No. 21-6012

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL D. RIMMER,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE TENNESSEE SUPREME COURT

RESPONDENT'S APPENDIX

HERBERT H. SLATERY III
Attorney General and Reporter
State of Tennessee

ANDRÉE SOPHIA BLUMSTEIN
Solicitor General

ANDREW C. COULAM
Senior Assistant Attorney General
Counsel of Record

P.O. Box 20207
Nashville, Tennessee 37202
615-741-1868
andrew.coulam@ag.tn.gov

Counsel for the Respondent

TABLE OF CONTENTS

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	
	)	
vs.	)	**No. W2017-00504-SC-DDT-DD**
	)	**Shelby County Case Nos. 98-01033-34**
MICHAEL RIMMER,	)	
	)	
Appellant.	)	

ON DIRECT APPEAL FROM THE JUDGMENT
OF THE CRIMINAL COURT OF SHELBY COUNTY, TENNESSEE

BRIEF OF THE APPELLANT MICHAEL RIMMER

Respectfully submitted by:

Paul Bruno, B.P.R. #17275
Bulloch, Fly, Hornsby & Evans PLLC
302 North Spring Street
P.O. Box 398
Murfreesboro, Tennessee 37133-0398
(615) 896-4154

and

Robert Parris, B.P.R. #19847
200 Jefferson Street
Suite 1500
Memphis, Tennessee 38103
(901) 529-8100

COUNSEL FOR APPELLANT MICHAEL RIMMER

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

INTRODUCTION

Although this brief will address all issues that were presented to the Court of Criminal Appeals, it is the intent of Mr. Rimmer to address some of the factual errors in the Court of Criminal Appeals' Opinion and to thereafter focus primarily in this brief on issues IX, XII, and XV that are pending before this Court.

Factually speaking, the Court of Criminal Appeals found that "the evidence showed that the Defendant and the victim had an on-and-off relationship in the late 1970s and early 1980s." (Page 3 of the Opinion). Actually, Mr. Rimmer had a relationship with Ms. Ellsworth in the late 1980s and 1990s. The Court also found that "The Defendant was released from prison in January 1997 and began working for an automobile repair shop." Actually, Mr. Rimmer was released in October, 1996. (Vol. 18. 894). The Court also stated that Dixie Presley "saw a maroon car parked in front of the office entrance with its trunk open." The maroon car was not parked in front of the office entrance. The Court also noted that "Investigators found large blood stains in the back seat of the car." The proof was that Mr. Baldwin saw a spot in the back seat of the vehicle that could have been blood. (Vol. 10. 441). He thought the spot was a size larger than a softball—five or six inches. (Vol. 10. 441).

Regarding sentencing, the Court wrote "the State introduced certified copies of the Defendant's four prior felony convictions involving the use of violence against a person." In fact, the State submitted copies related to two convictions. See exhibits 221 and 222.

Regarding issue IX, the Court of Criminal Appeals found that a computer search by a TBI agent followed by an unsuccessful lead through a telephone number constituted a "good-faith" effort to locate perhaps the most crucial witness in the entire case. This brief will address not only how

such a finding is not only unbelievable, but also how this Court should be weary of the implications of such a ruling in future cases if this Court does not reverse the Court of Criminal Appeals.

Further, regarding issues XII and XV, the Court of Criminal Appeals found **errors** that were made by the trial court, and then deemed the **errors** to be harmless. Mr. Rimmer will explain in this brief why the **errors** were not harmless.

In addition, Mr. Rimmer would submit that a person should not be put to death in any case in which **error** is found by the Court. This should be a fundamental principle of death penalty law. Otherwise, how can the State of Tennessee have confidence in death sentences when they are obtained with evidence that was admitted in **error**? It is never too much to ask that before the State of Tennessee can execute its citizens (as it is currently doing at an incredible pace), it should ensure that the proceedings are free from **error**.

TABLE OF AUTHORITIES

Page No(s).

CASES CITED:

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF COURT CITED:

LEGEND

Unless otherwise indicated, the following abbreviation will be used in this brief:

"R. ___" = Technical Record Page Numbers

"Vol. __. __" = Volume and Page Number of the Transcript

STATEMENT OF THE ISSUES

I. Whether the jury verdict regarding the offenses of conviction was contrary to the weight and sufficiency of the evidence, and whether the evidence was insufficient to lead any rational trier of fact to conclude that Mr. Rimmer was guilty beyond a reasonable doubt.

II. Whether the trial court erred in denying Mr. Rimmer's *Motion To Dismiss Count 2 of Case No. 98-01034.*

III. Whether the trial court erred in denying Mr. Rimmer's *Motion To Suppress DNA Evidence* which was heard on April 14, 2016.

IV. Whether the trial court erred in not striking the argument and/or declaring a mistrial when the State mentioned that the maroon vehicle had been taken and went missing, giving a clear indication that the vehicle had been stolen, in violation of the Court's prior order.

V. Whether the trial court erred in admitting evidence related to Mr. Rimmer's prior convictions for aggravated assault and rape and evidence related to Mr. Rimmer's alleged prior escapes or attempted escapes.

VI. Whether the trial court erred in not allowing William Baldwin to testify that he heard one of the Memphis Police Department detectives state, "The n***** did it."

VII. Whether the trial court erred in allowing testimony regarding a shank being located in the Indiana jail.

VIII. Whether the trial court erred in allowing a drawing of the backseat to be entered into evidence (exhibit 183).

IX. Whether the trial court erred in granting the State's motion in limine to declare James Allard unavailable and erred in admitting evidence in the form of transcripts and/or exhibits related to James Allard.

X. Whether the trial court erred in admitting hearsay testimony through Rhonda Ball regarding communication she allegedly had with William Conaley.

XI. Whether the trial court erred in allowing witness Chris Ellsworth to show his scars to the jury.

XII. Whether the trial court erred in admitting hearsay testimony through Tim Helldorfer regarding statements allegedly made by William Conaley and James Allard.

XIII. Whether the trial court erred in not allowing the defense to ask Tim Helldorfer whether a "positive" identification had been made by someone during the investigation.

XIV. Whether the trial court erred in not allowing Tim Helldorfer to testify about a document with his signature on it that indicated to whom the maroon vehicle was released.

XV. Whether the trial court erred in allowing testimony through Joyce Carmichael regarding Tommy Voyles.

XVI. Whether the trial court erred in admitting evidence in the form of transcripts and/or exhibits related to deceased and/or other unavailable witnesses in the form of testimony admitted through the reading of transcripts, as orally amended.

XVII. Whether the trial court erred in admitting the substance of Richard Rimmer's prior statement and exhibits 199 and 200 which were drawings allegedly made by Richard Rimmer.

XVIII. Whether the trial court erred in not allowing the testimony of Kenneth Falk regarding whether the lawsuit filed by him was successful.

XIX. Whether the trial court erred in not allowing Marilyn Miller to give an opinion regarding the length of time the maroon vehicle should have been retained by law enforcement before being released.

XX. Whether the trial court erred in not admitting documents marked as "Exhibit D" related to a lawsuit regarding the Shelby County Jail.

XXI. Whether the trial court erred in failing to give a *Ferguson* instruction.

XXII. Whether the trial court erred in finding Mr. Rimmer as the leader of the offense as a sentencing aggravator and finding consecutive sentencing appropriate.

STATEMENT OF THE CASE

On January 29, 1998, Michael Rimmer was indicted for first degree murder, felony murder, and aggravated robbery. (Vol. 8. 48-50).

On July 3, 2014, Mr. Rimmer filed a *Motion To Dismiss Count 2 of Case No. 98-01034.* (R. 1896-1903). On September 12, 2014, the State of Tennessee filed a *Response To Defense Motion To Dismiss Counts Two of Case Nos. 98-01034 and 97002817.* (R. 1984-1993). On October 24, 2014, the trial court filed an *Order Dismissing Count 2 of Indictment 97-02817 By Consent, And Denying The Motion To Dismiss Count Two of Indictment 98-01034.* (R. 2002-2010).

On September 12, 2014, the State of Tennessee filed a *Notice Of Intent To Seek Death Penalty.* (R. 1978-1979).

On September 12, 2014, Mr. Rimmer filed a *Motion to Suppress 404(b) Evidence.* (R. 1974-1977). On October 24, 2014, the State of Tennessee filed its *Response to Defense "Motion To Suppress" 404(b) Evidence.* (R. 2015-2016). On August 13, 2015, the State of Tennessee filed a *Notice of Intent To Use Potential 404(b) Evidence.* (R. 1550-1799). On September 2, 2015, Mr. Rimmer filed a *Response to State of Tennessee's Notice Of Intent To Use Potential 404(b) Evidence.* (R. 2038-2042). The trial court entered its *Order On Motions Related To Tenn. R. Evid. 404(b)* on September 14, 2015. (R. 60-74).

On March 30, 2016, Mr. Rimmer filed a *Motion To Suppress DNA Evidence.* (R. 2060-2070). The trial court entered its *Order Denying In Part Defendant's "Motion To Suppress DNA Evidence"* on April 27, 2016. (R. 78-95; 2077-2094).

On February 26, 2016, the State of Tennessee of filed a *Motion To Declare Witness Unavailable And Notice of Intent To Use Prior Testimony.* (R. 2051-2052).

Michael Rimmer's trial began with jury selection on April 25, 2016.

A *Consent Order Amending The Indictment* was entered on April 27, 2016. (R. 76).

Opening statements and the proof began on April 28, 2016.

On April 28, 2016, the State of Tennessee filed a *Motion To Declare Witness Unavailable And To Use Prior Sworn Testimony* related to James Allard. (R. 2095-2096).

Mr. Rimmer was found guilty of first degree murder and felony murder on May 6, 2016, on May 7, 2016, was sentenced to death. (R. 111-112). Mr. Rimmer was found guilty of Aggravated Robbery on May 6, 2016, and was sentenced to eighteen years imprisonment to be served consecutively to the death sentences. (R. 110).

Mr. Rimmer filed a *Third Amended Motion For Judgment Of Acquittal, Or, In The Alternative, Motion For A New Trial.* (R. 113-117). The trial court entered its *Order Denying Defendant's Motion For New Trial* on March 1, 2017. (R. 118-153). Mr. Rimmer timely filed a *Notice of Appeal* on March 8, 2017. (R. 156-157).

STATEMENT OF THE FACTS

Appellant, Michael Rimmer, was convicted in Shelby County, Tennessee in case numbers 98-01033 and 98-01034 of first degree premeditated murder, first degree felony murder, and aggravated robbery. Appellant was sentenced to death plus 18 years imprisonment.

I. The early morning hours of February 8, 1997, at the Memphis Inn in Shelby County, Tennessee.

On February 8, 1997, Raymond Summers was employed with CSX Transportation Company as a yard master. (Vol 9. 144; 146). Sometime after 2:45 a.m. on February 8, 1997, Mr. Summers went to the Memphis Inn in an attempt to make contact with a train crew. (Vol 9. 146-147). Upon entering the Memphis Inn, Mr. Summers did not see anyone. (Vol 9. 152). He noticed that the secured door to the office area was open. (Vol 9. 152). He walked through the office to the bathroom (Vol 9. 152; 158). He noticed blood in the bathroom, and upon seeing the blood, he exited the building as soon as possible. (Vol 9. 158-159).

He got into his van and headed toward a service station that had a pay phone. (Vol 9. 162-163). As he was headed that way, two sheriff's cars came out of a Denny's restaurant parking lot. (Vol 9. 163). Mr. Summers told the deputies that there had been a problem and that he needed somebody to come see what was going on. (Vol 9. 163). Mr. Summers followed the deputies to the Memphis Inn. (Vol 9. 163).

Lonnie Costello is a detective with the Shelby County Sheriff's Office. (Vol 9. 168). On February 8, 1997, Mr. Costello was on patrol when he was flagged down by Mr. Summers and went to the Memphis Inn. (Vol 9. 169-170). Ms. Costello and another deputy cleared the area in the clerk's office at the Memphis Inn. (Vol 9. 171). After securing the area, they contacted dispatch to

inform dispatch to call the Memphis Police Department. (Vol 9. 171). They kept the scene secure until officers with the Memphis Police Department arrived. (Vol 9. 172).

On February 8, 1997, Ronnie Weddle worked as a crime scene officer for the Memphis Police Department. (Vol 9. 210). Mr. Weddle had a bachelor's degree in law enforcement with a minor in political science from Eastern Kentucky Univesity. (Vol 9. 209-210). He had one-week training before bidding for the job. (Vol 9. 210). He rode with a senior partner for two weeks, and he did all the work. (Vol 9. 210). In February of 1997, he had been in the crime scene squad for about three years. (Vol 9. 211). In the early morning hours of February 8, 1997, Mr. Weddle responded to the scene at the Memphis Inn located at 6050 Macon Cove. (Vol 9. 211). Officer Peppers and Officer R. G. Moore worked with Mr. Weddle at the scene. (Vol 9. 212). They took photographs, dusted for fingerprints, collected and tagged evidence, prepared diagrams, and completed paperwork. (Vol 9. 212). Part of the gate latch was not tested for fingerprints. (Vol 9. 268).

Marilyn Miller is an expert in the fields of crime scene investigation, crime scene reconstruction, forensic science and serology, and blood spatter pattern analysis. (Vol. 19. 66; 71). She opined that although there was blood shed at the Memphis Inn, she could not tell whether a death occurred at the Memphis Inn. (Vol. 19. 74). There was also no way to know the quantity of blood at the Memphis Inn. (Vol. 19. 74). There was no evidence that a gunshot occurred inside that bathroom. (Vol. 19. 74). Regarding the crime scene investigation, she opined that there was a serious lack of crime scene control or security, the photography regarding the blood stain pattern analysis was totally inadequate, the fingerprint processing was inadequate, and there was no use of enhancement reagents to assist with the blood stain pattern analysis. (Vol. 19. 81-82). There were

no positive presumptive tests for any blood on any of the surfaces that were tested in the front of the maroon Honda. (Vol. 19. 87).

