil suit relating to jail conditions at the Johnson County Indiana jail that was ultimately successful. He stated he was not aware that, as a result of his suit, petitioner was moved from the county jail to the Indiana prison system and was subsequently assaulted. He stated that the defense team did not attempt to obtain petitioner's

Indiana prison records or the records from his subsequent hospitalization which occurred as a result of the aforementioned assault.

Johnson testified that, with regard to the extradition van incident in Ohio, he did not speak with Rimmer's Ohio counsel. Johnson testified that petitioner claimed he was being transported in inhumane conditions. He stated that at the time of transport from Ohio to Tennessee, petitioner had a broken leg. He stated he did not contest the admission of petitioner's Ohio escape charges at his capital murder trial on that basis. Johnson stated that he was aware petitioner originally charged with escape in relation to the Ohio incident and was aware the charges were subsequently dismissed. He stated that he did not ask for a copy of the Ohio lawyers file. Johnson testified that he recalled speaking with the driver of the extradition van and possibly spoke with other individuals on the van. He stated that he did not investigate the federal extradition agency operating the van; however he stated he was aware that in the same year as petitioner's escape attempt the agency had an accident which resulted in the death of prisoners.

Johnson testified that he recalled Rhonda Ball testifying at trial. He stated that he recalled Ball testifying that the victim had only been married to Donnie Ellsworth. Johnson reviewed two documents one purporting to be the marriage certificate of the victim and Tommy Ray Voyles West and the other purporting to be a divorce decree for the couple. Johnson stated he did not recall whether Tommy Voyles and petitioner were friends. He stated he did not recall Voyles being involved in the prior crimes committed by petitioner against the victim. He stated he was not aware Voyles had been charged with assaulting the victim. He stated that he was not aware that prior to marrying Donnie Ellsworth and Tommy (West) Voyles the victim had been married to Jessie Cleaves. However, Johnson testified that, if the record reflected that during his

cross examination of Mr. Ellsworth he elicited testimony from Ellsworth about the fact that the victim had other husbands; then, he has no reason to dispute the record. However, Johnson testified that he did not recall any member of the defense team attempting to obtain copies of the victim's criminal history.

Johnson testified that he did not conduct any investigation into the circumstances of petitioner's prior 1985 and 1989 convictions. He stated he was aware that the 1989 convictions involved Ricky Ellsworth, the victim in the 1997 murder case. Johnson testified that he was aware that Ellsworth had visited petitioner while he was incarcerated. He testified that he also elicited testimony at trial about the victim visiting petitioner in prison and after his release from prison.

Johnson testified that at the hearing on the Motion for New Trial petitioner attempted to raise claims of ineffective assistance of counsel and claims of prosecutorial misconduct. He stated that, based upon those attempts, Judge Axley removed petitioner from the courtroom and refused to rule on those issues. Johnson testified that those issues were not addressed in the Motion for New Trial that he prepared on petitioners' behalf.

On cross examination Johnson testified that when he began representing petitioner the defense team consisted of co-counsel Betty Thomas, Ralph Nally, the guilt phase investigator and Elizabeth Benson, the mitigation investigator. He stated that late in the case attorney Dianne Thackery replaced Betty Thomas as co-counsel. He explained that Thomas had was elected to a judgeship in the Shelby County General Sessions Court. Johnson testified that typically he did the bulk of the work on the case himself and did not delegate a lot of tasks to the various team members. He stated that as part of his preparation he would have reviewed the court documents

associated with the indictment and filing of the case and specifically would have reviewed the affidavit of complaint filed against the petitioner.

Johnson testified that the affidavit of complaint contained a description of what James Darnell saw on the night of February 8, 1997. He stated that the affidavit of complaint indicates Darnell saw two individuals in the lobby of the Memphis Inn – one on the clerk's side and one in outside of the clerk's partition. He further testified that on October 20, 1998, he was provided a list of potential state witnesses by the prosecution which included Billy Voyles, Darnell and Dixie Roberts. He stated that after being provided the witness list, he asked Ralph Nally to contact the witnesses. Johnson testified Nally was unable to contact Voyles. He stated that he could not recall whether Nally was able to contact Darnell but testified that Nally did speak with Dixie Roberts.

Johnson testified that he also received property receipts as part of the discovery in the case. He stated that normally he tries to determine if the receipts match up with anything that is relevant to his preparation of the defense, such as DNA evidence. He stated he did not recall reviewing the photo spreads; weapons photos; drawings; photos of the vehicle or other items listed on the property receipts. Johnson testified that he received photos of the vehicle in discovery. Johnson further stated he received some photo spreads in discovery; but, stated he could not distinguish who the photo spreads related to. He stated that he believed no one was identified in the photo spreads so he did not go to the property room to view the photo spreads. He stated he did not feel the evidence was relevant to the trial because to his knowledge no one signed the photo spreads and no identification had been made. He stated that he specifically requested as part of his motion for exculpatory evidence any information relating to the identification or failure to identify the defendant. He stated that he relied on state's response that

no such exculpatory evidence existed. Johnson again acknowleged that he never went to the property room to view the property.

Johnson further acknowledged that on October 27, 1998, he received information that Voyles had been listed as a possible suspect. He stated that he attempted to investigate Voyles prior to trial but was unsuccessful. He stated Nally attempted to locate Voyles but was unable to do so. Johnson testified that, although a supplement he was provided on October 27, 1998 indicated Voyles had given a statement to police, he did not inquire about the statement. Johnson testified that initially he was not aware that the Public Defender's office had previously represented Voyles. However, he stated that close to the time of petitioner's trial he learned about the prior representation. He stated that there is nothing about the Public Defender's prior representation of Voyles that prejudiced his representation of petitioner.

Johnson testified that he met with petitioner and discussed the case. He stated petitioner indicated he was at a strip club on the night of the murder and further indicated that there was a fight and he was thrown out of the strip club. Johnson stated that Nally located an individual who worked at the club; but, did not present testimony from that individual at trial because she could not specifically recall what night the indecent at the club occurred. He stated that the defense team was unable to locate anyone who could substantiate petitioner's alibi. Johnson identified a supplement from investigator Nally regarding information relating to potential alibi witness Darlene Sills. He stated that the supplement indicated Sills had seen petitioner at 10:30 on February 7, 1997. Johnson acknowledged that Sills was not subpoenaed for trial. He stated that the supplement indicated that on November 4, 1998 Nally tried to reach Sills but was unable to do so.

Johnson testified that the defense to the case was that petitioner was not the perpetrator. He stated that he discussed the defense with petitioner. Johnson stated that he had a good relationship with petitioner and petitioner was cooperative. However, Johnson testified that petitioner did not want counsel to present mitigation on his behalf during the sentencing phase of the trial. He stated that petitioner wanted to waive the jury in the second phase of the trial and have the court decide his punishment but the court refused to allow him to do so.

Johnson testified that, even though he attempted to continue the case and even though he had been appointed Judicial Commissioner just prior to trial, he represented petitioner to the best of his ability. He stated that he was not attempting to "get rid" of the case. Johnson testified that he began working the Shelby County Public Defender's Office in 1982 and had become a member of the Capital Team in 1991. He stated that in that time he tried several capital cases and was current with regard to his knowledge of the law in the area of capital litigation and capital case training.

William Baldwin:

William Baldwin testified that in March 1997 he was employed as the evidence technician for the Johnson County, Indiana Sherriff's Department. He stated that on March 5, 1997 he was asked to "tech" a vehicle in Franklin, Indiana. He stated he took photographs of the vehicle in the spot where the vehicle had been stopped; called for a wrecker; sealed the doors of the vehicle and the trunk; and followed the vehicle back to the Sherriff's Office and placed it in the receiving bay of the jail and secured the doors to the bay. Baldwin testified the next day he inventoried the items in the vehicle. Baldwin's report indicated that the inventory was witnessed by Sgt. Shemwell, Sgt. Wilkinson and Sgt. Ashton of the Memphis Police Department. Baldwin

testified that, after removing items from the back of the vehicle, he discovered a stain on the back seat. He stated that the stain was dark in color and about the size of a fist.

Baldwin testified that he took photographs of the items recovered from the inventory of the vehicle. He stated that the items he inventoried were placed in evidence envelopes, sealed, signed by him, and entered into evidence in the Johnson County Sheriff Department's property room. He stated that subsequently the evidence was transferred to the Memphis Police Department, specifically to Sgt. Shemwell's custody. He stated that Shemwell also signed for the vehicle. He stated that certain items were taken by Shemwell and other items were placed in the trunk of the vehicle and transported with the car. Baldwin testified that the Johnson County Sherriff Department did not retain any items taken from the vehicle and did not retain the photographs of the inventory.

Baldwin testified that he videotaped the inventory; however, he stated that he does not know what became of the video. He stated that there are no indications from the property receipts that the video was provided to the Memphis Police Department but there are also no records indicating it was retained by the Johnson County Sherriff's Department.

Baldwin testified that prior to joining the Johnson County Sherriff's Department he was employed as a correctional officer at the Johnson County jail. He described conditions at the jail as "overcrowded." He stated that as a result of a federal suit the county built a new jail. Baldwin recalled testifying in petitioner's initial trial. He stated that he provided truthful testimony and that he followed standard procedures in processing the vehicle.

Devonna Brown:

Devonna Brown testified that she was a guest at the Memphis Inn on the night Ricky Ellsworth went missing. She stated she was never interviewed by the police regarding what she had seen or heard on the night in question. She stated she did not recall hearing gunshots on the evening in question. Brown testified that she learned of the victim's disappearance from television.

Phillip Follis:

Phillip Follis testified that he met petitioner in 1989 at the Shelby County jail. He stated that he was located on the medical floor of the jail. Follis testified he was in the same pod with petitioner. Follis stated that, at the time, his brother and petitioner's father both worked for the City of Memphis. Follis testified that the conditions at the jail were "pretty rough." He stated he witnessed a lot of violence; drugs; overcrowding; and gang activity. He testified that the inmates controlled the jail. He stated that inmates on the medical floor had access to various pharmaceuticals. Follis testified that the petitioner ingested alcohol and drugs often and "stayed out of it all the time." He described petitioner's behavior as erratic and stated that the petitioner would at times pass out in the hallway. Follis testified that petitioner was visited by Ricky Ellsworth. He stated that petitioner referred to Ellsworth as his girlfriend and indicated petitioner was "infatuated" with Ellsworth. Follis testified that the relationship between Ellsworth and petitioner was "difficult." Follis testified that there was a lot of drug activity going on in the relationship.

With regard to petitioner's conviction for the rape of Ellsworth, Follis claimed that Ellsworth and petitioner were involved in a heated argument when Ellsworth made the charges

against petitioner. He claimed that by the time the couple had reconciled Ellsworth did not know how to go about retracting the charges made against petitioner. Follis claimed that at petitioner's guilty plea hearing petitioner was high and did not realize what sentence he had received.

Follis testified that he later read about Ellsworth's disappearance from the Memphis Inn. He stated that he had heard the Memphis Inn was located in an area where drug activity was prevalent. Follis testified that in 2006 or 2007, after petitioner was convicted for Ellsworth's murder, he wrote to petitioner.

Marilyn Miller:

Marilyn Miller testified without objection as an expert in the area of forensic crime scene investigation, crime scene reconstruction and serology. Miller testified that she is an associate professor of forensic science at Virginia Commonwealth University. Miller stated she also serves as a fellow at the Henry Lee Institute of Criminal Science. Miller testified that in the late 1970s she worked at the Pittsburgh Criminal Laboratory and subsequently established and ran various forensic laboratories in Florida and Asheville, North Carolina. Miller stated that she is a co-author of a textbook relating to crime scene investigations and has contributed to various other publications in the field of crime scene investigation and crime scene reconstruction. Miller testified that serology is the examination and identification of biological fluids. She stated that during her time at the Pittsburgh laboratory she performed examinations in over two thousand sexual assault cases. She stated that she has previously taught serology courses.

Miller stated that she was asked to review the crime scene investigation in petitioner's case. She testified that she reviewed the trial transcripts; laboratory results; some bench notes relating to certain analysis made in the case; all crime scene documents and documents relating

to the seized vehicle. Miller testified that in her opinion the crime scene work done by the Memphis Police Department was "sloppy." She stated that crime scene personnel failed to utilize some of the commonly used techniques both in the area of documentation and processing of the crime scene. Specifically, Miller stated that she found deficiencies in the proper use of the physical evidence in petitioner's case.

Miller testified that in petitioner's case the police failed to perform basic evidence gathering tasks such as searching for fingerprints; identifying bloody fingerprints; analyzing blood stain patterns and limiting the amount of access to the crime scene. She stated that in petitioner's case there were sixteen individuals in and out of the crime scene prior to the start of the actual crime scene investigation. Miller stated that in petitioner's case the primary areas for finding physical evidence would have included the point of entry; the point of exit; the body and areas around the body; and the pathways between the body and the entry and exits.

Miller testified that the belief that the crime scene was too bloody to obtain fingerprints was ill informed and demonstrated inexperience on the part of the crime scene investigators. Specifically, she state that the glass window separating the lobby and the clerk's office and the counter in the clerk's office and towel rack and sink in the bathroom were areas where no blood was present and were areas were fingerprint evidence may have been found. She stated that there was a door that led from the office area to the parking area. Miller testified that there was a contact transfer stain at the lower jam area of the door and some stains on the sidewalk and contact transfer on the curb adjacent to the parking lot. She stated that those areas could have been processed for fingerprints despite the presence of blood. Miller testified that in the 1990s there were several commonly used techniques for detecting fingerprints.

Miller testified that blood stain pattern analysis should have been done in petitioner's case. She stated that blood stain analysis can give a sequence of events for the crime and can often tell police what type of weapons are used in a crime. She stated that those measures could have determined where the vehicle was parked, could have demonstrated how the victim was placed in the car and could have possibly indicated whether the crime involved one or more perpetrators. She stated that in her review of the crime scene evidence, she found no evidence of gunshots.

Miller testified that the police in the instant case took little or no measures to secure the scene. She stated that this failure subjected the evidence to potential tampering either intentional or unintentional. Specifically, as it relates to the vehicle which was seized as part of the investigation, Miller testified that the release of the vehicle in a death investigation violated common standards of evidence preservation. She noted that petitioner was not indicted until several months after the vehicle had been released. Miller testified that a considerable amount of testing was conducted with relation to the vehicle with some testing showing a presumptive positive for blood and some testing showing a negative test for blood. Miller stated that without the vehicle it would be difficult for the defense to conduct independent testing or challenge the evidence.

Miller testified a presumptive test for blood is a test indicating a stain "might be" blood. She stated that if a presumptive test is positive the evidence should be collected and included in the investigation of the scene. Miller testified that after collecting the evidence testing should be conducted to confirm the presence of blood and the species of blood. She stated that thereafter DNA testing can be conducted. Miller testified that in petitioner's case the confirmatory testing was not done; but, stated that with certain samples there was species testing to determine the

presence of human proteins. She stated that if the stain is brown or dark in color and the presumptive test is positive for blood then many laboratories will skip the confirmatory test and go straight to species testing. Miller stated that the better scientific process is to conduct the intermediate confirmatory testing. She stated that such a method ensures there are no extraneous proteins unrelated to blood. However, she stated that skipping the intermediate step does not invalidate the findings or impact the results of the overall analysis.

Miller testified that the report prepared in this case stated that human blood was present in certain areas of the vehicle but fails to state what areas showed the presence of human blood and also fails to mention the negative results that were obtained from other areas of the vehicle. Miller testified that the drawing of the back seat contained in the T.B.I. report fails to show which areas of the seat were collected as samples. She stated that the only areas designated on the drawing are the areas where the control samples were obtained. Miller stated that the failure to make such designations is particularly significant in this case given the fact that the vehicle was released prior to petitioner's indictment.

Miller testified that the seat belt buckle and passenger side shoulder seat belt were also tested for the presence of blood. She stated that the T.B.I. bench notes indicate that the "plastic behind [the] seatbelt" and the seatbelt had a negative result. Miller testified that there was about a month between the crime and testing. She stated it was unusual that blood would remain on a metal surface such as a seatbelt clip for a month. She stated that blood on a hard non porous service will typically flake. Miller further criticized the transport of the vehicle. She stated that the vehicle should have been made secure and stated someone should have followed the vehicle for the entire trip so that they could accurately testify about the vehicle's care, custody and control.

Miller testified that in her opinion there is no evidence to suggest Ricki Ellsworth is deceased. Rather, she stated that the blood stain patterns and physical evidence merely demonstrate there was a struggle and that Ellsworth was bleeding. Miller further testified that there is no evidence indicating petitioner was involved in that struggle. However, she also acknowleged there was no evidence conclusively excluding petitioner as a suspect.

On cross examination, Miller testified that she never spoke with T.B.I. Agent Zavaro about her report and did not speak with the Agent who conducted the DNA analysis in the case. She further stated that she did not speak with the crime scene officers from the Memphis Police Department; did not speak with Sgt. Shemwell, the case officer; and, did not speak with Sgt. Heldorfer who assisted in the vehicle transport. Miller further testified that she did not speak with the crime scene officer from Indiana.

Keith Neff:

Keith Neff testified that in 1997 he was incarcerated in the Johnson County, Indiana jail. He stated that while incarcerated he met petitioner. Neff stated that the jail was overcrowded and he slept on a mat on the floor next to petitioner. Neff testified that while incarcerated he also met a man named James Allard. Neff testified that Allard was a "snitch" who would say anything in order to get released from jail. Neff stated that Allard gave the guards information against him. He stated that he was aware Allard also testified against petitioner at his initial trial. Neff testified these acts were the sole basis of his knowledge regarding Allard's reputation in the community as a "snitch." Neff stated that petitioner was "laid back;" but, stated petitioner was "a little distraught over what was going on with him." He stated that petitioner spoke "highly" of the victim.

Barbara Dycus:

Barbara Dycus testified that for twenty-eight years she has been the director of "Second Chance Prison Ministry." Dycus testified that she met petitioner through her ministry at the West Tennessee State Penitentiary. She stated that petitioner regularly attended worship services. Dycus testified that petitioner played guitar and sang and stated that petitioner had a positive influence on the worship group. Dycus testified that she met petitioner's mother when she testified at petitioner's resentencing hearing. She stated she could not recall if she was contacted by petitioner's counsel or by petitioner's mother.

Dycus testified that the victim, Ricky Ellsworth, was a volunteer with the prison ministry. She stated that Ellsworth helped with the annual Christmas project by baking cookies, cakes and pies. She stated that eventually Ellsworth was banned from the ministry because she was listed on the petitioner's visitation list. Dycus testified that Ellsworth told her she was engaged to petitioner and told her she was routinely visiting petitioner at the prison. Dycus stated that initially she was not aware that Ellsworth was the victim in the case for which petitioner had been convicted but stated that Ellsworth did eventually tell her about the event.

Michael Scholl:

Attorney Michael Scholl testified that he was appointed by the trial court to represent petition at his resentencing hearing. He stated that he began receiving files from prior counsel but was subsequently allowed to withdraw from representing petitioner. He stated that he was on the case for a total of approximately ten months. Scholl stated that he was on the case for about four to six months when he received a Board of Professional Responsibility complaint filed by petitioner. He stated that much of the remainder of his representation of petitioner consisted of

responding to the complaint. Scholl testified that the matter became very contentious and he was eventually allowed to withdraw.

Scholl testified that at the time he was allowed to withdraw from the case he was still gathering the files from previous counsel. He stated that he had not done a substantial amount of work on the case. He stated he had not started interviewing witnesses or investigating the facts of the case and had not gone to the property room to view the property. Scholl stated that, in capital cases, as a matter of course he goes to the property room and itemizes the items collected in the case. However, he stated he had not yet done that in this case.

Scholl testified that he did not receive the February 13, 1997 statement of James Darnell and did not receive the June 21, 1997 photographic line up signed by James Darnell, in which Darnell failed to indentify the petitioner but did identify Billy Wayne Voyles as one of the individuals he saw in the Memphis Inn on February 8, 1997. Scholl further testified that he did not receive Agent Peter Lee's June 24, 1997 F.B.I. 302 form which referenced the Darnell identification.

Sgt. Thomas Helldorfer:

Sgt. Helldorfer testified that he was previously employed by the Memphis Police Department and assisted in the investigation of the disappearance of Ricky Ellsworth. He stated Sgt. Robert Shemwell served as the case coordinator for the case. Sgt. Helldorfer testified that he signed the March 7, 1997 towing slip for the Honda Accord which was impounded in Indiana and transported back to Memphis. Sgt. Helldorfer reviewed a supplement he prepared referencing the transport of the vehicle from Indiana. He stated that he met the wrecker driver at Danny Thomas and Frazier Boulevard and escorted the vehicle to the Memphis Police

Department crime scene tunnel. Sgt. Helldorfer testified that when he met the wrecker, the driver was not accompanied by any police personnel or vehicles from either Memphis or Indiana.

Sgt. Helldorfer identified another supplement prepared by him on March 25, 1997, which indicated that he contacted the Memphis Police Department's vehicle storage lot and released the hold on the above referenced Honda Accord. Sgt. Helldorfer testified that the decision to release the vehicle was likely made by the case coordinator. He stated that he could not recall whether Tom Henderson was aware that the vehicle was being released. He identified a notation on the vehicle's towing slip which indicated that the vehicle was to be released to Southern Auto Salvage Auctions in Jackson, Tennessee.

Gerald Skahan:

Attorney Gerald Skahan testified he was appointed by the Tennessee Supreme Court to represent petitioner on direct appeal of his 1998 conviction and sentence of death. He stated there was a conflict involving the Shelby County Public Defender's Office so he was asked to take the case for purposes of direct appeal. Skahan testified that he could not recall the exact nature of the conflict. He stated that he did not handle the Motion for New Trial. Skahan testified that upon remand to the trial court he expected to be appointed by the Shelby County Criminal Court to represent petitioner at his resentencing proceeding. However, he stated the trial court did not appoint him to the case.

Skahan testified that issues regarding *Brady* violations and ineffective assistance of counsel were not raised at the 1998 direct appeal of petitioner's conviction and sentence because those issues had not been preserved in the trial court. Skahan testified that he does not recall seeing the following items during the course of his representation of petitioner: the February 13,

1997 interview with James Darnell; the June 21, 1997 signed photo spread shown to James Darnell, in which Darnell failed to identify the petitioner but identified Billy Wayne Voyles as one of the individuals he saw at the Memphis Inn on the night in question; the F.B.I. 302 form memorializing the Darnell photo spread identification of Voyles. On cross examination, Skahan testified that he was not aware that Darnell's name was on the witness list that was provided to counsel by the prosecution. He stated he did not recall whether he went to the property room to view the evidence.

Skahan testified that he has represented numerous capital defendants. He stated that in the period of 1997 to 1998 he was trying capital cases in Shelby County. Skahan testified that typically in such cases he filed an initial discovery motion and then followed up with a more specific *Brady* motion seeking more particularized requests to ensure there was no confusion regarding what was being requested. Skahan testified that he typically requested information relating to photo spread identifications made on the part of any witness in the case. He stated that he considers evidence relating to an eye witness' identification of a suspect other than his client to be exculpatory evidence. He stated that if he were trial counsel and he had been presented with that type of evidence he would have investigated the identified suspect and would have used that information to attempt to create reasonable doubt. Skahan testified that from his review of the record, he felt petitioner's case was handled "poorly." He stated that he recalled, at the time, thinking petitioner was "horribly represented" at his initial trial.

Skahan testified that he considered a case load of twenty-one first degree murder cases over a period of nine months to be excessive. He further stated that four months from appointment to trial is not a reasonable time in which to investigate and prepare a capital case for

trial. Skahan testified that, if a judge attempted to force him to trial prior to him completing his investigation, he would likely file an appeal to attempt to stop the trial from moving forward.

Skahan testified that he has had occasion to try cases against Assistant District Attorney Tom Henderson. Skahan testified that after trial there can sometimes be confusion as to what was provided to counsel. Thus, to ensure the State meets its discovery obligations he typically files notice with the court outlining the exact items that have been received in discovery.

Mark Goforth:

Mark Goforth testified that in January to February 1998 he was employed as a security guard at the "*Super 8*" motel on Sycamore View and Macon Cove across the street from the Memphis Inn. He stated that he knew the victim, Ricky Ellsworth. Goforth testified that on the night the victim went missing he was doing a perimeter check of the "*Super 8*" motel. He stated that once he saw the police cars at the Memphis Inn he went to the Memphis Inn to check on Ellsworth. He stated he was allowed to enter the Memphis Inn. He stated he saw a lot of blood and he specifically recalled seeing a bloody handprint on the counter.

Goforth testified that the police asked him if he had noticed anything happening at the Memphis Inn. He stated that he often visited Ellsworth when she was working and a couple of days before Ellsworth was killed he saw a man behind the secured clerk area laughing and talking with Ellsworth. He described the man as white with brownish blond hair and stated the man was in his early thirties. Goforth was shown the composite drawings prepared as a result of the police interview with Darnell. He stated that the individual wearing the hat looked like a man who worked construction and was staying at the Memphis Inn at the time that Ellsworth was murdered. Goforth testified that one night Ellsworth called him and told him she was having

problems with this individual. He stated Ellsworth asked him to come over and tell the individual to go to his room. He stated the individual was drunk and "acting a little crazy" but eventually returned to his room. Goforth testified that the Memphis Inn had a reputation as an establishment with a lot of drug use and prostitution.

Paul Springer:

Attorney Paul Springer testified that he was appointed to represent petitioner during his resentencing proceeding. He stated that initially Marty McAfee and Michael Scholl were appointed to represent petitioner at the resentencing proceeding. He stated, after Scholl and McAfee were allowed to withdraw from the case his law partner at the time, Coleman Garrett, was appointed to serve as petitioner's first chair counsel and he was appointed to serve as petitioner's second chair counsel. Springer testified that primarily he handled the "technical" aspects of the case, including legal research and investigation and presentation of testimony relating to the DNA evidence.

Springer testified that he and Garrett made several trips to Riverbend to meet with petitioner. He stated that petitioner had filed several *pro se* motions prior to them being appointed and was adamant about having those motions addressed. He stated they also filed additional motions. Springer testified that the defense team filed a motion to recuse Judge Axley due to bias. He stated the motion was denied by the trial court and the defense team sought a Rule 10 appeal.

Springer testified that the defense team also filed a motion for production of exculpatory evidence, which include a request for disclosure of any physical descriptions, photographs, line ups or any other information relating to a witness' identification of a suspect from a photograph

or otherwise. He stated that at the time, defense counsel did not have information relating to James Darnell's description of the two individuals he saw at the Memphis Inn on the night in question. However, he stated that, after filing an initial motion for exculpatory evidence, the defense learned from a police supplement, provided to them by petitioner, that James Darnell had come to the police station and given police a description of two individuals he saw at the Memphis Inn on the night in question. He stated that they also learned that Darnell was with a woman named Dixie Roberts. Springer testified that this new information prompted them to make additional specific oral requests for information relating to the photo spread shown to Darnell and any identification made by Darnell. He stated that they specifically asked Tom Henderson to provide them with information relating to Darnell and was told there was no other information relating to Darnell. Springer testified that the only Darnell document they received came from their client, Mr. Rimmer. Springer stated that Officer Shemwell brought up the photo-spread during his direct testimony. He stated this was the first time counsel learned Darnell had been shown a photo-spread.

Springer testified that he and Mr. Garrett obtained some information from prior counsel but stated that his recollection is that the information obtained from prior counsel was very limited. He stated that the only information petitioner had regarding Darnell was the police supplement indicating Darnell provided police with a description of two individuals he saw at the Memphis Inn on the night of the murdered. He stated the supplement was vague; thus, prompting them to request additional information. Springer testified that he does not recall if the above referenced supplement was introduced at the resentencing proceeding.

Springer stated that the prosecution filed a response to the defense request for exculpatory information relating to "identification" evidence. He testified that the response

stated the prosecution was not aware of any "misidentification" in the case and further indicated the identification witnesses in the case were "friends, co-workers and other acquaintances" of the petitioner. The response also stated that prosecution was not aware of any exculpatory evidence. Springer testified that the state never provided the defense with the February 13, 1997 statement of James Darnell.

Springer testified that he did not specifically recall that, after Assistant District Attorney Henderson and Sgt. Shemwell were ordered to review the file, Henderson elicited testimony from Shemwell indicating there were no supplements relating to the Darnell identification. He further stated he did not recall Shemwell stating that Darnell had not identified anyone from the photo spreads he was shown. Upon further questioning by the post conviction court, Springer once again explained that prior to trial defense counsel learned from their client that there was a police supplement outlining Darnell's description of the two individuals he saw a the Memphis Inn on the night of the murder. Springer stated that during trial counsel learned that, subsequent to providing a description of the two men to police, Darnell had been shown a photo spread. He stated counsel then requested to see the photo spread and the photo spread was never produced. Springer stated that counsel was not aware until this issue arose at trial that petitioner was in the photo spread that had been shown to Darnell. He stated that thereafter, counsel asked if there was a supplement relating to the Darnell photo spread. He stated that the trial court then took an extended lunch break and ordered the prosecution and Officer Shemwell to review the file and determine if such a supplement existed. Springer testified that, because the defense did not have the actual photo spread, they specifically wanted to know whether there was any supplement outlining the results of any photo spread shown to Darnell.

Springer testified that he never received the supplement prepared by Officer Stewart which indicated that Darnell was shown a photo spread in Hawaii and positively identified Billy Wayne Voyles as one of the individuals he had seen at the Memphis Inn on the night of the murder. Springer stated that the document was "vitally important" to petitioner's defense. He stated that the supplement indicates Tom Henderson was made aware of the identification. Springer further testified that he was not aware that the F.B.I. and U.S. Attorney's Office were involved in the investigation of the case. He stated that he never received the June 24, 1997 F.B.I. 302 form relating to Darnell's identification of Voyles.

Springer testified that by the time the resentencing proceeding was held, much of the evidence had been destroyed. Springer testified that, if he had information about Darnell's identification of Voyles during the guilt phase of petitioner's case, he would have used the information to implicate Voyles in the murder and exculpate petitioner. He stated that he would have attempted to locate Darnell. With regard to the resentencing proceeding, Springer testified that had he been provided the Stewart supplement he would have cross examined Shemwell about the Darnell identification and likely would have called Officer Stewart as a witness. Springer stated that the defense at the resentencing hearing was based primarily on residual doubt and stated that this evidence was critical to that defense.

Springer testified that he recalled filing a motion for continuance in petitioner's case. He stated that there were a lot of loose ends relating to the case that still needed to be investigated, including the James Darnell issue and the fact that the victim had previously visited petitioner in prison despite being the victim of the crime for which petitioner was incarcerated. He stated that his motion to continue was denied. Springer testified that he does not believe the defense team attempted to locate James Darnell.

Springer testified that he did not do any investigation into petitioner's 1985 conviction. However, he stated that the defense team did investigate petitioner's 1989 conviction for the rape of Ricky Ellsworth. Springer testified that the defense team filed a motion relating to the *corpus delicti* of the crime. Springer testified that defense counsel also inquired about the car which was seized at the time of petitioner's arrest in Indiana and was told the car had been destroyed.

Springer testified that defense counsel made a motion for change of venue due to petitioner's concern about the media coverage of the case. He stated that there were numerous newspaper and television stories relating to the case prior to the resentencing proceeding. Specifically, he stated that there was a local news report which showed a reenactment of the case and another true crime program related to the case.

Springer acknowleged that the news reports included statements from Officer Shemwell indicating that without the evidence recovered from the vehicle seized at the time of petitioner's arrest officers would have little or no evidence linking petitioner to the crime. However, he stated he did not consider using this statement as a basis for claims relating to the destruction of the car. He stated that the issue was discussed by the defense team; but, stated that because the only issue to be addressed by the jury was sentencing, the trial court may have limited counsel's ability to raise certain evidentiary motions relating to the guilt phase evidence presented at petitioner's 1998 trial. Springer further testified that, because the only issue was sentencing, the defense team was not focused on the issue of the improper destruction of evidence. He stated that the goal of petitioner's defense team at resentencing was to demonstrate residual doubt in an effort to keep petitioner "off of death row." Springer stated that there was some testimony and detailed cross examination relating to the collection and destruction of evidence but acknowleged that counsel did not pursue a pretrial motion relating to the destruction of evidence.

Springer also testified that in the news reports Tom Henderson stated that it was the prosecution's theory that the victim was beaten to death and placed in the trunk of the car. He stated that he did not consider using those specific statements at the resentencing hearing to rebut the state's contention that Rimmer placed the victim in the back seat of the car. However, he stated that at the resentencing hearing there was some argument relating to the state's "shifting theories" of the case. Springer stated that he did recall that Henderson argued at petitioner's 1998 trial that the victim was deceased when she was placed in the car in contrast to his argument at the resentencing proceeding that the victim was alive and moaning when she was placed in the car.

Springer testified he and Garrett did not represent petitioner on appeal. He stated that Joe Ozment was appointed to represent petitioner on appeal. He stated that he gave Ozment his case files. Springer testified that he believes kept his original file and only provided copies to Ozment.

On cross examination Springer testified that prior to petitioner's resentencing proceeding counsel obtained the transcripts from petitioner's original trial. He stated that he did not have the public defender's file but testified that he spoke with Dianne Thackery about the case. Springer testified that the defense team did not hire a fact investigator. He acknowledged that the presentation of residual doubt was important to the defense strategy at the resentencing hearing. He further acknowleged that Darnell was an important witness. However, he stated that the defense team did not learn about Darnell until well after they were appointed to the case. He stated that the information relating to Darnell was provided to counsel by petitioner shortly before trial. Springer testified that this information formed part of the basis for filing the defense motion to continue.

Springer acknowleged that the affidavit of complaint mentioned Darnell and his observations about seeing two men in the lobby of the motel on the night of the murder. He stated that the defense opening statement mentioned Darnell's failure to testify at trial and that he cross examined Shemwell about the Darnell identification. Springer further testified that during Shemwell's cross examination Darnell's observations from the night of the murder were put before the jury. Springer testified that he does not recall ever going to the clerk's office to review the evidence collected in the case. He stated that much of the evidence had been destroyed or was no longer available or suitable for testing, including the seat removed from the car; the car itself and DNA evidence.

