APPENDIX

APPENDIX A

2021 WL 982503
Only the Westlaw citation is currently available.

SEE RULE 19 OF THE RULES OF THE COURT OF CRIMINAL APPEALS RELATING TO PUBLICATION OF OPINIONS AND CITATION OF UNPUBLISHED OPINIONS.

Court of Criminal Appeals of Tennessee,
AT KNOXVILLE.

Terry Lynn KING
v.
STATE of Tennessee

No. E2019-00349-CCA-R3-PD
|
June 23, 2020 Session
|
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Appeal from the Criminal Court for Knox County, No. 72987, G. Scott Green, Judge

Attorneys and Law Firms

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Herbert H. Slatery III, Attorney General and Reporter; Courtney N. Orr, Assistant Attorney General; Charme Allen, District Attorney General; and Leland Price, Assistant District Attorney General, for the appellee, State of Tennessee.

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

OPINION

Norma McGee Ogle, J.

*1 The Petitioner, Terry Lynn King, through counsel, appeals from the post-conviction court's order summarily denying relief on his amended post-conviction petition challenging his 1985 death sentence for the first degree murder perpetrated in the simple kidnapping by confinement of Diana K. Smith. The Petitioner argues that (1) the prior violent felony aggravating circumstance applied in his case is unconstitutionally vague under Johnson v. United States, 576 U.S. 591, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015); (2) the harmless error analysis utilized by the original post-conviction court and this court concerning the erroneous application of the felony murder aggravating circumstance is unconstitutional under Hurst v. Florida, 577 U.S. 92, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016); (3) the Petitioner is entitled to post-conviction relief on amended claims alleging that the State committed Brady violations at his original trial, that the use of his Grainger County conviction to establish the prior violent felony aggravating circumstance violated his constitutional rights, and that counsel committed ineffective assistance of counsel; (4) the post-conviction court's summary denial of the amended post-conviction petition violated the Petitioner's right to due process; and (5) the cumulative effect of the errors resulted in a deprivation of constitutional rights.

I. Factual and Procedural Background

On February 1, 1985, a Knox County Criminal Court jury convicted the Petitioner of the July 31, 1983 first degree murder while in the perpetration of a simple kidnapping by confinement and armed robbery of Diana K. Smith. At sentencing, the jury imposed the death penalty for the first degree murder conviction based upon the weight of four aggravating circumstances, and the trial court imposed a sentence of 125 years in confinement for the armed robbery conviction. The Petitioner's convictions and sentences were affirmed on appeal. State v. King, 718 S.W.2d 241 (Tenn. 1986). The Petitioner unsuccessfully pursued post-conviction relief, the denial of which was affirmed by this court. Terry Lynn King v. State, No. 03C01-9601-CR-00024, 1997 WL 416389 (Tenn. Crim. App. July 14, 1997), aff'd, 989 S.W.2d 319 (Tenn. 1999), cert. denied, 528 U.S. 875, 120 S. Ct. 181, 145 L.Ed.2d 153 (1999). The Petitioner unsuccessfully pursued federal habeas corpus relief. Terry Lynn King v. Ricky Bell, No. 3:99-cv-454, 2011 WL 3566843 (E.D. Tenn. Aug. 12, 2011), aff'd, 847 F.3d 788 (6th Cir. 2017); see also King v. Dutton, 17 F.3d 151 (6th Cir. 1994) (challenging the Grainger County first degree murder conviction that served as a factual basis of the application of the prior violent felony aggravating circumstance), cert. denied, 512 U.S. 1222, 114 S. Ct. 2712, 129 L.Ed.2d 838 (1994). In state court, the Petitioner unsuccessfully pursued a petition for a writ of error coram nobis, the denial of which was affirmed on appeal by this court. Terry Lynn King v. State, No. E2014-01202-

CCA-R3-ECN, 2015 WL 3409486 (Tenn. Crim. App. Feb. 19, 2015), perm. app. denied (Tenn. Sept. 16, 2015). The Petitioner filed his first motion to reopen his post-conviction petition, alleging that the United States Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), invalidated his death sentence; the post-conviction court denied the motion to reopen, and this court denied the Petitioner's application for review. Terry Lynn King v. State, No. E2003-00701-CCA-R28-PD (Order) (Tenn. Crim. App. July 8, 2003), perm. app. denied (Tenn. Nov. 24, 2003).

The evidence presented at the Petitioner's trial was summarized by the Tennessee Supreme Court on direct appeal:

> The victim of both crimes for which defendant stands convicted was Diana K. Smith. Mrs. Smith left her home on Sunday afternoon, July 31, 1983, to go to a nearby McDonald's to get food for her family. Her automobile, a 1979 Camaro, was found on August 4, 1983, off the road in a heavily wooded area near Blaine, Tennessee.
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> On August 6, 1983, Mrs. Donna Allen went to the Asbury quarry in Knox County to swim. She noticed a strange odor coming from a yellow tarpaulin in the water near the bank, and reported the circumstance to the sheriff's office. On following-up Mrs. Allen's report, officers found the body of a white female in an advanced state of decomposition. The body was later identified as being that of Mrs. Smith. Death was from one or more shots fired into the back of Mrs. Smith's head from a high-powered weapon.
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> *2 In the course of the police investigation, the attention of the officers was focused on Terry King and Randall Sexton when Jerry Childers, an acquaintance of King, reported a conversation he had had with King and what he had found when he followed up on the conversation.
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> Jerry Childers testified that Terry King came to his house on the afternoon of Monday, August 1, 1983, and inquired as to whether Childers knew anyone that wanted to buy parts from a 1979 Camaro. According to Childers, King told Childers he had killed the woman who owned the automobile after she threatened to charge defendant with rape. According to Childers, defendant said he made the woman get out of the car trunk where he had confined her and lie face down on the ground, that the woman faced the defendant and begged him not to shoot her and offered money, and that he ordered her to turn her head away from him. When she did, he shot her in the back of the head. Defendant also told Childers he took forty dollars from the woman as well as taking her automobile.
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> The following Friday, which was August 5, 1983, Childers related defendant's story to Mr. Buford Watson. On Sunday, Childers went to the location defendant had described as the place of the killing and found something with hair on it. Childers then gave the information he had to Detective Herman Johnson of the Knox County Sheriff's Department and T.B.I. agent, David Davenport. In following up the report, the officers met Childers near Richland Creek and searched the area, finding pieces of bone, hair, and bloodstains. A later more thorough search turned up bullet fragments and additional bone fragments.
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> In the course of the police investigation, defendant and co-defendant, Sexton, were interviewed by the officers. Both gave written statements detailing the events of the night of July 31, 1983. Neither defendant testified in the guilt phase of the trial, but their statements were introduced in evidence. Both defendants testified in the sentencing phase of the trial and repeated in substance the facts set forth in the statements given the police officers in their statements.
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> The statements of King and Sexton were markedly similar for the time the two men were together. King's statement was the more comprehensive since it covered the entire period of time he was with Mrs. Smith. According to defendant, he and his cousin, Don King, picked up Mrs. Smith at the Cherokee Dam on Sunday, July 31, 1983. Defendant drove Mrs. Smith in her automobile to the nearby house trailer of his cousin, arriving there around 7:00 p.m. Don King drove his own automobile to the trailer. Shortly after arriving at the trailer, defendant called Eugene Thornhill who came to the trailer and left with defendant to obtain LSD and quaaludes. Defendant said he and Mrs. Smith took the drugs. Thereafter, defendant, Don King, and Eugene Thornhill had sex with Mrs. Smith.
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> After staying at the trailer for several hours, defendant and Mrs. Smith left in her automobile, with defendant driving. They went to a wooded area, where they again had sex. From there, they went to a service station for gas. Mrs. Smith got out of the automobile and grabbed the keys. Defendant told her to get back in the automobile and she did so. The defendant drove Mrs. Smith back to the wooded area, where they again had sex and the defendant took forty dollars from Mrs. Smith. According to defendant, Mrs. Smith then asked "why did you all rape me?" Defendant

stated that he knew then what he was going to do. He told Mrs. Smith to get into the trunk of the automobile. When she did, defendant drove to Sexton's house and told Sexton he had a woman in the trunk of the automobile and needed Sexton's help. Defendant got a rifle from Sexton and also a shovel. Defendant and Sexton then left the Sexton home in separate automobiles. After making a stop at a Publix station to purchase gas, defendant and Sexton drove to a wooded area near Richland Creek in Knox County. Defendant drove the 1979 Camaro off the road and became stuck. He then made Mrs. Smith get out of the automobile trunk and pointed the loaded rifle at her. Defendant made Mrs. Smith lie down on the ground, assuring her that he was not going to kill her, that others were coming to have sex with her. Sexton left in his automobile to return a funnel to the gas station. While he was gone, defendant shot Mrs. Smith in the back of the head. On Sexton's return, and after getting the Camaro unstuck, the two went through Mrs. Smith's effects, burning her identification. They then attempted to bury the body, but gave up because of the hardness of the ground. The next morning, defendant and Sexton wrapped Mrs. Smith's body in a tent, weighted it with cinder blocks and dumped it in the Asbury quarry. Mrs. Smith's automobile was hidden near Sexton's house.

*3 Agent Davenport testified that after making his statement, the defendant took him and other officers to the place where the Camaro was hidden and defendant also showed them where he had hidden the automobile license plate in a hollow tree. The defendant also showed the officers where he had placed the body in the quarry and where the shooting occurred.

Tommy Heflin, a firearms examiner for the Tennessee Bureau of Investigation, testified that he had examined the .30 Marlin rifle belonging to Sexton, the metal bullet jacket, and fragments recovered from the scene of the killing. According to Mr. Heflin, the intact metal jacket had been fired from Sexton's rifle and the fragments were fired from a rifle with the same rifling characteristics as Sexton's rifle. Mr. Heflin was of the opinion that at least two bullets had been fired.

Dr. Joseph Parker, who performed an autopsy on the body of Mrs. Smith, testified that death was due to an extensive head injury consistent with gunshot wounds from a high-powered rifle.

Over objection, the State also presented evidence through Lori Eastman Carter that defendant had attempted to kill her on October 13, 1982. According to Mrs. Carter, King hit her with a slapstick numerous times, while repeatedly asking her "how it felt to be dying, so that the next woman he killed he would know how she felt." Mrs. Carter testified that she lost consciousness. When she came to, she was still in her automobile with her hair rolled up in the window. She further testified that she heard defendant tell his cousin that he had killed her and wanted James King to help him put her in a quarry and burn her automobile.

James King disputed Mrs. Carter's version of events, saying that defendant came to King's home to get him to follow defendant to St. Mary's Hospital as Mrs. Carter was ill and needed treatment.

Karen Greeg, Lori Carter's sister, testified that Mrs. Carter cannot be believed, even under oath.

The defendant offered no other evidence in the guilt phase of the trial.

King, 718 S.W.2d at 243-45.

At the penalty phase of the trial, the jury imposed the death penalty based upon its finding of four aggravating circumstances: (1) that the Petitioner was previously convicted of one or more felonies, other than the present charge, which involved the use or threat of violence to the person.[1] Tenn. Code Ann. § 39-2-203(i)(2) (1982) (repealed); (2) that the murder was especially heinous, atrocious and cruel in that it involved torture or depravity of mind, Tenn. Code Ann. § 39-2-203(i)(5) (1982) (repealed); (3) the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest of the defendant or another, Tenn. Code Ann. § 39-2-203(i)(6) (1982) (repealed); and (4) the murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any rape, robbery, larceny or kidnapping, Tenn. Code Ann. § 39-2-203(i)(7) (1982) (repealed). King, 718 S.W.2d at 248. The trial court sentenced the Petitioner to one hundred and twenty-five years for the armed robbery conviction. Id. at 243.

*4 On automatic appeal to the Tennessee Supreme Court, the court held that the evidence was sufficient to support the Petitioner's convictions; that the trial court did not err by refusing to instruct the jury on the lesser included offenses; that the jury did not prematurely begin deliberations in violation of the Petitioner's right to a fair and impartial jury; that the trial court did not unduly restrict voir dire concerning

potential jurors' views on punishment; that the trial court did not err in admitting Lori Eastman Carter's testimony; that the trial court did not err in denying the Petitioner's motion to compel disclosure of Jerry Childers' criminal history; that the trial court did not err in denying the codefendants' motion to sever trial; that the trial court did not improperly limit argument or deny jury instruction requests at sentencing; and that the death penalty was imposed constitutionally. Id. at 245-50.

The Petitioner filed a timely petition for post-conviction relief. Following a hearing, the post-conviction court denied relief but found that the erroneous application of the felony murder aggravating circumstance was harmless. On appeal to this court, the Petitioner alleged that the aggravating factors supporting the death sentence were either constitutionally flawed or impermissibly tainted by inadmissible evidence; the trial court's failure to grant a severance at trial violated his constitutional rights, see Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) and Cruz v. New York, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987); trial and appellate counsel committed ineffective assistance of counsel; the trial court's failure to instruct the jury on second degree murder and voluntary intoxication violated his constitutional rights; the trial court's instruction on reasonable doubt violated his due process rights; the prosecution violated his due process rights by offering inadmissible, irrelevant and inflammatory evidence during both the guilt and penalty phases of his trial; and he is entitled to a new trial and/or a new sentencing hearing based on cumulative error. Terry Lynn King, 1997 WL 416389 at *1. On appeal, this court affirmed the post-conviction court's denial of relief and also affirmed the post-conviction court's finding of harmlessness concerning the erroneous application of the felony murder aggravating circumstance. Id. The Tennessee Supreme Court granted permission to appeal specific to the felony murder aggravating circumstance, Bruton, and ineffective assistance of counsel issues and affirmed this court's opinion. King, 989 S.W.2d at 322.

The Petitioner then sought federal habeas corpus relief. As relevant to the claims presented in this appeal, the federal district court denied relief as to the Petitioner's allegations that the prior violent felony aggravating circumstance was unconstitutionally applied because the Grainger County offense upon which it was based was adjudicated after the Knox County offense, that he was denied counsel in Knox County in relation to his guilty pleas in the Grainger County prosecution, that counsel were ineffective in investigating and presenting mental health evidence, and that allegations of Brady violations relative to the single gunshot evidence and impeachment evidence concerning Lori Eastman Carter deprived him of a fair trial. Terry Lynn King v. Ricky Bell, Warden, 2011 WL 3566843 at *7-43. The Sixth Circuit granted a partial certificate of appealability and affirmed the district court's denial of relief. King v. Westbrooks, 847 F.3d at 791 (affirming denial of habeas relief alleging ineffective assistance concerning counsel's abandonment of intoxication defense and delay in hiring mental health experts).

On June 25, 2013, the Petitioner filed a petition for a writ of error coram nobis in state court alleging the same Brady violations that he had alleged in the federal habeas corpus litigation. The coram nobis court summarily denied relief, finding that the petition was untimely and that due process did not require a tolling of the statute of limitations. This court affirmed the coram nobis court's judgment on appeal. Terry Lynn King, 2015 WL 3409486 at *9.

Motion to Reopen Post-Conviction Petition

***5** On June 22, 2016, the Petitioner filed a motion to reopen his post-conviction petition, alleging that the United States Supreme Court's decision in Johnson announced a new constitutional rule requiring retrospective application to reopen post-conviction proceedings that invalidated the application of the prior violent felony aggravating circumstance in his case. *See* T.C.A. § 40-30-117(a)(1) (2018). The State filed a reply, arguing that the rule announced in Johnson is inapplicable to Tennessee's prior violent felony aggravating circumstance.

On September 26, 2016, the post-conviction court entered an order setting further hearing "limited to the issue of whether the petition states a colorable claim which warrants a finding that Mr. King's post-conviction should be reopened." *See* T.C.A. § 40-30-117(b) ("The motion shall be denied unless the factual allegations, if true, meet the requirements of subsection (a). If the court grants the motion, the procedural, relief and appellate provisions of this part shall apply."); *Id.* § 40-30-107 (requiring the post-conviction court to enter a preliminary order if the pleading "is not dismissed upon preliminary consideration").

On November 22, 2016, the Petitioner filed an amended claim that the Supreme Court's decision in Hurst mandated a new sentencing hearing because the harmless error analysis

utilized when the felony murder aggravating circumstance was struck violated Hurst. On January 13, 2016, the State filed a response arguing that Hurst did not provide a basis to reopen the post-conviction petition because Hurst did not announce a new constitutional rule requiring retroactive application.

On April 3, 2017, the post-conviction court granted the motion to reopen as to the Johnson claim but denied the motion to reopen as to the Hurst claim. In the preliminary order, the post-conviction court directed the Petitioner to "investigate all possible constitutional grounds for relief for the purpose of filing an amended petition if necessary ... [and] raise any additional issues counsel deems necessary."

On October 16, 2017, the Petitioner amended his post-conviction petition with the additional claims concerning Brady violations, denial of counsel to advise him concerning the collateral consequence of the Grainger County pleas, ineffective assistance of counsel, and, once again, a Hurst claim. On November 30, 2017, the State responded that the additional claims had been previously determined by other litigation and that the Hurst claim had already been denied as a basis for reopening by the post-conviction court. On July 16, 2018, the Petitioner filed a reply to the State's response, arguing that due process required a tolling of the statute of limitations to permit the amendment of the petition for post-conviction relief with later-arising claims. On July 26, 2018, the State filed a response to the reply, arguing that this court had decided that the Johnson claim is not applicable to Tennessee's statute and that, therefore, the post-conviction court had improvidently granted the motion to reopen. On October 30, 2018, the Petitioner filed a second amendment to the post-conviction petition, alleging that the prior violent felony aggravating circumstance was unconstitutional because the prior conviction had not been adjudicated at the time of the offense.

On November 1, 2018, the post-conviction court heard arguments on the motion to reopen and took the matter under advisement. On January 24, 2019, the post-conviction court entered an order denying relief. The court found that Johnson did not apply to Tennessee's prior violent felony aggravating circumstance and that the additional claims went beyond the scope of the court's April 3, 2017 preliminary order. The court further found that the additional claims were procedurally barred by the statute of limitations and/or the previous determination and waiver provisions of the Post-Conviction Procedure Act. See Tenn. Code Ann. §§ 40-30-102(a), -106(h), -106(f).

*6 On appeal, the Petitioner argues that Tennessee's prior violent felony aggravating circumstance is unconstitutionally vague under Johnson. As an amended claim to the petition for post-conviction relief, the Petitioner argues that the re-weighing of aggravating circumstances and harmless error analysis employed by the appellate courts upon striking the felony murder aggravating circumstance violates Hurst. The Petitioner also argues that the State committed Brady violations related to the State's failure to disclose ballistics evidence that the victim was shot only once and impeachment evidence concerning Lori Eastman Carter, who testified for the State at trial. The Petitioner asserts that his Sixth Amendment right to counsel, Eighth Amendment right to be free from cruel and unusual punishment, and due process rights were violated by circumstances related to the use of the Grainger County murder conviction as a factual predicate to the prior violent felony aggravating circumstance. As part of the amended claims, the Petitioner also claims that counsel committed ineffective assistance by failing to investigate and present evidence of the Petitioner's organic brain damage. The Petitioner argues that the post-conviction court's summary denial of his amended claims violates his due process right to have all colorable claims heard and adjudicated on their merits. Lastly, he claims that the cumulative effect of all these errors deprived him of a fair trial.

The State argues that post-conviction court properly denied the motion to reopen because the Johnson claim does not provide a basis for reopening the post-conviction petition. The State further asserts that the Petitioner failed to properly seek review of the Hurst claim and that the Petitioner is procedurally barred from raising the additional claims for relief.

II. Analysis

In Harold Wayne Nichols v. State, this court analyzed a post-conviction court's review of a motion to reopen and a subsequent amendment to a first post-conviction petition made pursuant to a post-conviction court's order granting a motion to reopen. See Harold Wayne Nichols v. State, No. E2018-00626-CCA-R3-PD, 2019 WL 5079357 (Tenn. Crim. App. Oct. 10, 2019), perm. app. denied (Tenn. Jan. 15, 2020). Concerning the general availability of post-conviction relief in Tennessee, this court explained

> In Case v. Nebraska, 381 U.S. 336, 85 S. Ct. 1486, 14 L.Ed.2d 422 (1965), the United States Supreme Court recommended that the states implement post-conviction procedures to address alleged constitutional errors arising in state convictions in order to divert the burden of habeas corpus ligation in the federal courts. In response, the Tennessee legislature passed the Post-Conviction Procedure Act whereby a defendant may seek relief "when a conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." T.C.A. § 40-30-103. In its current ideation, the Post-Conviction Procedure Act "contemplates the filing of only one (1) petition for post-conviction relief. In no event may more than one (1) petition for post-conviction relief be filed attacking a single judgment." T.C.A. § 40-30-102(c). While "any second or subsequent petition shall be summarily dismissed," a petitioner may seek relief on the basis of claims that arise after the disposition of the initial petition by filing a motion to reopen the post-conviction proceedings "under the limited circumstances set out in § 40-30-117." Id.; see Fletcher v. State, 951 S.W.2d 378, 380 (Tenn. 1997).

Harold Wayne Nichols, 2019 WL 5079357, at *3. Although Tennessee limits the filing of a post-conviction relief petition to one petition, there are limited circumstances whereby a petitioner may allege later arising claims via a motion "to reopen the first post-conviction petition." T.C.A. § 40-30-117(a). As relevant in this case, a motion to reopen a first post-conviction petition should be granted when "[t]he claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required." *Id.* § 40-30-117(a)(1). Once a motion to reopen is granted, "the procedure, relief and appellate provisions of this part shall apply," *Id.* § 40-30-117(b)(1).

"[A] post-conviction court's grant of a motion to reopen does not fully place a petitioner back into the procedural posture of his original post-conviction proceedings." Harold Wayne Nichols, 2019 WL 5079357, at *7. As noted by the Tennessee Supreme Court, claims raised in a motion to reopen and subsequent amendments may be barred by the statute of limitations, previous determination, or waiver. Coleman v. State, 341 S.W.3d 221, 255 (Tenn. 2011). Generally, a petitioner must file a petition for post-conviction relief "within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken or, if no appeal is taken, within one (1) year of the date on which the judgment became final, or consideration of the petition shall be barred." T.C.A. § 40-30-102(a) (2018). The statutory grounds for tolling the statute of limitations are coextensive to those for granting a motion to reopen. Id. § 40-30-102(b) (2018). Thus, if an amended claim arising from a motion to reopen a post-conviction petition does not meet the requirements of Code sections 40-30-102(b) and 40-30-117(a), the claim is barred by the statute of limitations. "A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing." Id. § 40-30-106(h) (2018). Further, a claim will be treated as waived when "not raised before a court of competent jurisdiction in which the ground could have been presented." Id. § 40-30-110(f) (2018); see Coleman, 341 S.W.3d at 257 (discussing the waiver of a specific ineffective assistance of counsel claim for failing to raise it in the original post-conviction petition). The Post-Conviction Procedure Act requires the post-conviction court to summarily dismiss any claims which are raised beyond the statute of limitations, have been previously determined, or have been waived. T.C.A. § 40-30-106(b), (f). We review the post-conviction court's summary denial of relief de novo. Arnold v. State, 143 S.W.3d 784, 786 (Tenn. 2004).

A. Johnson Motion to Reopen Allegation

*7 In support of the motion to reopen the post-conviction petition, the Petitioner alleged that the Supreme Court's holding in Johnson rendered void the prior violent felony aggravating circumstance. While the post-conviction court preliminarily granted the motion to reopen based upon this allegation, the court ultimately determined that the decision in Johnson was inapplicable to Tennessee's prior violent felony aggravating circumstance. On appeal, the Petitioner argues that the prior violent felony aggravating circumstance is unconstitutionally vague in light of Johnson. The State asserts that the holding in Johnson is inapplicable to Tennessee's prior violent felony aggravating circumstance and, therefore, the post-conviction court properly denied the motion to reopen.

In Johnson, the Supreme Court examined the definition of a violent felony under the Armed Career Criminal Act (ACCA), which provided increased punishment for a defendant convicted of being a felon in possession of a firearm if a defendant has three or more previous convictions for a violent felony. *See* 18 U.S.C. § 924(e)(1). The ACCA defined a violent felony as

> any crime punishable by imprisonment for a term exceeding one year ... that – (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (ii) is burglary, arson, or involves the use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*

18 U.S.C. § 924(e)(2)(B) (emphasis added). The "otherwise involves conduct" language is referred to as the ACCA's residual clause. Johnson, 135 S. Ct. at 2556. The Court observed that the residual clause does not involve an examination of the elements of a prior offense, but instead "asks whether the crime *'involves conduct'* that presents too much risk of physical injury." Id. at 2557 (emphasis in the original). The Court determined that the judicial assessment of risk under the residual clause, which was not tied to the facts concerning the particular offense or to the statutory elements, rendered the residual clause unconstitutionally vague. *Id.* at 2557. In so doing, however, the Court limited its holding and held that the elements clause contained in subsection (i) survived constitutional scrutiny. *Id.* at 2563.

This court has analyzed the application of Johnson to Tennessee's prior violent felony aggravating circumstance. See Harold Wayne Nichols, 2019 WL 5079357; see also Nicholas Todd Sutton v. State, No. E2018-00877-CCA-R3-PD, 2020 WL 525169 (Tenn. Crim. App. Jan. 31, 2020), perm. app. denied (Tenn. Feb. 13, 2020). In both Nichols and Sutton, we noted that "this Court has rejected Johnson claims with respect to both the pre-and post-1989" versions of the prior violent felony aggravating circumstance when raised in applications for permission to appeal from the denial of a motion to reopen a post-conviction petition "because our supreme court has held, that under either version of the statute, trial courts are to look to the actual facts of the prior felony to determine the use of violence when such cannot be determined by the elements of the offense alone." Harold Wayne Nichols, at *6 (citations omitted); Nicholas Todd Sutton, at *7 (quoting Nichols). Unlike the approach to the ACCA's residual clause, "our precedent has never required the use of a judicially imagined ordinary case in applying the prior violent felony." Id. "Tennessee's prior violent felony aggravating circumstance is not void for vagueness under Johnson." Id. Therefore, the Petitioner is not entitled to relief as to this claim.

B. Claims Raised in Amended Pleadings

I. Hurst Claim

The Petitioner argues that the Supreme Court's decision in Hurst announced a new rule of constitutional law requiring retrospective application that qualifies as a basis to reopen the post-conviction petition. Specific to the circumstances of the Petitioner case, the Petitioner argues that a new sentencing hearing is required because the original post-conviction court's and this court's reweighing of aggravating circumstances through harmless error analysis in addressing the erroneous application of the felony murder aggravating circumstance violated Hurst. The State asserts that this court lacks jurisdiction to review the Hurst claim because the Petitioner failed to seek permission to appeal from the post-conviction court's preliminary order denying the Petitioner's motion to reopen based upon Hurst. See Tenn. Code Ann. § 40-30-117(c); Tenn. Sup. Ct. R. 28. The State also argues that the post-conviction court correctly refused to address the Hurst claim as an amendment to the post-conviction petition based upon its previous ruling that Hurst did not provide a basis for reopening the petition.

*8 This court has noted that "[t]here is no limit on the number of motions to reopen that may be filed [under the Post-Conviction Procedure Act], only a limit on the types of claims that may be raised." Harold Wayne Nichols, at *7, n. 8. In Nichols, we opined that had the Petitioner filed a separate motion to reopen alleging a Hurst claim and it had been denied by the post-conviction court, "our jurisdiction to hear the appeal would be dependent upon whether Petitioner followed the proper procedure for seeking permission to appeal pursuant to Tennessee Code Annotated section 40-30-117(c)." Id. However, the Petitioner in this case did not file a separate motion to reopen but, instead, amended his motion to reopen with the Hurst claim. Thereafter, when the post-conviction court granted the motion to reopen, in part, based on Johnson, the Petitioner amended the post-conviction petition with the Hurst claim. Under these circumstances, we determine that the Hurst claim is properly before the court.

That said, the State correctly notes that this court has consistently held that Hurst did not announce a new constitutional rule requiring retrospective application. See, e.g., Charles Rice v. State, No. W2017-01719-CCA-R28-PD (Tenn. Crim. App. Nov. 14, 2017) (order), perm.

app. denied (Tenn. Mar. 15, 2018); Richard Odom v. State, No. E2017-01027-CCA-R28-PD (Tenn. Crim. App. Oct. 20, 2017) (order); Jonathan Stephenson v. State, No. E2017-01067-CCA-R28-PD (Tenn. Crim. App. Sept. 19, 2017) (order), perm. app. denied (Tenn. Jan. 18, 2018); Dennis Wade Suttles v. State, No. E2017-00840-CCA-R28-PD (Tenn. Crim. App. Sept. 18, 2017) (order), perm. app. denied (Tenn. Jan. 18, 2018); Gary W. Sutton v. State, No. E2017-01394-CCA-R28-PD (Tenn. Crim. App. Sept. 13, 2017) (order), perm. app. denied (Tenn. Jan. 18, 2018); David Lynn Jordan v. State, No. W2017-00921-CCA-R28-PD (Tenn. Crim. App. Sept. 11, 2017) (order). Therefore, the post-conviction court correctly denied the motion to reopen on that basis.

Furthermore, this court has previously analyzed and rejected a Petitioner's argument that an appellate court's reweighing of aggravating circumstances against mitigating circumstances to determine whether the erroneous application of the felony murder aggravating circumstance was harmless violated Hurst. See Harold Wayne Nichols, at *7.; Nicholas Todd Sutton, at *7. "Because Hurst did not announce a new rule of constitutional law that must be applied retrospectively, this claim is procedurally barred by both the one-year statute of limitations and the one-petition rule." Harold Wayne Nichols, at *8. Additionally, the Petitioner's challenge to the harmless error analysis was previously determined to be without merit upon review by the district court in his federal habeas proceedings. See Terry Lynn King v. Ricky Bell, at *18.. Most significantly, however, is that the United States Supreme Court recently reaffirmed that Hurst does not apply retroactively to collateral review, McKinney v. Arizona, —— U.S. ——, 140 S. Ct. 702, 708, 206 L.Ed.2d 69 (2020) (citing Schriro v. Summerlin, 542 U.S. 348, 358, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004)). In so doing, the Court also rejected McKinney's argument that an appellate court's reweighing of aggravating circumstances and mitigating circumstances, "akin to harmless error review," violates Hurst, holding that "[t]his Court's precedents establish that state appellate courts may conduct a ... reweighing of aggravating and mitigating circumstances, *and may do so in collateral proceedings*...." Id. at 709 (emphasis added). The original post-conviction court's reweighing of aggravating circumstances against mitigating circumstances once the felony murder aggravator was held invalid does not run afoul of the Petitioner's Constitutional rights. The Petitioner is not entitled to relief on this issue.

II. Brady Allegations

The Petitioner asserts that his constitutional rights were violated by the State's withholding ballistics evidence that the victim died from a single gunshot wound and impeachment evidence concerning Lori Eastman Carter. The State argues that the post-conviction court did not err by denying this claim because both claims were procedurally barred by previous determination.

*9 The federal habeas corpus proceedings examined the Brady allegations and found them to be without merit. Terry Lynn King v. Ricky Bell, at *34-35. Further, we note that the Petitioner raised these identical allegations in a petition for a writ of error coram nobis, which the trial court denied as untimely because the petition was filed "twenty-eight years after the judgments became final, thirteen years after the discovery of the evidence during the federal habeas corpus proceedings, and almost two years after the federal district court denied relief." Terry Lynn King, at *5. On appeal, this court affirmed the denial of relief and held "that the delay in seeking coram nobis relief was unreasonable under the circumstances of this case and that due process does not preclude application of the [coram nobis] statute of limitations." Id. at *9. We conclude that these claims are procedurally barred as previously determined. The Petitioner is not entitled to relief as to these issues.

III. Prior Violent Felony Amended Claims

The Petitioner argues that the prior violent felony aggravating circumstance was unconstitutionally applied in his case because he was denied counsel to advise him of the collateral consequences of the Grainger County guilty pleas upon which the prior violent felony aggravating circumstance is predicated and because the Grainger County offenses were adjudicated after the offenses in this case occurred. The State asserts that these claims are procedurally barred.

The federal habeas corpus proceedings examined these allegations and found them to be without merit. Terry Lynn King v. Ricky Bell, at *40-43. We conclude that these claims are procedurally barred as previously determined. To the extent that the Petitioner also failed to raise these issues in the original post-conviction petition, we further conclude that they are waived and barred by the statute of limitations. The Petitioner is not entitled to relief as to these issues.

IV. Ineffective Assistance of Counsel Allegations

The Petitioner argues that trial counsel were ineffective for failing to investigate adequately and to present evidence of his organic brain damage during both phases of the trial. The State argues that the post-conviction court did not err by denying this claim because it was previously determined in other collateral litigation.

As already recounted, the Petitioner raised myriad allegations of ineffective assistance of counsel in the original post-conviction proceedings and in the federal habeas corpus proceedings, including allegations related to the presentation of mitigation evidence. See King, 989 S.W.2d at 330-334 (original post-conviction); King, 847 F.3d at 794, 799 (federal habeas corpus proceedings addressing organic brain damage issue). We conclude that the Petitioner is precluded from raising additional ineffective assistance of counsel allegations because the ineffective assistance of counsel claim was previously litigated and determined. See Cone v. State, 927 S.W.2d 579, 581-82 (Tenn. Crim. App. 1995) (stating that "[a] petitioner may not relitigate a previously determined issue by presenting additional factual allegations"). The ineffective assistance of counsel claim was previously determined, and the Petitioner is not entitled to relief on this basis.

C. Summary Denial of Post-Conviction Relief Claims

The Petitioner is not entitled to relief as to any claim alleged in the motion to reopen or in the amended and supplemental petitions. Nevertheless, the Petitioner contends that he was denied due process by the post-conviction court's summary denial of relief. As this court explained in Harold Wayne Nichols,

> the post-conviction court did not err in denying relief on any of the claims raised by Petitioner. The Johnson claim was the only one that was not procedurally barred; because that claim raised only a question of law and statutory interpretation, there was no need for an evidentiary hearing. The post-conviction court, despite its earlier finding that Petitioner had raised a colorable claim, was clearly authorized by the Post-Conviction Procedure Act to dismiss the amended petition without an evidentiary hearing upon conclusively determining that Petitioner was not entitled to relief.

***10** Harold Wayne Nichols, at *11 (citations omitted); *see also* T.C.A. § 40-30-109(a). "All that due process requires in the post-conviction setting is that the defendant have 'the opportunity to be heard at a meaningful time and in a meaningful manner.' " Stokes v. State, 146 S.W.3d 56, 61 (quoting Matthews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976)). The Petitioner has been afforded due process at every stage of his direct and collateral litigation challenging his first degree murder conviction and death sentence.

D. Cumulative Error

Finally, the Petitioner argues that "all claims of error coalesced into a unitary abridgement of [his] constitutional rights" under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Article I, sections 6, 7, 8, 9, 16, 17, 19, and 32 and Article XI, sections 8 and 16 of the Tennessee Constitution. "To warrant assessment under the cumulative error doctrine, there must have been more than one actual error committed in the trial proceedings." State v. Hester, 324 S.W.3d 1, 77 (Tenn. 2010). Because the Petitioner has not established any error, he is not entitled to relief pursuant to the cumulative error doctrine.

III. Conclusion

Based upon the foregoing, we affirm the judgment of the post-conviction court.

All Citations

Slip Copy, 2021 WL 982503

Footnotes

1 The Petitioner was convicted of the 1983 murder and aggravated kidnapping of Todd Millard in Grainger County, Tennessee. The Grainger County offenses occurred about one month before the offenses involving Ms. Smith. The Petitioner pleaded guilty to the Grainger County offenses while the Smith case was pending.

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APPENDIX B

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

TERRY LYNN KING v. STATE OF TENNESSEE

Criminal Court for Knox County
No. 72987

No. E2019-00349-SC-R11-PD

ORDER

Upon consideration of the application for permission to appeal of Terry Lynn King and the record before us, the application is denied.

PER CURIAM

APPENDIX C

IN THE CRIMINAL COURT FOR KNOX COUNTY, TENNESSEE
DIVISION III

TERRY LYNN KING, Petitioner	)	
	)	No. 72987
v.	)	(CAPITAL CASE)
	)	(POST-CONVICTION)
STATE OF TENNESSEE, Respondent.	)	(Granted Limited Motion to Reopen)

ORDER

I. Introduction

Petitioner, Terry Lynn King, by and through counsel, filed two motions to reopen in June and November 2016 pursuant to Tenn. Code Ann. § 40-30-117(a)(1) claiming he was entitled to relief based upon a new rule of law as announced in Johnson v. United States, 576 U.S. _____, 135 S. Ct. 2551 (2015),[1] and Hurst v. Florida 577 U.S. ____ , 136 S. Ct. 616 (2016). The State filed an initial response on July 26, 2016, asking for summary dismissal of Petitioner's June 2016 motion to reopen. Following Petitioner's November 22, 2016, reply and amended motion to reopen, the State filed a second response on January 13, 2017. The parties appeared before this Court on January 19, 2017, for argument. After reviewing the pleadings, the record, arguments of counsel, and the relevant authorities, and for the reasons stated within a prior order, Petitioner's Motion To Reopen was granted in part as to his claim pursuant to Johnson only. Petitioner's motion to reopen was denied as it related to his claim pursuant to Hurst.

[1] Petitioner also cites to Welch v. United States, 136 S. Ct. 1257 (2016), to support the retroactive application of Johnson.

Subsequently, on October 16, 2017, Petitioner filed an Amended Petition For Post-Conviction Relief raising numerous claims in addition to the Johnson issue, and on November 30, 2017, the State filed its response to that pleading. Petitioner then filed a reply on July 16, 2018, and the State filed a reply to that pleading on July 26, 2018. The Petitioner then filed a Second Amended Petition for Post-Conviction Relief on October 30, 2018, raising yet another issue. This Court held a hearing on November 1, 2018, at which the parties presented argument on the issues.

II. Procedural History

Trial and Direct Appeal

Petitioner was one of two men tried and convicted of the July 31, 1983, first degree felony murder and armed robbery of Diana Smith in Knox County. Petitioner King was convicted on February 1, 1985, and the jury sentenced him to death for the murder based upon the following statutory aggravating circumstances:

> (2) The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person;
>
> (5) The murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind;
>
> (6) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another; and
>
> (7) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb.

Tenn. Code Ann. § 39-2-203(i)(2), (5), (6), and (7) (1982) (repealed 1989). Petitioner was also sentenced to 125 years for the armed robbery to be served consecutive to the death sentence. On appeal, the appellate courts affirmed both the convictions and sentences. State v. King, 718 S.W.2d 241 (Tenn. 1986).

Post-Conviction

Petitioner subsequently filed a petition for post-conviction relief which was denied by the trial court, and the denial was affirmed by the appellate courts. King v. State, 989 S.W.2d 319 (Tenn.) (finding Middlebrooks[2] error to be harmless error), cert. denied, 528 U.S. 875 (1999).[3]

Petitioner subsequently filed an unsuccessful motion to reopen his post-conviction proceedings based upon Ring v. Arizona, 536 U.S. 584 (2002), United States v. Allen, 536 U.S. 953 (2002), and Apprendi v. New Jersey, 530 U.S. 266 (2000). The court of criminal appeals denied permission to appeal pursuant to Tenn. R. App. Pro. 28, and then the Tennessee Supreme Court denied permission to appeal. Terry Lynn King v. State, No. E2003-00701-CCA-R28-PD (Tenn. Crim. App. July 8, 2003) and Terry Lynn King v. State, No. E2003-00701-SC-R11-PD (Tenn. November 24, 2003).

Federal Habeas Corpus Proceedings

Petitioner's first petition for writ of habeas corpus filed in the United States District Court for the Eastern District of Tennessee was denied by the district court and affirmed on appeal. King v. Dutton, 17 F.3d 151 (6th Cir.), cert. denied, 512 U.S. 1222 (1994) (affirming the denial of habeas relief, holding that the State's use of the Grainger County murder conviction "as an aggravating circumstance in the sentencing of an unrelated but pending murder charge" was "a collateral consequence of the plea, about which King need not be advised in order for his plea to be found voluntary").

Petitioner subsequently filed a second habeas proceeding in which he was also denied relief. Terry Lynn King v. Ricky Bell, Warden, 2011 WL 3566843 (E.D. Tenn. August 12, 2011)(order). After the district court denied habeas corpus relief, Petitioner filed a motion to alter

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[2] State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992).

[3] The Middlebrooks error referred to was a finding that the (i)(7) aggravating factor was improperly applied in Petitioner's case. This finding was held to be harmless based on the remaining three aggravating circumstances.

or amend the district court's memorandum and judgment order with respect to the Brady claims and a motion for status. The court denied the motions after finding they were attempts to "re-argue the points previously considered." Terry Lynn King v. Ricky Bell, Warden, No. 3:99–cv–454 (E.D. Tenn. Sept. 25, 2013) (memorandum and order). The court also declined to certify any of Petitioner's claims for review by the Sixth Circuit Court of Appeals; however, on October 28, 2014, an order was entered granting a certificate of appealability on two claims of ineffective assistance of counsel. See Terry Lynn King v. Wayne Carpenter, Warden, No. 13–6387 (6th Cir. Oct. 28, 2014) (order). On February 9, 2017, the Sixth Circuit affirmed the district court's denial of relief. King v. Westbrooks, 847 F.3d 788 (6th Cir. 2017). Petitioner then filed a Petition to Rehear which is currently being held in abeyance.

Writ of Error Coram Nobis

Petitioner filed a petition for a writ of error coram nobis on June 25, 2013, in Knox County Criminal Court. The trial court denied the petition as untimely, and the denial was affirmed by the appellate courts. King v. State, 2015 WL 3409486 (Tenn. Crim. App. May 28, 2015), perm. app. denied, (Tenn. September 16, 2015), cert. denied, King v. Tennessee, 136 S. Ct. 2449 (2016).

III. Analysis of Non-*Johnson* Claims Raised In October 2017 and October 2018 Petitions

In his October 2017 and October 2018 Amended Petitions, Petitioner raised several claims not related to his Johnson v. United States claim.

Initially, this Court finds that the additional claims raised in Claims I, II, III, IV, and VI were not covered by the order granting the motion to reopen. This Court specifically permitted the motion to reopen only as it related to the Johnson claim. Therefore, Claims I-IV, and VI are beyond the scope of the current proceedings.

Even if this Court were to assume the additional claims were within the scope of the

current proceedings, such claims would be subject to preliminary review pursuant to Tenn. Code Ann. § 40-30-106,[4] and each of these claims are either previously determined, waived, and/or time-barred.

Claim I

Claim I asserts that the State failed to turn over "materially exculpatory evidence that would have assisted him in both the guilt-innocence as well as the sentencing phase of his trial" in violation of his constitutional rights. Specifically, he alleges the State withheld a TBI report which indicated the victim was only shot one time and medical records which showed Lori Carter, a prior victim, did not have the injuries she described at trial. By the Petitioner's own admissions, this allegedly "exculpatory" evidence was discovered during federal litigation in 2000, over 17 years ago. Clearly, these claims are time-barred under Tenn. Code Ann. § 40-30-102. See King v. State, 2015 WL 3409486 (Tenn. Crim. App. May 28, 2015), perm. app. denied, (Tenn. September 16, 2015), cert. denied, King v. Tennessee, 136 S. Ct. 2449 (2016)(Same issues raised in petition for writ of error coram nobis deemed time-barred).[5]

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[4] Relief under the Post-Conviction Procedure Act is available when a petitioner's "conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Tenn. Code Ann. § 40-30-103 (2012). "The petition must contain a clear and specific statement of all grounds upon which relief is sought, including full disclosure of the factual basis of those grounds." Tenn. Code Ann. § 40-30-106(d) (2014). The court preliminarily reviews the petition to determine if any issues raised should be dismissed as either previously determined and/or waived. Tenn. Code Ann. § 40-30-106(f)-(h)(2014). The procedural bars of previous determination and waiver are statutorily defined:

> (g) A ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented unless:
>
> (1) The claim for relief is based upon a constitutional right not recognized as existing at the time of trial if either the federal or state constitution requires retroactive application of that right; or
>
> (2) The failure to present the ground was the result of state action in violation of the federal or state constitution.
>
> (h) A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing. A full and fair hearing has occurred where the petitioner is afforded the opportunity to call witnesses and otherwise present evidence, regardless of whether the petitioner actually introduced any evidence.

Tenn. Code Ann. § 40-30-106(g) and (h); see Tenn. S. Ct. R. 28, Section 2(D) and (E).

[5] These issues have also been raised in federal court and have thus far been unsuccessful. Terry Lynn King v. Ricky Bell, Warden, 2011 WL 3566843 (E.D. Tenn. August 12, 2011)(order), aff'd, King v. Westbrooks, 847 F.3d 788 (6th Cir. 2017)(petition to rehear pending).

Claim II

Claim II asserts "Mr. King's death sentence is based on an aggravating circumstance that arose as a result of a denial of counsel in this matter" in violation of his right to counsel. This claim focuses on his assertion he was denied his right to counsel because he was not represented in the Knox County case while it was pending in the grand jury and while he was also entering a guilty plea to first degree murder and aggravating kidnapping in Grainger County. He claims he was not properly advised of the potential consequences his Grainger County case would have on his Knox County case and the potential sentence. Petitioner raised a related issue on post-conviction in his Grainger County case unsuccessfully, Terry King v. State, 1990 WL 198178 (Tenn. Crim. App. Dec. 11, 1990),[6] perm. app. denied, (Tenn. 1991)(Grainger County post-conviction), and again in the federal courts. King v. Dutton, 17 F.3d 151 (6th Cir.), cert. denied, 512 U.S. 1222 (1994) and Terry Lynn King v. Ricky Bell, Warden, 2011 WL 3566843 (E.D. Tenn. August 12, 2011) (order). To the extent that petitioner claims he received ineffective assistance of counsel in counsel's failure to advise of the consequences of his Granger County plea, this too was discussed in the post-conviction of his Grainger County case. In addition, Petitioner raised this issue but failed to pursue it in his first post-conviction proceeding. As such, Claim II has been previously determined and/or waived.

Lastly, to the extent not previously raised, this issue would also be time-barred.

Claim III

Claim III asserts ineffective assistance of counsel for failure to adequately investigate and present as mitigation the impact of Petitioner's organic brain damage. Initially, this Court finds this issue is time-barred. Petitioner relies upon a 1999 MRI and a 2001 report by an expert in support of this claim. Petitioner was aware of this issue for at least 16 years and failed to present

[6] Petition to rehear denied at Terry King v. State, 1991 WL 7906 (Tenn. Crim. App. January 30, 1991).

the claim in state court.

To the extent that this issue has not been previously raised, this issue is waived.[7] This issue could have been investigated and raised by post-conviction counsel. See King v. Westbrook, 847 F.3d 788, 797-99 (6th Cir. 2017) (petition to rehear pending).

Claim IV

Claim IV again raises the issue raised in the motions to reopen claiming Hurst v. Florida, 577 U.S. _____, 136 S. Ct. 616 (2016), announced a new rule of constitutional law. This Court's order dated April 3, 2017, already found this issue to be without merit and this Court will not readdress this issue here.

Claim VI [8]

Petitioner claims he is entitled to relief based upon the cumulative effect of the errors contained in Claims I through V. This Court, however, has found that Claims I-IV are time-barred, previously determined, and/or waived. The only issue remaining for consideration by this Court is Claim V, which was the only issue this Court permitted to proceed on the motion to reopen. This Court finds no basis for a claim of cumulative error which would warrant consideration.

Claim VII [9]

Petitioner claims the use of convictions which occurred subsequent to the offense for which the Petitioner was sentenced to death as "prior convictions" pursuant to Tenn. Code Ann. §39-2-203(i)(2) (1982) (prior violent felony aggravating circumstance) violated the clear language of the statute, as well as his constitutional right to due process and his rights under the Eighth Amendment of the United States Constitution. This issue is also beyond the scope of these

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[7] In addition, the issue of failure to present mental health expertise has been previously presented and rejected. King v. State, 989 S.W.2d 319 (Tenn. 1999). See also Terry Lynn King v. Ricky Bell, Warden, 2011 WL 3566843 (E.D. Tenn. August 12, 2011) (order), aff'd, King v. Westbrooks, 847 F.3d 788 (6th Cir. 2017) (petition to rehear pending).
[8] *Claim V* is the Johnson claim and will be addressed separately in "IV. Johnson Claim."
[9] *Claim VII* was incorrectly labeled as *Claim VIII* in the October 30, 2018, Second Amended Petition.

proceedings. Even if not beyond the scope, it is not appropriately before the court as it is waived and time-barred.

On or About July 2, 1983, Mr. Todd Millard was killed in Grainger County. Ms. Diana Smith, the victim in the instant case, left her home on July 31, 1983, her car was discovered on August 4, 1983, and her body was discovered on August 6, 1983. On August 8, 1983, Petitioner admitted to being present at the death of Mr. Millard and to the killing of Ms. Smith. On August 10, 1983, an arrest warrant was issued for Petitioner in the death of Mr. Millard, and Petitioner was subsequently indicted on the same charge. On May 3, 1984, Petitioner entered a plea of guilty to the murder of Todd Millard in Grainger County.

Meanwhile, Petitioner was indicted on February 20, 1984, in Knox County for the aggravated kidnapping of Ms. Donna Bowles on August 3, 1983, supposedly after the death of Ms. Smith. He subsequently entered a guilty plea to the kidnapping of Ms. Bowles prior to his trial on the offenses related to Ms. Smith. On July 16, 1984, Petitioner was indicted in Knox County for the murder of Ms. Smith. On February 1, 1985, Petitioner was convicted of the felony murder of Ms. Smith and sentenced to death. In support of the sentence of death, the State relied upon the conviction related to Mr. Millard and Ms. Bowles to support the factor that "the defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person." See Tenn. Code Ann. § 39-2-203(i)(2) (1982).

This is not a new issue. It is well established law in Tennessee that for purposes of Tenn. Code Ann. §39-13-204(i)(2), "so long as a defendant is convicted of a violent felony prior to the sentencing hearing at which the previous conviction is introduced, this aggravating circumstance is applicable." State v. Hodges, 944 S.W.2d 346, 357 (Tenn. 1997) (emphasis in original) (citing State v. Nichols, 877 S.W.2d 722, 736 (Tenn.1994), and State v. Caldwell, 671 S.W.2d 459, 464-65 (Tenn. 1984)); see also State v. Dellinger, 79 S.W.3d at 472; State v. Stout, 46 S.W.3d 689,

719 (Tenn. 2001). In other words, the "prior" offense may occur after the date of the commission of the capital offense so long as the defendant is convicted of the "prior" offense before the capital trial. This has been the law for many years. Accordingly, this Court finds this issue has been waived for failure to raise it previously and is time-barred.

IV. Johnson Claim

Petitioner argues in his Motion to Reopen and his Amended Petitions for Post-Conviction Relief that he is entitled to relief pursuant to what he claims is a new rule announced in Johnson v. United States, 135 S. Ct. 2551 (2015). Specifically, Petitioner claims the language of the prior violent felony aggravating circumstance in Tennessee's capital sentencing statute, Tenn. Code Ann. § 39-2-203(i)(2)(1982), is unconstitutionally vague under Johnson.