Jerry Findley is an expert in the field of blood stain pattern analysis. (Vol. 17. 782). He also testified that there was no indication at the crime scene that any of the blood was the result of a gunshot. (Vol. 18. 844).

Linda Spencer managed the Memphis Inn from 1989 to 2006. (Vol 9. 173). Ms. Spencer lived at the Memphis Inn. (Vol 9. 173). During the early morning hours of February 8, 1997, a Shelby County officer knocked on her door and told her that the clerk was missing. (Vol 9. 177). Ms. Spencer went to the front area of the Memphis Inn. (Vol 9. 178). She walked through the outside entrance into the vending area. (Vol 9. 178). The locked door to the office was open. (Vol 9. 178). The bathroom that was located in the office area had water running, blood on the floor and walls, a torn off toilet seat, and a glass and a flashlight in the sink. (Vol 9. 178). Money (about $600.00) was missing, and between three and five sets of sheets were missing. (Vol 9. 179-180; 197). Ricci Ellsworth's purse was in the office, and her car was still there at the Memphis Inn. (Vol 9. 190; 196). Ricci Ellsworth did not pick up her last paycheck. (Vol 9. 204). Ms. Spencer did not hear from Ricci Ellsworth after February 8, 1997. (Vol 9. 204).

Ms. Spencer testified that during the evening shift, if a guest requested extra towels, sheets, pillow cases or something else, the clerk would have to open the locked door to pass the items to the guests. (Vol 9. 207). She had also noted that there was a security camera behind the secured door, but it was not a real camera, and there was no tape in it. (Vol. 19. 56). Officer Shemwell noted that at the Memphis Inn, there was a security camera, but it was not actually working. (Vol. 12. 671). There was no tape in it because it was a dummy camera. (Vol. 12. 671).

II. The State's proof that Ricci Ellsworth is deceased.

Donald Ellsworth married Ricci Ellsworth in 1975. (Vol. 8. 121). They divorced around 1977 or 1978. (Vol. 8. 122) They remarried in 1992. (Vol. 8. 130). Mr. Ellsworth last saw her on February 7, 1997. (Vol. 8. 122).

Tracy Ellsworth Brown is the daughter of Ricci Ellsworth. (Vol. 8. 94). Her father was Donald Ellsworth. (Vol. 8. 94). She has two brothers, Chris Ellsworth and Keith Joshua (half-brother). (Vol. 8. 95). Mr. Brown has not seen, spoke with, or heard from her mother since a day or two before February 8, 1997. (Vol. 8. 110).

Christopher Ellsworth was the son of Ricci Ellsworth. (Vol. 16. 634). The last time he saw, heard from, or had any communication with his mother was around February, 1997. (Vol. 16. 640-641).

Margie Floyd was the mother of Ricci Ellsworth. (Vol. 13. 141). The last time she saw her daughter was on January 28, 1997. (Vol. 13. 141). She had not spoken to Ricci Ellsworth since February 7, 1997. (Vol. 13. 142).

III. The identity of the actual killers of Ricci Ellsworth.

Ronald King was staying at the Memphis Inn on Saturday, February 8, 1997. (Vol. 10. 445). Mr. King returned to the Memphis Inn around approximately 1:30 a.m. on Saturday, February 8, 1997. (Vol. 10. 445). Around 1:40 a.m. or 1:45 a.m., Mr. King went to the vending area (the night entrance area) at the Memphis Inn. (Vol. 10. 445). Mr. King observed a person come into the lobby and go through the door between the lobby of the Memphis Inn and the night clerk area. (Vol. 10. 447). It appeared to Mr. King that the night clerk knew the person who went through the door. (Vol. 10. 447). The man who went through the door arrived in a maroon vehicle. (Vol. 10. 449).

He was a white male, probably 6' or 6' 1", medium height and medium build, with a jacket and a cap on. (Vol. 10. 449). Mr. King got back to his room around 1:55 a.m. (Vol. 10. 448).

Natalie Doonan stayed at the Memphis Inn on the night of February 7, 1997, going into February 8, 1997. (Vol. 19. 144). At some point during the night, she went into the lobby area to get change for the vending machine. (Vol. 19. 144). She saw a woman working behind the glass. (Vol. 19. 144). She saw two males enter the Memphis Inn. (Vol. 19. 145). It was right before 2:00 a.m., or right after. (Vol. 19. 145). When asked if she recognized any of the people in the photo lineups as the one, or more, of the two people in the lobby area, she responded only from what she can vaguely remember. (Vol. 19. 146). She pointed out three people, including the number 5 on sheet "AA." (Vol. 19. 147; Exhibit 215). She described one of the persons in the lobby as big, tall, stocky, Hispanic, dark hair, dark complexion, not bald, with no head covering. (Vol. 19. 150). The second man was an average, white male with a basic body build. (Vol. 19. 151). She said the man had hair. (Vol. 19. 151).

On February 7, 1997, James Darnell, career military veteran, was on a date with Dixie Roberts Presley. (Vol. 13. 51-52). Mr. Darnell and Ms. Presley arrived at the Memphis Inn on February 8, 1997, in a maroon four-door Ford Taurus, S.H.O. between 1:30 a.m. and 2:00 a.m., according to his original statement (at trial, he thought it was around midnight or 12:30 a.m.). (Vol. 13. 54; 77). He believed he parked three or four spaces to the left of the clerk's door. (Vol. 13. 55). Ms. Roberts Presley stayed in the vehicle. (Vol. 13. 55).

When Mr. Darnell got out of his vehicle, he took several steps to the sidewalk and noticed a man about four or five spaces away to his left. (Vol. 13. 55-56). The man was standing directly behind a Honda vehicle. (Vol. 13. 56-57). (A few days after the incident, Mr. Darnell described the Honda vehicle as a grey four-door, compact, Honda Civic type sedan vehicle. (Vol. 13. 80).) Mr.

Darnell thought there were three vehicles between his vehicle and the vehicle behind which the man was standing, one of which was a minivan type vehicle. (Vol. 13. 56; 80). The man behind the Honda vehicle had something rolled up in his arms, and he looked like he was leaning down, putting it in the trunk. (Vol. 13. 57). The vehicle sank, or settled. (Vol. 13. 59). The man behind the vehicle had a baseball cap on his head. (Vol. 13. 58).

As Mr. Darnell approached the entrance to the Memphis Inn, the man behind the Honda vehicle approached the same entrance. (Vol. 13. 62). Mr. Darnell opened the door to let the other man go in first. (Vol. 13. 62). The man who preceded Mr. Darnell into the Memphis Inn was a male white; mid-twenties, five-foot, six inches, one-hundred fifty pounds, mustache, neck length light red hair, freckles on his left forearm, had on a orange and white baseball hat with a white nylon back, blue jeans, tennis shoes, bare arms (his sleeves were cut off), a wrist watch on the left arm, red hair, a red full, bushy, un-kept beard, and logo on his shirt. (Vol. 13. 64; 70; 83). He also had a tattoo on his left arm (maybe three or four inches). (Vol. 13. 87-88). In front of the jury, Michael Rimmer took off his shirt and showed his arms to the jury. (Vol. 21. 13). Mr. Rimmer had no tattoos on his arms.

When Mr. Darnell looked inside the Memphis Inn, he noticed that the night teller's office was wide open. (Vol. 13. 62). The man who went into the Memphis Inn before Mr. Darnell stood to the right of the (night clerk) window, and there was another man putting money under the window. (Vol. 13. 63). The man behind the window was a white male, mid-thirties, five-foot seven, one-hundred sixth pounds, collar length brown hair, thin mustache, a dark blue jacket, had on a black collared dark shirt, a dark pull over, and dark clothes on top. (Vol. 13. 70; 86). Both men had blood on their hands. (Vol. 13. 63). Mr. Darnell was in the lobby with the other two men for

approximately fifteen to twenty seconds. (Vol. 13. 64). Mr. Darnell turned around and left. (Vol. 13. 64).

Days later, Mr. Darnell read an article about what had happened, so he called the Crime Stoppers number and went down to the police department and gave an interview. (Vol. 13. 66-67). Mr. Darnell gave a description to law enforcement of the two individuals he saw at the Memphis Inn. (Vol. 12. 658). A sketch artist created composites based upon Mr. Darnell's descriptions. The composites are noted in Exhibits 152-154. (Vol. 12. 659-660). During the investigation, Billy Wayne Voyles became a suspect. (Vol. 12. 667).

In 1997, Richard Roleson was assigned to the F.B.I. Safe Street Task Force. (Vol. 20. 180). Mr. Roleson was asked by Sergeant Shemwell to send photospreads and pictures of a vehicle to the F.B.I. Office in Honolulu to have a witness (James Darnell) view them. (Vol. 20. 180). A positive identification was made. (Vol. 20. 180). Billy Wayne Voyles' photograph was included in the photo lineup because somebody said he might be one of the people in the composite drawings. (Vol. 12. 668). Mr. Darnell identified a photograph from photo lineup sheet #AA, numbered "5" as the person who entered the motel front desk area ahead of Mr. Darnell. (Exhibit 163, paragraph 11). Dequita Simmons identified the person on photo lineup sheet #AA, number 5, as Billy Wayne Voyles. (Exhibit 214).

Mark Goforth was a security guard for the Super 8 motel, right across the street from the Memphis Inn. (Vol. 20. 165). He knew Ricci Ellsworth as the night clerk at the Memphis Inn. (Vol. 20. 166). Mr. Goforth believed that the person on the left in Exhibit 154 stayed at the Memphis Inn and worked construction. (Vol. 20. 169). Mr. Goforth had a problem with him before. (Vol. 20. 170). The Memphis Inn had a reputation for prostitution, drugs, and stuff like that. (Vol. 20. 169).

Mary Ann Whitlock lives in Parkin, Arkansas. (Vol. 20. 171). Her husband was Johnny Whitlock. (Vol. 20. 172). In 1997, she saw a composite sketch on television. (Vol. 20. 172). She recognized the two people in the composite as Billy Wayne Voyles, Jr. and Raymond Cecil. (Vol. 20. 173; Exhibit 216). Billy Wayne Voyles, Jr. was the person with the mustache and the cap. (Vol. 20. 173). She recognized the person on page AA, number 5, in the photo lineup as Billy Wayne Voyles, Jr. (Vol. 20. 174; Exhibit 217). She knew Billy Wayne Voyles because his family is from Parkin, and she had known him since he was a teenager. (Vol. 20. 177). She has been around him in person several times. (Vol. 20. 177). She has also known Raymond Cecil for years. (Vol. 20. 177). She has seen the two of them together numerous times. (Vol. 20. 177).

After seeing the same composite on the next news cast, Johnny Whitlock called Arkansas State Police Officer Jackie Clark. (Vol. 20. 175).

IV. <u>Mr. Rimmer's last day at work.</u>

In 1997, James Wilcox was a co-worker of Mr. Rimmer for three days. (Vol. 16. 496). On February 7, 1997, Mr. Rimmer did not have money to get gas to cash his check. (Vol. 16. 497). Mr. Wilcox put $5.00 worth of gasoline in Mr. Rimmer's vehicle around 5:00 p.m. (Vol. 16. 497). Mr. Rimmer did not return to work again. (Vol. 16. 498). Mr. Rimmer was driving a maroon Honda Accord. (Vol. 16. 499).

In February, 1997, Jimmy Lamb was the employer of Michael Rimmer. (Vol. 17. 726). Mr. Rimmer did not return to work after February 7, 1997. (Vol. 17. 729). Mr. Rimmer did not come back and pick up his tools. (Vol. 17. 731). At the time, Mr. Rimmer drove a maroon Honda. (Vol. 17. 731).

V. The maroon Honda Accord.

In 1997, Cheryl Featherston owned a maroon Honda Accord. (Vol. 15. 454). She saw her vehicle being driven away. (Vol. 15. 455). When it was located, there were differences in the car from when it had been driven away. (Vol. 15. 456). There were items in the vehicle that did not belong to her. (Vol. 15. 456). When she had the vehicle, it did not have a shovel, duct tape, or reddish brown stains in it. (Vol. 15. 456-457). After it was located, the floor mats were missing. (Vol. 15. 458; Vol. 16. 488).

Howard (a.k.a. Steve) Featherston is married to Cheryl Featherston. (Vol. 16. 478). Mr. Featherston met Mr. Rimmer at Adesa, their place of employment. (Vol. 16. 480). Mr. Featherston testified that Mr. Rimmer had a tattoo on his upper arm. (Vol. 16. 483). In front of the jury, Michael Rimmer took off his shirt and showed his arms to the jury. (Vol. 21. 13). Mr. Rimmer had no tattoos on his arms. When the maroon Honda was located, the vehicle no longer had an upholstery cover on the inside of the trunk. (Vol. 16. 491).

On March 5, 1997, Michael Adams worked for the sheriff's department in Johnson County, Indiana. (Vol. 10. 329). At approximately 9:50 a.m. on the morning of March 5, 1997, Mr. Adams stopped a maroon Honda for speeding. (Vol. 10. 331-332). After being stopped, Mr. Rimmer exited his vehicle and began walking toward the deputy's vehicle. (Vol. 10. 333). When the deputy asked Mr. Rimmer to return to the vehicle, Mr. Rimmer complied and placed his hands on the trunk of the maroon Honda. (Vol. 10. 335). Mr. Rimmer provided a Mississippi driver's license to the deputy. (Vol. 10. 336). The deputy took Mr. Rimmer into custody. (Vol. 10. 336). The vehicle was towed to the police department's receiving bay. (Vol. 10. 337).