Springer testified that petitioner did not wish to testify at the resentencing proceeding. He stated that the defense team presented evidence from petitioner's mother and other individuals. He stated that he did not recall challenging the legitimacy of petitioner's prior conviction. Springer testified that the team collected evidence suggesting petitioner and the victim continued to have a relationship despite petitioner being convicted for the rape of the victim.

When questioned by the court, Springer testified that he never received property receipts indicating the police had collected assorted signed photo spreads. He stated that if he had received such information he would have reviewed the documents. Springer testified that at the time of resentencing, based upon the discovery he'd received and the information he collected from the prior attorneys, it was his belief that no identification and no photo spreads were involved in the initial trial. He stated that, if he knew there were photo spreads prepared in the case, he would have viewed them prior to trial.

Natalie Doonan:

Natalie Doonan testified that on February 7, 1997, she was at the Memphis Inn with Mark Hugel. She stated that she entered the vending machine area to purchase cigarettes between 1:30 a.m. and 2:00 a.m. She stated that she saw two men at the night clerk's desk. Doonan described one of the men as heavy set, "possibly Hispanic," six feet tall. She stated his hair was dark and long and stated he was not bald or balding. She described the other individual as a "little fella." She stated the individual was white and was small in stature standing about five feet eight inches tall. She also stated that the second man was not bald or balding. Doonan stated that she also saw the victim at the clerk's desk. Doonan testified that after purchasing the cigarettes she returned to her room. She stated that about thirty minutes later she called the clerk's desk but did not get an answer. Doonan testified that she attempted to call the desk several more times. Doonan testified at about 5:00 a.m. she and Hugel left the motel. Doonan testified that an investigator from the Post Conviction Defender's Office came to visit her in 2009 and showed her a photo spread. She stated that she identified photo AA #5 as one of the men she saw at the clerk's office on the night of the murder.

On cross-examination Doonan acknowledged that there was another signature on the photo spread under photo AA #5 prior to her viewing the photo spread and prior to her identifying the individual as one of the men she saw at the motel on the night of the murder. She stated she was not told anything about any of the photographs contained in the photo spread. Doonan stated that she did not see anyone in the photo spread who looked like the "dark haired man" she had seen on the night of February 7, 1997 at the clerk's desk in the lobby of the Memphis Inn.

Dianne Thackery:

Attorney Dianne Thackery testified that in 1998 she was employed as a member of the Shelby County Public Defender's Office capital defense team. She stated that she served as second chair counsel at petitioner's 1998 trial. Thackery testified that she took over Betty Thomas' case load a couple of months prior to trial. Petitioner testified that petitioner's trial was her first capital trial. Thackery testified that her co-counsel, attorney Ron Johnson, handled most of the preparation of the case on his own. Thackery testified that she does not recall speaking with either Coleman Garrett or Paul Springer about providing the Public Defender's file from the 1998 trial.

Thackery testified that she does not recall ever seeing a photo spread signed by James Darnell in which Darnell identified Billy Wayne Voyles as one of the men he saw at the Memphis Inn on the night in question. She further stated that she did not recall ever receiving an F.B.I. 302 form regarding the Darnell identification. Thackery stated she also did not recall every receiving a May 30, 1997 police supplement indicating that police informed A.D.A. Henderson about Darnell's identification of Voyles. Thackery testified that she did not recall going to the property room to view the evidence. She further testified that she could not recall whether Johnson went to the property room to review the evidence.

Thackery testified that she recalls investigator Ralph Nally looking for witnesses but stated she does not recall which specific witnesses he attempted to locate. Thackery testified that she prepared mitigation and prepared petitioner's family to testify during the sentencing phase of petitioner's trial. However, petitioner's family did not show up on the day that they were scheduled to testify and efforts to reach them were unsuccessful. She stated that the team later

learned that petitioner had told them he did not want them to beg for his life and instructed his attorneys that he did not wish to present any mitigation.

Joe Ozment:

Attorney Joe Ozment testified that he was appointed to represent petitioner during the direct appeal of petitioner's resentencing proceeding. He stated that Brock Mehler served as his co-counsel. He stated that in preparation for the appeal, he obtained and reviewed the files of Paul Springer and Coleman Garrett. Ozment testified that he does not recall seeing a May 30th police supplement stating that James Darnell identified Billy Wayne Voyles as one of the men he saw at the Memphis Inn on the night in question; a signed photo spread in which James Darnell identified Billy Wayne Voyles; an F.B.I. 302 document regarding the Darnell identification; or, the police interview with James Darnell. Ozment testified that he undertook no independent investigation of the case.

Coleman Garrett:

Attorney Coleman Garrett testified that he was appointed to represent petitioner in April of 2003. Garrett testified that he served as lead counsel and Paul Springer served as his co-counsel. He stated that after his representation of petitioner he turned his files over to petitioner's appellate counsel. Garrett testified that he did not recall why he and Springer did not handle the appeal. However, he stated that he did not recall any problems with petitioner. Although Garrett testified that petitioner had problems trusting counsel and stated that it took petitioner a while to share information with the defense team, he also testified that, as the process went along, petitioner gained more confidence in counsel's ability to handle his case and began

to share more information. Garrett testified that his philosophy is that it may be beneficial to have new counsel on appeal. He stated that, if you do not have a favorable outcome at trial, it may be beneficial to a defendant to have "fresh eyes" review the case.

Garrett testified that prior to petitioner's resentencing he obtained the records from all of the prior counsel associated with petitioner's representation and reviewed the record of the 1998 trial. Garrett testified that at the time of petitioner's trial he had represented many capital defendants. He stated that his co-counsel, Paul Springer, was not as experienced. However, he stated that he assigned Springer various tasks. He stated that after those tasks were completed the full team would sit down and discuss the issues relevant to the preparation of petitioner's case. Garrett testified that he and Springer met with petitioner on several occasions and stated he did not recall having any difficulties with petitioner.

Garrett testified that he filed a motion for exculpatory evidence prior to petitioner's resentencing hearing. He stated that he specifically requested exculpatory evidence relating to photographic lineups or other attempts to identify petitioner. He stated that the prosecution filed a response indicating that the state was not in possession of any identification information that was exculpatory.

Garrett testified that during the resentencing proceeding an issue arose regarding the identification made by James Darnell. He acknowleged that the issue arose during the testimony of Sgt. Shemwell and stated that he recalled that during a break in the proceedings Judge Axley ordered Shemwell and A.D.A Henderson to review the case file to determine if any supplements or documents indicating that Darnell had made an identification were contained in either the Memphis Police Department or District Attorney General's file. He stated that he recalled that upon returning from the break, Officer Shemwell testified that the file indicates Darnell did not

identify anyone from the photographic lineup. He stated that if he had been aware at the time that those statement were false he would have challenged Officer Shemwell's testimony.

Garrett testified that during the course of the resentencing proceedings there were lots of heated exchanges between himself and A.D.A. Henderson. He stated that some of the exchanges were personal and much of this interaction was not on the record. Garrett testified that prior to petitioner's case he had a good working relationship with Henderson and the rest of the Attorney General's Office.

He stated that he had some recollection regarding his opening statement in which he attacked the prior rape of the victim. Garrett stated he did not recall all of the specifics of the defense theory. However, Garrett testified that he did recall addressing in his opening statement Darnell's assertion that he had seen two individuals in the lobby of the Memphis Inn on the night in question with blood on their hands. He further acknowleged that he questioned Sgt. Shemwell about Darnell's description of the events. Garrett testified that he did not personally speak with James Darnell and stated that he did not recall whether the defense investigator contacted Darnell. He stated that he did not recall having Darnell subpoenaed. Garrett testified that he does not recall going to the property room to view the evidence in the case.

Garrett testified that the purpose of exploring the Darnell identification was to put before the jury a theory of residual doubt. He stated that, at the time, the defense theory was that there were two individuals at the Memphis Inn at the time of the murder and no one had identified petitioner as being one of those individuals. He stated that the photo spread indicating Darnell had identified Voyles would have been a crucial piece of evidence in support of their theory. He stated that he was never provided the photo spread and was repeatedly informed that none of the witnesses had made an identification.

In addition to the testimony presented during this week, the parties offered the following stipulations with relation to the proposed testimony of attorney Marty McAfee and Judge Mark Ward:

Judge Mark Ward[8]

The parties stipulated that in 1999 Judge Ward was employed as an Assistant Public Defender in the Office of the Shelby County Public Defender and was appointed to represent petitioner on appeal of his initial capital murder conviction and sentence of death. Ward entered the case after the Motion for New Trail had been denied and after the notice of appeal had been filed.

After the denial of petitioner's Motion for New Trial, petitioner filed a *pro se* motion for appointment of new counsel and sought to amend his motion for new trial to include claims relating to ineffective assistance of counsel and the prosecution's withholding of exculpatory evidence. Petitioner indicated he was preparing a civil malpractice suit against his lawyers. Thereafter, Ward filed a motion in the Court of Criminal Appeals requesting he and all of the Shelby County Public Defender's Office be allowed to withdrawal from the case due to a conflict of interest. In May 1999, the Court of Criminal Appeals denied the motion to withdraw. Subsequently, Ward sent petitioner a letter telling him the Court had denied the appointment of new counsel and informing him that he would begin working on his direct appeal but would not be raising claims of ineffective assistance of counsel since suck claims were best left for post conviction review. Ward also sought a Rule 10 appeal to the Tennessee Supreme Court on the issue of withdrawal. In November 1999, the Rule 10 application was granted. Ward was

[8] See Exhibit 81 to Post Conviction Hearing.

allowed to withdraw and attorneys Paula Skahan and Gerald Skahan were appointed to represent petitioner.

Marty McAfee[9]

The parties stipulated that, on August 13, 2002, McAffee was appointed to represent petition at his resentencing hearing. McAfee was appointed as second chair counsel. Michael Scholl was appointed as lead counsel. Although McAfee began reviewing the transcripts from petitioner's trial and other information gathered from petitioner's prior counsel, on January 8, 2003, he and attorney Scholl moved to withdrawal based upon a conflict of interest. The motion to withdraw was granted by the trial court on February 3, 2003.

During the time McAfee represented petitioner he never saw the February 13, 1997 statement of James Darnell; the May 30, 1997 MPD supplement documenting Darnell's identification of Billy Wayne Voyles; the photo spread sigend by Darnel in June of 1997; or, any FBI 302 forms documenting Darnell's identification. McAfee never went to the property room to review the evidence in the case.

The following testimony was heard on January 6, 2012:

Norman Lefstein:

Attorney Norman Lefstein was qualified without objection as an expert in the area of professional responsibility and the performance of defense services and representation.[10] Lefstein testified that he worked as assistant United States Attorney in Washington D.C.;

[9] See Exhibit 80 to Post Conviction Hearing.
[10] Lefstein has so testified on 29 occasions in 11 different states and in three federal courts, including a Tennessee case.

directed a Ford Foundation program relating to the assignment of attorneys to represent clients in juvenile court systems; worked for the Department of Justice; from 1969-1975 served as the director of the Washington, D.C. public defender service; served as a law professor at the University of North Carolina law school; served as the dean of the law school at Indiana University in Indianapolis; and served as a special assistant to the Chancellor at Indiana University. Lefstein testified that he assisted in developing the public defender system in Washington, D.C., including developing policies and dealing with budget matters relating to the agency. Relevant to petitioner's case, he stated that he helped establish policies relating to controlling the case load of attorneys. Lefstein testified that he has taught classes in criminal law and procedure and ethics, including courses relating to the ethics of prosecutors and defense counsel.

Lefstein testified that he has worked with professional organizations such as the American Bar Association (ABA), including the committee on criminal justice standards. He also served as a chief consultant for the Judicial Conference of the United States on a study of the federal death penalty and defense representation. He also served as chairperson for the ABA, Bureau of National Affairs, *Lawyers Manual on Professional Conduct*, which is a loose leaf service on ethics in legal representation both civil and criminal. He served for seventeen years as chairman of the Indiana Public Defender Commission, which developed guidelines and standards for the delivery of indigent defense services. Lefstein testified that initially the commission dealt primarily with death penalty cases, which resulted in the enactment of an Indiana Supreme Court Rule dealing with the representation of capital clients. He also stated he has done work with the National Legal Aid and Defender Association.

Lefstein testified that he was involved in a national study undertaken by the ABA which resulted in the publication of a book called *Criminal Defense Services for the Poor, Methods and Programs for Providing Legal Representation*, which was published in 1982. He was also involved in an ABA publication entitled *Gideon's Broken Promise*, which was published in 2004. Lefstein testified that he was asked by the Constitution Project in Washington D.C. to prepare a study of indigent defense which was published in 2009. He stated that the study was the most extensive study of indigent defense in the United States ever conducted. He indicated that there was a wide variety of individuals involved in criminal justice participating in the study. Lefstein testified that in 2009 he prepared for the ABA a publication entitled, *The ABA Eight Guidelines of Public Defense* - related to excessive workloads. He stated that the publication tries to provide direction to the public defenders programs in the United States on how to handle their work loads. Lefstein testified that he also served as a reporter for the second edition of ABA criminal justice standards relating to the following chapters: prosecution; the defense function; and defense services. He stated he was the principle architect of the second edition standards. He further stated that he chaired the task force for the third edition. He stated that most of the third edition standards relating to the chapters mentioned above are verbatim to the second edition standards. In November 2011, the ABA published a book by Lefstein entitled *"Securing Reasonable Caseload, Ethics and Law in Public Defense."* Lefstein testified that he has spoken at various forums on the topic of indigent defense hundreds of times over the course of his career.

Lefstein testified that in 1998, in the areas relevant to the matters addressed by his testimony, the Tennessee Code of Professional Responsibility was identical to the ABA Model Code of Professional Responsibility. He stated that under the Code it was a disciplinary offense

to render representation that was not competent and the Code created a mandatory duty to withdraw if competent representation could not be provided. He further stated that counsel had a duty to exercise reasonable diligence and practice in representing a client. Lefstein testified that the 1998 ABA national guidelines for the appointment of counsel in death penalty cases also provided standards for attorneys providing representation in capital cases. He stated that the 1998 ABA standards contained a couple of provisions particularly applicable to Rimmer's case. Specifically, Lefstein testified that the ABA guidelines required defense counsel to limit their caseload to the level necessary to provide the client with high quality legal representation. He stated that guidelines stated that attorneys should not accept a workload that would interfere with the quality of representation or lead to a breach of their professional obligations. Lefstein testified that in this respect the 1998 guidelines were substantially verbatim to the 1989 guidelines. Lefstein testified that the 1998 guidelines also contain provisions relating to the duty to conduct a prompt investigation of the case. He stated that the guidelines place a duty on counsel to conduct an independent investigation of the case which should begin immediately upon appointment and continue expeditiously. He stated that the 1989 guidelines were essentially the same.

Lefstein acknowledged that fulfillment of the obligations under the rule is essentially a matter of judgment. Each lawyer individually must determine whether they have the ability to perform all the necessary tasks required for each case or client. However, he stated that counsel should be adequately supervised and there should be adequate communication between attorneys representing clients and those in charge. Lefstein acknowledged that the ABA's 2009 *Eight Guidelines for Public Defense* were not in effect at the time of petitioner's trial; but, stated that they contained "common sense" recommendations that were applicable in 1998. For example,

he stated that guideline two recommends a supervision component to public defender programs and suggests that both the lawyers and supervisors need to constantly assess whether they have the adequate time to do the work which they are undertaking.

Lefstein testified that when he was at the Washington, D.C. Public Defender Service he implemented a system that required attorneys to report monthly to supervisors about their current case loads. He stated that attorneys were required to state how many cases they had; the status of each case; and the tasks still to be undertaken with regard to each case. He stated that, thereafter, there was a meeting with the supervisor to determine whether each attorney could adequately discharge their duties based upon their current case load. Lefstein further testified that based upon his work in Indiana, the Indiana Supreme Court instituted a rule stating that a lawyer representing a capital defendant may not set any other case for trial within fifteen days of a capital case being set for trial. Additionally, a lawyer representing a capital defendant may not receive any new appointments within thirty days of the capital case being set for trial. Lefstein testified that subsequent to his work, the Indiana Supreme Court adopted a new rule which stated that capital defenders in public defender programs should have their case load assessed in a manner that counts each capital case as the equivalent of forty non-capital cases. Lefstein explained that, under the Indiana Public Defender Commission's standards, a public defender may only have a maximum of one hundred and fifty cases. Thus, he stated that using the forty case equivalency standard, a public defender could not have more than three capital cases at a time.

With regard to the Rimmer case, Lefstein testified that he reviewed the Amended Post Conviction Petition; Ron Johnson's Motion to Continue; the State's Response to the Motion to Continue; the transcript of the hearing on the Motion to Continue; the appellate opinions;

memorandum prepared by the Post Conviction Defender, including an outline of Johnson's case load as gathered from the clerk's files; an affidavit of a Memphis Police Department Detective; and articles from the Commercial Appeal. Lefstein was shown and reviewed a chart prepared by the Office of the Post Conviction Defender's Office purportedly depicting Ron Johnson's assigned cases from February to November 1998. He stated that the Motion to Continue submitted by Johnson indicated that, during the time that he had been appointed on petitioner's case, he had handled three cases that had been completed prior to the filing of the motion; had fifteen other active cases; and was serving as co-counsel on ten other cases. He stated that it appeared Johnson was involved in twenty-one total first degree murder cases from February to November 1998. He acknowledged that not all of those cases were capital cases. Lefstein testified that under the ethical rules an attorney who is assigned a first degree murder case is obligated to prepare the case as if it is a capital case until such time as the state indicates it will not be seeking the death penalty.

Lefstein testified that he regarded Ron Johnson's case load as "ludicrous." He stated that Johnson had an "outrageous" number of cases. He stated that, given his experience with public defender programs across the state, this was an "unprecedented" number of cases assigned to one lawyer. Lefstein testified that it was his understanding that, within the dynamics of the Shelby County Public Defender's capital team, the role of co-counsel was perfunctory. However, Lefstein testified that, even if Johnson had a co-counsel in these cases that was actively engaged in the investigation and preparation of the case, he still would not consider the case load manageable.

Lefstein testified that in addition to Ron Johnson's case load with the Shelby County Public Defender as of October 1, 1998, Johnson was appointed as a Judicial Commissioner. He

stated that such an undertaking within thirty days of a capital trial is "unprecedented.' Lefstein stated that the last thirty days before trial is a very work intensive period of the case. Lefstein opined that, due to his case load and his recent appointment, Ron Johnson was not available to perform many of the tasks necessary to be completed in advance of trial. He stated that, in his opinion, Ron Johnson violated his ethical obligations to provide competent, prompt and diligent representation to petitioner.

Lefstein testified that Johnson was appointed in February of 1998 and apprised by the prosecution of some ninety relevant fact witnesses. He stated that it appeared only five of those witnesses were interviewed either prior to or during trial. Lefstein stated that the interviews took place well after Johnson's appointment in the case and at least two of the interviews were conducted by phone. Lefstein testified that, in his opinion, it was impossible for a single investigator to do an adequate job investigating petitioner's case, while also investigating the other cases assigned to the capital defense team.

Lefstein stated that the lack of investigation is evidenced by an October 20 1998 memo from Ron Johnson to Ralph Nally, in which Johnson instructs Nally to "check all possible witnesses." He stated that such a feat was not feasible given that the trial was set to start in approximately thirteen days. Lefstein testified that the issue relating to James Darnell illustrates the hazards of failing to adequately investigate. He stated that there were two public documents that Ron Johnson should have been aware of prior to trial. First, Lefstein stated counsel should have known about a Commercial Appeal article indicating there were two individuals involved in the homicide and stating that eye-witnesses had assisted the police in creating a composite sketch of the suspects and which included the composite drawings in the article. Second, Lefstein testified that counsel should have been aware of an affidavit signed by Detective

Shemwell in which he referred to witness James Darnell who he states observed two males inside the motel office area at the time of the murder. He stated that these documents were in the public record prior to Ron Johnson's appointment to the case. Lefstein stated that, although Johnson may not have been aware from these two public items that Darnell was one of the individuals who assisted police in preparing the composite sketch, he should have been aware that at one time the police believed there were two suspects in the case and there are sketches of suspects who do not resemble his client. Lefstein testified that it appears no investigation of these facts was made until late October when Nally attempted to locate Darnell. He stated that, in his opinion, the failure to locate and interview Darnell is simply a gross dereliction of counsel's responsibility and a violation of counsel's ethical obligations.

On cross examination, Lefstein testified that his understanding of what was done in petitioner's case was based solely upon documents provided to him by the Office of the Post Conviction Defender. He stated that he never spoke with Johnson, co-counsel Betty Thomas or the chief Public Defender for the period of February to October 1998 and did not review the transcripts of the testimony given by petitioner's defense counsel at the post conviction hearing. He stated that he was not aware whether Johnson conducted an investigation of the case independent of his investigator. Lefstein further testified that he is not aware of the duties of a Judicial Commissioner in the state of Tennessee.

On March 2, 2012, the State presented testimony from the following witness:

Detective Robert Shemwell[11]:

Detective Shemwell testified that he was employed with the Memphis Police Department for twenty-seven years. He stated that from 1996 to 2002 he served as a Sgt. in the Homicide Unit. Shemwell testified that he was the case officer for petitioner's case. He stated that the case officer collects all the information collected in the case and assigns duties to other officers regarding tasks that need to be accomplished in the case.

Shemwell testified that he was aware of an individual named James Darnell. He stated that on the early morning hours of February 7, 1997, Darnell pulled up to the Memphis Inn. Shemwell stated that Darnell went inside the motel to get a room and witnessed a strawberry blond man in front of him in the lobby area on the outside of the clerk's office and also witnessed another man on the inside of the clerk's office. Shemwell testified that Darnell witnessed the two men exchanging money through the glass partition separating the lobby from the clerk's office and noticed that the two men both had bloody knuckles. Shemwell stated that Darnell indicated he was uncomfortable with what he had witnessed and decided to leave the motel.

Shemwell testified that later Darnell assisted police in developing a composite drawing of the two individuals he witnessed in the lobby. He stated that those composites were eventually released to the local newspaper. Shemwell testified that sometime later Darnell, who was in the military, contacted officers to let them know that he was about to leave Memphis and return to Hawaii where he was stationed. Shemwell stated that after Darnell left Memphis he put together

[11] Shemwell also testified at a prior proceeding to determine whether the office of the Shelby County District Attorney General's Office should be disqualified from handling petitioner's post conviction hearing on behalf of the State.

a photo array of potential suspects and a photo spread of vehicles that may have been involved in the murder and contacted the F.B.I. to ask for assistance in showing those items to James Darnell. Shemwell testified that Sgt. Stumpy Roleson, who was a member of the Homicide Unit but also a member of the Safe Streets Task Force, worked as a liaison with the F.B.I. as part of a multi-jurisdictional task force. He stated that Roleson was assigned the task of coordinating with the F.B.I. in order to show the photo arrays to James Darnell. He stated that Roleson did not travel to Hawaii; rather, the documents were sealed and mailed to F.B.I. Agents in Hawaii. Shemwell testified that Sgt. Roleson informed him that James Darnell was unable to make a positive identification but had identified an individual that may have looked like one of the men he saw at the Memphis Inn on the night in question.

Shemwell testified that eventually he received the photo line ups back from the F.B.I.; tagged it into evidence; and, logged it into the evidence room. He stated that the package was sealed when he received it and he never opened it. Shemwell stated that at the time he was new to homicide and indicated that if he had it to do over he would have opened the envelope; reviewed the evidence; made a copy for the police file; resealed it and logged it into the evidence room.

Shemwell testified that he knew an individual named Natalie Doonan. He stated that Doonan worked at a restaurant in an area of Memphis known as Frayser. He stated that, prior to coming to Homicide, he had worked patrol in the area and became acquainted with Doonan. Shemwell testified that on the night of the murder Doonan was a patron at the Memphis Inn. He stated that Doonan checked into the motel at about the time that the murder occurred. Shemwell testified that he interviewed Doonan and took her statement. Doonan, who was previously acquainted with the victim, stated that she saw the victim in the lobby of the motel. Shemwell

testified that Doonan did not indicate she saw anyone else in the lobby. However, she saw an individual in the vending machine area. Doonan described the man as a white male with dark complexion and long brown wavy hair which he wore in a pony tail. She stated that the individual appeared to be between 35 and 45 years of age and appeared to be between five ten to six feet tall and was heavy set. Doonan indicated the individual wore a plaid jacket and had acne on his face. Shemwell testified that Doonan was shown a photo spread which included a photograph of the petitioner and was unable to identify the man she had seen at the Memphis Inn on the night in question.

Shemwell stated that he testified at both the petitioner's original trial and his resentencing proceeding. Shemwell testified that he recalled being asked as the resentencing hearing whether anyone other than the petitioner had been identified by a witness in the case. He further stated that he was aware that the petitioner has alleged he perjured himself during the resentencing hearing. Shemwell was asked whether he lied during the resentencing hearing and stated that he did not "intentionally lie." He stated that, at the time of his resentencing testimony, several years had passed between the commission of the crime and the resentencing proceeding. He further stated that his testimony lasted for five to six hours. Shemwell testified that he was asked whether James Darnell identified anyone. Shemwell stated that he responded, "no, Darnell had not identified anyone." Shemwell explained that in police parlance there is a difference between a witness making a positive identification and a "looks like" identification. Shemwell testified that it was his understanding that, based on information provided to him by the federal/state liaison, Sgt. Stumpy Roleson, Darnell pointed at a photograph and indicated that the individual "looks like" one of the men he saw at the Memphis Inn on the date in question. Shemwell testified that the police did not consider such a statement to be a positive identification. He

stated that "looking like" the individual was not enough to charge the man identified by Darnell. However, Shemwell testified that Darnell's statements were enough to continue to investigate the individual Darnell had pointed out and he stated that the police did in fact continue to investigate that individual.

Shemwell stated that he was aware that James Darnell had told police he saw two individuals. He stated that at the resentencing proceeding he testified to the fact that James Darnell had seen two unidentified individuals in the lobby of the Memphis Inn on the night in question. Shemwell acknowledged that he incorrectly testified that Darnell had pointed to petitioner's photograph and stated that petitioner looked like one of the individuals he had seen at the Memphis Inn on the night in question. Shemwell stated that he was going by his memory of the investigation and was clearly mistaken.

Shemwell testified that, during his testimony, he was asked to review his file and was given a period of time to do so. He stated that the file contained all the statements and supplements and was the largest file he has ever had. Shemwell stated that during the break he reviewed his case file and did not see any reference to Darnell's photo spread identification. He stated that he was assisted by prosecutor Tom Henderson. Shemwell testified that, at the time, he was looking for one of his case supplements which he believed referenced a conversation he had with Sgt. Stumpy Roleson regarding the photo spread shown to Darnell. He stated he was also looking for supplements from the officers who originally interviewed Darnell. He stated he was unable to locate those items. Thus, he informed the court that no one was identified by Darnell. Shemwell continued to maintain that this information was in fact accurate.

Shemwell testified that Voyles' statement should be part of the case file. He stated that he vaguely recalled Voyles claiming he had not been in Tennessee for two years because he was

on the run from a violation of parole warrant. He stated that he was unable to recall Voyles stating that he had been doing construction work in West Memphis, Arkansas during the past two years. Shemwell was shown exhibit 17, an oral interview with Billy Wayne Voyles, and exhibit 1, the Rimmer case file. He stated that the documents appear to indicate he was with Sgt. Heldorfer when Voyles was interviewed. However, Shemwell testified that he does not recall speaking with Voyles.

Shemwell acknowledged that Voyles provided police with several names of individuals who could verify that he had been in West Memphis for the last two years. He stated that the names include, Bobby Green, James Flemming, April Baldwin, Jeff Stritland, William Jones, Andy Jones, Ray Cecil and David Persons. Shemwell testified that, if the supplement relating to the Voyles interview indicated that these witnesses were not interviewed, then the witnesses likely were either not contacted or attempts to contact the witnesses were unsuccessful.

Shemwell testified that since the resentencing hearing he again reviewed the file and located a supplement from O.W. Stewart which references the photo spread shown to Darnell and Darnell's indication that Billy Wayne Voyles looks like one of the individuals he saw at the Memphis Inn on the night in question. Shemwell testified that he was never asked by A.D.A. Henderson to testify to facts he knew to be untrue. He further stated that, even if Henderson had made such a request, he would not have knowingly provided false testimony.

With regard to Darnell's indication that Voyles looked like one of the individuals he saw at the Memphis Inn, Shemwell testified that an investigation was conducted with regards to Voyles. He stated that he assigned officers to interview Voyles. Shemwell testified that Voyles indicated he had no information about the crime and did not know the petitioner. He stated that no evidence was found linking Voyles to the murder. Shemwell testified that, after Darnell

provided his description of the two individuals, he went back to the scene and reviewed the tray area that sits between the lobby and the clerk's office and found no blood on the tray or the glass partition separating the office and the lobby.

Shemwell stated that petitioner was immediately a suspect in the murder based upon information received from the victim's husband. He stated that petitioner was arrested in another state in a vehicle that was stolen from Shelby County prior to the victim's murder. Shemwell testified that the back seat of the car was saturated with blood. He stated that items from the vehicle were collected for testing, including a cutting from the rear seat of the vehicle. Shemwell testified that the blood found in the vehicle was compared to the blood of the victim's mother. Shemwell testified that no other leads were developed placing someone other than the petitioner at the scene of the crime. He stated that they investigated numerous leads. Shemwell stated that they had at least fifty photographs of potential suspects; but, no one was positively identified as the perpetrator.

Shemwell testified that the May 30, 1997 O.W. Stewart memo indicated that Sgt. Roleson was informed by Agent Peter Lee from the Honolulu F.B.I. field office that James Darnell had made a positive identification of the white male that he viewed entering the lobby of the Memphis Inn on the night of February 8, 1997. The memo stated that Darnell identified the photograph of Billy Wayne Voyles and indicated that the man he identified followed him into the motel on the night in question and Darnell stated that he observed blood on the man's knuckles. He acknowledged that the Stewart memo did not state that Darnell had indicated the man he identified "looked like" the individual he saw at the Memphis Inn on the date in question; rather, the document indicated that Darnell positively identified the individual as the man he saw in the lobby area of the motel. Shemwell stated that his testimony at the

resentencing proceeding was based on his recollection of his phone conversation with Sgt. Roleson and testified that, based on that conversation he did not feel Darnell had made a positive identification. Shemwell acknowledged that he did not prepare a supplement outlining his conversation with Sgt. Roleson despite the fact that his understanding of the events surrounding the photo spread shown to Darnell differed from the information contained in the file.

Shemwell identified exhibit 2 to the hearing as being a property evidence envelope with a notation that stated "signed photo spreads, vehicle, weapon, photos and drawings." He stated that the envelope was not sealed. Shemwell opened the envelope and testified that the contents of the envelope included a photo spread from William Conley and Roger LaScure in which both men identified the petitioner. Shemwell testified that he was familiar with those photo spreads.

Shemwell stated the envelope also included a photo spread labeled AA through GG which contained the signature of James Darnell. Shemwell testified that he assumed this was the photo spread that he prepared and sent to Hawaii. He stated that he further assumed this was the envelope that he received back from the F.B.I. and placed into evidence in the property room. Shemwell testified that the envelope also contained an F.B.I. 302 form dated June 24, 1997 regarding a June 21, 1997 showing of a photo lineup to witness James Darnell. He stated that the document indicated James Darnell identified photo AA- number 5 as one the individuals he saw at the Memphis Inn on the night in question. He stated that the document indicated Darnell stated the man he identified was the individual that followed him into the lobby that night and that the man had blood on his knuckles. Shemwell stated that he never opened the envelope and had not seen the Darnell photo spread prior to the post conviction hearing

Shemwell testified that he assumed there was a master list indicating who the individuals were in each of the photographs included in the photo spread. He stated that the list likely

included the individuals name, their booking number and information relating to how or from where the photograph was obtained. However, he stated that he does not have a specific recollection of creating a master list in this case. He stated that if there is no master list contained either in the police file or the District Attorney General file then the list either was not created or was removed from the file. Shemwell acknowledged that at a previous hearing he testified that the composite sketches created by the Memphis Police Department as a result of James Darnell's description of the two individuals he saw should have been tagged into evidence and subsequently transferred to the Attorney General's office for prosecution. He stated that if the property receipts indicated that the sketches were never received into property and were not found in the Attorney General's file, then he has no knowledge as to where those items might be.

Shemwell stated that he did not recall testifying at the grand jury. He explained that normally the "book" officer testifies before the grand jury. However, he stated that because the case file in this case was so large and complicated, he may have been called to testify before the grand jury. He stated that, if the grand jury had questions, the case coordinator would be better equipped to review the file and answer those questions. Shemwell stated that he was not called to testify at the preliminary hearing. He stated that if he had testified at the preliminary hearing and if he were asked about whether Voyles was a suspect, he would have stated that he was not a suspect. Shemwell stated that a follow up investigation failed to reveal any evidence linking Voyles to the murder.

Shemwell acknowledged that he previously testified that all the original documents in his case file were given to the State for prosecution after a copy was made and the copy was then sent to central records. He stated all other evidence was secured in the police property room until such time as the Assistant District Attorney General's office takes possession of those

items. Shemwell testified that if any time property is checked out the police property room; then, the individual taking custody of the item must sign for the item.

Shemwell testified that he was not involved in developing the questions asked of him by the prosecution at the 1998 trial or the resentencing proceeding. Shemwell acknowledged that he previously testified that A.D.A. Henderson did not ask him to contact James Darnell about coming to trial. He stated that if he had been asked to contact Darnell he would have; however, he stated that Henderson had investigators within the District Attorney General's office who could have contacted Darnell. Shemwell testified that he was responsible for transferring the Honda Accord that was recovered during the petitioner's arrest in Indiana to the state for prosecution. He stated that he is not aware what happened to the car after he transferred custody to the prosecution. He stated that he did not recall making a phone call to Sgt. Heldorfer in March of 1997 in which he told Heldorfer that the vehicle could be released from police custody.

Shemwell testified that he recalled there were individuals who testified at the petitioner's trial who had been housed in prison with the petitioner. He stated that he recalled that the theory of the state was that the petitioner was angry at the victim because he had been incarcerated for a crime committed against the victim in the late 1980s and the victim, who had once visited the petitioner in jail, had stopped visiting him. He stated that he was not aware that the victim's children visited petitioner during his prior incarceration or that the victim had spoken in support of petitioner at his parole hearing.