Initially, when this Court ruled Petitioner had stated a "colorable claim" as to Johnson, there was no authority in Tennessee which addressed this issue. Since then, the Tennessee Court of Criminal Appeals has decided Donnie Johnson v. State, No. W2017-00848-CCA-R28—PD (Tenn. Crim. App. September 11, 2017), perm. app. denied, (Tenn. January 19, 2018). In Johnson, the court held

> In [*Johnson v. United States*], the Supreme Court held that the "residual clause" contained in the definition of a violent felony of the federal Armed Career Criminal Act of 1984 (ACCA) is unconstitutionally vague. *Johnson*, 135 S. Ct. at 2557. The ACCA increases the punishment of a defendant convicted of being a felon in possession of a firearm if he or she has three or more previous convictions for a violent felony. 18 U.S.C. § 924(e)(1). The ACCA defines "violent felony" as
>
> > "any crime punishable by imprisonment for a term exceeding one year . . . that – (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."§924(e)(2)(B) (emphasis added).
>
> The "otherwise involves conduct that presents a serious potential risk of physical injury to another" language is known as the ACCA's "residual clause." *Johnson*, 135 S. Ct. at 2556. The court observed that, "unlike the part of the definition of a violent felony that asks

whether the crime 'has as an element the use ... of physical force,' the residual clause asks whether the crime 'involves conduct' that presents too much risk of physical injury." *Id.* at 2557. (emphasis in original). In making its ruling, the Supreme Court reasoned that the residual clause is unconstitutionally vague because it "leaves grave uncertainty about how to estimate the risk posed by a crime" and it "leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2557-58. In other words, "[d]eciding whether the residual clause covers a crime thus requires a court to picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury." *Id.* at 2557. That "task goes beyond deciding whether creation of risk is an element of the crime." *Id.* (emphasis added). As such, the majority declined the dissent's suggestion that looking at the particular facts underlying the prior violent felony could save the residual clause from vagueness. *Id.* at 2561-62.

The Petitioner alleges that the *Johnson* decision created a new constitutional right that would provide an avenue of relief pursuant to Tennessee Code Annotated section 40-30-117(a)(1). We must first look at *Johnson* to determine if a new constitutional right was created. Tennessee Code Annotated section 40-30-122 addresses interpretation of a new rule of constitutional law stating in part:

> "For purposes of this part, a new rule of constitutional criminal law is announced if the result is not dictated by precedent existing at the time the petitioner's conviction became final and application of the rule was susceptible to debate among reasonable minds."

Further, the courts have determined that a "case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government [or] ... if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague v. Lane*, 109 S.Ct. 1060, 1070 (1989) (citations omitted); *see also Van Tran v. State*, 66 S.W.3d 790, 810-11 (Tenn. 2001). On its face, the *Johnson* decision does not appear to create a new constitutional right but only applies an existing constitutional test to a statute. When referencing *Johnson*, the United States Supreme Court described the reasoning for the decision as follows:

> "Last Term, this Court decided *Johnson v. United States*, 135 S.Ct. 2551 (2015). *Johnson* considered the residual clause of the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B)(ii). The Court held that provision void for vagueness."

Welch v. United States, 136 S. Ct. 1257, 1260–61 (2016) (emphasis added). The court further stated:

> "Less than three weeks later, this Court issued its decision in *Johnson* holding, as already noted, that the residual clause is void for vagueness."

Id. (emphasis added). The ruling of the *Welch* court reinforces the idea that no new constitutional right was created by the *Johnson* opinion. The "void for vagueness" doctrine was not a new creation of the *Johnson* court in that the due process provisions of the 5th and 14th amendments have been utilized many times prior to *Johnson* to determine that a statute is unconstitutionally vague. *City of Chicago v. Morales*, 119 S. Ct. 1849 (1999) (speculation as to meaning of statute not allowed); *Maynard v. Cartwright*, 108 S.Ct. 1853 (1988) (aggravating circumstance language held as unconstitutionally vague); *Kolender v. Lawson*, 103 S. Ct. 1855 (1983) (statute held to be unconstitutionally vague by requiring "credible and reliable" identification); *Colautti v. Franklin*, 99 S. Ct. 675 (1979) (statute

vague due to required interpretation of "is viable" and "may be viable"); *Smith v. Goguen*, 94 S. Ct. 1242 (1974) (due process is denied where inherently vague statutory language permits selective law enforcement); *Grayned v. City of Rockford*, 92 S. Ct. 2294 (1972) (enactment is void for vagueness if its prohibitions are not clearly defined). As such, we cannot find that the United States Supreme Court established a new constitutional right through its ruling in *Johnson*.

Even if a new retroactively applicable constitutional right was created by the *Johnson* decision, such ruling would not offer relief to the Petitioner. The argument of the Petitioner is that one of the aggravating factors found by the jury to sentence the Petitioner to death is vague and under the ruling espoused by the *Johnson* court would be unconstitutional. The statute referenced by the Petitioner has been amended since the time of his trial and conviction but at the time of trial stated: "The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person." Tenn. Code Ann. §39-13-204(i)(2)(1988). A comparison of the two clauses the ACCA and the pre-1989 (i)(2) provision reveals that application of the *Johnson* court ruling would not result in the finding that the pre-1989 (i)(2) provision is unconstitutionally vague.

The "residual clause" of the ACCA defines a violent felony as a felony that "otherwise involves conduct that presents a serious risk of physical injury to another" while the pre-1989 (i)(2) provision required that the felony "involve the use or threat of violence to the person." The vagueness of the ACCA provision arose out of the multitude of potential means for physical injury to arise from a crime. As set out in the *Johnson* opinion, the phrasing of the ACCA required the trier of fact to determine any number of outcomes of a crime that may result in injury. *Id.* at 2557-2558. The determination was not a fact based determination upon the actual crime for which the defendant was being tried but a determination that in the ordinary course of the listed crime could the risk of physical injury arise. *Id.* The reason for this interpretation of the ACCA was the prior ruling by the Supreme Court in *Taylor v. United States* requiring the court to use the "categorical approach" in applying the ACCA. *Id.* (*citing Taylor v. United States*, 110 S. Ct. 2143 (1990)). Under this "categorical approach", the court must assess "whether a crime qualifies as a violent felony 'in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.'" *Id.* (*citing Begay v. United States*, 128 S. Ct. 1581 (2008)). With these constraints, the ACCA, as written, required the trier of fact to imagine some far reaching machination to determine any number of possible outcomes not specifically related to the underlying felony.

The pre-1989 (i)(2) provision differs from the ACCA in its specificity that the prior felonies involve the use or threat of violence to a person and the governance of how the prior crime is to be interpreted. Unlike the ACCA, which had been limited in interpretation by *Begay* and *Taylor*, there was no such limitation requiring the "ordinary case" interpretation of the prior felony portion of the (i)(2) aggravator at the time of the trial of the Petitioner. The Tennessee Supreme Court had previously taken up the issue of how to determine if the prior felony involved violence to a person pursuant to the (i)(2) provision as then written. *See State v. Moore*, 614 S.W.2d 348 (Tenn. 1981). The instruction given from the Tennessee Supreme Court in *Moore* distinguishes itself from the stated unconstitutional weakness in *Johnson* in that the *Moore* court required a determination of the existence of violence to a person to be made on the facts of the actual crime charged. *Id.* at 351. *Moore* centered its determination around prior crimes of arson and burglary, both of which the court found could be crimes that did or did not involve violence to the person depending upon the facts of the specific case. *Id.* With *Moore* as guidance for the application of the "use or threat of violence" language of the pre-1989 (i)(2) provision, the

vagueness shortcoming of the ACCA as found in *Johnson* would not apply. *Moore* did not limit determination of the pre-1989 (i)(2) provision to an "ordinary case" of the prior felony but required the court to look at the specific acts of the prior felony to determine if the use or threat of violence to a person was present. As such, the ruling of the Supreme Court in *Johnson* would have no effect upon the pre-1989 version of Tennessee Code Annotated section 39-13-204(i)(2) and the post-conviction court did not abuse its discretion in denying the Petitioner's motion.

As stated in Donnie Johnson above, the appellate courts have now addressed this issue and determined Petitioner is not entitled to relief on this issue. Accordingly, this Court finds this issue is without merit.

V. Conclusion

For the reasons stated above, Claims I, II, III, IV, VI, and VII are dismissed as beyond the scope of these proceedings, as well as for being previously determined, waived, and/or time-barred. Issue V is without merit. Accordingly, this matter is hereby DISMISSED.

IT IS SO ORDERED this the 10th day of Jan., 2019.

Scott Green
Criminal Court Judge
Division 3

CERTIFICATE OF SERVICE

I, Mike Hammond, Clerk, hereby certify that I have mailed a true and exact copy of same to Counsel of Record for the petitioner, and the State this the 24th day of January, 2019.

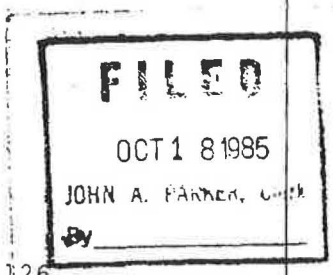
Clerk/Deputy Clerk

APPENDIX D

XIX SC NO. 174 Knox

IN THE CRIMINAL COURT, DIVISION II, OF KNOX COUNTY

AT KNOXVILLE, TENNESSEE



STATE OF TENNESSEE)
)
)
)
VS.) CASE NO. 21126
)
)
)
TERRY LYNN KING, ALIAS)
& RANDALL JOE SEXTON, ALIAS)

TRANSCRIPT OF THE EVIDENCE

Volume XVIII of XX Volumes

APPEARANCES:

THE HONORABLE RAY L. JENKINS, PRESIDING JUDGE

FOR THE STATE:

Mr. William H. Crabtree
Assistant Attorney General
Mr. Robert L. Jolley, Jr.
Assistant Attorney General
City-County Building
Knoxville, TN 37902

FOR THE DEFENDANT KING:

Mr. Robert R. Simpson
Attorney at Law
Mr. Joseph M. Tipton
Attorney at Law
TIPTON, ESHBAUGH, AND SIMPSON
614 Hamilton Building
531 S. Gay Street
Knoxville, TN 37902

FOR THE DEFENDANT SEXTON:

Mr. Charles C. Burks, Jr.
Attorney at Law
Mr. Paul E. Dunn
Attorney at Law
JENKINS & JENKINS
2121 Plaza Tower
Knoxville, TN 37929

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Volume XVIII

(Whereupon, the Court adjourned, to reconvene at 9 o'clock a.m. on the 6th day of February, 1985. The jury returned to open court, and, after the call of the jury was waived by all parties, the jury again retired to consider its verdicts.)

(Whereupon, at 1:06 p.m., the jury returned to open court, and, after the call of the jury was waived by all parties, the jury reported its verdicts as follows:)

THE COURT: All right. You have reached a verdict as to defendant Terry Lynn King; is that correct, sir?

THE FOREMAN: Yes, sir.

THE COURT: Would you stand and deliver it.

THE FOREMAN: The verdict is death by electrocution.

THE COURT: All right. If that is the verdict of each and every juror with regard to defendant Terry Lynn King, let it be known by raising your right hand.

(The jury so indicated.)

THE COURT: That is the verdict of the jury.

And have you reached a verdict as to the defendant Randall Joe Sexton?

THE FOREMAN: Yes, we have.

THE COURT: And what is that verdict?

THE FOREMAN: Life imprisonment.

THE COURT: If that is the verdict of each and every juror, let it be known by raising your right hand.

(The jury so indicated.)

THE COURT: That is the verdict of each and every juror.

You may be seated.

All right. Members of the jury, your verdicts are accepted. If you'll step out with your officers, I want to discuss some matters with you before you are discharged.

(Whereupon, the jury retired from open court, after which the further following proceedings were had, to-wit:)

THE COURT: All right. Gentlemen, would you approach the bench.

(Whereupon, a bench conference was held off the record, after which the further following proceedings were had, to-wit:)

THE COURT: All right. The sentencing hearing will be February the 28th, Thursday.

MR. BURKS: Your Honor, will the motion for new trial and everything be done at that time?

THE COURT: Yes. All right, Mr. King, please stand. Do you have anything to say to the Court before sentence is pronounced?

MR. KING: I'm very sorry for all that's happened.

I wished I could change them, but I can't.

THE COURT: Upon the verdict of the jury finding you, Terry Lynn King, to be guilty of murder in the first degree, as charged in the indictment, and upon the further verdict of the jury fixing your punishment at death, it is, therefore, ordered that you shall be put to death by electrocution in the mode prescribed by law, and that you shall be transferred to the custody of the warden at the State Penitentiary at Nashville, where on the 1st day of August, 1985, your body shall be subjected to shock by a sufficient current of electricity until you are dead.

You may be seated.

(Whereupon, the Court adjourned.)

FRIDAY, MARCH 8, 1985

Court met pursuant to adjournment, present and presiding the Honorable Ray L. Jenkins, Judge of Division II, Criminal Court for Knox County, Tennessee, when the following proceedings were had and entered of record, to-wit:

THE STATE NO. 21126

VS

TERRY LYNN KING, ALIAS & RANDALL JOE SEXTON, ALIAS — MURDER & KIDNAPPING & ARMED ROBBERY

AS TO TERRY LYNN KING: Came the Attorney General for the State, also defendant in proper person, having counsel present and came on for sentencing hearing. AS TO 6TH COUNT OF INDICTMENT: The defendant having been found guilty of Aggravated Kidnapping by jury verdict on February 1, 1985 and the Court having considered the evidence, the Court sets aside the jury verdict as to this count pursuant to Briggs vs. State of Tennessee, Tenn. 573SW2d-157. AS TO 7TH COUNT OF INDICTMENT: On February 1, 1985 the defendant having been found guilty by jury verdict of the offense of Armed Robbery, the defendant is convicted of Armed Robbery. After considering the evidence, the entire record, and all factors in T.C.A. Title 40, Chapter 43, all of which are incorporated by reference herein, the Court hereby fixes the punishment at 125 years in the State Penitentiary, the Court having found the offense to be especially aggravated the punishment for which falls within Range II as defined by statute. AS TO 3RD COUNT OF THE INDICTMENT: Judgment having been entered on February 11, 1985, it is further ordered that this sentence be served consecutively with the sentence in Case No. 19530 previously imposed and Case NO. 2381 imposed by Grainger County Circuit Court. AS TO 7TH COUNT OF INDICTMENT: It is, therefore, the judgment of the Court

This sentence shall be served consecutively with the sentence imposed in the 3rd Count of this Case and the sentence previously imposed in Case No. 19530 and the sentence in Case No. 2381 in Grainger County Circuit Court. AS TO ALL COUNTS: Defendant's Motion for New Trial came on to be heard and said Motion being argued by counsel, considered and well understood by the Court, is, in all things hereby OVERRULED. The defendant shall be transferred to the State Penitentiary to be held pending any appeal. The Clerk will furnish a transcript of this judgment to the Warden of the Penitentiary at her earliest convenience. AS TO RANDALL JOE SEXTON: Came the Attorney General for the State, also defendant in proper person, having counsel present and came on for sentencing hearing. AS TO 6TH COUNT OF INDICTMENT: The defendant having been found guilty of Aggravated Kidnapping by jury verdict on February 1, 1985 and the Court having considered the evidence, the Court sets aside the jury verdict as to this Count, pursuant to Briggs vs. State of Tennessee, Tenn. 573SW2d-157. AS TO 7TH COUNT OF THE INDICTMENT: On February 1, 1985 the defendant having been found guilty of jury verdict of the offense of Armed Robbery, the defendant is convicted of Armed Robbery. After considering the evidence, the entire record, and all factors in T.C.A. Title 40, Chapter 43, all of which are incorporated by reference herein, the Court hereby fixes the punishment at 125 years in the State Penitentiary, the Court having found the offense to be especially agravated the punishment for which falls within Range II as defined by statute. AS TO 3RD COUNT OF INDICTMENT: It is, therefore, the judgment of the Court that the defendant for the offense for which he stands convicted, to-wit: First Degree Murder, shall be imprisoned in the State Penitentiary for Life, the offense

This sentence shall be served consecutively with the sentence in case No. 2381 previously imposed by Grainger County Circuit Court. The defendant is given credit for 577 days jail time. (In custody from August 9, 1983 to March 8, 1985.) AS TO 7TH COUNT OF INDICTMENT: It is, therefore, the judgment of the Court that the defendant for the offense for which he stands convicted, to-wit: Armed Robbery, shall be imprisoned in the State Penitentiary for a period of 125 years, the offense being an especially aggravated offense which falls within Range II ans shall pay all the costs of this prosecution; that he be rendered infamous, as provided by law. This is a Class X Felony. This sentence shall be served consecutively with the sentence imposed in the 3rd Count of this Case and the sentence in Case No. 2381 previously imposed by Grainger County Cricuit Court. AS TO ALL COUNTS: Defendant's Motion for New Trial came on for hearing and said Motion being argued by counsel, considered and well understood by the Court, is, in all things hereby OVERRULED. On motion of the Hon. Chuck Burks and the Hon. Paul Dunn, retained counsel in this case and for good cause shown, the defendant is declared indigent for purposes of appeal and the Hon Chuck Burks and Hon. Paul Dunn are appointed as defense counsel for purposes of any appeal. The defendant shall be transferred to the State Penitentiary to be held pending any appeal. The Clerk will furnish a transcript of this judgment to the Warden of the Penitentiary at her earliest convenience.

COURT ADJOURNED UNTIL MONDAY, MARCH 11, 1985, AT 9:00 A. M.

(S) RAY L. JENKINS
RAY L. JENKINS, JUDGE
DIVISION II
CRIMINAL COURT

APPENDIX E

718 S.W.2d 241
Supreme Court of Tennessee,
at Knoxville.

STATE of Tennessee, Appellee,

v.

Terry Lynn KING, Appellant.

No. 174
|
July 28, 1986.
|
Rehearing Denied Oct. 27, 1986.

Synopsis
Defendant was convicted of murder in the first degree while in perpetration of simple kidnapping by confinement, and armed robbery. Defendant was sentenced to death by electrocution on felony-murder conviction, and to serve term of 125 years on armed robbery conviction by the Criminal Court, Knox County, Ray L. Jenkins, J., and defendant appealed. The Supreme Court, Cooper, J., held that: (1) evidence was sufficient to sustain conviction; (2) jury instructions on lesser included offenses were not required; (3) codefendants were properly tried together; (4) defendant should not have been examined as to his criminal actions as juvenile; and (5) skull and skull fragments were properly admitted as relevant to element of deliberation and premeditation.

Affirmed.

Attorneys and Law Firms

*243 Robert R. Simpson, Tipton, Eshbaugh and Simpson, Knoxville, for appellant.

Gordon W. Smith, Asst. Atty. Gen., W.J. Michael Cody, Atty. Gen. and Reporter, Nashville, for appellee.

OPINION

COOPER, Justice.

This is a direct appeal of a death penalty sentence. Defendant, Terry Lynn King, was convicted of murder in the first degree while in the perpetration of a simple kidnapping by confinement, and armed robbery.[1] He was sentenced to death by electrocution on the felony murder conviction, and to serve a term of 125 years on the armed robbery conviction. He challenges both convictions and sentences on several grounds, including rulings by the trial court on preliminary motions, voir dire, the admission of evidence, objections to arguments of counsel, and the court's instructions to the jury. Defendant also insists that the Tennessee Death Penalty Act, T.C.A. § 39–2–203 is unconstitutional. On consideration of the issues raised by appellant and after a review of the entire record, we are of the opinion that no reversible error was committed in either the convicting or sentencing phase of the trial, that the verdicts and sentences are sustained by the evidence, and, particularly, that the sentence of death under the circumstances of these convictions is in no way arbitrary or disproportionate. We therefore affirm the convictions, and the sentence of death.

The victim of both crimes for which defendant stands convicted was Diana K. Smith. Mrs. Smith left her home on Sunday afternoon, July 31, 1983, to go to a nearby McDonald's to get food for her family. Her automobile, a 1979 Camaro, was found on August 4, 1983, off the road in a heavily wooded area near Blaine, Tennessee.

On August 6, 1983, Mrs. Donna Allen went to the Asbury quarry in Knox County to swim. She noticed a strange odor coming from a yellow tarpaulin in the water near the bank, and reported the circumstance to the sheriff's office. On following-up Mrs. Allen's report, officers found the body of a white female in an advanced state of decomposition. The body was later identified as being that of Mrs. Smith. Death was from one or more shots fired into the back of Mrs. Smith's head from a high-powered weapon.

In the course of the police investigation, the attention of the officers was focused on Terry King and Randall Sexton when Jerry Childers, an acquaintance of King, reported a conversation he had had with King and what he had found when he followed up on the conversation.

Jerry Childers testified that Terry King came to his house on the afternoon of Monday, August 1, 1983, and inquired as to whether Childers knew anyone that wanted to buy parts from a 1979 Camaro. According to Childers, King told Childers he had *244 killed the woman who owned the automobile after she threatened to charge defendant with rape. According to Childers, defendant said he made the woman get out of the car trunk where he had confined her and lie face down on the

ground, that the woman faced the defendant and begged him not to shoot her and offered money, and that he ordered her to turn her head away from him. When she did, he shot her in the back of the head. Defendant also told Childers he took forty dollars from the woman as well as taking her automobile.

The following Friday, which was August 5, 1983, Childers related defendant's story to Mr. Buford Watson. On Sunday, Childers went to the location defendant had described as the place of the killing and found something with hair on it. Childers then gave the information he had to Detective Herman Johnson of the Knox County Sheriff's Department and T.B.I. agent, David Davenport. In following up the report, the officers met Childers near Richland Creek and searched the area, finding pieces of bone, hair, and bloodstains. A later more thorough search turned up bullet fragments and additional bone fragments.

In the course of the police investigation, defendant and co-defendant, Sexton, were interviewed by the officers. Both gave written statements detailing the events of the night of July 31, 1983. Neither defendant testified in the guilt phase of the trial, but their statements were introduced in evidence. Both defendants testified in the sentencing phase of the trial and repeated in substance the facts set forth in the statements given the police officers in their statements.

The statements of King and Sexton were markedly similar for the time the two men were together. King's statement was the more comprehensive since it covered the entire period of time he was with Mrs. Smith. According to defendant, he and his cousin, Don King, picked up Mrs. Smith at the Cherokee Dam on Sunday, July 31, 1983. Defendant drove Mrs. Smith in her automobile to the nearby house trailer of his cousin, arriving there around 7:00 p.m. Don King drove his own automobile to the trailer. Shortly after arriving at the trailer, defendant called Eugene Thornhill who came to the trailer and left with defendant to obtain LSD and quaaludes. Defendant said he and Mrs. Smith took the drugs. Thereafter, defendant, Don King, and Eugene Thornhill had sex with Mrs. Smith.

After staying at the trailer for several hours, defendant and Mrs. Smith left in her automobile, with defendant driving. They went to a wooded area, where they again had sex. From there, they went to a service station for gas. Mrs. Smith got out of the automobile and grabbed the keys. Defendant told her to get back in the automobile and she did so. The defendant drove Mrs. Smith back to the wooded area, where they again had sex and the defendant took forty dollars from Mrs. Smith. According to defendant, Mrs. Smith then asked "why did you all rape me?" Defendant stated that he knew then what he was going to do. He told Mrs. Smith to get into the trunk of the automobile. When she did, defendant drove to Sexton's house and told Sexton he had a woman in the trunk of the automobile and needed Sexton's help. Defendant got a rifle from Sexton and also a shovel. Defendant and Sexton then left the Sexton home in separate automobiles. After making a stop at a Publix station to purchase gas, defendant and Sexton drove to a wooded area near Richland Creek in Knox County. Defendant drove the 1979 Camaro off the road and became stuck. He then made Mrs. Smith get out of the automobile trunk and pointed the loaded rifle at her. Defendant made Mrs. Smith lie down on the ground, assuring her that he was not going to kill her, that others were coming to have sex with her. Sexton left in his automobile to return a funnel to the gas station. While he was gone, defendant shot Mrs. Smith in the back of the head. On Sexton's return, and after getting the Camaro unstuck, the two went through Mrs. Smith's effects, burning her identification. They then attempted to bury the body, but gave up because of the hardness of the ground. The next morning, defendant and Sexton wrapped Mrs. *245 Smith's body in a tent, weighted it with cinder blocks and dumped it in the Asburn quarry. Mrs. Smith's automobile was hidden near Sexton's house.

Agent Davenport testified that after making his statement, the defendant took him and other officers to the place where the Camaro was hidden and defendant also showed them where he had hidden the automobile license plate in a hollow tree. The defendant also showed the officers where he had placed the body in the quarry and where the shooting occurred.

Tommy Heflin, a firearms examiner for the Tennessee Bureau of Investigation, testified that he had examined the .30 Marlin rifle belonging to Sexton, the metal bullet jacket, and fragments recovered from the scene of the killing. According to Mr. Heflin, the intact metal jacket had been fired from Sexton's rifle and the fragments were fired from a rifle with the same rifling characteristics as Sexton's rifle. Mr. Heflin was of the opinion that at least two bullets had been fired.

Dr. Joseph Parker, who performed an autopsy on the body of Mrs. Smith, testified that death was due to an extensive head injury consistent with gunshot wounds from a high-powered rifle.

Over objection, the State also presented evidence through Lori Eastman Carter that defendant had attempted to kill her

on October 13, 1982. According to Mrs. Carter, King hit her with a slapstick numerous times, while repeatedly asking her "how it felt to be dying, so that the next woman he killed he would know how she felt." Mrs. Carter testified that she lost consciousness. When she came to, she was still in her automobile with her hair rolled up in the window. She further testified that she heard defendant tell his cousin that he had killed her and wanted James King to help him put her in a quarry and burn her automobile.

James King disputed Mrs. Carter's version of events, saying that defendant came to King's home to get him to follow defendant to St. Mary's Hospital as Mrs. Carter was ill and needed treatment.

Karen Greeg, Lori Carter's sister, testified that Mrs. Carter can not be believed, even under oath.

The defendant offered no other evidence in the guilt phase of the trial.

On considering the evidence, the jury found that the defendant and Randall Sexton were guilty of murder in the first degree in killing Diana K. Smith in the perpetration of a simple kidnapping by confinement and of armed robbery. In our opinion the evidence is overwhelming and supports the jury's verdict.

Counsel for the defendant has called attention of the court to the fact that the trial judge in instructing the jury did not include a charge on murder in the second degree, nor did he include a charge on voluntary or involuntary manslaughter. Defendant insists this was error.

The record shows that defendant was indicted for both common law murder and two counts of felony murder, and all counts were submitted to the jury for decision. Anytime a court instructs a jury in a homicide case, he should instruct all lesser included offenses and in most instances it is error not to do so. But where the evidence clearly shows that defendant was guilty of the greater offense, it is not error to fail to charge on a lesser included offense. *State v. Mellons*, 557 S.W.2d 497 (Tenn.1977); *Johnson v. State*, 531 S.W.2d 558, 559 (Tenn.1975); *State v. Wright*, 618 S.W.2d 310, 315 (Tenn.Crim.App.1981). In this case the record of the guilt phase of the trial is devoid of any evidence which would permit an inference of guilt of second-degree murder or the other lesser included offenses. The State's proof of premeditation and deliberation, and the fact that the killing occurred during the commission of a felony, which includes the defendant's confessions to Childers and to the police, was uncontradicted. Consequently, we find no prejudicial error in the trial judge's refusal to instruct the jury on the elements of murder in the second degree.

***246** Defendant also charges that the jury commenced its deliberations prior to the trial judge's instructions to the jury, and that this deprived defendant of a fair and impartial jury.

The record shows that before the case was submitted to the jury for decision the jurors requested to "see all paper evidence." From this, the defendant reasons that contrary to the trial judge's instructions, the jury had begun its deliberations without being instructed on the applicable law by the trial judge. We find no merit in this argument. As is pointed out in *Rushing v. State*, 565 S.W.2d 893, 895 (Tenn.Crim.App.1977) deliberation in the context of a jury function means that a "properly formed jury, comprised of the number of qualified persons required by law, are within the secrecy of the jury room, analyzing, discussing, and weighing the evidence which they have heard with a view to reaching a verdict based upon the law applicable to the facts of the case as they find them to be." The mere fact that the jurors agreed to request all paper evidence in our opinion does not show that the jurors were discussing, analyzing, and weighing the evidence with a view to reaching a verdict.

The defendant further insists that the trial court unduly restricted questions to be asked on *voir dire* and that this was error.

It is settled law in Tennessee that the trial judge has wide discretion in the examination of prospective jurors, and his action will not be disturbed unless there is an abuse of that discretion. *State v. Jefferson*, 529 S.W.2d 674, 682 (Tenn.1975). We find no abuse of discretion in this case. Counsel for defendant was given great latitude in examining prospective witnesses. The only questions excluded, and they on motion by the State, were: "Mrs. Kincer, if you had a vote right now, how would you vote?"; and the question asked of a group of prospective jurors "... [D]oes anyone have the opinion or think that if a sentence of life is meted out, that the defendant will not serve the rest of his natural life in prison?" In our opinion, the trial judge ruled correctly in excluding both questions. Counsel was permitted to ask questions concerning the presumption of innocence, the burden of proof, and the like. But to ask a juror how he would vote would be improper as tending to exact a pledge from the juror. *See Chambers v.*

Bradley County, 53 Tenn.App. 455, 384 S.W.2d 43 (1964). The question as to the duration of the life sentence also was improper as the after effect of a jury's verdict is not a proper consideration for the jury. *Houston v. State*, 593 S.W.2d 267, 278 (Tenn.1980); *Farris v. State*, 535 S.W.2d 608, 614 (Tenn.1976). In any event, considering the wide latitude given defendant in *voir dire*, the exclusion of these two questions could not have had a prejudicial effect on the outcome of the trial.

Defendant also takes issue with the admission of the testimony of Lori Eastman Carter, insisting that it was not relevant to a contested issue. Evidence that a defendant has committed some other crime wholly independent of that for which he is being tried, even though it is a crime of the same character, usually is not admissible because it is irrelevant. *Bunch v. State*, 605 S.W.2d, 227 (Tenn.1980); *Lee v. State*, 194 Tenn. 652, 254 S.W.2d 747 (1953); *Mays v. State*, 145 Tenn. 118, 238 S.W. 1096 (1921). However, if evidence that the defendant has committed a crime separate and distinct from the one on trial, is relevant to some matter actually in issue in the case on trial and if its probative value as evidence of such matter in issue is not outweighed by its prejudicial effect upon the defendant, then such evidence may be properly admitted. *Bunch v. State*, 605 S.W.2d 227 (Tenn.1980).

The State insists, as found by the trial judge, that the evidence of the Lori Eastman Carter incident is relevant to the issues of premeditation, intent, motive, and malice. The relevance of the testimony to these issues is tenuous at best and it would have been better for the trial judge to have excluded the testimony in view of the strength of other evidence on these issues. However, in our opinion, the admission of ***247** the evidence was harmless beyond a reasonable doubt and could not have affected in any way the results of the trial or the sentence imposed.

The defendant also insists that the trial court erred in failing to compel the State to disclose to the defense the criminal record of the witness, Jerry Childers. We see no error in the trial court's action, since the State has no duty, either under the Tennessee Rules of Criminal Procedure or by decisional law in this state, to provide such information to the defendant. *State v. Workman*, 667 S.W.2d 44, 51 (Tenn.1984). Further, it should be pointed out that the defendant suffered no prejudice as the result of the court's ruling. The record reflects that the defense had this information regarding the 19 year old Georgia auto theft conviction.

The defendant insists that the trial judge erred in refusing to sever the defendants for trial and in admitting the confession of Randall Joe Sexton, a nontestifying co-defendant, citing *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 476 (1968).

The *Bruton* rule proscribes, generally, the use of one co-defendant's confession to implicate the other as being violative of the nonconfessing co-defendant's Sixth Amendment right of confrontation. However, *Bruton* is not violated when the defendant confesses and his confession "interlocks" in material aspects with the confession of the co-defendant. *Parker v. Randolph*, 442 U.S. 62, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979). See also, *State v. Elliott*, 524 S.W.2d 473, 477–78 (Tenn.1975).

Recognizing these general statements of applicable law, defendant insists that the recitals in Sexton's statement that "Terry [the defendant] said he wasn't going to let her [the victim] go, because he was afraid he would get in the same mess he got into with Lori" and that the defendant told him he had "choked" the victim before placing her in the trunk of the car and later removed her from the trunk and shot her while she was begging for him not to did not "interlock" with the defendant's confession to police.

It is true defendant's confession to the police did not recite these facts, but his statement to Jerry Childress, also admitted in the trial, cured any material deficiency of the confession to the police. Childress testified that the defendant told him he killed the girl because "he had been in jail before, and he wasn't going back to jail" and that he put the victim in the trunk of his car, later made her get out of the car and lie on the ground, and put the gun to her head and shot her after she begged him not to shoot and offered him money to let her go.

The inculpatory confessions of the defendant and co-defendant interlocking in the crucial facts of time, location, felonious activity, and awareness of the overall plan or scheme, we find no *Bruton* violation in the admission in evidence of the confessions. *See Parker v. Randolph, supra*. The confessions being admissible, it cannot be said that the trial court erred in failing to grant a severance of the defendants pursuant to Rule 14(c) of the Tennessee Rules of Criminal Procedure.

Finding no material error in the guilt phase of the trial, and being convinced that the evidence supports the jury's finding that defendant was guilty of murder in the first degree in

killing Diana K. Smith during the perpetration of a simple kidnapping by confinement and of armed robbery, we affirm both convictions.

As to the sentencing phase of the trial, the State relied upon evidence introduced during the guilt phase. In addition, the State introduced evidence showing that the defendant and Sexton had been convicted previously of murder in the first degree by use of a firearm in perpetration of armed robbery and of aggravated kidnapping, both offenses being committed on July 2, 1983, less than a month before the defendants killed Mrs. Smith. The State also introduced evidence that the defendant had been convicted of an assault with intent to commit aggravated kidnapping, which was *248 committed only three days after the killing of Mrs. Smith.

In response, the defendant called numerous witnesses who testified that he had been a heavy user of drugs and alcohol for a number of years, and that their use could be expected to and did affect his judgment and actions. Further, there was expert medical proof that the effect of LSD and quaaludes, which defendant claimed to have taken on July 31, 1983, could be expected to continue for 8 to 12 hours after their ingestion. There was also evidence that defendant was remorseful, and that he had caused no disciplinary problems at the prison and had been moved from close security to medium security.

Both the defendant and Sexton took the witness stand in the sentencing proceeding, and their testimony substantially followed the statements they gave the police. The defendant did deny forming the intent to kill Mrs. Smith before he went to Sexton's house, insisting that he went there only for advise on what to do. He further testified that he got the rifle at Sexton's direction and formed the intent to kill Mrs. Smith after he took her to the place she was shot. Defendant stated he related the events of Mrs. Smith's death to Jerry Childers because it was bothering him. He denied telling Childers that Mrs. Smith begged for her life. On cross-examination, defendant admitted committing two armed robberies in January, 1980, when he was a juvenile.

Sexton testified generally in accord with the statement he had given the police. He denied having advised defendant to kill Mrs. Smith, but admitted that he gave defendant the weapon used in the murder and accompanied him to the death scene, knowing that Mrs. Smith was confined in the trunk of the automobile driven by the defendant. Sexton also helped in trying to dispose of the automobile, in destroying all Mrs. Smith's identification and in disposing of her body.

On considering this evidence, the jury returned the sentence of death against the defendant. Sexton was sentenced to life imprisonment, evidently because he was not present at the moment of the killing and did not shoot Mrs. Smith. In imposing the sentence of death on the defendant the jury expressly found that:

(1) the defendant was previously convicted of one or more felonies, other than the present charge, which involved the use of threat of violence to the person;

(2) the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind;

(3) the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest of the defendant or another; and

(4) the murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any rape, robbery, larceny or kidnapping. *See* T.C.A. § 39–2–203(i)(2), (5), (6), and (7). The jury also found that there was no mitigating circumstance sufficiently substantial to outweigh the statutory aggravating circumstances found by the jury. T.C.A. § 39–2–203(g).

The defendant does not argue that the aggravating circumstances were not proven beyond a reasonable doubt, but does insist that the trial court erred in restricting argument by defense counsel and in failing to give requested instructions, both as to aggravating and mitigating circumstances. The defendant also insists that the trial court erred in permitting the State to show, on cross-examination, that defendant had committed two armed robberies in January, 1980, while a juvenile.

The State now concedes that error was committed in examining defendant as to his actions as a juvenile. T.C.A. § 37–1–133(b); *State v. Dixon*, 656 S.W.2d 49, 51–52 (Tenn.Crim.App.1983). However, in our opinion the error was harmless. The evidence overwhelmingly established four statutory aggravating circumstances and that these circumstances were not outweighed by any substantial mitigating circumstances. While it is true that one of *249 the aggravating circumstances found was that the defendant was previously convicted of one or more felonies which

involved the use or threat of violence to the person, the finding was not dependent on the evidence that the defendant had committed crimes while a juvenile. It is undisputed in the record that in addition to the murder of Mrs. Smith, the defendant had been convicted of murder in the first degree in the perpetration of an armed robbery, aggravated kidnapping, and an assault with intent to commit aggravated kidnapping. In view of this evidence, the error in admitting evidence of defendant's crimes as a juvenile could not be prejudicial. *See* Rule 36(b) of the Tennessee Rules of Appellate Procedure.

The defendant insists he was deprived of a fair trial by restrictions placed on argument of counsel by the trial court. The record shows that the trial court sustained objections of the State to argument directed to the history and morality of the death penalty. We see no error in the court's ruling. The defendant's argument was not predicated on any evidence adduced at either the guilt or penalty phase of the trial and was, consequently, irrelevant. More appropriately, it is an argument to be made to the legislature in deciding whether the death penalty is ever a justified punishment.

There are several issues directed to the instructions given by the trial court to the jury in the sentencing phase of the trial. In a special request, the defendant sought to have the trial court instruct the jury that fourteen different circumstances, not listed in the statute, were to be considered by the jury as mitigating circumstances. The trial judge refused to give the requested instruction, and defendant assigns the ruling as error.

In ruling on a similar issue in *State v. Hartman*, 699 S.W.2d 538, 550–51 (Tenn.1985), this court held that the only mandatory instructions with respect to mitigating circumstances are that those statutory circumstances which are raised by the evidence shall be expressly charged. The jury must also be told that they shall weigh and consider any other fact or circumstance that is in mitigation, in making the determination of which circumstances, aggravating or mitigating, outweigh the other. The trial judge's instructions complied with this directive.

The defendant also insists that the trial court erred in failing to define for the jury the terms "to aggravate" and "torture," as requested by defendant. We see no error in the failure of the trial court to specifically define "to aggravate." It is a term in common use and not a legalism beyond the understanding of the jurors. *See State v. Groseclose*, 615 S.W.2d 142, 147–48 (Tenn.1981) ("Mitigating"). Neither do we find any prejudicial error in the trial court's failure to define the term "torture." The evidence in this case supports the aggravating circumstance, Tenn.Code Ann. § 39–2–203(i)(5), as defined in *State v. Williams*, 690 S.W.2d 517, 532–33 (Tenn.1985), as the defendant shot the victim in the head after she begged for her life and offered the defendant money to let her go. Furthermore, the remaining three aggravating circumstances were correctly charged and are overwhelmingly supported by the evidence. Under these circumstances, there was no prejudice to the defendant by the failure to define "torture." *State v. Duncan*, 698 S.W.2d 63, 70–71 (Tenn.1985).

The defendant further contends that the trial court erred in instructing the jury on the possible punishment of death or life imprisonment that, "Your verdict must be unanimous as to either form of punishment." He argues that this instruction violates T.C.A. § 39–2–203(h), which provides that if the jury cannot ultimately agree as to punishment the judge shall impose a life sentence. We see no basic error in the trial judge's instruction, which was verbatim the Tennessee Pattern Jury Instruction, T.P.I.—Crim. 20.05, formulated for use at the sentencing hearing in a capital case. There is no way a jury can impose a sentence if it is not unanimous in its decision. Where the jury is unable to *250 agree as to punishment, in a sentencing hearing of a first degree murder conviction, the judge is instructed to dismiss the jury and impose a sentence of life imprisonment. T.C.A. § 39–2–203(h). The statute also directs that "[t]he judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury, on the effect of the jury's failure to agree on a punishment."

Finally, the defendant contends that the trial court erred in instructing the jury, on the aggravating circumstances set forth in T.C.A. § 39–2–203(i)(7), as follows:

> The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit any first degree murder, arson, rape, robbery, larceny, kidnapping....

Specifically, defendant contends that the offenses of rape and larceny should not have been included as there was no proof justifying their inclusion. The argument overlooks the fact that in the defendant's confession, he stated that the victim had accused him of raping her, and that he had taken a gold cigarette lighter belonging to Mrs. Smith during the criminal episode. These facts would justify the submission of the instruction in the complete form used by the trial judge. Further, their inclusion could not have materially affected the

jury's finding on the issue in view of the overwhelming proof of murder in the first degree in the perpetration of a simple kidnapping and armed robbery.

Defendant also raises the question of the constitutionality of the Tennessee Death Penalty Act, evidently as a cautionary action as he does not discuss the issue in any detail in his brief. On reference to the motion which is the predicate of the assignment, we find that defendant raised no issue, nor advanced any argument that has not been considered and overruled in several prior cases. *See e.g., State v. Austin*, 618 S.W.2d 738 (Tenn.1981).

The defendant's conviction of murder in the first degree in the perpetration of a simple kidnapping and sentence of death is affirmed. We also affirm the defendant's conviction of armed robbery and the sentence that he serve 125 years in the state penitentiary. The death sentence will be carried out on the 7th day of October, 1986, unless stayed by appropriate authority. Costs are adjudged against the defendant.

I am authorized to state that Mr. Chief Justice BROCK concurs in the affirmance of conviction but dissents from the imposition of the death penalty for the reasons expressed in his dissent in *State of Tennessee v. Dicks*, 615 S.W.2d 126, 132 (Tenn.1981).

FONES, HARBISON and DROWOTA, JJ., concur.

BROCK, C.J., concurs and dissents.

OPINION ON PETITION TO REHEAR

COOPER, Justice.

Defendant has filed a petition to rehear insisting that the court has erroneously ruled on several issues, or has failed to consider them. On considering the petition and the briefs originally filed, we find that all material issues were considered and, in our opinion, properly decided. One of the issues, based on the admission in evidence of fragments of the victim's skull, was not discussed in detail in our finding that no prejudicial error was committed in either the convicting or sentencing phase of the trial. As to this issue, the parties stipulated prior to trial that Mrs. Smith's death was the result of a shot in the back of the head from a high-powered rifle. The defendant argues that in light of the stipulation the introduction of the skull and skull fragments was improper because no relevant issue remained to be proven.

The record shows that the state introduced in evidence the skull fragments in lieu of a picture of the body of Mrs. Smith in its decomposed state. The examining pathologist, Dr. Bass, used the skull to indicate to the jury where the bullet entered. He also used fragments to demonstrate ***251** that they contained lead splatters consistent with an injury from a bullet fired from a high-powered rifle at close range. Further, as pointed out by the state, the fragments could be of material assistance to the jury in visualizing the massive injury which caused Mrs. Smith's death and had some bearing on proving the element of deliberation and premeditation, an issue which the defendant would not concede. The evidence, being relevant to issues to be decided by the jury, was admissible in our opinion. *See State v. Morris*, 641 S.W.2d 883 (Tenn.1982). Being admissible, it was proper for the prosecution to call attention to the exhibit in his argument. And, if his comments were improper, considering the evidence in this case, they could not have affected the jury's verdict in either the guilt or sentencing phase of the trial.

Petition to Rehear denied, at the cost of the Appellant.

BROCK, C.J., and FONES, HARBISON and DROWOTA, JJ., concur.

All Citations

718 S.W.2d 241

Footnotes

1 Co-defendant Randall Sexton also was convicted of the same offenses, receiving a life sentence on the felony murder conviction and a term of 125 years in the state penitentiary for armed robbery. Sexton's appeal is not now before this court.

APPENDIX F

IN THE CRIMINAL COURT FOR KNOX COUNTY, TENNESSEE

DIVISION III

STATE OF TENNESSEE)
Respondent)
VS.) NO. 33878
OCT 3 1 1995
TERRY LYNN KING)
Petitioner)

ORDER

This cause came on to be heard on the petitioner's Petition For Post-Conviction Relief, testimony in open court, statements of counsel, and the record as a whole, from all of which it appears to the Court that the Petition For Post-Conviction Relief should be, and the same is hereby dismissed, with all costs taxed against the State, the petitioner being indigent. The Court's Finding Of Fact And Conclusions Of Law will be attached hereto and made a part of this order.

The Clerk shall furnish a copy of this order to the defendant, counsel for the defendant, and to the Knox County Attorney General.

ENTER this the 31st day of Oct., 1995.

Mary Beth Leibowitz

MARY BETH LEIBOWITZ, JUDGE
CRIMINAL COURT DIVISION III
SIXTH JUDICIAL DISTRICT

IN THE CRIMINAL COURT FOR KNOX COUNTY, TENNESSEE

DIVISION III

STATE OF TENNESSEE	)	
	)	
VS.	)	NO. 33878
	)	
TERRY LYNN KING	)	

OCT 3 1 1995

ORDER
AND
FINDINGS OF FACT AND MEMORANDUM OF LAW

This cause came on to be heard on petition of Terry Lynn King for Post-Conviction Relief filed April 5, 1989, and subsequent thereto several amendments, the pertinent Amendment, Number Three, filed on January 4, 1993. On April 5, 1993, a hearing was held to limit further amendments and to determine whether or not previous prosecutors could continue to represent the state. The Court ordered that there would be no further amendments to the petition and that the District Attorney's Office and its representatives could continue to represent the state in this case. On November 22, 1993, further hearing was had, a transcript of which shall be filed with these proceedings styled, A Preliminary Hearing For Post-Conviction Relief, to limit the issues in the cause. The Court put down a written order effectively determining previously determined or waived issues. It allowed the petitioner to proceed as to sections 8(a) in its entirety, 8 (b), 8 (c), 8 (d), 8 (f), and 8 (g), and amendment number three to the Petition For Post-Conviction Relief. This order was put down on the 29th day of March, 1994. On the 26th day of September, 1994, this cause came on to be heard in final hearing, and proof was had regarding the petition. The Court now makes its finding of fact and conclusions of law.

The facts of this case having been accurately recited in the Opinion of the Supreme Court, filed July 28, 1986, at the bottom of page 2 through line 1 of page 8, those pages of the slip opinion are attached hereto and incorporated here and by reference as if fully set out. The Supreme Court in its Opinion reviewed many issues, and upheld the verdict of the trial court and the sentence of death on the defendant.

Defense counsel organized its argument in the post-conviction proceeding based upon five

issues with sub-parts which counsel urges make reversal necessary. These issues and sub-parts essentially incorporate the issues which remain with regard to the comprehensive Petition of Post-Conviction Relief and Amendment Number Three in that petition. Because counsel for both the defense and state have argued these issues in this way as opposed to going through individual issue, and because counsel commented upon individual issues in the preliminary hearing for post-conviction relief, a copy of which transcript is also being filed herein, the Court will initially proceed to consider the case based upon those issues.

The first issue is, that pursuant to Cruz v. New York, infra, the State bore the burden to show that the use of statements through Lori Carter with whom the petitioner had had previous dealings, and her testimony were inappropriately included in testimony and used to consider motive for the killing of Diana Smith, and the armed robbery of Diana Smith.

Second, that because the co-defendant's lawyer was permitted to cross-examine Terry King about Lori Carter's testimony, and the state argued the statements of the co-defendant regarding Lori Carter, that this set up antagonistic defenses which would violate Cruz v. New York, 107 S.Ct. 1714 (1987) and Bruton v. U.S., 391 U.S. 123 (1968). Further, evidence regarding Lori Carter created a factual basis for the third aggravating circumstance in giving the death penalty, that is that the murder was committed to avoid arrest.

The issue requiring reversal as urged by the defense were that there were antagonistic defenses in mitigation, that is that the attorney for Joe Sexton, the co-defendant, used the actions of Terry King to destroy Terry King's mitigating factors and to save the life of Joe Sexton, who in fact received a life sentence in this case. The mitigating elements were that Mr. Sexton was an accomplice in the murder and that his participation was relatively minor, and further that he was not even present at the time of the actual killing. Further, that Mr. Sexton acted under extreme duress or the substantial domination of Terry King. These antagonistic defenses in mitigation, it is urged by the defense, resulted in the death penalty for Mr. King, and the failure to sever the two individuals created error.

The third issue raised by the defense is the right to a new sentencing hearing under State v. Middlebrook, 840 S.W.2nd 317 (1992). The defense urges that there were four aggravating factors, the first being I-7, which was the aggravating circumstance that the murder was committed during

a felony, and of course Mr. King was convicted of felony murder. There were three other aggravating circumstances which were considered by the jury as well.

1. That the murder was heinous, atrocious and cruel, in that it involved torture or depravity of mind.
2. That the killing was for the purpose of avoiding lawful arrest or prosecution, i.e., the problems which Mr. King had had with Lori Eastman Carter. The defense urges that this aggravating circumstance was supported by inadmissible evidence and therefore is not reliable enough to use in the harmless error analysis.
3. That the jury found that the defendant had previously been convicted of one or more felonies involving violence or the threat of violence (juvenile convictions which the Supreme Court found were harmless error were admitted as well as other prior convictions including the murder of Todd Millard by both Joe Sexton and Terry King wherein both received life sentences in Grainger County while they were awaiting charges in Knox County.)

The fourth issue raised by the defendant is the issue raised by the opinion in Rickman v. Dutton, U.S. Dist. Ct. No.3-85-0256 (M.D. Tenn. Filed 9-2-94) in which the United States District Court of the Middle District of Tennessee has found that the reasonable doubt instruction as given by the Tennessee Courts was ambiguous and unconstitutionally suggestive of a lower burden of proof.

Lastly, the defense argues that there has been such substantial cumulative error in the Cruz, antagonistic defenses, Middlebrooks, Rickman, admission of juvenile convictions, and ineffective assistance of counsel issues which are listed below, that the Court should find that their cumulative has deprived the defendant of a meaningful defense. The issues of ineffective assistance of counsel are:

1. Failure to identify and use competent mental health professionals on a timely basis.
2. Failure to develop or follow a coherent theory of defense in either phase.
3. Abandoned the opening statement in phase one.
4. Failure to preserve bench rulings.
5. Failure to exclude damaging and inadmissible evidence.

6. Failure to appeal the state's use of the juvenile dismissal.

7. Failure to appeal the underlying armed robbery conviction.

8. Failure to appeal the denial of the Motion To Suppress.

9. Failure to petition for certiorari to the Supreme Court of the United States following the affirmance of the trial court's conviction in the Supreme Court of Tennessee.

At hearing of this cause, the defense first called Dr. Pamela M. Auble, a Clinical Psychologist, who testified that she reviewed the juvenile mental health records of the petitioner, and the clinical report of Dr. Brogan as well as psychological summaries done by Dr. Gebrow prior to trial and further personally interviewed Mr. King on several occasions. She indicated that the findings were consistent with those of Dr. Gebrow who tested Mr. King within a few days prior to trial. She indicated he was a slow learner, and had had considerable experiences with drugs, including L.S.D. , Valium, Quaaludes, and Cocaine, from the age of fourteen, and had huffed gasoline from the age of eight or nine. She searched for organic brain damage in her testing and did not find any. She found that Mr. King had few emotional resources, poor self-esteem, related poorly to people, was distrustful and impulsive under stress, and had significant levels of depression, and also substance abuse. She indicated that her test are consistent with those that Dr. Gebrow and also Dr. Mendes, found at the time of trial and that Mr. King is responsive to prison life, and does well in prison because of the need for structure. In her opinion there were certain mitigating circumstances that should have been raised including Mr. King's emotional problems, as defined above, that he does exhibit remorse for his actions, that he is not a leader and looks for guidance. The report of her findings was made Exhibit One of this hearing. On cross-examination she indicated in her opinion that Mr. King was not comfortable with the murder, but that she was aware that Mr. King had testified. "She asked me why we did that to her", "I asked her what?" and she said, "Why did you all rape me?" "At that time I knew what she was going to do, and I knew what I was going to do." Although, Dr. Auble was asked about several incidents of criminal activity on the part of Mr. King she indicated that she felt he was not comfortable with criminal activity. It was her opinion that Mr. King acted on the advise of Joe Sexton, and was behaving impulsively, and perceives all women hostile because of Lori Eastman Carter. She found no evidence of psychotic thought process, nor of organic brain syndrome, but of impulsive behavior and psychopathic

disorder. In effect, the test which were given by Dr. Mendes, also indicated similar things.

Following the testimony of Dr. Auble the petitioner, Terry Lynn King, took the witness stand. He indicated that Dr. Auble's information regarding his personal background and drug abuse problems was correct, he testified about the events involving his interrogation by the police, and that his attorney did not permit him to testify regarding the motion to suppress. He testified that they could not find Lori Eastman Carter and Mr. Simpson did not talk with her prior to trial. He also said he told Mr. Simpson of Mr. Childress's testimony and his prison record. In addition there was a green wine bottle which was never recovered which had Diana Kay Smith's fingerprints on it in his opinion.