On March 5, 1997, Major Sexton went the location where the maroon Honda had been stopped. (Vol. 10. 346-347). Major Sexton communicated with the Memphis Police Department and

let them know he had the vehicle in his possession. (Vol. 10. 347-348). Memphis Police Department detectives went to Johnson County, Indiana. (Vol. 10. 348). On March 6, 1997, Major Sexton, Detective Skaggs, and Evidence Technician William Baldwin searched the vehicle in the presence of the Memphis Police Department detectives. (Vol. 10. 349). Major Sexton observed what he believed to be blood stains on the back seat of the vehicle. (Vol. 10. 350). The vehicle left the Johnson County Sheriff's Department receiving bay at 12:10 a.m. on March 7, 1997. (Vol. 10. 361).

On March 5, 1997, William Baldwin, Jr. was an evidence technician for the Johnson County Sheriff's Department. (Vol. 10. 386). Mr. Baldwin arrived where the maroon Honda had been stopped, and he secured the vehicle. (Vol. 10. 387). On March 6, 1997, in the presence of other law enforcement officers, Mr. Baldwin inventoried the vehicle and took photographs of the vehicle. (Vol. 10. 390). Mr. Baldwin secured the vehicle when he completed the inventory of the vehicle. (Vol. 10. 396). The items that were retrieved from the vehicle by Mr. Baldwin and the vehicle itself were released to the Memphis Police Department detectives on March 7, 1997. (Vol. 10. 406). Mr. Baldwin also audiotaped and videotaped the inventorying of the vehicle. (Vol. 10. 417). Mr. Baldwin testified that he put the videotape into evidence, processed it (meaning put it in the storage envelope), and released it to the Memphis Police Department. (Vol. 10. 441). During the inventory search, he thought he heard someone say what he believed was, "The n***** did it." (Vol. 10. 429). However, the Court did not allow this statement into evidence. (Vol. 10. 438-439). Mr. Baldwin saw a spot in the back seat of the vehicle that could have been blood. (Vol. 10. 441). He thought the spot was a size larger than a softball—five or six inches. (Vol. 10. 441).

On February 8, 1997, Robert Shemwell was a homicide detective with the Memphis Police Department. (Vol. 11. 559-560). Mr. Shemwell was the case coordinator for the Ricci Ellsworth

case. (Vol. 11. 561). On March 6, 1997, Mr. Shemwell traveled to Franklin, Indiana with Sergeant Ashton and Sergeant Wilkerson and observed the inventorying of the maroon vehicle by William Baldwin. (Vol. 11. 562-563). The inventorying was videotaped. (Vol. 11. 563). Mr. Shemwell noticed several cigarette ashes and butts in the vehicle's ashtray and a large burgundy duffel bag in the backseat. (Vol. 11. 564). When the duffel bag was removed, Mr. Shemwell observed what he believed to be dried blood on the backseat and on the little silver door plate on the bottom of the vehicle that covers over the carpet. (Vol. 11. 564).

The maroon Honda was taken from Indiana to the Memphis Police Department Impound Lot and was received by Sergeant Helldorfer on March 7, 1997. (Exhibit 121).

William Ashton worked for the Memphis Police Department in March, 1997. (Vol. 13. 157). Mr. Ashton was followed by a wrecker loaded with the maroon vehicle from Memphis, Tennessee to the Tennessee Bureau of Investigation in Nashville, Tennessee on March 11, 1997. (Vol. 13. 158-159). He signed over the vehicle to the Tennessee Bureau of Investigation, and he left a box of evidence at the Tennessee Bureau of Investigation. (Vol. 13. 159).

VI. The DNA Evidence

On July 1, 2014, Ryan Fletcher was working for the Tennessee Bureau of Investigation when he collected a DNA sample from Michael Rimmer. (Vol. 13. 22-23). On July 1, 2015, Mr. Fletcher collected a DNA sample from Tracy Brown. (Vol. 13. 27). On July 14, 2015, Mr. Fletcher collected a DNA sample from Chris Ellsworth. (Vol. 13. 27).

Margie Floyd was the mother of Ricci Ellsworth. (Vol. 13. 141). She gave blood in order to see if the blood found in the maroon vehicle was Ricci Ellsworth. (Vol. 13. 143). Mr. Shemwell obtained a blood sample from Margie Floyd, Ricci Ellsworth's mother, for DNA testing. (Vol. 11.

575). Stacey Powell drew the blood from Ms. Floyd. (Vol. 11. 575-576). The blood sample was turned over to FBI Special Agent Jennifer Eakin. (Vol. 11. 577).

On April 15, 1996, Dr. James Manning performed a Pap smear on Ricci Ellsworth. (Vol. 11. 542-544). The slide with the Pap smear material on it was sent to Roosevelt Medical Laboratories; the Lab Corps has the University of Tennessee Family Practice Healthplex. (Vol. 11. 546).

Mary Gill was a cytotechnologist, a person who screens Pap smears to detect for malignancies. (Vol. 11. 549). She received Ricci Ellsworth's slide from the UT Medical Group. (Vol. 11. 552). Special Agent Jennifer Eakin picked up the slide from Mary Gill. (Vol. 11. 557).

Samera Zavaro is an expert in the field of forensic serology. (Vol. 14. 209). In March, 1997, she analyzed a towel from the crime scene, a hammer from the maroon vehicle, a pillow from the maroon vehicle, a towel from the maroon vehicle, and a watch. (Vol. 14. 212). There was no blood on the hammer, the towel from the maroon vehicle, or the watch. (Vol. 14. 213). She found human blood on the towel from the crime scene and the pillow from the maroon vehicle. (Vol. 14. 214). However, she does not know whose blood is on the pillow. (Vol. 14. 232). From the maroon vehicle, she found human blood on the backseat. (Vol. 14. 218; 224). Four of her drawings were entered into evidence. (Vol. 14. 221-222). The defense objected to the admission of the drawing of the backseat (Exhibit 183). (Vol. 14. 220). It is the defenses position that Exhibit 183 does not reflect the true condition of the backseat-See Exhibits 85, 86, 87, 88, 89, 115, 173, 174, and 179.

Emily Jeskie is a forensic DNA analyst supervisor with Sorenson Forensics in Salt Lake City, Utah. (Vol. 13. 31). Ms. Jeskie obtained a DNA profile of Tracy Brown. (Vol. 13. 41). She compared that DNA profile from the DNA profile obtained from a cutting from a stain from a towel from the scene. (Vol. 13. 42; 46). Her conclusion was that the donor of the DNA from the towel stain is not excluded at the biological mother of Tracy Rene Brown. (Vol. 13. 43).

Frank Samuel Baechtel was an expert in the fields of forensic serology and forensic DNA profiling. (Vol. 15. 360). Mr. Baechtel received a cutting from a towel from the scene, a cutting from the backseat of the maroon vehicle, and swabs from the backseat area. (Vol. 15. 371). The blood from these three items all came from the same person. (Vol. 15. 376). He also received a blood standard from Margie Floyd, Ricci Ellsworth's mother. (Vol. 15. 371). He opined that the blood stains are consistent with having come from a person who was possibly a child of Mrs. Ellsworth (Floyd). (Vol. 15. 377).

Donna Nelson is an expert forensic scientist in the area of DNA analysis. (Vol. 17. 680-681). She is employed by the Tennessee Bureau of Investigation. (Vol. 17. 677). She tested Mr. Rimmer's hat, a Spaulding tennis shoe, and a Caseless shoe for blood, and there was none. (Vol. 17. 685; 690). When Ms. Nelson tested the pillow from the vehicle, she did not find the presence of blood. (Vol. 17. 693). When Ms. Nelson tested the duct tape from the vehicle, she did not find the presence of blood. (Vol. 17. 693). She tested swabs from the bathroom floor, which indicated the presence of human DNA. (Vol. 17. 697). Michael Rimmer was excluded as a contributor. (Vol. 17. 698). She tested the towel from the scene, which indicated the presence of human DNA. (Vol. 17. 703). Michael Rimmer was excluded as a contributor. (Vol. 17. 703). She tested a bath mat from the scene, which indicated the presence of human DNA. (Vol. 17. 704). Michael Rimmer was excluded as a contributor. (Vol. 17. 704). She tested swabs from the seatbelt from the maroon Honda, which did not indicate the presence of blood. (Vol. 17. 706). She tested cuttings from the backseat of the maroon Honda. (Vol. 17. 707). Her opinion was that the DNA profile from the cuttings from the backseat was consistent with the DNA profile from the towel at the scene. (Vol. 17. 707).

VII. Richard Wayne Rimmer

Richard Wayne Rimmer is the brother of Michael Rimmer. (Vol. 18. 901). When asked about a statement he gave to police, Richard Rimmer either did not remember stating a particular answer or denied making a particular answer. (Vol. 18. 912-931).

On February 18, 1997, Detective Thomas Helldorfer interviewed Richard Rimmer, Michael Rimmer's brother. (Vol. 19. 23). In summary, Richard Rimmer conveyed the following:

> After Mr. Rimmer was released from prison, he saw Ricci Ellsworth. Michael Rimmer told his brother that he knew he could not be with Ms. Ellsworth, but he still loved her, and he was going to let her get on with her life. Michael Rimmer visited Richard Rimmer on Wednesday, February 5, 1997; Friday, February 7, 1997; and the morning of Saturday, February 8, 1997. During the Friday visit, Michael Rimmer told his brother that he had a date that night. When Michael Rimmer came over on Saturday morning, his white tennis shoes were real muddy. Michael Rimmer washed off his shoes. Michael Rimmer was wanting to know if Richard Rimmer would clean the interior of his car. Richard Rimmer told him no because the weather was bad and his yard was fairly muddy. Michael Rimmer was driving a '90 or '91 model, Honda Accord, two door, wine colored. Michael Rimmer said there was some blood from a gal from having sex with her in the backseat. He said the gal was on her period. Richard Rimmer observed a new shovel in the car on the rear floor board. Richard Rimmer threw away the shovel.
>
> (Vol. 19. 24-31).

Two of Richard Rimmer's drawings were admitted as Exhibits 199 and 200. (Vol. 19. 33).

On February 8, 1997, Joyce Frazier saw Michael Rimmer at her house. (Vol. 19. 31). It was real rainy that morning. (Vol. 19. 38). Michael Rimmer arrived in a maroon Honda. (Vol. 19. 39). The vehicle was muddy and dirty. (Vol. 19. 39). Mr. Rimmer's tennis shoes were muddy. (Vol. 19. 39). She noticed a clean shovel in the vehicle. (Vol. 19. 40). The backseat appeared to be water wet. (Vol. 19. 40). Michael Rimmer wanted his brother to clean blood out of the car. (Vol. 19. 41). Mr. Rimmer said he had been to Arkabutla to plant some pot seeds. (Vol. 19. 42).

VIII. The Jailhouse Snitches

In July, 1992, William Conaley was convicted of possession of a controlled substance and of selling a controlled substance, and he received a nine-year sentence. (Vol. 16. 504). In September, 1992, he was convicted of possession of a controlled substance and of selling a controlled substance along with another possession of a controlled substance and another selling of a controlled substance, and he received a twelve-year sentence. (Vol. 16. 504-505).

In 1993, Mr. Conaley was moved to the Neil Roan Unit at the Northwest Correctional Center, where he encountered Mr. Rimmer. (Vol. 16. 506). Both Mr. Conaley and Mr. Rimmer knew Rhonda Ball. (Vol. 16. 507). Mr. Conaley did not know Mr. Rimmer very well. (Vol. 16. 525). In fact, when interviewed by law enforcement, Mr. Conaley referred to Mr. Rimmer as Mr. Rembert. (Vol. 16. 525). Mr. Rimmer told Mr. Conaley that basically Ricci Ellsworth had put him in prison, and he was not happy with that situation. (Vol. 16. 509). Mr. Rimmer said that he had assaulted Ms. Ellsworth. (Vol. 16. 509). Mr. Rimmer told Mr. Conaley that he was upset because he felt that he should get some of the money from a lawsuit filed on behalf of one of Ms. Ellsworth's children. (Vol. 16. 509). Mr. Rimmer told Mr. Conaley to tell Ricci Ellsworth that if he didn't get that money that he deserved that he was going to kill her when he got out. (Vol. 16. 511). Mr. Conaley told Rhonda Ball about that statement, but he did not immediately report anything to law enforcement or to prison officials. (Vol. 16. 509; 529).

In January, 1996, Mr. Conaley was arrested and convicted of two possession of a controlled substance charges, and he received an eight-year sentence. (Vol. 16. 512). In February, 1997, Mr. Conaley read two articles in *The Commercial Appeal* about Ricci Ellsworth. (Vol. 16. 513-514). He told his father and grandmother that Michael Rimmer had said he was going to kill Ricci Ellsworth when he got out of prison. (Vol. 16. 514).

In February, 1997, he told law enforcement basically the same thing. (Vol. 16. 518). At the time of his interview with law enforcement, Mr. Conaley knew that the interview was being recorded. (Vol. 16. 533-534). When law enforcement began to question Mr. Conaley about Mr. Rimmer and Mrs. Ellsworth, Mr. Conaley asked law enforcement to cut the tape (the recording). (Vol. 16. 534). While the tape recording was cut off, Mr. Conaley reached an agreement with law enforcement and prison officials to be moved to a different part of the prison (the easiest part) if he agreed to speak about Mr. Rimmer. (Vol. 16. 540-541). Mr. Conaley was moved that very day. (Vol. 16. 541). Mr. Conaley denied that he recognized the name Don McGhee, denied ever having gone by the name Don McGhee, and denied ever using the name Don McGhee as an alias. (Vol. 16. 536-537). Joyce Carmichael is the director of record management and the official records officer for the Tennessee Department of Correction. (Vol. 18. 877). She testified that the name Don R. McGhee was associated directly with the name William Conaley. (Vol. 18. 896; Exhibit 205).