Shemwell testified that he knew an individual named Robert Sexton, who was the Indiana officer handling the Indiana investigation. Shemwell stated that he recalled having a phone conversation with Sexton. However, he stated he did not recall telling Sexton that witness James Darnell had seen the Honda Accord recovered from the petitioner backed up to the office of the

Memphis Inn with the trunk and one car door open. Shemwell stated that his recollection was that James Darnell's female companion, Dixie, and not Darnell himself had seen the vehicle. He stated that, although he did not have any independent recollection of telling Sexton that Darnell had seen two men inside the Memphis Inn, if that information was contained in Sexton's report, then he obviously must have provided Sexton with that information. Shemwell stated that he told Sexton one of the descriptions given by Darnell matched the petitioner.

Shemwell was shown a three page supplement investigation report from Bill Baldwin of Indiana. He stated that the document contained a description of each item inventoried by Baldwin. Shemwell acknowledged that the inventory list contained a swatch of material from the back seat and back arm rest which the document indicates was tested and showed a presumptive positive for blood. He stated that the document indicates there was a swatch of material taken from two areas of the car. Shemwell testified that he was not present when the swatches were taken or tested. However, he stated that he transported the samples back to Tennessee. He stated that upon his return the items were logged into the Memphis Police Department's property room.

Shemwell was shown property and evidence receipts from petitioner's case. He stated that those with his signature were the items transported by him from Indiana back to Tennessee. Shemwell testified that the items that were not personally transported by him were placed in the trunk of the vehicle and were transported back to Tennessee along with the vehicle. He stated that a private company towed the vehicle back to Memphis. He testified that the vehicle was sealed and placed on a wrecker and a tarp was placed over the vehicle. Shemwell testified that there was no police escort accompanying the vehicle transport.

Shemwell testified that the vehicle was returned to Memphis and then sent to the T.B.I. lab in Nashville. He stated that he assumed the items in the trunk of the car were sent to T.B.I. as well. He stated that, if the items from the trunk of the car were never logged into the police property room, then they were likely stored at the T.B.I. facility. He stated that he did not recall whether the items of evidence which were never tagged into evidence were released with the car in March of 1997.

Shemwell testified that it appears from the O.W. Stewart supplement referenced above, that Stewart spoke with Tom Henderson regarding James Darnell's identification of Voyles. He stated that he assumed Henderson was aware that Darnell had identified Voyles as early as March of 1997. Shemwell testified that, when he was asked to review the file at the resentencing hearing, he reviewed the attorney general's case file. He stated that he assumed it contained the items found in exhibit one, which is the central records version of the Memphis Police Department's case file. He stated that he did not recall going through multiple boxes. He testified that if there are items, such as the interview of James Darnell and Dixie Roberts, which were not found in the central records copy of the file but were found in the District Attorney General's file, the he cannot say who removed the items. Shemwell testified that when he prints the case file he creates three identical copies of the file. He stated that one file goes to central records; one is maintained by the Homicide Unit; and the original documents all go the District Attorney General's Office.

FINDINGS

Post-conviction relief is only warranted when a petitioner establishes that his or her conviction is void or voidable because of an abridgement of a constitutional right. Tenn. Code Ann. § 40-30-103. The burden in a post-conviction proceeding is on the petitioner to prove the factual allegation to support his grounds for relief by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); See Dellinger v. State, 279 S.W.3d 282, 293-94 (Tenn. 2009). "Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." Hicks v. State, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998).

Prosecutorial Misconduct

Typically this court would begin by addressing petitioner's claims of ineffective assistance of counsel. However, because the primary basis for petitioner's claims with regard to ineffective assistance of his 1998 trial counsel and his resentencing counsel relate to counsels' failure to investigate his case or present evidence on his behalf and, because this court's conclusions with regard to those allegations are impacted by the court's determination as to what evidence was available to counsel, this court has determined that an initial investigation of petitioner's claims of prosecutorial misconduct is warranted.

Petitioner contends State prosecutors committed prosecutorial misconduct during his initial trial and his resentencing proceeding by: (1) withholding material exculpatory evidence;

(2) destroying exculpatory evidence; (3) engaging in misconduct during their motion practice; (4) engaging in misconduct at trial; and (5) failing to ensure petitioner received a fair trial.

In general, a prosecutor commits misconduct by the use of deceptive or reprehensible methods to persuade either the court or the jury. See State v. Rimmer, 250 S.W.3d 12 (Tenn. 2008) (citing People v. Strickland, 11 Cal.3d 946, 955, 114 Cal. Rptr. 632, 523 P.2d 672 (1974)). The defendant need not show that the prosecutor acted in bad faith or with appreciation for the wrongfulness of the conduct, nor is a claim of prosecutorial misconduct defeated by a showing of the prosecutor's subjective good faith. Rimmer, 250 S.W.3d at 41. (citing People v. Bolton, 23 Cal.3d 208, 214, 152 Cal.Rptr. 141, 589 P.2d 396 (1979). Factors to be considered in the event of instances of prosecutorial misconduct are as follows:

> (1) The conduct complained of viewed in context and in light of the facts and circumstances of the case.
> (2) The curative measures undertaken by the court and the prosecution.
> (3) The intent of the prosecutor
> (4) The cumulative effect of the improper conduct and any other errors in the record.
> (5) The relative strength or weakness of the case.

Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976); see also State v. Buck, 670 S.W.2d 600, 609 (Tenn. 1984). The ultimate test for evaluating prosecutorial misconduct is "whether the improper conduct could have affected the verdict to the prejudice of the defendant." Judge, 539 S.W.2d at 344; see also State v. Chalmers, 28 S.W.3d 913, 917 (Tenn. 2000).

A. Withholding Exculpatory Evidence

Petitioner asserts the prosecution withheld all information either documenting or suggesting James Darnell identified Billy Wayne Voyles as one of the two men he saw with blood on their hands at the Memphis Inn in the early morning hours of February 8, 1997.

Petitioner's claims relate to the prosecutions actions both at his original trial and at his 2004 resentencing proceeding. Petitioner contends counsel made a proper written request for exculpatory material and the prosecution had a duty under Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959); and Kyles v. Whitley, 514 U.S. 419 (1995), to disclose this information to counsel.

Post conviction counsel further asserts that the information relating to Darnell's identification of Voyles and failure to identify Rimmer was both favorable to the defense and material to petitioner's guilt and potential punishment. Counsel contends the prosecution had a duty to turn over all such evidence regardless of its admissibility at trial. Counsel further argues that prosecutors had an affirmative duty to inquire of the Memphis Police Department, the F.B.I., the United States Attorney's Office for the Western District of Tennessee, and any other agency acting on the government's behalf as to whether such agencies possessed information "favorable" to the petitioner. Petitioner asserts that the prosecutor's actions in this case violated his due process rights. He argues that, because trial counsel specifically requested exculpatory information and were told by the prosecution that no such evidence existed, he is entitled to a new trial. Petitioner further argues that the prosecution's actions in this case are particular egregious. He asserts the prosecution was not merely negligent in failing to turn over the favorable evidence; but, rather, willfully suppressed Darnell's identification of Voyles both at petitioner's original trial and during his resentencing proceeding.

In Brady v. Maryland, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87. Evidence that is "favorable to the accused" includes

evidence that is deemed to be exculpatory in nature and evidence that could be used to impeach the State's witnesses. State v. Walker, 910 S.W.2d 381, 389 (Tenn. 1995); State v. Copeland, 983 S.W.2d 703, 706 (Tenn. Crim. App. 1998); see also United States v. Bagley, 473 U.S. 667, 676 (1985). "Favorable" evidence

> may consist of evidence that could exonerate the accused, corroborate the accused's position in asserting his innocence, or possess favorable information that would have enabled defense counsel to conduct further and possibly fruitful investigation regarding the fact that someone other than the appellant killed the victim.

Johnson, 38 S.W.3d at 55-56, (quoting, Marshal, 845 S.W.2d at 233)).

The United States Supreme Court later stated in United States v. Agurs, 427 U.S. 97, 49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976), that if the evidence that was not supplied to the defense would not deprive the defendant of a fair trial, then there is no constitutional violation. Id. at 108. Thus, relief under Brady is not available unless the petitioner can establish that the evidence improperly withheld was material to the defense. State v. Edgin, 902 S.W.2d 387, 389 (Tenn. 1995). The Court in Johnson described "material" evidence in the following manner:

> Evidence is deemed to be material when 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' State v. Edgin, 902 S.W.2d 387, 390 (Tenn. 1995); see also State v. Walker, 910 S.W.2d 381, 389 (Tenn. 1995); State v. Copeland, 983 S.W.2d 703, 706 (Tenn. Crim. App. 1998). Despite the language of probabilities used in our cases, however, it must be emphasized that the test of materiality is not whether the defendant would more likely than not have received a different verdict had the evidence been disclosed. See Strickler v. Greene, 527 U.S. 263, 275, 144 L.Ed.2d 286, 119 S.Ct. 1936 (1999). Nor is the test of materiality equivalent to that of evidentiary sufficiency, such that we may affirm a conviction or sentence when, 'after discounting inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions.' Id.; Kyles v. Whitley, 514 U.S. 419, 435 n.8, 131 L.Ed. 2d 490, 115 S.Ct. 1555 (1995). . . . . Instead, a reviewing court must determine whether the defendant has shown that 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine the confidence of the verdict.' Irick v. State, 973 S.W.2d 643, 657 (Tenn. Crim. App. 1998) (citing Edgin, 902 S.W.2d at 390); see also Strickler, 527 U.S. at 290. In other words,

> evidence is material when, because of its absence, the defendant failed to receive a fair trial, 'understood as a trial resulting in a verdict worthy of confidence.' Kyles, 514 U.S. at 434.

Johnson, 38 S.W.3d at 55-56.Thus, in order to prove a *Brady* violation, a defendant must show undisclosed "favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. The Appellant bears the burden of demonstrating the elements of this claim by a preponderance of the evidence. Smith v. State, 757 S.W.2d 14, 19 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1988); see also United States v. Bagley, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 105 S. Ct. 3375.

Petitioner's 1998 counsel filed a motion for exculpatory evidence.[12] Specifically, counsel requested:

> the names, addresses and telephone numbers of any witnesses who have furnished the investigatory agencies and/or the prosecution with physical descriptions which do not correspond to the physical description of the accused: or who have been unable to identify the accused from photographs, line-ups, or other attempts at identifying the accused as being the perpetrator of the pending criminal charges.[13]

This request was filed on March 7, 1998. Additionally, counsel requested the prosecution provide to the court for in camera inspection those items which the prosecution "is unable to determine' is exculpatory.[14] In the Memorandum of Support accompanying counsels' motion, counsel argued that they were entitled to the production of:

> the names and addresses of witnesses who could exonerate the accused, who could corroborate the accused's' assertion of innocence, or who possessed favorable information that would have enabled the accused's counsel to conduct further and possibly fruitful investigation as to whether someone other than the

[12] See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 97-02817, 98-01033-34, W1999-00637-CCA-R3-DD, *Technical Record,* Vol. 1, *Motion for Production of Exculpatory Evidence*, page 42-43.
[13] Id. at page 43.
[14] Id.

> accused killed the victim, as well as statements that were exculpatory or favorable to the accused;[15]

and,

> the names addresses and telephone number of witnesses who have furnished law enforcement officials with physical descriptions which do not correspond to the physical description, characteristics and/or colorations of the accused.[16]

Likewise, petitioner's resentencing counsel filed a Motion for the production of exculpatory evidence.[17] In their motion, counsel requested production of:

> the names, addresses, and telephone numbers of any witnesses known to any investigatory agencies and/or the prosecution who have misidentified any physical evidence or facts pertaining to the charges pending against the accused, or who have in fact misidentified the accused, any accomplice, co-conspirator, accessory before or after the fact, or co-principal;[18]

and

> the names, addresses, and telephone numbers of any witnesses who have furnished the investigatory agencies and/or the prosecution with physical descriptions which do not correspond to the physical description of the accused; or who have been unable to identify the accused from photographs, line-ups, or other attempts at identifying the accused as being the perpetrator of the pending criminal charges.[19]

Similar to 1998 counsel, resentencing counsel requested that, if the state was unsure if evidence in their possession was exculpatory; then, the state provide the requested evidence to the court for an in camera inspection. Resentencing counsel also filed a Memorandum in support of their motion essentially outlining the same claims filed by 1998 counsel.[20] Resentencing counsel's Motion and Memorandum were filed on November 3, 2010.

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[15] See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 97-02817, 98-01033-34, W1999-00637-CCA-R3-DD, *Technical Record,* Vol. 1, *Memorandum in Support of Motion for Exculpatory Evidence*, pages 47.
[16] Id.
[17] See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 98-01034, W2004-02240-CCA-R3-DD, *Technical Record* Vol. 1, *Motion for Exculpatory Evidence*, pages 83-86.
[18] Id. at page 84.
[19] Id.
[20] See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 98-01034, W2004-02240-CCA-R3-DD, *Technical Record* Vol. 1, *Memorandum in Support of Motion for Exculpatory,* pages 87-90.

On March 16, 1998, the state responded to original counsels' request for exculpatory material, stating: "the state is unaware at this juncture of any information in possession of the State which would exonerate the defendant."[21] Nevertheless, the state indicated it was aware of its duty under *Brady* and its progeny. On November 3, 2003, the state responded to resentencing counsels' request for production of exculpatory evidence, stating "the state is not aware of any 'misidentification' in the case. It should be noted that the identification witnesses in this case are friends, co-workers and other acquaintances of the defendant."[22] The prosecution also indicated they were "not aware of any witnesses' erroneous descriptions of defendants or evidence in this case."[23] The response further stated that because the prosecutors had not been informed by counsel of the basis for the defense or theory of the case, they were "unable to determine whether information in their possession [is] exonerative of the defendant or whether Brady . . . applies."[24]

Initially, this court finds both 1998 counsel and resentencing counsel properly requested exculpatory evidence in the form of identifications of any form by witnesses of someone other than their client; physical descriptions by any witness which did not match the physical description of petitioner; and, any information relating to the failure of a witness to identify petitioner. This court finds that such evidence is the type of evidence contemplated under *Brady* and its progeny. Upon the filing of the motion, the burden of producing the requested materials shifted to the state. In the instant case, the state admittedly failed to meet their responsibilities under Brady. The court must next determine whether the improperly withheld evidence was

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[21] See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 97-02817, 98-01033- 34, W1999-00637-CCA-R3-DD, *Technical Record,* Vol. 1, *Response of the State of Tennessee to Motion of Defendant For Pre-Trial Discovery of Exculpatory Material,* page 49.
[22] See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 98-01034, W2004-02240-CCA-R3-DD, *Technical Record* Vol. 1, Response To Motion For Production of Exculpatory Evidence, pages 91-92. See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 98-01034, W2004-02240-CCA-R3-DD, *Technical Record* Vol. 1, Response To Motion For Production of Exculpatory Evidence, pages 91-92.
[23] Id. at page 91.
[24] Id. at page 92.

material to the defense. Since this court finds alternative evidence was available which would have led to counsels' independent discovery of the withheld evidence had competent investigation been undertaken by counsel, this court does not find petitioner is entitled to relief based upon a claim of prosecutorial misconduct.

The court has identified eleven (11) items which are the subject of both petitioner's *Brady* claims and his claims relating to ineffective assistance of trial, resentencing and appellate counsel and which are relevant to this court's determination of the petitioner's allegations of prosecutorial misconduct:[25] (1) James Darnell's February 13, 1997 statement to police; (2) the original composite sketches, which Darnell assisted police in preparing; (3) federal documents prepared by F.B.I. Agent Peter Lee relating to his role in presenting a photo line up to James Darnell, who was stationed in Honolulu, Hawaii, and the results of those efforts; (4) Memphis Police Officer O.W. Stewart's summary relating to Darnell's identification of Billy Wayne Voyles; (5) the Memphis Police Department's (MPD) supplement outlining a meeting with Tom Henderson, in which they informed Henderson of the Darnell identification and which outlines Henderson's efforts in extraditing Voyles to Tennessee; (6) the signed photographic line-up in which Darnell identified Billy Wayne Voyles, (7) the master "key" to the photo spreads, which specified who the individuals were in the photo spreads that were shown to Sgt. Darnell; (9) property receipts relating to the Darnell photo-spread; (10) MPD supplements relating to crime stopper tips; and, (11) the statement of Billy Wayne Voyles. Below, the court attempts to set forth the items which the court finds were available to counsel and those items which the court finds the prosecution withheld.

[25] Some of the items listed were presented at the post conviction hearing. Other items and relevant testimony were presented at motion hearings which occurred prior to the start of the presentation of post conviction testimony. In addressing petitioner's claims, this court has considered the evidence and testimony presented at each of the proceedings.

1998 TRIAL	
Items relating to eye-witness Darnell and items relating to suspect Billy Wayne Voyles which were either provided to counsel in discovery or available to counsel through competent investigation	**Items relating to eye-witness Darnell and items relating to suspect, Billy Wayne Voyles, which were not provided to counsel in discovery and were not available to counsel through competent investigation**
Crime Stopper's Tips relating to the identification of other potential suspects. [26]	Information relating to the details of Darnell's initial conversation with police.[27]
Police Supplement indicating Arkansas State Trooper, Jackie Clark, contacted the Memphis Police and told them an individual by the name of Johnnie Whitlock had contacted him and told him he knew the two individuals depicted in the composite sketches and identified the individuals as Billy Voyles and Ray Cecil.[28]	February 13, 2012, official statement of James Darnell[29]
Property receipts which were filled out by Sgt. Shemwell and entered into the Shelby County Clerk property room that contained the notation: signed photo-spreads; photo-spread vehicle photos; photo-spread drawings.[30]	Memphis Police Officer, O.W. Stewart's, supplement outlining the results of the Darnell photo-spread.[31]
State Report setting forth how each officer and each lay witness were involved in the case and which lists Billy Wayne Voyles as a "possible suspect" and Dixie Roberts and James Darnell as "eye witnesses."[32]	F.B.I. 302 forms and other F.B.I. communiqué relating to the Darnell photo-spread and Darnell's identification of Voyles.*[33]

[26] See Exhibit 27 to Post Conviction Hearing, batestamped page 202552.

[27] Information relating to Dixie Roberts initial statement to police is contained in Exhibit 27; however, information relating to Darnell's initial contact with police is not contained in the packet of supplements that were provided to defense in discovery. It is not clear that a supplement was prepared relating to Darnell's initial contact with police; however, no such information is contained in the discovery material.

[28] Id.

[29] See Exhibit 6 to Post Conviction Hearing

[30] See Exhibit 35 to Post Conviction Hearing

[31] See Exhibit 10 to Post Conviction Hearing.

At the post conviction hearing, resentencing counsel testified that they obtained a document relating to Darnell's identification. However, it is not clear where petitioner obtained the document. Prior to attorneys Springer and Garrett being appointed to petitioner's resentencing case, other counsel represented petitioner. Although prior counsel stated at the post conviction hearing that they had just begun to gather records, it is possible petitioner obtained the document from prior resentencing counsel and not from his 1998 counsel. 1998 counsel stated that they had never seen the document and were not aware Darnell had identified Voyles. Since this court cannot say where petitioner obtained the document, this court accredits the testimony of 1998 trial counsel and finds they did not receive this document.

[32] See Exhibit 27 to Post Conviction Hearing, batestamped page 202628.

[33] See Exhibits to hearing on Motion to Disqualify the Shelby County District Attorney General's Office; see also Exhibit 2 to Post Conviction Hearing.

July 14, 1997 interview of Billy Wayne Voyles, in which Voyles provides the name Raymond Cecil as a potential alibi.[34]	The photo-spread signed by Darnell, in which Darnell identifies Voyles as the man he saw entering the Memphis Inn on February 8, 1997.*[35]
Composite Sketches as they appeared in *The Commercial Appeal* newspaper.[36] & Black and white copies of the composite sketches Darnell assisted police in preparing.[37]	The master list for the photo array
MPD supplement outlining Dixie Roberts initial statement to police in which she indicates she was at the Memphis Inn at or near the time of the murder and was accompanied by James Darnell.[38]	

RESNETENCING TRIAL

Items relating to eye-witness Darnell and items relating to suspect Billy Wayne Voyles which were either provided to counsel in discovery or available to counsel through competent investigation	**Items relating to eye-witness Darnell and items relating to suspect, Billy Wayne Voyles, which were provided not provided to counsel in discovery and were not available to counsel through competent investigation**
Crime Stopper's Tips relating to the identification of other potential suspects. [39]	February 13, 2012, official statement of James Darnell[40]
Police Supplement indicating Arkansas State Trooper, Jackie Clark, contacted the Memphis Police and told them an individual by the name of Johnnie Whitlock had contacted him and told him he knew the two individuals depicted in the composite sketches and identified the individuals as Billy Voyles and Ray Cecil.[41]	The photo-spread signed by Darnell, in which Darnell identifies Voyles as the man he saw entering the Memphis Inn on February 8, 1997.*

[34] Id, at batestamped page 202590.
[35] See Exhibit 2 to Post Conviction Hearing
[36] See Exhibit 8 to Post Conviction Hearing.
[37] See Exhibit 35 to Post Conviction Hearing.
[38] See Exhibit 27 to Post Conviction Hearing, batestamped page 202539.
[39] See Exhibit 27 to Post Conviction Hearing.
[40] See Exhibit 6 to Post Conviction Hearing
[41] Id.

Property receipts which were filled out by Sgt. Shemwell and entered into the Shelby County Clerk property room that contained the notation: signed photo-spreads; photo-spread vehicle photos; photo-spread drawings.[42]	Memphis Police Officer, O.W. Stewart's, supplement outlining the results of the Darnell photo-spread.
State Report setting forth how each officer and each lay witness were involved in the case and which lists Billy Wayne Voyles as a "possible suspect" and Dixie Roberts and James Darnell as "eye witnesses."[43]	F.B.I. 302 forms and other F.B.I. communiqué relating to the Darnell photo-spread and Darnell's identification of Voyles.*
July 14, 1997 interview of Billy Wayne Voyles, in which Voyles provides the name Raymond Cecil as a potential alibi.[44]	The master list for the photo array
Composite Sketches as they appeared in *The Commercial Appeal* newspaper.	
Darnell's initial statement to police in which he describes the two men he saw at the Memphis Inn in the early morning hours of February 8, 1997.[45]	

Items in the above chart that are denoted by an asterisk are items both 1998 trial and appellate counsel and resentencing counsel and 2004 appellate counsel contend they never saw. While it is clear these items were not specifically turned over as part of the discovery packet provided to petitioner's counsel, it appears counsel could have discovered these items through a competent investigation of the case.

Certain property receipts referencing "signed photo-spreads" were provided to counsel as part of discovery. At the pre-trial hearing on petitioner's motion to discover, Carl Townsend, an employee of the Shelby County Clerk's property room testified that he located in the "residual"[46] file for petitioner's case an envelope with the notation "signed photo-spreads," which contained

[42] See Exhibit 35 to Post Conviction Hearing
[43] See Exhibit 27 to Post Conviction Hearing.
[44] Id.
[45] It appears that at some point just prior to or during petitioner's 2004 sentencing proceeding, petitioner provided re-sentencing counsel with a supplement outlining Darnell's initial description of the two men he saw in the Memphis Inn on the date in question.
[46] Townsend explained that the Shelby County Clerk's Office maintains as part of its "residual" files those items which were gathered in the investigation of a case but not admitted as evidence in the case.

the F.B.I. 302 form outlining Darnell's identification of Voyles and the signed photo-spread in which Darnell identified Voyles as the man he saw entering the Memphis Inn on February 8, 1997. Additionally, the envelope contained a United States Department of Justice property receipt indicating the item was released to Sgt. Shemwell and Sgt. Roleson on July 22, 1997.[47]

After this court's review of the testimony at both the 1998 trial and resentencing proceedings; the evidence presented at the post conviction motions hearings; and, the evidence presented at the actual post conviction hearing, this court concludes that in May of 1997, the photo-spreads were originally provided by Sgt. Shemwell to Safe Streets Task Force Coordinator, Sgt. Roleson, then given to F.B.I. Agent Lee in Honolulu, Hawaii who showed them to James Darnell. Darnell identified Voyles; but, failed to sign the photo-spread. In June Shemwell again sought the assistant of Roleson who contacted Lee who subsequently had Darnell sign the photo-spread. Thereafter, Lee returned the signed photo-spread to Roleson. On July 21, 1997, the photo-spread was released from the F.B.I. "bulky storage" to Roleson and Shemwell and transported to the Memphis Police Department's Homicide Division. The relevant portions of the documented communications between Shemwell, Roleson and Lee are set forth below:

Federal Bureau of Investigation Communications:[48]

1. FD-302, Federal Bureau of Investigation Report dated 5/21/97

A document identified as a F.B.I. FD-302 supplemental report was introduced during the hearing on petitioner's motion to compel discovery. The document relates to the photo identification made by Darnell. Darnell's name and social security number have been redacted from the document. The document is dated May 21, 1997 and indicates it originated in the

[47] See Exhibit 2 to Post Conviction Hearing
[48] See Exhibits to hearing on Motion to Disqualify. See also Exhibit 2 to Post Conviction Hearing.

Honolulu F.B.I. field office. The signature of the Agent who created the document has also been redacted. The redacted document reads as follows:

> On May 20, 1997, _____, Social Security Number _____, _____, Hawaii, work telephone number _____ was advised of the identity of the interviewing agent and the nature of the interview. _____ provided the following information:
>
> Agent _____ showed _____ four photographs of a maroon Honda Accord suspected of being present in the parking lot of the Memphis Inn East, located at 6050 Macon Cove, Memphis, Tennessee on the morning of 02/08/1997. _____ advised that he could possibly identify the Honda Accord from the midsection of the car to the rearend.
>
> In addition _____ reviewed seven photographic lineups identified as the following: #AA, #BB, #CC, #DD, #EE, #FF, and #GG. _____ positively identified only one photograph 02/08/1997, he opened the door to the motel front desk office and let "5" into the front desk area ahead of him. _____stated that "5" smelled of alcohol and appeared to be intoxicated. _____ advised that "5" had blood on his knuckles.

A cover page dated 5/22/1997 indicates that the FD-302 form as outlined above was sent to a SSTF (Safe Streets Task Force) representative in Memphis and was placed in the F.B.I. filed on May 29, 1997 under case number 7A-ME-51176.

2. Federal Bureau of Investigation Document dated 06/09/1997

A document from the Federal Bureau of Investigation dated 06/09/1997 indicates that a representative from the SSTF sent additional correspondence to the Honolulu F.B.I. Agent who initially showed Darnell the photo-spreads. The redacted document reads:

> Photo spreads are being returned to Honolulu so witness may initial the photograph of the individual he picked out of the photographic spread. . . . .
>
> Seven photographic line-ups and four photographs of a Honda Accord vehicle. . . . .
>
> Enclosed items were previously forwarded to Honolulu on Serial 8 so that _____ could view the photographs for possible identification of captioned subject. The FD-302 of _____ dated 5-20-97, indicates that _____ picked out individual #5 from photographic sheet #AA. _____ did not initial or date the photo spread on which he made the identification. Consultation with the both [sic] the United States Attorney's

> Office and the Attorney General's Office, who are both contemplating bringing charges in this matter, indicates a need for _____ to physically initial and date the photograph he picked out of the line-up to preclude any future problems at trial.

This document also contains the case number 7A-ME-51176.

3. Federal Bureau of Investigation Document dated 06/24/1997

It appears that on June 24, 1997, the following FD-302 was completed by an F.B.I. Agent in Honolulu, Hawaii in response to the Safe Streets Task Force's 6/9/1997 communication requesting Darnell sign the photo which he had previously identified:

> On June 21, 1997, _____, Social Security Number _____ _____, Hawaii, work telephone number _____ was advised of the identity of the interviewing agent and the nature of the interview. _____provided the following information:
>
> _____ was shown the photographic lineup provided by the Memphis, Tennessee, SSTF. He identified one photograph from sheet "AA" numbered "5." _____dated, initialed, and signed the back of the photograph. On a FD-302 dated 5/20/1007, _____ advised that on 02/08/1997, he opened the door to the motel front desk office and let "5" into the front desk area ahead of him. _____ stated that "5" smelled of alcohol and appeared to be intoxicated. _____ advised that "5" had blood on his knuckles.

Again, the document was redacted, removing Darnell's name and personal information and the name of the Honolulu agent.

4. Federal Bureau of Investigation Document Dated 7/28/97.

An additional federal FD-302 supplement dated 7/28/97 was submitted by post conviction counsel at the hearing on the motion to disqualify the Shelby County District Attorney General's Office. This redacted document also contained the case number 7A-ME-51176 and the following content:

> On July 21, 1997 _____ checked out of the Memphis FEDERAL BUREAU OF INVESTIGATION bulky storage the four laser photos

of a 1988 Honda and seven laser photo line ups which had been sent to Hawaii and returned. These 11 photographs were then taken to the MEMPHIS POLICE DEPARTMENT Homicide Division, 201 Poplar Avenue, Room 1121, and released to _____ Form FD-597 was filled out and signed by _____ and _____.

Form FD-597 will be retained in a 1A envelope.

5. Federal Bureau of Investigation Document Dated 8/15/1997

The following was communicated on 8/15/97 in a document purportedly from a Special Agent of the Memphis office of the F.B.I.:

> On 8/12/97, SA _____ and TFO _____ met with AUSA's Tony Arvin and John Fowlkes re captioned matter. AUSA John Fowlkes advised he would pursue prosecution of RIMMER utilizing the "three strikes" provision of the law and charging him with Hobbs Act Robbery provided the facts supported the charge. AUSA Fowlkes advised he would contact the DA's office to coordinate the joint prosecution. AUSA Fowlkes also requested a complete report containing summary, witness statements, photographs and case reports.

The document contained the case number 7A-ME-51176.

At the post conviction hearing, Officer Shemwell testified that he tagged the signed photo-spread and logged it into evidence. He stated the package was sealed when he retrieved it from the federal authorities and he did not open it. He later identified Exhibit 2, the property envelope referenced by Townsend. Shemwell acknowledged that the envelope was now open and stated that in addition to the Darnell photo-spread and federal 302 form, the envelope contained photo-spreads from inmates William Conely and Roger LeScure, who identified petitioner as the person they were incarcerated who had made threats against the victim or confessed to harming the victim. Shemwell testified that he assumed this was the same envelope he received from the F.B.I on July 22, 1997 and placed into the property room.

Despite petitioner's assertion that the state neither provided him this evidence directly; nor, made it available for his review, it appears from the evidence and testimony presented at the

post conviction hearing and the hearing on petitioner's Motion to Disqualify that the evidence was in the property room and could have been viewed by either 1998 counsel or resentencing counsel at any time. The evidence, which was not used at trial, remained in the Shelby County Clerk's property room as part of their residual files until it was discovered by post conviction counsel. This court finds its conclusion about the availability of this evidence is bolstered by 1998 counsels' and resentencing counsels' admission that they did not view the evidence in the property room; but, rather relied upon A.D.A. Henderson's assertions that none of the witnesses identified anyone other than petitioner and that all the identification witnesses were somehow connected to petitioner. Clearly counsel were misled. However, it does not appear the evidence was hidden, misplaced or deliberately mishandled and competent investigation would have revealed the evidence.

The "prosecution is not required to disclose information that the accused already possesses or is able to obtain." State v. Marshall, 845 S.W.2d 228, 233 (Tenn. Crim. App. 1992). Therefore, this court does not find the prosecution acted improperly with regard to Darnell's signed photographic line-up, in which Darnell identifies Voyles, or the F.B.I. 302 form outlining the Darnell identification. Next, as to petitioner's claim that he was not provided copies of the composite sketches Darnell helped to create, this court finds the State did provide the defense with black and white copies of the original sketches as part of discovery.[49] This court acknowledges that the copies are not particularly clear; however, counsel should have already known about the sketches given that they appeared as part of a prominent news story in the local newspaper, *The Commercial Appeal.* Having received black and white copies of the sketches in discovery, counsel could have inquired about the originals and could have further inquired about the circumstances under which the composites were developed. However, they failed to do so.

[49] See Exhibit 35 to Post Conviction Hearing.

The only remaining items at issue are: (1) the master list for the photo-spread, identifying each of the individuals included in the photo-spread shown to Darnell; (2) Darnell's statement to police; and, (3) the O.W. Stewart's supplement outlining Darnell's identification of Voyles. As previously stated, this court finds the prosecution had a duty to turn these items over to counsel.

A.D.A. Henderson argued that the information relating to Voyles did not have to be provided to counsel because the police had investigated Voyles and determined he was not a viable suspect. He further argued that Darnell's description of two suspects was not exculpatory. However, this court finds such information was favorable under *Brady* and it progeny. Favorable information must be disclosed regardless of whether the state believes it to be credible. Johnson v. State, 38 S.W.3d at 55 (Tenn. 2001). The "prosecution's duty to disclose is not limited in scope to 'competent evidence' or 'admissible evidence.'" State v. Marshall, 845 S.W.2d at 232.

Because the O.W. Stewart supplement outlining Darnell's identification and Darnell's statement could have been used to impeach the evidence offered against petitioner by the state and could have been used by counsel to conduct further investigation into Voyles as a possible suspect, this court finds the information was "favorable" to the petitioner and should have been disclosed. However, given that counsel could have obtained the photo-spread in which Darnell identified Voyles had they properly investigated and could have independently identified Darnell, this court finds the evidence was not material to petitioner's defense. Thus, he is not entitled to relief based upon the prosecution's failure to provide counsel with the evidence.

Finally, the court addresses the state's failure to provide a "master key" or "master list" for the photo-spread that was shown to James Darnell. Both Sgt. Shemwell and A.D.A.

Henderson testified that many tips came in on petitioner's case. Based upon those tips approximately fifty-one (51) photographs were compiled into a photo spread which was ultimately shown to Darnell as well as other witnesses. At the post conviction hearing, Shemwell testified that he "assumed" a master list identifying the individuals in the photo spreads was prepared by police. He stated the list would likely have included the individual's name, booking number and information relating to how the photograph was obtained and why it was included in the photo-spread. However, he stated that he did not have a specific recollection of creating a master list in petitioner's case. Shemwell testified that, if there is no master list in either the police file or the District Attorney General filed then the list was either not created or removed from the file. Given that Darnell was shown numerous photographs and only identified Voyles and given that multiple tips were garnered, investigated and potential suspects identified, this court finds that the master list was potentially favorable to the defense. For instance, it would have been helpful to defense to ascertain whether a photograph of Raymond (Ray) Cecil appeared in the photo spread since he, along with Voyles, had been identified as the men appearing in the composite sketches that were released to the public and since he was also listed by Voyles as an alibi. Thus, if such a list existed, this court finds the state had a duty to produce it.