He admitted to lying to his attorney, Mr. Simpson, about the letter regarding Joe Sexton and about the Grainger County killing, much of which is detailed in the original transcripts. He admitted that a severance had been attempted but not granted and that he did not participate in the jury selection process, but that he was uncomfortable with one of the jurors, and that Mr. Simpson did not explain to him the issue of preemptory challenges. He also indicated that Mr. Simpson had stated that Don King would be called as a witness in opening statement and then offered no explanation for not calling him. As to the penalty phase of the trial, he complained of introduction of juvenile convictions and a juvenile dismissal. He also said that there were many bench conferences, which had not been recorded. After the verdict and sentencing he was taken down stairs and saw counsel for only a few minutes and was sent to prison in Nashville the next morning. As to his motion for a new trial, he discussed with counsel his appeal to the Supreme Court of Tennessee but did not discuss the grounds. After the Supreme Court affirmed the conviction, he was told by counsel an appeal would be filed to the United States Supreme Court, but that appeal was never filed. He discussed with his counsel his right to have matters heard and never knowingly waived grounds or rights. On cross examination he admitted that he told Mr. Simpson about the incidents that occurred and how he shot Diana Kay Smith in the back of the head, took her money and car and put her body in the quarry and sank it. He admitted that he had been convicted in 1984, of Attempted Kidnapping in Knox County Criminal Court, and in Grainger County Criminal Court of First Degree Murder, and that he had had two previous juvenile convictions for Armed Robbery. He also testified that he admitted he had lied to Mr. Simpson and that the statements that were

maintained in the letter from Mr. Sexton to Mr. King from Fort Pillow were untruthful. He admitted that he had talked to Drs. Gebrow, Mendes, Kathleen Brogan, and his attorney about head injuries. He admitted that he was involved in his defense of his case and discussed his case and the circumstances with his lawyer. He admitted that he had told Mr. Simpson and detectives and others, including Jerry Childress, his own witness, and Don King, his own witness, that he had killed Diana Kay Smith.

The defense next called Douglas Trant, Esq., an attorney licensed to practice in Tennessee and Alabama, who testified as an expert in death penalty cases. Mr. Trant, who has taught at the College of Law and lectured on the subject of criminal defense as well as death penalty cases and practices 99% criminal defense law, testified that he has had approximately seventy (70) trials in front of a jury and nine (9) death penalty cases. He testified as to what should be done by an attorney to determine mental state and history of the defendant in every case, and how testimony should be dealt with, what the relationship with an accused should be, and how objections to errors should be preserved. He discussed the cruciality of the opening statement being accurate and not issuing promises that were later not delivered as in this case. He testified that counsel should preserve and present all issues for the appellate process and that the effective standards at that time were the American Bar Association Death Penalty Standards. He testified that he had reviewed the trial records of State v. King, 718 S.W.2nd 241 (Tenn. 1986) in the Supreme Court Opinion, and in his opinion the attorney for Mr. King did not meet the standard required. He felt that Mr. Simpson was deficient in his failure to investigate completely, to provide a mental health evaluation until just prior to the trial, in preparing his theory of evidence, and in acting with reasonable competency, and in not calling Mr. King in the motion to suppress. In his opinion the Cruz issue should have been raised Cruz having been decided just prior to this case, and further that the Baxter v. Rose, 523 S.W.2nd 930 (Tenn. 1975) standard had not been met.

On cross-examination he testified that he had not directly reviewed Mr. Simpson's investigation or conversed with Mr. King, and he did not review the records of Mr. Simpson or of now the Honorable Joe Tipton, of the Court of Criminal Appeals, who assisted Mr. Simpson in the defense of this case, and who is also, in Mr. Trant's opinion, an expert on death penalty cases. He also testified that if a client is not honest with his lawyer, discussions can sometimes render the client

more truthful, and that he does not always put a client on in a motion to suppress.

The defense also proffered certain exhibits, one of which was accepted by the Court, Collective Exhibit No. Five, regarding the Juvenile Court Clerk's record, and the original trial transcripts and records as well.

The State then presented its proof and called the trial judge, the Honorable Ray Lee Jenkins, who testified regarding this matter. Judge Jenkins testified that he presided in this case and that he was familiar with the standards of Baxter v. Rose, supra, and had two or three times a month since 1982 been called to rule upon those standards. He testified that he has been the Criminal Court Judge, for Division II, for a period of twelve (12) years and has been licensed to practice law for thirty-five (35) years. He testified that he observed Mr. Simpson and Mr. Tipton in the representation of Mr. King and that in his opinion they met the standards of Baxter v. Rose, supra, and in fact exceeded those standards. He further testified that he has determined at least two times in the past twelve years that counsel did not meet the Baxter v. Rose standard. He further testified that while he has every confidence in Mr. Trant as a competent practitioner and respects his professional opinions he his opinion differs from Mr. Trant, and that the standards required were exceeded by trial counsel.

The State next called Mr. Robert Simpson, who was the lead attorney for Mr. King. He related several stories which Mr. King had told him about the facts of this case, which differed in various ways. He indicated that the defendant changed his story on several occasions during the course of preparation for trial. He testified that he had taken a history of the events in the case and investigated those, also he had obtained information about the Grainger County killing which occurred the month prior to Ms. Smith's killing, and that he taken a social history of Mr. King. He testified that had interviewed the relatives of Mr. King who were devoted to Mr. King, and he talked with the people that Mr. King suggested. He does not recall the school and medical records, but he does recall that Mr. King wrote to him concerning a head injury that he had received as a child.

He was aware that Mr. King had been evaluated by Cherokee Mental Health Center because of the Millard case in Grainger County, and he had obtained a letter from them. Further, that the evaluation in that case had not been favorable to Mr. King, who was found to be competent. The family at the last minute came up with sufficient funds for a psychological evaluation, and Mr.

Tipton, was was assisting Mr. Simpson, arranged that Dr. Mendes, a psychologist, be brought in, and further that Dr. Gebrow be involved. Mr. Simpson, further said he did not find any problem communicating with Mr. King, that he was rational could discuss and make appropriate responses, and that to him there appeared to be no mental problems.

He did testify that he found that the psychological evaluation found that Mr. King was below average intelligence and possibly had experienced organic brain damage, but that the problem was what was not in the report. The problem was that Dr. Gebrow reported and would testify that Mr. King was a person who liked to hurt people. Further, that the suicide note story was obviously a fabrication and not at all the testimony at trial, and that Dr. Gebrow and Dr. Mendes found no evidence of organic brain syndrome, but did find that Terry Lynn King was a violent individual. Mr. Simpson testified that he concluded on those findings that they should not call Dr. Gebrow, but should present other mitigating evidence through Mr. King, his brother, his school teacher and others. One of the individuals that Mr. King wanted to have testify was a Sue Campbell, who Mr. Simpson did not present at trial. Mr. King had given Mr. Simpson her name as a character witness, and he interviewed her, and she told him that she had dated Mr. King, and liked him, until he began to say scary things and she began to carry a gun.

He did try to locate Lori Eastman Carter, and to talk to Don King. He did file the Suppression Motion, which was denied, and he determined not to put Terry King on at the hearing because he did not believe that the Judge would believe him over the testimony of the officers, he further determined that he did not want Mr. King exposed to cross-examination, because he believed that the scope of that examination would be exceeded and would be allowed. The officers clearly denied Mr. King's version of the facts surrounding the confession. Mr. Simpson was then asked about opening statements which was very brief, and is quoted in material which have been file in this file. In the guilt or innocence phase he was required to challenge Lori Eastman Carter, and her testimony was unexpected and devastating to him. He testified that at that point he dropped the idea of raising intoxication and decided to proceed to the penalty phase and went on to focus on the mitigation of the death penalty. He testified that he was successful that this was not a premediated murder because the defendant was convicted of felony murder and he wished to give the Judge as many reasons as possible not to pass the death penalty. He provided testimony that Mr. King thrived

in the institutional setting and he was a model prisoner, the jury, however, saw fit to impose the death penalty.

Mr. Simpson also testified that he had many discussions with Mr. King about the decisions to be made in the case, whether or not to testify, and that Mr. King had asked many questions and had made many suggestions. Had Mr. King insisted on testifying in the guilt or innocence of the trial Mr. Simpson would have argued against it but would have permitted him to testify as it was ultimately Mr. King's choice. He also testified that during the appellate process, he remained in telephone and correspondence contact with Mr. King. He testified that Mr. King had gone into the issues by letter as to the appeal, but never mentioned the suppression issue.

As to the failure to file a Petition For Certiorari in the United States Supreme Court, Mr. Simpson had indicated that he had made an error when he read the Federal Rules and had read the rules to say that he had ninety (90) days when there was only sixty (60) days to file, subsequently missing the deadline. These issues were later raised at the Supreme Court in motions to stay which the Supreme Court has previously denied. In his opinion the character or past actions of Diana Kay Smith could only be examined to a limited extent, and he did research into her behaviors. He also testified that there were witnesses that were pertinent to the case that were not called because he believed that they could not have helped Mr. King but would have hurt him. There is nothing that he is aware of, according to his testimony, that would have been helpful that he did not use in defense of Mr. King. He testified that he could have begun sooner and the psychological evaluation could have been done earlier, and that had he hired an investigator these issues would have been easier. He testified he raised issues on appeal by looking at the proof and by looking at the record and studying the case law. To quote Mr. Simpson he testified that he briefed "the dogs that would hunt" and left home "the dogs that wouldn't." Because there was no mental defense found, and because he would have been ready to present such a defense, if Dr. Gebrow had found one, he did not have a Graham standard mental situation. He testified that he thought the bench conferences had been recorded and that other than what Mr. King thought he knew nothing about Mr. Jerry Childress's criminal record.

On cross examination, Mr. Simpson testified that he had not had a prior death penalty case and that he had never read the death penalty statutes prior to being appointed in this case. He

testified that Mr. King spoke to him about his plea in Grainger County but that he did not tell Mr. King that it may be used to aggravate the Knox County case. He testified that he had learned much information well before trial, and much of the early time prior to trial was consumed with the kidnapping case, the effects of which he understood. He would have welcomed professional assistance in the explanation of mitigating circumstances to the jury, but had nothing available until he was able to get funds for a psychiatrist close to the trial date. By the time Mr. Simpson learned that Mr. King had a strong potential for violence, the state was already in its case-in-chief in phase one of the trial, and no further evaluation was made because there was not sufficient time. He admitted that he had not anticipated Lori Carter's testimony and did not track her down because he did not think her testimony was appropriate in the case and chief, and because the police did not cooperate with him in assisting to find her. He admitted that he had seen no need to check Mr. King's juvenile record. Further, Mr. Simpson testified that he does not remember explaining to Mr. King about waiver of grounds for appeal if they are not raised in the appeal. He stated that he only saw Mr. King face to face again after the original trial at the motion for new trial, and that he was not aware of the Cruz opinion until it was released. Mr. Simpson indicated in his review that his work as far as the Writ of Certiorari not being filed was his error, and that his work regarding the mental health professionals was not satisfactory, but did not rise to the level of ineffective assistance of counsel.

CONCLUSIONS OF LAW

After hearing the proof and reviewing the extremely well prepared Memorandum of the Defense and well as the Citations of Law given by the State, the Court first approaches the "Cruz" error. The peititon suggest , that there are two parts to this error:

1. That the statements of Lori Eastman Carter brought in the through testimony of Randall Joe Sexton the co-defendant were violative of Cruz v. New York.
2. That this presented antagonistic defenses which would require severance under Cruz. Cruz was decided after this trial, and the cert was granted previous to the Tennessee Supreme Court Opinion in State v. King being released. That opinion was released on July 28, 1986, and Cruz v. New York was decided by the United States Supreme Court on April 21, 1987. It is urged by the defense that because of Cruz, Mr. King's counsel had the duty to file its Petition for Certiorari, which should have been filed by December 26, 1986.

The State argues that these issues had been previously determined. The Supreme Court in State v. King found that the implicatory confessions of the defendant and of the co-defendant, were interlocking, and found no Bruton violations in the admission of those confessions. They relied on Parker v. Randolph 442 U.S. 62 (1979), and State v. Elliott 524 S.W.2nd 473 (Tenn. 1975). The Supreme Court found that while it was true that the defendant's confession to the police did not recite the same facts as Joe Sexton's confession, his statements to witness Jerry Childress which were admitted at trial, cured any material deficiencies. This opinion specifically addressed this issue, and found that the rulings had been proper under existing authority at the time. On December 29, 1988, notice was filed for reconsideration of judgment for failure to file regarding Cruz v. New York and on January 10, 1989, the Supreme Court of Tennessee denied the Motion to Vacate and Reinstate The Judgment as previously determined. Cruz was specifically raised in these issues. Further, Cruz's retroactivity was raised in State v. Myra Pettyjohn C.C.A. 01-C-01-9006-CC00139, out of Hickman County. In that opinion filed on March 19, 1992, the Court of Criminal Appeals finds that Cruz v. New York does not have retroactive application to the defendant's case and that at that time the confrontation clause did not require exclusion "as the Supreme Court of Tennessee found in this

case". It is also clear that if in fact there was error to admit this evidence that the Court could determine that there was only harmless error to do so and the Supreme Court of Tennessee has already so ruled.

Also in State v. Porterfield, 746 S.W. 2nd 441(Tenn. 1988), the Supreme Court of Tennessee found the admission of a co-defendant's statement to be harmless error due to overwhelming evidence presented at trial. In this case, again there appears to be overwhelming evidence as to guilt of Terry King in the murder of Diana Kay Smith. Thus, as to the statements of Lori Eastman Carter, this Court finds that if there was application of Cruz in this circumstance, which the Court does not feel is retroactive in this case, that application as to the statements regarding Lori Carter are harmless beyond a reasonable doubt.

As to antagonistic defenses created by the failure to apply Cruz, the Court must assume that Cruz is retroactive, and there are cases to that effect reported in Tennessee. Again, the Court finds that these issues have previously been raised and that they are not sufficient for reversal as to the Cruz issue. Also, severance as a matter of law had already been addressed by the Supreme Court, and this Court finds that these antagonistic defenses do not require a severance. As to the Cruz analysis regarding antagonistic defenses in mitigation the second issue raised by the defense as requiring reversal, 644 S.W. 2nd 418 State v. Brown states that, "a co-defendant's counsel has no obligation to protect the interest of the co-defendant. His duty and obligation is to his client alone.....", and "in a joint trial each defendant represented by separate counsel is thus protected." Additionally it says, " Indeed, the adversary system provides the opportunity for counsel to seek, as each defendant's counsel did in this case, to cast the co-defendant in the role of the guilty party, with each attorney seeking to exonerate his client. However, such action do not amount to conduct prejudicial to any constitutional right of the co-defendant against who these efforts are directed." In the mitigation portion of the trial both Mr. Sexton and Mr. King testified and were subject to cross examination. There is no requirement that antagonistic defenses in mitigation cause constitutional error in this case. Therefore, this Court rejects this issue as well.

The next issue raised by the defense is the Middlebrooks issue. State v. Middlebrooks of course establishes that consideration of the underlying felony in a felony murder as an aggravated circumstance to support the death penalty in that felony murder is violative to the Eight Amendment

of the United States Constitution and Article One, Section Sixteen of the Tennessee Constitution. The defense urges that the petitioner, Terry Lynn King, has the right to a new sentencing hearing under the State v. Middlebrooks 840 S.W. 2nd 317 (Tenn. 1992). It states that the use of the invalid statutory aggravated circumstance in the Jury's ballot cannot be considered harmless error beyond a reasonable doubt because of the weakness of the remaining aggravating factors to be considered by the jury, and the mitigating evidence presented, or which should have been presented.

The fourth issue raised by the defense is the issue of Rickman v. Dutton, supra, in which it is argued that the heinous, atrocious and cruel aggravating factor should also be found inapplicable to this case. The petitioner also cites Richard Houston v. Michael Dutton filed May 19, 1994, out of the United States District Court for the Middle District of Tennessee to support the issues in the Rickman v. Dutton case.

To study the Middlebrook circumstance the Court looks at each of the four aggravating circumstances used in this case. They are:

1. That the defendant was previously convicted of one or more felonies, other than the present charge, which involved the use or threat of violence to the person.

There is substantial proof that the defendant was previously convicted of the murder of Todd Miller, in Grainger County, as well as proof that he had been convicted in Juvenile Court of violent felonies, which may or may not be admissible herein, nevertheless, the defendant has clearly met the aggravating circumstance in number one.

2. That the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind.

This of course is not a Middlebrooks issue but rather a Rickman issue which is discussed as the fourth issue by the defense, but which this Court will address here. Judge Nixon, in the Rickman case has ruled that this aggravating circumstance is unconstitutional under Tennessee law. In the decision of the Tennessee Supreme Court in this case, the Court found that the aggravating circumstances introduced were supported by the proof. The State argues that this issue has been addressed by the Supreme Court and was supported well prior to the Rickman decision. In Houston v. Dutton the Federal Court Judge, Don Nixon, has ruled that, "In a weighing state such as Tennessee, a state appellate court may cure the constitutional error in sentencing by either relying

on an adequate narrowing instruction and reweighing the aggravating and mitigating circumstances, or by applying harmless-error analysis. In the absence of one of these cures by the state appellate courts, the sentence must be vacated." It is clear in this case that the Tennessee Supreme Court determined that there was not sufficient reason for a reweighing to be conducted, but it is clear to this Court that should a reweighing be conducted as to the aggravating circumstance in No. One. No. One was clearly found by the jury and for which there was adequate proof even absent the juvenile convictions, was sufficient to use this aggravating circumstance. Thus, the Court does not feel that the Rickman issue is applicable in this Post Conviction Petition.

In further reviewing the aggravating circumstances, the Court moves on to No. Three, that the murder was committed for the purpose of avoiding, interfering with, or prevented a lawful arrest or prosecution of the defendant or another. This is not a Middlebrooks issue, and the Supreme Court has also addressed this issue. The Court found that there was sufficient evidence to support the submission of this aggravating factor in that in the defendant's confession he stated that the victim had accused him of raping her and that he had stolen a cigarette lighter from her, and further the Court found that the conclusion could not have materially effected the jury's finding in view of the overwhelming proof of murder in the first degree in the perpetration of a simple kidnapping and armed robbery.

As to No. 4, the murder was committed in commission of a felony. The defendant was convicted in a felony murder. The Court finds that Middlebrooks does apply to this aggravating circumstance and that this circumstance should not have been considered by the jury. In evaluating whether or not harmless error has occurred the Court will look to the proof in the record and finds that if there was error, it was harmless due to the over-whelming proof of the defendant's guilt and to the application of one or more of the other overwhelming circumstances.

Lastly, as error in this petition the defense raises the issue of cumulative error as to each of the above issues, as well as the issue of ineffective assistance of counsel, naming some nine (9) points. The defense has argued that errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, but may cumulatively produce a trial setting that is fundamentally unfair. They cite Walker v. Engle, 703 F.2d 959 (6th Cir. 1983). United States v. Parker, 997 F2d 219 (6th Cir. 1993), and State v. Zimmerman, 823 S.W.2nd 220 (Tenn.Crim.App.

1991). Clearly, the defense urges that these issues and allegations of ineffective assistance of counsel, as will be discussed below, produced a failure of due process in this case and denied the defendant a meaningful defense. The Court will first examine the nine (9) issues of ineffective assistance of counsel:

1. Failure to identify and use a competent mental health professional in a timely basis - The proof in this case indicated that in the trial of Mr. King for the death of Todd Millard, and Cherokee Mental Health Association had previously done a mental evaluation. Further, that the defense although a bit late, obtained the services of a competent mental health professional who evaluated Mr. King and whose evaluation, the defense felt was not helpful to Mr. King. Although, that evaluation was done at the last minute, it is clear that a competent mental health professional was found on a timely basis, and that the findings of Dr. Auble who testified in this post-conviction case were not unlike the findings of those mental health professionals who did in fact examine Mr. King at that time. The Court finds no ineffective assistance as to ground No. 1.

2. That the defendant failed to develop or follow a coherent theory in this case - The theory of the defense was that there was voluntary intoxication, which should mitigate pre-meditated murder. Unfortunately for Mr. King, he had not told his lawyer the truth about what happened in this case until quite some time after he was charged, and had misled his lawyer with several different stories. Further, the theory of mental disorder was not usable, as described above, and clearly the defense's theory regarding voluntary intoxication must have had some impact on the jury because the defendant was found guilty of Felony Murder, to which voluntary intoxication does not apply. The defense attempted to mitigate in the sentencing phase by putting on several witnesses, and the jury did not accept that mitigation. The Court finds no ineffective assistance of counsel in that regard.

3. The abandonment of the opening statement in phase one - While the Court feels that the opening statement should not be misleading to the jury and that the failure to put Don King on after promising it to the jury was not very tactically appropriate, the Court does not find that this made ant substantial difference. In fact, Mr. Simpson testified that Mr. King's testimony regarding the occurrences, as well as the other individuals that may have been called, would have been harmful to Mr. King. Further, the defense did put Mr. Don King on in the penalty phase and the jury did in

fact ultimately hear from Mr. Don King. The Court does not find that this rises to ineffective assistance of counsel.

4. Failure to preserve bench rulings - The Court heard the testimony of the trial judge, the Honorable Ray Lee Jenkins, who indicated that the bench rulings were preserved as best as possible. Indeed, some of the bench rulings were preserved and some were not. While the defense argues that this has prejudice Mr. King's ability to proceed with appeal, there has been no showing of prejudice in this issue and it is not found to be ineffective assistance of counsel.

5. Failure to exclude damaging and inadmissible evidence such as the false Sexton confession in the Fort Pillow Letter - These items were introduced during Mr. Sexton's cross-examination after Mr. King and Mr. Sexton collaborated on a false version of what had occurred during the course of this murder. The Court finds no failure of counsel with regard to this issue.

6. Failure to appeal the state's use of the juvenile dismissal - The trial transcript at pages 708 and 709, page 722, and page 528 of the record will refer to the juvenile convictions and dismissal. These issues have been raised in the Supreme Court's Opinion and found to be error, but not prejudicial error, and the Court finds no ineffective assistance of counsel with regard to this issue.

7. Failure to appeal the underlying armed robbery conviction - There has been no proof of prejudice with regard to the previous underlying armed robbery conviction nor has any evidence been put forth with regard to this failure. Thus, the Court finds no ineffective assistance of counsel as to this conviction in light of the fact that counsel did file a timely appeal on the death penalty conviction in which the armed robbery conviction was subsumed.

8. Failure to appeal the denial of the Motion To Suppress - Mr. Simpson, in his testimony, raised reasons why the Motion To Suppress was put on without testimony by Mr. King, and gave adequate reasons for doing so. Further, even the expert witness for the defendant, Mr. Trant, testified that he does not always put a defendant on the witness stand regarding the motion to suppress that this a tactical decision. The Court can find no fault with the tactical decision of Mr. Simpson neither in the decision to suppress in his failure to appeal the denial of the motion to suppress.

9. Failure to petition for Writ of Certiorari - The Court finds that Mr. King discussed the petition for writ of certiorari with Mr. Simpson and that Mr. Simpson made an error in failing to

apply for said writ of certiorari. However, the law does not require Mr. Simpson to file a petition for certiorari and further this issue was raised on rehearing in the Supreme Court and the Supreme Court denied the request for rehearing based upon that.

As to the total issue of ineffective assistance of counsel the Court finds that counsel did abide by the standards of Baxter v. Rose. While there has been some proof by the defense that those standards were not followed, and proof by the State that those standards were followed, it is the burden of the defense to show the ineffective assistance of counsel, and the Court finds that they have not carried their burden in this regard.

The last issue which counsel has raised, but not in the argument at hearing, involved waiver of issues previously determined and counsel quotes the waiver provision of the Tennessee Post-Conviction Procedure Act as of 1971, and cites two new Court of Criminal Appeals cases House, and Johnson, which are attached to the defendant's Supplemental Memorandum of Law On Waiver, stating that the petitioner must be aware and knowingly understand waiver. House defines waiver that can be used as a bar. It must have been a knowing, conscious, and deliberate act upon the part of the petitioner. It is urged that Mr. King must be found to have personally waived the grounds listed in the petition of post-conviction relief at the time of his trial or direct appeal, and personally decided not to present them to the Court. Based upon the testimony during the post-conviction proceeding of Mr. King, that he actively took part in the defense of his case, and he discussed this matter and the issues with his lawyer. It appears that Mr. King had a full discussion with his lawyer as to the issues to be raised, and suggested certain issues to his lawyer, and that there is no proof that the petitioner did not knowingly and understandingly waive certain issues. Further, 40-30-112(b2) states that there is a rebuttable presumption that a ground for relief not raised in any such proceeding which was held was waived. Clearly there are many issues which have been raised in this petition for post-conviction relief such as Cruz error, which the defendant could not have known of, which have been properly raised in this case. There are certainly issues filed in the Comprehensive Petition for Post-Conviction Relief which have been raised, and the Court finds that Mr. King knew what issues were involved and assisted counsel.

The Court stands on its previous order determining whether any issues were previously waived, the Court has allowed all issues in section 8(a) to be considered for purposes of hearing and

specifically ruled as follows:

Section 8(a)

i. this issue has previously been discussed.

ii. this issue is not relevant to the the constitutional grounds for post-conviction relief.

iii. these issues have previously been discussed in this ruling.

iv. the Court has previously made findings of fact in this ruling.

v. the Court has previously made findings of fact in this ruling.

vi. the defendant was convicted of Felony Murder and this issue has previously been addressed.

vii. counsel adequately investigated Terry Lynn King's medical history, for use as evidence and mitigation.

viii. Lori Eastman's credibility has previously been discussed by the Supreme Court and this issue has been previously determined.

ix. this issue has been waived by the ruling of the State Supreme Court.

x. this issue has been previously discussed in this ruling.

xi., xii.

failure to object issues are previously determined.

xiii. Mr. King's confession was admitted properly and this issue is previously determined.

xiv., xv., xvi., xvii,

these issues have previously been discussed in this ruling.

xviii. there is no requirement of trial counsel to exhaust the peremptory challenges.

xix. this issue has been previously discussed.

xx. there has been no proof as to this issue.

xxi. there is no basis to raise this issue nor has there been any proof with regard to this issue.

xxii. this issue has previously been discussed.

xxiii. no proof has been presented as to this issue.

xxiv. this issue has been previously discussed.

xxv. this issue has been previously discussed.

xxvi. this issue has been previously determined.

xxvii. this issue has been previously discussed.

8 (b) these issues have been previously discussed in this ruling.

8 (c)

i., thru iii.

have previously been discussed.

iv. has been withdrawn.

v. these issues were previously determined

or

all issues have been previously discussed.

vi. this issue has been previously discussed in this ruling.

vii. this issue has been waived due to no proof regarding extensive publicity.

viii., ix.

these issues have previously been waived due to the Supreme Court's ruling.

x., xi., xii., xiii., xiv., xv.

these issues have previously been determined.

xvi., xvii.,

been waived by failure to waive those issues.

(d)

i., ii.,

these issues have previously been discussed.

(e)

all of these issues have previously been discussed in this proceeding, or counsel had agreed that a number of the grounds had been previously been determined and waived and in light of the Counts findings regarding cumulative effect the Court denies these grounds.

(f)

has been previously discussed in this ruling.

(g)

this section regards cumulative effect which the Court will discuss below.

The issues involved in Amendment No. Three to the Post-Conviction Relief have all been discussed herein.

Thus, as to cumulative effect that having examined all of the grounds for post-conviction relief, the Court finds that the petitioner, Terry Lynn King, has raised no grounds for which relief should be granted, therefore, cumulative effect also fails as an argument. The Petition For Post-Conviction Relief is hereby dismissed. However, the execution of the death sentence upon the petitioner is hereby stayed pending further order of this or other higher courts, so that the defendant shall have an opportunity to take appeal from this ruling.

The Clerk shall furnish a copy of this order to the petitioner, Terry Lynn King, counsel for the petitioner, Charles W. B. Fels, and to the Knox County Attorney General.

ENTER this the 31st day of Oct., 1995.

Mary Beth Leibowitz

MARY BETH LEIBOWITZ, JUDGE
CRIMINAL COURT DIVISION III
SIXTH JUDICIAL DISTRICT

APPENDIX G

1997 WL 416389
Only the Westlaw citation is currently available.

SEE RULE 19 OF THE RULES OF THE COURT OF CRIMINAL APPEALS RELATING TO PUBLICATION OF OPINIONS AND CITATION OF UNPUBLISHED OPINIONS.

Court of Criminal Appeals of Tennessee.

Terry Lynn KING, Appellant,

v.

STATE of Tennessee, Appellee.

No. 03C01-9601-CR-00024.

|

July 14, 1997.

|

Permission to Appeal Granted Dec. 8, 1997.

Attorneys and Law Firms

Charles W. B. Fels, Wade V. Davies, Kenneth F. Irvine, Jr., for the Appellant.

John Knox Walkup Attorney General & Reporter, John P. Cauley Asst. Atty. General, Randall E. Nichols District Attorney General, Robert L. Jolley, Jr. William Crabtree John W. Gill Asst. District Attorneys General, for the Appellee.

OPINION

PEAY, Judge.

*1 The petitioner was convicted by a jury on February 1, 1985, of first-degree (felony) murder and armed robbery.[1] He was sentenced to death for the first-degree murder offense and to one hundred twenty-five (125) years for the robbery offense. His convictions and sentences were affirmed on direct appeal. *State v. King*, 718 S.W.2d 241 (Tenn.1986). The petitioner subsequently filed for post-conviction relief which was denied after a hearing. He now appeals, raising the following issues:

I. The aggravating factors used in imposing the death sentence were either constitutionally flawed or impermissibly tainted by inadmissible evidence;

II. The trial court's failure to grant a severance violated *Bruton v. United States* and *Cruz v. New York* at trial and violated his due process rights at sentencing;

III. Trial and appellate counsel were ineffective;

IV. The trial court's failure to instruct the jury on second degree murder and voluntary intoxication violated his constitutional rights;

V. The trial court's instruction on reasonable doubt violated his due process rights;

VI. The prosecution violated his due process rights by offering inadmissible, irrelevant and inflammatory evidence during both the guilt and penalty phases of his trial; and

VII. He is entitled to a new trial and/or a new sentencing hearing based on cumulative error.

Finding no reversible error in the lower court's rulings on these issues, we affirm the judgment below.

FACTS

A brief recitation of the facts established at the petitioner's trial is sufficient for the purposes of this proceeding. On the afternoon of July 31, 1984, the petitioner and his cousin, Don King, were driving around Cherokee Lake together when they met the victim, Diana K. Smith. The three left and drove to Don King's trailer, the petitioner riding with the victim in her car. The petitioner subsequently obtained some LSD. He and the victim both took some of the LSD. The petitioner had also taken one or more Quaalude tablets and had been drinking beer all day. The victim had been drinking wine and continued to do so after arriving at Don King's trailer.

The proof established that the petitioner engaged in sex with the victim and that they went driving around in her car. At some point she asked him, "Why did you all rape me?"[2] The petitioner subsequently made her get into the trunk of her car and drove to the house where his friend, co-defendant Randall Joe Sexton lived. Here, the petitioner spoke with Sexton and obtained Sexton's rifle. He returned to the victim's car and drove off. Sexton accompanied the petitioner in his own car. Eventually, the petitioner drove to a wooded area near a creek where he made the victim get out of the trunk of her car and lie facedown on the ground. He then shot her in the back of

her head at least once, killing her. The petitioner and Sexton returned the next day to dispose of the body, wrapping it in a tent, weighting it down with cinder blocks and then throwing it into a quarry lake. The body was discovered several days later. Following their arrests, both Sexton and the petitioner made statements to the police after waiving their rights. Both men were tried together.

ANALYSIS

*2 As a preliminary matter, we first note that "[i]n post-conviction relief proceedings the petitioner has the burden of proving the allegations in his petition by a preponderance of the evidence." *McBee v. State*, 655 S.W.2d 191, 195 (Tenn.Crim.App.1983). Furthermore, the factual findings of the trial court in hearings "are conclusive on appeal unless the evidence preponderates against the judgment." *State v. Buford*, 666 S.W.2d 473, 475 (Tenn.Crim.App.1983).

I. AGGRAVATING FACTORS

In his first issue, the petitioner asserts that two of the four aggravating factors relied upon by the jury in imposing the death sentence "could not be constitutionally applied to the facts of this case" and that the remaining two factors "were impermissibly tainted by evidence which was erroneously admitted by the trial court." The four aggravating factors found by the jury were the following:

1. The petitioner was previously convicted of one or more felonies, other than the present charge, which involved the use or threat of violence to the person;

2. The murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind;

3. The murder was committed for the purpose of avoiding, interfering with or preventing a lawful arrest or prosecution of the petitioner or another; and

4. The murder was committed while the petitioner was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any rape, robbery, larceny or kidnapping.

T.C.A. § 39-2-203(i)(2), (5), (6), and (7) (1982 Reply).

With respect to the last of these factors, the petitioner alleges that our Supreme Court's opinion in *State v. Middlebrooks*, 840 S.W.2d 317 (Tenn.1992), requires this Court to conclude that the use of the felony murder aggravator in this case was unconstitutional.[3] The State disagrees, citing *State v. Hines*, 919 S.W.2d 573 (Tenn.1995), in which our Supreme Court held that "Where ... a felony not underlying the felony murder conviction is used to support the felony murder aggravating circumstance," there is no *Middlebrooks* error. 919 S.W.2d at 583.

In support of its argument, the State asserts that the petitioner was found guilty of felony murder "solely on the basis of kidnap[p]ing." Although the State cites to no portion of the record in support of this assertion, the charge to the jury on felony murder included as the underlying felony only the offense of kidnapping. Moreover, the jury stated to the trial court that the murder conviction was for count three of the indictment. Count three of the indictment alleged that the petitioner and his co-defendant had murdered the victim "while during the perpetration of a kidnapping."

*3 The charge given to the jury during the penalty phase of the trial included the following instruction:

No death penalty shall be imposed but upon a unanimous finding by the jury that one or more of the following specified statutory aggravating circumstances have been proved on the trial and/or on the sentence hearing beyond a reasonable doubt.

...

The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit any rape, robbery, larceny, or kidnapping.

Rape is the unlawful carnal knowledge of a woman, forcibly and against her will.

Robbery is the felonious and forcible taking of the goods or money of any value from the person or presence of another by violence or putting the person in fear.

Kidnapping is the offense of forcibly or unlawfully confining, inveigling, or enticing away another with the intent of causing him to be secretly confined or imprisoned against his will.

Any person who feloniously takes and carries away the personal goods of another with the intent to permanently deprive the true owner thereof is guilty of larceny.

Thus, the jury was given the choice of four felonies from which to choose in determining whether the felony murder aggravating circumstance applied. However, it is impossible to discern from the record which of the four felonies the jury relied upon in determining to apply this aggravator.

Nevertheless, *State* v. *Hines* appears to require this Court to find that no *Middlebrooks* error was committed under the facts of this case. In *Hines*, the defendant had been convicted of felony murder "solely on the basis of armed robbery." 919 S.W.2d at 583 However, our Supreme Court went on to find that "the felony underlying the conviction in this case is clear, as is the use of the two different and additional felonies [of larceny and rape] to establish the aggravating circumstance found by the jury." *Id.* In finding *Middlebrooks* inapplicable, the Court stated:

Where, as in the instant case, a felony not underlying the felony murder conviction is used to support the felony murder aggravating circumstance, there is no duplication. Furthermore, under these facts the aggravating circumstance as applied restricts the sentencer's discretion to those who kill while in the perpetration of multiple felonies, a class of murderers demonstrably smaller and more blameworthy than the general class of murderers eligible for the death penalty under the ... felony murder statute.... Under these circumstances, where a felony other than that used to prove the substantive offense is used to establish the aggravating circumstance, there is no constitutional prohibition against the use of the [felony murder] aggravating circumstance ... to support the imposition of the death penalty for felony murder.

Hines, 919 S.W.2d at 583.

***4** The *Hines* opinion does not reveal how the Court came to its conclusion that the jury's use of the rape and larceny felonies in establishing the aggravating circumstance was "clear." In a footnote, the opinion acknowledges that the jury found that the murder had been "committed while the defendant was engaged in committing or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any *robbery, larceny, or rape*." 919 S.W.2d at 582 n. 3 (emphasis added). Moreover, in what appears to be a contradictory position, the Court went on to conduct a harmless error analysis "[o]n the premise that error existed because the jury based its finding regarding the felony murder aggravating circumstance in part on the robbery." 919 S.W.2d at 583.

Nevertheless, the crux of the Court's reasoning appears to be that the defendant had been engaged in multiple felonies at the time he killed the victim.[4] In contrast, the defendant in *Middlebrooks* had been found guilty of first-degree felony murder and aggravated kidnapping (the felony on which both the murder conviction and the aggravating circumstance were based), but acquitted of premeditated murder, armed robbery, and aggravated sexual battery. *Middlebrooks*, 840 S.W.2d at 322. Therefore, *Middlebrooks* involved a murder committed in the commission of only a single felony.

In the instant case, the petitioner was convicted of felony murder solely on the basis of kidnapping. In addition to kidnapping, however, the felony murder aggravating circumstance was supported by three additional felonies: robbery, larceny and rape. Indeed, the petitioner was convicted of armed robbery in addition to felony murder. Moreover, in the direct appeal of this case, our Supreme Court found, according to the petitioner's confession, "that the victim had accused him of raping her, and that he had taken a gold cigarette lighter belonging to [the victim] during the criminal episode." *King*, 718 S.W.2d at 250. Accordingly, the Court held, the trial court had been justified in including the felonies of rape and larceny in the felony murder aggravator. Therefore, while the petitioner was not convicted of either rape or larceny, this fact did not preclude the jury from relying on either or both of these felonies in assessing the applicability of the felony murder aggravator. Thus, the petitioner was presented as a member of the class of murderers who kill during the perpetration of multiple felonies, "a class of murderers demonstrably smaller and more blameworthy than the general class of murderers eligible for the death penalty" under the felony murder statute as duplicated by the felony murder aggravator. *Hines*, 919 S.W.2d at 583. Accordingly, we disagree with the court below that the felony murder aggravating circumstance was improperly applied in this case, and hold that there was no *Middlebrooks* error.

***5** However, as did the *Hines* court, we also conduct a harmless error analysis out of concern that error was committed because the jury based its finding regarding the felony murder aggravating circumstance in part on the kidnapping. *See Hines*, 919 S.W.2d at 583. As set forth more fully below, we have determined that the remaining three aggravating circumstances were properly applied in

this case, and that the evidence strongly supported them. The State's closing arguments did not give extraordinary weight to the felony murder aggravator. The petitioner's prior felony convictions involving violence were not disputed. The petitioner admitted during the penalty phase that he had "probably" killed the victim because she had said "something about rape" and he "got scared." This admission was more than sufficient to support the aggravating factor that he had committed the murder to avoid prosecution. The evidence also supported application of the "heinous, atrocious or cruel" aggravator. As did our Supreme Court in *Hines*, then, we find that "[u]nder this record it can be concluded beyond a reasonable doubt that the sentence would have been the same had the jury given no weight to the [felony murder] aggravating factor." 919 S.W.2d at 584. *See also State v. Howell*, 868 S.W.2d 238, 260 (Tenn.1993) (the applicable harmless error analysis requires the reviewing court to conclude beyond a reasonable doubt that the sentence would have been the same had the jury given no weight to the invalid aggravating factor).

The petitioner also contends that the jury's finding that the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind must be set aside as unconstitutionally applied. In support of his argument, the petitioner complains about the jury instructions given (and those omitted) on this aggravating factor, and about the sufficiency of the evidence supporting this factor. However, our Supreme Court has previously addressed both of these issues, holding

> we find [no] prejudicial error in the trial court's failure to define the term 'torture.' The evidence in this case supports the aggravating circumstance, Tenn.Code Ann. § 39-2-203(i)(5), as defined in *State v. Williams* ... as the [petitioner] shot the victim in the head after she begged for her life and offered the [petitioner] money to let her go. Furthermore, the remaining three aggravating circumstances were correctly charged and are overwhelmingly supported by the evidence. Under these circumstances, there was no prejudice to the [petitioner] by the failure to define 'torture.'

King, 718 S.W.2d at 249. Accordingly, this issue has been previously determined. T.C.A. § 40-30-112(a). Moreover, although not noted by the Supreme Court in the direct appeal of this case but made plain by the record, the petitioner had trapped the victim in the trunk of her own car for some thirty to forty-five minutes immediately prior to shooting her. We think this treatment of the victim constituted severe mental pain[5] as contemplated by this aggravating circumstance.[6] Accordingly, this aggravator was not applied unconstitutionally.

*6 With respect to the remaining two aggravating factors found by the jury, the petitioner contends that they were "impermissibly tainted by the introduction of improper evidence by the State." Specifically, the petitioner attacks the admission of evidence about his two juvenile convictions for armed robbery and proof of another charge lodged while he was a minor, accusing him of assisting in the rape of his sister-in-law. Our Supreme Court determined on the direct appeal of this matter that the admission of the juvenile convictions was harmless error as to the application of the aggravator for prior felonies involving violence. *King*, 718 S.W.2d at 248. Accordingly, that issue has been previously determined. T.C.A. § 40-30-112(a). As to the other charge, the alleged harmful effect of that evidence was not raised in the direct appeal. Accordingly, any complaint about the admission of that evidence has been waived. T.C.A. § 40-30-112(b).

Furthermore, we are confident that our Supreme Court's ruling would have been the same had the admission of the rape allegation been raised. In addressing this issue with respect to the juvenile robbery offenses, it held:

> While it is true that one of the aggravating circumstances found was that the [petitioner] was previously convicted of one or more felonies which involved the use or threat of violence to the person, the finding was not dependent on the evidence that the [petitioner] had committed crimes while a juvenile. It is undisputed in the record that in addition to the murder of Mrs. Smith, the [petitioner] had been convicted of murder in the first degree in the perpetration of an armed robbery, aggravated kidnapping, and an assault with intent to commit aggravated kidnapping. In view of this evidence, the error in admitting evidence of [the petitioner's] crimes as a juvenile could not be prejudicial.

King, 718 S.W.2d at 248-49. The only evidence concerning the rape charge consisted of the prosecution asking the petitioner's brother during the penalty phase of the trial, "is it not correct, sir, that in January of 1979, more specifically January the 24th of 1979, that your wife, Donna J. King, accused Mr. Terry Lynn King, your brother, of assisting in her rape?" to which the witness responded, "Yes, sir." Given our Supreme Court's ruling on the issue of the juvenile robbery offenses, we are convinced that its ruling would have been the same had the allegation of error also included the admission of this evidence.

The petitioner's claim that his death sentence must be reversed because of improper application of the aggravating factors is without merit.

II. BRUTON/CRUZ ERRORS

The petitioner next complains that his constitutional rights were violated by the trial court's refusal to sever the trials of he and his codefendant, Randall Joe Sexton. Sexton did not testify during the guilt/innocence phase of the trial. However, the trial court ruled his confession to be admissible and gave the jury a limiting instruction that the confession was to be used only against Sexton. The petitioner now contends that the admission of Sexton's confession violated his Confrontation Clause rights under *Bruton v. United States*, 391 U.S. 123 (1968).

*7 In the direct appeal of this matter, our Supreme Court ruled on this issue and found "no *Bruton* violation in the admission in evidence of the confessions." *King*, 718 S.W.2d at 247. However, since our Supreme Court's opinion, the United States Supreme Court decided the case of *Cruz v. New York*, 481 U.S. 186 (1987). In *Cruz*, the Supreme Court held that "where a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant, ... the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him." *Cruz*, 481 U.S. at 193. The petitioner now contends that *Cruz* must be applied retroactively, and that we should find that the admission of Sexton's statement was constitutional error.

We find it unnecessary to decide whether or not *Cruz* is to be applied retroactively. Even if it were, *Cruz* provides for a harmless error analysis where a codefendant's confession is admitted in violation of the Confrontation Clause. 481 U.S. at 194. Although the petitioner contends that the admission of Sexton's confession was very harmful, we disagree. The crux of the petitioner's argument is based on a single statement contained in Sexton's confession: "Terry said he wasn't going to let her go, because he was afraid he would get in the same mess he got into with Lori." This "same mess" was not specifically explained. However, Lori Eastman Carter testified during the guilt phase that the defendant had assaulted her in 1982 and that she had subsequently sworn out a warrant against him. She also testified that, during the assault, the petitioner had told her to "tell him how it felt to be dying, so that the next woman he killed he would know how she felt." The admission of this testimony was found to have been error, although harmless, on direct appeal. *King*, 718 S.W.2d at 246-47.

The portion of Sexton's statement targeted by the petitioner as prejudicial, together with Carter's testimony, supported the State's attempt to prove the petitioner guilty of premeditated murder. The petitioner was not, however, convicted of premeditated murder: he was convicted of felony murder and armed robbery. And while we acknowledge that this portion of Sexton's confession was somewhat probative of the petitioner's state of mind with respect to his motives in kidnapping and killing the victim, the petitioner's murder conviction did not depend on his motives. We conclude, therefore, that the admission of Sexton's statement, insofar as it was offered to prove the petitioner's state of mind, was harmless error, if error at all.

We further conclude that the admission of Sexton's confession was, in all other respects as to the guilt phase of the trial, harmless error. In pertinent part, Sexton's confession provided as follows:[7]

*8 Terry came and got me up and said he needed my help. Terry said he wasn't going to let her go, because he was afraid he would get in the same mess he got into with Lori. Terry told me that the girl's name was Smith, and she lived up around Talbott. Terry told me he had met the girl at the lake, and they had been down at Don King's house partying, f_____g her. Terry told me she had tried to get away when they went down to the Pilot, that he had grabbed the keys to the car. Terry told me that he had choked her and put her in the trunk of the Camaro. I followed him in my car, a 1970 blue Audi, from my grandmother's down the road. I ran out of gas, and he pushed me with the Camaro to the Publix station. Before we left the house, Terry told me to get my rifle. It is a .30-30 lever-action rifle. Terry put the rifle in the seat of the Camaro. At the Publix I bought five dollars' worth of gas for my car and five dollars in a gas can for the Camaro. Terry had left it parked up the road from the gas station. We drove down Old Rutledge Pike to the creek where the old covered bridge used to be. Terry drove the Camaro down into the wooded area near the creek. I stayed on the paved portion of the road with my car running. I left and took a funnel back to the Publix station and got me a Coke. I drove back down to the creek and drove into the wooded area. I saw the Camaro. It was stuck. I helped him get it unstuck. Terry told me he had already killed the girl. Terry told me he laid the girl down on her stomach, and that

while she was begging for him not to, he shot her in the back of the head. Terry told me he had covered the body up with some weeds.

While the admission of this confession would certainly have been harmful error had there been no other evidence against the petitioner, there was overwhelming additional evidence: including the petitioner's own confession to the police and his earlier confession to Jerry Dean Childress. Childress testified, in pertinent part, as follows:

[The petitioner] said that-started telling me about it and said that he was with this-they picked this girl up at Cherokee Lake on the Sunday before that, that Monday, and that-he said that he-said he f_____d her, and that they done a Quaalude or two or hit of acid, and that this-he said this other person was with him, and that he tried to f__k the girl, and she said that if he did, that she was going to holler rape on them. And he said that he got scared and he couldn't-he had been in jail before, and he wasn't going back to jail.

...

And he said he locked-locked the girl in the trunk of [her] car ... and sent this other person after a .30-30 rifle-

...

he told me that he made the girl get out of the trunk of the car, lay facedown on the ground-

...

He said that she was talking to him and begging him not to shoot her, and that she told him she had some money in the bank, and that she would give it to him and forget all about it if he'd let her go. And he told her to shut her damn mouth and turn her head away from him.

*9 ...

He said he took the gun and put it to the back of her head and shot her.

Likewise, the petitioner's statement to the police included the following:[8]

We got back in the car and rode to the Pilot station on Rutledge Pike to get some gas. I told her to pump the gas, and when she got out, she grabbed the keys. I told her to get in the car, I was leaving. She got in the car, and I took off back to Lee Springs, and I screwed her again. We sat and talked. I knew she had forty dollars on her. I took it and asked her if she had any more money. She said she had two hundred dollars in the bank. She asked me why, and she said, Why did you all rape me? I told her we didn't. And at that time I knew what she was going to do, and I knew what I was going to do. I told her to get out and get in the trunk of the car. I had to take a crank and some pistons out of the trunk and a pinkish bucket and some wrenches to make room for her to get in. She got in the trunk, and I went to [Sexton's] grandmother's house on Lee Springs and got Joe Sexton up. I told him I needed his help. I told him I had a girl in the back of the car in the trunk. Joe's grandmother came out, and he told her my car was off in a ditch, and he was going to help me. He got his grandmother out of the living room, and I got his Marlin .30-30 rifle. Joe got a bullet, Joe got a mattock and shovel. And he said, Do you know what you're going to do? and I said I had a pretty good idea. We left. Joe was driving his car; I was driving [the victim's car]. A little ways down the road Joe ran out of gas, and I pushed him in the [victim's car] to the Publix station. As we approached the station, I ran out of gas, too. Joe got five dollars of gas in his car and five dollars' worth of gas in a gas can and borrowed a funnel from the gas attendant. We left and went to the creek by the old covered bridge. I pulled up in a wooded area and got stuck. I made the girl get out of the trunk. I had loaded the rifle and was pointing it at her. This was daylight. And I took the girl over into some weeds and made her lay down. She asked me what I was going to do, if I was going to kill her. I said, no, some more guys are going to screw you. I started covering her up with weeds. I told her this was so she couldn't be seen. I still had the gun. She was laying facedown. I picked up the rifle, held it approximately 3 feet from the back of her head and shot her. [Sexton] wasn't there. We got the [victim's car] unstuck after [Sexton] came back. We then went through her personal belongings. I burned her pictures and I.D. and panties. [Sexton] walked over and looked at her. We started to leave but decided to bury her. We started digging a grave next to the fence, but the ground was too hard, and we quit. We discussed what to do and decided to wrap her in a tent [Sexton] had in the back of his car, weight her and put her in the water. We decided we would do it the next morning. We left, went home and went to bed. Before we went home, we stopped at Sonny Reeser's garage and tried to sell him the car, but he wouldn't buy all of it, just some of the parts.

*10 Thus, we hold that, in light of the overwhelming evidence of the petitioner's guilt of felony murder adduced at his trial, not including Sexton's confession, the admission of that confession was harmless error. *See State v. Porterfield*,

746 S.W.2d 441, 446 (Tenn.1988) (under Cruz, admission of the codefendant's confession was harmless error "in light of the overwhelming evidence of guilt, considering only [the defendant's] confession and the evidence of the other witnesses and the circumstances of the murders"). This issue is without merit.

The petitioner also contends that the admission of Sexton's confession was harmful error in the context of the sentencing phase of his trial. We disagree. In reaching its decision on whether to impose the death penalty upon the petitioner, the jury had been charged with a single task: to determine whether the State had proved beyond a reasonable doubt at least one statutory aggravating circumstance and whether the aggravating circumstance(s) was outweighed by "any sufficiently substantial mitigating circumstances." The statutory aggravating circumstances with which the jury was charged are set forth hereinabove. The mitigating circumstances with which the jury was charged were:
The victim was a participant in the defendant's conduct or consented to the act.

The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

The youth of the defendant at the time of the crime.

The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication, which was insufficient to establish a defense to the crime, but which substantially affected his judgment.

Any other mitigating circumstances you may find.

Given the jury's instructions, which it is presumed to follow,[9] the only way in which Sexton's confession could have harmed the petitioner at sentencing is if it supported an aggravating factor not otherwise proved, or if it contradicted the petitioner's proof of mitigation in some manner not otherwise testified to by Sexton himself.