Mr. Conaley was provided a letter saying that he cooperated in the murder trial. (Vol. 16. 520).

Rhonda Jordan is Ricci Ellsworth's niece. (Vol. 16. 543). Over defense counsel's hearsay objection, Ms. Jordan testified that Mr. Conaley wrote her a letter and said that Mike Rimmer was in prison with him and that Mike wanted Billy to give her a message to give to her Aunt Ricci that he wanted his money or he was going to kill her. (Vol. 16. 548-553). Ms. Jordan told Mrs. Ellsworth. (Vol. 16. 553). Ms. Ellsworth was not concerned. (Vol. 16. 553).

Roger Lescure had previously been convicted of voluntary manslaughter in 1992, and he received a fifteen-year sentence. (Vol. 16. 563). He also had approximately fourteen or fifteen convictions for forgery. (Vol. 16. 563). With the voluntary manslaughter sentence, Mr. Lescure had a total of a twenty-seven-year sentence. (Vol. 16. 564). He also had an aggravated assault

conviction, eight additional forgery convictions, an aggravated child abuse conviction and a petite larceny conviction. (Vol. 16. 564-565). At one time, Mr. Lescure was incarcerated at the Northwest Correctional Complex in Tiptonville, Tennessee with Mr. Rimmer. (Vol. 16. 566). Mr. Rimmer told Mr. Lescure that when he got out he was going to kill Ms. Ellsworth. (Vol. 16. 568). Mr. Rimmer told Mr. Lescure that one could get rid of bodies with lime. (Vol. 16. 569). When Mr. Rimmer made the statements to Mr. Lescure, Mr. Lescure thought that Mr. Rimmer was "popping off", just talking a lot. (Vol. 16. 581). That's why he didn't pay a lot of attention to what Mr. Rimmer was saying and thought he was just running his mouth. (Vol. 16. 582). Mr. Lescure was given a letter for the parole board. (Vol. 16. 574).

Charles Baker is a special agent assigned to the Tennessee Bureau of Investigation (TBI). (Vol. 10. 314). Mr. Baker was asked to investigate and attempt to locate an individual by the name of James Douglas Allard with a date of birth of August 14, 1961. (Vol. 10. 314). Mr. Baker utilized the TBI databases in order to attempt to locate Mr. Allard. (Vol. 10. 315). Mr. Baker received information regarding addresses located in North Carolina related to Mr. Allard. (Vol. 10. 317). The State indicated there was a telephone number associated with Mr. Allard, and the telephone number was not a good number. (Vol. 10. 317).

Mr. Baker did not attempt to contact any of Mr. Allard's family members. (Vol. 10. 318). Mr. Baker was not looking at Mr. Allard's criminal background. (Vol. 10. 318). Mr. Baker did not attempt to see if Mr. Allard was incarcerated in an Indiana Department of Corrections prison or in a county jail. (Vol. 10. 319). There was no indication whether any other law enforcement officers went to Mr. Allard's last known address. (Vol. 10. 319). Mr. Baker did not check to see if Mr. Allard was on probation in any other state other than Tennessee. (Vol. 10. 319). Mr. Baker had no idea about whether a material witness warrant regarding Mr. Allard had been issued. (Vol. 10. 320).

James Douglas Allard, Jr. was confined to an institution in Indiana. (Vol. 14. 294). He had recently pled guilty to robbery. (Vol. 14. 294). He was serving a sentence out of Johnson County and Marion County. (Vol. 14. 294). In June of 1997, he was in the Johnson County Jail with Michael Rimmer. (Vol. 14. 296). He was involved in an attempted escape from the Johnson County Jail with Mr. Rimmer. (Vol. 14. 296). Mr. Allard had been involved in an escape in another block and was then moved into the block with Mr. Rimmer. (Vol. 14. 296). Mr. Rimmer found out that Mr. Allard was trying to get out of the jail and had attempted to get out of the jail and that is how the two began talking to each other. (Vol. 14. 296). Mr. Rimmer said that he wanted to get out of the rec yard, and he had been working on the fence out there. (Vol. 14. 297). There are little round clips that hold the fence secure to the ground, and Mr. Rimmer had already cut a few of them when he talked to Mr. Allard. (Vol. 14. 297). Mr. Rimmer showed Mr. Allard where he had been working on the fence. (Vol. 14. 298). Mr. Rimmer was cutting the clips to be able to lift the fence up and go underneath it. (Vol. 14. 298). He was cutting the clips with a big pair of toenail clippers. (Vol. 14. 298). Mr. Allard told Detective Skaggs about the attempted escape. (Vol. 14. 299).

Mr. Rimmer also told Mr. Allard that he thought about going out a window or trying to get through the block wall that is in the cell itself. (Vol. 14. 299-300). Mr. Rimmer also wanted to grab ahold of somebody, a guard, and try to just go right out the front of the jail. (Vol. 14. 300). Mr. Rimmer said that he was going to kill a woman guard and another guard in the jail to get out. (Vol. 14. 309-310). Mr. Allard saw Mr. Rimmer with a shank in the jail. (Vol. 14. 301; Exhibit 203).

Mr. Rimmer told Mr. Allard that he had murdered his wife. (Vol. 14. 302). Mr. Rimmer said that he went to her place of business (a hotel or a motel), and she (Ricci Ellsworth) let him in there. (Vol. 14. 303). At one time, Mr. Rimmer said that he shot her a couple of times. (Vol. 14. 303). Mr. Rimmer said that he beat her. (Vol. 14. 303). Mr. Rimmer said that it was in a back

room behind the service desk in the office part. (Vol. 14. 303). Mr. Rimmer said the back room was pretty bloody. (Vol. 14. 303). Mr. Rimmer said that he took the tape and erased it. (Vol. 14. 316). At one time, Mr. Rimmer said that the body was at a place that had a pond or lake on it. (Vol. 14. 303). He also said that the body was at a place near a cabin. (Vol. 14. 304). The prosecution wrote a letter on behalf of Mr. Allard regarding his cooperation. (Vol. 14. 306). Mr. Allard was in jail because he had smoked crack cocaine and robbed on a person with a BB gun in two different stores. (Vol. 14. 310-311). A stipulation regarding Mr. Allard's record was read into the record as Exhibit 193. The stipulation showed that Mr. Allard had previously been convicted of unlawfully driving away an auto, burglary, two escapes, attempted escape, four robberies, and failure to appear, all felonies. (Vol. 14. 318-319; Exhibit 193).

IX. 404(b) Evidence: Proof of Prior Convictions

The trial court admitted the judgments for Mr. Rimmer's aggravated assault and rape convictions (which had been entered on July 5, 1989) as Exhibits 10 and 11, respectively.

Mrs. Brown testified that when she was around 4 or 5 years old, Michael Rimmer began dating her mother. (Vol. 8. 100). In 1989, Mr. Rimmer was convicted of raping Ricci Ellsworth. (Vol. 8. 103). However, Ricci Ellsworth visited Mr. Rimmer after the conviction while he was incarcerated. (Vol. 8. 103; Vol. 13. 152; Exhibit 209). Exhibits 1A and 1B are pictures of Ricci Ellsworth and Mr. Rimmer from when she visited him while he was incarcerated. (Vol. 8. 105; Exhibits 1A and 1B).

X. 404(b) Evidence: Proof of Escapes/Attempted Escapes

On October 23, 1997, Tony Hetrick was employed by the City of Bowling Green, Ohio police department as a patrol officer. (Vol. 11. 476-477). He received a lookout for a stolen van, a transporter van by Federal Transport that transports prisoners from one part of the country to

another. (Vol. 11. 477). The van was located by Sergeant Joe Crowell. (Vol. 11. 478). The van then left and a pursuit was initiated. (Vol. 11. 479). The van eventually stopped. (Vol. 11. 487). An officer called the occupant out of the van. (Vol. 11. 494). The occupant had a very difficult time exiting the vehicle due to having a leg injury. (Vol. 11. 494). Michael Rimmer was the occupant of the van. (Vol. 11. 495). Following the cross-examination of Mr. Hetrick, the Court read a flight instruction to the jury. (Vol. 11. 504-505).

Kenneth Falk is the legal director of the American Civil Liberties Union of Indianapolis, Indiana. (Vol. 19. 61). He met Michael Rimmer after Mr. Rimmer contacted his office by letter with a complaint concerning the Johnson County Jail. (Vol. 19. 61). There was subsequently a lawsuit filed related to the conditions at the Johnson County Jail. (Vol. 19. 62).

On October 16, 1998, Tony Lomax worked at the Shelby County Jail. (Vol. 18. 858). Upon leaving around 9:45 p.m., Mr. Lomax was outside when he heard some banging on a jail window on the second floor. (Vol. 18. 859). The whole window pane came out. (Vol. 18. 859). He then saw two subjects (Chester Adams and Michael Rimmer) sticking their head out the window. (Vol. 18. 860). He called the main duty officer's desk and let them know they had two inmates that were trying to escape. (Vol. 18. 860). Mr. Lomax ran back toward the jail, and positioned himself under the window. (Vol. 18. 861-862). He noticed a rope coming out of the window (jail uniform pants and shirts tied together). (Vol. 18. 862).

Robert Hutton is an attorney in Memphis, Tennessee with the law firm of Glankler, Brown. (Vol. 20. 186). Mr. Hutton brought a lawsuit against the Shelby County Jail in the United States District Court regarding the conditions of the jail arising out of gang violence. (Vol. 20. 187). A consent order was entered by the United States District Court and was entered as exhibit 219. (Vol. 20. 199).

Additional 404(b) evidence related to an attempted escape is noted above when discussing James Douglas Allard.

ARGUMENTS

I. The jury verdict regarding the offenses of conviction was contrary to the weight and sufficiency of the evidence, and the evidence was insufficient to lead any rational trier of fact to conclude that Mr. Rimmer was guilty beyond a reasonable doubt.

> Our standard for reviewing the sufficiency of the evidence underlying a criminal conviction is well-established. First, we examine the relevant statute(s) in order to determine the elements that the State must prove to establish the offense. *See, e.g.*, *State v. Smith*, 436 S.W.3d 751, 761–65 (Tenn. 2014) (conducting statutory interpretation of offense's elements before conducting sufficiency review). Next, we analyze all of the evidence admitted at trial in order to determine whether each of the elements is supported by adequate proof. *See, e.g.*, *id.* at 764-65. In conducting this analysis, our inquiry 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 also* Tenn. R. App. P. 13(e) ("Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings of guilt ... beyond a reasonable doubt.").
>
> After a jury finds a defendant guilty, the presumption of innocence is removed and replaced with a presumption of guilt. *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992) (citing *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973)). Consequently, the defendant has the burden on appeal of demonstrating why the evidence is insufficient to support the jury's verdict. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982).

State v. Stephens, 521 S.W.3d 718, 723–24 (Tenn. 2017).

Michael Rimmer was charged with aggravated robbery, first degree premeditated murder, and felony murder (murder during the perpetration or attempt to perpetrate a robbery). (Vol. 8. 48-50). Regarding the aggravated robbery allegation, the State alleged that Michael Rimmer did take from the person of Ricci Lynn Ellsworth a sum of money of value by violence or putting Ricci Lynn Ellsworth in fear and the victim, Ricci Lynn Ellsworth, suffered serious bodily injury. (Vol. 8. 48). Regarding the first degree premeditated murder allegation, the State alleged that Michael Rimmer

did unlawfully, intentionally, and with premeditation kill Ricci Lynn Ellsworth. (Vol. 8. 49). Regarding the felony murder allegation, the State alleged that Michael Rimmer did unlawfully, with the intent to commit robbery, kill Ricci Lynn Ellsworth during the perpetration of or attempt to perpetrate robbery. (Vol. 8. 50). The indictments accused *only* Michael Rimmer of the crimes. The are no charges alleging a conspiracy with anyone else, known or unknown to the grand jury, to commit the alleged crimes.

However, in its rebuttal argument, the State argued, "This was a three man job. Michael Rimmer was doing the personal work. His crew, gathering the cash." (Vol. 21. 70). The State, in its rebuttal argument, also states, "Did Billy Wayne Voyles do this? I submit to you that there is evidence he probably did." (Vol. 21. 65). The State also argued, with absolutely no proof to support the allegation, that Tommy Wayne Voyles may have been involved. (Vol. 21. 68-69). The State then goes on to speculate about Mr. Rimmer's alleged involvement. (Vol. 21. 70). The problem with this entire argument is that it created a Fifth Amendment to the United States Constitution Due Process violation in that Mr. Rimmer was not provided proper notice of the allegations through the indictments.