Despite Shemwell's assertion that a "master list" may or may not have been created, this court finds there was surely some documentation identifying the individuals in the photo spread photos. Perhaps this information was not compiled in one "master list;" but, surely the police had to have some way of identifying the individuals and had to have documented that information in a supplement, report, or by other means. To whom the information may have been provided and where it may have been located is apparently a mystery. Nonetheless, in

whatever form it was contained, it should have been provided to counsel. However, since the petitioner did in fact have access to the signed photo spread in which Voyles was identified as the man he saw in the Memphis Inn and since counsel had access to information relating to Whitlock's identification of Voyles and Cecil, this court finds petitioner is not entitled to relief based upon the state's failure to provide counsel with this information.

B. Destruction of Exculpatory Evidence

Petitioner asserts the prosecution violated his due process rights by destroying evidence which could have exculpated him. Specifically, he argues that the Memphis Police Department improperly released its hold on the Honda, which the State asserted was driven by petitioner and contained blood with the same DNA characteristics as the blood of the victim's mother. He contends access to the Honda and the ability to test the Honda was critical to his defense.

In State v. Ferguson, 2 S.W.3d 912, 914 (Tenn. 1999), the Tennessee Supreme Court addressed the issue as to what factors guide the determination of the consequences that flow from the State's loss or destruction of evidence which the accused contends would be exculpatory. The Supreme Court answered that the critical inquiry was whether a trial, conducted without the destroyed evidence, would be fundamentally fair. Id. In reaching its decision, the Ferguson court noted that its inquiry was distinct from one under Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196, 10 L. Ed. 2d 215 (1963), and United States v. Agurs, 427 U.S. 97, 110-11, 96 S. Ct. 2392, 2401, 49 L. Ed. 2d 342 (1976), because those two cases addressed "plainly exculpatory" evidence, while Ferguson addressed a situation "wherein the existence of the destroyed videotape was known to the defense but where its true nature (exculpatory, inculpatory, or neutral) can never be determined." 2 S.W.3d at 915.

The court went on to explain that the first step in the analysis is determining whether the State had a duty to "preserve" the evidence. Id. at 917. "Generally speaking, the State has a duty to preserve all evidence subject to discovery and inspection under Tenn. R. Crim. P. 16, or other applicable law." Id. (footnote omitted). However,

> [w]hatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

Id. (quoting California v. Trombetta, 467 U.S. 479, 488-89, 104 S. Ct. 2528, 2533-34, 81 L. Ed. 2d 413 (1984)). Only if the proof demonstrates the existence of a duty to preserve and further shows that the State has failed in that duty must a court turn to a balancing analysis involving consideration of the following factors:

1. The degree of negligence involved;
2. The significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and
3. The sufficiency of the other evidence used at trial to support the conviction.

Id. (footnote omitted).

The record reflects that the petitioner was seized subsequent to petitioner's arrest in Johnson County, Indiana. The car had been reported stolen in late January 1997. The car was towed to the Johnson County Indiana Sheriff's Department. Upon a subsequent inventory search of the vehicle, law enforcement noticed a large dark stain on the back seat of the vehicle. Presumptive testing indicated the stain was blood. Samples of the stain were removed from the car and preserved for subsequent testing. Thereafter, the vehicle and the samples were transferred to the Memphis Police Department's custody. The samples were eventually sent to the TBI crime lab. The TBI determined that the stain was in fact blood and the items were sent

to the FBI for DNA comparison. It was eventually determined that the blood found on the seat samples was a match for the female offspring of the victim's mother.

On March 25 1997, the vehicle was released from police custody and sent to Southern Auto Salvage Auctions. Between the offense date and the time the vehicle was released, petitioner failed to file a motion to preserve the evidence. At the post conviction hearing, the petitioner presented the testimony of Marilyn Miller, an expert in forensics. With relation to the Honda Accord that was recovered as a result of petitioner's arrest, Miller testified it would be difficult for the defense to do their own testing after the vehicle was released from police custody. Miller testified that, prior to conducting DNA testing, a confirmatory test for human blood should have been conducted. However, she stated that many laboratories skip this step and go straight to species testing. Miller indicated that, although the better scientific process is to conduct each step of the testing, skipping the intermediate step does not invalidate the findings or impact the results of the overall analysis.

Miller asserted that the report prepared in relation to the testing failed to indicate what areas of the back seat showed the presence of human blood and failed to mention the negative results that were obtained from other areas of the vehicle. She stated that the TBI drawing of the back seat failed to show from where the samples had been collected. She asserted that the only areas designated on the drawing were the areas where the control samples had been taken. Miller argues that the failure to make such designations is particularly significant, given that the vehicle was released prior to petitioner's indictment.

First, this court finds the State was not required to preserve the entire vehicle. It was only required to preserve the samples taken from the vehicle. Also, this court finds such evidence would not be expected to play a significant role in petitioner's defense. Petitioner presented no

evidence and does not appear to even argue that the blood found in the vehicle could not be linked through DNA testing to the female offspring of the victim's mother. Rather, it appears the argument posed by petitioner is that the destruction of the car prevented him from challenging the state's position that the car back seat of the car was "covered in" or "saturated with" blood. As such, this court does not find that the destruction of the vehicle substantially hindered counsel's ability to present a defense. Moreover, it appears from the record that the police acted in good faith and apparently released the vehicle in conformity with established procedures. See State v. Brownell, 696 S.W.2d 362, 363-64 (Tenn. Crim. App. 1985); State v. Dowell, 705 S.W.2d 138, 141-42 (Tenn. Crim. App. 1985).

Given that samples were collected prior to the destruction of the vehicle, this court finds the evidence did not possess any exculpatory value that was apparent prior to its destruction. The TBI and FBI test results were available. Accordingly, police had no duty to preserve the evidence beyond the established procedures. Moreover, even if the State had a duty to preserve the entire vehicle and failed to do so, the petitioner has failed to demonstrate that his right to a fair trial was affected by the destruction of the evidence. See Ferguson, 2 S.W.3d at 917. "[T]he mere loss or destruction of evidence does not constitute bad faith." Edward Thompson v. State, No. E2003-01089-CCAR3-PC, 2004 Tenn. Crim. App. LEXIS 392, 2004 WL 911279, at *2 (Tenn. Crim. App. Apr. 29, 2004), perm. to appeal denied (Tenn. Oct. 4, 2004).

The second factor is the significance of the missing evidence. The defendant has not offered any proof that the State acted improperly in collecting or testing the samples. Despite Miller's argument that law enforcement skipped a step in the testing process, she further testified that this fact did not affect the ultimate conclusions. No evidence was presented supporting a conclusion that the samples had been the subject of tampering or had otherwise been mishandled.

The petitioner also failed to offer any evidence indicating the test results did not accurately reflect the contents of the samples that were taken from the back seat of the vehicle. Finally, because there is no indication that additional testing of the samples would have yielded results different from those found by the TBI and FBI, it cannot be said that evidence critical to the defense was excluded. As already noted, this court does not find the evidence was critical to the defense argument that the seat was not "covered," "soaked," or "saturated" with blood. The petitioner is not entitled to relief on this claim.

C. Inappropriate Motion Practice

Petitioner asserts that the prosecution filed motions in his case which contained false assertions. In particular, he asserts the prosecution misrepresented the evidence when they responded to 1998 counsels' request for exculpatory material. As noted above the stated responded to counsel's request by stating, "the state is unaware at this juncture of any information in possession of the State which would exonerate the defendant." Petitioner asserts that, at the time of making the statement, Assistant District Attorney General Tom Henderson had been personally advised by the Memphis Police Department that Sgt. James Darnell had identified Billy Wayne Voyles as one of the potential assailants. Additionally, petitioner asserts the prosecution misled resentencing counsel and the resentencing court when he responsed to resentencing cousnels' request for exculpatory material. Again, as noted above, Henderson responded to counsels' request by stating, "the state is not aware of any 'misidentification' in the case. It should be noted that the identification witnesses in this case are friends, co-workers and other acquaintances of the defendant." Petitioner argues that Henderson's assertions in this

regard obstructed trial counsels ability to investigate the facts of the case. Thus, he argues he is entitled to relief based upon the prosecutions misconduct.

A prosecutor commits misconduct by the use of deceptive or reprehensible methods to persuade either the court or the jury. See State v. Rimmer, 250 S.W.3d 12 (Tenn. 2008) (citing People v. Strickland, 11 Cal.3d 946, 955, 114 Cal. Rptr. 632, 523 P.2d 672 (1974)). Factors to be considered in the event of instances of prosecutorial misconduct are as follows:

> (1) The conduct complained of viewed in context and in light of the facts and circumstances of the case.
> (2) The curative measures undertaken by the court and the prosecution.
> (3) The intent of the prosecutor
> (4) The cumulative effect of the improper conduct and any other errors in the record.
> (5) The relative strength or weakness of the case.

Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976); see also State v. Buck, 670 S.W.2d 600, 609 (Tenn. 1984). The ultimate test for evaluating prosecutorial misconduct is "whether the improper conduct could have affected the verdict to the prejudice of the defendant." Judge, 539 S.W.2d at 344; see also State v. Chalmers, 28 S.W.3d 913, 917 (Tenn. 2000).

Initially, this court finds that Assistant District Attorney General Tom Henderson purposefully misled counsel with regard to the evidence obtained in the case. Although this court has found, above, that the evidence was available to counsel through diligent and competent investigation, this court finds that Henderson's assertions to 1998 trial counsel; resentencing counsel and the trial court both in 1998 and 2004 that no such evidence existed, greatly undermined counsel's investigation of the facts of petitioner's case. This court finds Henderson's statement to 1998 counsel that no misidentification had occurred; his claim in 2004 that the only identifications that were made in the case were the friends, co-workers and acquaintances of the petitioner; and his assertion both in 1998 and 2004 that he knew of no

evidence exonerating or exculpating petitioner was blatantly false, inappropriate and ethically questionable. Moreover, this court finds Henderson's conduct was purposeful. However, while this court finds Henderson's conduct may have violated his ethical duties as a prosecutor,[50] in evaluating the factors listed above, this court does not find petitioner is entitled to relief based upon Henderson's misrepresentations.

As noted above this court finds that the state was in possession of exculpatory evidence. However, the court also found that the State provided counsel, through discovery, with material that should have led counsel to discover the evidence favorable to the defense. In particular, as to 1998 counsel, Henderson provided counsel with the property receipts indicating that evidence had been collected in the form of signed photo-spreads. Although, Henderson informed counsel he was aware of no misidentifications in the case, counsel had an opportunity and an obligation to view the evidence in this case. Counsel's dereliction of that obligation is discussed in the next section of this court's order. While counsels' failures in this regard were certainly influenced by the prosecution's misleading assertions, because the evidence was actually available to counsel through diligent investigation, this court cannot find petitioner is entitled to relief based upon

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[50] The Tennessee Supreme Court has stated that

> A prosecutor is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that is shall win a case, but that justice shall be done.

State v. Culbreath, 30 S.W.3d 390 (Tenn. 2000) (citing Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). Additionally, Tenn. R. Sup. Ct. 8, EC 7-13 states:

> With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice; the prosecutor should make timely disclosure to the defense of available evidence, known to the prosecutor, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because the prosecutor believes it will damage the prosecutor's case or aid the accused.

Here, the court finds Henderson likely violated the rule. His comments to counsel and the court were both intellectually dishonest and may have been designed to gain a tactical advantage. Nevertheless as discussed, above, counsel is not entitled to relief based merely on a prosecutor's ethical lapse.

prosecutorial misconduct. However, it is worth noting that this court finds, in the instant case, the prosecution contributed to both 1998 and 2004 counsels' ineffective assistance.

D. Misconduct at Trial

Petitioner asserts the prosecution's presentation of witnesses and arguments to the jury served to paint a false picture of what the State knew the actual evidence to be. In particular, he contends, at his 1998 trial, the State inappropriately presented the case as a single perpetrator crime and knowingly directed Dixie Roberts to provide false testimony. Petitioner further asserts that at his 2004 resentencing proceeding, the prosecution inappropriately directed Sgt. Shemwell to provide false testimony.

As discussed, above, a prosecutor commits misconduct by the use of deceptive or reprehensible methods to persuade either the court or the jury. See State v. Rimmer, 250 S.W.3d 12 (Tenn. 2008) (citing People v. Strickland, 11 Cal.3d 946, 955, 114 Cal. Rptr. 632, 523 P.2d 672 (1974)). Again, the factors to be considered in the event of instances of prosecutorial misconduct are as follows:

> (1) The conduct complained of viewed in context and in light of the facts and circumstances of the case.
> (2) The curative measures undertaken by the court and the prosecution.
> (3) The intent of the prosecutor
> (4) The cumulative effect of the improper conduct and any other errors in the record.
> (5) The relative strength or weakness of the case.

Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976); see also State v. Buck, 670 S.W.2d 600, 609 (Tenn. 1984).

With regard to the prosecution's argument in support of their pursuit of a single perpetrator theory, this court finds, the prosecution was expressing a legitimate view of the

evidence and was presenting acceptable argument in support of their theory of the case. There are five general areas of potential prosecutorial misconduct related to jury argument:

> (1) It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw. (2) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or guilt of the defendant. (3) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury. (4) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict. (5) It is unprofessional conduct for a prosecutor to intentionally refer to or argue facts outside the record unless the facts are matters of common public knowledge.

Goltz, 111 S.W.3d at 6 (citations omitted). Prosecutorial misconduct during argument does not constitute reversible error unless it appears that the outcome was affected to the defendant's prejudice. See State v. Bane, 57 S.W.3d 411, 425 (Tenn. 2001). The court does not find the prosecution committed prosecutorial misconduct in their argument to the 1998 jury. The only applicable area of concern is area (1), outlined above, - did the prosecution intentionally misstate the evidence or mislead the jury about the inferences to be drawn from the evidence. This court finds they did not.

In relation to his 1998 trial, this court also finds the prosecution did not instruct Dixie Roberts to provide false testimony. At his 1998 trial, Dixie Roberts (Presley) testified that she and James Darnell[51] stopped at the Memphis Inn between 1:30 and 2:00 p.m. on the morning of February 8, 1997. She stated that the pair stopped at the Memphis Inn to obtain a map. Roberts testified that she saw a maroon car directly in front of the office with its trunk open. She stated that she remembered the vehicle because it was raining and she recalled thinking the trunk of the car was going to get wet.

[51] The witness initially misstated Darnell's name.

At the post conviction hearing, Roberts testified that on February 8, 1997 between 1:30 a.m. and 2:00 a.m. she and James Darnell stopped at the Memphis Inn to get a room and a map. She again testified about seeing the maroon car with its trunk open. Roberts also testified that she stayed in the car while Darnell went to get a room. She stated that subsequently Darnell returned to the car and indicated he had seen two men inside the lobby area and stated the men were intoxicated and had blood on their hands. Roberts stated that she could not recall if she was asked about Darnell's description of the two men at trial; but, stated that if the trial transcript reflected she was not asked; then, she has no reason to dispute the transcript.

Henderson also testified at the post conviction hearing. When asked about Roberts' testimony he stated that it was his recollection that Roberts' statement to police indicated that she and Darnell stopped at the Memphis Inn to get a map. Henderson further testified that, in his pretrial interview with Roberts, Roberts told him the pair stopped to get a map. This court finds the prosecution did not direct Roberts to lie and did not purposefully elicit false testimony. In fact, although Roberts 1998 trial testimony may have been incomplete, based upon her testimony at petitioner's post conviction hearing, it does not appear it was false.

Finally, this court addresses petitioner's claim that the prosecution directed Officer Shemwell to testify falsely. At petitioner's resentencing proceeding, the case coordinator, Sgt. Shemwell, testified on direct examination that petitioner was very quickly developed as a potential suspect in the victim's disappearance. However, he stated that law enforcement followed numerous leads throughout the course of the investigation. He explained:

> We had a composite drawing obtained from an individual who was there that night and saw a man behind the checkout counter, which he knew was not suppose to be there. We distributed that flyer and after that was distributed in the newspaper and the media, we started receiving calls from anybody that looked like him. And we did our best to attempt to locate any photographs, arrest histories of those individuals, whether they were local, or out of town. We would

> notify those police department or penal facilities, or anything, to locate photographs to put in a photo spread. And I think that I accumulated something like, I want to say, fifty-something photographs, a total of different people.[52]

He stated that the individual who provided the composite drawing was James Darnell. Shemwell testified that Darnell was in the military and was stationed in Hawaii. He stated that initially he did not speak directly with Darnell. He stated that Sgt. Bodding and Sgt. Wilkinson took Darnell's statement and assisted in obtaining the composites. However, Shemwell testified that later in the investigation he spoke with Darnell by phone.

At this point in the testimony there were a series of objections. Defense counsel, Paul Springer, stated:

> this particular witness . . . as based upon the records, as we have reviewed them, is the sole eye witness that was listed on the investigation. And he stated, based upon his discussions with the police officers that he saw two individuals, both with blood on their knuckles. One who was handing money to another individual through a door, or window of some sort. And that these individuals were there at around the same time that this crime was supposed to have been committed.[53]

Thereafter an offer of proof was made by defense counsel.

When asked to testify as to the description of the suspects Darnell had provided to law enforcement, Shemwell testified that "if your asking me height and weight, I can't recall. But I can advise that he gave us composite drawings of two individuals that he saw at the time that he went in to obtain a room that night."[54] He stated that Darnell indicated he was at the motel around 2:15 a.m. Shemwell testified that Darnell told officers, "one [of the men] was on the outside of the lobby area, where he was at. And the other [man] was on the other side of the

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[52] See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 98-01034, W2004-02240-CCA-R3-DD, *Transcript of Trial Proceedings,* Vol. 9, page 667.
[53] See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 98-01034, W2004-02240-CCA-R3-DD, *Transcript of Trial Proceedings,* Vol. 9, page 690.

[54] Id. at page 691-692.

window, where the cashier would have been." He stated Darnell "advised that it appeared to him that the one on the inside was giving the one on the outside, that was in front of him, money and change. Dollar bills and change." Shemwell stated Darnell told officers "he believed that he saw blood from both these individuals' hands . . . around the knuckles." Counsel asked Shemwell what specific description Darnell provided of the two individuals. He stated:

> I can't recall. I believe he said that the individual on the inside was about five seven, or five eight, medium built, brown hair. And I want to say that he said that he was wearing what he thought to be blue jeans, I want to say a black shirt, maybe. And maybe a blue jacket. The individual on the outside was wearing a tee-shirt and he believed, I think if I'm not mistaken, that he said was ripped, or torn around the shoulders. He had a strawberry blondish, long, kind of unkept hair.[55]

He stated that Darnell told officers he "thought these two individuals might have had a confrontation with each other." He further testified that Darnell believed the person on the inside of the office was the clerk. He stated that Darnell indicated that he saw blood on both of the individuals' hands.

Defense counsel asked Shemwell if he showed Darnell any photographs of potential suspects and Shemwell replied, "I want to say that I shipped, or the F.B.I. sent photographs that I compiled. I want to say that there was something, like, fifty-something photographs, of individuals who were named and Michael Rimmer's picture was in that group of photographs."[56] Shemwell stated that Darnell "identified Michael Rimmer and another individual as someone that looked familiar to him. But he did not positively identify him as being the one that was behind, or in front of him at the hotel."[57]

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[55] Id. at page 693.
[56] Id. at page 694.
[57] Id. at page 695.

Defense counsel asked Shemwell whether the "identification information" was included in his "investigative report," and Shemwell indicated "it should be."[58] He testified, "I believe it was sent back to us with a result from the F.B. I."[59] Counsel asked if he "had those reports" with him and Shemwell again indicated that "they should be in the file."[60] Shemwell was asked whether he could "refer to those reports" and tell the court "specifically what Mr. Darnell said with respect to that identification of Mr. Rimmer."[61] Again, Shemwell testified that, although he did not personally speak with Darnell until later in the investigation, the information regarding his identification "should be" in the file.[62]

At this point counsel asked for a recess so that Shemwell could review his reports "to see exactly what was said, regarding the identification of Mr. Rimmer." Assistant District Attorney General Henderson reminded the court that Shemwell did not take the witnesses statement or coordinate the photo array; thus, he would need to review the entire investigative file in order to accurately testify about Darnell's statements and any identifications made by Darnell. Shemwell stated,

> I'd have to go through the whole thing, Your Honor. There was a conversation with me and I think, Stumpy Roberson, Seargent Roberson was the one that handled that, Your Honor, with the F.B.I. and sent it out there. They were all Fed-Ex'd out to this individual, an F.B. I. agent in Hawaii.[63]

Thereafter, Shemwell was given an opportunity to review his file. Upon returning to the court Shemwell indicated that, during the recess he and Henderson went to the Shelby County District Attorney General's office and reviewed the entire case file. He stated that he could not locate a

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[58] Id.
[59] Id.
[60] Id.
[61] Id.
[62] Id.
[63] Id. at page 696.

supplement from Sergeant Roberson or from the F.B.I. regarding Darnell's identification. Shemwell testified as follows:

> Sgt. Roberson contacted the F.B.I., submitted that information [the photographs], I believe, to Agent Eakins here, locally. And she had already opened up a case file with the F.B.I. on the federal level, in order to do the blood work and other DNA evidence that we had. And she sent it to the agents in Hawaii for them to follow up. The photo-spreads of everyone that we could find photos on that was mentioned in any crime stopper, any informant information, or anybody's name that came up in the investigation.[64]

Henderson asked Sgt. Shemwell if he remembered whether he ever got a written supplement containing the results of the photo-spread and Shemwell stated, "no" and indicated that, after looking at the file, he did not find a supplement setting forth the results of the photo-spread.[65] Thereafter the following exchange occurred:

DEFENSE COUNSEL:	That is not all the records that we received to ascertain. I have a supplement that sets out the information provided to the police department during this investigation that was provided by the eye witness, James Darnell, and we're requesting that Officer Shemwell provide copies of the supplements from his investigative files, regarding the information gathered from James Darnell.
HENDERSON:	Isn't that what we were just talking about?
SHEMWELL:	I submitted everything that I have.
HENDERSON:	He's got the supplement. And for the records, I did go back and double check and it was furnished to his original counsel, along with all the crime stoppers and false lead information. So it's been around since 1998, at least.
COURT:	Furnished to the defense?
HENDERSON:	Yes sir. I keep a complete copy of everything that I've given to the defense. And Mr. Ron Johnson got it, along with all the other stuff.

. . . .

[64] Id. at page 700.
[65] Id.

DEFNESE COUNSEL: Judge, I don't quite understand counsel's position. We were appointed on this case to represent Mr. Rimmer in connection with this resentencing. We filed motions in connection with that appointment. We filed motions for exculpatory evidence. We got a response to those motions for exculpatory evidence and discovery motions and what have you. I didn't know that I am held accountable for documents that the Prosecutor's Office provided to Ron Johnson.

Obviously, we endeavored to gather all of the documents that we can. But, we haven't been provided any of this information by the Prosecutor's Office, since we have been on this case.

Quite frankly, the information that I have, the little bit that I have, regarding this particular subject matter, that being that of Jim Darnell, came from the defendant himself. I found no such information in the copies that I got from Mr. Johnson's office, or Mr. Scholl's office or the Skahan's office. We haven't been provided with it.

Now, if I'm held accountable for something that the Prosecutor's Office provided to some other counsel on this matter, during some other trial proceeding, I didn't know that I was being held accountable. I didn't know that. I didn't understand that that's the way the rules were. That once you provide it to some counsel, at some stage, that that also covers your obligation to provide that information to present counsel. If it does, then fine, but I didn't understand that.

COURT: Did you request from the Public Defender's Office, Mr. Johnson's file?

DEFENSE COUNSEL: I requested the file from Mr. Johnson. . . . . The documents were provided, how complete they were–

COURT: Okay. Did you request through the Skahan's who handled the appeal, what they had?

DEFENSE COUNSEL: I got – let me back up just a minute. We didn't request documents from Ron Johnson. . . . . I didn't request documents from the Public Defender's Office. I requested documents from Mr.

	Scholl. He was on the case before we were. . . . . Mr. Scholl had gathered documents for the P.D.'s Office and I went to Mr. Scholl's office and got everything he had.
COURT:	Where do you think your client got it?
DEFENSE COUNSEL:	From one of these counsels
COURT:	From Mr. Scholl.
DEFENSE COUNSEL:	Yeah, that's my understanding. . . . . Mr. Rimmer provided me with the little information that I do have, as it relates to this particular witness. . . . .
HENDERSON:	Your Honor, that's the only supplement that there is about Mr. Darnell. He thinks that there's a whole investigative file on it, there's not. There's a two page, or a page and a half supplement on it.
DEFENSE COUNSEL:	Well, the problem with that is that the copy that I got has got a couple or three lines that are not legible. On the copy that I have.
COURT:	See if Mr. Henderson has something.
HENDERSON:	Your Honor, if I thought that we were fighting over whether or not two lines were legible, we probably could have handled this some time ago. . . . . There is one sentence missing off the top of the second page. . . . .
COURT:	Okay. One line. Now, does that improve the document that you were given by your client?
DEFNSE COUNSEL:	Yes sir. . . . . We are ready to proceed.[66]

Thereafter, the defense cross examination of Shemwell continued. Shemwell identified the case "incident report" which he explained lists "people as to the possible relationship to the crime,

[66] Id. at pages 700-705.

whether or not that individual's involved, or they might be a witness. And if they're a witness, a witness to what. What they might be a witness to, or suspect information."[67] He acknowleged that next to James Darnell's name was a notation that read, "witness/eye."[68] Shemwell also identified a police supplement outlining Darnell's initial statement. The supplement contained the following information:

> 22:00 hours the writer received a call from a male white identifying himself as Jim Darnell, 32 years of age, date of birth 2-17-65. Social security number 414-94-2007, home address 7270 Stomford Drive, Germantown, Tennessee. Home phone number 754-2989, work . . . at this time, is in the Army stationed in Hawaii.
>
> Darnell advised that he and a female white, Dixie Roberts, went to the motel on 2-8-97 around 1:45 to 2:00 a.m. He pulled up in front of the check-out window, saw a male white bleeding from his hands and another male white on the other side of the check out glass and office area, with also, what appeared to be blood on his knuckles.
>
> He described the first male white outside the checkout window as being about 23 to 24 years of age, red hair, long, wearing a ball cap, orange, with a white adjustable band on the back, blue jeans and a tee shirt with the sleeves cut off, or rolled up.
>
> He was very drunk and had numerous freckles on his arms. The subject was described to have blood dripping from his knuckles.
>
> The second male white, who Darnell believed to have been the clerk, was described as being about 30 years of age, brown hair and mustache, long hair, wearing a dark colored jacket and blue jeans. The subject also looked as if his knuckles were bleeding, but not as bad as the first subject.
>
> Darnell stated that he stood there, but as he stood there he observed the male white, he believed to be the clerk, hand some money through the check out window to the other subject, both dollar bills and some change.
>
> He thought that the two had gotten into a fight and that the clerk was attempting to get the guy to leave, or give back his money.
>
> He did advise that it was strange that neither had any injuries to their face and weren't bleeding from anywhere other than their hands.

[67] Id. at page 707.
[68] Id.

> He advised that he became very uncomfortable and decided to leave and go somewhere else. When he got his car he did mention to Dixie that the two guys were bleeding from their knuckles and he had advised that he had just found out about the clerk missing from the hotel the day before and wanted to call before h left to Hawaii.
>
> Darnell further advised that he might be able to identify the two male whites that he saw in the motel on 2/8 of '97 if he saw them again.
>
> He further advised that there was a vehicle that was backed in front of the night enterence when he went inside. He described the vehicle as being a black, or a dark colored, possibly Toyota, with light colored interior, being a fairly newer model vehicle.
>
> Darnell advised that he could come to the homicide office in the morning and give a statement about what he observed. [69]

The supplement was dated February 13, 1997.

Defense Counsel asked Shemwell if there were any efforts made to determine if Darnell could identify the individuals that he saw on the evening of the murder. Shemwell testified:

> I had an investigator in my office get with the F.B.I. agent, who was assigned, had already opened a case with the F.B.I. office, regarding the DNA evidence, to contact the Hawaii office. Sent them all photographs of everyone that we have compiled through crime stoppers, T.F. & N. information. I think it's something like 50 something photographs. Sent them out to the agent in Hawaii to meet with Mr. Darnell. He viewed the photo-spread.[70]

Shemwell was asked if Darnell identified anyone "as being one of the individuals that he observed in the hotel on the evening in question."[71] To which Shemwell replied, "he could not positively identify anyone, no."[72] Shemwell testified that petitioner's photograph was included in the group of photos that were sent to Hawaii. Finally, Shemwell testified that, as the coordinator on this case, he was the person responsible for meeting with the D.A.'s office and discussing the evidence that the investigation has uncovered.

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[69] Id. at pages 719-721.
[70] Id. at page 722.
[71] Id.
[72] Id. at pate 722.

As set forth above in section "A.," above, at a hearing on petitioner's discovery motion and at the post conviction hearing, petitioner introduced the various communications between Agent Lee of the Honolulu F.B.I. field office, Sgt. Roberson and Sgt. Shemwell. Additionally, petitioner introduced the statement that was given by Darnell, who appeared in person at the Homicide Office, later in the day on February 13, 1997. The supplement outlining the statement was prepared by Officers Wilkinson and Bodding. Darnell again described the events as he had earlier relayed them to the officers. He also provided the following description of the individuals he'd seen at the Memphis Inn between 1:30 a.m. and 2:00 a.m. on the morning of February 8, 1997. He described the white male who followed him into the lobby as follows:

> M/W, mid-20's, 5'6", 150 lbs., mustache, neck-length, light red hair, freckles on his left forearm, orange and white baseball cap, white t-shirt with torn left sleeve, blue jeans, tennis shoes I believe, wristwatch on left arm.

He described the individual behind the clerk's counter as follows:

> White/Male, mid-30's, 5'7", 160 lbs., collar length brown hair, thin mustache, dark blue jacket, I'd say black collared shirt under the jacket (jacket was buttoned all the way up to the second button), he was bleeding from the knuckles on his left hand, kind of pale skin tone.

The supplement indicated that Darnell stated he got a very good look at the individual that was behind the clerk's desk. The bottom right corner of the document introduced by petitioner contains the following batestamp, "Rimmer DA File: 2004186."[73] Petitioner also introduced, what purports to be a police supplement prepared by Sgt. O.W. Stewart at 1:30 a.m. on 5-30-97. The heading of the document reads "Supsect #2 Identified/Voyles."[74] The relevant portions of the documents content are as follows:

[73] See Exhibit 6 to Post Conviction Hearing.
[74] See Exhibit 10 to Post Conviction Hearing.

> Sgt. O.W. Stewart, 7927 received a phone call from Sgt. R.D. Roleson[75], SSTF,[76] regarding a communiqué from Peter H. Lee, Honolulu, FBI. This writer was informed that a positive identification had been made by a Sergeant James M. Darnell, witness, identifying the male white that he saw at the Memphis Inn on Macon Road on the night of Febraury 8, 1997, as he entered to rent a room and this male white followed him into the motel and this male white had what appeared to be blood on his knuckles. This identification was made from photo spread "AA" and the photograph identified was in position #5. The person in this photograph had been identified as Billy Wayne Voyles, Jr., DOB: 7-27-97, H/A 6942 Tobin Dr, Bartlett, TN.
>
> Sgt O.W. Stewart pulled the B of I file #92849 from the Shelby County Records and Identification section as Sgt. T. Heldorfer did a warrant check on the above individual. Records indicate that Billy Wayne Voyles, DOB: 7-27-64, was arrested on 1-28-95 on aggravated robbery after he picked up male white from the sweet's four wheel lounge and while attempting to rob this male white, Billy Voyles stabbed this male white. This incident was filed under an assault report #950107328. Billy Wayne Voyles, Jr. was released on a $35,000.00 bond after being held to the state in General Sessions Court. Billy Voyles never returned to court and a capias warrant was issued for Billy Wayne Voyles, Jr., for the charge of Criminal Attempt, to wit: Especially Aggravated Robbery and Criminal Attempt, to wit: Murder First Degree on Indictment #95-04149 and Warrant #96087008.
>
> . . . . Officer Glenn was advised of the current warrant on Billy Wayne Voyles, Jr. and advised him that this Dept. would ascertain from the Attorney General's Office if extradition would be authorized and to have the warrant placed in the N.C.I.C. and requested officer Glenn to attempt to locate this subject for the Memphis P.D. . . . .
>
> Asst. A.G. Tom Henderson was notified of this development and he came to the homicide office and after a consultation he authorized extradition and sent this authorization to the fugitive squad for entry into the N.C.I.C.[77]

As previously discussed, the Darnell photo-spread identifying Voyles as the man who accompanied him into the Memphis Inn and F.B.I. 302 communiqués regarding the identification were located in the Shelby County Criminal Court Clerk's property room as part of the "residual" case file.

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[75] The resentencing transcript refers to Sgt. Roberson. This court finds that references to Sgt. Roberson are actually references to Sgt. Roleson.

[76] SSTF is the police abbreviation for the joint federal and state "Safe Streets Task Force."

[77] Exhibit 10 to Post Conviction Hearing

Shemwell and Henderson testified at the post conviction hearing. Both men acknowledged that they provided resentencing counsel and the resentencing court with misinformation regarding Darnell's ability to identify the individuals he saw on the night of the murder. Henderson testified that there were obviously documents available outlining the results of the police efforts. However, he stated that in the short time that he and Sgt. Shemwell had to review the file, he was unable to locate the documents. Shemwell testified that he was obviously mistaken when he informed the court, counsel and the jury that Darnell had not identified anyone. He stated that the resentencing proceeding occurred several years after the murder and his memory was faulty.