Sexton's confession provided no support for the aggravating circumstance of prior violent felonies. It provided only minimal support for the State's theory that the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind. Sexton's statement contained a single sentence about the petitioner having told him that he had "put her in the trunk of [her car]." However, both Childress' testimony and the petitioner's own statement to the police contained more than sufficient proof of this fact. And while Sexton's statement also included a reference to the victim's having begged for her life, Childress' testimony was much stronger on this point. Accordingly, we find that Sexton's statement did not harm the petitioner by materially bolstering the State's proof of these two aggravating factors.[10]

*11 As previously noted, Sexton's statement included the sentence, "Terry said he wasn't going to let her go, because he was afraid he would get in the same mess he got into with Lori." Certainly, this portion of Sexton's statement provided some proof that the petitioner had committed the murder for the purpose of avoiding or preventing his arrest or prosecution. However, Childress' testimony also included similar proof: that the petitioner had told him that the victim had threatened to "holler rape" and that he "got scared and he couldn't-he had been in jail before, and he wasn't going back to jail." Moreover, the petitioner's own statement to the police included the admission that, after the victim had raised the specter of a rape accusation, he "at that time ... knew what she was going to do, and [he] knew what [he] was going to do." In light of this evidence, we hold the admission of Sexton's statement on the issue of this aggravating circumstance to have been harmless.

As to the felony murder aggravator, we have previously held that the death sentence would have been imposed even had the jury given no weight to this factor. Therefore, any support given this circumstance, if any, by Sexton's confession was harmless.

As to the mitigating circumstances offered by the petitioner, Sexton's confession became basically irrelevant in light of Sexton's testimony at the sentencing hearing. We agree with the petitioner that Sexton's testimony may have undercut certain of his mitigation proof. To the extent Sexton's confession contained similar information, then, it became merely redundant. Sexton's confession did not contain any additional or different information which was independently damaging to the petitioner's proof in mitigation. Accordingly, we hold that the admission of Sexton's confession was harmless error, if error at all, as to the sentencing phase of the trial. The petitioner's contentions with respect to alleged *Bruton/Cruz* errors are without merit.

The petitioner also complains that his due process rights were violated during the penalty phase of the trial by the trial

court's refusal to sever the defendants. We first note that the petitioner has cited no cases finding a due process violation resulting from a joint sentencing hearing. We acknowledge, however, that such violations are theoretically possible where the failure to sever renders the proceeding fundamentally unfair so as to violate due process. *See, e.g., Ruiz v. Norris*, 868 F.Supp. 1471, 1486 (E.D.Ark.1994). The petitioner contends that the joint trial rendered the sentencing phase fundamentally unfair because Sexton presented as mitigation that he had participated as a minor accomplice in the murder committed by the petitioner, and that he had acted under extreme duress or the substantial domination of the petitioner.

It was undisputed at both phases of the trial that the petitioner had actually killed the victim. It was also undisputed that the murder had been accomplished with Sexton's gun. The only significant difference in proof at sentencing with respect to Sexton's participation in the murder was whose idea it was to kill the victim. Sexton claimed it was the petitioner's; the petitioner claimed that it was Sexton's. Sexton's testimony on this point was unequivocal. The petitioner's was far less definite. More damning than anything Sexton stated, however, was first, the petitioner's own confession that, as soon as the victim had asked why they had raped her, he "knew what she was going to do, and [he] knew what [he] was going to do." Second, the petitioner admitted during cross-examination that he had "probably" killed the victim because she had mentioned rape and he became scared. Sexton's proof in mitigation of his own guilt paled in comparison with these admissions by the petitioner and we therefore find that Sexton's testimony on this issue did not render the petitioner's sentencing hearing fundamentally unfair.

*12 Nor was the hearing rendered fundamentally unfair by Sexton's testimony that the petitioner had appeared sober[11] to him at the time the petitioner came and got him immediately prior to the murder. The petitioner testified about the quantity of drugs and alcohol which he had consumed prior to the murder, and Sexton did not dispute this testimony. The petitioner offered expert proof as to the likely effects of these substances upon him and Sexton did nothing to contest that testimony. In fact, Sexton admitted that, when he had first seen the petitioner at about 2:00 a.m. on the morning in question, he had appeared to be under the influence of something. While Sexton's testimony about the petitioner's demeanor at the time of the murder was prejudicial insofar as it undercut the petitioner's attempt to offer as mitigation that his capacity to appreciate the wrongfulness of his conduct was substantially impaired as a result of intoxication, we do not think it was so harmful as to render the sentencing hearing fundamentally unfair. The jury undoubtedly understood that each of these men was trying to save himself at the expense of the other, and evaluated their credibility accordingly.

We have further examined the record of the sentencing hearing with respect to the petitioner's allegations of "the extreme antagonism of [Sexton's] counsel" and that Sexton's counsel "hurt [the petitioner] in ways that would have been improper for the State prosecutor to try." Our examination reveals no due process violation. The trial court's refusal to sever the defendants did not render the sentencing hearing fundamentally unfair as to the petitioner. This issue is without merit.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

The petitioner claims that he received ineffective assistance of counsel at both the trial and appellate levels. In reviewing the petitioner's Sixth Amendment claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn.1975). To prevail on a claim of ineffective counsel, a petitioner "must show that counsel's representation fell below an objective standard of reasonableness" and that this performance prejudiced the defense. There must be a reasonable probability that but for counsel's error the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 692, 694 (1984); *Best v. State*, 708 S.W.2d 421, 422 (Tenn.Crim.App.1985).

In support of his claim, the petitioner first complains that his trial counsel "abandoned" the defense theory of voluntary intoxication after having introduced it during opening statement. During the guilt phase of the trial, proof of the petitioner's consumption of alcohol and drugs came in through Childress' testimony and the petitioner's confession.[12] Defense counsel did not call Don King, with whom the petitioner and the victim had spent the afternoon and evening, until the sentencing phase. King then testified that, beginning in the morning of July 31, 1984, the petitioner had drunk over a case of beer and had taken two "hits" of acid with the victim. He further testified that the petitioner had been "messed up worse than what I'd ever seen him." Also called by defense counsel during the penalty phase was Dr. Robert Booher, a physician who specialized

in addictionology. Dr. Booher testified that LSD "greatly impairs a person's judgment" and that its "behavioral effects can last, usually, around eight to twelve hours." He also testified that Quaaludes cause "a marked impairment in judgment" and that it takes up to twenty-four to thirty-six hours for them to be eliminated from the body. According to Dr. Booher, alcohol also "impairs a person's judgment" and when alcohol and Quaaludes are combined, "the effects of each more than double each other." He further testified that Quaaludes will inhibit the body's ability to eliminate alcohol. On cross-examination, Dr. Booher testified that he had never examined the petitioner, that he had no way of knowing the amounts of LSD and/or Quaaludes the petitioner had taken without testing the actual substances which he had ingested, and that a person who takes these drugs over a long period of time develops a tolerance to their effects. The petitioner contends that defense counsel erred by not putting on this proof during the guilt phase of the trial so as to require the trial court to give an instruction on voluntary intoxication.

*13 The trial court refused defense counsel's request for an instruction on voluntary intoxication on the basis of *Harrell v. State*, 593 S.W.2d 664 (Tenn.Crim.App.1979).[13] In *Harrell*, this Court stated,

> Proof of intoxication alone is not a defense to a charge of committing a specific intent crime [such as premeditated murder] nor does it entitle an accused to jury instructions...: there must be evidence that the intoxication deprived the accused of the mental capacity to form specific intent.... The determinative question is not whether the accused was intoxicated, but what was his mental capacity.

593 S.W.2d at 672. Of course, in the instant case, the only witnesses who could have testified about the petitioner's state of mind at the time he committed the murder were the petitioner himself, Sexton, and the victim. While King's testimony might have been helpful as to the amount of drugs and alcohol he observed the petitioner ingest during the day and evening of July 31, 1984, the murder was not committed until after daylight had begun on the next morning. Don King's testimony, even combined with Dr. Booher's, was simply not sufficient in and of itself to establish the petitioner's state of mind as of the time he murdered the victim. And the petitioner's own statement to the police contains evidence that his state of mind was not so intoxicated as to require the jury instruction. His confession includes a very detailed recounting of the murder and the events leading up to it, indicating a clear memory; it indicates that he formed an intent to keep the victim from accusing him of rape; that he was able to drive a vehicle and load, point and fire a gun, indicating some level of motor skills; and that he had the presence of mind to go through the victim's personal belongings and burn her pictures and identification after murdering her. The proof available to the petitioner in this case was simply not sufficient to require a jury instruction on voluntary intoxication. Accordingly, defense counsel did not err by failing to pursue this "defense" more vigorously.[14] This issue is without merit.

The petitioner next complains that his trial counsel was ineffective in failing to seek evaluations from mental health experts in a timely fashion. Defense counsel acknowledged on cross-examination that his office had begun the process of locating mental health expertise on January 9, 1985. At this time, the trial was set to begin on January 21, 1985, but was subsequently postponed to January 23, 1985, due to weather. Defense counsel obtained the services of Dr. Martin Gebrow, a psychiatrist, as of January 15, 1985. Dr. Gebrow first examined the petitioner on January 23, 1985; the day the trial began. Dr. Gebrow's evaluation was such that defense counsel made a strategic decision not to call him as a witness. This decision was based on two things: first, that the petitioner had lied to Dr. Gebrow about the circumstances of the murder he committed, and second, that Dr. Gebrow had told defense counsel that the petitioner "was a person that just liked to hurt people."

*14 Defense counsel admitted at the post-conviction hearing that, given the time frame, they were not able to seek a second opinion which may have been more helpful. The petitioner therefore makes much of the delay in seeking Dr. Gebrow's assistance. However, the petitioner has failed to prove that, had counsel begun the mental health evaluations earlier, a more favorable evaluation would have been obtained. Although the petitioner offered at the hearing the testimony of Dr. Pamela Auble, who evaluated the petitioner for the purposes of this proceeding, Dr. Auble's testimony does not establish that an earlier pretrial evaluation of the petitioner would have been to his benefit. For one thing, her evaluation of the petitioner occurred many years after the offenses and after many years of incarceration.[15] Also, the petitioner was apparently more truthful with Dr. Auble than he was with Dr. Gebrow. Of course, this "honesty" occurred only after the petitioner had been convicted. Accordingly, to the extent that Dr. Auble's evaluation of the petitioner might have presented a more favorable picture of him, it is impossible for us to conclude whether this more favorable picture stems from the petitioner's varying degrees of veracity in speaking with

these experts, the passage of time spent in prison, and/or the fact that one evaluation occurred before conviction, the other years afterward. Thus, it would be sheer speculation for us to conclude that defense counsel would have eventually obtained a more helpful expert opinion had they started the process months earlier. It is the petitioner's burden to prove that he was prejudiced by the alleged failures of his trial counsel, and he has failed to meet that burden on this issue. Accordingly, we find it to be without merit.

The petitioner further complains that defense counsel's delay in seeking mental health expertise resulted in less mitigation proof than should have been offered. The record belies this assertion. Proof of mitigation introduced at trial included the devastating loss of the petitioner's father at an early age, his frequent sniffing of gasoline fumes and use of alcohol and/or drugs beginning at an early age, his poor school and work performances, and the disastrous effects of drugs and alcohol on his thoughts and actions. Also introduced was evidence of the petitioner's remorse and his good behavior while jailed. Dr. Auble's testimony at the post-conviction hearing did not alter this portrait of the petitioner in a beneficial manner.[16] She characterized the petitioner as "impulsive," "dependent, immature" and as someone who "took offense very easily" while drinking or under the influence of drugs and who "tends to misinterpret people's actions as hostile."[17] She further testified that the victim's suggestion to the petitioner that she might file a rape charge

***15** was a trigger for [the petitioner]. The reasons that it was a trigger-there are three reasons. One is that [the petitioner] has a lot of fears of rejection that began way back after his father died. She was rejecting him. He perceived this. Second, he has this old accusation of holding his sister-in-law down while she was being raped. He knows that it is possible that, if a woman does this-files a rape charge-that it will be very difficult for him, and he will spend time incarcerated.
Third, he has had this recent bad relationship with Lori-recent in terms of the time of this event. He does not expect women to be good to him. He expects them to accuse him of things. He expects to be rejected by them.

These three factors went together and triggered a great deal of anger in [the petitioner]. This is anger that he has had for many years. Ever since his father died probably is when it started. This overwhelmed him, and he could not cope effectively. You know, as we have talked about, [the petitioner] is impulsive. He has poor judgment and has difficulty handling, or planning, or dealing with stress.

Not only does this testimony not add anything beneficial to what was put into evidence during the sentencing phase, it supports the State's case on the aggravating factor for committing the offense to avoid prosecution. Accordingly, the petitioner has failed to demonstrate that he was prejudiced by his lawyer's failure to hire an expert like Dr. Auble at an earlier time.

The petitioner also complains that his trial counsel was deficient in failing to investigate thoroughly the victim's past. Specifically, he asserts that counsel should have discovered certain public records concerning a prior rape allegation, later dismissed, apparently made by the victim against another man long before she met the petitioner. Defense counsel admitted that he had not discovered this item from the victim's past. However, we fail to see what good this information would have done the petitioner at trial, even had his lawyer stumbled across it. The victim's character was not a relevant issue at trial. The victim's past actions, of which the petitioner had no knowledge at the time he murdered her, were not a relevant issue at trial. Therefore, this "evidence" would not have been admissible at trial and the petitioner suffered no prejudice from his attorney's failure to discover it.

The petitioner next points to his defense counsel's failure to preserve on the record all of the bench conferences which occurred during the trial. While we agree with the petitioner that all bench conferences should be preserved on the record, *see, e.g., State v. Hammons*, 737 S.W.2d 549, 551 (Tenn.Crim.App.1987), we disagree that "the lack of a transcript of these crucial conversations" is, *ipso facto*, prejudicial within the context of *Strickland*. In order to demonstrate prejudice on this issue, the petitioner must show at least a likelihood that one or more of the unrecorded bench conferences resulted in an adverse ruling that constituted reversible error. The petitioner has not done so. Indeed, the petitioner has conceded that "this factor taken by itself would not warrant reversal." This allegation is without merit.

***16** The petitioner further complains about defense counsel's failure to call him to the witness stand during the suppression hearing. In response to being asked why he did not call the petitioner to the stand, defense counsel testified:
One, I knew Judge Jenkins wasn't going to believe a convicted felon with his record over the testimony of, at least, two officers. But what deterred us from putting [the petitioner] on the stand was you,[18] and Mr. Crabtree, and ... Judge Jenkins-that we did not want to expose [the petitioner] to your cross-

examination. We were confident that you would exceed the scope of a suppression hearing in your cross-examination: that Judge Jenkins would allow you to do so, coupled with the fact that we were dealing with a young man that we knew was of below-average intelligence, and would not do well on cross-examination. And we were confident that, upon trial, even though it is not admissible, that some of that stuff that you would glean from a suppression hearing ... would come in at trial, and we didn't want you to go to school on [[the petitioner] as a witness. We wanted your first crack at him to be your only crack at him.

As correctly noted by the court below, this was a "tactical decision" and one that was made with "adequate reasons." We will not now second-guess this strategy call with the benefit of twenty-twenty hindsight. *See Adkins v. State*, 911 S.W.2d 334, 347 (Tenn.Crim.App.1994) ("The petitioner is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy by his counsel, and cannot criticize a sound, but unsuccessful, tactical decision made during the course of the proceedings.") This issue is without merit.

In his next allegation of ineffective assistance of counsel, the petitioner points to the penalty phase of his trial during which his counsel did not object upon introduction into evidence of a suicide note written by the petitioner's codefendant, Randall Joe Sexton. Sexton had written the note in contemplation of his suicide prior to trial. He testified that he had discussed the contents of the note with the petitioner prior to writing it, and that the petitioner had suggested he include a statement that he, Sexton, was responsible for the victim's death, not the petitioner. The note was found after Sexton attempted suicide and was taken to the hospital, and was used very effectively by the State to impeach Sexton's credibility. The petitioner's counsel subsequently relied on it in closing not only to argue that Sexton could not be believed, but to demonstrate that the petitioner had not tried to rely on this note for his defense, and admitted (during the penalty phase of the trial) to having killed the victim. In other words, defense counsel used it against Sexton and as a method of bolstering their own client's credibility and willingness to take responsibility for his own actions. This was a strategy call by defense counsel and one that we will not condemn.

*17 The petitioner further alleges that defense counsel was ineffective for failing to appeal the State's use during the penalty phase of the trial of a charge that had been made against the petitioner while a juvenile and later dismissed. We remind the petitioner that

there is no constitutional requirement that an attorney argue every issue on appeal.... Generally, the determination of which issues to present on appeal is a matter which addresses itself to the professional judgment and sound discretion of appellate counsel.

***

Moreover, the determination of which issues to raise on appeal can be characterized as tactical or strategical choices, which ... should not be 'second guessed' on appeal, subject, of course, to the requisite professional standards.

Cooper v. State, 849 S.W.2d 744, 747 (Tenn.1993). When questioned in this case about how he had decided which issues to raise in the direct appeal, defense counsel testified, "You look at the proof as it was adduced at trial. You read your record as carefully as you can, bone up on the applicable case law as to the issues suggested; and the dogs that will hunt, you put in the brief, and the ones that won't, you leave home." Obviously, defense counsel decided that the admission of the juvenile charge in question "wouldn't hunt." We will not second-guess this strategy call.[19]

The petitioner also alleges that one of his trial lawyer's representation was deficient because he failed to timely file a petition for writ of certiorari with the United States Supreme Court after having told the petitioner that he would do so. The State concedes that the attorney's failure in this regard was "an instance of deficient performance." Whether deficient or not, a lawyer's failure to file a petition for discretionary review does not constitute ineffective assistance of counsel. The United States Supreme Court has held that criminal defendants do not have a constitutional right to counsel to pursue applications for its review. *Ross v. Moffitt*, 417 U.S. 600 (1974). It has further held that, because a defendant has no constitutional right to counsel to pursue applications for certiorari, he can't be deprived of the effective assistance of counsel by his counsel's failure to file the application timely. *Wainwright v. Torna*, 455 U.S. 586 (1982). Accordingly, this allegation of ineffective assistance is without merit.

IV. and V. JURY INSTRUCTIONS

The petitioner next contends that his constitutional rights were violated when the trial court refused to issue

jury instructions on second-degree murder and voluntary intoxication. We first note that the trial court's refusal to give an instruction on second degree murder was raised in the direct appeal of this case and overruled. King, 718 S.W.2d at 245. This issue has therefore been previously determined and we need not reconsider it here. T.C.A. § 40-30-112(a). As to the trial court's refusal to give an instruction on voluntary intoxication, this was a matter appropriate to the direct appeal of the petitioner's case. His failure to raise it there constitutes a waiver of this issue. T.C.A. § 40-30-112(b). *See House v. State*, 911 S.W.2d 705, 714 (Tenn.1995). Moreover, as noted above, an instruction on voluntary intoxication was not warranted in this case. This issue is without merit.

*18 The petitioner next asserts that the trial court's jury instruction on reasonable doubt violated his due process rights. Specifically, he contests the trial court's description of "reasonable doubt" as meaning "an inability ... to let the mind rest easily as to the certainty of guilt" and that it requires proof "to a moral certainty."[20] This issue was not raised in the petitioner's motion for new trial or on direct appeal. Accordingly, it has been waived. T.C.A. § 40-30-112(b). Additionally, similar instructions have repeatedly been held to pass constitutional muster. *See, e.g. State v. Nichols*, 877 S.W.2d 722, 734 (Tenn.1994); *Pettyjohn v. State*, 885 S.W.2d 364 365-66 (Tenn.Crim.App.); *State v. Hallock*, 875 S.W.2d 285, 294 (Tenn.Crim.App.1993). *See also State v. Michael Dean Bush*, No. 03C01-9403-CR-00094, Cumberland County (Tenn.Crim.App. filed Feb. 12, 1996, at Knoxville). This issue is without merit.

VI. PROSECUTORIAL MISCONDUCT

The petitioner also claims that his due process rights were violated by the prosecution's "offering inadmissible, irrelevant and inflammatory evidence" during both the guilt and penalty phases of his trial. Of course, issues concerning the admissibility of evidence, prosecutorial misconduct and the necessity of a mistrial, must all be addressed on direct appeal or they are waived. T.C.A. § 40-30-112(b). And, to the extent that the petitioner's concerns about the presentation of evidence and prosecutorial argument were reviewed on direct appeal, they have been previously determined and need not be re-examined by this Court. T.C.A. § 40-30-112(a). Accordingly, this issue is without merit in this proceeding.

VII. CUMULATIVE ERROR

In his last issue, the petitioner contends that he is entitled to a new trial and/or a new sentencing hearing based upon the cumulative errors which occurred during his trial. A review of our Supreme Court's decision in the direct appeal of the petitioner's convictions and sentence reveals that it found only three errors to have been committed during the trial: the admission of Lori Eastman Carter's testimony; the State's cross-examination of the petitioner concerning his juvenile offenses; and the trial court's failure to define the word "torture" in its instruction to the jury on the "heinous, atrocious or cruel" aggravating circumstance. It further found each of these errors to have been harmless. In our review of the alleged errors which are properly before us in this post-conviction proceeding, we have determined that the admission of Sexton's confession and the use of the felony murder aggravator *may* have been error, but were also harmless. Even when viewed cumulatively, we do not find that the sum total of these errors robbed the petitioner of a fair trial at either the guilt or penalty phases. This issue is without merit.

*19 Having found no reversible error in the lower court's ruling on this petition for post-conviction relief, we affirm the judgment below. The sentence of death will be carried out as provided by law on the 22nd day of September, 1997, unless otherwise ordered by this Court, or other proper authorities.

All Citations

Not Reported in S.W.2d, 1997 WL 416389

Footnotes

1 The petitioner was also convicted of aggravated kidnapping. This conviction was set aside by the trial court on March 8, 1985.

2 Don King testified during the sentencing hearing that he had also had sex with the victim while they were at his trailer. The only proof that the victim's sex with either Don King or the petitioner was anything other than consensual was the victim's question to the petitioner, as reported in his confession to the police.

3 In *Middlebrooks*, our Supreme Court held that "when the defendant is convicted of first-degree murder solely on the basis of felony murder, the aggravating circumstance set out in Tenn.Code Ann. §§ 39-2-203(i)(7) (1982) and 39-13-204(i)(7)(1991), does not narrow the class of death-eligible murderers sufficiently under the Eighth Amendment to the U.S. Constitution, and Article I, § 16 of the Tennessee Constitution because it duplicates the elements of the offense. As a result, we conclude that Tenn.Code Ann. § 39-2-203(i)(7) is unconstitutionally applied under the Eighth Amendment to the U.S. Constitution and Article I, § 16 of the Tennessee Constitution where the death penalty is imposed for felony murder." 840 S.W.2d at 346.

4 However, the opinion does not indicate whether Hines was either indicted for or convicted of any other offenses.

5 The term "torture" as used in this aggravating circumstance has been defined by our Supreme Court as "the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious." *State v. Williams*, 690 S.W.2d 517, 529 (Tenn.1985).

6 This case is distinguishable from *State v. Christopher S. Beckham*, No. 02C01-9406-CR-00107, Shelby County (Tenn.Crim.App. filed Sept. 27, 1995, at Jackson), perm. to appeal granted and remanded for resentencing (Tenn.1996). In *Beckham*, the victim had been handcuffed and driven around in a pick-up for two hours and then taken out of the truck and shot in the head while begging for his life. This Court held that the "especially heinous" aggravating circumstance was not supported by sufficient evidence because "[what] happened while ... the appellant, and the victim were riding around in the truck is pure speculation. The fact that there was a time lapse between the abduction of the victim and the actual murder does not alone support a finding that the victim was mentally tortured." In contrast, being locked in the trunk of a car is obviously and profoundly different in its capacity to cause mental suffering than being held as a passenger in a vehicle, even while handcuffed.

7 As read to the jury by TBI agent David Davenport.

8 As read to the jury by agent Davenport.

9 *See, State v. Blackmon*, 701 S.W.2d 228, 233 (Tenn.Crim.App.1985).

10 Sexton's confession also included a single reference to the petitioner having choked the victim prior to imprisoning her in the trunk of her car. In light of the other proof supporting this factor, we find that this single reference-not mentioned by the State during its closing arguments at sentencing-was insignificant as to this factor.

11 Specifically, Sexton testified that, when the petitioner came and got him at 5:30 or 6:00 a.m. on the morning of the murder, he was "coherent," "not high," and "normal."

12 Included in the petitioner's confession were the statements, "I think me and the girl did two hits of acid and a couple of [Quaa]ludes.... I was pretty messed up."

13 The trial court also cited two later cases, *State v. Vanzant*, 659 S.W.2d 816 (Tenn.Crim.App.1983), and *State v. Troutt* (unpublished). In the trial court's words, these later cases "reaffirm[ed]" and "reiterat[ed]" the holding of *Harrell*.

14 While defense counsel may have erred in raising the possibility of this defense during opening statement, the petitioner has failed to prove that this tactic probably affected the jury's verdict.

15 Dr. Auble testified that she and her associates had evaluated the petitioner in October 1991.

16 Of those portions of Dr. Auble's testimony stressed in the petitioner's briefs as "valuable mitigation evidence," we find only two statements which might have benefitted the petitioner at his sentencing hearing and which were not otherwise indicated by the proof: that the petitioner is "easily led, if he is under stress," and that he "perceived himself as getting advice" from Sexton about what to do. We find that this evidence, even if it had been introduced at trial, would not have helped the petitioner. As discussed more fully above, the petitioner's claims at the sentencing hearing that the murder was Sexton's idea were rendered virtually meaningless in light of his confession and his admission during cross-examination.

17 We question whether a jury would be less inclined to impose the death penalty on an individual who has been convicted of repeated violent acts, including two murders, and that tends to misinterpret people's actions as hostile." One obvious conclusion to be drawn from this psychological insight is that, given the opportunity, the individual may again misinterpret innocent actions as hostile and respond with violence. It is within the realm of every juror's experience and common sense that prisoners-even those imprisoned for life-may get such later opportunities, either through parole (since the sentence of life without parole was not available at the time the petitioner was sentenced) or through escape.

18 The defense attorney was responding to a question by Mr. Bob Jolley, one of the assistant district attorneys who prosecuted this case at trial.

19 Also, as set forth earlier in this opinion, we agree that this issue "wouldn't hunt" insofar as it would not have changed our Supreme Court's ruling on the issue of the admission of juvenile offenses.

20 The reasonable doubt instruction given during the guilt phase was "Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the

certainty of guilt. Reasonable doubt does not mean a captious, possible or imaginary doubt. In order to convict a defendant of any criminal charge, every element of proof required to constitute the offense must be proven to a moral certainty, but absolute certainty of guilt is not demanded by the law." At the penalty phase, it was "Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of your findings. You are the sole and exclusive judges of the credibility of the witnesses and the weight to be given to the evidence presented."

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APPENDIX H

989 S.W.2d 319
Supreme Court of Tennessee,
at Knoxville.

Terry Lynn KING, Appellant,

v.

STATE of Tennessee, Appellee.

April 12, 1999.

Synopsis

After defendant's convictions for armed robbery and felony murder and his sentence of death were affirmed on direct appeal, 718 S.W.2d 241, defendant sought post-conviction relief. The trial court, Knox County, Mary Beth Leibowitz, J., denied relief. Defendant appealed. The Court of Criminal Appeals affirmed. Appeal was granted. The Supreme Court, Barker, J., held that: (1) State's use of felony murder aggravating circumstance, in addition to three other aggravators, to support death penalty for felony murder conviction was harmless error; (2) any *Bruton* error from admission of codefendant's confession in joint trial was harmless; and (3) assistance of defense counsel was not ineffective despite in change in trial strategy, failure to obtain mental health expert opinions at earlier date, failure to ensure recording of bench conferences, and failure to learn of prior false rape accusation by victim.

Affirmed.

Attorneys and Law Firms

*321 Charles W. Fels & Wade V. Davies, Ritchie, Fels & Dillard, Knoxville, Tennessee, Kenneth F. Irvine, Jr., Eldridge, Irvine & Hendricks, Knoxville, Tennessee, for Appellant.

John Knox Walkup, Attorney General & Reporter, Michael E. Moore, Solicitor General, John P. Cauley, Assistant Attorney General, Nashville, Tennessee, Randall Eugene Nichols, District Attorney General, for Appellee.

***322 OPINION**

BARKER, J.

We granted this post-conviction appeal to review the appellant's conviction of felony murder and the sentence of death based, in part, on the felony murder aggravating circumstance. The appellant requests this Court to clarify the *Howell* harmless error analysis used in *State v. Hines*, 919 S.W.2d 573, 583–84 (Tenn.1995), and to address whether the *Howell* analysis requires a comprehensive review of cumulative errors in the record. The appellant also alleges ineffective assistance of counsel and contends that his case should have been severed from his co-defendant's under *Cruz v. New York*, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987).

For the reasons that follow, we conclude that any *Middlebrooks* error in this case, for use of the felony murder aggravating circumstance, was harmless beyond a reasonable doubt. Although *Howell* requires us to review the record for factors that may have influenced the imposition of the death sentence,[1] we hold that such review need not incorporate a comprehensive analysis of alleged cumulative errors. We find no reversible error and affirm the judgments of the trial court and the Court of Criminal Appeals.

BACKGROUND

The appellant's criminal history reveals a pattern of violent behavior that has ultimately lead him to a position on death row. In this case, the appellant and co-defendant Randall Sexton[2] were convicted of felony murder and aggravated robbery of Diana K. Smith.[3] The evidence at trial was that on July 31, 1983, the appellant and Ms. Smith spent the afternoon together drinking beer, ingesting hallucinogenic drugs, and engaging in sexual intercourse. At some point during the day, Ms. Smith accused the appellant of raping her. The appellant responded that "he knew what he would do," whereupon he forced Ms. Smith into the trunk of her own car and drove to Mr. Sexton's residence. With Mr. Sexton following in a separate vehicle, the appellant drove Ms. Smith to a remote location in Knox County. The appellant ordered Ms. Smith to get out of the trunk and lie on the ground. He then shot her at close range in the back of the head with Mr. Sexton's high-powered rifle.

After the two men disposed of the body, they took Ms. Smith's car and other items that she had on her person. The body was discovered several days later in the Asbury quarry in Knox County. During the police investigation, both the

appellant and Mr. Sexton made written statements to the police implicating themselves in the crime.

At the sentencing phase of trial, the jury sentenced the appellant to death based upon four aggravating circumstances: (1) the murder was committed by the appellant while he was engaged in committing rape, robbery, larceny, or kidnapping of the victim; (2) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; (3) the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the appellant; and (4) the appellant was previously convicted of one or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person. Tenn.Code Ann. § 39-2-203(i)(7), (5), (6), and (2) (1982).

Following his unsuccessful direct appeal to this Court,[4] the appellant filed a post-conviction petition[5] alleging, among other things, that he was convicted and sentenced to death ***323** based in part on an invalid felony murder aggravator, that his trial counsel were ineffective, and that his joint trial with Mr. Sexton violated *Cruz v. New York*. In addition, he argued that he was entitled to a new trial and/or a new sentencing hearing based upon cumulative errors in the record.

The trial court conducted an evidentiary hearing and dismissed appellant's post-conviction petition. The trial court found a *Middlebrooks* error based upon appellant's conviction of felony murder and the State's use of the felony murder aggravating circumstance. However, the court determined that the error was harmless in light of the three remaining valid aggravating circumstances. On the joint trial issue, the court found that even if *Cruz v. New York* applies retroactively, the joint trial with Mr. Sexton was harmless error based upon the overwhelming evidence of appellant's guilt. Lastly, the court found that the appellant failed to prove that his counsel were ineffective at trial or on direct appeal. The trial court found no reversible error and held that appellant's claim of cumulative error was without merit.

The Court of Criminal Appeals affirmed the judgment of the trial court. The intermediate appellate court determined, however, that there was no *Middlebrooks* error because the underlying felony used to support the felony murder conviction may have differed from the felonies found by the jury to support the felony murder aggravator. The court noted that the felony murder conviction was based upon the kidnapping and murder of Ms. Smith. The possible underlying felonies listed to support the felony murder aggravator were kidnapping, rape, larceny, and robbery.

Relying in part on this Court's decision in *State v. Hines*, 919 S.W.2d 573, 583–84 (Tenn.1995), the intermediate appellate court concluded that the appellant was in a class of death eligible offenders demonstrably smaller and more blameworthy than the class addressed in *Middlebrooks*. The court, therefore, held that the use of the felony murder aggravator was not error in this case.

DISCUSSION

In this post-conviction proceeding, the appellant has the burden of proving the allegations in his petition by a preponderance of the evidence. *State v. Benson*, 973 S.W.2d 202, 207 (Tenn.1998).[6] The factual findings of the trial court are conclusive on appeal unless the evidence preponderates against the judgment. *Butler v. State*, 789 S.W.2d 898, 899 (Tenn.1990); *State v. Buford*, 666 S.W.2d 473, 475 (Tenn.Crim.App.1983).

I.

The appellant first contends that the Court of Criminal Appeals misapplied the principles announced in *Hines*, 919 S.W.2d at 583–84, to determine that there was no *Middlebrooks* error. He argues that the court effectively created a new non-statutory aggravating circumstance that "the accused committed the murder in the course of committing multiple felonies."

It is now a well-known principle that when a defendant is convicted of first degree murder solely on the basis of felony murder, the use of the felony murder aggravating circumstance to support a death sentence, without more, fails to sufficiently narrow the class of death-eligible offenders. *State v. Middlebrooks*, 840 S.W.2d 317, 346 (Tenn.1992).[7] The majority of the Court in *Middlebrooks* based that decision upon a determination that the felony murder aggravator contains language that is virtually identical to the statutory definition of felony murder.[8]

***324** At the time of the killing in this case, the felony murder aggravator read as follows:

> (7) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb.

Tenn.Code Ann. § 39–2–203(i)(7) (1982).[9]

In comparison, Tenn.Code Ann. § 39–2–202(a) (1982) defined first degree felony murder as "every murder ... committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb."

The duplicative language in the above provisions has served as the basis for finding *Middlebrooks* error in cases where the underlying felony used to support a felony murder conviction was also used to support the felony murder aggravator. In a case that followed *Middlebrooks*, however, this Court addressed for the first time whether it was error to rely on the felony murder aggravator when an additional or different felony supported the aggravating circumstance, but was not the underlying felony for the felony murder conviction. *State v. Hines*, 919 S.W.2d 573 (Tenn.1995).

The defendant in *Hines* was convicted of felony murder based upon the victim's death during the course of an armed robbery. *Id.* at 576. The jury sentenced the defendant to death based in part on the felony murder aggravating circumstance. *Id.* at 577.[10] The felonies relied upon to support the felony murder aggravator were robbery, larceny, and rape. *Id.* at 583.

The Court in *Hines* reiterated concern for applying aggravating circumstances and any mitigating circumstances so as to narrow the class of death eligible offenders in capital cases. *Id.* at 583. A majority of the Court[11] determined, however, that when a felony not underlying the felony murder conviction is used to support the felony murder aggravator, there is no duplication, and hence the narrowing function is sufficiently performed. *Id.* The majority held that absent any duplication, there is no constitutional prohibition against the use of the felony murder aggravator to support the imposition of the death penalty for a felony murder conviction. *Id.*

The majority in *Hines* noted that duplication may have occurred in that case since armed robbery was the basis for the felony murder conviction and was also included for the jury's consideration of the felony murder aggravator. *Id.* The majority, therefore, conducted the harmless error analysis under *Howell* to address the possible *Middlebrooks* error. *See Hines*, 919 S.W.2d at 583–84.

The appellant's case is remarkably similar to the circumstances in *Hines*. The appellant was convicted of felony murder based upon his act of killing Ms. Smith during the course of a kidnapping. The felonies relied upon to support the felony murder aggravating circumstance were kidnapping, rape, larceny, and robbery.

The Court of Criminal Appeals relied on *Hines* to address whether the use of the felony murder aggravator violated *Middlebrooks*. The court properly noted that the jury may have relied on the felonies of rape, larceny, and robbery to impose the felony ***325** murder aggravator, which would have avoided any duplication problem under *Middlebrooks*. However, the court went further to conclude that there was no *Middlebrooks* error since the appellant was engaged in multiple felonies at the time he killed Ms. Smith. According to the court, the appellant was in a class of death-eligible offenders smaller and more blameworthy than the class at issue in *Middlebrooks*.

We agree with the Court of Criminal Appeals that the appellant is a death eligible offender. However, to the extent that the court found no *Middlebrooks* error, we must respectfully disagree. As discussed in *Hines*, the mere fact that multiple felonies were listed by the State to support the felony murder aggravator does not eliminate the possible duplication error under *Middlebrooks*. Where, as in the instant case, there is no clear showing of which felonies the jury considered to impose the felony murder aggravator, we cannot presume that no *Middlebrooks* error occurred. In appellant's case, the jury may have relied on the kidnapping felony in part to convict the appellant of felony murder and to find the felony murder aggravating circumstance. If that occurred, then the use of the felony murder aggravator is error under *Middlebrooks*.

On the premise that the jury improperly relied on the kidnapping felony at sentencing, we shall conduct a *Howell* harmless error analysis. The *Howell* analysis requires us to determine beyond a reasonable doubt whether the appellant's sentence would have been the same had the jury given no weight or consideration to the felony murder aggravating circumstance. 868 S.W.2d at 260–62. It is important to

examine the entire record for the presence of factors which potentially influenced the sentence imposed. These include, but are not limited to, the number and strength of remaining valid aggravating circumstances, the prosecution's argument at sentencing, the evidence admitted to establish the felony murder aggravator, and the nature, quality, and strength of any mitigating evidence. *Id.* at 261.

Our examination of the record in accordance with the foregoing principles demonstrates that the use of the felony murder aggravator, if error, was harmless beyond a reasonable doubt. The remaining three aggravating circumstances were properly applied and strongly supported by the evidence.[12] First, there is no dispute that the appellant has prior felonious convictions that involve violence or threat of violence to the person. *See* Tenn.Code Ann. § 39–2–203(i)(2) (1982). In 1983, the appellant was convicted of felony murder and aggravating kidnapping based upon a criminal episode in Grainger County. Moreover, he was convicted of assault with intent to commit aggravated kidnapping for criminal conduct in Knox County that occurred only three days after the murder of Ms. Smith.

The appellant argues that the (i)(2) aggravator was somehow tainted by the State's introduction of his juvenile convictions at the sentencing hearing. We disagree. As this Court determined on direct appeal, the introduction of the juvenile records, while improper, had no bearing on the outcome of appellant's trial. His prior convictions as an adult reflect complete disregard for human life and strongly support the (i)(2) aggravator. The use of the juvenile record was harmless, and the (i)(2) aggravator was properly used to impose the death sentence.

Second, as the appellant admitted both before trial and at the sentencing hearing, he kidnapped and murdered Ms. Smith to avoid an allegation and possible charge of rape. *See* Tenn.Code Ann. § 39–2–203(i)(6). The evidence at trial reflected that the appellant spent the afternoon with Ms. Smith drinking alcohol, ingesting drugs, and having sexual intercourse. At some point, Ms. Smith asked the appellant why he had raped her. There is no dispute that appellant's subsequent criminal conduct against Ms. Smith was a reaction to Ms. Smith's accusation.

***326** The appellant nevertheless contends that the (i)(6) aggravator was tainted by the testimony of appellant's ex-girlfriend, Lori Eastman Carter. Ms. Carter testified during the guilt phase that the appellant had previously assaulted her and attempted to kill her. On direct appeal, this Court determined that the testimony should have been excluded as irrelevant, but that any error was harmless beyond a reasonable doubt. The appellant now claims that the testimony improperly served as the factual basis for the (i)(6) aggravator. We disagree. The appellant's own admissions fully support the aggravator without any consideration of Ms. Carter's testimony. There was no error in the jury's finding of that aggravator.

Third, the jury found that the murder was especially heinous, atrocious, and cruel in that it involved torture or depravity of mind. *See* Tenn.Code Ann. § 39–2–203(i)(5). The appellant argued on direct appeal and contends now that this aggravator is invalid because the trial court did not define "torture." In the direct appeal, this Court held that there was no prejudicial error in the trial court's charge on the (i)(5) aggravator. The appellant offers no valid reason why that determination should be disturbed now.

As the Court of Criminal Appeals noted, the evidence supports the jury's finding that the murder was especially heinous, atrocious, and cruel. The appellant kept Ms. Smith trapped in the trunk of her own car for at least forty-five (45) minutes before the shooting. After driving to the remote wooded area, the appellant ordered Ms. Smith to get out of the trunk and lie face down in the weeds. The appellant had the rifle in his possession and began placing brush on top of Ms. Smith. She begged him not to shoot her and offered money to spare her life. When she asked about her fate, the appellant responded that other guys were coming to have sexual intercourse with her.

The appellant ordered Ms. Smith to look away from him while she was lying in the weeds. He then shot her at close range in the back of the head. We agree with the courts below that the manner of Ms. Smith's death involved severe mental pain and anxiety as contemplated by the (i)(5) aggravator and as defined by this Court in *State v. Williams*, 690 S.W.2d 517, 529 (Tenn.1985).

The next step under the *Howell* analysis is to review whether the prosecution placed undue emphasis on the felony murder aggravator during the closing argument at sentencing. The record reflects that the prosecution referred to four aggravating circumstances during his closing argument. He emphasized the manner in which the jury was to consider and weigh the aggravating circumstances together with any evidence of mitigation. In briefly discussing the aggravators,

the prosecution mentioned the felony murder aggravator only once in the context of the closing argument. No more weight or emphasis was given to that aggravator than was given to the other three aggravating circumstances.

Moreover, aside from evidence at the guilt phase of trial, no additional evidence was submitted by the prosecution to establish the felony murder aggravator. At the sentencing hearing, the prosecution presented evidence only of appellant's previous convictions in Grainger County and Knox County. Therefore, we conclude that the prosecution did not rely unduly or introduce improper evidence concerning the felony murder aggravator at sentencing.

Lastly, under *Howell*, we must review the nature, quality, and strength of any mitigating evidence in appellant's case. At the sentencing hearing, the appellant relied on four mitigating circumstances: (1) the murder was committed while the appellant was under the influence of extreme mental or emotional disturbance; (2) the victim was a participant in the appellant's conduct or consented to the act; (3) the appellant was only twenty-one years old at the time of the crime; and (4) the capacity of the appellant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment. Tenn.Code Ann. § 39–2–203(j)(2), (3), (7), (8) (1982).

*327 The appellant emphasized the detrimental effects of alcohol abuse and mind altering drugs, such as LSD and quaaludes. There was evidence that the appellant had been taking those substances on the day of the murder. Also, the appellant presented evidence of his social history through his own testimony and the testimony of family members, a childhood friend, and a guidance counselor from his former high school. The evidence showed that the appellant suffered emotional trauma and became involved in excessive drug use at an early age, following the death of his father. By the age of fourteen, the appellant was a regular user of cocaine, valium, and alcohol. He had a poor academic record during his school years and he dropped out of high school after failing the ninth grade.

The jury considered the above evidence and found beyond a reasonable doubt that it did not outweigh the strong showing of aggravating circumstances. After our independent review of the record, we are confident that the weighing of the mitigating evidence against the three remaining aggravators would have resulted in the same sentence of death. Accordingly, we conclude that appellant's sentence of death would have been the same had the jury given no weight or consideration to the felony murder aggravator and affirm the capital sentence.

II.

We shall next address whether the *Howell* analysis requires a comprehensive review of the cumulative effect of errors in the record, including errors that have already been previously determined, or waived, on direct appeal. The appellant contends that there are numerous "harmless" errors in the record, that when considered cumulatively and in the context of *Howell*, render his death sentence fundamentally unfair and invalid.

The appellant essentially asks this Court to conduct a harmless error analysis within the context of the *Howell* harmless error analysis. This we decline to do. As we discussed above, the *Howell* analysis is conducted in cases where the jury's consideration of the felony murder aggravator constitutes error under *Middlebrooks*. The crux of the *Howell* analysis is to review the record to determine whether the appellant's sentence of death is appropriate based upon the relative strengths and weaknesses of the valid aggravating circumstances and any mitigating circumstances. We focus upon those circumstances, including the evidence used to support them, and determine beyond a reasonable doubt whether the sentence would have been the same had the jury given no weight or consideration to the felony murder aggravator.

In conducting the *Howell* analysis, courts must conduct an intensive review of the sentencing phase of trial to address the strength of the remaining aggravating circumstances, the nature, quality and strength of any mitigating evidence, the prosecution's argument at sentencing, and the evidence used to establish the felony murder aggravator. Assignments of error concerning the above factors are certainly relevant to the analysis under *Howell*.

We have conducted the *Howell* analysis in this case, addressing the alleged errors as to the remaining aggravating circumstances and other factors at sentencing. Based upon our review, we concluded beyond a reasonable doubt that the appellant's sentence would have been the same regardless

of the felony murder aggravator. That deliberate process has been approved by this Court in *Howell* and *Hines* to preserve the principles of individualized sentencing and to ensure that the appellant is a death-eligible offender. We find no reason to modify that analysis here.

The *Howell* decision was never intended to be a vehicle for reviewing or relitigating harmless errors or errors that have been previously determined or waived. Particularly, in post-conviction proceedings, courts must adhere to the limitations set forth in the Post–Conviction Procedure Act. Under the Act of 1989, a post-conviction hearing may extend to "all grounds the petitioner may have, except those grounds which the court finds should be excluded because they have been waived or previously determined." Tenn.Code Ann. § 40–30–111 (Repealed 1995)

***328** A ground for relief is " 'waived' if the petitioner knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented." Tenn.Code Ann. § 40–30–112(b)(1).[13] A ground for relief has been " 'previously determined' if a court of competent jurisdiction has ruled on the merits after a full and fair hearing." Tenn.Code Ann. § 40–30–112(a).

With those principles in mind, we decline to give comprehensive review to any errors that were adjudicated on direct appeal or errors that the appellant could have, but did not raise until this proceeding. Having determined that any sentencing error is harmless beyond a reasonable doubt, we again conclude that appellant's sentence of death should stand.

III.

The appellant next contends that the trial court's refusal to sever his case from Mr. Sexton's was prejudicial error requiring a reversal of his conviction under *Cruz v. New York*. Neither the appellant nor Mr. Sexton testified during the guilt phase of trial. The State, however, introduced into evidence a written confession made by each defendant during the police investigation. The trial court instructed the jury that each confession could be considered as evidence only against the confessor. The appellant argues that the admission of Mr. Sexton's confession violated his Confrontation Clause rights and constitutes reversible error under *Cruz*.

In the direct appeal, this Court upheld the admission of Mr. Sexton's confession based on the United States Supreme Court's decisions in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), and *Parker v. Randolph*, 442 U.S. 62, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979). The well-established rule from *Bruton* is that a defendant is deprived of his Confrontation Clause rights when a codefendant's incriminating confession is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant. In *Parker*, the Supreme Court modified the reach of *Bruton* where multiple defendants in a joint trial each have a confession that is introduced into evidence. The Court held that there was no Confrontation Clause violation under *Bruton* if the defendant's own confession recited essentially the same facts as the confession of the nontestifying codefendant. 442 U.S. at 73, 99 S.Ct. at 2140.[14]

Relying on the decision in *Parker*, this Court examined the confessions of both the appellant and Mr. Sexton and determined that they were "interlocking in the crucial facts of time, location, felonious activity, and awareness of the overall plan or scheme" of the killing. This Court, therefore, held that there was no *Bruton* violation and that the trial court did not err in denying the severance motion under Rule 14(c) of the Tennessee Rules of Criminal Procedure.

Following appellant's direct appeal, the United States Supreme Court decided the case of *Cruz v. New York*. In *Cruz*, the Court overruled the "interlocking" confession exception in *Parker*, reasoning that a codefendant's confession may be "devastating"[15] to the defendant and violative of the Confrontation Clause, even if it overlaps material facts in a confession made by the defendant. *Cruz*, 481 U.S. at 193, 107 S.Ct. at 1719. The Court, therefore, held that "where a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant, ... the Confrontation Clause bars its admission at their joint trial, ***329** even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him." *Id.*

The appellant requests this Court to apply *Cruz* retroactively and to hold that the admission of Mr. Sexton's confession was constitutional error. Having carefully reviewed the progeny of cases under *Bruton*, we find it unnecessary to determine whether *Cruz* has retroactive application in this case. We are confident that, even under the principles of *Cruz*, the admission of Mr. Sexton's confession was harmless beyond a reasonable doubt. *Schneble v. Florida*, 405 U.S. 427, 432,

92 S.Ct. 1056, 1060, 31 L.Ed.2d 340 (1972); *Harrington v. California*, 395 U.S. 250, 254, 89 S.Ct. 1726, 1728–29, 23 L.Ed.2d 284 (1969); *State v. Porterfield*, 746 S.W.2d 441, 446 (Tenn.1988), *cert. denied*, 486 U.S. 1017, 108 S.Ct. 1756, 100 L.Ed.2d 218 (1988).

Mr. Sexton's written confession described his involvement in the killing from the time the appellant arrived at his residence with Ms. Smith locked in the trunk of her own car. In his confession, Mr. Sexton stated that the appellant was not going to release Ms. Smith because he was afraid "he would get in the same mess he got into with Lori [Eastman Carter]." Mr. Sexton admitted that the appellant took his high-powered rifle and that the two men drove separately out to a rural area in Knox County.

Before reaching their destination, both Mr. Sexton's vehicle and the vehicle driven by the appellant ran out of gasoline. In his confession, Mr. Sexton stated that he purchased five (5) dollars of gasoline for his car and five (5) dollars of gasoline in a separate container for Ms. Smith's car. The two men then drove a few miles up the road to a wooded area where the shooting was to occur. Mr. Sexton's confession describes in pertinent part:

> I left and took a funnel back to the Publix station and got me a Coke. I drove back down to the creek and drove into the wooded area. I saw the Camaro. It was stuck. I helped [the appellant] get it unstuck. Terry told me he had already killed the girl. Terry told me he laid the girl down on her stomach, and that while she was begging for him not to, he shot her in the back of the head. Terry told me he had covered the body up with some weeds.

Having carefully reviewed the written confessions made by the appellant and Mr. Sexton, we again note that they are substantially similar as to the facts and circumstances involving the murder. The appellant's confession, however, contains greater detail concerning the actual shooting. His confession provides in pertinent part:

> I pulled up in a wooded area and got stuck. I made the girl get out of the trunk. I had loaded the rifle and was pointing it at her. This [sic] was daylight. And I took the girl over into some weeds and made her lay down. She asked me what I was going to do, if I was going to kill her. I said, no, some more guys are going to screw you. I started covering her up with weeds. I told her this was so she couldn't be seen. I still had the gun. She was laying facedown. I picked up the rifle, held it approximately 3 feet from the back her head and shot her. [Mr. Sexton] wasn't there. We got the [victim's car] unstuck after [Mr. Sexton] came back. We then went through her personal belongings. I burned her pictures and I.D. and panties. [Mr. Sexton] walked over and looked at her. We started to leave, but decided to bury her. We started digging a grave next to the fence, but the ground was too hard, and we quit. We discussed what to do and decided to wrap her in a tent [Mr. Sexton] had in the back of his car, [sic] weight her and put her in the water. We decided we would do it the next morning.

It is clear that the admission of Mr. Sexton's confession into evidence would have constituted a *Bruton* violation under the rationale of *Cruz*. Nevertheless, the mere finding of a *Bruton* error in the course of the trial "does not automatically require reversal of the ensuing criminal conviction." *Schneble*, 405 U.S. at 430, 92 S.Ct. at 1059. In cases where the properly admitted evidence of guilt is overwhelming, and the prejudicial effect of the codefendant's confession is insignificant by comparison, then the improper admission is harmless beyond a reasonable *330 doubt. *Id.*See *also Porterfield*, 746 S.W.2d at 446.

In this case, the objective evidence against the appellant was overwhelming. Jerry Childers, an acquaintance of the appellant, testified that the appellant came to his house on August 1, 1983, to inquire if he knew anyone who wanted to buy parts from a 1979 Camaro. Mr. Childers testified that the appellant confessed to having killed the woman who owned the Camaro after she threatened to charge him with rape.[16] The appellant told Mr. Childers that he ordered the woman to get out of the trunk of her own car and to lie face down on the ground. The woman begged the appellant not to shoot her and offered him money. The appellant told Mr. Childers that he told the woman to turn away from him, and when she complied, he shot her in the back of the head.