> Challenges to the legal sufficiency of a presentment present questions of law subject to de novo review on appeal. *See State v. Wilson*, 31 S.W.3d 189, 191 (Tenn. 2000); *State v. Hill*, 954 S.W.2d 725, 727 (Tenn. 1997); *State v. Davis*, 940 S.W.2d 558, 561 (Tenn. 1997).
>
> "[T]he Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Tennessee Constitution guarantee to the accused the right to be informed of the nature and cause of the accusation." *Hill*, 954 S.W.2d at 727; *State v. Berry*, 141 S.W.3d 549, 561 (Tenn. 2004) ("The overriding purpose of an indictment is to inform the accused of 'the nature and cause of the accusation.' "). "[T]he touchstone for constitutionality is adequate notice to the accused." *Hill*, 954 S.W.2d at 729. Additionally, *Tennessee Code Annotated* section 40-13-202 provides:
>
> The indictment must state the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in a manner so 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. In no case are the words "force and arms" or "contrary to the form of the statute" necessary.
>
> T.C.A. § 40-13-202 (2006). As a general rule, "an indictment is valid if it provides sufficient information (1) to enable the accused to know the accusation to which answer is required, (2) to furnish the court adequate basis for the entry of a proper judgment, and (3) to protect the accused from double jeopardy." *Hill*, 954 S.W.2d at 729 (citing *State v. Byrd*, 820 S.W.2d 739, 741 (Tenn. 1991); *VanArsdall v. State*, 919 S.W.2d 626, 630 (Tenn. Crim. App. 1995); *State v. Smith*, 612 S.W.2d 493, 497 (Tenn. Crim. App. 1980)).
>
> "It is generally sufficient for the indictment to state the offense charged in the words of the statute." *State v. Majors*, 318 S.W.3d 850, 864 (Tenn. 2010); *see also State v. Carter,* 121 S.W.3d 579, 587 (Tenn. 2003) ("[A]n indictment which references the statute defining the offense is sufficient and satisfies the constitutional and statutory requirements of Hill."); *State v. Sledge*, 15 S.W.3d 93, 95 (Tenn. 2000); *State v. Carter*, 988 S.W.2d 145, 148 (Tenn. 1999); *Ruff v. State*, 978 S.W.2d 95, 100 (Tenn. 1998) ("[W]here the constitutional and statutory requirements outlined in Hill are met, an indictment which cites the pertinent statute and uses its language will be sufficient to support a conviction."). "[A]n 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." *State v. Hammonds*, 30 S.W.3d 294, 300 (Tenn. 2000).

State v. Davidson, 509 S.W.3d 156, 234 (Tenn. 2016), cert. denied, 138 S. Ct. 105, 199 L. Ed. 2d 66 (2017).

The State of Tennessee provided notice to Michael Rimmer that he, and he alone, perpetrated the acts alleged in the Indictments. By the time the case was completed, the proof showed that Billy Wayne Voyles, Jr. and Raymond Cecil likely committed these crimes. (See Statement of Facts-III. The identity of the actual killers of Ricci Ellsworth.) Even if this Court believes that Raymond Cecil was not the second person who committed these crimes with Billy Wayne Voyles, Jr., there is no question that Michael Rimmer was not the second perpetrator, given the composite drawing of the second individual, which include hair that in no way could be confused with Michael Rimmer's baldness as proven by the multiple exhibits entered showing his hair was in no way similar to the description of the second perpetrator. (Exhibits 120, 134, 139, 141, and 196). There was no DNA evidence, fingerprint evidence, trace evidence, eyewitness testimony, or other reliable evidence that Mr. Rimmer was involved. Evidence presented through the prior testimony of James Allard was

presented to the jury. This evidence was unreliable and should have been inadmissible. This evidence will be addressed hereafter in another issue dealing with James Allard.

The State is apparently relying upon a criminal responsibility theory. However, this is not supported by the facts either. The relevant portion of the criminal responsibility instruction in this case is, "The defendant is criminally responsible for an offense committed by the conduct of another if, acting with the intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, that defendant solicits, directs, aids or attempts to aid another person to commit the offense." (Vol 4. 19.) Again, there is no proof that Mr. Rimmer solicited, directed, aided, or attempted to aid Billy Wayne Voyles, Jr., Raymond Cecil, Tommy Voyles, or any other person. The State's theory is simply not supported by the facts.

Based upon the foregoing, the convictions in this case should be vacated, and the indictments should be dismissed.

II. The trial court erred in denying Mr. Rimmer's *Motion To Dismiss Count 2 of Case No. 98-01034.*

Double jeopardy principles embodied in the Fifth Amendment to the United States Constitution protect defendants from twice being placed in jeopardy for the same offense by barring (1) a second prosecution for the same offense following acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.

"The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Green v. United States*, 355 U.S. 184, 187 (1957); *see Price v. Georgia*, 398 U.S. 323, 326 (1970). This constitutional safeguard applies "even where no final determination of guilt

or innocence has been made." *United States v. Scott*, 437 U.S 82, 92 (1978); *see Green,* 355 U.S. at 188 ("It is not even essential that a verdict of guilty or innocent be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge.")

Courts have long applied these principles finding that Double Jeopardy bars retrial when a defendant has already been put to the expense and jeopardy of a full trial on a particular charge and-although a jury does not return an actual verdict on that charge – the essential result of the trial is favorable to the defendant as to that charge. *See Terry v. Potter,* 111 F.3d 454 (6th Cir. 1997); *Saylor*, 845 F.2d 1401. Permitting retrial would open the door to "exactly the dangers the double jeopardy clause was designed to prevent." *Terry*, 111F.3d at 459.

In 2004, our Tennessee Supreme Court recognized the "double jeopardy issue" created when trial courts did not require jurors to render verdicts as to every count of the indictment in *State v Howard,* 30 S.W. 3d 271 (Tenn. 2000): *see note 4.* In Howard's retrial, the trial court failed to heed the warnings of The Tennessee Supreme Court and on appeal, this Court reversed and dismissed the felony murder counts to which the jury was again silent. *State v. Howard.* 2004 WL 2715346. This Court solved the double jeopardy "problem" by vacating and dismissing the convictions. *Id. at* 12.

Mr. Rimmer filed a *Motion To Dismiss Count 2 of Case No. 98-01034.* (R. 1896-1903). In the motion, as evidenced in the attachments to the motion, Mr. Rimmer showed that on November 7, 1998, he was convicted of Count 1 in Case No. 98-01034. The jury did not return a verdict regarding Count 2 of Case No. 98-01034. The verdict was written by the jury foreperson on the jacket, a copy of which was attached to the motion. Judge Fred Axley read the jury's verdict into the record, as evidenced by the transcript attached to the motion. No judgment was entered regarding Count 2 of Case No. 98-01034.

The Tennessee Supreme Court, in *Briggs v. State*, 573 S.W.2d 157 (Tenn. 1978), wrote:

> Moreover, "[t]he settled law of this State is that a special verdict upon a single count of indictment is given the effect of an acquittal upon the other counts to which the jury did not respond . . . ." *Conner v. State*, 531 S.W.2d 119, 126 (Tenn.Cr.App.1975).
>
> Thus, the jury by failing to respond to the second count of the indictment, found the petitioners not guilty of murder in the first degree, as specified in the indictment and under s 39-2402(1), T.C.A., leaving the conviction solely for felony-murder with the premeditation being supplied by the fact that the killing was in the perpetration of a named felony.

In Mr. Rimmer's case, the jury in the original trial failed to respond to Count 2 of the Indictment in Case No. 98-01034 as indicated by the written verdict, the Court's recitation of the verdict, and the lack of a judgment. As such, Mr. Rimmer was acquitted of Count 2, felony murder, and he should not have been retried on that count. As such, the conviction regarding Count 2 of Case No. 98-01034 should be vacated, and that count should be dismissed. The failure by the trial court to dismiss Count 2 violated Mr. Rimmer's Fifth Amendment Rights.

III. The trial court erred in denying Mr. Rimmer's *Motion To Suppress DNA Evidence* which was heard on April 14, 2016.

Mr. Rimmer filed a *Motion To Suppress DNA Evidence*. (R. 2060-2070). The trial court entered its *Order Denying In Part Defendant's "Motion To Suppress DNA Evidence"* on April 27, 2016. (R. 78-95; 2077-2094). The primary issue on appeal related to Mr. Rimmer's motion is the Court's denial of Mr. Rimmer's request to dismiss the indictments or to suppress the DNA evidence based upon the premature destruction of evidence by the Memphis Police Department. (R. 2067-2069). The essence of the claim stems from the Memphis Police Department's release of the maroon Honda in this case before the defense had an opportunity to inspect the vehicle. Mr. Rimmer's asserts a Fifth Amendment Due Process claim for the State's failure to preserve the

maroon Honda in this case so that the defense could have conducted a proper inspection of the vehicle. Mr. Rimmer relies upon the cases of *State v. Merriman*, 410 S.W.3d 779 (Tenn. 2013), and *State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999).

> Those cases stand for the proposition that the loss or destruction of potentially exculpatory evidence may violate a defendant's right to a fair trial. "[T]he State's duty to preserve evidence is limited to constitutionally material evidence described as 'evidence that might be expected to play a significant role in the suspect's defense.' "
> *Merriman*, 410 S.W.3d at 785 (quoting *Ferguson*, 2 S.W.3d at 917)). If the State fails in its duty, a trial court must examine (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 in order to determine whether a trial conducted without the missing or destroyed evidence would be fundamentally fair. *Id.*

Odom v. State, No. W201501742CCAR3PD, 2017 WL 4764908, (Tenn. Crim. App. Oct. 20, 2017).

When the State (through the Memphis Police Department) failed to preserve the vehicle for the defense to have an opportunity to inspect it, the defense was unable to inspect the inside of the vehicle to determine whether the State's testing of the inside of the vehicle was reliable and accurate. Further, there is a continuing dispute as to the amount of blood that was on the backseat of the vehicle. This dispute could have been remedied had the defense had to the opportunity to properly inspect the backseat of the vehicle.

Further, and perhaps more importantly, the defense was unable to properly inspect the trunk of the vehicle to determine if there was any evidence of any blood in the trunk. As Mr. Darnell stated, the man behind the Honda vehicle had something rolled up in his arms, and he looked like he was leaning down, putting it in the trunk. (Vol. 13. 57). The vehicle sank, or settled (when the object was put in the vehicle). (Vol. 13. 59). Clearly, this is an indication that the body of Mrs. Ellsworth was placed inside the trunk of a vehicle. Given the amount of blood at the crime scene, along with

evidence that the man who placed the object in the trunk had blood on his hands, there would likely have been evidence of blood somewhere in the trunk had it been properly inspected. Apparently, the State failed to properly inspect the trunk. The defense should have had an opportunity to properly inspect to the trunk to look for evidence, or the lack thereof, of blood in the trunk. The State was clearly negligent in prematurely releasing the vehicle. The evidence that was destroyed or lost as a result of releasing the vehicle was extremely significant, given the state of the crime scene and the eyewitness testimony regarding the apparent placing of a body into the trunk of a vehicle. Had the defense been able to show that there was no blood in the trunk of the maroon Honda, this evidence would have been significant as it would have supported an argument that the maroon Honda that was being driven by Mr. Rimmer was not the vehicle used in this crime. The State's failure to properly preserve the vehicle should have resulted in the suppression of the DNA evidence or the dismissal of the indictments. This Court should grant such relief.

IV. The trial court erred in not striking the argument and/or declaring a mistrial when the State mentioned that the maroon vehicle had been "taken" and went missing, giving a clear indication that the vehicle had been stolen, in violation of the Court's prior order.

In a pretrial ruling, the Court ruled that the prosecution could not refer the maroon Honda as being "stolen" as this would unduly prejudice Mr. Rimmer's trial. The trial court severed the theft indictment in this case and ruled that the jury would not be allowed to know that the car Mr. Rimmer was riding in was stolen. (Vol. 8. 29). In its opening statement, the prosecution referred to the maroon Honda as having been "taken", which, in the context of the proof in the case from the Featherston's and the recovery of the vehicle in Indiana, clearly implied that the vehicle had been stolen. More specifically, the State stated in its opening, "And learned that that vehicle had been

taken from outside Mr. Featherston, Steve Featherson's home. And so the police are going to be on the lookout for this tag number and this vehicle." (Vol. 8. 68). By using the word ("taken"), which implies that the vehicle was stolen when used in the context of the other statements noted herein, the State clearly violated the Court's order, violated Rule 404(b), and prejudiced Mr. Rimmer. This was also a Fifth Amendment Due Process violation. Counsel for Mr. Rimmer objected to the statement, moved to strike the statement, and moved for a mistrial. (Vol. 8. 78).

Mr. Rimmer refers the Court to the case of *State v. Greene*, No. 03C01-9407CR00247, 1995 WL 564939, at *3–4 (Tenn. Crim. App. Sept. 26, 1995), to support his argument. That case states, in part, as follows:

> The defendant also contends that the trial court erred by refusing to grant a mistrial when the state referred to excluded evidence in its opening statement. Upon the defendant's motion in limine, the trial court ordered the state before trial not to introduce evidence that surveillance of the defendant before his arrest resulted from information received from informants that the defendant was involved in illegal activity. Nevertheless, near the beginning of his opening statement, the prosecutor made the following statement, "On May 14, 1993, last year, the Third Judicial Drug Task Force had information that a James Lee and Jimmy Greene were dealing drugs." Arguing that the statement put him in an impossible position in which he would have to prove that the statement was both false and prejudicial, the defendant objected to the relevance of the statement and moved for a mistrial. Although it overruled the motion for a mistrial, the trial court sustained the objection and stated to the jury, "I'll ask the jury to disregard that statement and not consider it for any purpose. You should know that is not a proper statement."
>
> *4 The prosecutor's mention of excluded evidence was improper. In fact, it is particularly inappropriate to present purported criminal activity by the defendant that is similar to the offense charged and on trial for the so-called purpose of "setting the scene." *See* 2 John William Strong, *McCormick On Evidence*, § 249, at 104 (4th ed.1992). Ordinarily, a violation of a court order of exclusion by introduction of information carrying such a potential for prejudice should be remedied by the grant of a mistrial when the violation occurs before the taking of evidence has begun. Not only does it carry the potential to taint the whole proceedings, but a trial court has no ability to determine what proof will be introduced so as to obviate any potential harm. Thus, a greater risk for waste of judicial resources may occur by holding the trial than by granting a mistrial and selecting a new jury.

State v. Greene, No. 03C01-9407CR00247, 1995 WL 564939, at *3–4 (Tenn. Crim. App. Sept. 26, 1995).