After reviewing the resentencing proceeding, it appears Shemwell was having considerable difficulty recalling some of the facts of the case. During the post conviction proceedings, Shemwell stated that once he received the signed photo-spread from the F.B.I. he placed it in an envelope, sealed it and checked it into the property room. He stated that he never actually viewed the documents provided him. He repeatedly stated that it was his recollection that Darnell had not made a positive identification. This court finds the fact that Shemwell never viewed the actual photo-spread that was signed by Darnell likely affected his ability to later recall that Darnell had actually made the identification. It was not that Shemwell could not recall the complicated details surrounding the showing of the photo-spread to Darnell; rather, he was only unable to recall the results of those efforts. By the time the documents were received by Shemwell, police had honed in on petitioner as the only suspect in the case. It is possible, Shemwell simply disregarded the Darnell identification and seven years later was unable to recall a fact to which he had placed little significance. Thus, this court does not find Shemwell purposefully misled resentencing counsel or the resentencing court.

Thus, the only remaining issue is whether A.D.A. Henderson knowingly elicited false testimony or failed to correct false testimony. A review of the resentencing proceedings indicates Henderson had a very good recollection of evidence and facts in petitioner's case. Henderson should have known about the results of the photo-spread as he was certainly informed of them by law enforcement. Moreover, as noted in section "A." above, the prosecution had a responsibility to turn these items over to counsel and the prosecution misled counsel about the availability of this evidence. However, based upon the testimony of Henderson and officer Shemwell; and, given that the murder occurred some seven years prior to the resentencing proceeding, this court finds petitioner has failed to establish the prosecution purposefully misled counsel, the court and the jury. He is not entitled to relief based upon this claim.

E. Failure to Ensure Petitioner Received a Fair Trial

Petitioner contends the prosecution knew that his original trial counsel, Ron Johnson, had an overburdened case load and a conflict of interest that would preclude his competent representation of petitioner, namely that Johnson had been appointed judicial commissioner and that the Shelby County Public Defender's Office had previously represented Billy Wayne Voyles. He asserts the prosecution had a duty to inform Johnson about the possible conflict that resulted from his Office's prior representation of Voyles; had a duty to inform the court about the potential conflict resulting from Johnson becoming a judicial commissioner; and, had a duty to make concessions in setting the case for trial based upon the prosecution's knowledge that Johnson carried a heavy case load.

As previously noted, this court finds the prosecution inappropriately hid the Voyles identification from trial counsel. However, there was reference to Voyles in the materials that

the State did provide to counsel. Thus, this court does not find that the prosecution had a duty to discover that the Shelby County Public Defender's represented Voyles. Moreover, even if this information were known to the prosecution, this court does not find that the State had an obligation to raise this issue either with counsel or the court. Likewise, this court finds the prosecution had no burden to inform the court that trial counsel had become a judicial commissioner. Finally, this court does not find that the prosecution had an obligation to join in defense counsel's motion to continue the trial based upon trial counsel's overburdened case load. Moreover, this court does not find the prosecution had a duty to delay the case on their own initiative to accommodate counsel's schedule. Therefore, this court does not find petitioner is entitled to relief based upon these claims.

Ineffective Assistance of Trial Counsel

Petitioner contends his rights under Article I, §§ 8, 9, and 16 of the Tennessee Constitution, and Amendments VI, VIII, and XIV of the United States Constitution were violated by counsel rendering ineffective assistance at both his 1998 and 2004 capital sentencing proceedings. In support of his contentions, petitioner raises several allegations of deficient performance.

To succeed on a challenge of ineffective assistance of counsel, the petitioner bears the burden of establishing the allegations set forth in his petition by clear and convincing evidence. Tenn. Code Ann. §40-30-110(f). The petitioner must demonstrate that counsel's representation fell below the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Under Strickland v. Washington, 466 U.S. 668, 687, 104

S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), a petitioner must establish (1) deficient performance and (2) prejudice resulting from the deficiency. Thus, when a defendant seeks relief on the basis of ineffective assistance of counsel, he must first establish that the services rendered or the advice given was below "the range of competence demanded of attorneys in criminal cases." Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Second, he must show that the deficiencies "actually had an adverse effect on the defense." Strickland v. Washington, 466 U.S. 668, 693, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984). There must be a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. Id. at 694, 104 S. Ct. at 2068; see Best v. State, 708 S.W.2d 421, 422 (Tenn. Crim. App. 1985). Should the defendant fail to establish either factor, he is not entitled to relief.

The petitioner is not entitled to the benefit of hindsight, may not second guess a reasonably based trial strategy, and cannot criticize a sound, but unsuccessful, tactical decision made during the course of the proceedings. Adkins v. State, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). Moreover, when evaluating an ineffective assistance of counsel claim, the reviewing court should judge the attorney's performance within the context of the case as a whole, taking into account all relevant circumstances. Strickland, 466 U.S. at 690; State v. Mitchell, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The reviewing court must evaluate the questionable conduct from the attorney's perspective at the time. Strickland, 466 U.S. at 690; Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). In doing so, the reviewing court must be highly deferential and "should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Burns, 6 S.W.3d at 462.

Defendant in a criminal case is not entitled to perfect representation, only constitutionally adequate representation. Denton v. State, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). In

other words, "in considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.'" Burger v. Kemp, 483 U.S. 776, 794, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987) (quoting United States v. Cronic, 466 U.S. 648, 665 n.38, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)). Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. Williams v. State, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. House, 44 S.W.3d at 515 (citing Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996)). Notwithstanding, it is the duty of this court to "search for constitutional [deficiencies] with painstaking care" as this responsibility is "never more exacting than it is in a capital case. Burger v. Kemp, 483 U.S. 776, 785.

Strategic 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. . Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary. Thus, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation. House, 44 S.W.3d at 515.

With respect to the prejudice prong of ineffective assistance of counsel, a showing that "errors had some conceivable effect on the outcome of the proceeding" is insufficient. Id. at 693, 104 S. Ct. at 2067. Rather, the defendant must show there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A

reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S. Ct. at 2068. In assessing the claim of prejudice, the "court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law." Id., 104 S. Ct. at 2068. The reviewing court must consider the "totality of the evidence before the judge or jury" and should take into account the relative strength or weakness of the evidence supporting the verdict or conclusion. Id. at 695, 104 S. Ct. at 2069. A failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim. Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996) (citing Strickland, 466 U.S. at 697, 104 S. Ct. at 2069). It is unnecessary for a court to address deficiency or prejudice in any particular order, or even to address both if the petitioner make an insufficient showing on either. Strickland, 466 U.S. at 697, 104 S.Ct. at 2069.

I. Representation at Initial Trial and Sentencing

Petitioner asserts his trial counsel at his 1998 trial were ineffective for failing to: (1) maintain an appropriate caseload; (2) withdraw based upon a conflict of interest; (3) investigate the facts of his case and develop a theory of defense; (4) challenge the State's proof relating to *corpus delicti*; (5) conduct an adequate *voir dire* of the jury; (6) challenge the introduction of improper evidence and preserve *Brady* claims; (7) subject the state's witnesses to cross examination and present defense witnesses on his behalf; (8) rebut the aggravating evidence and present mitigating evidence; and (9) preserve claims of ineffective assistance of counsel for appeal. This court has addressed each of petitioner's claims individually. Upon review of

petitioner's allegations, this court finds petitioner's 1998 counsel did indeed provide ineffective assistance during the guilt phase of petitioner's trial.

This court finds 1998 counsels' representation of petitioner fell below the objective standard of reasonableness required of counsel in capital cases. See Strickland v. Washington, 466 U.S. 668, 687-88 (1984). This court further finds that petitioner was prejudiced by counsel's ineffective assistance to the point that the verdict rendered in his case is not reliable. Id. at 687. The following analysis of petitioner's claims sets forth the specific deficiencies and prejudice found by this court with regard to the representation provided to petitioner by his 1998 trial counsel:

A. Counsel's Case Load

Petitioner's assertion that counsels' caseload was such that it precluded adequate representation of petitioner is two-fold. First, petitioner asserts lead counsel, assistant public defender Ron Johnson, had a case load that was so heavy as to preclude adequate and timely representation of petitioner. Secondly, petitioner asserts the Shelby County Public Defender's Office failed to provide in any meaningful manner second chair counsel to assist Johnson in the investigation and preparation of his case. He argues that attorney Johnson was the only counsel consistently working on petitioner's case. Petitioner argues that the tasks required for preparation of his case were too burdensome for one attorney to complete. Post conviction counsel further argue that attorney Thackery's late entry into the case hampered her ability to establish a sufficient relationship with petitioner.

With regard to these claims and the claims discussed in the subsection B. of this section, relating to Johnson's alleged conflict of interest, petitioner asserts that, if the court finds counsel

was ineffective in this regard; then under the analysis set forth in United States v. Cronic, 466 U.S. 648 (1984), the court should presume prejudice has been established. In Cronic the Court identified three situations where a presumption of prejudice is appropriate based upon counsels' actions. The first area requiring a presumption of prejudice involves a situation where a defendant is completely denied access to counsel at a "critical stage" of the proceedings. Cronic, 466 U.S. 659. The second involves a situation where counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing." The third situation requiring a presumption of prejudice involves instances where, "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct at trial." Id. (citing Powell v. Alabama, 287 U.S. 45 (1932)). Petitioner relies upon this third category to support his assertion that this court should presume counsel was ineffective.

It is axiomatic that our criminal justice system demands that every defendant threatened with a loss of liberty be represented at trial and on appeal by competent counsel. See Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); Douglas v. California, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963). Assigning an attorney incapable, for whatever reason, of providing effective assistance at these stages violates a defendant's constitutional rights. Id. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063-64, 80 L. Ed. 2d 674 (1984). Timely appointment and opportunity for adequate preparation are absolute prerequisites for counsel to fulfill his constitutionally assigned role of seeing to it that available defenses are raised and the prosecution put to its proof." Brescia v. New Jersey, 417 U.S. 921, 924, 94 S. Ct. 2630, 41 L. Ed. 2d 227 (1974)(Marshall, J., dissenting). Indeed, the United States

Supreme Court has held that a state's obligation to provide counsel is "not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." Powell v. Alabama, 287 U.S. 45, 71, 53 S. Ct. 55, 77 L. Ed. 158 (1932). In the words of Justice Thurgood Marshall, it is an accepted principle that" 'the defendant needs counsel and counsel needs time.'" Hawk v. Olson, 326 U.S. 271, 278 [66 S. Ct. 116, 90 L. Ed. 61] (1945).

Specifically, petitioner asserts that Ron Johnson's case load was such that he was unable to provide effective assistance to counsel. Petitioner contends that, given that trial was initially set four months after the appointment of counsel, there was no way Johnson could have adequately prepared for his case especially in light of the fact that Johnson was currently representing at least sixteen other defendants charged with first degree murder, six of whom had pending trial dates. Petitioner argues that Johnson informed the court that he could not meet his ethical obligations to petitioner in the time frame set forth by the court; thus, the court's refusal to continue the case in essence required him to proceed with ineffective counsel. Therefore, he asserts Cronic applies because the trial court's actions coupled with counsel's untenable work load led to a circumstance whereby even competent counsel could not provide effective representation. This court disagrees. Rather, the court finds petitioner's allegations should be evaluated under the traditional two-prong Strickland analysis.

At the post conviction hearing, petitioner presented evidence demonstrating that lead counsel, Ronald Johnson, was handling twenty-one first degree murder cases during the time in which he was appointed to represent petitioner. An affidavit prepared by Johnson in association with his motion to continue the June 22, 1998 trial date showed that he had five pending first

degree murder trials which were set within three months of petitioner's trial.[78] Johnson testified at the post conviction hearing that four of those cases were cases in which the state had filed a notice indicating it intended to seek the death penalty. Additionally, Johnson's affidavit indicates he was handling nine other cases, some of which were capital, which had not yet been set for trial.[79] In addition to these cases, Johnson testified at the post conviction hearing that he had responsibilities as second chair counsel in several other capital cases. The affidavit prepared by Johnson in support of his motion to continue stated that Johnson felt he had not had time to adequately prepare for petitioner's trial.[80] Johnson further informed the trial court on the record that if he was forced to proceed without being adequately prepared, he would be ethically obligated to resign from the Shelby County Public Defender's Office. Subsequently, the trial court denied Johnson's motion to continue but granted his oral motion for permission to appeal.[81]

As a result of counsel's appeal of the trial court denial of the defense motion to continue, counsel was provided an additional four and a half months to prepare petitioner's case for trial. During this time second chair counsel left the Shelby County Public Defender's Office and new second chair counsel was appointed. Dianne Thackery testified at the post conviction hearing that she was assigned by the office to assist Johnson approximately two months prior to petitioner's trial. She stated that petitioner's case was her first capital case. Thackery testified that Johnson had built a rapport with petitioner and indicated Johnson handled much of the preparation and presentation of petitioner's case; however, she stated that she did assist on the case.

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[78] See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 97-02817, 98-01033-34, W1999-00637-CCA-R3-DD, *Technical Record,* Vol. 2, *Motion to Continue* and attached affidavit at page 173-176.
[79] Id.
[80] Id.
[81] See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 97-02817, 98-01033, 34, *Technical Record,* Vol. 2, Division 6 Minute entry for Monday June 22, 1998, at page 178.

Johnson's handling of nearly a dozen pending capital cases at one time in addition to several other first degree murder cases clearly had the potential to lead to ineffective representation. Certainly, Johnson's case load may offer insight into why certain investigation was not done and the failure to conduct certain investigations or complete certain tasks may well serve as a basis for finding counsels' performance was not effective. However, this court finds mere case load, alone, is simply not sufficient to support petitioner's assertion that counsel was ineffective and that prejudice should in fact be presumed. Rather, this court finds that, under Strickland, a petitioner seeking relief based upon counsel's overburdened case load must demonstrate with specificity how counsel's caseload led to ineffective assistance in his/her case. In other words, in order to prevail on such claims, petitioner must demonstrate counsel failed to adequately investigate; failed to file pretrial motions or fulfill certain other routine duties expected of attorneys representing criminal defendants; missed deadlines or failed to show up for court proceedings; or otherwise failed to provide competent and timely representation to petitioner.

This court does not find trial counsels' self assertions of ineffective representation require this court to conclude counsel were ineffective or that petitioner was prejudiced by counsel's case load. While self-critical analysis by counsel may be helpful in assessing the effectiveness of counsel's representation, counsel who are disappointed with the results of a trial can always conceive, on reflection, of something different that could have been done. Thus, counsel's statements of remorse after losing a contested proceeding are not sufficient to establish ineffective assistance under the high Strickland standard. Likewise, this court finds counsels' assertion prior to trial that they were unable to fulfill their obligations to their client is simply insufficient to establish counsel's subsequent representation was deficient.

This court has given considerable weight to Dr. Lefstein's lengthy, yet, informative testimony regarding the acceptable case load for public defenders handling capital cases. There is no question that counsel for petitioner was handling an enormous caseload, far beyond what this court considers and what the prevailing professional standards at the time considered manageable. The burden of this caseload rested not only on attorney Johnson; but, on the investigative staff that made up the remainder of petitioner's team. It appears that the entire capital team may have been assisted by only one fact investigator. However, this court finds Lefstein's recommendations and assertions regarding an acceptable workload are in most respects simply unworkable. Moreover, this court finds that in some instances counsel may be able to manage such a case load and still provide effective representation. Members of the defense team may be able to adequately assist counsel in the preparation of the case. The time for preparing a matter for trial is different in every case. Some fact investigations may be minimal. Mitigation is not always complex. Thus, in order to warrant relief based upon this claim, as mentioned above, a petitioner needs to present more than mere evidence showing that a lawyer had an overwhelming caseload. Here, petitioner has met that burden.

As discussed in more detail in this order, it appears counsel's overburdened case load caused both counsel and the auxiliary members of the defense team to conduct a seriously deficient investigation of petitioner's case. Although the trial court's grant of counsels' request for permission to appeal his denial of a continuance, gave counsel over four additional months to prepare for petitioner's trial, it appears little additional investigation and preparation was conducted in petitioner's case. Moreover, from counsel's affidavit it appears that in the time from June 1998 to November 1998, lead counsel was responsible for preparing four other capital cases for trial and had numerous other first degree murder cases, some of which were capital

cases that were in various stages of litigation. During this time counsel directed fact investigator Nally to investigate and/or interview all of the state's ninety witnesses. However, few of the witnesses were ever contacted by Nally. Of those witnesses who were not located, were James Darnell and Dixie Roberts, the two "eyewitnesses" to the murder. As discussed elsewhere in this order, the failure to interview Darnell was devastating to petitioner's defense and led to a trial in which the jury never heard that an individual the prosecution described as an "eyewitness" had seen an individual place a heavy object in the open trunk of a Honda Accord outside the Memphis Inn in the early morning hours of February 8, 1997. The jury never learned that Darnell had later identified the individual from a photo lineup and never heard that the individual was known as Billy Wayne Voyles. The jury also never heard that Darnell failed to identify the petitioner as one of the men he saw at the Memphis Inn on the night of the murder.

While these issues are discussed in more detail later in this order, this court cannot conclude that attorney Johnson's heavy caseload and attorney Thackery's late entry into the case did not contribute to the failure of counsel to properly investigate petitioner's case. Therefore, this court finds counsel were ineffective in failing to maintain an appropriate caseload. This court is mindful of the enormous burden carried by public defenders in this country, this state and in particular in Shelby County. This court does not find that attorneys Johnson or Thackery purposefully neglected petitioner's case. Clearly, counsel were overwhelmed by the enormity of their case load. Nevertheless, this court is constrained to find that, in the instant case, counsels' inability to more effectively manage their caseload prejudiced petitioner. The exact nature of the prejudice is discussed in more detail in other sections of this order. As it relates to this issue, the court finds the enormity of counsel's caseload at the time of petitioner's trial sets the backdrop upon which this court has examined the petitioner's specific allegations of inadequate

representation and certainly adds credibility to petitioner's claims that counsel failed to adequately prepare his case for trial. Thus, begins the court's review of petitioner's additional allegations of ineffective assistance of his 1998 trial counsel's representation at both the guilt and sentencing phases of his trial.

B. Conflict of Interest

In addition to asserting Johnson's heavy case load mandates a presumption of prejudice, petitioner asserts that Johnson had a conflict of interest which also requires the court to presume prejudice under the Cronic standard. Specifically, petitioner asserts that because Johnson was appointed on September 29, 1998, approximately five weeks prior to petitioner's trial, to the post of Shelby County Judicial Commissioner he should have disclosed to the court and petitioner that he had a conflict of interest that precluded him from continuing his representation of petitioner and should have sought to withdraw from the case based upon that conflict. Again citing Cronic, petitioner contends that Johnson's failure to disclose this conflict and/or withdraw from the case establishes that the likelihood that Johnson, even if found competent, could provide effective assistance is so small that the presumption of prejudice is appropriate in this case. Again, this court does not agree.

In Shelby County the Judicial Commissioners are responsible for the issuance of arrest and search warrants upon a finding of probable cause; issuance of mittimus; appointing attorneys for indigent defendants in general sessions cases; setting and approving bonds and the release on recognizance of defendants in general sessions cases; and, setting bond for the circuit court judges and chancellors in cases involving violations of orders of protection between the hours of nine o'clock p.m. (9:00 p.m.) and seven o'clock a.m. (7:00 a.m.) on weekdays, and on weekends,

holidays and at any other time when the judge or chancellor is unavailable to set bond. See Tenn. Code Ann. §40-1-111.

At the post conviction hearing, attorney Johnson testified that in September of 1998, approximately one month prior to petitioner's trial, he was appointed to the newly created post of Judicial Commissioner. He stated that at the time of his appointment there were three Judicial Commissioners. Johnson testified that the three commissioners shared responsibilities and indicated that his obligations were primarily in the evening hours. He stated that he did not inform petitioner of his appointment and indicated he did not consider his service as Judicial Commissioner to be in conflict with his representation of petitioner. This court agrees.

Not withstanding petitioner's arguments about counsel's duties both as an Assistant Public Defender and as Judicial Commissioner interfering with petitioner's ability to adequately prepare and present his case, this court finds nothing about Johnson's actions as Judicial Commissioner were in conflict with counsel's representation of petitioner. Moreover, Tennessee Supreme Court Rule 10, Cannon 5, section (G) states that a judge has one hundred and eighty (180) days to wrap up their practice after assuming office. Petitioner's trial occurred less than thirty days after Johnson's appointment. Thus, this court finds counsel complied with his ethical obligations. Therefore, petitioner is not entitled to relief based upon this claim.

However, as it has with Johnson's Public Defender case load, when evaluating petitioner's specific allegations of ineffective assistance this court has considered the time constraints and additional obligations such a position would have placed on Johnson in the weeks leading up to and during petitioner's trial. It is clear from communications between Johnson and his fellow Judicial Commissioners that Johnson had some responsibilities as a Judicial

Commissioner during petitioner's trial.[82] Thus, this court has considered whether Johnson's added responsibilities as Judicial Commissioner effected his ability to adequately prepare for petitioner's trial or present a defense at both the guilt and sentencing phases of petitioner's trial. Those issues are discussed more fully below.

C. Investigation of Petitioner's Case and Presentation of a Theory of the Case

Petitioner asserts counsel failed to conduct an adequate investigation of his case. He contends counsel's failure to investigate the case also led to a failure by counsel to develop and present a theory of the case. First, petitioner asserts the witness descriptions of the two assailants do not resemble his description. He contends counsel should have reviewed the composite sketches prepared in the case and investigated other potential subjects matching the description of the assailants provided by the witnesses in the case. Specifically, petitioner argues counsel were ineffective in failing to interview James Darnell and Dixie Roberts (Presley). Second, petitioner asserts counsel failed to investigate the possible involvement of Billy Wayne Voyles and Raymond Cecil, Jr. in the murder. Finally, petitioner asserts the defense investigator only interviewed a "handful" of the ninety witnesses provided to the defense by the State in discovery and conducted the majority of those interviews by phone, a method petitioner asserts is unreliable.

Counsel's duty to investigate and prepare derives from counsel's basic function "to make the adversarial testing process work in the particular case." Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). Counsel's duty to investigate all reasonable lines of defense is most strictly observed in capital cases. Although trial counsel is afforded great deference over matters of trial strategy, the decision to select a trial strategy must be

[82] See Exhibit 48 to Post Conviction Hearing.

reasonably supported and within the wide range of professionally competent assistance. Strickland, 466 U.S. at 690. "Viewing the performance of counsel solely from the perspective of strategic competence, the reviewing court must find that defense counsel made a significant effort, based on reasonable investigation and logical argument, to present the defendant's case ably to the jury." See McKinney v. State, 2010 Tenn. Crim. App. LEXIS 219, 97-98 (Tenn. Crim. App. Mar. 9, 2010). "An attorney is not ineffective merely because he fails to follow every evidentiary lead. However, a strategic decision is not reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." Id at 98.

This court finds counsel provided ineffective assistance by conducting an inadequate investigation of petitioner's case. This court further finds petitioner has established he was prejudiced by counsel's inaction. Given that the defense did not interview critical witnesses; did not follow up on information provided them by petitioner; did not conduct an independent investigation of the facts; and, made no effort to view the evidence in the case, this court finds counsels' inaction was so egregious as to deprive petitioner of a fair trial. See Strickland, 466 U.S. at 687.

This court notes that it also finds, as discussed above, that the investigation of petitioner's case was greatly hindered by the prosecution's failure to timely provide counsel with exculpatory evidence. Petitioner made a proper request for exculpatory evidence, including evidence of any misidentification and was informed by the prosecution that no such identification had occurred in the case and that the state was not in possession of any exculpatory evidence. However, this court finds that other evidence which could have been used to attack the credibility of the state's witnesses and challenge the state's theory of the case was available to defense counsel had a proper investigation of the case been conducted. Thus, the court cannot lay the blame for the

failure to discover pertinent evidence solely at the feet of the prosecution. Rather, this court finds it is the collective failure of both defense counsel and the prosecution in this case which renders the verdict in this matter unreliable.

At issue is counsel's failure to interview witnesses James Darnell and Dixie Roberts and counsel's failure to discover that Darnell had given a statement to police in which he described two individuals who did not match the description of the petitioner and that was later shown a photographic lineup in which he picked out an individual, identified as Billy Wayne Voyles, who Darnell indicated was one of the individuals he saw at the Memphis Inn on the night of February 8, 1997. As discussed in the section of this order addressing prosecutorial misconduct, it appears counsel were never directly provided by the prosecution a copy of the police supplement outlining Darnell's initial statement to police; Darnell's official statement to police; a copy of the signed photo-spread in which Darnell identified Voyles, but failed to identify the petitioner; a MPD supplement outlining Darnell's identification of Voyles; or, an F.B.I. 302 form outlining the Darnell's identification of Voyles. Thus, the question that remains is whether counsel could have and should have, through independent investigation, obtained the facts which are the subject of the undisclosed documents. This court finds counsel had such an obligation and their utter dereliction of that obligation resulted in a trial that was not fair and a verdict that is not reliable. Therefore, this court finds petitioner is entitled to a new trial.

Despite the court's finding that the prosecution did not provide counsel with the items discussed above, this court finds the following evidence was available to counsel and was either not investigated or not presented at trial:

1. information provided in discovery regarding crime stoppers tips, which includes information that an individual called the tip line and told authorities that he could identify

the individuals depicted in police composite sketches as Billy Wayne Voyles and Raymond Cecil, Jr.[83];

2. property receipts which were provided to counsel in discovery and which listed items located in the Shelby County Clerk property room and included the notation, "signed photo spread;" and "photo spread drawings."[84]

3. a witness list provided to counsel by the prosecution in which the names James Darnell appears with the notation "witness – eye";[85]

4. the composite sketches as prepared as a result of Darnell's description of the suspects which were published in *The Commercial Appeal.*[86]

In addition to investigating these items, counsel should have located and interviewed James Darnell and Dixie Roberts. Moreover, counsel should have conducted their own investigation into Voyles and his possible connection to the victim. This court finds that counsel's failure to investigate the items listed above or to interview eyewitnesses, James Darnell and Dixie Roberts, resulted in the presentation of an incomplete defense.

Exhibit 27 to the Post Conviction Hearing is a copy of a group of documents provided to counsel during discovery which outline crime stoppers tips received in petitioner's case. Contained in the documents is a notation from February 28, 1997 indicated that, after the release of the composite drawings to the media, Memphis Police were contacted by Arkansas State Trooper, Jackie Clark, who informed them that he had received information from an individual named Johnnie Whitlock in relation to the Ellsworth murder. Clark informed officers that Whitlock claimed the men in the composite drawing were Billy Voyles and Raymond Cecil, Jr.

[83] See Exhibit 27 to Post Conviction Hearing
[84] See Exhibit 35 to Post Conviction Hearing
[85] See Exhibit 35 to Post Conviction Hearing
[86] See Exhibit 35 to Post Conviction Hearing

At the post conviction hearing, Shemwell testified that based upon this tip Voyles was included in the photo-spread that was ultimately shown to Darnell. Despite having received this information in discovery, counsel never followed up with an independent investigation into Voyles or Cecil. Thus, counsel never learned that Voyles had previously been charged with robbing and stabbing a man and never learned that, when questioned by the police in connection with the Ellsworth investigation, Voyles provided Cecil as one of his alibi witnesses.

Exhibit 35 to the Post Conviction Hearing is a packet of discovery that was provided to 1998 counsel by the prosecution. One of the documents in Exhibit 35 is a copy of a property receipt number 429623. At the post conviction hearing, Assistant Attorney General Henderson testified that the receipt was included in the state report. Henderson testified that the receipt was filled out by Detective Shemwell and the document indicated the property was located at 201 Poplar. The receipt listed the following items: "signed photo spread; photo spread vehicle photos; photo spread weapons photos; photo spread drawings." Henderson testified that a copy of the receipt was turned over to defense counsel, Ron Johnson, as part of discovery. He indicated the state's providing the receipt was the state's way of letting the defense know what was in property room so that they could view the items if they wanted to see them.

Both 1998 counsel testified that they did not go to the property room and view the evidence. Attorney Johnson testified that he relied upon attorney Henderson's response to his request for exculpatory evidence and believed that based upon Henderson's response, that no identification had been made. This court has addressed Henderson's actions elsewhere in this order. However, regardless of the prosecution's conduct, this court finds that, upon being provided this information, counsel had an obligation to view the evidence. The failure to conduct any meaningful investigation into the facts and circumstances of the offense in a capital

murder trial is objectively unreasonable and falls below the level of representation required under Strickland. This court cannot conceive of a situation in which it is acceptable for counsel in a capital murder trial to refrain from viewing the evidence available to them. As both attorney Leifstein and attorney Skahan testified, it simply is not within the realm of acceptable representation in a capital case. Due to counsel's failure to view the evidence in this matter, counsel failed to discovery evidence that could have established an "eye" witness identified an individual who was not the petitioner.

Exhibit 27 also contained a list of witnesses. The witness list contained in the exhibit had various notations relating to the listed witnesses. The document lists Dixie Lee Roberts and James Darnell, Jr. and beside the names appears the notation, "eye witnesses." This document is part of the documents provided to 1998 counsel in discovery. Despite having received a document in discovery identifying Roberts and Darnell as eyewitnesses to the crime, it appears counsel did not interview either Roberts or Darnell. Although defense investigator Nally testified that he attempted to interview Darnell, it appears his efforts were minimal.

Finally, while it is unclear whether counsel received copies of the composite drawings from the prosecution, the composite drawings were available to counsel by virtue of having been published in the *The Commercial Appeal*. Counsel failed to investigate the circumstances under which the drawings were prepared. By failing to further investigate, counsel failed to discover that Darnell had identified Voyles, whose line up photograph closely resembled one of the composite sketches.

A review of Officer Shemwell's 1998 testimony is critical to this court's review of the impact of counsel's failure to investigate. Sgt. Shemwell was the case officer for the homicide of Ricci Ellsworth. At petitioner's 1998 trial, Shemwell testified that shortly after the discovery of

the bloody scene at the Memphis Inn, the victim's husband informed them that the petitioner may have been involved in the victim's disappearance. Previous testimony presented at trial described prior violent acts committed by the petitioner against the victim. Additionally, previous witnesses had testified that the petitioner had threatened to kill the victim. Shemwell testified that petitioner was subsequently arrested in Franklin, Indiana.

On cross examination of Shemwell, defense counsel questioned the witness about the transport of the vehicle from Indiana to Memphis; about fingerprints taken at the Memphis Inn; and, about whether the police initially designated the crime a kidnapping or a homicide. Neither Shemwell nor any other officer was questioned about the statement given by Darnell, the composite photographs Darnell assisted police in developing; or, Darnell's identification of Voyles and/or failure to identify the petitioner. Additionally, Dixie Roberts was not questioned about her knowledge as to whether Darnell had provided a statement to police or identified anyone in the course of the police investigation into Ellsworth's murder. This court notes that neither O.W. Stewart; Agent Lee; nor, Sgt. Roleson testified at petitioner's 1998 trial.

Due to counsels' failure to investigate the facts and circumstances of his case and to interview pertinent witnesses, petitioner's 1998 jury never heard that James Darnell witnessed two white males at the Memphis Inn in the early morning hours of February 8, 1998. The jury did not learn that Darnell told police that both men had blood on their hands. At the post conviction hearing Darnell testified he told the police that, when he arrived, he noticed a man putting a heavy object wrapped in a comforter into the open trunk of a Honda Accord which was backed up to the office door of the Memphis Inn. Due to 1998 counsels' failure to interview Darnell the jury never heard this testimony. The jury also never learned that Darnell identified the man, who he stated made him "uncomfortable," from a photo line-up. The jury did not hear

testimony that the line-up Darnell was shown including a photograph of petitioner. The jury never learned that Darnell did not identify petitioner as one of the men he had seen; but, rather picked out an individual identified as Billy Wayne Voyles. Additionally, the jury did not hear testimony regarding the fact that the Memphis Police were informed by an Arkansas State Trooper that he had received a call from an individual who identified the two men depicted in the composite sketches Darnell helped to create as Billy Wayne Voyles and Raymond Cecil, Jr. The jury did not hear testimony from law enforcement regarding their interview with Voyles, in which Voyles provided the name of Raymond Cecil as his alibi.

This court acknowledges that the evidence against petitioner at trial was strong. Petitioner and the victim had a prior history of violent interactions which eventually led to petitioner's conviction and incarceration. While incarcerated, petitioner made threats against the victim. Ultimately, petitioner was arrested in a car in which the victim's blood was found and later made admissions to a jailhouse informant. It is against this context that the court must determine whether the petitioner was prejudiced by counsel's failure to present evidence relating to Darnell's failure to identify the petitioner and subsequent identification of Voyles. Despite the strength of the state's case, this court finds petitioner is entitled to relief.

This case is similar to the cases of Timothy McKinney v. State of Tennessee, No. W2006-02132-CCA-R3-PD, 2010 Tenn. Crim. App. LEXIS 219 (filed March 9, 2010 at Jackson) and Michael Lee McCormick v. State of Tennessee, No. 03C01-9802-CR-00052, 1999 Tenn Crim. App. LEXIS 594 (filed June 17, 1999 at Knoxville). In both McKinney and McCormick the Courts found trial counsel were ineffective in failing to properly investigate eye-witness testimony. In particular in McCormick, the Court found despite strong evidence of guilt, including petitioner's confession, the Court held petitioner was prejudiced by counsels' failure to

properly investigate the eye witness testimony. Relevant to petitioner's case, McCormick involved counsel's failure to investigate a witness' description of a suspect which did not match the description of the petitioner. Also, like the instant case, the eye-witness in McCormick provided law enforcement with a composite of the suspect.

This court notes that the victim's body was never recovered. Additionally, evidence contradicting the state's assertion that the victim and the petitioner's relationship was acrimonious was available had counsel properly investigated the case. This court notes that much of the state's evidence as to motive came from jailhouse informants. Given the nature of the uninvestigated evidence in this case, this court cannot find counsel's inactions were harmless. Rather, this court finds counsel's failure to present the above outlined evidence, which this court finds would have been available to them through diligent investigation, calls into question the reliability of the jury's verdict. As such, this court finds petitioner is entitled to a new trial.

Having found petitioner has demonstrated both ineffective assistance and prejudice with regard to this allegation, this court need not address the remainder of petitioner's allegations. Nevertheless, given the certainty of appellate review of this court's decision, the court has endeavored to address each of petitioner's remaining allegations.