Mr. Childers testified that a few days after talking to the appellant, he went to the location where appellant had said the shooting occurred. While walking in the area, he found an object with hair on it. He then gave the information he had to Detective Herman Johnson of the Knox County Sheriff's Department and to Agent David Davenport with the Tennessee Bureau of Investigation. The two officers met Mr. Childers at the professed shooting location and searched the area, finding pieces of bone, hair, and bloodstains. A later more thorough search revealed bullet fragments and additional bone fragments.[17]

There is no question that the evidence of appellant's guilt was overwhelming even without consideration of the two written confessions. Considering the above evidence, coupled with appellant's properly admitted confession, any *Bruton* error was harmless beyond a reasonable doubt.

IV.

The appellant next contends that he received ineffective assistance of counsel at both the trial and the direct appeal. To prevail on a claim of ineffective counsel in this proceeding, the appellant must prove by a preponderance of the evidence that the advice given or services rendered by his counsel fell below the range of competence demanded of attorneys in criminal cases. *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn.1975). He must also demonstrate prejudice by showing a reasonable probability that but for counsels' error, the result of the trial proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); *Goad v. State*, 938 S.W.2d 363, 369 (Tenn.1996).

The appellant first claims that his trial counsel abandoned the defense theory of voluntary intoxication after having introduced it to the jury during the opening statement.[18] Defense counsel Robert Simpson stated during his opening remarks that Ms. Smith willingly spent time with the appellant and appellant's cousin, Don King, on the day of the killing. While at Don King's trailer, the three drank large quantities of alcohol and ingested various mind-altering drugs, including LSD and quaaludes. Counsel stated that:

> We think the proof will show that whatever happened to Mrs. Smith, Mr. King's involvement was the product of an incredible quantity of intoxicants. And we think the proof will show that he cannot be held ***331** legally responsible for all of his actions to the degree the State would ask you, simply because of the vast quantities of intoxicants that he consumed. And the proof is going to be very clear on that point.

During the guilt phase of trial, proof of appellant's alcohol and drug consumption was admitted into evidence through the testimony of Jerry Childers[19] and the admission of appellant's police confession. Counsel Simpson testified at the post-conviction hearing that he did not call Don King to testify at the guilt phase because he strategized that Don King's testimony would hurt the defense.[20] Moreover, counsel stated that he decided to abandon the use of voluntary intoxication to defend appellant's actions after the testimony of appellant's ex-girlfriend, Lori Eastman Carter.

Ms. Carter testified for the prosecution, over the objection of defense counsel, that the appellant had attempted to kill her on October 13, 1982. According to Ms. Carter, the appellant hit her with a slapstick numerous times while repeatedly asking her "how it felt to be dying, so that the next woman he killed he would know how she felt." Ms. Carter testified that the appellant was sober when he attacked her with the slapstick.

Counsel Simpson testified at the post-conviction hearing that Ms. Carter's testimony was unexpected and devastating to appellant's case. Counsel had attempted to contact Ms. Carter for an interview before trial, but was unable to locate her. During appellant's case in chief, counsel attempted to rebut her testimony by calling appellant's cousin, James King, who testified that he and the appellant had taken Ms. Carter to St. Mary's Hospital for treatment. In addition, the defense called Karen Greeg, Ms. Carter's sister, who testified that Ms. Carter could not be believed, even under oath.

Counsel Simpson testified that the theory of voluntary intoxication was rendered futile after Ms. Carter's testimony. Counsel decided to challenge Ms. Carter's credibility during the guilt phase of trial and to rely on the evidence of intoxication during the sentencing.

The appellant relies on *State v. Zimmerman*, 823 S.W.2d 220, 224–26 (Tenn.Crim.App.1991), to argue that the change in the defense theory constituted ineffective assistance of counsel. His reliance on that decision is misplaced. In *Zimmerman*, the defense theorized initially that the defendant was a battered and abused wife who had killed her husband in self defense. *Id.* at 224. Opening statements were made to the jury based upon that theory, and the defense planned to call the defendant as a witness. *Id.* at 224–25.

During the course of the trial, however, counsel advised the defendant to "shut down" the defense and to decline from testifying. *Id.* Zimmerman's counsel apparently reasoned that a conviction was inevitable, even though no surprise or new evidence had been presented by the State. *Id.* The Court of Criminal Appeals held that the sudden change in defense strategy constituted ineffective assistance of counsel under the circumstances of that case. *Id.* at 224. The court particularly noted that nothing changed or transpired

during the course of trial to warrant counsel's peremptory abandonment of the sound defense theory. *Id.* at 224, 226.

In appellant's case, Counsel Simpson testified that he revised the defense theory solely in response to the surprise testimony of Ms. Carter. Counsel objected to the introduction of her testimony, but was forced to deal with it after the trial court allowed it into evidence. Although we acknowledge that defense attorneys should strive to present a consistent theory of defense at trial, we must avoid judging the tactical decisions of counsel in hindsight. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn.1982). We have reviewed ***332** the circumstances from counsel's perspective at the time and conclude that the change in strategy does not rise to the level of ineffective assistance.

The appellant next contends that his counsel were ineffective in failing to obtain the assistance of mental health experts in a timely fashion. Counsel Simpson testified that he began the process of locating a mental health expert on January 9, 1985. At that time, the trial was set to begin on January 21, 1985, but was subsequently postponed to January 23, 1985, due to weather. Counsel obtained the services of Dr. Martin Gebrow, a psychiatrist, on January 15, 1985, and the doctor evaluated appellant on the first day of trial.[21] Counsel subsequently made a strategic decision not to use Dr. Gebrow's evaluation because the appellant had initially lied about the circumstances of the murder[22] and because Dr. Gebrow opined that the appellant was an impulsive person who enjoyed hurting people.

Counsel Simpson testified at the post-conviction hearing that the defense was unable to obtain a second opinion due to the time constraints of trial. Counsel instead relied upon their own investigation of the appellant, including appellant's familial relations and his social history. Through the testimony of appellant's family and friends,[23] the defense presented evidence that the appellant suffered emotional trauma arising from the death of his father when appellant was eight (8) years old. The appellant became involved in harmful activities, including sniffing gasoline and alcohol abuse, at an early age. By the age of fourteen (14), he was a regular user of alcohol, LSD, cocaine, and valium. His scholastic record was poor and he dropped out of high school after failing the ninth grade.

Dr. Robert Booher, a medical doctor specializing in "addictionology," testified for the defense regarding the harmful effects of LSD and other hallucinogenic drugs. Defense counsel intended to use Dr. Booher's testimony together with evidence that the appellant had taken LSD and quaaludes on the day of the killing. The evidence supported part of the defense's mitigation theory that the murder was committed while the appellant was under an extreme mental disturbance and that appellant's capacity to appreciate the wrongfulness of his actions was substantially impaired by mental disease, defect or intoxication. Tenn.Code Ann. § 39–3–203(j)(2), (8) (1982).

The appellant argues that the mitigating evidence could have been strengthened if his counsel had initiated the mental health evaluations earlier before the start of trial. He relies on the testimony of psychologist Dr. Pamela Auble, who conducted a mental evaluation of him after his convictions.

Dr. Auble testified at the post-conviction hearing that the appellant is an impulsive, immature person who has difficulty trusting other people. She opined that based upon appellant's experiences as a child, he also has a strong sense of insecurity and often perceives other people as being hostile towards him. This impulsive and insecure nature, according to Dr. Auble, does not necessarily lead the appellant to act violently. However, she opined that when the appellant is confronted with a stressful situation, he is unable to think clearly before reacting. Dr. Auble further stated that appellant's impulsive behavior is exacerbated by his abuse of drugs and alcohol.

***333** Based upon Dr. Auble's review of the facts in this case, she opined that the appellant unleashed a lifelong build-up of anger and hostility when Ms. Smith accused him of rape.[24] Dr. Auble testified that the appellant probably looked to Mr. Sexton for advice and then carried out the killing because of his impulsive nature and poor judgment.

The trial court reviewed Dr. Auble's testimony and determined that her evaluation provided little information in addition to that previously discovered by Dr. Gebrow. The trial court concluded, therefore, that even if defense counsel had initiated the mental health evaluations earlier, there was no proof that a more favorable report would have been obtained. We find no evidence to preponderate against that finding. Moreover, the record reflects that counsel presented evidence through lay witnesses that was remarkably similar to the information provided by Dr. Auble. Appellant's counsel were not ineffective on this issue.[25]

The appellant next contends that his counsel were ineffective in failing to thoroughly investigate Ms. Smith's past. According to appellant, counsel should have discovered public records concerning a prior false allegation of rape made by Ms. Smith.

Counsel Simpson testified at the post-conviction hearing that he investigated Ms. Smith's past and her involvement with the appellant before the killing. He stated that he did not rely heavily on Ms. Smith's past because he did not want the jury to focus on her as a victim. Counsel was aware that Ms. Smith had lived in McMinn County, but he had no information concerning her prior rape allegation.

We agree with the Court of Criminal Appeals that the prior rape allegation would not have benefited the appellant at trial. If anything, the information would have strengthened the prosecution's evidence of motive against him. Moreover, Ms. Smith's character was not at issue, and there has been no showing that information of her prior rape allegation would have been admissible. Therefore, we cannot say that defense counsel were ineffective for failing to discover it.

The appellant next argues that his counsel were ineffective for failing to ensure the recording of all bench conferences during trial. Counsel Simpson testified that he mistakenly believed the bench conferences were being recorded throughout the trial. Only a few of the numerous bench conversations between counsel and the trial judge were preserved for the record.

The State concedes that counsels' failure to preserve all of the bench conferences was an instance of deficient performance. The State argues, however, that the appellant has not demonstrated any prejudice as a result of the deficiency. We agree. In order to demonstrate prejudice here, the appellant must show a reasonable probability that one or more of the unrecorded bench conferences resulted in an adverse ruling that constituted reversible error. The appellant has not satisfied that burden. Accordingly, this issue is without merit.

The appellant next contends that counsel should have called him as a witness at the pre-trial suppression hearing. Counsel Simpson testified that appellant's value and credibility as a witness was seriously undermined by his violent criminal history. Based upon that premise, counsel believed that any benefit from allowing the appellant to testify at the suppression hearing would have been outweighed by the risk of consequences from the prosecution's in-depth cross-examination. Counsel testified that he wanted to make the prosecution wait until trial before taking a crack at the appellant.

As correctly noted by both the trial court and the Court of Criminal Appeals, counsel ***334** made a tactical decision not to call the appellant as a witness at the suppression hearing. We will not second guess that strategy on appeal with the benefit of twenty-twenty hindsight. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065; *Hellard*, 629 S.W.2d at 9. Counsel made a calculated decision, and there has been no showing of ineffectiveness.

The appellant next contends that his counsel were ineffective in failing to object to the admission of Mr. Sexton's suicide letter at the sentencing hearing. Mr. Sexton had written the letter in contemplation of suicide while he and the appellant were incarcerated at the Fort Pillow State Prison.[26] During the cross-examination of Mr. Sexton at the sentencing hearing, the State introduced the letter into evidence.

Mr. Sexton testified that he had discussed the contents of the letter with the appellant prior to writing it, and that the appellant had encouraged him to include a statement that he, Mr. Sexton, was responsible for Ms. Smith's death, not the appellant. Appellant's counsel relied on the letter in his closing argument to undermine Mr. Sexton's credibility and to demonstrate that the appellant had not used the letter as a defense. Counsels' strategy in part was to show that the appellant had admitted to the killing and was remorseful.

We agree with the Court of Criminal Appeals that counsel made a tactical decision to use the suicide letter, not only to attack Mr. Sexton's credibility, but to bolster the credibility of the appellant. Again, we decline to second guess the strategy chosen by defense counsel. Counsel knew about the suicide letter before trial and chose to use it during the sentencing phase to undermine the testimony of Mr. Sexton.

The appellant further contends that his counsel were ineffective for failing to challenge on direct appeal the State's improper use of a dismissed juvenile charge during the sentencing phase of trial. At sentencing, the State cross-examined the appellant as to his criminal conduct as a juvenile.[27] His juvenile record revealed two armed robbery convictions and a dismissed charge of rape. Appellant's counsel challenged on direct appeal the admission of the two armed robbery convictions, but apparently omitted the State's use of the dismissed rape charge.

This Court has previously held that there is no constitutional requirement for an attorney to raise every issue on appeal. *Campbell v. State*, 904 S.W.2d 594, 596–97 (Tenn.1995). *See also Jones v. Barnes*, 463 U.S. 745, 750–51, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987 (1983). "Generally, the determination of which issues to present on appeal is a matter which addresses itself to the professional judgment and sound discretion of appellate counsel." *Cooper v. State*, 849 S.W.2d 744, 747 (Tenn.1993). Counsel is given considerable leeway to decide which issues will serve the appellant best on appeal, and we should not second guess those decisions here. *Campbell*, 904 S.W.2d at 597.

Counsel Simpson testified that the defense carefully examined the trial record and listed every issue that might have merit on appeal. Counsel included a challenge on direct appeal to the State's use of the armed robbery convictions, and this Court held that admission to be harmless error. Under those circumstances, we cannot say that counsels' omission of the dismissed rape charge was ineffective.

CONCLUSION

Based upon the foregoing, we conclude that any *Middlebrooks* error in this case, for use of the felony murder aggravator, was harmless beyond a reasonable doubt. We have addressed the concerns of individualized sentencing under *Middlebrooks* and *Howell* and conclude that the appellant was properly sentenced to death. Finding no reversible *335 error, we affirm the judgments of the trial court and the Court of Criminal Appeals.

Unless stayed by this Court or other appropriate authority, the appellant's sentence of death shall be carried out as provided by law on the 16th day of August, 1999.

ANDERSON, C.J., DROWOTA, BIRCH, and HOLDER, JJ., concur.

All Citations

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Footnotes

1 *State v. Howell*, 868 S.W.2d 238, 260–61 (Tenn.1993).

2 Mr. Sexton was tried together with the appellant for the crimes against Ms. Smith. Mr. Sexton was sentenced to life in prison plus a term of 125 years for his convictions. His appeal is not now before this Court.

3 The appellant was also convicted of aggravated kidnapping based upon the same criminal episode. The trial court granted a judgment of acquittal on that conviction.

4 *State v. King*, 718 S.W.2d 241 (Tenn.1986).

5 The appellant filed his post-conviction petition under the pre--1995 Post Conviction Procedure Act. Tenn.Code Ann. § 40–30–101 to –124 (Repealed 1995).

6 Under the new post-conviction procedure act, petitioners have the burden of proving factual allegations by clear and convincing evidence. Tenn.Code Ann. § 40–30–210(f) (1997).

7 There has been some question concerning whether the decision in *Middlebrooks* was required under the cruel and unusual punishment provision of the federal constitution. Following *Middlebrooks*, a majority of this Court has held that the *Middlebrooks* decision was based independently on Article I, section 16 of the Tennessee Constitution. *State v. Bigbee*, 885 S.W.2d 797, 816 (Tenn.1994); *Howell*, 868 S.W.2d at 259 n. 7.

8 Justice Drowota and former Justice O'Brien dissented as to the holding in *Middlebrooks*. *See* 840 S.W.2d at 347–350 (Drowota, J., dissenting).

9 The felony murder aggravator has since been amended to provide that, "[t]he murder was knowingly committed, solicited, directed, or aided by the defendant, while the defendant had a substantial role in committing or attempting to commit, or was fleeing after having a substantial role in committing or attempting to commit, any" of the enumerated felonies. Tenn.Code Ann. § 39–13–204(i)(7) (Supp.1995).

10 The jury also found that the defendant had been previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person, and that the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind. *Id.* (referring to Tenn.Code Ann. § 39–2–203(i)(2),(5) (1982)).

11 O'Brien, Sp., J. wrote for the majority, concurred in by Anderson, C.J., Drowota and Birch, J.J. Former Justice Reid dissented. *See Hines*, 919 S.W.2d at 584–88 (Reid, J., dissenting).

12 It is important to note that under the law in effect at the time of this trial, a jury could have imposed a sentence of death upon finding only one aggravating circumstance beyond a reasonable doubt, so long as there were no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance. Tenn.Code. Ann. § 39–2–203(g) (1982). In this case, the jury found four aggravating circumstances.

13 Section (b)(2) further provides that "[t]here is a rebuttable presumption that a ground for relief not raised in any such proceeding which was held was waived." Tenn.Code Ann. § 40–30–112(b)(2).

14 A plurality of the Court in *Parker* reasoned that when the defendant has confessed to the crime, his case is already "devastated," so that the codefendant's confession "will seldom, if ever, be of the 'devastating' character referred to in *Bruton*," and impeaching the codefendant's confession on cross-examination "would likely yield small advantage." *Parker*, 442 U.S. at 73, 99 S.Ct. at 2139.

15 The Court acknowledged that the codefendant's confession may actually enhance the reliability of the defendant's confession, and increase the likelihood of a conviction, where the two confessions are interlocking. *Cruz*, 481 U.S. at 193, 107 S.Ct. at 1719.

16 The appellant testified at the post-conviction hearing that he had told four people about the shooting, including Mr. Childers, before he was questioned by police.

17 Additional evidence was provided by Agent Davenport and Tommy Heflin, a firearms examiner for the T.B.I. Agent Davenport testified that after the appellant made a statement, appellant took him and other officers to the place where the Camaro was hidden and to where he had hidden the vehicle's license plate. Also, appellant showed the officers where the shooting occurred and where he and Mr. Sexton had submerged the body in the quarry. Mr. Heflin testified that, based upon his examination, at least two bullets had been fired from a rifle with the same firing characteristics as Mr. Sexton's rifle. He further stated that the intact metal bullet jacket found at the scene had been fired from Mr. Sexton's rifle.

18 The appellant was represented at trial by attorneys Robert R. Simpson and Joseph M. Tipton. Mr. Tipton has been a respected judge on the Tennessee Court of Criminal Appeals since 1990. He did not testify at the post-conviction hearing.

19 Mr. Childers was an acquaintance of the appellant. He testified at trial that the appellant came to his house on August 1, 1983, to inquire whether he would purchase automotive parts from a 1979 Camaro. During his visit, the appellant told Mr. Childers that he had killed the owner of the vehicle after she threatened to charge him with rape. The appellant confessed the details of the killing to Mr. Childers, including the events that preceded the crime.

20 The appellant had apparently confessed his involvement in the murder to Don King.

21 Dr. Gebrow retained the services of a psychologist, Dr. David Mindes, to conduct neurological testing of the appellant. Those results were included in the evaluation report submitted to defense counsel by Dr. Gebrow.

22 At the time of the evaluation, the appellant claimed that Mr. Sexton was responsible for the death of Ms. Smith. The appellant and Mr. Sexton had fabricated this false version of the crime through a suicide letter that Mr. Sexton had left in his jail cell at the Fort Pillow State Prison. In the letter, Mr. Sexton confessed that he was the killer and that the appellant was not responsible for Ms. Smith's death. Mr. Sexton's suicide attempt failed, and both he and the appellant eventually admitted that the information in the letter was false.

23 Defense witnesses in that regard included the appellant, his mother, his brother, a childhood friend, and a guidance counselor from appellant's former high school. Additional witnesses for the defense during the sentencing phase were Dr. Robert Booher and two correctional officers from the Fort Pillow State Prison.

24 Dr. Auble testified that there were three reasons why the rape accusation triggered appellant's anger: (1) the appellant was fearful of rejection relating back to the death of his father; (2) his sister-in-law had accused him of rape when he was a juvenile; and (3) he had been involved in an abusive relationship with his ex-girlfriend, Lori Eastman Carter.

25 We further note that portions of Dr. Auble's testimony supported the State's theory that the appellant committed the murder to avoid prosecution for rape. It is questionable whether defense counsel would have used that information even if it had been available.

26 The letter was found at the prison facility after Mr. Sexton attempted to commit suicide.

27 As mentioned above, the State also introduced appellant's criminal record as an adult. The appellant had a prior conviction of felony murder, aggravated kidnapping, and joyriding. Also, he was convicted of assault with the intent to commit aggravated kidnapping based upon a criminal episode that occurred three days after the murder of Ms. Smith.

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APPENDIX I

2011 WL 3566843
Only the Westlaw citation is currently available.
United States District Court, E.D. Tennessee.

Terry Lynn KING, Petitioner,

v.

Ricky BELL, Warden, Respondent.

No. 3:99–cv–454.

|

Aug. 12, 2011.

Attorneys and Law Firms

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Jennifer L. Smith, Office of the Attorney General, Nashville, TN, for Respondent.

MEMORANDUM

LEON JORDAN, District Judge.

*1 This is a petition for the writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner Terry Lynn King ("King") is incarcerated on death row. The matter is before the court on the respondent's motions for summary judgment and King's response thereto. For the following reasons, the motions for summary judgment will be **GRANTED** and the petition for habeas corpus relief will be **DENIED.**

I. *Factual Background and Procedural History*

The respondent has provided the court with copies of the relevant documents as to King's direct appeal and post-conviction proceedings. [Court File No. 10, Notice of Filing Documents, Addenda 1–4].[1] King was convicted of first degree murder in the perpetration of simple kidnaping by confinement (felony murder), and armed robbery.[2] He was sentenced to death on the felony murder conviction and to 125 years imprisonment on the armed robbery conviction. The convictions and sentences were affirmed on direct appeal. *State v. King*, 718 S.W.2d 241 (Tenn.1986).[3]

King next filed a petition for post-conviction relief, which was denied after an evidentiary hearing. The Tennessee Court of Criminal Appeals affirmed the denial of post-conviction relief. *King v. State*, No. 03C01–9601–CR–00024, 1997 WL 416389 (Tenn.Crim.App. July 14, 1997), *perm. app. granted, id.* (Tenn. Dec. 8, 1997). The Tennessee Supreme Court granted King's application for permission to appeal, pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure, and subsequently affirmed the denial of post-conviction relief. *King v. State*, 989 S.W.2d 319 (Tenn.), *cert. denied*, 528 U.S. 975 (1999). King then filed the pending petition for federal habeas corpus relief.

The facts that led to King's convictions are set forth in detail in the opinion of the Tennessee Supreme Court on direct appeal as follows:

> The victim of both crimes for which defendant stands convicted was Diana K. Smith. Mrs. Smith left her home on Sunday afternoon, July 31, 1983, to go to a nearby McDonald's to get food for her family. Her automobile, a 1979 Camaro, was found on August 4, 1983, off the road in a heavily wooded area near Blaine, Tennessee.
>
> On August 6, 1983, Mrs. Donna Allen went to the Asbury quarry in Knox County to swim. She noticed a strange odor coming from a yellow tarpaulin in the water near the bank, and reported the circumstance to the sheriff's office. On following-up Mrs. Allen's report, officers found the body of a white female in an advanced state of decomposition. The body was later identified as being that of Mrs. Smith. Death was from one or more shots fired into the back of Mrs. Smith's head from a high-powered weapon.
>
> In the course of the police investigation, the attention of the officers was focused on Terry King and Randall Sexton when Jerry Childers[4], an acquaintance of King, reported a conversation he had had with King and what he had found when he followed up on the conversation.

*2 Jerry Childers testified that Terry King came to his house on the afternoon of Monday, August 1, 1983, and inquired as to whether Childers knew anyone that wanted to buy parts from a 1979 Camaro. According to Childers, King told Childers he had killed the woman who owned the automobile after she threatened to charge defendant with rape. According to Childers, defendant said he made the woman get out of the car trunk where he had confined her and lie face down on the ground, that the woman faced

the defendant and begged him not to shoot her and offered money, and that he ordered her to turn her head away from him. When she did, he shot her in the back of the head. Defendant also told Childers he took forty dollars from the woman as well as taking her automobile.

The following Friday, which was August 5, 1983, Childers related defendant's story to Mr. Buford Watson. On Sunday, Childers went to the location defendant had described as the place of the killing and found something with hair on it. Childers then gave the information he had to Detective Herman Johnson of the Knox County Sheriff's Department and T.B.I. agent, David Davenport. In following up the report, the officers met Childers near Richland Creek and searched the area, finding pieces of bone, hair, and bloodstains. A later more thorough search turned up bullet fragments and additional bone fragments.

In the course of the police investigation, defendant and co-defendant, Sexton, were interviewed by the officers. Both gave written statements detailing the events of the night of July 31, 1983. Neither defendant testified in the guilt phase of the trial, but their statements were introduced in evidence. Both defendants testified in the sentencing phase of the trial and repeated in substance the facts set forth in the statements given the police officers in their statements.

The statements of King and Sexton were markedly similar for the time the two men were together. King's statement was the more comprehensive since it covered the entire period of time he was with Mrs. Smith. According to defendant, he and his cousin, Don King, picked up Mrs. Smith at the Cherokee Dam on Sunday, July 31, 1983. Defendant drove Mrs. Smith in her automobile to the nearby house trailer of his cousin, arriving there around 7:00 p.m. Don King drove his own automobile to the trailer. Shortly after arriving at the trailer, defendant called Eugene Thornhill who came to the trailer and left with defendant to obtain LSD and quaaludes. Defendant said he and Mrs. Smith took the drugs. Thereafter, defendant, Don King, and Eugene Thornhill had sex with Mrs. Smith.

After staying at the trailer for several hours, defendant and Mrs. Smith left, in her automobile, with defendant driving. They went to a wooded area, where they again had sex. From there, they went to a service station for gas. Mrs. Smith got out of the automobile and grabbed the keys. Defendant told her to get back in the automobile and she did so. The defendant drove Mrs. Smith back to the wooded area, where they again had sex and the defendant took forty dollars from Mrs. Smith. According to defendant, Mrs. Smith then asked "why did you all rape me?" Defendant stated that he knew then what he was going to do. He told Mrs. Smith to get into the trunk of the automobile. When she did, defendant drove to Sexton's house and told Sexton he had a woman in the trunk of the automobile and needed Sexton's help. Defendant got a rifle from Sexton and also a shovel. Defendant and Sexton then left the Sexton home in separate automobiles. After making a stop at a Publix station to purchase gas, defendant and Sexton drove to a wooded area near Richland Creek in Knox County. Defendant drove the 1979 Camaro off the road and became stuck. He then made Mrs. Smith get out of the automobile trunk and pointed the loaded rifle at her. Defendant made Mrs. Smith lie down on the ground, assuring her that he was not going to kill her, that others were coming to have sex with her. Sexton left in his automobile to return a funnel to the gas station. While he was gone, defendant shot Mrs. Smith in the back of the head. On Sexton's return, and after getting the Camaro unstuck, the two went through Mrs. Smith's effects, burning her identification. They then attempted to bury the body, but gave up because of the hardness of the ground. The next morning, defendant and Sexton wrapped Mrs. Smith's body in a tent, weighted it with cinder blocks and dumped it in the Asburn quarry. Mrs. Smith's automobile was hidden near Sexton's house.

*3 Agent Davenport testified that after making his statement, the defendant took him and other officers to the place where the Camaro was hidden and defendant also showed them where he had hidden the automobile license plate in a hollow tree. The defendant also showed the officers where he had placed the body in the quarry and where the shooting occurred.

Tommy Heflin, a firearms examiner for the Tennessee Bureau of Investigation, testified that he had examined the .30 Marlin rifle belonging to Sexton, the metal bullet jacket, and fragments recovered from the scene of the killing. According to Mr. Heflin, the intact metal jacket had been fired from Sexton's rifle and the fragments were fired from a rifle with the same rifling characteristics as Sexton's rifle. Mr. Heflin was of the opinion that at least two bullets had been fired.

> Dr. Joseph Parker, who performed an autopsy on the body of Mrs. Smith, testified that death was due to an extensive head injury consistent with gunshot wounds from a high-powered rifle.
>
> Over objection, the State also presented evidence through Lori Eastman Carter that defendant had attempted to kill her on October 13, 1982. According to Mrs. Carter, King hit her with a slapstick numerous times, while repeatedly asking her "how it felt to be dying, so that the next woman he killed he would know how she felt." Mrs. Carter testified that she lost consciousness. When she came to, she was still in her automobile with her hair rolled up in the window. She further testified that she heard defendant tell his cousin that he had killed her and wanted James King to help him put her in a quarry and burn her automobile.
>
> James King disputed Mrs. Carter's version of events, saying that defendant came to King's home to get him to follow defendant to St. Mary's Hospital as Mrs. Carter was ill and needed treatment.
>
> Karen Greeg, Lori Carter's sister, testified that Mrs. Carter can not be believed, even under oath.
>
> The defendant offered no other evidence in the guilt phase of the trial.
>
> On considering the evidence, the jury found that the defendant and Randall Sexton were guilty of murder in the first degree in killing Diana K. Smith in the perpetration of a simple kidnapping by confinement and of armed robbery. In our opinion the evidence is overwhelming and supports the jury's verdict.

State v. King, 718 S.W.2d at 243–45.

With respect to the imposition of the death penalty, the Tennessee Supreme Court also detailed the supporting facts:

> As to the sentencing phase of the trial, the State relied upon evidence introduced during the guilt phase. In addition, the State introduced evidence showing that the defendant and Sexton had been convicted previously of murder in the first degree by use of a firearm in perpetration of armed robbery and of aggravated kidnapping, both offenses being committed on July 2, 1983, less than a month before the defendants killed Mrs. Smith.[5] The State also introduced evidence that the defendant had been convicted of an assault with intent to commit aggravated kidnapping, which was committed only three days after the killing of Mrs. Smith.

*4 In response, the defendant called numerous witnesses who testified that he had been a heavy user of drugs and alcohol for a number of years, and that their use could be expected to and did affect his judgment and actions. Further, there was expert medical proof that the effect of LSD and quaaludes, which defendant claimed to have taken on July 31, 1983, could be expected to continue for 8 to 12 hours after their ingestion. There was also evidence that defendant was remorseful, and that he had caused no disciplinary problems at the prison and had been moved from close security to medium security.

> Both the defendant and Sexton took the witness stand in the sentencing proceeding, and their testimony substantially followed the statements they gave the police. The defendant did deny forming the intent to kill Mrs. Smith before he went to Sexton's house, insisting that he went there only for advise on what to do. He further testified that he got the rifle at Sexton's direction and formed the intent to kill Mrs. Smith after he took her to the place she was shot. Defendant stated he related the events of Mrs. Smith's death to Jerry Childers because it was bothering him. He denied telling Childers that Mrs. Smith begged for her life. On cross-examination, defendant admitted committing two armed robberies in January, 1980, when he was a juvenile.
>
> Sexton testified generally in accord with the statement he had given the police. He denied having advised defendant to kill Mrs. Smith, but admitted that he gave defendant the weapon used in the murder and accompanied him to the death scene, knowing that Mrs. Smith was confined in the trunk of the automobile driven by the defendant. Sexton also helped in trying to dispose of the automobile, in destroying all Mrs. Smith's identification and in disposing of her body.
>
> On considering this evidence, the jury returned the sentence of death against the defendant. Sexton was sentenced to life imprisonment, evidently because he was not present at the moment of the killing and did not shoot Mrs. Smith. In imposing the sentence of death on the defendant the jury expressly found that:
>
> (1) the defendant was previously convicted of one or more felonies, other than the present charge, which involved the use of threat of violence to the person;

> (2) the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind;
>
> (3) the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest of the defendant or another; and
>
> (4) the murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any rape, robbery, larceny or kidnapping. The jury also found that there was no mitigating circumstance sufficiently substantial to outweigh the statutory aggravating circumstances found by the jury.

***5** *Id.* at 247–48 (internal citations omitted).

II. *Standard of Review*

The Attorney General contends that several of King's claims are procedurally defaulted. As to the remaining claims, the Attorney General argues that the respondent is entitled to judgment as a matter of law based on the findings of the Tennessee state courts.

A. Procedural Default

The doctrine of procedural default is an extension of the exhaustion doctrine. A state prisoner's petition for a writ of habeas corpus cannot be granted by a federal court unless the petitioner has exhausted his available state court remedies. 28 U.S.C. § 2254. This rule has been interpreted by the Supreme Court as one of total exhaustion. *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982). Thus, each and every claim set forth in the federal habeas corpus petition must have been presented to the state appellate court. *Picard v. Connor*, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971). *See also Pillette v. Foltz*, 824 F.2d 494, 496 (6th Cir.1987) (Exhaustion "generally entails fairly presenting the legal and factual substance of every claim to all levels of state court review."). Moreover, the substance of the claim must have been presented as a federal constitutional claim. *Gray v. Netherland*, 518 U.S. 152, 162–63, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996).

King cannot file another state petition for post-conviction relief. Tenn.Code Ann. § 40–30–102(a). Accordingly, he has no remedy available to him in the Tennessee state courts for challenging his conviction and is deemed to have exhausted his state remedies.

It is well established that a criminal defendant who fails to comply with state procedural rules which require the timely presentation of constitutional claims waives the right to federal habeas corpus review of those claims "absent a showing of cause for the noncompliance and some showing of actual prejudice resulting from the alleged constitutional violation." *Wainwright v. Sykes*, 433 U.S. 72, 84, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). *Accord Engle v. Isaac*, 456 U.S. 107, 129, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982) ("We reaffirm, therefore, that any prisoner bringing a constitutional claim to the federal courthouse after a state procedural default must demonstrate cause and actual prejudice before obtaining relief.").

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

"When a state-law default prevents the state court from reaching the merits of a federal claim, that claim can ordinarily not be reviewed in federal court." *Ylst v. Nunnemaker*, 501 U.S. 797, 801, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991). Therefore, to excuse his procedural default, King must first demonstrate cause for his failure to present an issue to the state courts. "[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986).

B. State Court Findings

***6** Pursuant to 28 U.S.C. § 2254(d), King may not obtain federal habeas corpus relief with respect to a claim that was adjudicated on the merits in a state court proceeding unless the state court decision (1) was contrary to, or involved an unreasonable application of, clearly established federal law or

(2) was not reasonably supported by the evidence presented to the state court. In addition, findings of fact by a state court are presumed correct and King must rebut the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e).

The Supreme Court, in *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), clarified the distinction between a decision "contrary to," and an "unreasonable application of," clearly established Supreme Court law under § 2254(d)(1). A state court decision is "contrary to" Supreme Court precedent "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Id.* at 413. A state court decision "involves an unreasonable application of clearly established Federal law" only where "the state court's application of clearly established federal law was objectively unreasonable." *Id.* at 409. A federal habeas court may not find a state adjudication to be "unreasonable" "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411.

C. Motion for Summary Judgment

The respondent filed a motion for summary judgment and, after King filed his amended petition for the writ of habeas corpus, a second motion for summary judgment. It is well established that a motion for summary judgment, as provided in Rule 56 of the Federal Rules of Civil Procedure, is applicable to habeas corpus proceedings and allows the court to assess the need for an evidentiary hearing on the merits of the habeas petition. *See Blackledge v. Allison*, 431 U.S. 63, 80–81, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). Rule 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." "In considering a motion for summary judgment, the court must view the facts and all inferences to be drawn therefrom in the light most favorable to the nonmoving party." *60 Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir.1987). *See also Kochins v. Linden–Alimak, Inc.*, 799 F.2d 1128, 1133 (6th Cir.1986); *Securities and Exchange Commission v. Blavin*, 760 F.2d 706, 710 (6th Cir.1985).

The burden is on the moving party to conclusively show that no genuine issue of material fact exists. *Smith v. Hudson*, 600 F.2d 60, 63 (6th Cir.1979). Once the moving party presents evidence sufficient to support a motion for summary judgment, the nonmoving party is not entitled to a trial merely on the basis of allegations. The non-moving party must present some significant probative evidence to support its position. *White v. Turfway Park Racing Association, Inc.*, 909 F.2d 941, 943–44 (6th Cir.1990); *Gregg v. Allen–Bradley Co.*, 801 F.2d 859, 861 (6th Cir.1986).

"[S]ummary judgment should not be disfavored and may be an appropriate avenue for the "just, speedy and inexpensive determination" of an action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The moving party is entitled to judgment as a matter of law "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322.

III. *Claims for relief*

The court will consider King's claims for relief as presented in his amended petition for writ of habeas corpus and set forth below in bold, in turn and in light of the respondent's second motion for summary judgment.

I. The trial court's failure to grant a severance of co-defendants in this case violated the federal constitution under *Bruton/Cruz* and further violated Mr. King's right to due process at sentencing when the antagonistic defenses of co-defendant turned co-defendant's counsel into a private prosecutor.

A. The finding of guilt of first-degree murder was constitutionally infirm because of serious *Bruton/Cruz* errors which were demonstrably prejudicial to Terry King.

This claim specifically refers to the statement of co-defendant Sexton as it related to the testimony of Lori Eastman Carter ("Carter"). The Tennessee Court of Criminal Appeals summarized the issue as follows:

> The crux of the petitioner's argument is based on a single statement contained in Sexton's confession: "Terry said

> he wasn't going to let her go, because he was afraid he would get in the same mess he got into with Lori." This "same mess" was not specifically explained. However, Lori Eastman Carter testified during the guilt phase that the defendant had assaulted her in 1982 and that she had subsequently sworn out a warrant against him. She also testified that, during the assault, the petitioner had told her to "tell him how it felt to be dying, so that the next woman he killed he would know how she felt."

King v. State, 1997 WL 416389 at *7.

Neither King nor Sexton testified during the guilt phase of the trial, but their written statements were introduced into evidence; the trial court instructed the jury that each statement could only be considered as evidence against the defendant who made the statement. *State v. King*, 718 S.W.2d at 244; *King v. State*, 989 S.W.2d at 328.

In *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), the Supreme Court held that, in a joint trial where a co-defendant does not take the stand, the admission of the co-defendant's statement that inculpates the petitioner is a violation of the petitioner's right of cross-examination under the Confrontation Clause of the Sixth Amendment. *Id.* at 126. Nevertheless, the Supreme Court subsequently held that a *Bruton* violation can constitute harmless error in light of the weight of additional evidence against the defendant. *Harrington v. California*, 395 U.S. 250, 253, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969). As stated by the *Supreme Court in Schneble v. Florida*, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972):

> *8 The mere finding of a violation of the *Bruton* rule in the course of the trial, however, does not automatically require reversal of the ensuing criminal conviction. In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error.

Id. at 430.

On direct appeal, the Tennessee Supreme Court considered King's claim of a *Bruton* violation and found no error. The court specifically found, based upon *Parker v. Randolph*, 442 U.S. 62, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979), that there was no *Bruton* violation in the admitting Sexton's statement and thus the trial court did not err in refusing to grant a severance. *State v. King*, 718 S.W.2d at 247.

The *Bruton* rule proscribes, generally, the use of one co-defendant's confession to implicate the other as being violative of the nonconfessing co-defendant's Sixth Amendment right of confrontation. However, *Bruton* is not violated when the defendant confesses and his confession "interlocks" in material aspects with the confession of the co-defendant.

Recognizing these general statements of applicable law, defendant insists that the recitals in Sexton's statement that "Terry [the defendant] said he wasn't going to let her [the victim] go, because he was afraid he would get in the same mess he got into with Lori" and that the defendant told him he had "choked" the victim before placing her in the trunk of the car and later removed her from the trunk and shot her while she was begging for him not to did not "interlock" with the defendant's confession to police.

It is true defendant's confession to the police did not recite these facts, but his statement to Jerry Childress, also admitted in the trial, cured any material deficiency of the confession to the police. Childress testified that the defendant told him he killed the girl because "he had been in jail before, and he wasn't going back to jail" and that he put the victim in the trunk of his car, later made her get out of the car and lie on the ground, and put the gun to her head and shot her after she begged him not to shoot and offered him money to let her go.

> The inculpatory confessions of the defendant and co-defendant interlocking in the crucial facts of time, location, felonious activity, and awareness of the overall plan or scheme, we find no *Bruton* violation in the admission in evidence of the confessions. *See Parker v. Randolph, supra.* The confessions being admissible, it cannot be said that the trial court erred in failing to grant a severance of the defendants pursuant to Rule 14(c) of the Tennessee Rules of Criminal Procedure.

Id. (quoting *Parker v. Randolph*, 442 U.S. at 75) (other internal citations omitted).

Subsequent to the decision of the Tennessee Supreme Court on direct appeal, *Parker v. Randolph* was abrogated by the Supreme Court's decision in *Cruz v. New York*, 481 U.S. 186, 107 S.Ct. 1714, 95 L.Ed.2d 162 (1987). In *Cruz*, the Supreme Court expanded *Bruton* and held that "where a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant, the Confrontation Clause bars its admission at their joint

trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him." *Id.* at 193 (internal citation omitted). The Court specifically found an "interlocking" confession to be especially problematic and thus inadmissible. *Id.* at 192–93. Nevertheless, the Court noted that a *Bruton* violation still could be considered harmless under the standard in *Harrington v. California*. *Id.* at 194.

*9 In post-conviction proceedings, King again raised the *Bruton* issue in light of the intervening *Cruz* decision, which he argued should be applied retroactively. The Tennessee Court of Criminal Appeals declined to decide whether *Cruz* should be retroactive, noting that "[e]ven if it were, *Cruz* provides for a harmless error analysis where a codefendant's confession is admitted in violation of the Confrontation Clause." *King v. State*, 1997 WL 416389 at *7. The appellate court then found that the admission of Sexton's statement was harmless error "in light of the overwhelming evidence of [King's] guilt of felony murder." *Id.* at *9.

The Tennessee Supreme Court affirmed, stating "We are confident that even under the principles of *Cruz*, the admission of Mr. Sexton's confession was harmless beyond a reasonable doubt." *King v. State*, 989 S.W.2d at 329 (citing *Schneble v. Florida*, 405 U.S. 427, 432, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972); *Harrington v. California*, 395 U.S. 250, 254, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969); *State v. Porterfield*, 746 S.W.2d 441, 446 (Tenn.), *cert. denied*, 486 U.S. 1017, 108 S.Ct. 1756, 100 L.Ed.2d 218 (1988)). In doing so, the court first recited and compared the confessions of King and Sexton:

> Mr. Sexton's written confession described his involvement in the killing from the time the appellant arrived at his residence with Ms. Smith locked in the trunk of her own car. In his confession, Mr. Sexton stated that the appellant was not going to release Ms. Smith because he was afraid "he would get in the same mess he got into with Lori [Eastman Carter]." Mr. Sexton admitted that the appellant took his high-powered rifle and that the two men drove separately out to a rural area in Knox County.
>
> Before reaching their destination, both Mr. Sexton's vehicle and the vehicle driven by the appellant ran out of gasoline. In his confession, Mr. Sexton stated that he purchased five (5) dollars of gasoline for his car and five (5) dollars of gasoline in a separate container for Ms. Smith's car. The two men then drove a few miles up the road to a wooded area where the shooting was to occur. Mr. Sexton's confession describes in pertinent part:
>
> > I left and took a funnel back to the Publix station and got me a Coke. I drove back down to the creek and drove into the wooded area. I saw the Camaro. It was stuck. I helped [the appellant] get it unstuck. Terry told me he had already killed the girl. Terry told me he laid the girl down on her stomach, and that while she was begging for him not to, he shot her in the back of the head. Terry told me he had covered the body up with some weeds.
>
> Having carefully reviewed the written confessions made by the appellant and Mr. Sexton, we again note that they are substantially similar as to the facts and circumstances involving the murder. The appellant's confession, however, contains greater detail concerning the actual shooting. His confession provides in pertinent part:
>
> > I pulled up in a wooded area and got stuck. I made the girl get out of the trunk. I had loaded the rifle and was pointing it at her. This [sic] was daylight. And I took the girl over into some weeds and made her lay down. She asked me what I was going to do, if I was going to kill her. I said, no, some more guys are going to screw you. I started covering her up with weeds. I told her this was so she couldn't be seen. I still had the gun. She was laying facedown. I picked up the rifle, held it approximately 3 feet from the back her head and shot her. [Mr. Sexton] wasn't there. We got the [victim's car] unstuck after [Mr. Sexton] came back. We then went through her personal belongings. I burned her pictures and I.D. and panties. [Mr. Sexton] walked over and looked at her. We started to leave, but decided to bury her. We started digging a grave next to the fence, but the ground was too hard, and we quit. We discussed what to do and decided to wrap her in a tent [Mr. Sexton] had in the back of his car, [sic] weight her and put her in the water. We decided we would do it the next morning.

*10 *Id.*

The court then noted that, although "the admission of Mr. Sexton's confession into evidence would have constituted a *Bruton* violation" under *Cruz*, "the mere finding of a violation of the *Bruton* rule in the course of the trial, however, does not automatically require reversal of the ensuing criminal conviction." *Id.* (quoting *Schneble v. Florida*, 405 U.S. at 430). The court further noted that a *Bruton* violation may constitute harmless error "[i]n cases where the properly

admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison." *Id.* at 329–30. The court then summarized the additional evidence against King.

> In this case, the objective evidence against the appellant was overwhelming. Jerry Childers, an acquaintance of the appellant, testified that the appellant came to his house on August 1, 1983, to inquire if he knew anyone who wanted to buy parts from a 1979 Camaro. Mr. Childers testified that the appellant confessed to having killed the woman who owned the Camaro after she threatened to charge him with rape. The appellant told Mr. Childers that he ordered the woman to get out of the trunk of her own car and to lie face down on the ground. The woman begged the appellant not to shoot her and offered him money. The appellant told Mr. Childers that he told the woman to turn away from him, and when she complied, he shot her in the back of the head.
>
> Mr. Childers testified that a few days after talking to the appellant, he went to the location where appellant had said the shooting occurred. While walking in the area, he found an object with hair on it. He then gave the information he had to Detective Herman Johnson of the Knox County Sheriff's Department and to Agent David Davenport with the Tennessee Bureau of Investigation. The two officers met Mr. Childers at the professed shooting location and searched the area, finding pieces of bone, hair, and bloodstains. A later more thorough search revealed bullet fragments and additional bone fragments.

Id. at 330 (footnotes omitted).

In a footnote, the court recounted additional proof against King:

> Additional evidence was provided by Agent Davenport and Tommy Heflin, a firearms examiner for the T.B.I. Agent Davenport testified that after the appellant made a statement, appellant took him and other officers to the place where the Camaro was hidden and to where he had hidden the vehicle's license plate. Also, appellant showed the officers where the shooting occurred and where he and Mr. Sexton had submerged the body in the quarry. Mr. Heflin testified that, based upon his examination, at least two bullets had been fired from a rifle with the same firing characteristics as Mr. Sexton's rifle. He further stated that the intact metal bullet jacket found at the scene had been fired from Mr. Sexton's rifle.

Id. n. 17. The Tennessee Supreme Court thus concluded: "There is no question that the evidence of appellant's guilt was overwhelming even without consideration of the two written confessions. Considering the above evidence, coupled with appellant's properly admitted confession, any *Bruton* error was harmless beyond a reasonable doubt." *Id.*

***11** King insists that the admission of Sexton's confession was not harmless because it was used by the State with regard to Carter's testimony to explain King's subsequent actions with regard to Mrs. Smith. As the State points out, however, King has never denied that he was the one who killed Mrs. Smith and in fact confessed to the killing.

This court has reviewed the entire record of King's trial; the factual findings of the Tennessee Supreme Court are supported in the record. Based upon the foregoing, this court concludes that the determination by the Tennessee Supreme Court that the admission of Sexton's statement was harmless beyond a reasonable doubt was neither contrary to, nor did it involve an unreasonable application of, federal law as established by the Supreme Court in *Bruton*, *Harrington*, *Schneble*, and *Cruz*, given the overwhelming evidence against King. King is not entitled to relief on this claim.

B. The failure to grant a severance at the sentencing hearing deprived Mr. King of his federal right to due process because the sentencing scheme created an inherent and insurmountable antagonism between the co-defendants and required Sexton's counsel to become a private prosecutor against Mr. King and allowed Sexton's counsel to damage Mr. King in a fashion that would have been unavailable to the State had Mr. King received a separate trial.

King claims that the penalty phase of the trial was dominated by an inherent, statutory set of antagonistic defenses between the co-defendants by which the only way Sexton could defend himself was to argue that King was more culpable. King refers to two of the four mitigating factors requested by Sexton, which directly and adversely implicated King: that Sexton was an accomplice in a murder committed by another person and his participation was relatively minor, and that Sexton acted under extreme duress or the substantial domination of another person. According to King, Sexton's attorney was thus required by necessity to lambast King from every conceivable quarter, including cross-examining the State's witnesses about King's actions, calling witnesses that were not called by the State in an effort to impeach King, cross-examining King himself, soliciting testimony from Sexton that King appeared normal and sober on the day of the murder, and openly disparaging King's defense in final argument.

The Tennessee Court of Criminal Appeals considered and rejected these arguments in post-conviction proceedings:

> The petitioner also complains that his due process rights were violated during the penalty phase of the trial by the trial court's refusal to sever the defendants. We first note that the petitioner has cited no cases finding a due process violation resulting from a joint sentencing hearing. We acknowledge, however, that such violations are theoretically possible where the failure to sever renders the proceeding fundamentally unfair so as to violate due process. The petitioner contends that the joint trial rendered the sentencing phase fundamentally unfair because Sexton presented as mitigation that he had participated as a minor accomplice in the murder committed by the petitioner, and that he had acted under extreme duress or the substantial domination of the petitioner.
>
> *12 It was undisputed at both phases of the trial that the petitioner had actually killed the victim. It was also undisputed that the murder had been accomplished with Sexton's gun. The only significant difference in proof at sentencing with respect to Sexton's participation in the murder was whose idea it was to kill the victim. Sexton claimed it was the petitioner's; the petitioner claimed that it was Sexton's. Sexton's testimony on this point was unequivocal. The petitioner's was far less definite. More damning than anything Sexton stated, however, was first, the petitioner's own confession that, as soon as the victim had asked why they had raped her, he "knew what she was going to do, and [he] knew what [he] was going to do." Second, the petitioner admitted during cross-examination that he had "probably" killed the victim because she had mentioned rape and he became scared. Sexton's proof in mitigation of his own guilt paled in comparison with these admissions by the petitioner and we therefore find that Sexton's testimony on this issue did not render the petitioner's sentencing hearing fundamentally unfair.
>
> Nor was the hearing rendered fundamentally unfair by Sexton's testimony that the petitioner had appeared sober to him at the time the petitioner came and got him immediately prior to the murder. The petitioner testified about the quantity of drugs and alcohol which he had consumed prior to the murder, and Sexton did not dispute this testimony. The petitioner offered expert proof as to the likely effects of these substances upon him and Sexton did nothing to contest that testimony. In fact, Sexton admitted that, when he had first seen the petitioner at about 2:00 a.m. on the morning in question, he had appeared to be under the influence of something. While Sexton's testimony about the petitioner's demeanor at the time of the murder was prejudicial insofar as it undercut the petitioner's attempt to offer as mitigation that his capacity to appreciate the wrongfulness of his conduct was substantially impaired as a result of intoxication, we do not think it was so harmful as to render the sentencing hearing fundamentally unfair. The jury undoubtedly understood that each of these men was trying to save himself at the expense of the other, and evaluated their credibility accordingly.
>
> We have further examined the record of the sentencing hearing with respect to the petitioner's allegations of "the extreme antagonism of [Sexton's] counsel" and that Sexton's counsel "hurt [the petitioner] in ways that would have been improper for the State prosecutor to try." Our examination reveals no due process violation. The trial court's refusal to sever the defendants did not render the sentencing hearing fundamentally unfair as to the petitioner. This issue is without merit.

King v. State, 1997 WL 416389 at ——11–12 (internal citation and footnote omitted).

The factual findings of the Tennessee Court of Criminal Appeals are supported in the record. Based upon the foregoing, this court concludes that the determination by the appellate court that the failure to sever the defendants did not result in a fundamentally unfair sentencing hearing was neither contrary to, nor did it involve an unreasonable application of, federal law. *See, e.g., Zafiro v. United States*, 506 U.S. 534, 539, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993) ("Mutually antagonistic defenses are not prejudicial *per se.*").