V. **The trial court erred in admitting evidence related to Mr. Rimmer's prior convictions for aggravated assault and rape and evidence related to Mr. Rimmer's alleged prior escapes or attempted escapes.**

Tennessee Rule of Evidence (T.R.E.) 404(a) provides that "evidence of a person's character trait is not admissible for the purpose of providing action in conformity with the character or trait on a particular occasion." The prohibition of propensity evidence is an elementary precept of the Tennessee Rules of Evidence, grounded in a century of caselaw. The core principal of this tenet is relevance. It is relevance that drives the rule that proof of a crime other than the one alleged in the indictment is not admissible against a defendant. T.R.E 402, 403: *State v. Parton*, 694 S.W. 2d 299 (Tenn. 1985); *State v. Rounsaville*, 701 S.W. 2d 817 (Tenn. 1985; *State v. Roberson*, 846 S.W. 2d 278 (Tenn.Crim.App. 1992).

T.R.E Rule 404 (b) provides that evidence of other crimes, wrongs or acts are not admissible unless the following conditions are met:

> (1) The court 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 the 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,
> [Adopted effective January 1, 1990. Amended July 1, 2003; July 1, 2009]

Unlike T.R.E Rule 403, this is a rule of exclusion, not inclusion. "Trial courts have been encouraged to take a restrictive approach of Rule 404 (b) because 'other act' evidence carries a significant potential of unfairly influencing a jury." *State v. Jones*, 450 S.W. 3d 866 (Tenn. 2014) (quoting *State v. Dotson*, 254 S.W 3d378, 387 (Tenn. 2008)) .

Comments to the Rule provide that the evidence of other crimes, wrongs, or acts should be excluded unless relevant to an issue other than the character of a defendant, "such as identity, motive, intent, or absence of mistake." *See* Tenn. R. Evid. 404 Advisory Commission cmt. In the instant case, the State sought to admit prior assaults and a prior rape of the victim by the defendant to ostensibly prove intent, motive, identity, and premeditation. (R. 1550-1799). The State also sought to introduce evidence of the defendant's prior escape attempts occurring in Indiana, Ohio, and Tennessee. (R. 1550-1799). Introduction of the escapes and escape attempts were offered to demonstrate consciousness of guilt associated with flight. The State additionally sought to introduce evidence that the car driven by the defendant when he was arrested had been reported stolen. (R. 1550-1799). This portion of the State's request was denied, the theft count having previously been severed upon Motion by the defendant.

The trial court held an out of jury hearing as proscribed by Rule 404 on September 4th, 2015 and heard evidence from two live witnesses, Tracey Ellsworth Brown, the victim's daughter, and Clifford Freeman, formerly of the Memphis Police Department regarding the alleged rape and assault on the victim by the defendant. Ms. Brown testified that she remembered the date in question and that she saw the defendant fight with a visitor in the home, Tommy Voyles. This was in January of 1989 and Ms. Brown was six (6) years old at that time. She described the relationship between the defendant and the victim as "violent," however she could not testify as to any specific acts of violence by the defendant to the victim, nor could she testify regarding the alleged assault or rape on the date in question. (Vol. 6. 20-24). Clifford Freeman testified that he was a Memphis Police Officer in January of 1989 and he responded to an assault in progress call made by Mr. Voyles. Upon making the scene, Officer Freeman observed Mr. Voyles outside the victim's residence "excited, exaggerated, waving his arms..." He explained that when he and his girlfriend

(victim) arrived at the residence, they were confronted by the defendant, that he was threatened by the defendant and forced to leave the residence. (Vol. 6. 26-28).

Officer Freeman testified that a short time after arriving he heard a scream for help come from inside the house by what sounded like a female voice. (Vol. 8. 29). He and other officers began kicking the door, and the defendant opened the door. Officer Freeman testified that almost immediately a woman, later identified as the victim, appeared and screamed "he raped me." She was in a light housecoat and appeared to have been beaten about the face. (Vol. 8. 30-33). The defendant attempted to flee and was taken into custody. Over defense objections, Freeman testified that he'd been told by other officers that the victim had stated that the defendant had beat her about the head with his fists and a drinking glass; that the defendant ordered her to take a shower; that the defendant digitally penetrated her vaginally; and that the defendant threatened to take the victim to Mississippi and kill her. (Vol. 8. 37-40). The State attached copies of medical records, photographs, and police reports detailing the victim's injuries to their Notice.

The trial court ruled that the defendant's guilty plea, conviction, and incarceration for rape, burglary, and assault for the 1989 attack on the victim admissible in the state's case in chief, in particular, finding that the attack was proven by clear and convincing evidence, that the prior attack was probative of intent, premeditation, motive and identity, and that the probative value of the evidence was not outweighed by the danger of unfair prejudice to the defendant. [Vol. 1. 68, 71-72.]. Correctly, the trial court also ruled other alleged incidents of domestic violence against the victim by the defendant inadmissible, as the evidence presented did not meet the clear and convincing standard demanded by the Rule. While it would be disingenuous to assert that evidence of the defendant's guilty plea to rape and assault had no probative value, its prejudicial effect cannot be overstated. The convictions were entered into evidence and published to the jury on the first day

of trial, April 28th, 2016. (Vol. 8. 119-120). From this point forward, the defendant's conviction was assured.

In the instant case, the trial court complies with Rule 404(b) procedure by hearing the proposed evidence prior to trial and making findings prior to admission of the evidence. Therefore, abuse of discretion is the standard of review. "A court abuses its discretion when it applies an incorrect legal standard or its decision is illogical or unreasonable, is based on a clearly erroneous assessment of the evidence, or utilizes reasoning that results in an injustice to the complaining party." *State v. Adams*, 405 S.W.3d 641, 660 (Tenn.2013) (quoting *Wilson v. State*, 367 S.W. 3d 229, 235 (Tenn.2012). The court found identity to be a material issue, that evidence of the rape and assault convictions were probative to that issue, and that probative value was not outweighed by the danger of unfair prejudice. It is this balancing test where the court commits error to the extent that it is unreasonable and incorrect application of the standard.

Rule 404(b)is a rule of exclusion that recognizes that evidence of other crimes, wrongs, or acts carries a significant danger of unfair prejudice. *State v. Dubose*, 953 S.W. 2d 649, 654 (Tenn.1997). The term "unfair prejudice has been defined as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Id. When the crime is similar to the charged offense and particularly when it is the same victim, the danger of unfair prejudice is especially prevalent, increasing the likelihood that "the jury would convict on the perception of a past pattern of conduct, instead of on the facts of the charged offense." *State v. Mallard*, 40 S.W. 3d 473, 488 (Tenn.2001). In *Old Chief v. United States*, the United States Supreme Court pointed out that "the risk that a jury will convict for crimes other than those charged-or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment-creates a prejudicial effect that outweighs ordinary relevance." 519 U.S. 178, 181, (1997). This is the exact

nature of the prior rape and assault convictions in this cause. Its sole purpose was to show bad or violent character of the defendant. The defendant was on trial for murder, not rape or assault. Admission of the convictions did not aid the jury in determining a material issue. It merely convinced them that he was a bad person.

Equally erroneous, if not as inflammatory, was the trial court's allowing evidence presented by the state of three prior escape attempts. The State sought to introduce the evidence of the prior escape attempts asserting that the evidence is relevant to demonstrate consciousness of guilt associated with evidence of flight. While this Court addressed the issue in the defendant's initial direct appeal in 2001, it appears that the court evaluated the issue under T.R.E. Rules 401 & 403. *State v. Rimmer*, 2001 WL 56790 (Tenn.Crim.App. 2001). Undoubtedly, prior defense counsel did not raise the issue at trial or direct appeal. Nonetheless, the trial court made its own findings that the transcripts amounted to clear and convincing evidence of the escape attempts and agreed with the State that they were probative of the defendant's consciousness of guilt. [Vol. 1. 71-72]. These attempts were made months or years from the original arrest. The remoteness of the acts cuts against their probative value. This wasn't a man fleeing the scene of a crime. He was a man attempting escape from extremely harsh and unconstitutional confinement. The evidence was presented for the same reason as the prior rape and assault convictions, simply to show that he was a bad person.

VI. The trial court erred in not allowing William Baldwin to testify that he heard one of the Memphis Police Department detectives state, "The n***** did it."

On March 5, 1997, William Baldwin, Jr. was an evidence technician for the Johnson County Sheriff's Department. (Vol. 10. 386). Mr. Baldwin arrived where the maroon Honda had been

stopped, and he secured the vehicle. (Vol. 10. 387). On March 6, 1997, in the presence of other law enforcement officers from Johnson County and three detectives from the Memphis Police Department, Mr. Baldwin inventoried the vehicle and took photographs of the vehicle. (Vol. 10. 390). Mr. Baldwin secured the vehicle when he completed the inventory of the vehicle. (Vol. 10. 396). During the inventory search, he thought he heard someone say what he believed was, "The n***** did it." (Vol. 10. 429). However, the Court did not allow this statement into evidence. (Vol. 10. 438-439). In excluding the testimony, the trial court violated the Fifth Amendment to the United States Constitution and the *Tennessee Rules of Evidence* 401 and 402. The Court should have allowed Mr. Baldwin to testify as to what he believed was said by law enforcement during the search. The prosecution could have thereafter cross-examined Mr. Baldwin, allowing for the jury to give Mr. Baldwin's testimony whatever weight it deemed necessary.

In addition, Mr. Baldwin also audiotaped and videotaped the inventorying of the vehicle. (Vol. 10. 417). Mr. Baldwin testified that he put the videotape into evidence, processed it (meaning put it in the storage envelope), and released it to the Memphis Police Department. (Vol. 10. 441). However, there was no videotape of the inventorying of the vehicle in the discovery. The failure of law enforcement to maintain the videotape and provide it to the defense (whether the fault of the Johnson County Sheriff's Department or the Memphis Police Department) is arguably a Brady violation in light of the statement made by one of the detectives. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

VII. The trial court erred in allowing testimony regarding a shank being located in the Indiana jail.

Detective Robert Shemwell went to the Johnson County Jail and conducted a search of the cell in which Mr. Rimmer had been incarcerated. (Vol. 12, 630-631). Detective Shemwell removed what he described as a trap door that is held by four screws inside the cell. (Vol. 12. 631). Upon removing the trap door, he looked inside and found two shanks. 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, 403 and 404(b). The shanks had no relevance to the Shelby County case, and the evidence of the shanks as evidence of an attempted escape was admitted in violation of *Tennessee Rule of Evidence* 404(b) as previously addressed herein.

VIII. The trial court erred in allowing a drawing of the backseat to be entered into evidence (exhibit 183).

Samera Zavaro is an expert in the field of forensic serology. (Vol. 14. 209). In March, 1997, she analyzed a towel from the crime scene, a hammer from the maroon vehicle, a pillow from the maroon vehicle, a towel from the maroon vehicle, and a watch. (Vol. 14. 212). Four of her drawings were entered into evidence. (Vol. 14. 221-222). The defense objected to the admission of the drawing of the backseat (Exhibit 183). (Vol. 14. 220). The basis for the objection was that it was drawing was not consistent with the actual evidence in the case and was unduly prejudicial to Mr. Rimmer. It is the defense's position that Exhibit 183 does not reflect the true condition of the backseat-See Exhibits 85, 86, 87, 88, 89, 115, 173, 174, and 179. Exhibit 183 was admitted in violation of the Fifth Amendment of the United States Constitution and *Tennessee Rules of Evidence* 403.

IX. **The trial court erred in granting the State's motion in limine to declare James Allard unavailable and erred in admitting evidence in the form of transcripts and/or exhibits related to James Allard.**

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 provides the right "to meet witnesses face to face." Tenn. Const. art. I, § 9.

These guaranties were created in order to: (1) have the witness testify under oath and subject to the penalties for perjury; (2) enable the fact-finder to observe the manner or demeanor of the witness and assess his or her credibility; and (3) have the witness available for cross-examination. *See Ohio v. Roberts,* 448 U.S. 56, 63–64, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), *overruled on other grounds by Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (internal quotation omitted); *California v. Green,* 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970); *State v. Hughes,* 713 S.W.2d 58 (Tenn.1986). Notwithstanding these objectives, 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 repeatedly 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); *see also Sherman v. Scott,* 62 F.3d 136, 140 (5th Cir.1995), *cert. denied,* 516 U.S. 1180, 116 S.Ct. 1279, 134 L.Ed.2d 225 (1996).

The Tennessee Supreme Court has addressed the standards and criteria that must be met in order for out-of-court statements to satisfy the Confrontation Clause of both the Sixth Amendment of the United States Constitution and Article I, Section 9 of the Tennessee Constitution. *See State v. Armes,* 607 S.W.2d 234, 236 (Tenn.1980); *State v. Henderson,* 554 S.W.2d 117 (Tenn.1977). In *Henderson,* our supreme court recognized that valid claims of an unconstitutional abridgement of the right to confront witnesses arise when:

(1) [T]he hearsay evidence is crucial to proving the State's case, i.e., the evidence is offered to prove an essential element of the crime or it connects the defendant directly to the commission of the crime;

(2) there is no proof that the witness is unavailable, i.e., the State must make a good faith effort to secure the presence of the person whose statement is to be offered against the defendant; and

(3) the hearsay evidence is lacking its own indicia of reliability.

Henderson, 554 S.W.2d at 120.

State v. Sharp, 327 S.W.3d 704, 709 (Tenn. Crim. App. 2010).

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 such as redacted transcript in this case 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.

There is no question in the case at hand that Ms. Winston's prior testimony *712 would be considered testimonial. Rather, the question raised is whether or not the State proved that Ms. Winston was "unavailable." As stated above, our supreme court stated in *Henderson* that the State must prove that it made a good faith effort to secure the presence of the witness in question. "Good faith" has been defined as "[t]he lengths to which the prosecution must go to produce a witness ... [and] is a question of reasonableness." *Roberts,* 448 U.S. at 74, 100 S.Ct. 2531. The decision of the trial court will be affirmed absent an abuse of discretion. *Hicks v. State,* 490 S.W.2d 174, 179 (Tenn.Crim.App.1972).