D. *Corpus Delicti*

Petitioner asserts the State failed to prove *corpus delicti* in the case and argues counsel were ineffective in failing to move to dismiss the case prior to trial and at the close of the state's case and in failing to argue the issue in the motion for new trial. Petitioner contends no evidence was presented at trial demonstrating the victim was in fact deceased. He argues that there was no testimony indicating the blood found at the scene was of such a volume as to indicate that the

victim must be deceased. Thus, he argues had counsel raised this issue he would not have been convicted of the victim's murder. This court finds counsel were not ineffective in this regard.

Although counsel did not file any pre-trial motions challenging the state's ability to prove *corpus delicti*, counsel did reference the lack of proof as to corpus in the defense's opening statement. Attorney Johnson stated, "As to how the person got in the Memphis Inn, we don't know. . . . As to whether there was a scuffle in the Memphis Inn . . . we don't know."[87] He further stated, "[y]ou have to always remind yourself when you're talking about a murder trial, where is the body."[88] During closing arguments counsel made the following statements, "[l]et me tell you about reasonable doubt. Tell you what to look at, tell you what to look for. There's no body. . ."[89] Johnson stated, "Where is the body? Don't know. If in fact there is one. We don't know. We don't know."[90] He further argued, "Ms. Ellsworth is a person . . . [w]e don't know where she is. . . . . Judge this case on what was presented to you. No body, No fingerprints, no ID."[91] Additionally, counsel raised the sufficiency of the corpus proof in their motion for new trial.[92] The trial court briefly addressed the issue and found the evidence was sufficient to support petitioner's conviction and specifically referenced the strength of the state's

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[87] See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 97-02817, 98-01033- 34, W1999-00637-CCA-R3-DD, *Transcript of Trial Proceedings*, November 3, 1998, (CCA Vol. 7, Trial Vol. 5), page 215.

[88] Id.

[89] See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 97-02817, 98-01033- 34, W1999-00637-CCA-R3-DD, *Transcript of Trial Proceedings*, November 7, 1998, (CCA Vol. 11, Trial Vol. 9), page 826..

[90] See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 97-02817, 98-01033- 34, W1999-00637-CCA-R3-DD, *Transcript of Trial Proceedings*, November 7, 1998, (CCA Vol. 11, Trial Vol. 9), page 833.

[91] See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 97-02817, 98-01033- 34, W1999-00637-CCA-R3-DD, *Transcript of Trial Proceedings*, November 7, 1998, (CCA Vol. 11, Trial Vol. 9), page 834.

[92] See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 97-02817, 98-01033-34, W1999-00637-CCA-R3-DD, *Technical Record,* Vol. 2, *Motion For Judgment of Acquittal or in the Alternative Motion for New Trial* bate stamped pages 216-218; See also State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 97-02817, 98-01033- 34, W1999-00637-CCA-R3-DD, *Transcript of Motion for New Trial Hearing* (trial record Vol. 14)- January 15, 1999.

evidence with regard to motive.[93] This court finds counsel were not ineffective in failing to further challenge the state's corpus proof. Even if this court were to find counsel were ineffective in this regard, petitioner has failed to demonstrate he was prejudiced by counsel's inaction.

On direct appeal of petitioner's 1998 conviction and sentence, appellate counsel argued, based upon common law, that a death sentence in a case where no body was recovered is a disproportionate punishment and therefore should be set aside.[94] The Court of Criminal Appeals concluded that adequately proportionality review could be conducted despite the fact that the victim's body had not been recovered. See State v. Michael D. Rimmer, No. W1999-00637-CCA-R3-DD, 2001 Tenn. Crim. App. LEXIS 399, *36-41 (filed May 25, 2001 at Jackson). Moreover, the court found that the evidence presented at trial demonstrated that the victim was in fact deceased. Id. at *38. Specifically, the Court found:

> Evidence at trial revealed that the victim, the Defendant's former girlfriend, suffered a violent death given the huge amount of blood in the bathroom and the broken bathroom fixtures; that the Defendant harbored a strong desire for revenge against the victim; and that the murder occurred during perpetration of a robbery wherein $ 600 and several sets of sheets were stolen from the victim's place of business.

State v. Michael D. Rimmer, No. W1999-00637-CCA-R3-DD, 2001 Tenn. Crim. App. LEXIS 399, *38 (filed May 25, 2001 at Jackson). Thus, even if this court were to find counsel were ineffective in failing to challenge the state's corpus proof, based upon the analysis of the Court of Criminal Appeals and this court's independent evaluation of the evidence presented at

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[93] See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 97-02817, 98-01033-34, W1999-00637-CCA-R3-DD, *Technical Record,* Vol. 2, *Order Denying Motion For Judgment of Acquittal or in the Alternative Motion for New Trial* bate stamped pages 235-245; See also State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 97-02817, 98-01033- 34, W1999-00637-CCA-R3-DD, *Transcript of Motion for New Trial Hearing* (trial record Vol. 14)- January 15, 1999.

[94] See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 97-02817, 98-01033- 34, W1999-00637-CCA-R3-DD, *Revised Brief of Appellant*, pages 28-32.

petitioner's 1998 trial. The court finds petitioner was not prejudiced by counsel's inaction. Although petitioner presented expert forensic testimony at the post conviction hearing disputing the state's assertion and the Court of Criminal Appeals finding that the evidence supports a conclusion that the victim is in fact deceased, this court did not find the witness' assertion that there was absolutely no evidence that a murder had occurred credible. Rather, this court agrees with the Court of Criminal Appeals assessment that a deadly and violent struggle occurred. The floor of the office bathroom was covered in blood, including blood spatter on the walls and smearing along the door facings. The sink had been fractured and the toilet seat ripped off. In some areas of the bathroom there were pools of blood. A blood drenched towel was also found in the room. In addition to the trail of blood which extended beyond the bathroom, through the office, into a storage room and out to the curb, the police also found the victim's purse and identification, her car, and jewelry she was known to wear at the scene. Based upon this evidence, the court does not find petitioner was prejudiced by counsel's failure to further challenge the state's ability to establish *corpus delicti.*

E. Investigation of and Challenge to Admission of Improper Evidence

Petitioner asserts counsel failed to investigate and challenge the introduction of improper evidence. Specifically, petitioner asserts counsel failed to investigate or challenge the following: (1) evidence obtained from the Honda Accord in which petitioner was arrested; (2) evidence regarding petitioner's escape attempts in Indiana, Ohio and Memphis; and (3) the testimony of jail house snitches James Allard, Roger Lescure and William Conaley. This court finds counsel were not ineffective in failing to challenge this evidence. Thus, petitioner is not entitled to relief based upon this claim.

1. Evidence from the Honda Accord

Petitioner contends counsel should have moved to suppress all of the evidence from the Honda Accord due to the State's destruction of the car. The Honda Accord was registered to Cheryl Featherstone who reported to Memphis Police that the vehicle had been stolen from her driveway late on the night of January 4, 1997. Cheryl Featherstone and her husband Steve Featherstone were acquainted with petitioner. Steve Featehrstone and petitioner worked together. Petitioner told police that the vehicle was not stolen but was obtained by petitioner through an arrangement between himself and Steve Featherstone.

When petitioner was arrested in Indiana on March 5, 1997, the vehicle was seized and an inventory was done by local police in the presence of Memphis officers. Some items of evidence recovered from the vehicle were transferred to the custody of the Memphis officers. The car was then transported to Memphis by a towing company, without a police escort. The vehicle arrived at the Memphis Police Department's vehicle storage lot on the morning of March 7, 1997. On March 11, 1997, the vehicle was taken to the Tennessee Bureau of Investigation Crime lab in Nashville, Tennessee for analysis. It was returned to Memphis on March 17, 1997. Subsequently, on March 25, 1997, the Memphis Police Department released the hold on the vehicle and it was transported to a salvage lot and later resold.

Petitioner contends that, given the State's argument that the back seat of the vehicle was covered in blood, access to the Honda was critical to his defense. He contends the back seat of the vehicle was not, as the State argued, "covered" in blood. He argues that without the car he was unable to rebut the State's assertion that eighty percent of the back seat of the car was covered in the victim's blood. Petitioner further asserts counsel should have moved to suppress the evidence obtained from the Honda based upon the fact that the Indiana search warrant was

based on false information provided to Indiana authorities by Memphis Homicide Detective Robert Shemwell. He contends Shemwell's affidavit in support of the warrant falsely states that James Darnell's description of one of the two men he saw at the Memphis Inn matches Rimmer's description.

At trial counsel did cross examine certain State witnesses regarding their handling of the Honda and in closing argument attorney Johnson stated, "[w]hat happened with the car from Indiana to here? . . . They said it was sealed. . . . It was picked up on some street perhaps."[95] At the post conviction hearing, Johnson testified that he was aware the affidavit in support of the Indiana search warrant relating to the Honda Accord contained statements indicating Officer Shemwell of the Memphis Police Department told the affiant that a witness named "Jim" Darnell saw a vehicle matching the description of the Honda Accord backed up to the office of the Memphis Inn in the time frame of the murder and the witness had indicated the car's trunk and door were open. Johnson testified that he was also aware that the affidavit indicated Darnell had given a description of two men that he saw and one of the descriptions matched that of Michael Rimmer. Johnson stated that he did not consider suppressing the motion to search the vehicle on the basis that the affidavit supporting the warrant contained false information.

a. Ferguson Claim

In State v. Ferguson, 2 S.W.3d 912, 914 (Tenn. 1999), the Tennessee Supreme Court addressed the issue as to what factors guide the determination of the consequences that flow from the State's loss or destruction of evidence which the accused contends would be

[95] See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 97-02817, 98-01033- 34, W1999-00637-CCA-R3-DD, *Transcript of Trial Proceedings*, November 7, 1998, (CCA Vol. 11, Trial Vol. 9), page 833.

exculpatory. The Supreme Court answered that the critical inquiry was whether a trial, conducted without the destroyed evidence, would be fundamentally fair. Id.

Generally speaking, the State has a duty to preserve all evidence subject to discovery and inspection under Tenn. R. Crim. P. 16, or other applicable law." Id. (footnote omitted). Additionally, Ferguson imposed the duty on the State to preserve "potentially exculpatory evidence." Noting that the evidence in question "was probably of marginal exculpatory value," the Ferguson court nevertheless said "it was at least 'material to the preparation of the defendant's defense' and might have led the jury to entertain a reasonable doubt about [the defendant's] guilt." Id. The court held that the State breached its duty to preserve the evidence and conducted a balancing analysis using three factors to determine if the evidence must be excluded:

> 1. The degree of negligence involved; 2. The significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and 3. The sufficiency of the other evidence used at trial to support the conviction."

Id. (footnote omitted).

Initially this court finds that the evidence did not possess any exculpatory value that was apparent prior to its destruction. Photographs of the back seat were taken at the time of the vehicle inventory. Additionally, cuttings from the stained area were taken and tested and the test results were available to defense counsel. The initial tests revealed the presence of human blood and subsequent DNA testing linked the blood to the victim. The officers who collected the evidence testified that there was a large stain on the seat. Several different cutting were taken and different areas of the seat were tested. Accordingly, this court finds the police had no duty to preserve the evidence beyond established procedures. Moreover, even if the State had a duty to preserve the car and failed to do so, the defendant has failed to demonstrate that his right to a fair

trial was affected by the destruction of the evidence. See Ferguson, 2 S.W.3d at 917. The mere loss or destruction of evidence does not constitute bad faith.

The second factor to consider is the significance of the missing evidence. At the post conviction hearing Marilyn Miller, an expert in forensic crime scene analysis and evidence collection, testified that the lab report failed to demonstrate from what portion of the seat the samples were taken. However, the trial record indicates officers in Indiana photographed the seat as it appeared when the vehicle was impounded and photographed the areas where the samples had been taken. This court did not find Miller's testimony particularly persuasive. Rather, this court finds petitioner failed to establish the police utilized an inappropriate collection process for recovering samples from the blood stained back seat and failed to demonstrate the police somehow improperly documented the process used to collect such samples or the evidence that was obtained. Additionally, petitioner presented no persuasive proof suggesting there was evidence of tampering prior to testing. Moreover, petitioner has failed to offer any persuasive evidence demonstrating the test results reported by Agent Zavaro or Dr. Baechtel were inaccurate. Finally, because there is no indication that additional testing of the back seat of the Honda would have yielded results different from those found by the TBI, it cannot be said that evidence critical to the defense was excluded. The petitioner is not entitled to relief on this claim.

b. Challenge to Search Warrant

In order to object to the admission of illegally seized evidence, the defendant must establish a legitimate expectation of privacy in the place searched. Rawlings v. Kentucky, 448 U.S. 98, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980); State v. Harmon, 775 S.W.2d 583 (Tenn.

1989); State v. Roberge, 642 S.W.2d 716 (Tenn. 1982); State v. Crawford, 783 S.W.2d 573 (Tenn. Crim. App. 1989); State v. Burton, 751 S.W.2d 440 (Tenn. Crim. App. 1988). The defendant bears the initial burden of proving by a preponderance of the evidence that the defendant has a legitimate expectation of privacy in the place or property from which the items sought to be suppressed were seized and the identity of the items to suppress. State v. Bell, 832 S.W.2d 583, 589 (Tenn. Crim. App. 1991). A reviewing court should consider the following factors when making a "legitimate expectation of privacy" inquiry:

> (1) property ownership;
> (2) whether the defendant has a possessory interest in the thing seized;
> (3) whether the defendant has a possessory interest in the place searched;
> (4) whether he has the right to exclude others from that place;
> (5) whether he has exhibited a subjective expectation that the place would remain free from governmental invasion;
> (6) whether he took normal precautions to maintain his privacy; and
> (7) whether he was legitimately on the premises.

State v. Turnbill, 640 S.W.2d 40, 46 (Tenn. Crim. App. 1982).

In this case, although the defendant claimed to have an interest in the vehicle, the evidence collected by law enforcement preponderated against such a claim. In late January 1997, Cheryl Featherstone reported the maroon 1988 Honda Accord stolen. This is the same vehicle which petitioner was driving when stopped in Indiana. The Defendant had no ownership interest in Featherstone's car and, hence, no right to exclude others from the car. Therefore, he had no standing to complain about the seizure of evidence from the vehicle. Thus, this court need not address petitioner's assertions that the affidavit in support of the search warrant contained material misrepresentations.

2. Evidence of Escape Attempts

Petitioner contends counsel should have challenged the State's introduction of evidence relating to his escape attempts from Indiana, Ohio and Memphis. Moreover, he argues counsel failed to investigate the circumstances under which the alleged escape attempts were made in an effort to rebut the State's allegations. This court finds counsel did not provide deficient representation by failing to investigate the circumstances surrounding petitioner's attempts to escape custody in Indiana, Ohio and Memphis.

Prior to the selection of the jury, the court heard several motions by the State. One such motion was for a pretrial ruling on the admissibility of petitioner's escape attempts. Counsel for petitioner did in fact challenge the introduction of this evidence. Attorney Johnson stated,

> Your Honor, I would submit that to use the escape - - and there's no doubt about this, that it is highly prejudicial in this particular matter since we're talking about a murder in the first degree case. Some of them - - some of the incidents didn't involve basically our jurisdiction in this particular matter. And I think to allude to a escape here in this jail that happened on or about . . . October 17 would be extremely prejudicial in this particular matter.
>
> So I would submit that it's not relevant to prove any particular issue in this particular case. And I would submit that I don't think the Court should allow it.[96]

The trial court overruled counsel's objection and the state was permitted to introduce evidence of petitioner's escape attempts. The Court of Criminal Appeals opinion relating to petitioners direct appeal of his 1998 conviction and sentence accurately and succinctly sets forth the testimony that was presented regarding petitioner's escape attempts. See State of Tennessee v. Michael D. Rimmer, W1999-00637-CCA-R3-DD, 2001 Tenn. Crim. App. LEXIS 399 (filed May 21, 2001 at Jackson). The Court wrote:

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[96] See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 97-02817, 98-01033- 34, W1999-00637-CCA-R3-DD, *Transcript of Trial Proceedings*, November 2, 1998, (CCA Vol. 6, Trial Vol. 4), page 8.

> The Defendant participated in at least three escape attempts after his arrest. The first involved using toe-nail clippers to cut an opening in the recreation yard fence at the Johnson County Indiana jail. The Defendant discussed this attempt with Allard and enumerated plans which included the possibility of taking a guard hostage or killing a guard to get out. Two "shanks," or homemade knives, were found in the defendant's Indiana cell. In his second attempt, the Defendant seized control of a prisoner transport van. After a chase of approximately twenty miles, Bowling Green, Ohio police were able to stop the van and apprehend the Defendant who had a shotgun, shells and beer in the van. The third attempt occurred at the Shelby County jail where the Defendant and another inmate sawed through the bars of their cell, broke out a window, and used a homemade rope to climb down.

Id. at *9.

This court does not find counsel was ineffective in failing to further challenge the introduction of this evidence at trial. Moreover, even if the court were to find counsel were ineffective in this regard, given the appellate courts review of this issue on direct appeal of his sentence and conviction, this court finds petitioner has failed to demonstrate he was prejudiced by counsel's inaction. On direct appeal, the Court of Criminal Appeals held:

> The State's introduction of evidence related to the Defendant's multiple escape attempts was intended to demonstrate consciousness of guilt associated with evidence of flight. The evidence introduced included testimony and physical evidence. The Defendant's Indiana cell mate testified regarding plans and actions taken by the Defendant at the Johnson County jail. An officer testified that he found two shanks hidden in the Defendant's Indiana cell. The Bowling Green, Ohio officer who apprehended the Defendant in the prison transport van testified about a shotgun and ammunition found in the van. Two jailers testified about the Defendant's attempts to climb out of the window at the Shelby County jail using a homemade rope; the rope, the sawed-through cell bars, the homemade pick that was used to break the window at the Shelby County jail were introduced into evidence. The Defendant claims that the prejudicial effect of this evidence significantly outweighed its probative value, especially when compared to the evidence of his cross-country journey immediately following the crime.
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> The trial court addressed the Defendant's objections to the evidence as they arose during the course of the trial. It concluded that the stated purpose of introducing the evidence was proper and that its probative value was not outweighed by its prejudicial effect. The trial court, as the trier of fact, is able to assess the credibility of the witnesses, determine the weight and value to be given to the evidence, and resolve any conflicts in the evidence. State v. Odom, 928 S.W.2d

18, 23 (Tenn. 1996). The trial court did not abuse its discretion and this issue is without merit.

State v. Michael D. Rimmer, No. W1999-00637-CCA-R3-DD, 2001 Tenn. Crim. App. LEXIS 399, *13 (filed May 25, 2001 at Jackson). Based upon the appellate court's finding, this court finds petitioner has failed to demonstrate he was prejudiced by counsels' inaction. Thus, he is not entitled to relief based upon this claim.

3. Jailhouse Snitches

Petitioner argues counsel were ineffective in failing to investigate and challenge the testimony offered by jailhouse informants James Allard; Roger Lescure; and, William Conaley. He argues that these witnesses were the only evidence presented by the State with regard to motive; and, thus, asserts he was prejudiced by counsel's failure to challenge their testimony. He contends counsel should have presented evidence regarding his past relationship with the victim, including evidence indicating he and the victim had reconciled while he was previously incarcerated and evidence suggesting he and the victim were on good terms following his 1996 release from prison. Petitioner further argues that jailhouse snitches are generally unreliable. Therefore, he asserts counsel was ineffective in failing to investigate the claims of these witnesses and in failing to attempt to have the court disallow or limit their testimony based upon the inherent unreliability of such testimony. This court finds counsel was not ineffective in this regard.

Initially, this court notes that all questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact. See State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). Thus, any motion to preclude the testimony of the witness based solely upon their credibility or the reliability of their

testimony would likely have been unsuccessful. As petitioner notes, the witnesses were relevant to establish motive. Thus, this court does not find counsel were ineffective in failing to seek pretrial exclusion of their testimony. Next, this court considers petitioner's argument regarding counsels' failure to subject the witnesses to thorough cross examination and failure to present alternative evidence in contradiction to the witnesses' testimony relating to petitioner's potential motive for killing the victim, Ricky Ellsworth.

At trial Allard testified that he was incarcerated with petitioner in the Johnson County, Indiana jail.[97] Allard stated that Detective Skaggs with the Johnson County authorities came to see him and wanted to know if he had any information with regard to petitioner that might be helpful to authorities.[98] He told Skaggs that petitioner told him that he murdered his "wife."[99] Allard further testified petitioner indicated he went to his "wife's" place of business; the victim let the petitioner in; and, petitioner shot her one time in the chest and once in the head and then beat her.[100] He stated that he believed the victim worked at either a hotel or motel.[101] He stated that the murder occurred in a "back" room "behind the service desk" . . . or "in the office part."[102] Allard testified that the petitioner told him the back room "was pretty bloody."[103] He stated that Rimmer told him he put the body in the car and later disposed of it.[104] He testified that the petitioner once told him the body was in a location with a pond or lake, next to a "big

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[97] See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 97-02817, 98-01033- 34, W1999-00637-CCA-R3-DD, *Transcript of Trial Proceedings*, November 5, 1998, (CCA Vol. 8, Trial Vol. 6), page 445.
[98] Id. at page 448.
[99] See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 97-02817, 98-01033- 34, W1999-00637-CCA-R3-DD, *Transcript of Trial Proceedings*, November 5, 1998, (CCA Vol. 9, Trial Vol.7), page 451-452.
[100] Id. at page 451.
[101] Id.
[102] Id. at page 452.
[103] Id.
[104] Id. at page 453.

white house" that was owned either by the petitioner's family or the victim's family.[105] He stated that on another occasion the petitioner told him the body was buried in the woods near an open field and a cabin.[106] Finally, Allard testified that when the petitioner spoke about the victim his eyes "got real shiny" and "he started sweating a lot."[107]

At trial Conaley testified that in 1993 he was housed with petitioner at Tennessee's Northwest Correctional Facility in Tiptonville.[108] He stated that he knew the victim, Ricci Ellsworth's, niece, Rhonda Ball.[109] Conaley testified that petitioner told him Ellsworth "put charges on him" and that was why petitioner was incarcerated.[110] He stated that petitioner was "quite upset" about Ellsworth putting him in prison.[111] Conaley testified that petitioner told him Ellsworth's son was involved in a lawsuit and expected to receive a large sum of money.[112] He stated that petitioner told him he expected to get some of the money.[113] Conaley testified that he was allowed furlough from his prison sentence and stated that petitioner asked him if he would be seeing Rhonda Ball during his furlough.[114] He testified that, when he told petitioner he would be seeing Rhonda, petitioner told him to tell Rhonda to tell Ellsworth that "when he got out, if he didn't receive the money, he'd kill her."[115] Conaley testified that he delivered the message.[116] He stated that when he heard about the victim's death he wrote to a friend and told him that he

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[105] Id. at page 452.
[106] Id.
[107] Id. at page 454.
[108] See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 97-02817, 98-01033- 34, W1999-00637-CCA-R3-DD, *Transcript of Trial Proceedings*, November 4, 1998, (CCA Vol. 9, Trial Vol. 7), page 469-470.
[109] Id at page 471.
[110] Id. at page 472.
[111] Id.
[112] Id.
[113] Id.
[114] Id. at page 473.
[115] Id.
[116] Id.

thought he knew the person the police were looking for.[117] Conaley testified that thereafter the police came to visit him and he told them about his conversations with petitioner.[118]

Lesure testified that he met petitioner while they were housed together at Tennessee's Northwest Correctional Facility.[119] Lesure testified that in late 1996 or early 1997 petitioner stated of Ellsworth, "if ever I get out, I'm going to kill the fucking bitch."[120] He further testified that the petitioner talked about disposing of the body and stated, "you could gut them and put a brick on them and throw them in the river, and they'd never come up."[121] He stated that when petitioner would discuss killing the victim he would become "hyper" and "seemed like he sort of really got into it," or "got off on" "violent" talk.[122] Lesure stated that when he read the news about the victim's disappearance, he wrote a letter to the Tennessee Bureau of Investigation and told them about his conversation with petitioner.[123]

During the cross examination of each of these witnesses trial counsel questioned the witnesses about the basis of their knowledge; their motivations for coming forward and when appropriate attempted to impeach the witnesses with their prior convictions. Additionally, counsel argued in closing arguments that these witnesses were not credible.[124] This court does not find counsel were ineffective in challenging the testimony of these witnesses. Moreover, this court finds even if counsel were ineffective in challenging the testimony of Allard, Conaley and Lesure, petitioner has failed to demonstrate he was prejudiced by counsels' inaction.

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[117] Id. at page 476.
[118] Id.
[119] See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 97-02817, 98-01033- 34, W1999-00637-CCA-R3-DD, *Transcript of Trial Proceedings*, November 6, 1998, (CCA Vol. 11, Trial Vol. 9), page 827.
[120] Id. at page 702.
[121] Id. at page 704.
[122] Id. at page 703.
[123] Id. at page 703.
[124] See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 97-02817, 98-01033- 34, W1999-00637-CCA-R3-DD, *Transcript of Trial Proceedings*, November 3, 1998, (CCA Vol. 11, Trial Vol. 5), page 226.

As to petitioner's claim that counsel should have presented testimony contradicting that provided by Allard, Conaley and Lesure, this court likewise finds counsel were not ineffective in this regard. At the post conviction hearing, petitioner presented testimony from Phillip Follis, who stated that he was incarcerated with petitioner in the Shelby County jail in 1989. Follis stated that he recalled Ellsworth visiting petitioner. He stated that petitioner was infatuated with Ellsworth but indicated the relationship between Ellsworth and petitioner was "difficult." He stated that the couple was involved in drugs. With regard to Ellsworth's allegations of rape, Follis claimed that Ellsworth and petitioner were involved in a heated argument when Ellsworth made the rape allegations. According to Follis, the couple reconciled soon after; but, Ellsworth did not know how to go about having the charges dismissed.

Petitioner also presented testimony from Keith Neff who stated that in 1997 he was incarcerated with petitioner in the Johnson County, Indiana jail. He stated that he also knew an individual named James Allard. He described Allard as a "snitch" who would say anything to secure his own release. However, Neff acknowleged that his sole basis for forming this opinion about Allard was the fact that Allard had provided information to the guards against him and Allard's participation in petitioner's trial. Neff claimed petitioner spoke highly of the victim.

Finally, Petitioner presented testimony from Barbara Dycus of the Second Chance Prison Ministry. Dycus testified that her group led church services and visited with prisoners at the West Tennessee State Penitentiary. Dycus testified that Ellsworth was a volunteer with the ministry. However, she stated that Ellsworth was later banned from the ministry because she was on the petitioner's visitation list. Dycus stated that Ellsworth told her she was engaged to petitioner. She further testified that Ellsworth subsequently informed her that the she was the victim in the cases for which petitioner was incarcerated.

Based upon this testimony, the court finds even if counsel were ineffective petitioner has failed to demonstrate he was prejudiced by counsels' failure to present these witnesses. It is unlikely Neff's testimony would have been admissible at petitioner's trial. The basis for Neff's knowledge regarding Allard's reputation is suspect at best. Clearly he has personally dealings with Allard that call into question the credibility of his statements. Moreover, this court finds that Allard's reputation in the "jail community" was not relevant to the issues presented at petitioner's trial and likely would not have been admissible. While Follis' and Dycus' testimony is clearly more credible and relevant than that offered by Neff, this court nonetheless finds petitioner was not prejudiced by counsel's failure to present this testimony to the jury.

At trial, counsel cross examined Rhonda Ball, the victim's niece, about the relationship between the petitioner and the victim. Ball stated that she was aware that, after accusing petitioner of rape, the victim had been to the penitentiary to visit petitioner and had seen petitioner after his release from prison. Margie Floyd, the victim's mother also testified on cross examination that the victim visited petitioner while he was incarcerated on the rape conviction.[125] Likewise, the victim's husband, Donnie Ellsworth, testified on cross examination, that the victim visited petitioner in prison after his conviction for her rape.[126] Moreover, counsel argued in closing arguments, "now, we know this, that Ms. Ricci Lynn Ellsworth was going to the penitentiary to see Michael Rimmer. We also know that after he got out, they were together. . . . we are talking '97. They were together, although she was married. They were going out."[127]

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[125] See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 97-02817, 98-01033- 34, W1999-00637-CCA-R3-DD, *Transcript of Trial Proceedings*, November 3, 1998, (CCA Vol. 7, Trial Vol. 5), page 226.

[126] See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 97-02817, 98-01033- 34, W1999-00637-CCA-R3-DD, *Transcript of Trial Proceedings*, November 3, 1998, (CCA Vol. 7, Trial Vol. 5), page 237.

[127] See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 97-02817, 98-01033- 34, W1999-00637-CCA-R3-DD, *Transcript of Trial Proceedings*, November 6, 1998, (CCA Vol. 11, Trial Vol. 9), page 827.

This court does not find anything further would have been added through the testimony of Neff, Follis or Dycus. Therefore, this court finds petitioner is not entitled to relief based upon this claim.

F. *Voir Dire* of the Jury

Petitioner asserts counsel failed to provide competent representation during the selection of the jury. Specifically, petitioner contends counsel failed to: (1) ask questions designed to identify jurors whose life circumstances rendered them unqualified to serve in his case and to utilize challenges for cause or peremptory challenges to remove such jurors from the panel; (2) failed to ensure that the *voir dire* on issues of life qualification and death qualification and the issue of publicity were conducted individually or comprehensively; and (3) conduct *voir dire* consistent with the defense theory of the case. This court finds counsel were not ineffective in this regard.

1. Unqualified Jurors

Petitioner contends counsel should have excluded certain jurors based upon their "life circumstances." In particular he asserts counsel should have challenged the following jurors who indicated they were victims of a crime: Larry Hibler, Starr Arthur, Robert Russell, Shelia Halford and Mary Albert. Additionally, he contends counsel should have challenged juror Richard Runge, whose brother in law was a police officer with the Memphis Police Department's Organized Crime Unit and Juror Artis Garmon, whose wife worked at the Rose Court Irish Motel.

The United States and the Tennessee Constitutions guarantee a criminal defendant the right to a trial by an impartial jury. U.S. Const. amend. VI; Tenn. Const. art. I, § 9. "The ultimate goal of voir dire is to ensure that jurors are competent, unbiased and impartial." State v. Hugueley, 185 S.W.3d 356, app. 390 (Tenn. 2006) (citing State v. Cazes, 875 S.W.2d 253, 262 (Tenn. 1994), and State v. Howell, 868 S.W.2d 238, 247 (Tenn. 1993)). The "proper fields of inquiry include the juror's occupation, habits, acquaintanceships, associations and other factors, including his [or her] experiences, which will indicate his [or her] freedom from bias." State v. Onidas, 635 S.W.2d 516, 517 (Tenn. 1982) (quoting Smith v. State, 205 Tenn. 502, 327 S.W.2d 308, 318 (Tenn. 1959)). The Tennessee Supreme Court recently addressed claims of ineffective assistance of counsel relating to issues of jury selection and in particular addressed counsels' failure to question and/or strike jurors regarding potential bias based on a juror having previously been the victim of a crime. See State v. Smith, 357 S.W.3d 322 (Tenn. 2011). The Court held that,

> [w]hile there is no requirement that counsel ask any specific questions of potential jurors during the *voir dire* process, this Court has previously recognized that potential bias arises if a juror has been involved in a crime or incident similar to the one on trial. See Ricketts v. Carter, 918 S.W.2d 419, 422 (Tenn. 1996); Durham v. State, 182 Tenn. 577, 188 S.W.2d 555, 558 (Tenn. 1945). We believe that questions to cull the jury for persons who might be biased due to their past experiences with the criminal justice system are a critical part of a competent *voir dire* in criminal cases, and that, absent a showing that counsel had a strategic reason for not asking the question, the failure to ask the prospective jurors about their past experiences as victims or associates of victims is objectively unreasonable. See Hughes v. United States, 258 F.3d 453, 460 (6th Cir. 2001) (stating that "'[a]bsent the showing of a strategic decision, failure to request the removal of a biased juror can constitute ineffective assistance of counsel'") (quoting Johnson v. Armontrout, 961 F.2d 748, 755 (8th Cir. 1992)). We conclude that the failure of counsel to question the jury venire about their experiences as crime victims or relating to crime victims was deficient performance under the circumstances of this case.

Smith, 357 S.W.3d at 347-348.

However, despite finding counsel were ineffective in their questioning of the jurors, the Smith court nonetheless found petitioner was not entitled to relief. Evaluating the prejudice prong of the *Strickland* analysis the Court concluded Smith failed to prove prejudice. The Court wrote:

> In order to prevail on a claim of ineffective assistance of counsel based on deficient *voir dire*, a petitioner is required to prove that the deficiency resulted in having a juror seated who was actually biased. See Dellinger v. State, No. E2005-01485-CCA-R3-PD, 2007 Tenn. Crim. App. LEXIS 682, 2007 WL 2428049, at *30 (Tenn. Crim. App. Aug. 28, 2007), aff'd, 279 S.W.3d 282 (Tenn. 2009); see also State v. Caughron, 855 S.W.2d 526, 539 (Tenn. 1993) (stating in the context of a direct appeal challenge to juror bias that "[w]here a juror is not legally disqualified or there is no inherent prejudice, the burden is on the Defendant to show that a juror is in some way biased or prejudiced"); State v. Baker, 956 S.W.2d 8, 16 (Tenn. Crim. App. 1997) (same).

Smith, 357 S.W.3d at 348. In response to Smith's argument that prejudice should be presumed, the Court held:

> Whether a juror's partiality may be presumed from the circumstances is a question of law. State v. Akins, 867 S.W.2d 350, 355-56 (Tenn. Crim. App. 1993). In Tennessee, a presumption of juror bias arises "'[w]hen a juror willfully conceals (or fails to disclose) information on *voir dire* which reflects on the juror's lack of impartiality . . . .'" Carruthers v. State, 145 S.W.3d 85, 95 (Tenn. Crim. App. 2003) (citing Akins, 867 S.W.2d at 355). Likewise, "[s]ilence on the juror's part when asked a question reasonably calculated to produce an answer is tantamount to a negative answer." Akins, 867 S.W.2d at 355. Therefore, a juror's "failure to disclose information in the face of a material question reasonably calculated to produce the answer or false disclosures gives rise to a presumption of bias and partiality." Id. at 356 (footnotes omitted). Other circumstances justifying a presumption of bias include a juror's willful concealment of prior involvement as the prosecuting witness in a similar case or a juror's concealment of a close personal or familial relationship with one of the parties involved in the trial. See Hugueley, 185 S.W.3d at 378 (citing Durham, 188 S.W.2d at 559, and Toombs v. State, 197 Tenn. 229, 270 S.W.2d 649, 651 (Tenn. 1954)).