> *13 A showing that a defendant would have a better chance of acquittal in a separate trial does not establish prejudice requiring severance. To show enough prejudice to require severance, a defendant must establish "substantial prejudice," "undue prejudice," or "compelling prejudice."
>
> Generally, persons indicted together should be tried together. Where the same evidence is admissible against all defendants, a severance should not be granted. However, severance is not required if some evidence is admissible against some defendants and not others. A defendant is not entitled to severance because the proof is greater against a co-defendant. Nor is a defendant entitled to a severance because a co-defendant has a criminal record.

> Hostility among defendants or the attempt of one defendant to save himself by inculpating another does not require that defendants be tried separately. Neither does a difference in trial strategies mandate separate trials. The burden is on defendants to show that an antagonistic defense would present a conflict "so prejudicial that defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty."

United States v. Warner, 971 F.2d 1189, 1196 (6th Cir.1992) (quoting *United States v. Davis*, 623 F.2d 188, 194–95 (1st Cir.1980)) (citations omitted). King is not entitled to relief on this claim.

C. Conclusion

King is not entitled to relief on his claims that the trial court's failure to grant a severance violated his constitutional rights either during the guilt phase or the penalty phase of the trial.

II. The unconstitutional use of aggravating circumstances at the trial requires the entry of a life sentence or a new sentencing hearing.

A. Introduction.

As previously noted, in imposing the death penalty as to King, the jury found the following aggravating factors:

> (1) the defendant was previously convicted of one or more felonies, other than the present charge, which involved the use of threat of violence to the person;
>
> (2) the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind;
>
> (3) the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest of the defendant or another; and
>
> (4) the murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any rape, robbery, larceny or kidnapping. The jury also found that there was no mitigating circumstance sufficiently substantial to outweigh the statutory aggravating circumstances found by the jury.

State v. King, 718 S.W.2d at 248 (internal citations to the Tennessee Code Annotated omitted).

B. Two of these four aggravating circumstances were invalid.

King first claims that the felony-murder aggravator was improperly considered by the jury, in light of the subsequent decision of the Tennessee Supreme Court in *State v. Middlebrooks*, 840 S.W.2d 317, 346 (Tenn.1992). In post-conviction proceedings, the Tennessee Supreme Court agreed with him: "It is now a well-known principle that when a defendant is convicted of first degree murder solely on the basis of felony murder, the use of the felony murder aggravating circumstance to support a death sentence, without more, fails to sufficiently narrow the class of death-eligible offenders." *King v. State*, 989 S.W.2d 319, 323 (Tenn.1999) (citing *Middlebrooks*).

*14 Despite finding a *Middlebrooks* error, however, the court concluded the error was harmless in light of the remaining aggravating factors.

> Our examination of the record in accordance with the foregoing principles demonstrates that the use of the felony murder aggravator, if error, was harmless beyond a reasonable doubt. The remaining three aggravating circumstances were properly applied and strongly supported by the evidence. First, there is no dispute that the appellant has prior felonious convictions that involve violence or threat of violence to the person. In 1983, the appellant was convicted of felony murder and aggravating [sic] kidnapping based upon a criminal episode in Grainger County. Moreover, he was convicted of assault with intent to commit aggravated kidnapping for criminal conduct in Knox County that occurred only three days after the murder of Ms. Smith.

Id. at 325 (footnote and internal citation omitted). In a footnote, the court noted that "under the law in effect at the time of this trial, a jury could have imposed a sentence of death upon finding only one aggravating circumstance beyond a reasonable doubt, so long as there were no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance." *Id.* n. 12 (citation omitted).

The determination by the Tennessee Supreme Court in this regard was based solely on state law, and thus was neither contrary to, nor did it involve an unreasonable application of, federal law. King is not entitled to relief on this claim.

King also contends that the trial court's instruction on the heinous, atrocious and cruel (HAC) aggravator, as set forth in Tenn.Code Ann. § 39–2–203(i)(5) (repealed),

was unconstitutional. During the penalty phase of the trial, the court instructed the jury that it could consider the following aggravating circumstance: The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind;[6] the court did not define the terms heinous, atrocious, or cruel. [Addendum 1, Transcript of the Trial, Vol. XIX, p. 946]. King claims this instruction was unconstitutionally vague and relies on *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988).

In *Maynard*, the Supreme Court held that the statutory aggravating circumstance that the murder was "especially heinous, atrocious, or cruel," without more, was unconstitutionally vague because it failed to furnish guidance to the jury in choosing between death and a lesser penalty. *Id.* at 363–64. The Court noted with approval, however, that a state court could restrict the HAC aggravator to murders "in which torture or serious physical abuse is present." *Id.* at 365.

Prior to *Maynard*, the Tennessee Supreme Court had narrowed the HAC aggravator by setting forth definitions of heinous, atrocious, cruel, torture, and depravity of mind:

> Our statute provides that it is *the murder* which must be *especially* heinous, atrocious, or cruel. The second clause of this statutory provision, *viz.*, "... in that it involved torture or depravity of mind," qualifies, limits and restricts the preceding words "especially heinous, atrocious or cruel." This second clause means that to show that the murder was especially heinous, atrocious or cruel the State must prove that it involved torture of the victim or depravity of mind of the killer.
>
> *15 "Torture" means the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious. In proving that such torture occurred, the State, necessarily, also proves that the murder involved depravity of mind of the murderer, because the state of mind of one who willfully inflicts such severe physical or mental pain on the victim is depraved.
>
> However, we hold that "depravity of mind" may, in some circumstances, be shown although torture, as hereinabove defined, did not occur. If acts occurring after the death of the victim are relied upon to show depravity of mind of the murderer, such acts must be shown to have occurred so close to the time of the victim's death, and must have been of such a nature, that the inference can be fairly drawn that the depraved state of mind of the murderer existed at the time the fatal blows were inflicted upon the victim. This is true because it is the murderer's state of mind at the time of the killing which must be shown to have been depraved.
>
> Thus, mutilation of the dead body of the victim may be found to constitute depravity of mind, but only if the mutilation occurred so soon after the death of the victim that the inference may be fairly drawn that the murderer possessed that depravity of mind at the time of the actual killing. If the length of time intervening between the time of death of the victim and the time of mutilation of the body is so great that the inference cannot be fairly drawn that the murderer possessed the depravity of mind at the time the fatal blows were inflicted, then it cannot be said that the murder, itself, involved depravity of mind.

State v. Williams, 690 S.W.2d 517, 529–30 (Tenn.1985)

The Sixth Circuit has found Tennessee's HAC aggravating circumstance to be impermissibly vague on its fact. *Houston v. Dutton*, 50 F.3d 381, 383, 387 (6th Cir.1995). The problem is curable, however, with appropriately narrowing language in the jury instructions, *Coe v. Bell*, 161 F.3d 320, 335 (6th Cir.1988), or through a narrowing construction of the statutory language by a reviewing court on appeal. *Bell v. Cone*, 543 U.S. 447, 455–60, 125 S.Ct. 847, 160 L.Ed.2d 881 (2005) (per curiam).

In *Bell v. Cone*, the Supreme Court reversed the Sixth Circuit's grant of habeas corpus relief and held that the Tennessee Supreme Court's affirmance on direct review of the imposition of the death penalty based upon the jury's finding of the HAC aggravator was not contrary to clearly established federal law. *Id.* at 460. In doing so, the Court reviewed prior cases in which the Tennessee Supreme Court had consistently applied the narrowed construction of the HAC aggravator in affirming death sentences. *Id.* at 456–67. The Court then held that the Tennessee Supreme Court is presumed to have applied a narrowing construction of the HAC aggravator in the present case "absent an affirmative indication to the contrary." *Id.* at 456. Any error in the instruction to the jury was thus cured. *Id.* at 455.

> *16 In light of these holdings, we are satisfied that the State's aggravating circumstance, as construed by the Tennessee Supreme Court, ensured that there was a "principled basis" for distinguishing between those cases in which the death penalty was assessed and those cases in which it was not.

> In sum, even assuming that the Court of Appeals was correct to conclude that the State's statutory aggravating circumstance was facially vague, the court erred in presuming that the State Supreme Court failed to cure this vagueness by applying a narrowing construction on direct appeal. The state court did apply such a narrowing construction, and that construction satisfied constitutional demands by ensuring that respondent was not sentenced to death in an arbitrary or capricious manner.

Id. at 459–60 (quoting *Arave v. Creech*, 507 U.S. 463, 474, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993)); *see also Sutton v. Bell*, —— F.3d ——, 2011 WL 2207315 at *6 (6th Cir.2011) ("The Tennessee Supreme Court reviewed and affirmed the jury's finding of the [HAC] aggravator on direct appeal. Because there is no "affirmative indication to the contrary, we must presume that it" applied its well-established, and permissible, narrowing construction of the aggravator, thereby "cur[ing] any error in the jury instruction.") (quoting *Bell v. Cone*, 543 U.S. at 453–56); *Payne v. Bell* 418 F.3d 644, 657 (6th Cir.2005) ("The Tennessee Supreme Court in this case can be presumed to have applied a narrowing construction to the HAC aggravator in its decision upholding Payne's [death] sentence.").

In King's case, the Tennessee Supreme Court on direct appeal found no error in the failure of the trial court to define "torture." "The evidence in this case supports the aggravating circumstance, Tenn.Code Ann. § 39–2–203(i)(5), as defined in *State v. Williams*, 690 S.W.2d 517, 532–33 (Tenn.1985), as the defendant shot the victim in the head after she begged for her life and offered the defendant money to let her go." *State v. King*, 718 S.W.2d at 249.

In post-conviction proceedings, King again raised the constitutionality of the HAC aggravator. The Tennessee Court of Criminal Appeals found the issue had been previously determined by the supreme court on direct review. Nevertheless, the court of criminal appeals also observed the following:

> Moreover, although not noted by the Supreme Court in the direct appeal of this case but made plain by the record, the petitioner had trapped the victim in the trunk of her own car for some thirty to forty-five minutes immediately prior to shooting her. We think this treatment of the victim constituted severe mental pain as contemplated by this aggravating circumstance. Accordingly, this aggravator was not applied unconstitutionally.

King v. Sate, 1997 WL 416389 at *5 (footnotes omitted).

The Tennessee Supreme Court on appeal in post-conviction proceedings reiterated its conclusions.

> As the Court of Criminal Appeals noted, the evidence supports the jury's finding that the murder was especially heinous, atrocious, and cruel. The appellant kept Ms. Smith trapped in the trunk of her own car for at least forty-five (45) minutes before the shooting. After driving to the remote wooded area, the appellant ordered Ms. Smith to get out of the trunk and lie face down in the weeds. The appellant had the rifle in his possession and began placing brush on top of Ms. Smith. She begged him not to shoot her and offered money to spare her life. When she asked about her fate, the appellant responded that other guys were coming to have sexual intercourse with her.
>
> *17 The appellant ordered Ms. Smith to look away from him while she was lying in the weeds. He then shot her at close range in the back of the head. We agree with the courts below that the manner of Ms. Smith's death involved severe mental pain and anxiety as contemplated by the (i)(5) aggravator and as defined by this Court in *State v. Williams*, 690 S.W.2d 517, 529 (Tenn.1985).

King v. State, 989 S.W.2d at 326. The Tennessee Supreme Court clearly applied a narrowing construction to the HAC aggravator in upholding King's death sentence and thus cured any error in the jury instructions.

King alleges that the Tennessee Supreme Court's narrowing construction of the HAC aggravator to cure the jury's finding cannot stand in light of *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). In *Ring*, the Court held that, pursuant to the Sixth Amendment, a jury, and not a judge, is required to find the aggravating circumstance that makes a defendant eligible for the death penalty. *Id.* at 609. As the Supreme Court in *Bell v. Cone* court noted, however, *Ring* does not apply retroactively. 543 U.S. at 454 n. 6 (citing *Schriro v. Summerlin*, 542 U.S. 348, 358, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004)).

C. The third aggravating circumstance of "prior violent felony" was unconstitutionally applied in Mr. King's case.

King complains that the Tennessee death penalty statute allowed, as an aggravating circumstance to make him eligible for the death penalty, the use of offenses that were unadjudicated at the time of instant offense as well as offenses allegedly committed after the instant offense. He claims that

this resulted in double jeopardy at sentencing, since the range of punishment was changed partially by the aggravating factor. King admits that this claim was not presented to the state courts but contends that his procedural default should be excused because he is actually innocent of the death penalty.

King relies on *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). " '[I]n an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.' " *Id.* at 321 (quoting *Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986)). The doctrine of actual innocence also applies to eligibility for the death penalty. A federal court may review a capital defendant's procedurally defaulted claim if the petitioner can show by "clear and convincing evidence that but for constitutional error at his sentencing hearing, no reasonable juror would have found him eligible for the death penalty" under state law. *Sawyer v. Whitley*, 505 U.S. 333, 350, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992).

In this case, the court has found that the HAC aggravator was constitutionally applied to King, *supra* at 25–30. In addition, the jury also found the aggravating circumstance that the murder was committed for the purpose of avoiding, interfering with, or preventing the lawful arrest or prosecution of the defendant or another. Clearly, King was eligible for the death penalty and thus is not actually innocent of the death penalty. There is accordingly no basis for excusing his procedural default on the claim that the third aggravating circumstance was unconstitutionally applied.

D. The "prior felony" aggravating circumstance and the one remaining aggravating circumstance failed to complete constitutionally mandated narrowing due to the introduction of improper evidence by the State.

*18 King contends that Ms. Carter's testimony, the admission of which the Tennessee Supreme Court found to be harmless error, 718 S.W.2d at 246–47, supplied the factual basis for the aggravating circumstance that the murder was committed for the purpose of avoiding, interfering, or preventing the lawful arrest or prosecution of the defendant or another. King also refers to the fact that the State conceded on direct appeal that it was error to admit evidence of his two prior juvenile armed robbery convictions, which the Tennessee Supreme Court found to be harmless error based upon the "undisputed" evidence of King's prior convictions of "murder in the first degree in the perpetration of an armed robbery, aggravated kidnapping, and an assault with intent to commit aggravated kidnapping." *Id.* at 249. King argues that the foregoing admission of improper evidence, in light of the fact that two of the four aggravating circumstances were invalid, clouded the two remaining aggravating circumstances and cannot constitutionally support his death penalty.

As noted previously, the Tennessee Supreme Court found that use of the felony-murder aggravator was harmless error. There remain three valid aggravating circumstances, despite King's insistence otherwise. There is nothing in the record to suggest that the evidence which the Tennessee Supreme Court found to be harmless error tainted the jury's consideration of the three aggravating circumstances.

E. The "reweighing" and "harmless error analysis" conducted by the Tennessee courts are contrary to, or an unreasonable application of, federal constitutional law.

King contends that the Tennessee Supreme Court conducted an improper harmless error analysis after finding that the felony-murder aggravator should not have been used. The Supreme Court in *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), held that when a state appellate court has found that an aggravating factor was unconstitutional, the court may conduct a harmless-error review of the capital sentencing. *Id.* at 754. After finding that the felony-murder aggravator was improperly applied under *Middlebrooks*, the Tennessee Supreme Court in post-conviction proceedings determined the error was "harmless beyond a reasonable doubt" in light of the "remaining three aggravating circumstances [which] were properly applied and strongly supported by the evidence." *King v. State*, 989 W.2d at 325.

The court specifically stated as follows:

> After our independent review of the record, we are confident that the weighing of the mitigating evidence against the three remaining aggravators would have resulted in the same sentence of death. Accordingly, we conclude that appellant's sentence of death would have been the same had the jury given no weight or consideration to the felony murder aggravator and affirm the capital sentence.

Id. at 327. The findings of the Tennessee Supreme Court are supported in the record and its conclusions are neither contrary to, nor did they involve an unreasonable application

of, federal law. *See Stringer v. Black*, 503 U.S. 222, 230–31, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992) (a state appellate court may affirm a death sentence "after the sentencer was instructed to consider an invalid factor" if the appellate court "determine[s] that the sentence would have been the same had the [sentencer] given no weight to the invalid factor"); *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (a constitutional error discovered on direct review may be held harmless only if it is "harmless beyond a reasonable doubt").

***19** King also challenges the Tennessee Supreme Court's refusal to conduct a cumulative-error review. This claim lacks merit. As noted, the Supreme Court has held that a state court may uphold a death sentence that was "based in part on an invalid or improperly defined aggravating circumstance" if the court conducts a "harmless-error review." *Clemons v. Mississippi*, 494 U.S. at 741. The Tennessee Supreme Court did so. "Having determined that any sentencing error is harmless beyond a reasonable doubt, we again conclude that appellant's sentence of death should stand." *King v. State*, 989 S.W.2d at 328.

III. Terry King's original trial counsel and appellate counsel were ineffective as a matter of federal constitutional law.

In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) the Supreme Court established a two-part standard for evaluating claims of ineffective assistance of counsel:

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

Id. at 687.

To establish that his attorney was not performing "within the range of competence demanded of attorneys in criminal cases," *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970), King must demonstrate that the attorney's representation "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. at 687–88. In judging an attorney's conduct, a court should consider all the circumstances and facts of the particular case. *Id.* at 690. Additionally, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)). A finding of serious attorney incompetence will not justify setting aside a conviction, however, absent prejudice to the defendant so as to render the conviction unreliable. *Id.* at 691–92.

The issue is whether counsel's performance "was so manifestly ineffective that defeat was snatched from the hands of probable victory." *United States v. Morrow*, 977 F.2d 222, 229 (6th Cir.1992) (*en banc*). In addition, the court should not focus only upon "outcome determination."

> Thus, an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him.

***20** *Lockhart v. Fretwell*, 506 U.S. 364, 369–70, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993).

This court has reviewed the entire record of King's post-conviction proceedings. The factual findings of the state courts set forth below are supported in the record. In addition, both the Tennessee Court of Criminal Appeals and Tennessee Supreme Court noted that the standard for evaluating claims of ineffective assistance of counsel was established in *Strickland v. Washington*. *King v. State*, 1997 S.W.2d 416389 at * 12, 989 S.W.2d at 330, respectively. With the foregoing principles in mind, the court will consider King's claims of ineffective assistance of counsel.

A. The failure of trial counsel to develop a theory of defense; the error in promising a defense of voluntary intoxication during the opening statement and then abandoning that defense in front of the jury.

King alleges that his attorney never developed a consistent theory of defense for the guilt phase of the trial, and further abandoned a defense of voluntary intoxication that was promised to the jury during opening arguments. According to King, it was constitutionally ineffective assistance of counsel to promise the jury during opening statements that a defense

would be presented and then fail to call available witnesses to establish that defense. Defense counsel made the following opening statement:

> Ladies and gentlemen of the jury, significant elements of this case have been ignored by the State in its opening statement. And you will hear about Diana Kay Smith was at Cherokee Dam. She was drinking. She was met by Mr. King. She was met by Mr. King's cousin, Mr. Don King, who we believe will testify, and that she voluntarily went to the trailer of Mr. Don King. That they consumed alcohol, LSD. Both Mr. Terry King and Mrs. Smith.
>
> That several other people came to the trailer, young males. That she engaged in consensual sex acts with these men. That Mr. King had been drinking all day, starting at about 10 o'clock in the morning, drinking beer. He consumed in excess of one case of beer, and a case of beer is twenty-four beers. That he had at least three separate tablets of LSD, three quaaludes during the course of that day. And Mrs. Smith had drank a considerable amount of wine, perhaps liquor as well, and took LSD.
>
> The proof will show that Mr. King was extremely intoxicated throughout the course of the events of July 31st, 1983, through the early morning hours and into the daylight hours of August 1 st, 1983.
>
> We think the proof will show that whatever happened to Mrs. Smith, Mr. King's involvement was the product of an incredible quantity of intoxicants. And we think the proof will show that he cannot be held legally responsible for all of his actions to the degree the State would ask you, simply because of the vast quantities of intoxicants that he consumed. And the proof is going to be very clear on that point.

[Addendum 1, Transcript of the Trial, Vol. IX, pp. 9–10].

***21** During closing argument, defense counsel stated "The effects of the drugs upon Terry? We don't know." [*Id.*, Vol. XIII, p. 400]. Counsel also stated "Now, whether his conduct was caused by drugs or some other reason, we don't know." [*Id.*, Vol. XIX, p. 401]. As part of his claim that defense counsel abandoned the theory of voluntary intoxication, King alleges his attorney erred in failing to call as a witness Don King, whom counsel had stated in his opening argument would probably testify, to establish King's intoxication.

King raised this issue in post-conviction proceedings, which was considered and rejected by the Tennessee Court of Criminal Appeals.

> In support of his claim, the petitioner first complains that his trial counsel "abandoned" the defense theory of voluntary intoxication after having introduced it during opening statement. During the guilt phase of the trial, proof of the petitioner's consumption of alcohol and drugs came in through Childress' testimony and the petitioner's confession. Defense counsel did not call Don King, with whom the petitioner and the victim had spent the afternoon and evening, until the sentencing phase. King then testified that, beginning in the morning of July 31, 1984, the petitioner had drunk over a case of beer and had taken two "hits" of acid with the victim. He further testified that the petitioner had been "messed up worse than what I'd ever seen him." Also called by defense counsel during the penalty phase was Dr. Robert Booher, a physician who specialized in addictionology. Dr. Booher testified that LSD "greatly impairs a person's judgment" and that its "behavioral effects can last, usually, around eight to twelve hours." He also testified that Quaaludes cause "a marked impairment in judgment" and that it takes up to twenty-four to thirty-six hours for them to be eliminated from the body. According to Dr. Booher, alcohol also "impairs a person's judgment" and when alcohol and Quaaludes are combined, "the effects of each more than double each other." He further testified that Quaaludes will inhibit the body's ability to eliminate alcohol. On cross-examination, Dr. Booher testified that he had never examined the petitioner, that he had no way of knowing the amounts of LSD and/or Quaaludes the petitioner had taken without testing the actual substances which he had ingested, and that a person who takes these drugs over a long period of time develops a tolerance to their effects. The petitioner contends that defense counsel erred by not putting on this proof during the guilt phase of the trial so as to require the trial court to give an instruction on voluntary intoxication.
>
> The trial court refused defense counsel's request for an instruction on voluntary intoxication on the basis of *Harrell v. State*, 593 S.W.2d 664 (Tenn.Crim.App.1979). In *Harrell*, this Court stated,
>
> Proof of intoxication alone is not a defense to a charge of committing a specific intent crime [such as premeditated murder] nor does it entitle an accused to jury instructions ...; there must be evidence that the intoxication deprived the accused of the mental capacity to form specific intent....

> The determinative question is not whether the accused was intoxicated, but what was his mental capacity.
>
> *22 593 S.W.2d at 672. Of course, in the instant case, the only witnesses who could have testified about the petitioner's state of mind at the time he committed the murder were the petitioner himself, Sexton, and the victim. While King's testimony might have been helpful as to the amount of drugs and alcohol he observed the petitioner ingest during the day and evening of July 31, 1984, the murder was not committed until after daylight had begun on the next morning. Don King's testimony, even combined with Dr. Booher's, was simply not sufficient in and of itself to establish the petitioner's state of mind as of the time he murdered the victim. And the petitioner's own statement to the police contains evidence that his state of mind was not so intoxicated as to require the jury instruction. His confession includes a very detailed recounting of the murder and the events leading up to it, indicating a clear memory; it indicates that he formed an intent to keep the victim from accusing him of rape; that he was able to drive a vehicle and load, point and fire a gun, indicating some level of motor skills; and that he had the presence of mind to go through the victim's personal belongings and burn her pictures and identification after murdering her. The proof available to the petitioner in this case was simply not sufficient to require a jury instruction on voluntary intoxication. Accordingly, defense counsel did not err by failing to pursue this "defense" more vigorously. This issue is without merit.

King v. State, 1997 WL 416389 at *12 (footnotes omitted). The court further noted that "[w]hile defense counsel may have erred in raising the possibility of this defense during opening statement, the petitioner has failed to prove that this tactic probably affected the jury's verdict." *Id.* n. 14.

The Tennessee Supreme Court agreed that King's counsel was not ineffective in failing to pursue the voluntary intoxication defense. The court first noted that defense counsel testified at the post-conviction evidentiary hearing "that he did not call Don King to testify at the guilt phase because he strategized that Don King's testimony would hurt the defense." *King v. State*, 989 S.W.2d at 331 (footnote omitted). This presumably was because King had admitted his guilt to Don King. *Id.* n. 19. The court further noted that defense counsel testified at the post-conviction evidentiary hearing "that Ms. Carter's testimony was unexpected and devastating to [King's] case" and "that the theory of voluntary intoxication was rendered futile after Ms. Carter's testimony. Counsel decided to challenge Ms. Carter's credibility during the guilt phase of trial and to rely on the evidence of intoxication during the sentencing." *Id.* The court concluded:

> Although we acknowledge that defense attorneys should strive to present a consistent theory of defense at trial, we must avoid judging the tactical decisions of counsel in hindsight. We have reviewed the circumstances from counsel's perspective at the time and conclude that the change in strategy does not rise to the level of ineffective assistance.
>
> *23 *Id.* at 331–32 (internal citations omitted).

King argues that the supreme court's finding that Ms. Carter's surprise testimony rendered futile the theory of voluntary intoxication is at odds with its finding on direct appeal that the admission of Ms. Carter's testimony was harmless error and "could not have affected in any way the results of the trial or the sentence imposed." *State v. King*, 718 S.W.2d at 247. This argument overlooks the fact that Ms. Carter's testimony was harmless given the overwhelming evidence of felony murder that was properly admitted against King. That the surprise testimony of Ms. Carter altered the decision-making of defense counsel does not, without more, make the admission of Ms. Carter's testimony harmful error. This is especially true given the details of King's confession, which belie his claim that he was so intoxicated he should not be held responsible for his actions. As defense counsel testified during the post-conviction hearing,

> The testimony of Lori Eastman was, from our perspective, totally unexpected and very devastating. It really skewed how we were looking at this case. We dropped the idea, after that, of even raising intoxication in the hopes of getting a second-degree murder conviction, which we had viewed as slim, anyway, and just decided to proceed with it in the penalty phase and raise it there, because of her testimony, apparently when he was sober, of nearly beating her to death, the way she described it, with her hair rolled up in a car window, and asking her if she was dying, and what did it feel like, and he wanted to know, so he would know what the next woman he killed felt like.

[Addendum 3, Transcript of the Evidence, Vol. IV, p. 400–Vol. V, p. 401]. The court also notes that it is not unusual for counsel to change strategy as the evidence comes in during a trial, particularly a criminal trial.

King also challenges the conclusion by the Tennessee Court of Criminal Appeals that the testimony of Don King was not sufficient to support the theory of voluntary intoxication. This also overlooks the fact that counsel determined that

Don King's testimony would hurt King's defense and for that reason decided to not call him as a witness. As defense counsel testified during the post-conviction hearing, once the defense strategy changed during the guilt phase as a result of Ms. Carter's testimony, the defense "wanted out of that phase as quick as we could and focus the jury on our side of the case," which was "[f]actors in mitigation to avoid the death penalty." [*Id.*, Vol. V, p. 401].

Based upon the foregoing, this court concludes that the determination by the state courts that counsel was not ineffective in failing to pursue the voluntary intoxication defense was neither contrary to, nor did it involve an unreasonable application of, federal law under *Strickland*.

B. The failure of trial counsel to seek the assistance of qualified mental health experts or mitigation experts for the penalty phase of the trial.

*24 King alleges that, although counsel were aware of King's long history of abusing drugs and alcohol as well as a variety of other events in his life that affected his mental and emotional state, they waited until the eve of trial before contacting any mental health experts. According to King, counsel were waiting for his family to raise the funds to hire experts and were not aware of a statute that authorized experts at state expense. King further contends that testimony from a mental health expert was necessary to prove a number of statutory and non-statutory mitigating factors which were applicable to his case.

King raised this issue in post-conviction proceedings, which was considered and rejected by the Tennessee Court of Criminal Appeals.

> The petitioner next complains that his trial counsel was ineffective in failing to seek evaluations from mental health experts in a timely fashion. Defense counsel acknowledged on cross-examination that his office had begun the process of locating mental health expertise on January 9, 1985. At this time, the trial was set to begin on January 21, 1985, but was subsequently postponed to January 23, 1985, due to weather. Defense counsel obtained the services of Dr. Martin Gebrow, a psychiatrist, as of January 15, 1985. Dr. Gebrow first examined the petitioner on January 23, 1985; the day the trial began. Dr. Gebrow s evaluation was such that defense counsel made a strategic decision not to call him as a witness. This decision was based on two things: first, that the petitioner had lied to Dr. Gebrow about the circumstances of the murder he committed, and second, that Dr. Gebrow had told defense counsel that the petitioner "was a person that just liked to hurt people."
>
> Defense counsel admitted at the post-conviction hearing that, given the time frame, they were not able to seek a second opinion which may have been more helpful. The petitioner therefore makes much of the delay in seeking Dr. Gebrow's assistance. However, the petitioner has failed to prove that, had counsel begun the mental health evaluations earlier, a more favorable evaluation would have been obtained. Although the petitioner offered at the hearing the testimony of Dr. Pamela Auble, who evaluated the petitioner for the purposes of this proceeding, Dr. Auble's testimony does not establish that an earlier pretrial evaluation of the petitioner would have been to his benefit. For one thing, her evaluation of the petitioner occurred many years after the offenses and after many years of incarceration. Also, the petitioner was apparently more truthful with Dr. Auble than he was with Dr. Gebrow. Of course, this "honesty" occurred only after the petitioner had been convicted. Accordingly, to the extent that Dr. Auble's evaluation of the petitioner might have presented a more favorable picture of him, it is impossible for us to conclude whether this more favorable picture stems from the petitioner's varying degrees of veracity in speaking with these experts, the passage of time spent in prison, and/or the fact that one evaluation occurred before conviction, the other years afterward. Thus, it would be sheer speculation for us to conclude that defense counsel would have eventually obtained a more helpful expert opinion had they started the process months earlier. It is the petitioner's burden to prove that he was prejudiced by the alleged failures of his trial counsel, and he has failed to meet that burden on this issue. Accordingly, we find it to be without merit.
>
> *25 The petitioner further complains that defense counsel's delay in seeking mental health expertise resulted in less mitigation proof than should have been offered. The record belies this assertion. Proof of mitigation introduced at trial included the devastating loss of the petitioner's father at an early age, his frequent sniffing of gasoline fumes and use of alcohol and/or drugs beginning at an early age, his poor school and work performances, and the disastrous effects of drugs and alcohol on his thoughts and actions. Also introduced was evidence of the petitioner's remorse and his good behavior while jailed. Dr. Auble's testimony at the post-conviction hearing did not alter this portrait of the petitioner in a beneficial manner. She characterized the petitioner as "impulsive," "dependent,

immature" and as someone who "took offense very easily" while drinking or under the influence of drugs and who "tends to misinterpret people's actions as hostile." She further testified that the victim's suggestion to the petitioner that she might file a rape charge

> was a trigger for [the petitioner]. The reasons that it was a trigger-there are three reasons. One is that [the petitioner] has a lot of fears of rejection that began way back after his father died. She was rejecting him. He perceived this. Second, he has this old accusation of holding his sister-in-law down while she was being raped. He knows that it is possible that, if a woman does this-files a rape charge-that it will be very difficult for him, and he will spend time incarcerated.
>
> Third, he has had this recent bad relationship with Lori-recent in terms of the time of this event. He does not expect women to be good to him. He expects them to accuse him of things. He expects to be rejected by them.
>
> These three factors went together and triggered a great deal of anger in [the petitioner]. This is anger that he has had for many years. Ever since his father died probably is when it started. This overwhelmed him, and he could not cope effectively. You know, as we have talked about, [the petitioner] is impulsive. He has poor judgment and has difficulty handling, or planning, or dealing with stress.
>
> Not only does this testimony not add anything beneficial to what was put into evidence during the sentencing phase, it supports the State's case on the aggravating factor for committing the offense to avoid prosecution. Accordingly, the petitioner has failed to demonstrate that he was prejudiced by his lawyer's failure to hire an expert like Dr. Auble at an earlier time.

King v. State, 1997 WL 416389 at ——13–15 (footnotes omitted). The Tennessee Supreme Court reiterated the testimony recounted by the court of criminal appeals and agreed with its conclusion that "counsel were not ineffective on this issue." *King v. State*, 989 S.W.2d at 333.

The court has read the testimony of Dr. Auble, as well as the other evidence presented at the post-conviction hearing. Dr. Auble testified that King was impulsive, took offense easily, and interprets the actions of others as hostile. [Addendum 3, Transcript of the Evidence, Vol. II, pp. 113, 123]. And she testified as to Ms. Smith's threat of a rape charge as a trigger for King's conduct. [*Id.* at 146–47].

***26** On cross-examination, the prosecutor challenged Dr. Auble's conclusion that King's conduct was "impulsive" and not the actions of a cold-blooded killer, given the fact that, once Ms. Smith mentioned rape, King knew what he was going to do, made Ms. Smith get into the trunk of the car, procured a gun and loaded it, drove to a wooded area where he made Ms. Smith get out of the car and lay in the weeds, shot her, and then attempted to hide the body, first by burying it and then throwing it in a quarry. [*Id.* at 150–59]. Dr. Auble also testified on cross-examination that King meets the criteria for "antisocial personality disorder" which is "a personality disorder which is characterized by criminal activity." [*Id.* at 170–71].

Defense counsel testified that he did not call Dr. Gebrow as a witness during the penalty phase for two reasons: (1) the lies that King told Dr. Gebrow regarding Ms. Smith's murder would have been "a dangerous impeachment tool" for the prosecution, and (2) Dr. Gebrow "said that Mr. King was a person that just liked to hurt people, and that is not the kind of witness you want in a death penalty case." [*Id.*, Vol. IV, p. 387]. Based upon the foregoing, this court concludes that the determination by the state courts that counsel was not ineffective in failing to present during the penalty phase the testimony of mental health experts was neither contrary to, nor did it involve an unreasonable application of, federal law under *Strickland*.

C. The failure of trial counsel to investigate the background of the victim and discover a prior false allegation of rape by the victim.

King raised this issue in post-conviction proceedings, which was considered and rejected by the Tennessee Court of Criminal Appeals.

> The petitioner also complains that his trial counsel was deficient in failing to investigate thoroughly the victim's past. Specifically, he asserts that counsel should have discovered certain public records concerning a prior rape allegation, later dismissed, apparently made by the victim against another man long before she met the petitioner. Defense counsel admitted that he had not discovered this item from the victim's past. However, we fail to see what good this information would have done the petitioner at trial, even had his lawyer stumbled across it. The victim's character was not a relevant issue at trial. The victim's past actions, of which the petitioner had no knowledge at the time he murdered her, were not a relevant issue at trial. Therefore, this "evidence" would not have been admissible

> at trial and the petitioner suffered no prejudice from his attorney's failure to discover it.

King v. State, 1997 WL 416389 at *15. The Tennessee Supreme Court agreed.

> Counsel Simpson testified at the post-conviction hearing that he investigated Ms. Smith's past and her involvement with the appellant before the killing. He stated that he did not rely heavily on Ms. Smith's past because he did not want the jury to focus on her as a victim. Counsel was aware that Ms. Smith had lived in McMinn County, but he had no information concerning her prior rape allegation.
>
> *27 We agree with the Court of Criminal Appeals that the prior rape allegation would not have benefited [sic] the appellant at trial. If anything, the information would have strengthened the prosecution's evidence of motive against him. Moreover, Ms. Smith's character was not at issue, and there has been no showing that information of her prior rape allegation would have been admissible. Therefore, we cannot say that defense counsel were ineffective for failing to discover it.

King v. State, 989 S.W.2d at 333.

This court agrees with the conclusions of the state courts. Accordingly, this court concludes that the determination by the state courts that counsel was not ineffective in failing to investigate the victim's background was neither contrary to, nor did it involve an unreasonable application of, federal law under *Strickland*.

D. The failure of trial counsel to call Mr. Terry Lynn King as a witness at the hearing on the motion to suppress Mr. King's statement.

King raised this issue in post-conviction proceedings, which was considered and rejected by the Tennessee Court of Criminal Appeals.

> The petitioner further complains about defense counsel's failure to call him to the witness stand during the suppression hearing. In response to being asked why he did not call the petitioner to the stand, defense counsel testified:
>
> > One, I knew Judge Jenkins wasn't going to believe a convicted felon with his record over the testimony of, at least, two officers. But what deterred us from putting [the petitioner] on the stand was you [referring to prosecutor Jolley], and Mr. Crabtree, and ... Judge Jenkins-that we did not want to expose [the petitioner] to your cross-examination. We were confident that you would exceed the scope of a suppression hearing in your cross-examination; that Judge Jenkins would allow you to do so, coupled with the fact that we were dealing with a young man that we knew was of below-average intelligence, and would not do well on cross-examination. And we were confident that, upon trial, even though it is not admissible, that some of that stuff that you would glean from a suppression hearing ... would come in at trial, and we didn't want you to go to school on [[the petitioner] as a witness. We wanted your first crack at him to be your only crack at him.
>
> As correctly noted by the court below, this was a "tactical decision" and one that was made with "adequate reasons." We will not now second-guess this strategy call with the benefit of twenty-twenty hindsight. This issue is without merit.

King v. State, 1997 WL 416389 at *16 (footnote and internal citation omitted). The Tennessee Supreme Court agreed.

> As correctly noted by both the trial court and the Court of Criminal Appeals, counsel made a tactical decision not to call the appellant as a witness at the suppression hearing. We will not second guess that strategy on appeal with the benefit of twenty-twenty hindsight. Counsel made a calculated decision, and there has been no showing of ineffectiveness.

*28 *King v. State*, 989 S.W.2d at 333–34 (internal citations omitted).

King contends that it was not reasonable for trial counsel to believe that the trial judge would not follow the law and would allow the prosecutors to use improperly obtained information at trial. Nevertheless, that was a call for trial counsel to make. This court agrees with the conclusions of the state courts and will not second guess defense counsel's trial strategy in this regard. Accordingly, this court concludes that the determination by the state courts that counsel was not ineffective in failing to call King as a witness at the suppression hearing was neither contrary to, nor did it involve an unreasonable application of, federal law under *Strickland*.

E(D).[7] The failure of trial counsel to ensure that all bench conferences were recorded and transcribed by the court reporter.

King raised this issue in post-conviction proceedings, which was considered and rejected by the Tennessee Court of Criminal Appeals.

> The petitioner next points to his defense counsel's failure to preserve on the record all of the bench conferences which occurred during the trial. While we agree with the petitioner that all bench conferences should be preserved on the record, *see, e.g., State v. Hammons*, 737 S.W.2d 549, 551 (Tenn.Crim.App.1987), we disagree that "the lack of a transcript of these crucial conversations" is, *ipso facto*, prejudicial within the context of *Strickland*. In order to demonstrate prejudice on this issue, the petitioner must show at least a likelihood that one or more of the unrecorded bench conferences resulted in an adverse ruling that constituted reversible error. The petitioner has not done so. Indeed, the petitioner has conceded that "this factor taken by itself would not warrant reversal." This allegation is without merit.

King v. State, 1997 WL 416389 at *15. The Tennessee Supreme Court agreed.

> The State concedes that counsels' failure to preserve all of the bench conferences was an instance of deficient performance. The State argues, however, that the appellant has not demonstrated any prejudice as a result of the deficiency. We agree. In order to demonstrate prejudice here, the appellant must show a reasonable probability that one or more of the unrecorded bench conferences resulted in an adverse ruling that constituted reversible error. The appellant has not satisfied that burden. Accordingly, this issue is without merit.

King v. State, 989 S.W.2d at 333.

King argues that the absence of any record of what was said at the bench conferences makes it impossible to make a showing of prejudice. Nevertheless, in order to demonstrate ineffective assistance of counsel, King must show some prejudice, which he has failed to do. Therefore, this court concludes that the determination by the state courts that King failed to demonstrate prejudice as to his claim that counsel was ineffective in failing to ensure that all bench conferences were recorded and transcribed was neither contrary to, nor did it involve an unreasonable application of, federal law under *Strickland*.

F(E). The failure of trial counsel to object to the introduction of the suicide note.

*29 Co-defendant Joe Sexton attempted suicide prior to trial and left a handwritten note which cleared King of Ms. Smith's murder. In fact, the note was fabricated with King's knowledge and at his request. The State introduced the suicide note during the cross-examination of Sexton during the penalty phase. King claims trial counsel was ineffective in failing to object to the introduction of the note. He raised this issue in post-conviction proceedings, which was considered and rejected by the Tennessee Court of Criminal Appeals.

> In his next allegation of ineffective assistance of counsel, the petitioner points to the penalty phase of his trial during which his counsel did not object upon introduction into evidence of a suicide note written by the petitioner's codefendant, Randall Joe Sexton. Sexton had written the note in contemplation of his suicide prior to trial. He testified that he had discussed the contents of the note with the petitioner prior to writing it, and that the petitioner had suggested he include a statement that he, Sexton, was responsible for the victim's death, not the petitioner. The note was found after Sexton attempted suicide and was taken to the hospital, and was used very effectively by the State to impeach Sexton's credibility. The petitioner's counsel subsequently relied on it in closing not only to argue that Sexton could not be believed, but to demonstrate that the petitioner had not tried to rely on this note for his defense, and admitted (during the penalty phase of the trial) to having killed the victim. In other words, defense counsel used it against Sexton and as a method of bolstering their own client's credibility and willingness to take responsibility for his own actions. This was a strategy call by defense counsel and one that we will not condemn.

King v. State, 1997 WL 416389 at *16. The Tennessee Supreme Court agreed.

> We agree with the Court of Criminal Appeals that counsel made a tactical decision to use the suicide letter, not only to attack Mr. Sexton's credibility, but to bolster the credibility of the appellant. Again, we decline to second guess the strategy chosen by defense counsel. Counsel knew about the suicide letter before trial and chose to use it during the sentencing phase to undermine the testimony of Mr. Sexton.

King v. State, 989 S.W.2d at 334.

King argues that the admission of the suicide note did not further King's interests and that it is difficult to conceive of a tactical reason to justify counsel's failure to object. This court, however, agrees with the appellate courts that this was trial strategy, which the court will not second-guess. Based upon the foregoing, this court concludes that the determination by the state courts that counsel was not ineffective in failing to object to the introduction of Sexton's suicide note was neither

contrary to, nor did it involve an unreasonable application of, federal law under *Strickland*.

G(F). The failure of appellate counsel to appeal the State's use of a dismissed juvenile allegation during the trial.

***30** This claim refers to a question asked during the cross-examination of Gary E. King, petitioner King's brother, who testified on his behalf in the penalty phase of the trial.

> Q Mr. King, is it not correct, sir, that in January of 1979, more specifically January the 24th of 1979, that your wife, Donna J. King, accused Mr. Terry Lynn King, your brother, of assisting in her rape?
>
> A Yes, sir.
>
> MR. TIPTON: We object to that, your Honor.
>
> THE COURT: Overruled.

[Addendum 1, Transcript of the Trial, Vol. XV, p. 528]. Mr. King also admitted that he took his wife out of the jurisdiction so she would not be available to testify against petitioner King. [*Id.* at 529]. King contends that the admission of this evidence was in error because King was a juvenile at the time and because the warrant had been dismissed, and that counsel should have raised the error on direct appeal.

King raised this issue in post-conviction proceedings, which was considered and rejected by the Tennessee Court of Criminal Appeals.

> The petitioner further alleges that defense counsel was ineffective for failing to appeal the State's use during the penalty phase of the trial of a charge that had been made against the petitioner while a juvenile and later dismissed. We remind the petitioner that
>
> > there is no constitutional requirement that an attorney argue every issue on appeal.... Generally, the determination of which issues to present on appeal is a matter which addresses itself to the professional judgment and sound discretion of appellate counsel.
> >
> > * * *
> >
> > Moreover, the determination of which issues to raise on appeal can be characterized as tactical or strategical choices, which ... should not be 'second guessed' on appeal, subject, of course, to the requisite professional standards.
>
> When questioned in this case about how he had decided which issues to raise in the direct appeal, defense counsel testified, "You look at the proof as it was adduced at trial. You read your record as carefully as you can, bone up on the applicable case law as to the issues suggested; and the dogs that will hunt, you put in the brief, and the ones that won't, you leave home." Obviously, defense counsel decided that the admission of the juvenile charge in question "wouldn't hunt." We will not second-guess this strategy call.

King v. State, 1997 WL 416389 at *17 (quoting *Cooper v. State*, 849 S.W.2d 744, 747 (Tenn.1993)) (footnote omitted). The Tennessee Supreme Court agreed.

> This Court has previously held that there is no constitutional requirement for an attorney to raise every issue on appeal. "Generally, the determination of which issues to present on appeal is a matter which addresses itself to the professional judgment and sound discretion of appellate counsel." Counsel is given considerable leeway to decide which issues will serve the appellant best on appeal, and we should not second guess those decisions here.
>
> ***31** Counsel Simpson testified that the defense carefully examined the trial record and listed every issue that might have merit on appeal. Counsel included a challenge on direct appeal to the State's use of the armed robbery convictions, and this Court held that admission to be harmless error. Under those circumstances, we cannot say that counsels' omission of the dismissed rape charge was ineffective.

King v. State, 989 S.W.2d at 334 (quoting *Cooper v. State*, 849 S.W.2d 744, 747 (Tenn.1993)) (internal citations omitted).

King contends that, in light of the fact that the Tennessee Supreme Court held that the use of King's juvenile convictions for armed robbery was harmless error, had counsel appealed the use of the dismissed juvenile charge the supreme court would have been faced with a more difficult question. This court disagrees with King and agrees with the state appellate courts that this was a matter within the discretion of counsel. Accordingly, this court concludes that the determination by the state courts that counsel was not ineffective in failing to appeal the use of the dismissed juvenile charge was neither contrary to, nor did it involve an unreasonable application of, federal law under *Strickland*.

II(G). The failure of trial counsel to investigate the dismissed juvenile charge.

King claims that defense counsel correctly but foolishly assumed that a dismissed charge would not be admissible at trial and therefore failed to investigate the charge. According to King, counsel learned after the trial was over that the investigating officer did not believe Mrs. King's allegations and that one of the prosecutors at King's murder trial was the person who moved to have the juvenile charge dismissed.

King did not raise this claim in post-conviction proceedings. Accordingly, the claim has been procedurally defaulted.

I(H). It was ineffective assistance of appellate counsel to fail to file a petition for certiorari to the United States Supreme Court after appellate counsel promised to file such a petition and the petition would have been granted in light of the status of *Cruz v. New York*.

Defense counsel admitted that he misread the rules as to filing a petition for certiorari and believed he had ninety days within which to file the petition, when in fact he had sixty days. When he realized his mistake, the sixty days had passed and any request for an extension of time had to have been filed during the original sixty-day period. [Addendum 3, Transcript of the Evidence, Vol. V, pp. 407–10].

King raised this issue in post-conviction proceedings, which was considered and rejected by the Tennessee Court of Criminal Appeals.

> The petitioner also alleges that one of his trial lawyer's representation was deficient because he failed to timely file a petition for writ of certiorari with the United States Supreme Court after having told the petitioner that he would do so. The State concedes that the attorney's failure in this regard was "an instance of deficient performance." Whether deficient or not, a lawyer's failure to file a petition for discretionary review does not constitute ineffective assistance of counsel. The United States Supreme Court has held that criminal defendants do not have a constitutional right to counsel to pursue applications for its review. It has further held that, because a defendant has no constitutional right to counsel to pursue applications for certiorari, he can't be deprived of the effective assistance of counsel by his counsel's failure to file the application timely. Accordingly, this allegation of ineffective assistance is without merit.

***32** *King v. State*, 1997 WL 416389 at *17 (citing, respectively, *Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974) and *Wainwright v. Torna*, 455 U.S. 586, 102 S.Ct. 1300, 71 L.Ed.2d 475 (1982)). The Tennessee Supreme Court did not address this issue in its opinion.

King contends that had counsel filed the petition for certiorari, it almost certainly would have been granted because *Cruz v. New York* had been accepted for argument by the U.S. Supreme Court while King's direct appeal was pending before the Tennessee Supreme Court. Nevertheless, the Tennessee Court of Criminal Appeals was correct that a criminal defendant does not have a constitutional right to counsel "to file petitions for certiorari" in the Supreme Court, *Ross v. Moffitt*, 417 U.S. at 612, and thus a criminal defendant "could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely." *Wainwright v. Torna*, 455 U.S. at 587.

In any event, *Cruz* allows a court to conduct a harmless error analysis of a *Bruton* claim under the standard set forth in *Harrington v. California*. The Tennessee Supreme Court performed such a analysis. Based upon the foregoing, this court concludes that the determination by the Tennessee Court of Criminal Appeals that counsel was not ineffective in failing to timely file a petition for certiorari was neither contrary to, nor did it involve an unreasonable application of, federal law under *Strickland*.

J(I). Conclusion

King claims that the individual and cumulative effect of counsel's errors denied him the effective assistance of counsel. The court has found that the state courts' findings on the individual claims that counsel was not ineffective were neither contrary to, nor did they involve an unreasonable application of, federal law under *Strickland*. To the extent King alleges he is entitled to relief under a cumulative error theory, this claim lacks merit. *See Campbell v. United States*, 364 F.3d 727, 736 (6th Cir.2004) ("the accumulation of non-errors cannot collectively amount to a violation of due process") (internal quotation marks omitted).

IV. Mr. King's conviction and death sentence violate the doctrines of *Brady/Giglio* and deny Mr. King his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

King alleges the prosecution withheld exculpatory, mitigating, and/or impeachment evidence in violation of his

rights under *Brady* and *Giglio*. In *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the Supreme Court held "that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. Impeachment evidence as well as exculpatory evidence "falls within the *Brady* rule." *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). "Favorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different.' " *Kyles v. Whitley*, 514 U.S. 419, 433–34, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (quoting *Bagley*, 473 U.S. at 682).

***33** "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).

In *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), the Supreme Court considered a situation where the prosecution withheld from the jury the fact that it had promised a key witness that he would not be prosecuted for his part in a crime if he testified against his companion. Because the witness's credibility was a key issue, the Court found that the government's conduct violated due process and the defendant was entitled to a new trial. *Id.* at 154–55. "[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.' " *Id.* at 153 (quoting *Mooney v. Holohan*, 294 U.S. 103, 112, 55 S.Ct. 340, 79 L.Ed. 791 (1935)).

In order to state a *Giglio* claim a petitioner must demonstrate "(1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew it was false." *United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir.1989). Furthermore, "mere inconsistencies in testimony by government witnesses do not establish knowing use of false testimony." *Id.*

King first alleges that the State withheld evidence demonstrating that there was only one bullet associated with Ms. Smith's murder. According to King, this is important because the prosecution told the jury that Ms. Smith was shot twice. King also claims that the prosecution urged the jury to find the HAC aggravating circumstance partially on the theory that the victim was shot not once, as King admitted, but twice. A review of the transcript of closing arguments during the penalty phase reveals, however, that neither prosecutor asked the jury to base the HAC aggravating factor on the fact that Ms. Smith was shot twice nor did either prosecutor mention this fact. [Addendum 1, Transcript of the Trial, Vol. XVIII, p. 894–Vol. XIX, p. 904, pp. 941–45].

Agent David Davenport with the TBI testified that a bullet and bullet fragment were found at the crime scene where Ms. Smith was killed. [*Id.*, Vol. XI, p. 106]. Tommy Heflin, a firearms examiner with the TBI crime lab testified that at least two bullets were fired. [*Id.*, Vol. XI, p. 227]. King alleges that records recently obtained by current counsel from the TBI reveal that only one bullet was found at the crime scene and that Ms. Smith was shot one time. It appears from the record that there was some confusion as to whether the bullet fragment was recovered from the site where Todd Lee Millard's body was found or where Ms. Smith was killed. According to King, this is because one metal object was found where Ms. Smith was killed, two metal objects were found at Mr. Millard's grave site, and three metal objects were turned over to the TBI for testing.

***34** The court does not find that King has shown a violation of either *Brady* or *Giglio* with respect to whether there was one bullet or two bullets. There is nothing in the record to suggest that the prosecution withheld exculpatory evidence or deliberately presented false evidence. In addition, given the overwhelming evidence against King including his admission that he shot Ms. Smith in the head with the intent to kill her, any alleged violation is not material because it would not have altered the outcome of the proceedings.