In *State v. Armes,* 607 S.W.2d 234 (Tenn.1980), our supreme court visited the issue as to what constitutes a good faith effort. 607 S.W.2d at 237.

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. Not surprisingly, the State was unable to locate the witness. *Id.* At trial the State attempted to present the testimony of the witness at the preliminary hearing. *Id.* To prove the witness's unavailability, the State failed to provide any independent evidence of an attempt to locate the witness other than a statement by the prosecutor. Our supreme court stated, "The 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 stated 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.*

As in *Armes,* in the case at hand, the State did not provide any independent evidence of its efforts to locate Ms. Winston. A copy of the subpoena dated September 4, 2007, was included in the record. Handwritten on the subpoena was a notation that Ms. Winston had moved to Atlanta, Georgia. At a hearing on the matter, the State presented the subpoena then stated on the record after contacting Ms. Winston's foster mother the State acquired a telephone number and had repeatedly tried to contact Ms. Winston by telephone over a six to eight month period. At some point, according the assistant district attorney, the telephone was disconnected.

By the State's own admission, it had been attempting to locate Ms. Winston for six to eight months. It appears that the State should have realized early on that placing telephone calls in and of itself would not be sufficient to contact the witness in question.

The State failed to present any other witnesses to demonstrate the efforts extended to locate the witness. We conclude that the State has not proven that it made a good faith effort to locate Ms. Winston and, therefore, cannot meet the requirement that it has proven that Ms. Winston was unavailable under the test set out in *Crawford.* The trial court abused its discretion in allowing her testimony from the prior trial to be read at trial and entered as evidence.

> Appellant's constitutional right to confrontation has been breached, and this requires that his conviction be reversed based upon this fact alone. However, as required by our supreme court, we address Appellant's other issues.

State v. Sharp, 327 S.W.3d 704, 711–12 (Tenn. Crim. App. 2010).

Charles Baker is a special agent assigned to the Tennessee Bureau of Investigation (TBI). (Vol. 10. 314). Mr. Baker was asked to investigate and attempt to locate an individual by the name of James Douglas Allard with a date of birth of August 14, 1961. (Vol. 10. 314). Mr. Baker utilized the TBI databases in order to attempt to locate Mr. Allard. (Vol. 10. 315). Mr. Baker received information regarding addresses located in North Carolina related to Mr. Allard. (Vol. 10. 317). The State indicated there was a telephone number associated with Mr. Allard, and the telephone number was not a good number. (Vol. 10. 317).

Mr. Baker did not attempt to contact any of Mr. Allard's family members. (Vol. 10. 318). Mr. Baker was not looking at Mr. Allard's criminal background. (Vol. 10. 318). Mr. Baker did not attempt to see if Mr. Allard was incarcerated in an Indiana Department of Corrections prison or in a county jail. (Vol. 10. 319). There was no indication whether any other law enforcement officers went to Mr. Allard's last known address. (Vol. 10. 319). Mr. Baker did not check to see if Mr. Allard was on probation in any other state other than Tennessee. (Vol. 10. 319). Mr. Baker had no idea about whether a material witness warrant regarding Mr. Allard had been issued. (Vol. 10. 320). These efforts, or lack thereof, are wholly insufficient to support a finding of a reasonable attempt to locate and secure the attendance of a James Allard. As indicated in the Statement of Facts, Mr. Allard's prior testimony that was read into the record was devastating. There is no way that the attempt to locate and secure the presence of Mr. Allard by the State of Tennessee can be deemed reasonable. As such, his prior testimony should have been excluded.

The Court of Criminal Appeals found that a computer search by a TBI agent followed by an unsuccessful lead through a telephone number constituted a "good-faith" effort to locate perhaps the most crucial witness in the entire case. Why was Mr. Allard the most crucial witness in the entire case? Mr. Allard was the most crucial witness in the entire case as he is the only witness who provided testimony regarding an alleged confession. There is no more powerful evidence that can be presented against a defendant than the defendant's words themselves. That is why Mr. Allard's testimony was so prejudicial.

The Court's finding that a computer search by a TBI agent followed by an unsuccessful lead through a telephone number constituted a "good-faith" effort to locate perhaps the most crucial witness in the entire case is, quite frankly, unbelievable. A "good-faith" effort would have consisted of the TBI agent contacting law enforcement agencies in Indiana and North Carolina to determine if Mr. Allard was under some type of court-ordered supervision. Court records would probably have led to the names, addresses, and perhaps telephone numbers of family members of Mr. Allard. In this day and time with the technology that exists, there is no way that the TBI agent's effort could possibly be deemed sufficient, adequate, or even minimal to meet a "good-faith" standard. It appears that since Mr. Allard did not have ties to Tennessee, the TBI agent simply refused to put forth any real effort to locate Mr. Allard. The trial court allowed the prosecution to escape its obligation to make a "good-faith" effort to secure the attendance of Mr. Allard at trial, and then allowed incredibly damaging evidence against Mr. Rimmer to be heard by the jury through a transcript, which precluded trial counsel from conducting a proper and effective cross-examination of Mr. Allard.

The Court of Criminal Appeals has also set a precedent that this Court should be weary of regarding future cases. If completing a computer search and following one unsuccessful telephone

lead is a sufficient search for a witness, then the Court has set an all-time low bar for defense attorneys who need to locate and subpoena critical witnesses for their clients. If Mr. Allard had been an alibi witness for Mr. Rimmer and trial counsel had put forth the effort that the TBI agent did to secure his presence, the Court of Criminal Appeals would have, by implication, found trial counsel's efforts to be sufficient and his or her performance to not be deficient. The effort, in counsel's opinion, should be considered not only deficient, but also pitiful and effectively non-existent. This Court should raise the bar set by the Court of Criminal Appeals and set a standard that is respectable and effective. This Court should find that the TBI agent's effort were wholly sufficient, which resulted in Mr. Allard not properly being deemed unavailable. This would result in reversible error as Mr. Allard's incredibly prejudicial testimony should have been excluded.

X. The trial court erred in admitting hearsay testimony through Rhonda Ball regarding communication she allegedly had with William Conaley.

Rhonda Jordan is Ricci Ellsworth's niece. (Vol. 16. 543). Over defense counsel's hearsay objection, Ms. Jordan testified that Mr. Conaley wrote her a letter and said "that Mike Rimmer was in prison with him and that Mike wanted Billy to give me a message to give to my Aunt Ricci that he wanted his money or he was going to kill her." (Vol. 16. 548-553). Ms. Jordan told Mrs. Ellsworth. (Vol. 16. 553). Ms. Ellsworth was not concerned. (Vol. 16. 553). Mr. Rimmer objected to the Court allowing Rhonda Ball Jordan to testify as to what Mr. Conaley told her as this was clearly inadmissible hearsay. The Court's admission of this evidence was in violation of the Fifth Amendment of the United States Constitution and *Tennessee Rules of Evidence* 801 and 802.

XI. The trial court erred in allowing witness Chris Ellsworth to show his scars to the jury.

Chris Ellsworth was burned when he was a child. (Vol. 16. 634.) The State wanted to show the jury his scarring from an accident that had nothing to do with this case, and, over the defense's objection, the trial court allowed Mr. Ellsworth to show his scars to the jury. (Vol. 16. 639). This was clearly done in violation of the Fifth Amendment of the United States Constitution and *Tennessee Rules of Evidence* 401, 402, and 403, as it was done to inflame the jurors and illicit sympathy for the witness.

XII. As the Court of Criminal Appeals found, the trial court erred in admitting hearsay testimony through Tim Helldorfer regarding statements allegedly made by William Conaley and James Allard.

Detective Tim Helldorder was allowed to testify about the statements Michael Rimmer allegedly made to William Conaley. (Vol. 17. 734-735). This was done after both William Conaley and Rhonda Ball Jordan had testified about the same subject matter. In addition, Detective Helldorfer was allowed to testify that Mr. Allard's testimony (which was read into evidence via a transcript of prior testimony) was consistent with what Mr. Allard had previously told Detective Helldorfer. The Court's admission of this evidence was in violation of the Fifth Amendment of the United States Constitution and *Tennessee Rules of Evidence* 801 and 802.

The Court of Criminal Appeals found that the statements "were not prior consistent statements, and the court erred in admitting the statements." See page 34 of the Opinion. The Court went on to find that these errors were non-constitutional errors, and that harmless error analysis under Tennessee Rule of Appellate Procedure 36(b) was appropriate. As a result, Mr. Rimmer bears the burden of showing that a con-constitutional error "more probably than not affected the judgment or would result in prejudice to the judicial process."

As previously stated, there is no more powerful evidence that can be presented against a defendant than the defendant's words themselves. Permitting the State to repeatedly present such highly prejudicial evidence only operates to emphasize its importance, regardless of any limiting instructions. Part of the evidence presented (Allard's statement) is the only evidence of an alleged confession in this case and, as such, the admission of such evidence is highly prejudicial.

In addition, a person should not be put to death in any case in which error is found by the Court. This should be a fundamental principle of death penalty law. Otherwise, how can the State of Tennessee have confidence in death sentences when they are obtained with evidence that was admitted in error? It is never too much to ask that before the State of Tennessee can execute its citizens (as it is currently doing at an incredible pace), it should ensure that the proceedings are free from error.

Mr. Rimmer moves the Court to reverse his conviction and grant him a new trial.

XIII. The trial court erred in not allowing the defense to ask Tim Helldorfer whether a "positive" identification had been made by someone during the investigation.

During cross-examination of Detective Helldorfer, the defense attempted to ask Detective Helldorfer if a positive identification had been made of any suspect in this case. (Vol. 17. 745). The Court refused to allow the defense to ask this question in violation of the Fifth Amendment of the United States Constitution and *Tennessee Rules of Evidence* 401 and 402. If asked the question, Mr. Helldorfer could have answer "Yes" or "No", and the parties could have dealt with the answer. Had Mr. Helldorfer answer "Yes", his answer would have provided evidence that could have been used to impeach Detective Robert Shemwell, who stated there was no positive identification made. If he had answered "No", then his testimony and Detective Shemwell's testimony would have been

impeached by the testimony of Richard Roleson. In 1997, Richard Roleson was assigned to the F.B.I. Safe Street Task Force. (Vol. 20. 180). Mr. Roleson was asked by Sergeant Shemwell to send photospreads and pictures of a vehicle to the F.B.I. Office in Honolulu to have a witness view them. (Vol. 20. 180). A positive identification was made. (Vol. 20. 180).

XIV. The trial court erred in not allowing Tim Helldorfer to testify about a document with his signature on it that indicated to whom the maroon vehicle was released.

The defense attempted to enter into evidence a document that Mr. Helldorfer had signed. The defense was attempting to get into evidence information related to who released the maroon Honda, when the maroon Honda was released, and to whom it was released. The Court did not allow the admission of the document. (Vol. 17. 755-760). The exclusion of this evidence was a violation of the Fifth Amendment of the United States Constitution and *Tennessee Rules of Evidence* 401 and 402.

XV. As the Court of Criminal Appeals found, the trial court erred in allowing testimony through Joyce Carmichael regarding Tommy Voyles.

The State of Tennessee, over the defense's objection (Vol. 18. 853-855), introduced evidence that Tommy Voyles had once been incarcerated with Michael Rimmer. (Exhibit 208). It was never proven that Tommy Voyles had anything relevant to do with the disappearance of Ricci Ellsworth. There was only pure speculation in the State's rebuttal argument. Any evidence related to the incarceration of Mr. Rimmer and Mr. Voyles together was completely irrelevant. The Court's admission of this evidence was in violation of the Fifth Amendment of the United States Constitution and *Tennessee Rules of Evidence* 401, 402, and 403.

The Court of Criminal Appeals ruled that "The court's admission of this irrelevant evidence was error." See page 38 of the Opinion. The Court then concluded "that the error was harmless based upon the overwhelming circumstantial evidence of the Defendant's guilt." Mr. Rimmer asserts that he was prejudiced by the admission of such evidence, especially when the prosecutor referred to Tommy Voyles in her closing argument. The State argued, with absolutely no proof to support the allegation, that Tommy Wayne Voyles may have been involved. (Vol. 21. 68-69).

As previously argued, a person should not be put to death in any case in which error is found by the Court. This should be a fundamental principle of death penalty law. Otherwise, how can the State of Tennessee have confidence in death sentences when they are obtained with evidence that was admitted in error? It is never too much to ask that before the State of Tennessee can execute its citizens (as it is currently doing at an incredible pace), it should ensure that the proceedings are free from error.

Mr. Rimmer moves the Court to reverse his conviction and grant him a new trial.

XVI. The trial court erred in admitting evidence in the form of transcripts and/or exhibits related to deceased and/or other unavailable witnesses in the form of testimony admitted through the reading of transcripts, as orally amended.

Due to the unavailability of a number of witnesses, the State requested that it be allowed to introduce the prior testimony of a number of witnesses by reading a transcript of the prior testimony. The defense objected. (Vol. 7. 78-124).