Smith, 357 S.W.3d at 348. Finding the facts in Smith distinguishable from the circumstances outlined above, the Smith court found petitioner failed to establish prejudice; thus, the Court denied relief based upon this claim. Id. The Court wrote,

> We have never presumed bias absent either an affirmative statement of bias, willful concealment of bias, or failure to disclose information that would call into question the juror's bias, and we decline to do so now. Accordingly, to prevail on this claim, Smith is required to prove actual bias. He has introduced no evidence of actual bias or partiality.

Smith, 357 S.W.3d at 359.

In the instant case, each of the jurors listed by petitioner were questioned by the prosecution during Attorney General Henderson's *voir dire*. Juror Hibler stated that he was a victim of a crime but did not elaborate on the nature of the crime.[128] He stated that no one was ever arrested and indicated that nothing about the past events would affect his ability to be fair and impartial as a juror in petitioner's case.[129] Juror Arthur stated that approximately four years prior to petitioner's trial he had been a victim of a burglary.[130] She stated that a suspect was arrested and tried for the crime and indicated she was a witness at the defendant's trial.[131] Arthur stated that nothing about that experience would prevent her from being fair and impartial as a juror on petitioner's case.[132] Juror Russell testified that five years prior to petitioner's trial he had been a victim of a crime.[133] However, he stated that nothing about the prior incident would affect his judgment as a juror in petitioner's case.[134] Juror Albert stated that twelve years prior to petitioner's trial he was a victim of a crime.[135] He stated that nothing about that experience would make him prejudice against either party.[136] Juror Halford stated that over twenty years

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[128] See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 97-02817, 98-01033- 34, W1999-00637-CCA-R3-DD, *Transcript of Trial Proceedings*, November 2, 1998, (CCA Vol. 6, Trial Vol. 4), page 80.
[129] Id.
[130] Id. at page 81.
[131] Id. at page 82.
[132] Id. at page 83.
[133] Id. at page 111.
[134] Id.
[135] Id. at page 62.
[136] Id. at page 63.

ago she was the victim of a burglary.[137] She also stated that her nephew was murdered two and a half years prior to petitioner's trial.[138] Halford stated that there was nothing about her nephew's case that would affect her judgment in petitioner's case.[139]

In addition to the jurors who stated they were crime victims, Juror Runge stated that his brother in law worked for the city's Organized Crime Unit.[140] When questioned by attorney Johnson, Runge stated that he and his brother in law did not discuss cases and stated that he would not credit the testimony of law enforcement more than that of any other witness.[141] Juror Garmon stated that his wife worked as a desk clerk at the Irish Motel. Thereafter, the following colloquy was had between Garmon and Attorney General Henderson:

HENDERSON:	All right. Now I've got to ask you this, of course, because she's in a similar occupation, a similar position as Ms. Ellsworth was. Do you think that would cause you any difficulty in being fair and impartial in this case.
GARMON:	Well, I used to work at one myself and I was robbed a few years back. . .
HENDERSON:	Okay. The question really, though, is can you decide this case just based on what the witnesses tell you and what the judge tells you the law is?
GARMON:	Yes. Yes, I could.
HENDERSON:	In other words, you're not going to convict this man here just because you were robbed before, right?
GARMON:	No, I don't think so.

[137] See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 97-02817, 98-01033- 34, W1999-00637-CCA-R3-DD, *Transcript of Trial Proceedings*, November 3, 1998, (CCA Vol. 7, Trial Vol. 5), page 181.
[138] Id. at page 182.
[139] Id. at pages 182-183.
[140] See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 97-02817, 98-01033- 34, W1999-00637-CCA-R3-DD, *Transcript of Trial Proceedings*, November 2, 1998, (CCA Vol. 6, Trial Vol. 4), page 120.
[141] Id.

HENDERSON: And you wouldn't sentence him to death because your wife happens to work at a motel, would you?

GARMON: No.[142]

None of the jurors testified at the post conviction hearing.

This court does not find counsel were ineffective in failing to further question the jurors about their experiences as crime victims or in failing to strike the jurors based upon their responses. Each juror stated that their past experience would not affect their deliberations in petitioner's case. Moreover, using the Smith opinion as its guide, this court finds, even if counsel were ineffective in this regard, petitioner has failed to demonstrate he was prejudiced by counsel's inaction. Petitioner presented no evidence demonstrating any of the jurors made an affirmative statement evidencing bias; willfully concealed bias; or, failed to disclose information that would now call into question their ability to be fair and impartial. Therefore, this court finds petitioner is not entitled to relief based upon this claim.

2. (a) Individual *Voir Dire*

Petitioner asserts counsel should have requested individual *voir dire* on the issue of death and life qualification and the issue of pretrial publicity. Counsel made an initial motion for individual *voir dire* prior to trial. However, the trial court reserved ruling on the issue until closer to trial. It does not appear counsel renewed their motion prior to the start of jury selection. Nevertheless, even if this court were to find counsel were ineffective in failing to once again raise the issue of individual *voir dire* prior to the start of jury selection, this court does not find petitioner was prejudiced by counsel's inaction.

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[142] See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 97-02817, 98-01033- 34, W1999-00637-CCA-R3-DD, *Transcript of Trial Proceedings*, November 2, 1998, (CCA Vol. 6, Trial Vol. 4), page 78-79

Our appellate courts have held that "individual *voir dire* is mandated only when there is a 'significant possibility' that a juror has been exposed to potentially prejudicial material." See State v. Keen, 31 S.W.3d 196, 229 (Tenn. 2000) (quoting State v. Harris, 839 S.W.2d 54, 65 (1992) (citing State v. Porterfield, 746 S.W.2d 441, 447 (1988)). Here, petitioner has failed to demonstrate that there was a significant possibility that the jurors were exposed to potentially prejudicial publicity. Additionally, there is no support in the record of prejudice based upon counsel having conducted group *voir dire* of the jurors' views of the death penalty. The Tennessee Supreme Court has repeatedly held that death qualification of jurors is not required to be conducted by individual, sequestered *voir dire.* See State v. Stephenson, 878 S.W.2d 530, 540 (Tenn. 1994) (citations omitted). Accordingly, petitioner is not entitled to relief based upon this claim.

(b) Adequate Voir Dire on Life/Death Qualification

Petitioner argues counsel were ineffective in their *voir dire* questioning regarding the issues of life qualification and death qualification of jurors. He asserts counsels' questions were not sufficient to determine whether jurors could consider and give effect to mitigating circumstances. He further contends counsel misstated the law of capital sentencing.

This court again notes that in order to prevail on a claim of ineffective assistance of counsel based on deficient *voir dire*, a petitioner is required to prove that the deficiency resulted in having a juror seated who was actually biased. See Smith v. State, 357 S.W.3d 322, 349 (Tenn. 2011), (citing Dellinger v. State, No. E2005-01485-CCA-R3-PD, 2007 Tenn. Crim. App. LEXIS 682, 2007 WL 2428049, at *30 (Tenn. Crim. App. Aug. 28, 2007), aff'd, 279 S.W.3d 282 (Tenn. 2009); State v. Caughron, 855 S.W.2d 526, 539 (Tenn. 1993)). Petitioner presented no

proof indicating a more thorough *voir dire* on these issues would have revealed potential prejudices or resulted in the court refusing to seat any of the selected jurors. After an independent review of the record, this Court concludes that counsel's performance did not fall below the acceptable standard of representation required by Strickland. Furthermore, this court finds petitioner has not shown that there is a reasonable probability that the result of the proceeding would have been different had counsel conducted *voir dire* differently. See Strickland v. Washington, 466 U.S. at 694, 104 S. Ct. at 2068; Henley v. State, 960 S.W.2d at 579.

In determining when a prospective juror may be excused for cause because of his or her views on the death penalty, the standard is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Witt, 469 U.S. at 424. A juror whose views on the death penalty prevent him or her from returning a sentence of death is therefore excusable for cause. The Supreme Court further observed that "this standard likewise does not require that a juror's biases be proved with 'unmistakable clarity.'" Id. "However, the trial judge must have the 'definite impression' that a prospective juror could not follow the law." State v. Austin, 87 S.W.3d 447, 473 (Tenn. 2002). Where attempts to rehabilitate a juror who has refused to impose the death penalty would be futile, refusal to engage in such useless efforts rarely constitutes deficient performance under Strickland. See Simon v. Epps, 344 Fed. Appx. 69, 84, 2009 WL 2873912, **15 (5th Cir. 2009).

The prospective jurors who were excused were adamant and unequivocal in their position that they could not return a sentence of death. Efforts in attempting to rehabilitate these jurors would have been futile. Therefore, lead counsel's performance was not deficient. All of the excused jurors indicated that they could not vote for capital punishment under any circumstance.

When such affirmations are made, it is proper for the trial court to exclude those prospective jurors for cause. See Morgan v. Illinois, 504 U.S. 719, 728, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992); Lockhart v. McCree, 476 U.S. 162, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986) (holding that jurors can be removed for cause if their views on the death penalty would substantially impair their performance as a juror in the sentencing phase of the trial). Moreover, the petitioner's claim of prejudice is necessarily speculative because the Petitioner has failed to present any testimony as to whether the prospective jurors could have been rehabilitated.

In this case, on several occasions during jury selection, lead counsel questioned the prospective jurors about their ability to consider the entire range of punishment and mitigation evidence. The jurors stated that they could consider the entire range of punishment. Accordingly, we conclude that the record supports the petitioner's allegation that lead counsel neglected to adequately question the jurors about the entire range of punishment.

(c) *Voir Dire* as to Pretrial Publicity

Petitioner argues counsel should have questioned Jurors Russell, Albert and Bowers regarding what they had seen and heard on television and read in the newspaper about the facts of his case. Juror Russell stated that he had heard about the case on television and read about the case in the paper.[143] However, he stated that he had formed no opinions about the case based upon what he had seen and heard.[144] Albert and Bowers likewise indicated they had heard something about the case; but, had not formed any opinion about the case based upon what they

[143] See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 97-02817, 98-01033- 34, W1999-00637-CCA-R3-DD, *Transcript of Trial Proceedings*, November 3, 1998, (CCA Vol. 7, Trial Vol. 5), page 142.
[144] Id.

had seen or heard.[145] This court notes that the information provided by all three jurors was elicited during attorney Johnson's *voir dire*.

Given the jurors' responses, this court does not find counsel was ineffective in failing to further inquire into the nature of the information viewed or heard by the jurors. Moreover, petitioner has again failed to establish that Bowers, Albert or Russell were actually biased against him or withheld information that would lead this court to suspect they may be bias. Thus, even if the court were to find counsel should have further questioned these jurors, petitioner has failed to establish prejudice. Therefore, he is not entitled to relief.

3. *Voir Dire* Consistent with Defense Theory of the Case

Petitioner also argues that counsel were ineffective in failing to present a cohesive theory of defense during the jury selection process. He argues counsel should have informed the jury during the *voir dire* that the petitioner did not meet the description of the two men seen by James Darnell at the Memphis Inn on the night of the murder and should have questioned the jury about this potential defense theory.

All defendants are entitled to a trial by a jury free of "bias or partiality toward one side or the other of the litigation." State v. Schmeiderer, 319 S.W.3d 607, 624 (Tenn. 2010) (appendix). To achieve this goal of fair and impartial juries, *voir dire* permits questioning by the court and counsel so that certain potential jurors can be properly challenged and stricken. See State v. Akins, 867 S.W.2d 350, 354 (Tenn. Crim. App. 1993). The purpose of *voir dire* is "to see that jurors are competent, unbiased, and impartial" and to allow counsel to "discover[ ] bases for challenge for cause and [to] intelligently exercise[ ] peremptory challenges." State v. Howell,

[145] Id. at page 143.

868 S.W.2d 238, 247 (Tenn. 1993); Tenn. R. Crim. P. 24(b)(1); see also State v. Mann, 959 S.W.2d 503, 533 (Tenn. 1997).

As discussed above this court finds counsel were not ineffective in failing to unearth some hidden bias in one of the impaneled jurors. Moreover, even if the court were to find counsel were somehow deficient in this regard, petitioner has failed to demonstrate prejudice. Although incorporation of a theory of defense or theme into the *voir dire* of the jury may be useful in presenting a defense, this court does not find that the failure to do so in light of an otherwise adequate *voir dire* renders counsel ineffective. This court understands that many different professional organizations and professional publications, including publications of professional standards recommend presenting a theory of defense during the *voir dire* process. However, this court finds that, where counsel has conducted an otherwise appropriate and adequate voir dire, the failure to do so does not fall below the objective standard of reasonable representation required of counsel. Thus, the court does not find petitioner is entitled to relief based solely on this claim.

This court notes that it has previously found that counsel provided deficient performance in their pretrial investigation and preparation of petitioner's case. This court further notes that the failure to adequately investigate petitioner's case likely contributed to counsel's adequate but brief *voir dire*. As such, the court has considered this fact in its determination that petitioner was prejudiced by counsel's failure to adequately investigate and prepare his case for trial.

G. Presentation of Witnesses and Cross Examination of State's Proof

Petitioner asserts trial counsel were ineffective for failing to present witnesses on his behalf both at the guilt and sentencing phases of his trial and in failing to properly cross examine

the state's witnesses. Petitioner contends counsel was totally deficient in this regard and insists the instances demonstrating counsel's failure in this regard are too numerous to list. He states that the result of counsel's failure was that the state was allowed to erroneously claim that the crime was a single perpetrator crime when evidence suggested that in fact more than one perpetrator was involved. He argues that trial counsel should have presented a multiple perpetrator theory of the case through the testimony of Robert Shemwell or Dixie Roberts. Additionally, petitioner asserts counsel should have objected to hearsay and inadmissible testimony, including testimony from Rhonda Ball that "everyone knew" petitioner would do something to the victim; Ball's testimony about the "kind of person" petitioner is; and, testimony from Allard indicating he thinks petitioner is a killer.

With regard to petitioner's generalized assertion that counsel was totally ineffective in failing to present witnesses or cross examine witnesses, this court declines to address such a generalized assertion. Rather, this court has only addressed petitioner's specific assertions relating to the cross examination of witnesses Roberts and Shemwell and his assertions with regard to counsel's failure to object to the testimony of Ball and Allard. This court finds counsel were ineffective in failing to cross examine Roberts about the events she witnessed on the night of the murder and in failing to cross examine Officer Shemwell about other potential suspects. Much of counsels' failure in this regard has been previously discussed in the section of this court's order dealing with counsel's failure to properly investigate and prepare petitioner's case for trial. This court declines to further address counsel's failure here. Rather, the court simple finds counsel were ineffective in this regard and for the same reasons mentioned above finds petitioner was prejudiced by counsel's inaction.

As to counsel's claims that counsel were deficient for failing to object to the testimony of Allard, this court finds petitioner is not entitled to relief based upon this claim. Allard testified as to his observations relating to petitioner's demeanor at the time that petitioner told him about killing the victim. This court finds such evidence was relevant to the state's presentation of motive and intent. Thus, this court does not find counsel were ineffective in failing to object to this testimony. While counsel should have objected to Allard's statement that he "believed" petitioner is a "killer," this court finds petitioner was not prejudiced by such statement to the point that its admission calls into question the verdict in this case.

Finally, as to Ball's testimony, this court finds counsel were ineffective in failing to object to Ball's testimony regarding what William Conaley said to her. However, since Conaley had previously testified about the statements defendant made and about his conversation with Ball in which he related to her petitioner's comments about threatening to kill the victim, this court does not find petitioner was prejudiced by counsel's inaction. This court finds counsel were not ineffective in failing to object to Ball's statement that her family knew "what kind of person [petitioner] was" and "knew that he would try something when he got out." This court finds that Ball's statement was relevant to the state's presentation of proof on the issue of petitioner's motive and intent. Therefore, counsel were not ineffective in failing to raise and objection to this testimony and petitioner is not entitled to relief based upon this claim.

H. Sentencing Phase Representation

Petitioner asserts counsel conducted no mitigation investigation and failed to present any evidence at the sentencing phase of his trial. Petitioner further asserts trial counsel failed to challenge the state's aggravating factors. He argues that counsel should have challenged the

prior violent felony aggravating circumstance by presenting evidence to the jury regarding the circumstances surrounding his prior conviction. He also argues counsel should have challenged the felony murder aggravating circumstances based upon the lack of evidence tying petitioner to the alleged robbery and murder of the victim.

In death penalty cases, "the sentencer, in all but the rarest kind of capital case, [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record of any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604-05, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) (plurality opinion); see also Johnson v. Texas, 509 U.S. 350, 361, 113 S. Ct. 2658, 125 L. Ed. 2d 290 (1993). The United States Supreme Court has held that mitigating evidence is relevant to sentencing hearings and should be heard. See California v. Brown, 479 U.S. 538, 541, 107 S. Ct. 837, 93 L. Ed. 2d 934 (1987); Eddings v. Oklahoma, 455 U.S. 104, 113-15, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982).

In determining whether counsel breached this duty, counsel's performance is reviewed for reasonableness under prevailing professional norms, which includes a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time. Wiggins, 539 U.S. at 523 (citations omitted). In this regard, counsel's duty to investigate is not limitless, See Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981); however, counsel's investigation must be reasonable in the context of the facts of the particular case and at the time of counsel's conduct. See Roe v. Flores-Ortega, 528 U.S. 470, 477, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). When challenging the imposition of a sentence of death, the petitioner must show that "there is a reasonable probability that, absent the errors [of counsel], the sentencer . . . would

have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Henley, 960 S.W.2d at 579-80 (citing Strickland, 466 U.S. at 695).

There is no legal requirement and no established practice that the accused must offer evidence at the penalty phase of a capital trial. State v. Melson, 772 S.W.2d 417, 421 (Tenn. 1989). In fact, in many death penalty cases, counsel has properly seen fit not to offer any evidence at the penalty phase. Melson, 772 S.W.2d at 421. However, "a strategy of silence may be adopted only after a reasonable investigation for mitigation evidence or a reasonable decision that an investigation would be fruitless." Tafero v. Wainwright, 796 F.2d 1314, 1320 (11th Cir. 1986). It is impossible that "a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." Id. (quoting Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991)).

Initially, this court notes that, at trial, petitioner waived his presentation of mitigating evidence.[146] Counsel intended to present mitigating evidence from petitioner's parents.[147] However, petitioner refused to allow counsel to present such testimony.[148] Although, petitioner argues that his waiver was based upon counsel's ineffective representation, this court does not agree. Petitioner stated on the record that it was his desire to forgo the presentation of mitigation to spare his family's feelings.[149] This court finds petitioner was fully aware of the effect of his refusal to allow his parents to testify and chose not to proceed with putting on evidence during the sentencing phase of his trial. This court does not find the decision of petitioner was the result of ineffective assistance. Rather, counsel vigorously presented their objections to petitioner's

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[146] See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 97-02817, 98-01033- 34, W1999-00637-CCA-R3-DD, *Transcript of Trial Proceedings*, November 9, 1998, (CCA Vol. 11, Trial Vol. 9), page 860.
[147] Id.
[148] Id.
[149] Id. at page 860.

decision on the record and questioned petitioner extensively about having advised petitioner against such action.[150] Moreover, the mitigation specialist, Elizabeth Benson, testified that she had interviewed petitioner's family and prepared them to testify in mitigation.[151] This court finds nothing ineffective about counsels' actions with regard to the presentation of mitigation. Furthermore, even if the court were to find counsel were somehow ineffective in this regard, given the Court of Criminal Appeals ruling on direct appeal of petitioner's convictions and sentence, petitioner has failed to demonstrate prejudice.

On direct appeal of his 1998 conviction and sentence of death, the Court of Criminal Appeals reviewed petitioner's claim that the trial court and trial counsel failed to ensure that he was making a competent and informed decision to waive mitigation. The Court wrote:

> When faced with a criminal defendant who desires to forego the presentation of mitigation evidence, Zagorski requires the trial court to: (1) inform the defendant of his right to present mitigating evidence and make a determination that the defendant understands this right and the importance of such evidence; (2) question whether the defendant and counsel have discussed the importance of mitigation evidence and the risks of not presenting such; and (3) after ensuring that the defendant understands the importance of mitigation, inquire whether he still wishes to forego such presentation. 938 S.W.2d at 660-61.
>
> At sentencing the defendant made a pro se motion to waive jury sentencing and defense counsel advised the court that the Defendant also wished to waive further presentation of mitigating evidence. The Defendant was placed under oath and questioned regarding these requests. There was no suggestion that the Defendant was incompetent to understand the possible consequences of his request, and the trial court noted the Defendant's intellect.
>
> The trial court questioned whether counsel advised the Defendant regarding the potentially devastating consequences of failing to present mitigation evidence. Counsel indicated that he had advised the Defendant, and the Defendant indicated he understood the risks of waiving his right and did so on his own volition. When the defense made an offer of proof by their mitigation specialist, the Defendant again expressed his desire to forego mitigation by strenuously objecting to the offer of proof. At the close of the State's proof, the trial court offered the Defendant an opportunity to change his mind. The Defendant responded that he did not wish to change his mind, that no one pressured him into the decision, and that the decision was his own.

[150] Id. at pages 859-861.
[151] Id. at page 879.

> The trial court correctly determined that the Defendant was competent to execute a waiver of his right to present mitigating evidence, (citations omitted), and substantially complied with the requirements established by Zagorski.

State of Tennessee v. Michael D. Rimmer, W1999-00637-CCA-R3-DD, 2001 Tenn. Crim. App. LEXIS 399, *21-22 (Tenn. Crim. App. filed May 25, 2001, at Jackson). Thus, petitioner is not entitled to relief on the basis of any claim relating to counsels' presentation or failure to present mitigation.

As to petitioner's allegation that counsel was ineffective in failing to challenge the aggravating circumstances, this court likewise finds counsel was not ineffective in this regard. The State presented two witnesses at the sentencing portion of petitioner's trial: Margie Floyd, the victim's mother, who provided victim impact testimony, and Audrey Hager, the clerk of the court who testified about petitioner's prior convictions. Defense counsel asked no questions of either witness.

The State relied upon the prior violent felony aggravating circumstance[152] and the felony murder aggravating circumstance.[153] In reviewing the petitioner's death sentence on direct appeal, the Court of Criminal Appeals stated:

> Evidence at trial revealed that the victim, the Defendant's former girlfriend, suffered a violent death . . . and that the murder occurred during the perpetration of a robbery wherein $600 and several sets of sheets were stolen from the victim's place of business. . . .
>
> At sentencing the jury received conclusive, undisputed evidence of the Defendant's convictions for prior violent felonies. . . . The Defendant, who was 31 years old at the time he committed the murder in the instant case, has a criminal record consisting of rape, two counts of aggravated assault, and assault with intent to commit robbery with a deadly weapon.

State of Tennessee v. Michael D. Rimmer, W1999-00637-CCA-R3-DD, 2001 Tenn. Crim. App. LEXIS 399, at *39 (Tenn. Crim. App. filed May 25, 2001, at Jackson). There was little in the

[152] See Tenn. Code Ann. § 39-13-204(i)(2) (Supp. 2000).
[153] See Tenn. Code Ann. § 39-13-204(i)(7) (Supp. 2000).

way of fruitful cross examination that could have been done at petitioner's sentencing hearing. Petitioner's claims with regard to counsel's failure to investigate and present evidence challenging the circumstances of the crime at the guilt phase of the trial have been previously discussed by this court. However, even if counsel had performed such an investigation, this court finds that petitioner has failed to establish prejudice in the sentencing portion of the trial based upon counsels' inaction. Since petitioner refused to allow mitigation to be presented on his behalf, this court finds there was little counsel could do to challenge the State's aggravating factors. Moreover, even if this court were to find counsel were ineffective during the sentencing portion of petitioner's trial, given that on direct appeal of his conviction and sentence the Court of Criminal Appeals granted petitioner a new sentencing hearing, this court finds petitioner is not entitled to relief based upon this claim.[154]

I. Preservation of *Brady* Claims and Ineffective Assistance of Counsel Claims

Petitioner contends counsel failed to preserve his claims relating to Brady violations and ineffective assistance of counsel. Counsel for petitioner filed an initial motion for judgment of acquittal or motion for new trial asserting that the evidence was insufficient to support petitioner's conviction and claiming the verdict was contrary to the law and evidence. Later, counsel filed a more detailed amended motion for new trial. However, counsel's amended motion did not include claims of alleged *Brady* violations or ineffective assistance of counsel. Subsequent to the trial court's denial of petitioner's motion; but, prior to the filing of his direct appeal, petitioner filed a *pro se* motion requesting the appointment of new counsel. Petitioner also moved to amend his motion for new trial in order to raise claims of ineffective assistance of counsel and *Brady* violations. Petitioner acknowledges that the Tennessee Supreme Court

[154] See State of Tennessee v. Michael D. Rimmer, No. W1999-00637-CCA-R3-DD (filed May 25, 2001 at Jackson).

eventually considered his claims of ineffective assistance of counsel and determined such claims were more appropriately reserved for post conviction review. See State v. Rimmer, No. 02C01-9905-CR-00152. He also acknowledges that his *Brady* claims were preserved for future review. However, he argues he was prejudiced by the delay in having such claims heard and contends trial counsel is to blame for the delay.

This court finds counsel were not ineffective in failing to present petitioner's claims of ineffective assistance of counsel in their motion for new trial. The appellate courts have stated, that, although a defendant may raise an ineffective assistance of counsel claim on direct appeal, "the practice of raising ineffective assistance of counsel claims on direct appeal is 'fraught with peril' since it 'is virtually impossible to demonstrate prejudice as required' without an evidentiary hearing." State v. Blackmon, 78 S.W.3d 322, 328 (Tenn. Crim. App. 2001) (citations omitted). As for counsel's failure to raise petitioner's *Brady* claims, this court notes that it has previously addressed counsel's failure to investigate the facts which are the subject of petitioner's claims and found counsel were ineffective in this regard. Thus, the court likewise finds counsel were ineffective in failing to raise petitioner's *Brady* claims in their motion for new trial. Moreover, this court finds petitioner was prejudiced by counsels' inaction.

II. 1998 Appellate Counsel [155]

Petitioner asserts his 1998 appellate counsel provided ineffective assistance of counsel. Specifically, he asserts that he attempted to raise issues of ineffective assistance of counsel on appeal and appellate counsel failed to assist him in this effort. Petitioner argues that by failing to assist him in making a record of the ineffective assistance of his trial counsel and his claims under *Brady,* appellate counsel failed to preserve the opportunity to timely litigate such claims. This court finds this issue is without merit.

With regard to the assistance of appellate counsel, the appellate courts of this state have held it is appellate counsel's responsibility to determine the issues to present on appeal. State v. Matson, 729 S.W.2d 281, 282 (Tenn. Crim. App. 1986)(citing State v. Swanson, 680 S.W.2d 487, 491 (Tenn. Crim. App. 1984)). This responsibility addresses itself to the professional judgment and sound discretion of appellate counsel. Porterfield v. State, 897 S.W.2d 672, 678 (Tenn. 1995). However, there is no constitutional requirement that every conceivable issue be raised on appeal. Campbell v. State, 904 S.W.2d 594, 597 (Tenn. 1995). The determination of which issues to raise is a tactical or strategic choice. Id. To determine whether appellate counsel was constitutionally effective, courts use the two-prong test set forth in Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984) - the same test that is

[155] Initially, petitioner's trial counsel, Ron Johnson, prepared the notice of appeal. The notice was filed on February 12, 1998. Loyce Lambert, also an attorney with the Shelby County Public Defender's Capital Team, prepared and filed a motion for stay of execution on March 24, 1998. It appears the case was subsequently assigned to Shelby County Public Defender Mark Ward, who handled capital appeals for the office. Sometime after the appointment of Mark Ward petitioner filed a pro se motion in the Shelby County Criminal Court seeking to remove his appellate counsel based upon a conflict of interest. Thereafter, appellate counsel filed a motion to withdraw as counsel in the Tennessee Court of Criminal Appeals. Petitioner filed his own motion supporting disqualification of appellate counsel. Due to a pending bar complaint filed by petitioner against trial counsel and a malpractice suit filed on behalf of petitioner against trial counsel, the Tennessee Supreme Court ultimately determined that the Shelby County Public Defender's Office should not be allowed to continue to represent petitioner on appeal. Thereafter, attorneys Paula and Gerald Skahan were appointed to represent petitioner.

applied to claims of ineffective assistance of trial counsel asserted under the Sixth Amendment to the United States Constitution. Porterfield v. State, 897 S.W.2d 672, 678 (Tenn. 1995); see also Smith v. Murray, 477 U.S. 527, 535-36, 91 L. Ed. 2d 434, 106 S. Ct. 2661 (1986) (applying Strickland to a claim of attorney error on appeal). As previously stated, under Strickland, we must determine: 1) whether counsel's performance was deficient; and 2) whether the defense was prejudiced by the alleged deficiency. 466 U.S. at 687. The petitioner bears the burden of establishing both prongs of this test. Id. at 690-94. Failure to establish either prong provides a sufficient basis to deny relief. Id. at 697. Accordingly, a court need not address both prongs if the petitioner makes an insufficient showing of one component. Id.

As noted in the section of this court's order dealing with ineffective assistance of petitioner's 1998 trial counsel, given the Tennessee Supreme Court's holding with regard to petitioner's claims of ineffective assistance of counsel, this court finds appellate counsel were not ineffective in failing to raise this issue on appeal. As the court has previously noted, the appellate courts have repeatedly addressed the perils of raising claims of ineffective assistance of counsel on direct appeal. See State v. Blackmon, 78 S.W.3d 322, 328 (Tenn. Crim. App. 2001). Given the appellate courts' position on this issue, this court finds appellate counsel appropriately declined to address this issue on direct appeal of petitioner's conviction and sentence.

With regard to petitioner's allegation that appellate counsel were ineffective in failing to present his *Brady* claims, this court finds appellate counsel were likewise not ineffective in raising these claims on direct appeal of petitioner's conviction and sentence. At the post conviction hearing, Gerald Skahan testified that issues regarding alleged *Brady* violations were not raised on direct appeal because those issues had not been preserved in the trial court. Appellate counsel is bound by the issues raised and preserved at trial. Moreover, appellate

counsel is bound by the investigation that was conducted by trial counsel. Therefore, under the circumstances presented in this case, as discussed in detail in the portion of this order addressing the ineffective assistance of trial counsel, this court does not find appellate counsel were ineffective in failing to raise *Brady* claims relating to Darnell's identification on appeal. Thus, petitioner is not entitled to relief based upon this claim.

III. Resentencing Representation

A. Representation of Trial Counsel

Petitioner asserts his resentencing counsel were ineffective in failing to: (1) investigate the facts of the case; (2) challenge the state's ability to prove *corpus delicti*; (3) challenge the introduction of improper evidence; and, (4) present witnesses in support of mitigation and challenge the state's proof as to guilt and as to the aggravating circumstance.

Petitioner asserts his resentencing counsel failed to conduct an adequate investigation of the guilt phase facts of his case. He contends, had counsel conducted a proper investigation of the facts, they would have been able to present a more effective residual doubt defense at his resentencing hearing. Petitioner further argues that, had counsel conducted a proper investigation, they would have been able to challenge the state's ability to prove *corpus delicti* and would have been better prepared to challenge the introduction of improper evidence and to confront the state's witnesses and rebut the aggravating circumstances. He argues that but for counsel's failure in this regard, there is a reasonable probability the jury would have reached a different conclusion as to his sentence.

Initially, this court notes that it has evaluated all challenges relating to resentencing counsel's representation to determine how such alleged deficiencies would have affected

petitioner's sentence only. Thus, issues relating to such matters as the state's ability to prove *corpus delicti,* or counsel's cross examination of state witnesses are reviewed only for the affect counsel's alleged failures had on petitioner's sentence. This court finds resentencing counsel failed to adequately investigate the facts of petitioner's case. Moreover, this court finds petitioner was prejudiced by counsel's inaction.

(1) Investigation Into the Facts of Petitioner's Case

This court finds petitioner's resentencing counsel did an extensive investigation into the facts of petitioner's case. It was in fact, resentencing counsel who first put forth proof regarding James Darnell's description of two perpetrators. Additionally, resentencing counsel conducted an investigation into the nature of the relationship between petitioner and the victim and presented proof designed to refute the state's aggravating circumstances. Resentencing counsels' investigation and presentation of proof relating to the facts of petitioner's case was far greater than that performed by petitioner's 1998 counsel. Nevertheless, this court finds that resentencing counsel were ineffective in failing to locate and interview James Darnell and in failing to go to the property room and view the evidence in this case.

The theory of the defense at resentencing was one of residual doubt. Residual doubt evidence refers to proof that the defendant did not commit the murder and that, notwithstanding the jury's verdict of guilt, may raise some lingering or residual doubt in the jury's mind about the defendant's culpability and which may act as a mitigating circumstance with respect to punishment. See Franklin v. Lynaugh, 487 U.S. 164, 188, 108 S. Ct. 2320, 101 L. Ed. 2d 155 (1988) (O'Connor, J., concurring) ("'Residual doubt' is not a fact about the defendant or the circumstances of the crime. It is instead a lingering uncertainty about facts, a state of mind that

exists somewhere between beyond a reasonable doubt and absolute certainty."); State v. Hartman, 42 S.W.3d 44, 57 (Tenn. 2001) ("By definition, residual doubt is established by proof that casts doubt on the defendant's guilt."). In this case, the defense attempted to present two types of residual doubt evidence: (1) proof that there were two individuals at the Memphis Inn at the time of the murder and proof that petitioner did not match the description of either perpetrator; and (2) proof refuting the state's theory that the killing was the result of animosity between the defendant and the victim. The most critical element of the defense was the presentation of proof attempting to demonstrate that there were two individuals involved in the murder and that the description of those individuals did not match the description of petitioner. The success of this proof turned on information relating to the identification made by witness James Darnell.