King also alleges that the prosecution withheld evidence that would have impeached the testimony of Lori Eastman Carter. According to King, although Ms. Carter testified at trial that King beat her to the point of unconsciousness, recently discovered photographs taken of Ms. Carter immediately after the incident show that Ms. Carter had no injuries other than a bruised eye. [Court File No. 95, Notice of Filing, Attachment I to Amended Habeas Petition]. In addition, King claims that the hospital report from her visit that evening describe her as "drinking/incoherent/states she was beaten up." [Attachment G to Amended Habeas Corpus Petition].[8]

King contends that had defense counsel been provided the photographs of Ms. Carter, it would have been likely that the trial judge would have excluded her testimony. Even if the testimony had not been excluded, King argues that Ms. Carter could have been impeached by the photographs.

The trial court allowed the testimony of Ms. Carter over defense counsel's strenuous objection, finding the testimony "material on the issues of premeditation, motive, intent, and malice." [Addendum 1, Transcript of the Trial, Vol. XII, p. 276]. The court further found that "the probative force of the evidence outweighs the potential for unfair prejudice." [*Id.* at 276–77].

Ms. Carter testified that on October 13, 1982, while at her car in the parking lot of the Foxy Lady Lounge on Merchants Drive, King hit her causing her to lose consciousness; when she regained consciousness, she was in the floorboard of her car and King was driving the car. [*Id.* at 278–79]. Ms. Carter further testified that King subsequently stopped the car, pulled her from the floorboard by her hair, rolled her hair up in the car window, and continued to beat her around her face and neck. [*Id.* at 279]. Ms. Carter also testified as follows:

> Several times he said that he wanted me to tell him—he asked me if I knew that I was dying, and I said yes. And he wanted me to tell him how it felt to be dying, so that the next woman he killed he would know how she felt.

[*Id.*].

Finally, Ms. Carter testified that she again lost consciousness and when she regained consciousness she heard King telling his cousin James King that he, King, had killed her and needed help in putting her in the quarry and burning her car. [*Id.* at 279–80]. After Ms. Carter's testimony, the court instructed the jury that "with regard to the testimony of Lori Eastman Carter, I instruct you that you are to consider the evidence of the incident which she testified to only in regard to the issues of premeditation, motive, intent, and malice in the case that we are trying now and for no other purpose." [*Id.* at 294].

*35 James King, who testified on behalf of King during the guilt phase of the trial, admitted that he saw King with Ms. Carter on October 12 or 13, 1982, but denied that King told him he had killed her. [*Id.*, Vol. XIII, p. 324]. James King testified that King asked him to follow him to St. Mary's Hospital because Ms. Carter was sick. [*Id.*]. On cross-examination, James King testified that when he looked in the car, Ms. Carter was half in the seat and half in the floorboard, but he did not look at her face and thus did not see any bruises. [*Id.* at 326]. He also testified that the interior of the car smelled very bad. [*Id.*]. On redirect, he testified that the smell was like someone had been drinking a lot of alcohol and had regurgitated the alcohol. [*Id.* at 330].

In support of his claim, King has attached the affidavit of Michael R. Chavis, an investigator for the Federal Defender Services of Eastern Tennessee, Inc., which represents King in this proceeding. [Attachment F to Amended Habeas Corpus Petition]. Mr. Chavis testifies that he interviewed Ms. Carter at her residence; she stated that King beat her unconscious and pulled out patches of her hair when he rolled it up in a car window, and that she took photographs to document the injuries. [*Id.*]. According to King, the photographs do not show patches of her hair missing. This argument overlooks the fact that Ms. Carter did not testify at trial that patches of her hair were pulled out.

Based upon the foregoing, the court finds that King has not shown a violation of either *Brady* or *Giglio* with respect to the pictures of Ms. Carter or the hospital report. The pictures show that Ms. Carter was assaulted, which was consistent with her testimony, and she was taken to the hospital where she was treated for her injuries. The hospital report does refer to the fact that Ms. Carter had been drinking, but that was testified to by James King. In any event, the fact that Ms. Carter may have been drinking is not relevant to her allegation of assault.

V. Mr. King was denied due process and his right to trial by jury when the trial court refused to instruct the jury on second degree murder and voluntary intoxication.

King alleges that, since the jury did not find him guilty of first degree premeditated murder but rather guilty of felony murder, the jury determined that he should be found guilty of some form of murder. According to King, the evidence of his intoxication must have been sufficient to prevent the jury from finding him guilty of first degree premeditated murder and thus felony murder was the only option left. King therefore argues that had the jury been instructed on second degree murder, they could have found him guilty on that lesser offense.

A. The proof of intoxication and passion.

King contends that the State's own evidence during its case in chief, including King's statement, showed that King had ingested an extraordinary quantity of mind-altering drugs,

King also contends that the evidence showed that he acted in a state of extreme passion at the possibility that he would be unjustly accused of rape.

B. The right to have the jury fully instructed on the law.

***36** King relies on *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), for the proposition that an accused in a capital case has a constitutional right to a jury instruction on lesser included offenses. In *Beck*, the Supreme Court was faced with a state law which prohibited the trial judge in a death penalty case from giving the jury the option of conviction on a lesser included offense--the jury was required to either convict the defendant of the capital crime and impose the death penalty, or acquit him; if convicted the trial judge was to then consider aggravating and mitigating circumstances, and then refuse to impose the death sentence if it was not warranted and instead sentence the defendant to life in prison. *Id.* at 627–29. The Court considered the question "May a sentence of death constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict?" and held it could not. *Id.* at 627.

In doing so, the Court observed:

> While we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard. That safeguard would seem to be especially important in a case such as this. For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense-but leaves some doubt with respect to an element that would justify conviction of a capital offense-the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.
>
> Such a risk cannot be tolerated in a case in which the defendant's life is at stake. As we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments:
>
> > [D]eath is a different kind of punishment from any other which may be imposed in this country.... From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.
>
> To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case.

***37** *Id.* at 637–38 (quoting *Gardner v. Florida*, 430 U.S. 349, 358–58, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977)) (footnotes omitted).

The *Beck* Court thus invalidated a state statute that *prohibited* a trial judge from instructing a jury on lesser included offenses. Contrary to King's contention, the Court did not hold that the due process clause always requires giving a instruction on a lesser included offense. In fact, in *Hopper v. Evans*, 456 U.S. 605, 611, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982), the Court ruled that a capital defendant is entitled to a lesser included offense instruction *"only* when the evidence warrants such an instruction." Thus the *Hopper* Court concluded that no lesser included offense instruction was required where "[t]he evidence not only supported the claim that the defendant intended to kill the victim, but affirmatively negated any claim that he did not intend to kill the victim." *Id.* at 613.

C. Under these facts, the trial court deprived Mr. King of due process.

On direct appeal, King complained of the trial court's failure to charge the jury on second degree murder. In post-conviction proceedings, he again raised that issue as well as his claim that the trial court should have instructed the jury on voluntary intoxication.

The Tennessee Supreme Court on direct appeal rejected the claim that the jury should have been instructed on second degree murder.

> The record shows that defendant was indicted for both common law murder and two counts of felony murder, and all counts were submitted to the jury for decision. Anytime a court instructs a jury in a homicide case, he should instruct all lesser included offenses and in most instances it is error not to do so. But where the evidence clearly shows that defendant was guilty of the greater offense, it is not error to fail to charge on a lesser included offense. In this case the record of the guilt phase of the trial is devoid of any evidence which would permit an inference of guilt of second-degree murder or the other lesser included offenses. The State's proof of premeditation and deliberation, and the fact that the killing occurred during the commission of a felony, which includes the defendant's confessions to Childers and to the police, was uncontradicted. Consequently, we find no prejudicial error in the trial judge's refusal to instruct the jury on the elements of murder in the second degree.

State v. King, 718 S.W.2d at 245 (internal citations omitted).

The Tennessee Court of Criminal Appeals in post-conviction proceedings thus concluded that the issue of whether second degree murder should have been presented to the jury had been previously determined and the court thus refused to reconsider it. *King v. State*, 1997 WL 416389 at *17. The appellate court also found that King had waived his claim that the trial court should have given an instruction on voluntary intoxication by failing to raise the claim on direct appeal. *Id.*

The court first notes that, although King now claims that the failure to instruct the jury on the lesser-included offense of second degree murder violated his rights under both federal and state law, in his brief on direct appeal King raised this issue solely as a matter of state law. [Addendum 2, Document A, Brief of Appellant, pp. 53–55]. The Tennessee Court of Criminal Appeals likewise considered the issue solely as a matter of state law. *State v. King*, 718 S.W.2d at 244. Accordingly, by failing to raise this claim as a matter of federal constitutional law, King has procedurally defaulted his claim that the trial court should have instructed the jury on lesser included offense of second degree murder. *See Gray v. Netherland*, 518 U.S. 152, 162–63, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996) (in order to exhaust state remedies as to a particular claim, that claim must have been presented to the state courts as a federal constitutional claim).

*38 In any event, the court finds that King would not be entitled to relief on this claim. As the Tennessee Supreme Court found, the evidence adduced at trial clearly militated against an instruction on second degree murder or other lesser included offenses. Thus, the conclusion of the Tennessee Supreme Court was neither contrary to, nor did it involve an unreasonable application of, federal law under *Beck v. Alabama* and *Hopper v. Evans*.

With respect to his claim that the trial court should have instructed the jury on the defense of voluntary intoxication, the Tennessee Court of Appeals found that King waived that issue by failing to raise it on direct appeal. That being so, King has procedurally defaulted the claim in this court. King contends that his default should be excused because his attorney rendered ineffective assistance of counsel by failing to pursue the issue on direct appeal. King did not raise such a claim of ineffective assistance of counsel in post-conviction proceedings and thus cannot rely on it in these proceedings. [Addendum 4, Doc. A, Brief of the Appellant, pp. 75–107].

VI. The "reasonable doubt" instructions given in the case violated Mr. King's right to due process because the use of the phrases "moral certainty" and "let the mind rest easy" denigrate the high standard of proof required to sustain a criminal conviction.

A. Reasonable doubt instructions given in *State v. King*.

The trial court gave the following reasonable doubt instruction during the guilt phase:

> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of guilt. Reasonable doubt does not mean a captious, possible or imaginary doubt. In order to convict a defendant of any criminal charge, every element of proof required to constitute the offense must be proven to a moral certainty, but absolute certainty of guilt is not demanded by the law.

[Addendum 1, Transcript of the Trial, Vol. XIV, pp. 444–45].

During the penalty phase, the court gave the following instruction:

> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of your findings. You are the sole and exclusive judges of the credibility of the witnesses and the weight to be given to the evidence presented.

[*Id.*, Vol. XIX, p. 949].

B. *Cage v. Louisiana* and its progeny.

C. *Rickman v. Dutton* and the Tennessee Reasonable Doubt Instruction.

King alleges that the trial court's instruction to the jury on reasonable doubt violated his right to due process. The Tennessee Court of Criminal Appeals found that this issue had been waived because it "was not raised in the petitioner's motion for new trial or on direct appeal." *King v. State*, 1997 WL 417389 at *18. Accordingly, King as procedurally defaulted this claim. In any event, King would not be entitled to relief.

*39 In *Rickman v. Dutton*, 864 F.Supp. 686 (M.D.Tenn.1994), *aff'd*, 131 F.3d 1150 (6th Cir.1997), U.S. District Judge John T. Nixon granted the petitioner a writ of habeas corpus on five grounds: (1) the petitioner's attorney rendered ineffective assistance of counsel during the guilt phase of the trial, (2) the perjured testimony of a prosecution witness was not harmless beyond a reasonable doubt, (3) the jury instruction on reasonable doubt misstated the burden of proof, (4) petitioner's due process rights were violated by the involuntary administration of sedatives and depressants to him, and (5) the cumulative effect of the errors in the case violated due process.

With respect to the reasonable doubt jury charge, Judge Nixon found the following charge constitutionally defective:

> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability after such investigation to let the mind rest easily upon the certainty of guilt. Reasonable doubt does not mean a doubt that may arise from possibility. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required and this certainty is required as to every proposition of proof requisite to constitute the offense.

864 F.Supp. at 708. Judge Nixon relied on *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1991), in which the Supreme Court found that a jury instruction stating what was required was a "moral certainty" rather than an "evidentiary certainty" allowed a reasonable juror to find guilt based on a lower standard of proof. *Id.* at 40–41. Judge Nixon noted, however, the decision in *Victor v. Nebraska*, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994), wherein the Supreme Court held that the term "moral certainty" does not, of itself, render a reasonable doubt instruction unconstitutional so long as the rest of the instruction "lends content to the phrase." *Id.* at 14–16.

In affirming Judge's Nixon's decision in *Rickman*, the Sixth Circuit resolved the appeal on the sole issue of ineffective assistance of counsel and thus declined to address the remaining issues, including the constitutionality of the reasonable doubt instruction. *Rickman v. Bell*, 131 F.3d at 1152. Nevertheless, in *Austin v. Bell*, 126 F.3d 843 (6th Cir.1997), *cert. denied*, 523 U.S. 1088, 118 S.Ct. 1547, 140 L.Ed.2d 695 (1998), the Sixth Circuit held constitutional the same reasonable doubt jury instruction that Judge Nixon in *Rickman* found to be unconstitutional. In doing so, the Sixth Circuit found that "[t]he language of an 'inability to let the mind rest easily' lends content to the phrase 'moral certainty' .... increasing, if anything, the prosecutor's burden of proof." 126 F.3d at 847.

The instruction in this case was similar to that in *Austin v. Bell*:

> Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability after such investigation to let the mind rest easily upon the certainty of guilt. Reasonable doubt does not mean a doubt that may arise from possibility. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required and this certainty is required as to every proposition of proof requisite to constitute the offense.

*40 126 F.3d at 846. Accordingly, the court finds that King's claim as to the "reasonable doubt" jury instructions lacks merit. *See, e.g., United States v. Perry*, 438 F.3d 642, 651 (6th Cir.), *cert. denied*, 547 U.S. 1139, 126 S.Ct. 2045, 164 L.Ed.2d 799 (2006).

VII. The prosecution repeatedly violated Mr. King's due process rights by offering inadmissible, irrelevant and inflammatory evidence during both phases of Mr. King's trial.

A. The First Phase.

King claims that prosecutorial error infected the trial from voir dire through sentencing. He specifically refers to the following during the guilt phase: the prosecution's question during voir dire as to whether any of the jurors believed that the use of drugs by a victim justifies blowing the top of her head off; the prosecution's theory that the blood in Sexton's car came from Ms. Smith, despite the evidence that the blood was from the Grainger County victim; the introduction of

the testimony of Lori Eastman Carter; and closing arguments designed only to inflame the passions of the jury.

B. The Second Phase.

During the penalty phase, King claims the prosecution committed the following errors: the prosecution argued at length about the facts of the prior Grainger County homicide; the prosecution told the jury that to return a life sentence would be to disregard their oaths as jurors and their duty to follow the law; the prosecution told the jurors that they had a civic duty to protect society; the prosecution asked the jury to penalize King for entering a plea of not guilty; and the prosecution cross-examined King about Ms. Smith's skull, about his two juvenile convictions for armed robbery, about the dismissed juvenile charge, and about the Grainger County homicide as well as the conviction for assault with intent to commit aggravated kidnaping.

C. The law requires reversal as a result of these deliberate actions.

King contends that the prosecution acted deliberately and that the cumulative effect of the errors requires reversal of his conviction and sentence. The Tennessee Court of Criminal Appeals in post-conviction proceedings determined that, by failing to raise them on direct appeal, King had waived his claims "that his due process rights were violated by the prosecution's 'offering inadmissible, irrelevant and inflammatory evidence' during both the guilt and penalty phases of his trial." *King v. State*, 1997 WL 416389 at * 18. That being so, King has procedurally defaulted this claim.

VIII. The State of Tennessee submitted evidence of an invalid conviction to support the "prior crime of violence" aggravating factor.

This claim refers to King's conviction in Grainger County, Tennessee, for the first degree murder and aggravated kidnapping of Todd Lee Millard. Mr. Millard's murder occurred prior to Ms. Smith's murder in Knox County, but King and Sexton were not arrested for the murder until after their arrest for Ms. Smith's murder. While the case against King for Ms. Smith's murder was pending, he pleaded guilty in the Millard case pursuant to a plea agreement and received concurrent life sentences. These convictions were then used against King in the Smith case as an aggravating circumstance to support the death penalty.

*41 After he was convicted of Ms. Smith's murder and sentenced to death, King filed a state petition for post-conviction relief in the Millard case, arguing that his guilty pleas were not free and voluntary because he was not advised by the trial court that his Grainger County convictions could later be used as enhancement factors in his Knox County case. The trial court denied post-conviction relief and the Tennessee Court of Criminal Appeals affirmed. *King v. State*, 1990 WL 198178 (Tenn.Crim.App. Dec.11, 1990), *perm. app. denied, id.* (Tenn.1991).

King next filed a federal habeas corpus petition with the same argument and it was denied. The Sixth Circuit affirmed the denial of habeas relief, holding that the State's use of the Grainger County murder conviction "as an aggravating circumstance in the sentencing of an unrelated but pending murder charge" was "a collateral consequence of the plea, about which King need not be advised in order for his plea to be found voluntary." *King v. Dutton*, 17 F.3d 151 (6th Cir.), *cert. denied*, 512 U.S. 1222, 114 S.Ct. 2712, 129 L.Ed.2d 838 (1994).

In this proceeding King now maintains his innocence of the Grainger County offenses. He contends that had statements consistent with his innocence been revealed to him, he would not have pleaded guilty to first degree murder. King refers to an alleged statement of Sexton to the Grainger County police that he, Sexton, alone killed Mr. Millard while King sat in the car and an alleged statement he made to Jerry Childress that he was not involved in Mr. Millard's death, which Mr. Childress allegedly related later to the authorities. He also contends he was induced to plead guilty by his attorney who had promised him a package deal with the Knox County charges for life imprisonment. King claims that had he known he would not receive a plea bargain from Knox County, but instead the Grainger County convictions would be used as an aggravating circumstance, he would not have pleaded guilty. King insists that, although he was present with Sexton at the time of the Grainger County offenses, once he realized that Sexton was going to kill the victim, he stated he wanted no part in the murder, tried to prevent it, and stayed in the car.

King did not present this claim to the Tennessee state courts and thus the claim is procedurally defaulted. King contends his default should be excused because he can demonstrate both cause and actual prejudice, and because he has made a showing of factual innocence.

As cause, King argues that the State withheld the exculpatory statements; he also argues that his attorney failed to conduct a reasonable investigation and discover the statements. This argument overlooks the fact that the state courts, a federal district court, and the Sixth Circuit have all upheld the validity of King's guilty plea in the first degree murder of Mr. Millard. In addition, this court has previously determined that King is not actually innocent of the death penalty and thus cannot use factual innocence to excuse his procedural default.

IX. Both Terry King and Joseph Randall Sexton participated in the same homicide but received drastically different punishment. Joseph Randall Sexton was the principal in one homicide, Terry Lynn King was the principal in the second, but because of the circumstances under which the present case was tried, Joseph Sexton received life imprisonment in both cases while Terry Lynn King was sentenced to death. The Tennessee statute and the prosecutors' manipulation of that statute was arbitrary and capricious and violated the Fifth, Sixth, Eight, and Fourteenth Amendments to the Constitution of the United States.

*42 The respondent contends that this claim was procedurally defaulted. King raised this claim in his petition for post-conviction relief. [Addendum 3, Technical Record of Post–Conviction Proceedings, Vol. I, Comprehensive Petition for Post–Conviction Relief (hereinafter T.R.), p. 86[9]]. On appeal to the Tennessee Court of Criminal Appeals from the denial of post-conviction relief, King did not include this claim in his brief but rather in an Addendum attached to the brief without argument. [Addendum 4, Document A, Brief of Appellant, Addendum (hereinafter Add.), p. 141]. In the opening paragraphs of the Addendum to the brief, King's counsel stated that they have included in the Addendum "a series of issues which they seek to preserve on behalf of Mr. King." [*Id.* at 140]. Counsel also stated that they "stand ready to brief any such issues at length if the Court so desires." [*Id.*].

The Addendum set forth seven claims, all without argument. The Tennessee Court of Criminal Appeals did not address any of the seven claims, nor did the Tennessee Supreme Court. Respondent contends that King waived consideration of these claims because he did not include them in his brief to the Tennessee Court of Criminal Appeals, as required by Rule 27(a)(4) & (7) of the Tennessee Rules of Appellate Procedure. Respondent also refers to Rule 10(b) of the Rules of the Court of Criminal Appeals of Tennessee, which provides that "[i]ssues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court."[10]

King avers that he did exhaust these claims by including them in his post-conviction petition and in the addendum to the brief on appeal. This court disagrees. Because King did not include the claims in his brief, and only in an addendum without argument, the court finds that he waived consideration of the claims in the Tennessee Court of Criminal Appeals and thus has procedurally defaulted the claims in this court. Nevertheless, out of an abundance of caution, the court will consider the claims on the merits.[11]

With respect to King's claim that the imposition of the death sentence was arbitrary and capricious under the Tennessee statute, the court finds that the claim lacks merit. King contends that because of the significant delay of the indictment for Ms. Smith's murder in Knox County, the Grainger County case was resolved and King was convicted of first degree murder prior to the return of the Knox County indictment. Thus, when King went to trial in Knox County in the case in which he was the principle participant, he was already convicted of first degree murder in Grainger County, a strong aggravating circumstance. On the other hand, Sexton had not yet been convicted of first degree murder in Knox County when he faced the Grainger County charges in which he was the principle participant and was able to resolve those charges without the aggravating circumstance of a prior violent felony.

*43 To the extent King alleges that the State should not have been allowed to use as an aggravating circumstance an offense that was unadjudicated at the time of the instant offense, the court has already found that this claim was procedurally defaulted, *supra* at 71–73. King also avers that the disparate treatment of him and Sexton shows that the death penalty was arbitrarily applied in this case. In this regard, it appears that he is referring to the State's use of the assault with intent to commit aggravated kidnapping, which was committed only three days after the killing of Mrs. Smith.

Under Tennessee law, for purposes of the aggravating circumstance of prior violent felony, "the order in which the crimes were actually committed is irrelevant so long as the convictions have been entered before the sentencing hearing at which they were introduced." *State v. Nichols*, 877 S.W.2d 722, 735 (Tenn.1994). The discretion of the prosecution in this regard does not violate the Constitution. *See Gregg v.*

Georgia, 428 U.S. 153, 199, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). King is not entitled to relief on this claim.

X. At the time Terry Lynn King entered a plea of guilty to first-degree murder in Grainger County on May 3, 1984, he had been charged in the present case but was not represented by counsel and hence did not receive any advice of counsel to the effect that his conviction in Grainger County could be used as an important and powerful aggravating circumstance in his eventual trial in the present case in Knox County. He had retained counsel Tommy Hindman on another Knox County case. Despite this pre-existing attorney/client relationship, Mr. King was questioned on the Knox County case in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights.

To the extent King challenges the validity of his Grainger County guilty plea, the court previously noted, *supra* at 73, that the state courts, a federal district court, and the Sixth Circuit have all upheld the validity of King's guilty plea in the first degree murder of Mr. Millard. With respect to King's allegation that he was questioned in the instant case without benefit of counsel who was representing him on another matter, that claim was raised in the Addendum in the post-conviction appeal. [Add. at 142].

The Supreme Court has held that the right to counsel under the Sixth Amendment is "offense specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *McNeil v. Wisconsin*, 501 U.S. 171, 175, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991) (internal quotation marks and citation omitted). Thus, "a defendant's statement regarding offenses for which he had not been charged were admissible notwithstanding the attachment of his Sixth Amendment right to counsel on other charged offenses." *Texas v. Cobb*, 532 U.S. 162, 168, 121 S.Ct. 1335, 149 L.Ed.2d 321 (2001). This claim lacks merit.

XI. The Tennessee Death Penalty statute codified at 39–2–203 (1982) was unconstitutional in the following respects:

*44 a) The statute failed to require the jury to make specific findings as to the presence or absence of mitigating circumstances but required written findings of aggravating circumstances, hence emphasizing the aggravating circumstances in the jury's consideration and preventing effective appellate review.

b) The statute relieved the state of its burden of proof and shifted the burden to the defendant to show that mitigating evidence outweighed the aggravating evidence.

c) The statute permitted inadmissible, non probative and unreliable evidence to be used against the defendant during the sentencing phase.

d) The statute made death mandatory when the aggravating circumstances outweigh the mitigating circumstances without permitting the jury to show mercy.

e) The statute failed to provide for adequate appellate review of proportionality of the capital defendant's death sentence. *State v. Black*, 815 S.W.2d 166, 192 (Tenn.1991) (Reid, concurring and dissenting).

f) T.C.A. Section 39–2–203(h) prohibited the jury from understanding the nature and effect of a non-unanimous verdict because telling the jury that its verdict must be unanimous was a fiction because no such unanimity was in fact needed for a life sentence. *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983).

King has failed to cite any authority holding the Tennessee Death Penalty Act unconstitutional. The court notes at the outset that the Sixth Circuit has held that Tennessee's death penalty statute is constitutional. *Workman v. Bell*, 178 F.3d 759, 778 (6th Cir.1998), *cert. denied*, 528 U.S. 913, 120 S.Ct. 264, 145 L.Ed.2d 221 (1999).

Subparts (a)-(c) were raised by King on direct appeal.[12] The Tennessee Supreme Court gave short shrift to these arguments.

> Defendant also raises the question of the constitutionality of the Tennessee Death Penalty Act, evidently as a cautionary action as he does not discuss the issue in any detail in his brief. On reference to the motion which is the predicate of the assignment, we find that defendant raised no issue, nor advanced any argument that has not been considered and overruled in several prior cases.

State v. King, 718 S.W.2d at 250 (citing *State v. Austin*, 618 S.W.2d 738 (Tenn.1981)). For the following reasons, the

conclusion of the Tennessee Supreme Court was neither contrary to, nor did it involve an unreasonable application of, federal law.

With respect to King's claim that the statute failed to require the jury to make specific findings as to mitigating circumstances, the court is not aware of any constitutional requirement in that regard. *See Martin v. Maggio*, 711 F.2d 1273, 1287 (5th Cir.1983), *cert. denied*, 469 U.S. 1028, 105 S.Ct. 447, 83 L.Ed.2d 373 (1984) ("The Constitution simply does not require such a procedure."); *see also Austin v. Bell*, 927 F.Supp. 1058 (M.D.Tenn.1996) ("The Constitution does not require a jury that imposes a death sentence to make specific written findings of mitigating circumstances.").

As to King's claim that the statute shifted the burden to the defendant to show that mitigating evidence outweighed aggravating evidence the State bears the burden of proving aggravating circumstances and the statute does not place upon the defendant the burden of proving mitigating circumstances. To the extent King contends that the statute implicitly places such a burden on the defendant, that is not unconstitutional. *Walton v. Arizona*, 497 U.S. 639, 649–50, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

***45** With respect to King's claim that the statute permitted inadmissible and unreliable evidence to be used during the sentencing phase, he makes only a conclusory argument that this is so. As previously noted, the Sixth Circuit has held that Tennessee's death penalty statute is constitutional.

Subparts (d)-(f) were raised in the Addendum in the post-conviction appeal. [Add. at 142--43]. With respect to King's claim that the statute made death mandatory when the aggravating circumstances outweigh the mitigating circumstances, the Supreme Court has never held "that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence." *Buchanan v. Angelone*, 522 U.S. 269, 276, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998). So long as a jury is "allowed to consider and give effect to all relevant mitigating evidence", as is the case in Tennessee, the statute is not impermissibly "mandatory." *Blystone v. Pennsylvania*, 494 U.S. 299, 305, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990); *see also Kansas v. Marsh*, 548 U.S. 163, 171, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006) ("So long as the sentencer is not precluded from considering relevant mitigating evidence, a capital sentencing statute cannot be said to impermissibly, much less automatically, impose death.") (citations omitted). This claim lacks merit.

As to King's claim that the statute failed to provide adequate appellate proportionality review, the Supreme Court has held that the Constitution does not require a proportionality review. *Pulley v. Harris*, 465 U.S. 37, 44, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). This claim lacks merit.

With respect to King's claim that the statute prohibited the jury from understanding the nature and effect of a non-unanimous verdict, he claims that unanimity is not needed for a life sentence and thus it is error to instruct a jury that its verdict must be unanimous. In *Jones v. United States*, 527 U.S. 373, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999), the Supreme Court held that there is no constitutional requirement that a capital sentencing jury must be informed of the consequences of their failure to reach a unanimous decision. *Id.* at 381–82. This claim lacks merit.

XII. The trial court failed to cure the facial unconstitutionality of the Tennessee death penalty statute of its errors in the following instructions:

a) The trial court failed to define "aggravation" or "mitigation" and hence failed to provide the appropriate guidance to the jury in evaluating the meaning of those terms.

b) The trial court failed to instruct the jury specifically that it could consider the fourteen non-statutory mitigating circumstances which were specifically requested by defense counsel and which were referred to the court only as "any other mitigating circumstances you may find" rather than as specific mitigating circumstances which it could consider. (TR 948).

c) The trial court emphasized the mandatory nature of the death penalty statute and the ambiguous standard contained therein by the use of the Pattern Jury Instruction set forth on page 948 of the transcript to the effect:

***46** If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the state beyond a reasonable doubt and said circumstances are not outweighed by any

sufficiently substantial mitigating circumstances, the sentence shall be death.

without an explanation of the following:

1) What constitutes a "sufficiently substantial" mitigating circumstance to offset any aggravating circumstance that the jury might find.

2) Whether the meaning of the word "substantial" is a qualitative or quantitative matter.

3) Whether the balancing test to be conducted by the jury was a qualitative rather than a quantitative balancing test. *E.g., State v. Howell,* 868 S.W.2d at 216 (emphasizing that the test is to be qualitative).

4) That the jury could place whatever weight it might deem appropriate on any of the aggravating or mitigating circumstances it might find.

5) The use of the plural term "mitigating circumstances" instructs the jury that they must unanimously find more than on, when that is not a legal requirement.

6) The jury's findings on mitigating factors did not have to be unanimous. *See Austin v. Bell,* 126 F.3d 843 (6th Cir.1997).

These claims were raised in the Addendum in the post-conviction appeal. [Add. at 143–44]. With respect to the first claim, King avers that the trial court's failure to define "aggravation" or "mitigation" amounted to constitutional error. The Tennessee Supreme Court on direct appeal determined that the trial court did not err in refusing to define "to aggravate" because it "is a term in common use and not a legalism beyond the understanding of the juror." *State v. King,* 718 S.W.2d at 249. "To mitigate" would fall into the same category.

Under Tennessee's death penalty scheme, in order to impose a death sentence, a jury must find at least one statutory aggravating circumstances. The jury is also instructed as to applicable mitigating circumstances and further told that they may consider any other mitigating circumstances they may find. Such was the instruction in King's case. [Addendum 1, Transcript of the Trial, Vol. XIX, pp. 947–48]. The instruction was not unconstitutional and this claim lacks merit. *See Gregg v. Georgia,* 428 U.S. 153, 196–98, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

As to King's second claim in this section, the Tennessee Supreme Court held that the trial court did not err in refusing to instruct the jury to consider fourteen non-statutory mitigating circumstances which were requested by defense counsel. *State v. King,* 718 S.W.2d at 249. This conclusion was neither contrary to, nor did it involve an unreasonable application of, federal law. *See Buchanan v. Angelone,* 522 U.S. 269, 276–77, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998).

With respect to King's third claim in this section, the instruction to the jury was similar to the instruction found constitutional by the Court in *Buchanan, Id.* at 277. This claim lacks merit.

XIII. Section 39–2–203(c) of the Tennessee Code permits the court to instruct on *any matter* which it deems relevant to the punishment without guiding the court or the jury as to what such items might be. The statute thus allows the introduction of legally irrelevant evidence which does not go to any of the statutory aggravating circumstances, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

***47** This claim was raised in the Addendum in the post-conviction appeal. [Add. at 144]. King contends that, by its very terms, the statute purports to authorize the admission of irrelevant evidence. The claim lacks merit for the following reason.

In *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the Supreme Court held that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. *Id.* at 604–05 (footnotes omitted). King's claim overlooks the fact that the Tennessee Supreme Court has construed the above referenced statute as enlarging the defendant's ability to introduce relevant mitigation evidence, as required by *Lockett. See State v. Johnson,* 632 S.W.2d 542, 548 (Tenn.1982) (in enacting this statute, the Tennessee legislature went "even further than is required by" *Lockett*); *see also State v. Bates,* 804 S.W.2d 868, 880 (Tenn.1991) ("We have held that under the statute evidence is relative to punishment, and thus admissible, only if it is relevant to an aggravating circumstance, or to a mitigating factor raised by the defendant.").

XIV. Death by electrocution in the State of Tennessee constitutes a physically cruel and inhuman punishment in violation of the Eighth Amendment of the Constitution of the United States because of the mental and physical torture which the process of death by electrocution imposes upon the individual who dies in such a fashion. The post-conviction court further erred by refusing to consider petitioner's evidence of this cruel and inhuman process. (Post-conviction hearing, III, 296–300; IV, 301–306).

This claim was raised in the Addendum in the post-conviction appeal [Add. at 144–45] and is now moot. In 2000, the Tennessee legislature passed a law providing for execution by lethal injection. Tenn.Code Ann. § 40–23–114(a). Because he committed his offense prior to January 1, 1999, King may elect by written waiver to be executed by electrocution instead of lethal injection. *Id.* § 40–23–114(b). Should he choose to make such a waiver, King would waive any claim that electrocution is unconstitutional. *See Stewart v. LaGrand*, 526 U.S. 115, 119, 119 S.Ct. 1018, 143 L.Ed.2d 196 (1999).

XIV. Death by lethal injection is cruel and unusual punishment which violates the Eighth Amendment to the United States Constitution.

This claim has not been presented to the state courts, either on direct appeal or in post-conviction proceedings, because it was not an issue at that time. Nevertheless, as far as this court is aware, Tennessee's provision for death by lethal injection has not been ruled unconstitutional. *See, e.g., Harbison v. Little*, 571 F.3d 531, 539 (6th Cir.2009); *State v. Jordan*, 325 S.W.3d 1, 87–88 (Tenn.2010); *Thomas v. State*, 2011 WL 675936 at *46 (Tenn.Crim.App. Feb.23, 2011). King is not entitled to relief on this claim.

XVI. The length of time between imposition of sentence and execution constitutes cruel and unusual punishment.

***48** This claim has not been presented to the state courts, either on direct appeal or in post-conviction proceedings. Accordingly, King has procedurally defaulted this claim. In any event, this claim lacks merit. *See Knight v. Florida*, 528 U.S. 990, 120 S.Ct. 459, 145 L.Ed.2d 370 (1999) (Thomas, J., concurring in denial of certiorari) ("I write only to point out that I am unaware of any support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed.").

XVII. The court and the district attorney excused prospective jurors who could not consider the death penalty by virtue of the free exercise of their religion. See TR 154–156. The court and the State therefore violated the defendant's rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution.

This claim was raised in the Addendum in the post-conviction appeal. [Add. at 145]. It refers to one juror who stated she did not believe in capital punishment because of the biblical admonition against killing and that she could not impose the death penalty. [Addendum 1, Transcript of the Trial, Vol. VIII, p. 599–Vol. IX, p. 604]. The trial court granted the State's motion to remove the juror for cause. [*Id.* at 605].

In *Witherspoon v. Illinois*, 391 U.S. 510, 522, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), the Supreme Court held that jurors in a death penalty case may not be excluded merely "because they voiced general objections to the death penalty or express conscientious or religious scruples against its infliction." Nevertheless, "the Constitution does not prohibit the States from 'death qualifying' juries in capital cases." *Lockhart v. McCree*, 476 U.S. 162, 173, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986). The proper standard for evaluating such a claim is "whether a juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1985)).

In this case, the juror was removed for cause based upon her inability to impose the death penalty. The fact that her feelings were based upon her interpretation of the Bible was not a religious test and King is not entitled to relief on this claim.

XVIII. Mr. King was entitled to a new trial and/or a new sentencing hearing based on the cumulative errors which occurred during his trial in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

The Tennessee courts found any errors in King's case to be harmless. King contends that the cumulative effect of the errors requires reversal of his conviction and sentence. He raised this claim in post-conviction proceedings and the

Tennessee Court of Criminal Appeals concluded that "[e]ven when viewed cumulatively, we do not find that the sum total of these errors robbed the petitioner of a fair trial at either the guilt or penalty phases." *King v. State*, 1997 WL 416389 at *18.

***49** The Sixth Circuit has held in the past that, regardless of whether each of a petitioner's alleged errors, standing alone, would require a finding of deprivation of due process, a court may look to whether the cumulative effect of the errors was such that the petitioner was denied fundamental fairness. *See, e.g., Cooper v. Sowders*, 837 F.2d 284, 286 (6th Cir.1988); *Walker v. Engle*, 703 F.2d 959, 968 (6th Cir.1983). These cases, however, were decided prior to the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which amended 28 U.S.C. § 2254 with regard to the standard of review in habeas corpus cases.

The Supreme Court has not held that a district court may look to the cumulative effects of trial court errors in deciding whether to grant habeas corpus relief. *See Williams v. Anderson*, 460 F.3d 789, (6th Cir.2006) (death-penalty decision stating, "[T]he law of this Circuit is that cumulative error claims are not cognizable on habeas because the Supreme Court has not spoken on this issue. No matter how misguided this case law may be it binds us."); *Moore v. Parker*, 425 F.3d 250, 256 (6th Cir.2005) (death-penalty decision stating, "[W]e have held that, post-AEDPA, not even constitutional errors that would not individually support habeas relief can be cumulated to support habeas relief."); *Scott v. Elo*, 302 F.3d 598, 607 (6th Cir.2002) ("The Supreme Court has not held that constitutional claims that would not individually support habeas relief may be cumulated in order to support relief."); *Lorraine v. Coyle*, 291 F.3d 416, 447(6th Cir.2002) (death-penalty decision stating, "The Supreme Court has not held that distinct constitutional claims can be cumulated to grant habeas relief."); *but see DePew v. Anderson*, 311 F.3d 742, 751 (6th Cir.2002) (constitutional errors that might have been harmless when considered individually maybe be cumulated in a capital case, leading to a reversal of a death sentence).

Accordingly, because there is no Supreme Court precedent in this regard, King cannot demonstrate that the Tennessee Court of Criminal Appeals' rejection of his cumulative effect argument was either contrary to, or an unreasonable application of, clearly established federal law as required by *Williams v. Taylor*. *See Baze v. Parker*, 371 F.3d 310, 330 (6th Cir.2004) (death penalty decision; petitioner's cumulative error theory lacks merit because it "depends on non-Supreme Court precedent").

To the extent King contends that *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) required the Tennessee Supreme Court to conduct a cumulative error analysis, this court disagrees. *Kyles* was concerned with the suppression by the government of material evidence favorable to the defense in violation of *Brady*.

IV. *Conclusion*

King is not entitled to relief under 28 U.S.C. § 2254, the respondent's motions for summary judgment will be **GRANTED,** and the petition for the writ of habeas corpus will be **DENIED.** The stay of execution previously entered in this matter will be **VACATED.** The petitioner having failed to make a substantial showing of the denial of a constitutional right, a certificate of appealability **SHALL NOT ISSUE.** 28 U.S.C. § 2253(c).

***50 AN APPROPRIATE ORDER WILL ENTER.**

All Citations

Not Reported in F.Supp.2d, 2011 WL 3566843

Footnotes

1 Addendum 1 contains the technical record (one volume) and transcripts and exhibits (22 volumes) of King's trial proceedings; Addendum 3 contains the technical record (five volumes), transcripts and exhibits (six volumes), pre-hearing transcript (one volume), and appendix (one volume) of King's post-conviction proceedings. Generally, the volume number of the transcripts and other documents in the state record does not correspond to the volume number listed by the respondent. The court's reference to the record is to the volume number listed by the respondent.

2 King was also convicted of aggravated kidnaping; that conviction was set aside by the trial court on King's motion for judgment of acquittal.

3 King's co-defendant, Randall Joe Sexton, was tried in the same trial with King and was also convicted of felony murder and armed robbery; Sexton was spared the death penalty by the jury and instead was sentenced to consecutive sentences

of life in prison and 125 years, respectively. *State v. Sexton*, 724 S.W.2d 371 (Tenn.Crim.App.), *perm. app. denied, id.* (Tenn.1986).

4 The witness's name was actually Jerry Dean Childress. [Addendum 1, Transcript of the Trial, Vol. X, p. 51].

5 King was convicted of the first degree murder and aggravated kidnapping of Todd Lee Millard in Grainger County, Tennessee. The authorities learned of King's involvement during questioning of King and Sexton with respect to Ms. Smith's murder. *See, e.g., King v. Dutton*, 17 F.3d 151 (6th Cir.1994). This conviction and it use as an aggravating circumstance are discussed in more detail with respect to claim VIII, *infra* at 71–73.

6 Tennessee law now provides the following HAC aggravator: "The murder was especially heinous, atrocious, or cruel, in that it involved torture or serious physical abuse beyond that necessary to produce death." Tenn.Code Ann. § 39–13–204(i)(5).

7 This subpart was incorrectly designated in the amended habeas corpus petition as a second "D." and has been redesignated by the court as subpart "E." Subsequent subparts were likewise incorrectly designated and have been redesignated by the court in logical progression, with the original designation in parentheses.

8 King also claims that, although the incidence took place on August 12, 1982, Ms. Carter waited two months, until October 13, 1982, to take out a misdemeanor warrant against King for assault and battery. There is nothing in the record, however, to show that the incident took place on August 12, 1982, and the record in fact contradicts this claim. The handwritten statement of Ms. Carter and the warrant she swore out on October 13, 1982, state that the incident occurred on October 12, 1982. [Addendum 1, Transcript of Trial, Vol. XXI, Exhibits 66 and 67, pp. 1099 and 1100, respectively].

9 Page references are to the sequential page numbers of the Technical Record, not of the Post–Conviction Petition itself.

10 Respondent also contends that King waived these claims because he did not include them in his Rules 11 application for permission to appeal to the Tennessee Supreme Court. In the past, the required state court review included review by the Tennessee Supreme Court. *Picard v. Connor*, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971). On June 28, 2001, however, the Tennessee Supreme Court promulgated Rule 39, which provides in pertinent part that a claim which has been presented to the Tennessee Court of Criminal Appeals is deemed exhausted. In *Adams v. Holland*, 330 F.3d 398 (6th Cir.2003), *cert. denied*, 541 U.S. 956, 124 S.Ct. 1654, 158 L.Ed.2d 392 (2004), the Sixth Circuit held "that Rule 39 rendered Tennessee Supreme Court review 'unavailable' in the context of habeas relief." The court also held that Rule 39 was not a change in Tennessee law, but only a clarification of existing law, and thus it should be applied retroactively so as to prevent procedural default. Thus, King's failure to include the claims in his Rule 11 application is no longer relevant to the issue of procedural default.

11 The court previously ordered the parties to brief the exhaustion issue on these claims and additionally ordered the parties to brief the merits of each claim, with factual and legal support. [Court File No. 152]. The parties have done so. [Court File No. 158, Supplement Brief of Petitioner; Court File No. 169, Supplement Brief of Respondent].

12 King raised these issues in the trial court by way of a motion to declare Tennessee's death penalty statute unconstitutional [Addendum 1, Technical Record on Direct Appeal, Vol. I, pp. 62–64], which was denied [*id.* at 103]. On appeal to the Tennessee Supreme Court, he argued in his brief that the Tennessee death penalty statute is unconstitutional and referred to his previous motion. [Addendum 2, Document A, Brief of Appellant, p. 31].

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APPENDIX J

847 F.3d 788
United States Court of Appeals, Sixth Circuit.

Terry Lynn KING, Petitioner–Appellant,

v.

Bruce WESTBROOKS, Warden, Respondent–Appellee.

No. 13-6387

Argued: September 28, 2016

Decided and Filed: February 9, 2017

Synopsis

Background: Following affirmance in direct appeal of petitioner's state-court convictions for murder in the first degree while in perpetration of simple kidnapping by confinement, and armed robbery, and his death sentence, 718 S.W.2d 241, he filed a petition for writ of habeas corpus. The United States District Court for the Eastern District of Tennessee, Robert Leon Jordan, J., 2011 WL 3566843, dismissed the petition. Following grant of certificate of appealability, petitioner appealed.

Holdings: The Court of Appeals, Karen Nelson Moore, Circuit Judge, held that:

trial counsel's decision to abandon intoxication defense during guilt phase of trial did not constitute ineffective assistance;

delay in hiring mental health experts to evaluate petitioner was not ineffective assistance of counsel; and

habeas court was precluded from considering opinions of mental health experts who testified during the habeas proceeding.

Affirmed.

*790 Appeal from the United States District Court for the Eastern District of Tennessee at Knoxville. No. 3:99-cv-00454—Robert Leon Jordan, District Judge.

Attorneys and Law Firms

ARGUED: Dana C. Hansen Chavis, FEDERAL DEFENDER SERVICES OF EASTERN TENNESSEE, INC., Knoxville, Tennessee, for Appellant. Jennifer L. Smith, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee. ON BRIEF: Dana C. Hansen Chavis, FEDERAL DEFENDER SERVICES OF EASTERN TENNESSEE, INC., Knoxville, Tennessee, Wade V. Davies, Stephen Ross Johnson, RITCHIE, DILLARD, DAVIES & JOHNSON, P.C., Knoxville, Tennessee, C. Mark Pickrell, THE PICKRELL LAW GROUP, P.C., Nashville, Tennessee, for Appellant. Jennifer L. Smith, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee.

Before: BATCHELDER, MOORE, and GIBBONS, Circuit Judges.

OPINION

KAREN NELSON MOORE, Circuit Judge.

This death penalty case arises out of the kidnapping and murder of Diana K. Smith *791 by Petitioner–Appellant Terry King. Following the district court's dismissal of King's petition for a writ of habeas corpus, we granted a certificate of appealability on two issues: whether trial counsel was ineffective for failing to present during the trial testimony about King's intoxication at the time of the murder and whether trial counsel was ineffective for failing to investigate adequately King's mental health and to obtain expert assistance in a timely manner. For the reasons stated below, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

At trial, the Government put forth the testimony of two individuals to whom King confessed: Jerry Childers,[1] an acquaintance of King, *see* Trial Tr. ("TT") Vol. IX at 52 (Childers Test.), and David Davenport, *id.* at 84 (Davenport Test.), an investigator for the Tennessee Bureau of Investigation. Childers described a conversation he had with King, *see id.* at 53–69 (Childers Test.), and Davenport read statements that he took from King and Randall Joe Sexton, King's co-defendant, at the Knox County Sheriff's Department. *see* TT Vol. IX at 86 (Davenport Test.); *id.* at

90–94 (Davenport Test., Sexton Statement); TT Vols. IX–X at 100–05 (Davenport Test., King Statement). The following is a summary of that testimony.

On July 31, 1983, King; his cousin, Don King; a man named Eugene Thornhill; and the victim, Diana K. Smith, consumed large amounts of alcohol, LSD, and Quaaludes and engaged in sexual intercourse throughout the day. *Id.* at 100–01 (Davenport Test., King Statement). At one point, King and Smith drove to a wooded area in Smith's car, where Smith accused King and the others of raping her. TT Vol. IX at 56 (Appellant's App'x at 110) (Childers Test.); TT Vol. X at 101 (Davenport Test.). In response, King told Smith to get into the trunk of the car. TT Vol. IX at 56 (Appellant's App'x at 110) (Childers Test.); TT Vol. X at 101–02 (Davenport Test., King Statement). With Smith in the trunk, King drove to Sexton's house, where King obtained a rifle and shovel. TT Vol. IX at 56 (Appellant's App'x at 110) (Childers Test.); *id.* at 91 (Davenport Test., Sexton Statement); TT Vol. X at 102 (Davenport Test., King Statement). King and Sexton then drove to a wooded area, where King ordered Smith out of the trunk and shot her in the back of the head. TT Vol. IX at 67–68 (Childers Test.); TT Vol. X at 102–03 (Davenport Test., King Statement). After unsuccessfully attempting to bury Smith, King and Sexton went home. TT Vol. X at 103 (Davenport Test., King Statement). The following day, King and Sexton returned to the scene and disposed of Smith's body in a nearby quarry. TT Vol. IX at 92 (Davenport Test., Sexton Statement); TT Vol. X at 103 (Davenport Test., King Statement).

In preparation for trial, which began on January 23, 1985, *see* Post–conviction Tr. ("PCT") Vol. V at 426 (Appellant's 2d Supp. App'x at 796) (Simpson Test.), King's trial counsel, Robert R. Simpson, suspected that King may have had brain damage as a result of a childhood head ***792** injury and substance abuse. PCT Vol. IV at 376, 381–82, 384 (Appellant's 2d Supp. App'x at 744, 749–50, 752) (Simpson Test.). In addition to a childhood head injury, in 1982, King—then about nineteen years old—hit his head in a car accident and had double vision for a couple of months afterwards. R. 254–3 at 4 (Gebrow Report at 2) (Page ID #475). From age eight to sixteen, King sniffed gasoline. *Id.* at 5 (Gebrow Report at 3) (Page ID #476). He also consumed alcohol beginning at age twelve or thirteen and LSD and Quaaludes beginning at age fifteen or sixteen. *Id.* at 4–5 (Gebrow Report at 2–3) (Page ID #475–76).

On January 15, 1985, Simpson retained a mental-health expert, Martin Gebrow, M.D., to evaluate King. Simpson used private funds from King's family to pay for Dr. Gebrow's services because Simpson was unaware of state law that provided for state funding of an expert. PCT Vol. V at 424, 431–32 (Appellant's 2d Supp. App'x at 794, 801–02) (Simpson Test.). Dr. Gebrow's report indicated that he evaluated King on January 23, 1985. R. 254–3 (Gebrow Report at 1) (Page ID #474). The report described King's background, including his history of substance abuse. *Id.* at 1–3 (Page ID #474–76). Dr. Gebrow concluded, "My examination of Mr. King did not reveal any evidence of psychotic thought process. Nor did it reveal any evidence of an organic brain syndrome such as might have been caused by the chronic use of hydrocarbons by inhalation, alcohol, or LSD." *Id.* at 3–4 (Page ID #476–77). He continued, "This however does not mean that any brain damage does not exist. It would be my recommendation that Mr. King have an electroencephalogram and psychological testing to rule out organicity and/or major thought disorder." *Id.* at 4 (Page ID #477).

During voir dire, Simpson made an oral motion to "permit the taking of an electroencephalogram" of King. TT Vol. VII at 552–53 (Appellant's App'x at 158–59), which is "a brain wave test that measures the electrical activity of the brain and can ascertain whether or not there are any abnormal electrical discharges which would indicate brain damage." TT Vol. VIII at 642 (Gebrow Test.). In a hearing on the motion, during which Dr. Gebrow testified, the trial court inquired of Dr. Gebrow whether there was "a substantial possibility of damage." *Id.* at 657. Dr. Gebrow responded, "With the eight year—eight-or-nine-year history of constant hydrocarbon abuse, I think that there would be—could be an excellent chance that this was—that there was some damage" but that it was not a "probability." *Id.* at 658. Dr. Gebrow also agreed that, based on the examination, King was coherent, his memory appeared to be intact, and that he was able to express himself well. *Id.* Because Dr. Gebrow "went in cold to do the evaluation," *id.* at 655, he was not aware of certain conditions that he admitted would affect the evaluation, including prior psychological testing, *id.* at 648, and evidence of antisocial behavior, *id.* at 665–66. As a result, the trial court denied King's motion but noted that it would reconsider if Dr. Gebrow reviewed more of King's medical records and decided that an electroencephalogram would still be required. *See id.* at 670. Having reviewed these records, Dr. Gebrow testified later at trial that an electroencephalogram was not necessary. TT Vol. XII at 383 (Gebrow Test.).