> 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 provides the right "to meet witnesses face to face." Tenn. Const. art. I, § 9.
>
> These guaranties were created in order to: (1) have the witness testify under oath and subject to the penalties for perjury; (2) enable the fact-finder to observe the manner or demeanor of the witness and assess his or her credibility; and (3) have the witness available for cross-examination. *See Ohio v. Roberts,* 448 U.S. 56, 63–64,

> 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), *overruled on other grounds by Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (internal quotation omitted); *California v. Green,* 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970); *State v. Hughes,* 713 S.W.2d 58 (Tenn.1986). Notwithstanding these objectives, 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 repeatedly 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); *see also Sherman v. Scott,* 62 F.3d 136, 140 (5th Cir.1995), *cert. denied,* 516 U.S. 1180, 116 S.Ct. 1279, 134 L.Ed.2d 225 (1996).
>
> The Tennessee Supreme Court has addressed the standards and criteria that must be met in order for out-of-court statements to satisfy the Confrontation Clause of both the Sixth Amendment of the United States Constitution and Article I, Section 9 of the Tennessee Constitution. *See State v. Armes,* 607 S.W.2d 234, 236 (Tenn.1980); *State v. Henderson,* 554 S.W.2d 117 (Tenn.1977). In *Henderson,* our supreme court recognized that valid claims of an unconstitutional abridgement of the right to confront witnesses arise when:
>
> (1) [T]he hearsay evidence is crucial to proving the State's case, i.e., the evidence is offered to prove an essential element of the crime or it connects the defendant directly to the commission of the crime;
>
> (2) there is no proof that the witness is unavailable, i.e., the State must make a good faith effort to secure the presence of the person whose statement is to be offered against the defendant; and
>
> (3) the hearsay evidence is lacking its own indicia of reliability.
>
> *Henderson,* 554 S.W.2d at 120.

State v. Sharp, 327 S.W.3d 704, 709 (Tenn. Crim. App. 2010).

The defense argued to the Court that due to prior trial counsel having been found to be ineffective, Mr. Rimmer should not be prejudiced by, in effect, having to rely upon the representation of the prior ineffective counsel. In order for Mr. Rimmer to receive a proper trial, he should have lawyers who have not been found to be ineffective in his case to properly examine and/or cross-examine witnesses in his case. The trial court violated Mr. Rimmer's Fifth Amendment Due Process rights when it allowed the reading of the transcripts of prior testimony into evidence.

XVII. The trial court erred in admitting the substance of Richard Rimmer's prior statement and exhibits 199 and 200 which were drawings allegedly made by Richard Rimmer.

The Tennessee Supreme Court, in *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000), stated as follows:

> Our cases have consistently held that a prior inconsistent statement is admissible under the Rules of Evidence when the prior statement is used to impeach the credibility of a witness. *See, e.g., Jones v. Lenoir City Car Works,* 216 Tenn. 351, 356, 392 S.W.2d 671, 673 (1965) (stating that "prior inconsistent statements of a witness are admissible for the purposes of impeachment and testing the credibility of the witness"). On the other hand, the restriction on hearsay evidence limits the admissibility of prior inconsistent statements when a party offers the prior statements as evidence to prove the matter asserted in the statement, or as substantive evidence. *See id.* (stating that prior inconsistent statements "are not to be considered as substantive evidence of the truth of the matter asserted therein"); *see also Rhea v. State,* 208 Tenn. 559, 563, 347 S.W.2d 486, 488 (1961) (stating that "any prior contradictory statements shown are not to be taken as evidence of the facts therein stated but are simply limited to the function of discrediting the witness").[6] Upon timely objection, the trial court should exclude a prior inconsistent statement when offered as substantive evidence of guilt or innocence, and upon request, the court should instruct the jury that the prior statement may only be considered as reflecting upon the credibility of the witness. *See* Tenn. R. Evid. 105 (stating that "[w]hen evidence which is admissible ... for one purpose but not admissible ... for another purpose is admitted, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly").
>
> *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000).

The trial court allowed Mr. Helldorfer's testimony regarding Mr. Rimmer's statement to be treated a substantive evidence, or evidence in the case. (Vol. 19. 22). The trial court even allowed in as substance evidence those questions and answers in which Richard Rimmer denied making the statements. (See exhibit 211 (for ID only) which shows which answers were denied and see Helldorfer's testimony (Vol. 19. 22-34).) These answers should have been considered by the jury for credibility purposes only. The trial court erred in allowing denied answers as substantive evidence. Allowing the answers to be treated as substantive evidence was a violation of the Fifth Amendment.

XVIII. **The trial court erred in not allowing the testimony of Kenneth Falk regarding whether the lawsuit filed by him was successful.**

Kenneth Falk is the legal director of the American Civil Liberties Union of Indianapolis, Indiana. (Vol. 19. 61). He met Michael Rimmer after Mr. Rimmer contacted his office by letter with a complaint concerning the Johnson County Jail. (Vol. 19. 61). There was subsequently a lawsuit filed related to the conditions at the Johnson County Jail. (Vol. 19. 62). The defense wanted the jury to know whether or not the lawsuit was successful, so as to bolster the credibility of Mr. Rimmer's complaint. The trial court's exclusion of this evidence was in violation of the Fifth Amendment of the United States Constitution and *Tennessee Rules of Evidence* 401 and 402.

XIX. **The trial court erred in not allowing Marilyn Miller to give an opinion regarding the length of time the maroon vehicle should have been retained by law enforcement before being released.**

The defense wanted to ask expert Marilyn Miller how long the maroon Honda should have been retained before it was released so as to give additional support to a request for a *Ferguson* instruction and so that the jury would understand that the defense was not given ample opportunity to inspect and test the maroon Honda. The trial court refused to allow Ms. Miller to give such an expert opinion. (Vol. 19. 88-89). The trial court's exclusion of this evidence was in violation of the Fifth Amendment of the United States Constitution and *Tennessee Rules of Evidence* 401 and 402.

XX. **The trial court erred in not admitting documents marked as "Exhibit D" related to a lawsuit regarding the Shelby County Jail.**

Robert Hutton is an attorney in Memphis, Tennessee with the law firm of Glankler, Brown. (Vol. 20. 186). Mr. Hutton brought a lawsuit against the Shelby County Jail in the United States District Court regarding the conditions of the jail arising out of gang violence. (Vol. 20. 187). A

consent order was entered by the United States District Court and was entered as exhibit 219. (Vol. 20. 199). The defense wanted to offer into evidence additional documents related to the lawsuit, but the Court denied the request. (Vol. 20. 188-195.) The trial court's exclusion of this evidence was in violation of the Fifth Amendment of the United States Constitution and *Tennessee Rules of Evidence* 401 and 402.

XXI. The trial court erred in failing to give a *Ferguson* instruction.

The defense made a jury instruction request for a *Ferguson* instruction, which is found in the *Tennessee Criminal Pattern Instructions*, Section 42.23, based upon the State's releasing the maroon Honda before the defense had a chance to inspect and test it. (Vol. 21. 10). When the State (through the Memphis Police Department) failed to preserve the vehicle for the defense to have an opportunity to inspect and test it, the defense was unable to inspect the inside of the vehicle to determine whether the State's testing of the inside of the vehicle was reliable and accurate. Further, there is a continuing dispute as to the amount of blood that was on the backseat of the vehicle. This dispute could have been remedied had the defense had the opportunity to properly inspect the backseat of the vehicle.

Further, and perhaps more importantly, the defense is unable to properly inspect the trunk of the vehicle to determine if there was any evidence of any blood in the trunk. As Mr. Darnell stated, the man behind the Honda vehicle had something rolled up in his arms, and he looked like he was leaning down, putting it in the trunk. (Vol. 13. 57). The vehicle sank, or settled (when the object was placed in the vehicle). (Vol. 13. 59). Clearly, this is an indication that the body of Mrs. Ellsworth was placed inside the trunk of a vehicle. Given the amount of blood at the crime scene along with evidence that the man who place the object in the vehicle had blood on his hands, there

would likely have been evidence of blood somewhere in the trunk had it been properly inspected and test. Apparently, the State failed to properly inspect the trunk.

The defense should have had an opportunity to properly inspect the trunk to look for evidence, or the lack thereof, of blood in the trunk. The State was clearly negligent in prematurely releasing the vehicle. The evidence that was destroyed or lost as a result of releasing the vehicle was extremely significant, given the state of the crime scene and the eyewitness testimony regarding the apparent placing of a body into the trunk of a vehicle. Had the defense been able to show that there was no blood in the trunk of the maroon Honda, this evidence would have been significant as it would have supported an argument that the maroon Honda that was being driven by Mr. Rimmer was not the vehicle used in this crime. The trial court violated Mr. Rimmer's Fifth Amendment Due Process rights by failing to properly instruct the jury.

The Tennessee Supreme Court, in *State v. Fayne,* 451 S.W.3d 362, 373 (Tenn. 2014), stated:

> The United States Constitution and Tennessee Constitution guarantee a right to trial by jury. U.S. Const. amend. VI; Tenn. Const. art. I, § 6 (providing "[t]hat the right of trial by jury shall remain inviolate").
>
> This right encompasses an entitlement to "a complete and correct charge of the law, so that each issue of fact raised by the evidence will be submitted to the jury on proper instructions." *State v. Dorantes,* 331 S.W.3d 370, 390 (Tenn.2011). In consequence, the trial court has the duty to give a comprehensive instruction of the law as applicable to the facts in each case, *State v. Thompson,* 519 S.W.2d 789, 792 (Tenn.1975), including a definition of the elements of each offense, *see State v. Ducker,* 27 S.W.3d 889, 899 (Tenn.2000); *State v. Cravens,* 764 S.W.2d 754, 756 (Tenn.1989). When the general charge fully and fairly sets forth the applicable law, a special instruction is unnecessary. *See State v. Hanson,* 279 S.W.3d 265, 280 (Tenn.2009) (emphasizing the importance of assessing the adequacy of the instructions as a whole rather than in isolation). Instead, "[t]he purpose of a special instruction is 'to supply an omission or correct a mistake made in the general charge, to present a material question not treated in the general charge, or to limit, extend, eliminate, or more accurately define a proposition already submitted to the jury.' " *State v. Adams,* 405 S.W.3d 641, 661 (Tenn.2013) (quoting *State v. Cozart,* 54 S.W.3d 242, 245 (Tenn.2001), *overruled on other grounds by State v. White,* 362 S.W.3d 559 (Tenn.2012)). As a result, the refusal to provide special instructions will be deemed

> error only if the charged instruction "fails to fairly submit the legal issues or if it misleads the jury as to the applicable law." *See State v. Vann,* 976 S.W.2d 93, 101 (Tenn.1998) (citing *State v. Forbes,* 918 S.W.2d 431, 447 (Tenn.Crim.App.1995); *Graham v. State,* 547 S.W.2d 531 (Tenn.1977)); *see also Shell v. State,* 584 S.W.2d 231, 235 (Tenn.Crim.App.1979) (declining to find error when the charged instruction provided a correct statement of Tennessee law albeit in less precise terms than the requested instruction). The propriety of a jury instruction is a mixed question of law and fact, reviewed de novo with no presumption of correctness. *State v. Rush,* 50 S.W.3d 424, 427 (Tenn.2001); *State v. Smiley,* 38 S.W.3d 521, 524 (Tenn.2001).

State v. Fayne, 451 S.W.3d 362, 373 (Tenn. 2014).

The trial court's failure to charge *Tennessee Criminal Pattern Instructions*, Section 42.23, was error. As such, the convictions should be vacated, and a new trial should be granted.

XXII. The trial court erred in finding Mr. Rimmer as the leader of the offense as a sentencing aggravator and finding consecutive sentencing appropriate.

In its rebuttal argument, the State argued, "This was a three-man job. Michael Rimmer was doing the personal work. His crew, gathering the cash." (Vol. 21. 70). The State, in its rebuttal argument, also states, "Did Billy Wayne Voyles do this? I submit to you that there is evidence he probably did." (Vol. 21. 65). The State also argued, with absolutely no proof to support the allegation, that Tommy Wayne Voyles may have been involved. (Vol. 21. 68-69). The State then goes on to speculate about Mr. Rimmer's alleged involvement. (Vol. 21. 70). The trial court enhanced Mr. Rimmer's sentence for aggravated robbery, in part, due to the accusation that he was the leader in the commission of the offense involving two or more criminal actors. Tenn.Code Ann. § 40–35–114(1), (2) (Supp.2001). There was no proof that Mr. Rimmer was the leader of this offense.

> When an accused challenges the length, range, or the manner of service of a sentence, this court has a duty to conduct a *de novo* review of the sentence with a presumption that the determinations made by the trial court are correct. Tenn.Code Ann. § 40–35–401(d) (1997); *State v. Ashby,* 823 S.W.2d 166, 169 (Tenn.1991). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the

> sentencing principles and all relevant facts and circumstances." *Ashby,* 823 S.W.2d at 169. When conducting a *de novo* review of a sentence, this court must consider: (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the pre-sentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the Appellant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. Tenn.Code Ann. §§ 40–35–102, –103, –210 (1997); *Ashby,* 823 S.W.2d at 168.

State v. Holston, 94 S.W.3d 507, 511 (Tenn. Crim. App. 2002).

This enhancement was improperly applied in violation of Mr. Rimmer's Fifth Amendment Due Process rights. In addition, the trial court erred in running the sentence for the aggravated robbery conviction consecutively to the death sentences.

CONCLUSION

Based upon the foregoing, Appellant hereby requests this Honorable Court to reverse this case, vacate the convictions in this case, and grant Appellant a new trial.

Respectfully submitted,

Paul Bruno

Paul Bruno, B.P.R. #17275
Bulloch, Fly, Hornsby & Evans PLLC
302 North Spring Street
P.O. Box 398
Murfreesboro, Tennessee 37133-0398
(615) 896-4154

Robert Parris by Paul Bruno with permission

Robert Parris, B.P.R. #19847
200 Jefferson Street
Suite 1500
Memphis, Tennessee 38103
(901) 529-8500

COUNSEL FOR MICHAEL RIMMER

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing *Brief Of The Appellant Michael Rimmer* has been provided, via United States Mail, postage prepaid, to Andrew Coulam, Assistant Attorney General, Office of the Tennessee Attorney General, 425 Fifth Avenue, North, P.O. Box 20207, Nashville, Tennessee 37202-0207, on this the 6th day of August, 2019.

Paul Bruno

Paul Bruno