At the post conviction hearing both Attorney Springer and Attorney Garrett testified that they did not recall interviewing James Darnell and did not recall going to the property room to view the evidence. Had counsel interviewed Darnell, he could have informed them that he was shown a photographic lineup. Although counsel ultimately learned that Darnell had been shown a photographic lineup, they did not learn this information until Officer Shemwell testified at the resentencing proceeding. Thus, they had to rely on the assertions of Assistant District Attorney General Henderson and Officer Shemwell regarding the whereabouts of the photo line-up and the outcome of the line-up. Based upon the witnesses misrepresentations, resentencing counsel were left with the impression that Darnell had in fact made no identification.

Both attorneys testified about the devastating effect this conclusion had on their ability to present a comprehensive and effective theory of residual doubt. Attorney Springer stated such evidence was critical to the defense presentation of residual doubt. Attorney Garrett testified that

the photo spread indicating Darnell had identified Voyles was a crucial piece of evidence that would have supported the defense theory of residual doubt. Springer stated that had he been aware that Darnell had identified Voyles, he would have attempted to locate Darnell prior to trial. Garrett stated that had he been aware of the photo-spread identification he would have further challenged officer Shemwell's testimony. While this court has sympathy with the predicament resentencing counsel found themselves in due to 1998 counsels' failure to investigate and the state's misrepresentations about the evidence, the court finds counsels' failure to attempt to locate, interview and subpoena Darnell and counsels' failure to go to the property room and review the evidence available to them unacceptable.

Having reviewed both the 1998 trial record; the resentencing record; the exhibits submitted by post conviction counsel and the State during the post conviction proceeding, this court finds a review of the evidence contained in the clerk's property room would have given counsel access to the Darnell photo-spread; officer Stewart's supplement outlining the results of the Darnell photo spread; and, at least one of the F.B.I. 302 forms relating to the Darnell photo spread. Thus, this court finds petitioner was prejudiced by counsel's failure to review the property room evidence. With regard to the failure of resentencing counsel to contact Darnell, this court likewise finds counsel were ineffective. Moreover, this court finds petitioner was prejudiced by counsels' inaction.

The blame for mishandling petitioner's case does not fall only at the feet of the prosecution and petitioner's original trial counsel. An opportunity to have this proof presented to a jury was missed due to resentencing counsel's failure to interview Darnell and failure to view the evidence in the property room. Resentencing counsel were far ahead of 1998 counsel in discovering that there was an eyewitness and that the eyewitness had described two suspects.

Counsel was in possession of the supplement which outlined Darnell's statement to police. Thus, counsel knew that Darnell had indicated he saw two individuals at the Memphis Inn at the time of the murder. Moreover, the document contained Darnell's name, date of birth, social security number, last known phone number and address, and information about Darnell's military service. However, despite making Darnell's identification of two suspects the hallmark of their residual doubt defense, counsel failed to interview Darnell. Like counsel before them, had resentencing counsel done so, Darnell could have told them that he was shown a photo spread and that he had identified an individual from the photo spread as one of the men he saw with blood on his hands in the lobby of the Memphis Inn on the night of the murder. Counsel could have discovered that the man Darnel identified was Billy Wayne Voyles and could have learned Darnell did not identify petitioner. Furthermore, according to Darnell's testimony at the post conviction hearing, had counsel interviewed Darnell they would have learned that Darnell had witnessed the man he identified placing a heavy object wrapped in what appeared to be a hotel comforter into the open trunk of the Honda Accord, the same type of car Dixie Roberts had also identified.

At the post conviction hearing, Darnell testified that on Saturday February 8, 1997, between 1:30 a.m. and 2:30 a.m. he witnessed a man in the parking lot of the Memphis Inn putting something "rolled up" in a motel comforter into the open trunk of a Honda Accord. Darnell stated that the object was heavy enough that the car "dropped a little bit" when the object was placed inside the trunk and indicated that the man appeared to be struggling. Darnell testified that he turned and walked toward the clerk's office and by the time he reached the door the man he saw putting the object in the trunk of the car was beside him. He stated that he was

uncomfortable having the man behind him so he stopped and opened the door and allowed the man to pass in front of him. Darnell stated that the man had blood on his hands.

As previously discussed a supplement prepared by Sergeant O.W. Stewart at 1:30 a.m. on May 30, 1997 indicated that Sgt. R.D. Roleson of the Safe Streets Task Force (SSTF) received information from F.B.I. Agent Peter Lee indicating James Darnell had positively identified the male white that he saw at the Memphis Inn on February 8, 1997 as he was entering the establishment to rent a room. The report indicates that Darnell stated that the individual he saw followed him into the motel and appeared to have blood on his knuckles. Finally, the report indicates that Darnell picked out the individual he saw from a photo spread and that the individual was identified by police as Billy Wayne Voyles.

Given that resentencing counsel's primary strategy was built upon a theory of residual doubt that largely turned on Darnell's description of the two individuals he saw at the Memphis Inn on the night of the murder, this court cannot find petitioner was not prejudiced by counsels' failure to interview Darnell. Had resentencing counsel testified that they made legitimate and repeated attempts to locate Darnell and were unable to do so, then the court might be of the opinion that resentencing counsel had conducted an adequate investigation of the case. However, both attorneys testified that they could recall no such efforts. Moreover, had the 1998 guilt phase jury heard that Darnell had identified someone other than petitioner and rejected this evidence, then the court would certainly be persuaded that the failure to present such evidence at the resentencing proceeding either was not ineffective or even if ineffective was not prejudicial. Such is not the case. Rather, the resentencing jury who was asked to consider residual doubt as mitigation and who had one, arguably partially rebutted, aggravating factor to consider heard nothing about the identification of another suspect by the one potential eyewitness to the murder.

The jury also did not hear that another individual had identified the same suspect as Darnell from the composite sketches Darnell helped to create.

This court acknowledges that resentencing counsel attempted to discover all the information relating to the Darnell photo-spread after learning, during Shemwell's direct testimony, that Darnell had been shown a photographic line-up. However, as the axiom goes, counsels' efforts were too little too late. Had counsel made similar inquiries pre-trial, based upon their own diligent investigation, then perhaps the state would have been able to locate the signed photo-spread and/or the documents related to it. However, counsel undertook no suck investigation. Rather, they relied on the one document provided them by their client and did not follow up with additional investigation. As such, this court is constrained to find that the resentencing jury's verdict is not reliable. Therefore, petitioner is entitled to a new sentencing hearing.

(2) Challenge to State's Corpus Proof

This court does not find resentencing counsel were ineffective in failing to challenge the state's proof of *corpus delicti*. At the time of resentencing, the petitioner had already been adjudged guilty of killing the victim. Although resentencing counsel's strategy was to raise the issue of residual doubt, it appears counsel made a tactical decision to challenge the state's proof of motive and identification rather than challenge the state's corpus proof. Tactical choices made by counsel are given deference, and reviewing courts must not measure trial counsel's deficiency by "20-20 hindsight." Cooper v. State, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992). The fact that a particular strategy or tactical decision failed does not by itself establish ineffective assistance of counsel. Goad, 938 S.W.2d at 369.

Under the circumstances, this court does not find counsel's tactical choices were unreasonable. The murder was alleged to have occurred in February of 1997. By the time the resentencing hearing occurred nearly seven years had passed. During that time there was no evidence to support an assertion by counsel that the victim was still alive; thus, to argue such would only undermine the defense's legitimate residual doubt evidence. As such this court finds petitioner is not entitled to relief based upon this claim.

(3) Introduction of Improper Evidence

Petitioner has failed to specify what improper evidence counsel should have sought to exclude or what objection counsel should have raised. Nevertheless, this court assumes petitioner relies on the same grounds set forth with regard to his claim of ineffective assistance of his 1998 counsel. Given that the petitioner had already been convicted and that such proof had previously been admitted, this court does not find resentencing counsel were ineffective in this regard. Moreover, given that the only issue before the jury was sentencing, this court finds even if counsel were ineffective petitioner has failed to demonstrate he was prejudiced by counsels' inactions.

(4) Failure to Challenge State's Case and Present Evidence

Again, this court notes that petitioner has failed to specify what portions of the state's case counsel were ineffective in failing to challenge and has failed to specify what evidence counsel should have presented. "When a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing. Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App.

1990); see also Scott v. State, 936 S.W.2d 271, 273 (Tenn. Crim. App. 1996). As a general rule, this is the only way the petitioner can establish that (1) a material witness existed who could have been discovered but for counsel's negligent investigation of the case; (2) a known witness was not interviewed; (3) the failure to discover or interview the witness caused him prejudice; or (4) the failure to present a known witness or call the witness to the stand resulted in the denial of critical evidence which caused the petitioner prejudice. Black, 794 S.W.2d at 757. Again, it appears petitioner relies on the same assertions raised in relation to his claims of ineffective assistance of his 1998 counsel.

The resentencing jury found one statutory aggravating circumstance: "the defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person." Tenn. Code Ann. §39-13-204(i)(2) (1997). On direct appeal of petitioner's re-sentence of death, the Tennessee Supreme Court outlined the strength of the State's aggravating factor and the attempts of counsel to undermine the state's proof. See State v. Michael Dale Rimmer, No. W2004-02240-SC-DDT-DD (filed February 20, 2008 at Jackson). The Court wrote:

> During the sentencing hearing, the State introduced evidence that the Defendant had been convicted of assault with intent to commit robbery with a deadly weapon and pleaded guilty to aggravated assault in 1985. The proof also established that in 1989, the Defendant pleaded guilty to the aggravated assault and rape of the victim. All of these offenses involved the use of violence to the person. The Defendant attempted to impeach the conviction for rape through the testimony by his mother, Sandra Rimmer. She testified that the victim had confided in her that her boyfriend, Tommy Voyles, had pushed her into bringing the rape charges. The jury implicitly considered this testimony unpersuasive because they found that the State had established the prior violent felony aggravating circumstance beyond a reasonable doubt.

Id. at *19. The Court held that the evidence presented by the State was sufficient to support the jury's verdict. In addition to testimony of Sandra Rimmer as outlined above by the Court,

resentencing counsel also attempted to rebut the state's aggravating circumstance by demonstrating that the relationship between the victim and the defendant remained amicable. Sandra Rimmer testified that the victim often accompanied her to visit petitioner in prison and stated that the pair continued to show affection for one another. In addition to this testimony, resentencing counsel attempted to elicit testimony from Sandra Rimmer regarding conversations she had with Tommy Voyles, in which Voyles attempted to extort $5,000 from her in exchange for him having the victim drop the rape charges against petitioner. Although the trial court disallowed this testimony, it is clear to this court that resentencing counsel thoroughly investigated the circumstances surrounding petitioner's prior offenses and attempted to challenge the state's aggravating circumstance based upon information gathered as a result of that investigation. This court finds counsel were not ineffective in failing to challenge the state's aggravating circumstance.

As to the presentation of mitigation, this court finds resentencing counsel were ineffective in their investigation and presentation of mitigation. Resentencing counsel did an extensive investigation into the facts and circumstances of the murder and presented considerable residual doubt evidence through the cross examination of the state's witnesses. Additionally, resentencing counsel presented several witnesses who spoke about the relationship between the victim and the petitioner and petitioner's religious conversion and involvement in the prison ministry. Resentencing counsel also presented testimony from mitigation specialist Dr. Ann Marie Charvat, who testified about the petitioner's family history and petitioner's social history and arrest history. However, as discussed in more detail above, resentencing counsel failed to view the evidence and failed to discover that an eyewitness had provided a description of suspects that did not match petitioner; had assisted police in developing a composite sketch of

suspects that do not resemble petitioner; and had failed to identify defendant while positively identifying another suspect, who had previously been implicated through a crime stoppers tip. Given that counsel chose residual doubt as their mitigation theory, this court finds counsel's failure to interview Darnell was not objectively reasonable. Moreover, this court finds counsels' inaction in this regard calls into question the reliability of the verdict.

There was only one aggravating circumstance found by the jury. As already noted, the entire defense strategy revolved around a theory of residual doubt. Thus, the failure to investigate and present critical evidence demonstrating another suspect had been positively identified by an eye-witness was highly prejudicial to petitioner's case. As such, this court finds, even if the court's conclusions about 1998 trial counsel are incorrect, petitioner is entitled to a new sentencing hearing based upon resentencing counsel's failure to interview Darnell and present his testimony at the resentencing proceeding.

B. Appellate Counsel's Representation on Direct Appeal of Resentencing Issues

Petitioner asserts appellate counsel were prejudicially deficient in failing to challenge the sufficiency of the evidence and in failing to challenge the state's proof of *corpus delicti*. This court finds appellate counsel provided competent representation during the direct appeal of petitioner's re-sentence of death. Thus, petitioner is not entitled to relief on the based upon these claims.

IV. Due Process Violations

Petitioner asserts his due process rights were violated by: (1) the state's destruction of the Honda's back seat; (2) the trial court's denial of trial counsel's motion to continue; (3) the trial court's refusal to appoint un-conflicted counsel and to consider *Brady* and ineffective assistance of counsel claims at the Motion for New Trial; (4) judicial bias; and (5) the trial court's refusal to allow him to sit at counsel's table. This court finds petitioner is not entitled to relief based upon this claim.

A. Destruction of the Backseat of the Honda

Petitioner asserts his due process rights were violated when the back seat of the Honda Accord was destroyed. Although he acknowledges that samples from the back seat were retained, he argues that testing of the entire back seat was necessary and would have rebutted the State's claim that the back seat of the car was saturated with the victim's blood and would have ultimately exculpated him of the crime. This court has previously held that the State did not commit prosecutorial misconduct by releasing the vehicle. Likewise, this court does not find petitioner's due process rights were violated by the release of the vehicle. Thus, this court finds petitioner is not entitled to relief based upon this claim.

B. Denial of Motion to Continue

Petitioner asserts his due process rights were violated by the trial court's refusal to grant a continuance of his original trial. He contends trial counsel's caseload was so burdensome that counsel could not provide adequate representation. Therefore, he contends the trial court should

have granted counsel's motion to continue his case. As a result of counsel's appeal of the trial court's denial of their motion to continue, counsel received an additional three months to prepare petitioner's case. Therefore, even if this court were to find petitioner's rights were somehow violated by the trial court's actions, petitioner has failed to establish he is entitled to relief based upon this claim.

D. Refusal to Appoint Un-Conflicted Counsel and to Consider Claims at Motion for New Trial

Petitioner argues that his due process rights were violated by the trial court's refusal at the Motion for New Trial to consider his claims relating to alleged *Brady* violations and claims of ineffective assistance of counsel. This court finds this issue is without merit and petitioner is not entitled to relief based upon this claim. The arguments presented in support of this claim have been addressed by the court in the section of this order dealing with judicial bias. The court declines to further comment on this issue.

E. Judicial Bias

Petitioner contends Judge Axley exhibited bias against him both at his initial trial and at his 2004 resentencing proceeding. In addition to his claims relating to the trial court's denial of a continuance discussed above, petitioner asserts the trial court demonstrate bias by: (1) making comments during his initial trial which suggested the trial court was "tag teaming" the prosecution; (2) covertly revising the jury's verdict at his initial trial; (3) refusing his right to be heard at the hearing on his Motion for New Trial and by removing him from the courtroom; (4) refusing to appoint Gerald and Paula Skahan to represent him at his resentencing proceeding; (5) showing bias and prejudice against all death penalty cases; (6) failing to grant a motion for

continuance in his resentencing proceeding; and (7) failing to recuse himself from the case. This court finds petitioner is not entitled to relief based upon his claim of judicial bias.

(1) Trial Court Statements of Bias

Petitioner contends the trial court made statements indicating it was biased against him and suggesting the court was collaborating with the state to set his trial at a time mutually convenient to the court and the state without consideration for defense counsel's schedule. Specifically he points to the following exchange:

THE COURT: Yes. See. Mr. Rimmer has a constitutional right to a speedy trial. I'm very concerned about protecting his Constitutional right.

MR. HENDERSON: And I'm going to try to, see that he gets everything he is entitled to as well.

THE COURT: I'm not going to comment on that. All right. He can step out.[156]

Initially, this court notes that adverse rulings by a trial court do not, standing alone, establish judicial bias of the trial court. See, Herrera v. Herrera, 944 S.W.2d 379, 392 (Tenn. Ct. App. 1996); State v. Wilson, 2012 Tenn. Crim. App. LEXIS 553 (Tenn. Crim. App. July 25, 2012). This court finds that the comments of the trial court do not establish bias.

(2) Revision of Jury Verdict

Petitioner contends the trial judge exhibited judicial bias when he revised the jury verdict. The 1998 sentencing jury returned a verdict of death and in listing the aggravating circumstances listed:

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[156] See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 97-02817, 98-01033- 34, W1999-00637-CCA-R3-DD, *Technical Record.*

> Guilty of Murder in the 1st degree, aggravated assault with intent to commit robbery, theft Nov. 7, 1998; 1st degree Burglary, aggravated assault, and rape – June 6, 1989; and assault with intent to commit robbery with a deadly weapon and aggravated assault, June 10, 1985.

See State v. Michael D. Rimmer, No. W1999-00637-CCA-RD-DD (Tenn. Crim. App. filed May 25, 2001 at Jackson). The trial court read from the verdict form in open court but omitted theft and burglary from its recitation without informing counsel what the verdict from actually reflected.[157] Upon reviewing the propriety of the verdict, the Court of Criminal Appeals concluded that the errors in the jury verdict warranted a new sentencing proceeding. In so finding, the Court noted that the trial judge had "abdicated his responsibility to have the jury render a verdict that unquestionably reflected its findings." See State v. Michael D. Rimmer, No. W1999-00637-CCA-RD-DD (Tenn. Crim. App. filed May 25, 2001 at Jackson). The Court further found that the trial judge was without authority to *sua sponte* revise the jury's verdict without informing counsel.

This court finds, although the trial court was in error, the petitioner has failed to demonstrate that his actions evidenced bias. Neither party was informed of the court's decision to, on its own initiative, substantially revise the jury's verdict. It does not appear that the court's decision to withhold this information was based upon a bias against petitioner. The State had just as much interest in having the jury return a proper verdict as did petitioner and they were likewise not informed of the court's inappropriate revisions or the jury's unacceptable verdict form.

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[157] See See State of Tennessee vs. Michael D. Rimmer, Shelby County Criminal Court, No. 97-02817, 98-01033-34, W1999-00637-CCA-R3-DD, *Transcript of Trial Proceedings.*

(3) Petitioner's Right to be Heard

Petitioner asserts the trial court exhibited bias at his Motion for New Trial when the court refused to allow him to be heard and had him removed from the courtroom. Under Tenn. R. Crim. P. 43, the trial court has discretion to remove an unruly defendant. However, this court notes that petitioner was not removed from the courtroom until the trial court had ruled upon his motion for a new trial. As to petitioner's claim that the trial court was biased in refusing to allow him to make additional arguments at the motion for new trial hearing, this court finds the trial court's actions in this regard did not demonstrate bias. At the time petitioner was represented by counsel, as such he did not have the right to simultaneously proceed with his *pro se* motion. See State v. Burkhart, 541 S.W.2d 365, 371 (Tenn. 1976) (holding that a defendant may not proceed pro se when simultaneously represented by counsel).

(4) Appointment of Counsel for Resentencing

Petitioner asserts the trial court demonstrated bias by refusing to appoint his appellate counsel, Gerald Skahan and Paula Skahan to represent him during his resentencing proceeding. This court finds petitioner has failed to demonstrate that the trial court's appointment of counsel in this matter was predicated upon a bias against him.

(5) Bias and Prejudice in Death Penalty Cases

Petitioner asserts the trial judge in his case has a demonstrated history of prejudice and bias while presiding over death penalty cases. This court finds petitioner has offered no evidence in support of this assertion. Moreover, comments made by a judge in a separate and unrelated case cannot be imputed to the present case. See State v. Michael Dale Rimmer, No. W2004-

02240-CCA-R3-DD, 2006 Tenn. Crim. App. LEXIS, *36 (filed December 6, 2006 at Jackson). Additionally, in so far as remarks from the judge indicate a judge's personal moral conviction or which "reflect prevailing societal attitudes," such remarks are insufficient alone to mandate disqualification. Id. (quoting Alley, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994)). (citations omitted). Given the appellate court's holding, this court finds petitioner has failed to establish judicial bais based upon the trial judge's comments in prior, unrelated proceedings.

(6) Motion for Continuance in Resentencing Proceeding

Petitioner asserts the trial court exhibited bias by failing to grant a continuance of his resentencing proceeding. On direct appeal of petitioner's resentence of death, the Court of Criminal Appeals found "nothing in the record suggests that the trial court abused its discretion," in denying counsels' request for a continuance. State v. Michael Dale Rimmer, No. W2004-02240-CCA-R3-DD, 2006 Tenn. Crim. App. LEXIS, *41 (filed December 6, 2006 at Jackson). Given the appellate court's holding, this court finds petitioner has failed to demonstrate the trial judge was bias based upon his denial of counsels' motion to continue. An adverse ruling against a party, alone, is insufficient to establish bias.

(7) Failing to Recuse at Resentencing

Petitioner argues the trial court should have recused itself from presiding over his resentencing proceeding. Again, the Court of Criminal Appeals addressed petitioner's claims on direct appeal of his re-sentence of death and found there was no evidence in the record that the trial judge "prejudged any factual issues that arose related to the re-sentencing hearing." State v. Michael Dale Rimmer, No. W2004-02240-CCA-R3-DD, 2006 Tenn. Crim. App. LEXIS, *37

(filed December 6, 2006 at Jackson). It is well-established that post-conviction proceedings may not be employed to raise and re-litigate issues previously determined on direct appeal. Roy E. Keough v. State, No. W2008-01916-CCA-R3-PD, 2010 Tenn. Crim. App. LEXIS 549, 2010 WL 2612937, at *38 (Tenn. Crim. App., at Jackson, June 30, 2010) (citing Miller v. State, 54 S.W.3d 743, 747-48 (Tenn. 2001)). Thus, based upon the appellate Court's holding, this court finds the petitioner has not established judicial bias based upon the trial judge's refusal to recuse himself.

F. Right to Sit at Counsel's Table

Petitioner asserts his due process rights were violated by the trial court's refusal to allow him to sit at counsel's table. Rule 8.05 of the Rules of Practice and Procedure for Shelby County Criminal Court provides that "where space is available and with permission of the Court, the defendant may sit at counsel table with his or her attorney." Thus, the local rule leaves to the discretion of the trial judge whether the defendant may sit at the table with counsel. This issue of whether the local rule violates a defendant's due process rights has been previously litigated. In State v. Rice, 184 S.W.3d 646 (Tenn. 2006), the Court noted that "in general, the course and conduct of trial proceedings rests within the sound discretion of the trial court." Id. at 674, (quoting State v. King, 40 S.W.3d 442, 449 (Tenn. 2001)). (citations omitted). After reviewing the practice of numerous jurisdictions, the Court held,

> While it is the better practice to allow a defendant to sit at counsel table, we conclude that the trial court did not abuse its discretion in this case by ordering the defendant to sit in the first row behind defense counsel's table. The seating arrangement did not impair the defendant's presumption of innocence. Nor did the court's order impact the defendant's ability to communicate with counsel.

Id. at 675. Given the Court's holding in Rice, this court finds petitioner is not entitled to relief based upon this claim.

V. Claim of Actual Innocence

Petitioner contends he is innocent of the crimes for which he has been convicted. Thus, he argues that his execution would violate the state and federal constitutions. A claim of actual innocence based on new scientific evidence may be presented in a post-conviction proceeding. Dellinger v. State, 279 S.W.3d 282, 291 (Tenn. 2009); cf. T.C.A. § 40-30-102(b) (2011) (stating that a belated post-conviction claim may be filed "based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which he was convicted"). However, any other claims of actual innocence based on newly discovered evidence should be raised in a petition for a *writ of error coram nobis*. Harris v. State, 102 S.W.3d 587, 591 (Tenn. 2003); Shaun Alexander Hodge v. State, No. E2009-02508-CCA-R3-PC, 2011 Tenn. Crim. App. LEXIS 672, at **22 (Tenn. Crim. App. August 26, 2011); Sarrah Hewlett v. State, No. M2009-00379-CCA-R3-PC, 2010 Tenn. Crim. App. LEXIS 594, at **13-14 (Tenn. Crim. App. July 20, 2010). This court finds petitioner's claims of actual innocence are not the proper subject of a post conviction petition. Thus, he is not entitled to relief.

VI. Sufficiency of the Evidence

Petitioner contends the evidence presented at both his initial trial and his resentencing proceeding was insufficient to sustain his convictions and his sentence of death. Petitioner acknowledges that these claims were previously addressed by the appellate courts on direct appeal of his initial convictions and sentence of death and his subsequent sentence of death. However, he argues that appellate counsel failed to adequately challenge the sufficiency of the

state's evidence of *corpus delicit*. Therefore, he claims this court should once again review the sufficiency of the evidence. This court finds petitioner is not entitled to relief based upon this claim. As addressed elsewhere in this order, on direct appeal of petitioner's 1998 convictions and sentence of death, the Court of Criminal Appeals found that the evidence sufficiently established that the victim was in fact deceased. See State of Michael D. Rimmer, No. 1999-00637-CCA-R3-DD, *3 (filed May 25, 2001 at Jackson). Moreover, this court's independent reviewed the evidence supports this conclusion.

VII. Cumulative Error

Petitioner asserts the cumulative errors of his trial counsel, alone, require this court grant his request for a new trial and sentencing hearing. He further asserts that the prosecutorial misconduct in his case, alone, warrants reversal of his convictions and death sentence. Moreover, he asserts that the errors of his original trial counsel when considered in conjunction with the prosecutorial misconduct exhibited by Assistant District Attorney General Tom Henderson warrant the granting of a new trial and sentencing hearing.

When an attorney has made a series of errors that prevents the proper presentation of a defense, it is appropriate to consider the cumulative impact of the errors in assessing prejudice. See Harris by and through Ramseyer v. Wood, 64 F.3d 1432, 1438 (9th Cir. 1995) (citations omitted). This court agrees petitioner is entitled to relief for the reasons set forth above. However, having individually addressed each claim and having found petitioner has demonstrated he is entitled to relief, this court declines to further address petitioner's claims with

regard to the cumulative effect of trial counsels'; resentencing counsels'; or, the prosecution's errors in his case.

VIII. Constitutionality of the Death Penalty & Constitutionality of Petitioner's Death Sentence

Petitioner raises various challenges to the constitutionality of the death penalty in Tennessee. Specifically, petitioner asserts: (1) the discretion provided prosecutors in charging capital defendants in Tennessee violates due process; (2) Shelby County fails to provide for adequate representation in death penalty cases; (3) the Tennessee Supreme Court's direct appellate review of proportionality of the sentence in all capital cases is both substantively and procedurally inadequate; and, (4) Tennessee's lethal injection protocol is unconstitutional. This court finds these claims are without merit.

Numerous claims relating to the constitutionality of Tennessee's death penalty scheme have been reviewed and rejected by the Tennessee's Appellate Courts. Tennessee appellate courts have consistently rejected claims that Tennessee's lethal injection protocol violates the Eighth Amendment's prohibition against cruel and unusual punishment. See State v. Kiser, 284 S.W.3d 227, 275-76 (Tenn. 2009), *cert. denied*, Kiser v. Tennessee 2009 U.S. LEXIS 5954, 130 S. Ct. 229, 175 L. Ed. 2d 158 (2009); State v. Banks, 271 S.W.3d 90, 160 (Tenn. 2008), *cert. denied*, Banks v. Tennessee, 2009 U.S. LEXIS 2440, 129 S. Ct. 1677, 173 L. Ed. 2d 1043 (2009); Abdur'Rahman v. Bredesen, 181 S.W.3d 292, 297-98 (Tenn. 2005). Thereafter, the United States Supreme Court upheld the state of Kentucky's three drug lethal injection protocol. Baze v. Rees, 2008 U.S. LEXIS 3476, 128 S.Ct.1520, 170 L.Ed.2d 420 (2008). Subsequently, finding Tennessee's protocol "substantially similar" to Kentucky's, the Sixth Circuit, held that

Tennessee's lethal injection protocol is constitutional. See Harbison v. Little, 571 F.3d 531 (6th Cir. 2009), *cert denied* 130 S. Ct. 1689; 176 L. Ed. 2d 187; 2010 U.S. LEXIS 2053; 78 U.S.L.W. 3499 (2010), *rehearing denied* by Harbison v. Little, 130 S. Ct. 2144, 176 L. Ed. 2d 761, 2010 U.S. LEXIS 3256 (U.S., 2010).

The Tennessee appellate courts have also rejected constitutional challenges regarding unlimited prosecutorial discretion as well as claims asserting discriminatory imposition of the death penalty. See State v. Ivy, 2004 Tenn. Crim. App. LEXIS 1154 at *86 (filed December 30, 2004, at Jackson) (relying upon the Tennessee Supreme Court's holding in Hines, 919 S.W.2d at 582 and State v. Brimmer, 876 S.W.2d 75, 87 (Tenn. 1994), *cert denied*, 513 U.S. 1020, 115 S.Ct. 585, 130 L.Ed.2d 499 (1994); State v. Cazes, 875 S.W.2d 268 (Tenn. 1993); State v. Smith, 857 S.W.2d 1, 23 (Tenn.), *cert. denied*, 510 U.S. 996, 126 L.Ed.2d 461, 114 S.Ct. 561 (1993)); see also State v. Stevens, 78 S.W.3d 817 (Tenn. 2002). The Tennessee Supreme Court in State v. Austin, 87 S.W.3d 447 (Tenn. 2002), specifically found: (1) Tennessee's death penalty statutes meaningfully narrow the class of death eligible defendants; (2) the death sentence is not capriciously and arbitrarily imposed in that (a) the prosecutor is not vested with unlimited discretion as to whether or not to seek the death penalty and (b) the death penalty is not imposed in a discriminatory manner based upon economics, race, geography.

Finally, our supreme court has repeatedly upheld the comparative proportionality review undertaken by the appellate courts in this state as meeting state constitutional standards. See State v. Vann, 976 S.W. 2d 93, 118 (Tenn. 1998) (appendix); State v. Keen, 926 S.W.2d 727, 743-44 (Tenn. 1994); State v. Barber, 753 S.W.2d 659, 663-668 (Tenn. 1988); State v. Coleman, 619 S.W.2d 112, 115-16 (Tenn. 1981). In particular State v. Keen, 926 S.W.2d at 743, rejected

the very arguments set forth by petitioner. Thus, this court does not find petitioner is entitled to relief based upon his constitutional challenges to Tennessee's death penalty scheme.

IX. Constitutionality of Prior Conviction

Petitioner contends his death sentence must be vacated because the State relied on prior unconstitutionally obtained convictions in securing his sentence of death. Petitioner asserts his 1985 convictions for assault and aggravated assault and his 1989 conviction for aggravated assault, rape and assault with intent to commit robbery were unconstitutionally obtained. At petitioner's capital sentencing hearing, the prosecution relied upon these convictions to establish the prior violent felony aggravating circumstance. See Tenn. Code Ann. § 39-13-403(i)(2). This court finds the instant post conviction proceeding is not an appropriate avenue to challenge the constitutionality of his prior convictions. Petitioner has no fundamental right to collaterally attack a conviction and due process requires only that a petitioner be provided an opportunity for the presentation of the claim at a meaningful time and in a meaningful manner.. See Reid v. State, 197 S.W.3d 694, 701 (Tenn. 2006). In Tennessee, two distinct procedural avenues are available to collaterally attack a final judgment in a criminal case -- habeas corpus and post-conviction petitions. Taylor v. State, 995 S.W.2d 78, 83 (Tenn. 1999); Potts v. State, 833 S.W.2d 60, 62 (Tenn. 1992). It does not appear petitioner challenge the convictions in a proper post conviction proceeding; thus, the only proper avenue for relief is through a habeas petition.[158]

[158] Although there is no habeas corpus statute of limitations, the grounds upon which habeas corpus relief will be granted are narrow. Dixon v. Holland, 70 S.W.3d 33, 36 (Tenn. 2002); See State v. Ritchie, 20 S.W.3d 624, 630 (Tenn. 2000). Habeas corpus relief is proper only if the petition establishes that the challenged judgment is void, as opposed to merely voidable. Taylor v. State, 995 S.W.2d 78, 83 (Tenn. 1999); Potts, 833 S.W.2d 60, 62 (Tenn. 1992). A judgment is void "only when 'it appears upon the face of the judgment or the record of the proceedings upon which the judgment is rendered' that a convicting court was without jurisdiction or authority to sentence a defendant, or that a defendant's sentence of imprisonment or other restraint has expired." Ritchie, 20 S.W.3d at 630

Moreover, even if this court were to find such a challenge was appropriate, this court finds petitioner has failed to present any proof in support of this allegation. Therefore, he is not entitled to relief based upon this claim.

X. Ongoing Conflict of Interest

Petitioner asserts that the ongoing conflict of interest in the Shelby County District Attorney General's continued representation of the State in this matter violates his right to due process. This court finds this matter was fully litigated at a prior hearing in this matter. Having found no such conflict exists, this court declines to address this issue further.

(citations omitted). A petition for post-conviction relief is the procedural avenue for attacking voidable judgments. Taylor, 995 S.W.2d at 83; State v. McClintock, 732 S.W.2d 268, 272 (Tenn. 1987). A one-year statute of limitations applies to post-conviction petitions. Tenn. Code Ann. § 40-30-102.

CONCLUSION[159]

Having found both petitioner's 1998 counsel and petitioner's resentencing counsel provided ineffective assistance of counsel by failing to properly investigate and present evidence and having found that such failure on the part of counsel prejudiced petitioner to the point that the court's confidence in the verdicts has been undermined and reliability in the verdicts cannot be had, this court finds petitioner is entitled to relief in the form of a new trial and capital sentencing hearing.

It is so ordered, this the 12 day of Oct, 2012.

James C. Beasley, Jr.

Judge James C. Beasley, Jr.
Division 10, Shelby County Criminal Court

[159]This court has reviewed all of the allegations submitted in petitioner's numerous petitions. Any claim not specifically addressed in this order, has been found by this court to be without merit.

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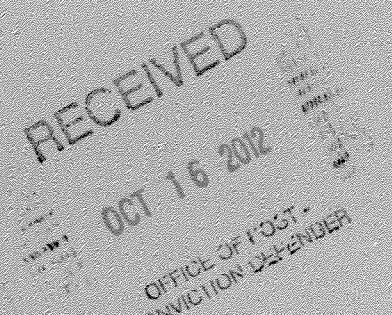

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