Simpson suggested in his opening statement that King's intoxicated state influenced his actions:

> We think the proof will show that whatever happened to Mrs. Smith, Mr. King's involvement was the product of an incredible quantity of intoxicants. And we think the proof will show that he ***793** cannot be held legally responsible for all of his actions to the degree the State would ask you, simply because of the vast quantities of intoxicants that he consumed. And the proof is going to be very clear on that point.

TT Vol. IX at 10 (Appellant's App'x at 161). Simpson's trial strategy changed when King's former girlfriend, Lori Eastman Carter ("Carter"), testified. Carter described an incident on October 13, 1982, in which King assaulted her in her car. TT Vol. XI at 278–79 (Appellee's App'x at 203–04). She testified that King struck her, causing her to lose consciousness, and that when she became conscious, "he pulled me from the floorboard by my hair, rolled my hair up in the car window, and continued to beat me around my face and neck." *Id.* at 279 (Appellee's App'x at 204). She continued, "Several times he said that he wanted me to tell him—he asked me if I knew that I was dying, and I said yes. And he wanted me to tell him how it felt to be dying, so that the next woman he killed he would know how she felt." *Id.* After losing and regaining consciousness once more, Carter overheard King telling his brother, James King, that he killed Carter and that he needed help putting her body in a quarry. *Id.* at 280 (Appellee's App'x at 205). Carter did not say whether King was sober when he attacked her.

At the penalty phase, King's mother, Billie King, testified that she would find King sniffing gasoline when she came home from work: "Well, you could tell that he had—he had a motorcycle. It was tore up, but it was on the back porch. And he had the gas cap off from the motorcycle. And you could tell that he had been into the gas, and he couldn't hardly sit up. And I whipped him, you know. He promised me he'd never do it again." TT Vol. XIII at 496. Similarly, King's brother, Gary Edward King, testified that following his father's death, King would sniff gasoline "several times a week." TT Vol. XIV at 509. King also called Robert Booher, M.D., a specialist in "addictionology," to testify about the general effects of LSD, Quaaludes, and alcohol. TT Vol. XVI at 730–37.

Ultimately, the jury found King guilty of first-degree murder and recommended death by electrocution, which the trial court imposed. *See State v. King*, 718 S.W.2d 241, 243 (Tenn. 1986). Following an unsuccessful direct appeal, *see id.* King filed a petition for post-conviction relief in state court, in which he raised, among other claims, the same ineffective assistance of counsel claims that are the subject of this appeal. *See King v. State*, No. 03C01-9601-CR-00024, 1997 WL 416389, at *1, 12–17 (Tenn. Crim. App. July 14, 1997). At post-conviction proceedings, King called a clinical psychologist, Pamela Auble, Ph.D, who had evaluated King and reviewed his medical records. PCT Vols. I–II at 76, 99–100, 106–07 (Appellant's 2d Supp. App'x at 439, 462–63, 471–72) (Auble Test.). She testified, "The psychological testing that I have done and that has been done—the evaluation by Dr. Gebrow that was done prior both raise the question of potential brain damage. This issue still needs to be explored, is not yet conclusive, but is a possible thing that could be explored." PCT Vol. II at 148, 168 (Appellant's 2d Supp. App'x at 513, 533) (Auble Test.). She also testified that she had reviewed a report by a Dr. Kaminski, who performed an EEG on King that "showed negative results."[2] *Id.* at 167 (Appellant's ***794** 2d Supp. App'x at 532) (Auble Test.). She further observed that there was no evidence of psychotic thought process. *Id.*

In addition to Dr. Auble, Simpson testified during post-conviction proceedings on his decision not to raise an intoxication defense. He stated that "The testimony of Lori Eastman [Carter] was, from our perspective, totally unexpected and very devastating. It really skewed how we were looking at this case. We dropped the idea, after that, of even raising intoxication in the hopes of getting a second-degree murder conviction, which we had viewed as slim, anyway, and just decided to proceed with it in the penalty phase and raise it there, because of her testimony, apparently when he was sober, of nearly beating her to death." PCT Vol. IV at 400 (Appellee's 2d App'x at 768) (Simpson Test.). Characterizing her testimony as "Pretty devastating stuff," he continued: "But that really skewed our defense, and we wanted out of that phase as quick as we could and focus the jury on our side of the case, and our side of the case was as long as the guilt-innocence phase." *Id.* at 400–01 (Appellee's 2d App'x at 768, 771) (Simpson Test.).

The trial court denied King's petition for post-conviction relief, and the Tennessee Court of Criminal Appeals and Tennessee Supreme Court affirmed its judgment. *See King v. State*, 989 S.W.2d 319, 321 (Tenn. 1999); *King*, 1997 WL 416389, at *19. King then filed a federal petition for a writ of habeas corpus, in which he raised the same ineffective-assistance-of-counsel claims. *See King v. Bell*, No. 3:99-cv-454, 2011 WL 3566843, at *20–26 (E.D. Tenn. Aug. 12, 2011). At this stage, King called expert witnesses who stated

that in fact King had organic brain damage at the time of Smith's death. An evaluation by James R. Merikangas, M.D., P.C., on June 27, 2000, demonstrated with "a reasonable degree of medical certainty that Mr. King suffers from brain damage and did so at the time of the crime for which he stands convicted." Merikangas Report at 3 (Appellant's App'x at 48). Dr. Merikangas also stated that King does not have antisocial personality disorder, but rather "brain damage which is no fault of his own." *Id.* at 4 (Appellant's App'x at 49). On March 21, 2001, a psychiatrist named Robert L. Sadoff, M.D., evaluated King and, after reviewing King's previous medical records, including Dr. Merikangas's report, concluded that "[i]t was the combination of all these factors, including his intoxication by several substances at the same time, his brain damage and his personality disorders that substantially impaired his capacity to conform his conduct to the requirements of the law." Sadoff Report at 22 (Appellant's App'x at 79). Finally, a physician named Murray W. Smith, M.D., evaluated King and, in a February 7, 2001 affidavit, stated "Any pre-existing brain damage resulting from the very heavy and frequent use of inhalants from age 8 to age 16, as well as the use of cocaine and amphetamine as found in my evaluation of Mr. King, would further multiply the effects of the alcohol and drugs on the causation of the violent interaction Mr. Terry King had with Ms. Diana Smith." Smith Aff. at 2 (Appellant's App'x at 53). Ultimately, the district court awarded summary ***795** judgment against King and dismissed his petition. King has appealed the district court's judgment.

II. DISCUSSION

We granted a certificate of appealability on two questions: (1) "[W]hether trial counsel was ineffective for failing to present testimony about King's intoxication at the time of the murder during the trial" and (2) "[W]hether trial counsel was ineffective for failing to adequately investigate King's mental health and obtain expert assistance in a timely manner." Certificate of Appealability at 2. For the reasons stated below, the answer to both questions is no.

A. Standard of Review

When reviewing a district court's denial of a § 2254 petition, "[t]his court reviews de novo [the] district court's legal conclusions and mixed questions of law and fact and reviews its factual findings for clear error." *Moore v. Mitchell*, 708 F.3d 760, 774 (6th Cir. 2013). King is entitled to relief only if the Tennessee Supreme Court—which issued "the last reasoned state-court opinion" in this case, *Ylst v. Nunnemaker*, 501 U.S. 797, 804–05, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991)—adjudicated King's ineffective-assistance claims on the merits in a way that:

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

28 U.S.C. § 2254(d) (2012).

The Tennessee Supreme Court, applying *Strickland* and Tennessee ineffective-assistance case law, rejected both of the ineffective-assistance claims that King raises in this appeal. *King*, 989 S.W.2d at 330–32 (intoxication defense); *id.* at 332–33 (mental-health investigation). The district court also rejected both claims in its order denying King's § 2254 petition. *King*, 2011 WL 3566843, at *20–23 (intoxication defense); *id.* at *24–26 (mental-health investigation).

B. King's Ineffective Assistance of Counsel Claims

To demonstrate that his counsel was constitutionally ineffective under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), King must make two showings: "(1) [his] counsel's performance was deficient, or put differently, 'fell below an objective standard of reasonableness'; and (2) the performance prejudiced [King]." *United States v. Mahbub*, 818 F.3d 213, 230–31 (6th Cir. 2016) (quoting *Strickland*, 466 U.S. at 687–88, 104 S.Ct. 2052). Because the *Strickland* standard is already "highly deferential," *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052, our review of a state-court decision on a *Strickland* claim is "doubly deferential" under the Anti–Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Cullen v. Pinholster*, 563 U.S. 170, 189–90, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011) (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 123, 129 S.Ct. 1411, 173 L.Ed.2d 251 (2009)). However, "[w]hen a state court relied only on one *Strickland* prong to adjudicate an ineffective assistance of counsel claim, AEDPA deference does not apply to review of the *Strickland* prong not relied upon by the state court. The unadjudicated prong is reviewed de novo." *Rayner v. Mills*, 685 F.3d 631, 638 (6th Cir. 2012).

Although the Tennessee Supreme Court did not specifically state how it ruled on either *Strickland* prong, it is clear from ***796** the substance of its decision that it decided the intoxication defense ineffective-assistance-of-counsel claim based on the deficient-performance prong and the mental-health-expert ineffective-assistance-of-counsel claim based on the prejudice prong. With respect to the intoxication defense ineffective-assistance-of-counsel claim, the court held as follows:

> Although we acknowledge that defense attorneys should strive to present a consistent theory of defense at trial, we must avoid judging the tactical decisions of counsel in hindsight. We have reviewed the circumstances from counsel's perspective at the time and conclude that the change in strategy does not rise to the level of ineffective assistance.

King v. State, 989 S.W.2d at 331–32 (citing *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052; *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982)). Because the court focused on Simpson's "tactical decisions" and trial strategy, it appears to have concluded that Simpson's performance was not deficient. And with respect to the mental-health expert ineffective-assistance-of-counsel claim, it held as follows:

> The trial court concluded ... that even if defense counsel had initiated the mental health evaluations earlier, there was no proof that a more favorable report would have been obtained. We find no evidence to preponderate against that finding. Moreover, the record reflects that counsel presented evidence through lay witnesses that was remarkably similar to the information provided by Dr. Auble. Appellant's counsel were not ineffective on this issue.

Id. at 333. Because the court focused on the effect mental-health experts would have had on the defense, and not whether Simpson's failure to retain those experts hurt King's defense, it appears to have concluded that Simpson's performance, regardless of its deficiency, did not prejudice King. Nevertheless, we will analyze the deficiency prong of King's intoxication defense ineffective-assistance claim and the prejudice prong of King's mental-health-expert ineffective-assistance claim de novo "because, even under that more liberal standard of review, we conclude that his counsel was not deficient." *See Davis v. Lafler*, 658 F.3d 525, 537 (6th Cir. 2011) (en banc).

1. Intoxication Defense

King argues that his trial counsel was ineffective during the guilt phase of King's trial for failing to present evidence that King was severely intoxicated when he murdered Smith. Appellant's Br. at 29. That evidence, King contends, would have shown that King lacked the capacity "to form the specific intent for first-degree murder." *Id.* at 31; *see id.* at 29 (same). As stated above, we review the deficiency prong of this claim de novo.

Determining whether an attorney's representation "fell below an objective standard of reasonableness" requires a court to consider "all the circumstances." *Strickland*, 466 U.S. at 687–88, 104 S.Ct. 2052. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Id.* at 688–89, 104 S.Ct. 2052. In addition, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689, 104 S.Ct. 2052. In light of this standard and the manner in which the trial unfolded, we conclude that Simpson's representation did not fall below an objective standard of reasonableness.

Simpson's view that Carter's testimony was "very devastating" is wholly supported by the circumstances of the ***797** case. Carter testified that King struck her unconscious with a slapstick, "rolled [her] hair up in the car window," and "beat [her] around [her] face and neck." TT Vol. XI at 279, 281–82 (Appellant's App'x at 96, 98–99) (Carter Test.). Her testimony that King asked her "how it felt to be dying, so that the next woman he killed he would know how she felt" could be seen as an ominous reference to Smith. *See id.* at 279 (Appellant's App'x at 96) (Carter Test.). Finally, that King considered putting Carter's body—and actually put Smith's body—in a quarry demonstrates a premeditation common to both attacks that could frustrate an intoxication defense. *See* TT Vol. IX at 92 (Davenport Test., Sexton Statement); TT Vol. X at 103 (Davenport Test., King Statement); TT Vol. XI at 280 (Appellant's App'x at 97) (Carter Test.).

Yet another reason for Simpson to abandon the intoxication defense was that King "apparently" was sober when he attacked Carter. PCT Vol. IV at 400 (Appellant's 2d Supp. App'x at 768) (Simpson Test.). If King appeared to be sober when he attacked Carter, an already "slim" intoxication defense, *id.* would become even slimmer. King argues that Simpson had an inaccurate understanding of Carter's testimony when Simpson stated that King assaulted Carter "apparently when he was sober." *See id.* In truth, it was the

Tennessee Supreme Court, but not necessarily Simpson, that had an inaccurate understanding of Carter's testimony. The record does not support that court's conclusion that "Ms. Carter testified that the appellant was sober when he attacked her with the slapstick" because Carter did not specifically state whether King was sober. *See King*, 989 S.W.2d at 331. Crucially, however, Simpson never claimed that Carter stated that King was sober; Simpson said that King "apparently" was sober. *See* PCT Vol. IV at 400 (Appellant's 2d Supp. App'x at 768) (Simpson Test.). Tone, mannerisms, and the like are impossible to discern from the cold record before us, so we will not second-guess Simpson's conclusion on what was "apparently" so in Carter's testimony. Therefore, and in light of Carter's testimony, it was not unreasonable for Simpson to get "out of [the guilt] phase as quick as we could and focus the jury on our side of the case." *See* PCT Vol. V at 401 (Appellant's 2d Supp. App'x at 771) (Simpson Test.). Accordingly, King has failed to demonstrate deficient performance of his trial counsel, and we **AFFIRM** the judgment of the district court on this ineffective-assistance-of-counsel claim.

2. Mental-Health Expert

King next argues that his counsel was constitutionally ineffective at the guilt and penalty phases for failing to investigate King's mental health on a timely basis and to obtain expert assistance concerning the same. Specifically, King focuses on his attorney's allegedly untimely retention of Dr. Gebrow. As discussed above, we review the deficient performance prong de novo because the state court did not address this prong. We also review the prejudice prong de novo because "even under that more liberal standard of review, we conclude that his counsel was not [ineffective]." *See Davis*, 658 F.3d at 537.

There is no question that Simpson's delay in retaining Dr. Gebrow fell below an objective standard of reasonableness. "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." *Hinton v. Alabama*, —— U.S. ——, 134 S.Ct. 1081, 1088–89, 188 L.Ed.2d 1 (2014) (citing ***798** *Williams v. Taylor*, 529 U.S. 362, 395, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). Section 40–14–207 of the Tennessee Code, which has not been amended since the time of King's trial, states in relevant part,

> In capital cases where the defendant has been found to be indigent by the court of record having jurisdiction of the case, the court in an *ex parte* hearing may, in its discretion, determine that investigative or expert services or other similar services are necessary to ensure that the constitutional rights of the defendant are properly protected.

Tenn. Code Ann. § 40–14–207(b) (West 2002). At a hearing on King's state petition for post-conviction relief, trial counsel stated that he "was unaware of" his ability to obtain state funds in order to hire an expert for King under this section. PCT Vol. V at 424 (Appellant's 2d Supp. App'x at 794) (Simpson Test.). He also indicated that he waited to receive private funds before retaining Dr. Gebrow because he was unaware of this section. *Id.* at 425 (Appellant's 2d Supp. App'x at 795) (Simpson Test.). King was charged with first-degree murder; his mental state at the time he killed Smith was a critical factor in the jury's determination that he was guilty and that he deserved a death sentence. Such an "inexcusable mistake of law—the unreasonable failure to understand the resources that state law made available to him" constitutes deficient performance. *See Hinton*, 134 S.Ct. at 1089. Nevertheless, because King has not shown that he was prejudiced by this deficient performance, he has not demonstrated ineffective assistance of counsel.

Even reviewing the prejudice prong de novo, we conclude that habeas relief is not warranted. Fundamentally, King has not shown, with the evidence properly available to us on federal habeas review, that the timely retention of a mental expert would have produced any evidence different from what was already available at the time of trial. Dr. Gebrow testified at a hearing on King's motion to continue the trial that "with the history of gasoline inhalation that there might be a generalized diffused type of brain damage" and that "[y]ou could also find, possibly, some focal point of brain damage." TT Vol. VIII at 644 (Gebrow Test.). He stated, "That is the reason that I requested or recommended that an electroencephalogram and psychological testing be done." *Id.* To support his argument that his trial counsel should have obtained a mental expert earlier, King introduced Dr. Auble during post-conviction proceedings. Similarly to Dr. Gebrow, she testified, "The psychological testing that I have done and that has been done—the evaluation by Dr. Gebrow that was done prior both raise the question of potential brain damage. This issue still needs to be explored, is not yet conclusive, but is a possible thing that could be explored." PCT Vol. II at 148 (Appellant's 2d Supp. App'x at 513) (Auble Test.). She also acknowledged that an electroencephalogram had been performed on King that showed negative results, but that it still had not been determined whether there was evidence

of organic brain syndrome. *Id.* at 167–68 (Appellant's 2d Supp. App'x at 532–33) (Auble Test.). Based on Dr. Auble's nearly identical uncertainty regarding whether King had brain damage, King has not shown that "[t]imely securing the services of an expert would have provided counsel with an expert opinion that related the impact of intoxication and brain damage on King's judgment and behavior at the time of the crime and King's ability to form specific intent for first-degree murder," Appellant's Br. at 75, let alone whether there would be a reasonable probability of a different outcome. *See Strickland*, 466 U.S. at 695–96, 104 S.Ct. 2052. Therefore, King has not shown that he was *799 prejudiced by the delay in retaining a mental-health expert.

To be sure, the findings of the mental-health experts on federal habeas review are troubling. Although the experts presented at trial and during state post–conviction proceedings were never able definitively to determine whether King had brain damage, we now know that King "suffers from brain damage which is no fault of his own." Merikangas Report at 4 (Appellant's App'x at 49). Unfortunately for King, AEDPA does not permit us to consider this evidence. Section 2254(e)(2) controls the admissibility of evidence on federal habeas review:

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

28 U.S.C. § 2254(e)(2). This provision controls even if the petitioner seeks relief based on new evidence without an evidentiary hearing. *See Holland v. Jackson*, 542 U.S. 649, 653, 124 S.Ct. 2736, 159 L.Ed.2d 683 (2004). "Although state prisoners may sometimes submit new evidence in federal court, AEDPA's statutory scheme is designed to strongly discourage them from doing so. Provisions like §§ 2254(d)(1) and (e)(2) ensure that '[f]ederal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings.' " *Pinholster*, 563 U.S. at 186, 131 S.Ct. 1388 (citation omitted).

The mental-health experts to whom King points at this late stage cannot be considered because they could have been discovered through the exercise of due diligence of post–conviction counsel. *See Roberts v. Dretke*, 356 F.3d 632, 641 (5th Cir. 2004) ("Seeking and presenting medical records and affidavits from family members available at the time of the state habeas hearing is within the exercise of due diligence."). Each of the medical reports presented for the first time on federal habeas review necessarily relies on information that was available at the time of post–conviction review: they draw conclusions on King's mental health at the time of the crime. Indeed, that King was able to obtain the medical report from Dr. Auble during state post–conviction proceedings demonstrates that he could have obtained expert opinions at that time. Therefore, with the evidence that can be considered on federal habeas review, we conclude that King has not shown that he was prejudiced by trial counsel's deficient performance, and habeas relief is unwarranted. *See Strickland*, 466 U.S. at 687, 104 S.Ct. 2052.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

All Citations

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Footnotes

1 Although Childers's name is spelled "Childress" in the trial court transcript, *see, e.g.*, TT Vol. IX at 51 (Childers Test.), King explains in his brief that his name is actually spelled "Childers." See Appellant's Br. at 10 n.3. Because the Government and previous courts have also spelled his name "Childers," *see, e.g.*, Appellee's Br. at 11; *State v. King*, 718 S.W.2d 241, 243 (Tenn. 1986); *King v. State*, 989 S.W.2d 319, 330 (Tenn. 1999); *but see King v. Bell*, No. 3:99–cv–454, 2011

WL 3566843, at *1 n.4 (E.D. Tenn. Aug. 12, 2011); *King v. State*, No. 03C01–9601–CR–00024, 1997 WL 416389, at *8 (Tenn. Crim. App. July 14, 1997), we use this spelling throughout this opinion.

2 Dr. Auble testified on September 26, 1994. PCT Vol. I at ii (Appellant's 2d Supp. App'x at 360). In a report she prepared prior to testifying, Dr. Auble wrote, "Mr. King was evaluated by Dr. Gary Solomon on August 16–17, 1990 at the request of Dr. Michael Kaminski. Apparently, Dr. Kaminski had seen Mr. King for a neurological evaluation for severe headaches and episodic loss of balance. I do not have Dr. Kaminski's report." Auble Report at 5 (Appellant's App'x at 40). However, later in her testimony, she stated that she had access to Dr. Kaminski's report. PCT Vol. I at 100 (Appellant's 2d Supp. App'x at 463). At oral argument for the instant proceedings, counsel was unable to clarify whether Dr. Auble reviewed Dr. Kaminski's report. It appears from her 1994 testimony that Dr. Auble reviewed Dr. Kaminski's report between writing her report and testifying at the post–conviction proceedings.

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APPENDIX K

Case No. 13-6387

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

TERRY LYNN KING

Petitioner - Appellant

v.

BRUCE WESTBROOKS, Warden

Respondent - Appellee.

Upon consideration of the appellant's motion to hold the above-styled appeal in abeyance pending exhaustion of the appellant's newly-reopened state post-conviction proceeding,

It is **ORDERED** that the motion is hereby **GRANTED**. All briefing is stopped until further notice. The appellant is to file a status report every 30 days. The first status report is due **May 18, 2017**.

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt, Clerk

Issued: April 18, 2017

APPENDIX L

(ORDER LIST: 594 U.S.)

MONDAY, JULY 19, 2021

ORDER

IT IS ORDERED that the Court's orders of March 19, 2020 and April 15, 2020 relating to COVID-19 are rescinded, subject to the clarifications set forth below.

IT IS FURTHER ORDERED that, in any case in which the relevant lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing was issued prior to July 19, 2021, the deadline to file a petition for a writ of certiorari remains extended to 150 days from the date of that judgment or order. In any case in which the relevant lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing was issued on or after July 19, 2021, the deadline to file a petition for a writ of certiorari is as provided by Rule 13.

IT IS FURTHER ORDERED that the requirement of Rule 33.1 that 40 copies of documents be submitted in booklet format will go back into effect as to covered documents filed on or after September 1, 2021. For submissions pursuant to Rule 33.2, the requirement of Rule 39 that an original and 10 copies be submitted, where applicable, will also go back into effect as to covered documents filed on or after September 1, 2021. The authorization to file a single copy of certain documents on 8½ x 11 inch paper, as set forth in the Court's April 15, 2020 order, will remain in effect only as to documents filed before September 1, 2021.

IT IS FURTHER ORDERED that the following types of documents should not be filed in paper form if they are submitted through the Court's electronic filing system: (1) motions for an extension of time under Rule 30.4; (2) waivers of the right to respond to a

petition under Rule 15.5; and (3) blanket consents to the filing of amicus briefs under Rules 37.2(a) and 37.3(a). Notwithstanding Rule 34.6 and paragraph 9 of the Guidelines for the Submission of Documents to the Supreme Court's Electronic Filing System, these enumerated filings should be filed electronically in cases governed by Rule 34.6, although other types of documents in those cases should be filed in paper form only.

APPENDIX M

2019 WL 5079357
Only the Westlaw citation is currently available.

SEE RULE 19 OF THE RULES OF THE COURT OF CRIMINAL APPEALS RELATING TO PUBLICATION OF OPINIONS AND CITATION OF UNPUBLISHED OPINIONS.

Court of Criminal Appeals of Tennessee,
AT KNOXVILLE.

Harold Wayne NICHOLS

v.

STATE of Tennessee

No. E2018-00626-CCA-R3-PD
|
March 26, 2019 Session
|
Filed 10/10/2019
|
Application for Permission to Appeal
Denied by Supreme Court January 15, 2020

Appeal from the Criminal Court for Hamilton County, No. 205863, Don R. Ash, Senior Judge

Attorneys and Law Firms

Deborah Y. Drew, Deputy Post-Conviction Defender; Andrew L. Harris, Assistant Post-Conviction Defender, Nashville, Tennessee, for the appellant, Harold Wayne Nichols.

Herbert H. Slatery III, Attorney General and Reporter; Nicholas W. Spangler, Senior Assistant Attorney General; Neal Pinkston, District Attorney General; and Crystle Carrion, Assistant District Attorney General, for the appellee, State of Tennessee.

Timothy L. Easter, J., delivered the opinion of the court, in which Norma McGee Ogle and Camille R. McMullen, JJ., joined.

OPINION

Timothy L. Easter, J.

Petitioner, Harold Wayne Nichols, pled guilty to first degree murder in 1990. A jury imposed the death penalty. In June of 2016, Petitioner moved to reopen his post-conviction petition on the basis that the Supreme Court's decision in *Johnson v. United States*, —— U.S. ——, 135 S. Ct. 2551, 192 L.Ed.2d 569 (2015), announced a new rule of constitutional law requiring retroactive application. The post-conviction court granted the motion to reopen, but after Petitioner amended his petition and asserted additional claims, the post-conviction court denied relief without a hearing. On appeal, Petitioner argues (1) that the sole aggravating circumstance supporting his death sentence is unconstitutionally vague under *Johnson*; (2) that a judge, rather than a jury, determined facts in imposing the death penalty in violation of *Hurst v. Florida*, —— U.S. ——, 136 S. Ct. 616, 193 L.Ed.2d 504 (2016), a new rule of constitutional law requiring retroactive application; (3) that the State committed prosecutorial misconduct at Petitioner's sentencing hearing, along with a related ineffective assistance of trial counsel claim; (4) that the post-conviction court erred in canceling the scheduled evidentiary hearing without notice and a fair opportunity to be heard; (5) that the post-conviction court erred in denying the parties' proposed settlement agreement to vacate the death sentence and enter a judgment of life imprisonment; and (6) that Petitioner's death sentence is invalid due to the cumulative effect of the asserted errors. Following our review, we affirm the judgment of the post-conviction court.

Factual and Procedural Background

***1** On May 9, 1990, Petitioner pled guilty to first degree felony murder, aggravated rape, and first degree burglary with his sentence to be determined by a jury. The Tennessee Supreme Court summarized the evidence presented at the sentencing hearing as follows:

> The proof showed that on the night of September 30, 1988, [Petitioner] broke into the house where the 21-year-old-victim, Karen Pulley, lived with two roommates in the Brainerd area of Chattanooga, Tennessee. After finding Pulley home alone in her upstairs bedroom, [Petitioner] tore her undergarments from her and violently raped her. Because of her resistance during the rape, he forcibly struck her at least twice in the head with a two-by-four he had picked up after entering the house. After the rape, [Petitioner], while still struggling with the victim, struck her again several times with great force in the head with

> the two-by-four. The next morning, one of Karen Pulley's roommates discovered her alive and lying in a pool of blood on the floor next to her bed. Pulley died the next day. Three months after the rape and murder, a Chattanooga police detective questioned [Petitioner] about Pulley's murder while he was in the custody of the East Ridge police department on unrelated charges. It was at this point that [Petitioner] confessed to the crime. This videotaped confession provided the only link between [Petitioner] and the Pulley rape and murder.
>
> The evidence showed that, until his arrest in January 1989, [Petitioner] roamed the city at night and, when "energized," relentlessly searched for vulnerable female victims. At the time of trial, [Petitioner] had been convicted on five charges of aggravated rape involving four other Chattanooga women. These rapes had occurred in December 1988 and January 1989, within three months after Pulley's rape and murder ....

State v. Nichols, 877 S.W.2d 722, 726 (Tenn. 1994) (footnotes omitted), *cert. denied*, 513 U.S. 1114, 115 S.Ct. 909, 130 L.Ed.2d 791 (1995). In three of those prior rapes, Petitioner had been armed with a weapon (a cord, a knife, and a pistol, respectively), and he caused personal injury to the victim in the fourth. *Id.*

In support of the death penalty, the State relied upon two aggravating circumstances: (1) that Petitioner had one or more prior convictions for violent felonies, namely the five convictions for aggravated rape, and (2) that the murder occurred during the commission of a felony. *See* T.C.A. § 39-2-203(i)(2) & (7). The jury imposed the death penalty after finding both aggravating circumstances were proven beyond a reasonable doubt and that the aggravating circumstances outweighed any mitigating circumstances beyond a reasonable doubt.[1] On direct appeal, the Tennessee Supreme Court concluded, among other issues, that the application of the felony murder aggravating circumstance was harmless error and affirmed Petitioner's convictions and death sentence. *Id.* at 738-39.

***2** On April 20, 1995, Petitioner filed a petition for post-conviction relief, raising multiple claims of ineffective assistance of trial counsel. Following an extensive evidentiary hearing spanning eight days, the post-conviction court upheld Petitioner's convictions and death sentence.[2] On appeal to this Court, we held that the trial court erred in allowing Petitioner to assert his right against self-incrimination at the post-conviction hearing but affirmed the post-conviction court's denial of relief. *Harold Wayne Nichols v. State*, E1998-00562-CCA-R3-PD, 2001 WL 55747 (Tenn. Crim. App. Jan. 19, 2001). The Tennessee Supreme Court held that this Court should not have addressed the self-incrimination issue but affirmed the post-conviction court's denial of relief. *Nichols v. State*, 90 S.W.3d 576 (Tenn. 2002). Petitioner was subsequently unsuccessful in his attempt to seek federal habeas corpus relief. *See Nichols v. Heidle*, 725 F.3d 516 (6th Cir. 2013), *cert. denied*, —— U.S. ——, 135 S. Ct. 704, —— L.Ed.2d —— (2014).

On June 24, 2016, Petitioner filed a motion to reopen his post-conviction petition, alleging that *Johnson v. United States* announced a new constitutional rule requiring retrospective application. In *Johnson*, the United States Supreme Court held that the "residual clause" of the Armed Career Criminal Act ("ACCA"), which defined prior violent felony for the purpose of sentence enhancement as an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another," was void for vagueness. *See* 135 S. Ct. at 2557-58. Petitioner argued that pursuant to the ruling in *Johnson*, Tennessee's prior violent felony aggravating circumstance – the sole aggravating circumstance supporting his death sentence – was similarly void for vagueness. On September 29, 2016, the State filed a response to the motion to reopen, arguing that the ruling in *Johnson* did not apply to the language of Tennessee's prior violent felony aggravator, which was more akin to the "elements clause" of the ACCA that was held to be constitutional in *Johnson*. *See* 135 S. Ct. at 2563.

At an October 4, 2016 hearing, the post-conviction court found that Petitioner had stated a "colorable claim" for reopening post-conviction proceedings. In its order granting the motion to reopen, the post-conviction court noted that Petitioner's case was unusual due to the timing of his offense and the amendment of the sentencing statutes in 1989. Even though the pre-1989 statute[3] should have applied to Petitioner's case, the jury was actually instructed on the post-1989 aggravating factor.[4] The post-conviction court noted that challenges to the post-1989 aggravating factor "would likely fail to state a claim in a motion to reopen" because it specifically referred to the "statutory elements" of the prior offense, similar to the "elements clause" that was upheld in *Johnson*. However, the post-conviction court found that the pre-1989 aggravating factor "contained language which arguably was similar to the federal statutory clause recently found unconstitutionally vague in *Johnson*." The post-conviction court stated that its finding that Petitioner's

motion to reopen stated a colorable claim was based in part on the "alleged lack of guidance regarding the trial court's application of the pre-1989 prior violent felony conviction statutory aggravating circumstance" as well as "upon the differing conclusions federal and state courts have reached in applying the *Johnson* holding to non-ACCA cases." The order directed Petitioner's counsel "to investigate all possible constitutional grounds for relief for the purpose of filing an amended petition" and that the amended petition should address "any additional issues counsel deems necessary."

***3** On January 12, 2017, Petitioner filed an amendment to the post-conviction petition reasserting the *Johnson* claim as well as adding the following additional claims: (1) that Petitioner's death sentence was invalid under the United States Supreme Court's decision in *Hurst v. Florida*, a new rule of constitutional law requiring retrospective application, because a judge made findings of fact rather than the jury; (2) that the State committed prosecutorial misconduct during closing argument at the sentencing hearing by alluding to the possibility of Petitioner's release if the death penalty were not imposed as well as a related claim that trial counsel were ineffective for failing to object to the argument and failing to interview jurors regarding the effect of the argument; (3) that Tennessee's death penalty system is "broken"; and (4) that Petitioner's constitutional rights were abridged by the cumulative effect of the errors.

During a December 8, 2017 teleconference with the post-conviction court, the parties announced that they were engaged in settlement negotiations to modify Petitioner's sentence to life imprisonment. At a January 31, 2018 hearing, Petitioner argued that the State could concede that error had occurred in the imposition of the death sentence and could modify the sentence to life imprisonment. The District Attorney General responded that the State was prepared to concede error and enter into an agreement whereby Petitioner's sentence would be modified and his petition withdrawn. The post-conviction court, concerned that a basis to grant post-conviction relief had not been established, opined that a valid basis for post-conviction relief had to be found as a prerequisite to the parties entering a settlement agreement modifying the sentence. The post-conviction court, however, permitted the parties to submit additional authority concerning the propriety of the settlement agreement and rescheduled the hearing for March 14, 2018. On February 12, 2018, the Petitioner filed a motion to approve the settlement agreement, citing similar agreements in other death penalty cases and Petitioner's record of good behavior while incarcerated.

On March 7, 2018, one week prior to the rescheduled hearing, the post-conviction court entered an order summarily denying relief. The post-conviction court stated that it had "reviewed the pleadings of the parties, the record, and applicable law" in accordance with the provisions of the Post-Conviction Procedure Act. The post-conviction court noted that at the time it granted the motion to reopen on the basis that Petitioner had stated a colorable claim, no appellate court had determined whether *Johnson* applied to Tennessee's prior violent felony aggravator. Since then, the Court of Criminal Appeals had rejected such a claim. *See Donnie E. Johnson v. State*, No. W2017-00848-CCA-R28-PD, Order (Tenn. Crim. App. Sept. 11, 2017), *perm. app. denied* (Tenn. Jan. 19, 2018). The post-conviction court concluded that based on the *Donnie E. Johnson* decision, "this issue is appropriate for disposition without a hearing." As to the additional claims raised in the amended petition, the post-conviction court concluded based on its preliminary review that *Hurst* did not announce a new rule of constitutional law that required retrospective application and was inapplicable to this case and that the remaining claims were previously determined, waived, and/or time-barred. Finally, the post-conviction court concluded that it was "not appropriate to accept ... [the] proposed settlement agreement under the circumstances of this case where there is no claim for post-conviction relief before this Court which should survive this Court's statutorily required preliminary order." On April 6, 2018, Petitioner filed a notice of appeal pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure.

Analysis

In *Case v. Nebraska*, 381 U.S. 336, 85 S.Ct. 1486, 14 L.Ed.2d 422 (1965), the United States Supreme Court recommended that the states implement post-conviction procedures to address alleged constitutional errors arising in state convictions in order to divert the burden of habeas corpus ligation in the federal courts. In response, the Tennessee legislature passed the Post-Conviction Procedure Act whereby a defendant may seek relief "when a conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." T.C.A. § 40-30-103. In its current ideation, the Post-Conviction Procedure Act "contemplates the filing of only one (1) petition for post-

conviction relief. In no event may more than one (1) petition for post-conviction relief be filed attacking a single judgment." T.C.A. § 40-30-102(c). While "any second or subsequent petition shall be summarily dismissed," a petitioner may seek relief on the basis of claims that arise after the disposition of the initial petition by filing a motion to reopen the post-conviction proceedings "under the limited circumstances set out in § 40-30-117." *Id.*; *see Fletcher v. State*, 951 S.W.2d 378, 380 (Tenn. 1997).

***4** A motion to reopen post-conviction proceedings should be granted only under the following circumstances:

> (1) The claim in the motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial, if retrospective application of that right is required. The motion must be filed within one (1) year of the ruling of the highest state appellate court or the United States supreme court establishing a constitutional right that was not recognized as existing at the time of trial; or
>
> (2) The claim in the motion is based upon new scientific evidence establishing that the petitioner is actually innocent of the offense or offenses for which the petitioner was convicted; or
>
> (3) The claim asserted in the motion seeks relief from a sentence that was enhanced because of a previous conviction and the conviction in the case in which the claim is asserted was not a guilty plea with an agreed sentence, and the previous conviction has subsequently been held to be invalid, in which case the motion must be filed within one (1) year of the finality of the ruling holding the previous conviction to be invalid; and
>
> (4) It appears that the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced.

T.C.A. § 40-30-117(a). The motion should set out the factual basis underlying the claim, supported by affidavit. T.C.A. § 40-30-117(b). Once the post-conviction court grants the motion to reopen,[5] "the procedure, relief and appellate provisions of this part shall apply." *Id.*; *see* T.C.A. § 40-30-101 ("This part shall be known and may be referred to as the 'Post-Conviction Procedure Act.' "). The appellate provisions of the Post-Conviction Procedure Act allow for an appeal as of right under Tennessee Rule of Appellate Procedure 3(b) from a final order granting or denying post-conviction relief. T.C.A. § 40-30-116; Tenn. Sup. Ct. R. 28. § 10(A).[6] We review the lower court's summary denial of post-conviction relief de novo. *Arnold v. State*, 143 S.W.3d 784, 786 (Tenn. 2004).

I. Johnson Claim

***5** In *Johnson*, the Supreme Court held that the "residual clause" contained in the definition of a violent felony under the ACCA was unconstitutionally vague. *Johnson*, 135 S. Ct. at 2557. The ACCA increases the punishment of a defendant convicted of being a felon in possession of a firearm if he has three or more previous convictions for a violent felony. 18 U.S.C. § 924(e)(1). The ACCA defined a "violent felony" as

> any crime punishable by imprisonment for a term exceeding one year ... that – (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*

18 U.S.C. § 924(e)(2)(B) (emphasis added). The "otherwise involves conduct" language is known as the ACCA's residual clause. *Johnson*, 135 S. Ct. at 2556. The Court observed that "unlike the part of the definition of a violent felony that asks whether the crime 'has *as an element* the use of ... physical force,' the residual clause asks whether the crime '*involves conduct*' that presents too much risk of physical injury." *Id.* at 2557 (emphasis in original). Because of prior precedent holding that the statute required a categorical rather than a fact-specific approach, federal courts were required "to picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury." *Id.* (citing *James v. United States*, 550 U.S. 192, 208, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007)). The Supreme Court determined this judicial assessment of risk under the residual clause, which was not tied to either real-world facts or statutory elements, was unconstitutionally vague because it "leaves grave uncertainty about how to estimate the risk posed by a crime" and "about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2557-58. However, the Court clarified that its decision "does not call into the question ... the remainder of the [ACCA]'s definition of a violent felony." *Id.* at 2563. Thus, the elements clause of the ACCA's violent felony definition survived constitutional scrutiny. *See Stokeling v. United States*, —— U.S. ——, 139 S.

Ct. 544, 550, 202 L.Ed.2d 512 (2019) (applying the elements clause to Florida's robbery statute).

While the concept of a statute being unconstitutionally void for vagueness is not new, *see, e.g.*, *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) (holding a statutory aggravating factor void for vagueness), the Supreme Court subsequently clarified that *Johnson* did announce a new substantive rule which applied retroactively on collateral review. *Welch v. United States*, — U.S. —, 136 S. Ct. 1257, 1265, 194 L.Ed.2d 387 (2016) (applying the retroactivity standard set out in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), and its progeny); *cf. Van Tran v. State*, 66 S.W.3d 790, 810-11 (Tenn. 2001) (applying the *Teague* retroactivity standard to a motion to reopen). The Court explained that the residual clause was deemed void for vagueness because "courts were to determine whether a crime involved a 'serious potential risk of physical injury' by considering not the defendant's actual conduct but an 'idealized ordinary case of the crime.' " *Id.* at 1262 (quoting *Johnson*, 135 S. Ct. at 2561). In applying *Johnson* to other federal statutes similarly defining violent felony, the Supreme Court held that "the imposition of criminal punishment can't be made to depend on a judge's estimation of the degree of risk posed by a crime's imagined 'ordinary case.' " *United States v. Davis*, — U.S. —, 139 S. Ct. 2319, 2326, 204 L.Ed.2d 757 (2019). However, "a case-specific approach would avoid the vagueness problems that doomed the statute[ ] in *Johnson*[.]" *Id.* at 2327.

***6** The aggravating circumstance applicable at the time Petitioner committed his crime provides that "[t]he defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person." T.C.A. § 39-13-204(i)(2) (1988). However, as noted by the post-conviction court, the jury in Petitioner's capital sentencing hearing was instructed on the post-1989 version of the prior violent felony aggravator, which looks to whether the "statutory elements [of the prior conviction] involve the use of violence to the person." T.C.A. § 39-13-204(i)(2) (Supp. 1990). Though Petitioner refers to his jury as having been "erroneously instructed," he has never challenged this instruction as error, *see generally Nichols v. State*, 90 S.W.3d 576 (Tenn. 2002); *State v. Nichols*, 877 S.W.2d 722 (Tenn. 1994), and he does not do so now. Instead, Petitioner argues that either version of the prior violent felony aggravator would be void for vagueness under *Johnson* because "the addition of the word 'elements' to the statute did not significantly alter the meaning of the statute."

However, this Court has rejected *Johnson* claims with respect to both the pre- and post-1989 statutory language in prior cases denying permission to appeal from the denial of a motion to reopen. *See Donnie E. Johnson v. State*, No. W2017-00848-CCA-R28-PD, Order (Tenn. Crim. App. Sept. 11, 2017) (upholding pre-1989 aggravating factor), *perm. app. denied* (Tenn. Jan. 19, 2018); *Gary W. Sutton v. State*, No. E2016-02112-CCA-R28-PD, Order (Tenn. Crim. App. Jan. 23, 2017) (upholding post-1989 aggravating factor), *perm. app. denied* (Tenn. May 18, 2017). This is because our supreme court has held, that under either version of the statute, trial courts are to look to the actual facts of the prior felony to determine the use of violence when such cannot be determined by the elements of the offense alone. *See State v. Sims*, 45 S.W.3d 1, 12 (Tenn. 2001) (holding that under the post-1989 aggravating factor, a trial court "must necessarily examine the facts underlying the prior felony if the statutory elements of that felony may be satisfied either with or without proof of violence"); *State v. Moore*, 614 S.W.2d 348, 351 (Tenn. 1981) (holding that the State was required "to show that there was in fact either violence to another or the threat thereof" for prior felonies that did not "by their very definition involve the use or threat of violence to a person").[7] Thus, our precedent has never required the use of a judicially imagined ordinary case in applying the prior violent felony aggravating circumstance. The fact that the federal statues invalidated by *Johnson* and its progeny could not be saved by applying a fact-specific approach due to the language of those statutes and the precedent interpreting that language does not mean that a fact-specific approach is itself unconstitutional. *See Davis*, 139 S. Ct. at 2327 (recognizing that a case-specific approach would avoid a vagueness problem but rejecting it based on "the statute's text, context, and history"); *cf. State v. Crank*, 468 S.W.3d 15, 22-23 (Tenn. 2015) ("In evaluating a statute for vagueness, courts may consider the plain meaning of the statutory terms, the legislative history, and prior judicial interpretations of the statutory language."). Thus, regardless of which version of the statute did or should have applied to Petitioner, Tennessee's prior violent felony aggravating circumstance is not void for vagueness under *Johnson*. Petitioner is not entitled to relief on this claim.

II. Additional Claims and Scope of Amendment

The next question we must determine is the permissible scope of amendment once a post-conviction court grants a motion to reopen. Despite directing counsel to "investigate

all possible constitutional grounds for relief for the purpose of filing an amended petition" in the order granting the motion to reopen, the post-conviction court noted that the additional claims raised in the amended petition were "beyond the intended scope of the current proceedings"; however, the post-conviction court addressed all of Petitioner's claims on the merits. Petitioner contends that because the post-conviction court granted his motion to reopen, the additional claims raised in his amended petition are "part of the initial post-conviction petition proceedings" and are, therefore, not procedurally defaulted. The State argues that because the post-conviction court only granted Petitioner's motion to reopen with respect to the *Johnson* claim and Petitioner's additional claims do not qualify under any of the exceptions to the one-petition rule under Tennessee Code Annotated section 40-30-102(c), the additional claims are procedurally barred.

***7** In *Coleman v. State*, the Tennessee Supreme Court addressed the procedural limitations of raising claims in a motion to reopen and subsequent amendments, which include "the statute of limitations, the restrictions on re-opening petitions for post-conviction relief once they have been ruled on, and the prohibition against re-litigating issues that have been previously determined." 341 S.W.3d 221, 255 (Tenn. 2011). The Post-Conviction Procedure Act "contemplates the filing of only one (1) petition for post-conviction relief," T.C.A. § 40-30-102(c), which must be done within the one-year statute of limitations. *Id.* at (a). The motion to reopen stands as an exception to the one-petition rule. *See id.* at (c) (citing T.C.A. § 40-30-117). The grounds to reopen post-conviction proceedings correspond with the statutory grounds for tolling the statute of limitations. T.C.A. §§ 40-30-102(b), -117(a). Moreover, a claim for relief must not have been previously determined or it will be summarily dismissed. *See* T.C.A. § 40-30-106(f). Failure to overcome these hurdles results in claims that are procedurally barred. *Coleman*, 341 S.W.3d at 257-58. Thus, a post-conviction court's grant of a motion to reopen does not fully place a petitioner back into the procedural posture of his original post-conviction proceedings. *See id.* (holding that ineffective assistance of counsel claim was procedurally barred even though the post-conviction court granted motion to reopen with respect to intellectual disability claim); *Corey Alan Bennett v. State*, No. E2014-01637-CCA-R3-PC, 2015 WL 12978648, at *4 (Tenn. Crim. App. June 29, 2015) ("The only way in which the petitioner may reach back to his original petition is through a motion to reopen the original petition, and, even then, only the new issues raised will be addressed."), *perm. app. denied* (Tenn. Nov. 24, 2015).

A. Hurst Claim

Petitioner argues that the United States Supreme Court's decision in *Hurst v. Florida* is a new rule of constitutional law requiring retrospective application, which, if true, would bring this claim under an exception to the one-year statute of limitations and the one-petition rule.[8] *See* T.C.A. §§ 40-30-102(b)(1), -117(a)(1). In *Hurst*, the United States Supreme Court held that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." 136 S. Ct. at 619. Petitioner argues that this rule was violated in his case because "the trial judge made independent factual findings regarding the existence of the prior violent felony aggravating circumstance necessary for the imposition of the death penalty." Petitioner argues that this rule was further violated when the appellate court, after striking the felony murder aggravating circumstance, reweighed the remaining aggravating circumstance against the mitigation evidence in determining that the error was harmless. *See Nichols*, 877 S.W.2d at 737-39. The State responds that *Hurst* did not announce a new rule of constitutional law requiring retrospective application and, thus, consideration of the issue is procedurally barred.

In order to determine whether an appellate court ruling creates a new constitutional rule that must be applied retroactively to cases on collateral review, the Post-Conviction Procedure Act provides the following guidance:

> For purposes of this part, a new rule of constitutional criminal law is announced if the result is not dictated by precedent existing at the time the petitioner's conviction became final and application of the rule was susceptible to debate among reasonable minds. A new rule of constitutional criminal law shall not be applied retroactively in a post-conviction proceeding unless the new rule places primary, private individual conduct beyond the power of the criminal law-making authority to proscribe or requires the observance of fairness safeguards that are implicit in the concept of ordered liberty.

***8** T.C.A. § 40-30-122. The United States Supreme Court has stated that "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government [or] ... if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301, 109 S.Ct. 1060 (citations omitted). The Tennessee Supreme Court has applied

the *Teague* retroactivity standard to motions to reopen under Tennessee Code Annotated section 40-30-117(a)(1). *See Van Tran*, 66 S.W.3d at 810-11.

In *Hurst*, the United States Supreme Court held that Florida's capital sentencing scheme was unconstitutional under the Sixth Amendment because it "required the judge alone to find the existence of an aggravating circumstance" while the jury merely provided an advisory sentence without making any specific findings. 136 S. Ct. at 624. In reaching this conclusion, the Court relied heavily on its previous decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 494, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (holding that any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" must be submitted to a jury), and *Ring v. Arizona*, 536 U.S. 584, 604, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (applying *Apprendi* to capital sentencing and the finding of aggravating circumstances). *See Hurst*, 136 S. Ct. at 621-22. Specifically, the Court held that "[t]he analysis the *Ring* Court applied to Arizona's sentencing scheme applies equally to Florida's [because l]ike Arizona at the time of *Ring*, Florida does not require the jury to make the critical findings necessary to impose the death penalty." *Id.* Thus, "[i]n light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment." *Id.* at 622.

Hurst is clearly derivative of *Apprendi* and *Ring*; it did not expand upon their holdings or otherwise break new ground. The fact that the *Hurst* Court expressly overruled pre-*Apprendi* cases upholding Florida's capital sentencing scheme does not mean that the decision was not dictated by precedent or was susceptible to reasonable debate; those cases were overruled precisely because they were irreconcilable with *Apprendi*. *See Hurst*, 136 S. Ct. at 623 (overruling *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989) and *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984)). The United States Supreme Court has previously held that its decision in *Ring* "announced a new procedural rule that *does not apply retroactively* to cases already final under direct review," *Schriro v. Summerlin*, 542 U.S. 348, 358, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004) (emphasis added), even though it too overruled a pre-*Apprendi* case. *See Ring*, 536 U.S. at 603, 122 S.Ct. 2428 (overruling *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990)). Moreover, this Court has held that neither *Ring* nor *Apprendi* required retrospective application to cases on collateral review. *See, e.g., Anthony Darrell Hines v. State*, No. M2004-01610-CCA-RM-PD, 2004 WL 1567120, at *37 (Tenn. Crim. App. July 14, 2004), *perm. app. denied* (Tenn. Nov. 29, 2004). Thus, it follows that *Hurst* likewise does not require retrospective application. This Court has consistently held as such in previous cases denying permission to appeal from the denial of a motion to reopen raising a *Hurst* claim. *See, e.g., Charles Rice v. State*, No. W2017-01719-CCA-R28-PD, Order (Tenn. Crim. App. Nov. 14, 2017), *perm. app. denied* (Tenn. Mar. 15, 2018); *Dennis Wade Suttles v. State*, No. E2017-00840-CCA-R28-PD, Order (Tenn. Crim. App. Sept. 18, 2017), *perm. app. denied* (Tenn. Jan. 18, 2018). Because *Hurst* did not announce a new rule of constitutional law that must be applied retrospectively, this claim is procedurally barred by both the one-year statute of limitations and the one-petition rule. *See* T.C.A. §§ 40-30-102(b), -117(a). Petitioner is not entitled to relief.

B. Prosecutorial Misconduct and Ineffective Assistance of Counsel Claims

***9** Petitioner argues that during closing argument at the capital sentencing hearing, the State committed prosecutorial misconduct by commenting on the possibility of parole and Petitioner's future dangerousness if released, thereby tainting the jury's verdict and rendering his death sentence unconstitutional. He argues that the majority's conclusion on direct appeal that the argument did not "prejudicially affect[ ] the jury's sentencing determination," *Nichols*, 877 S.W.2d at 733, was wrong based on affidavits from jurors indicating that they voted for death based on the belief that "the State of Tennessee would never actually execute anyone sentenced to death" and that "a death sentence served as a de facto life in prison without the possibility of parole (LWOP) sentence." In a closely related argument, Petitioner alleges that trial counsel were ineffective for failing to object to the improper argument and for "failing to interview jury members about the State's closing argument prior to litigating the motion for a new trial."

Regardless of whether this issue is framed as one of prosecutorial misconduct or ineffective assistance of counsel, it has been previously determined. "A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing." T.C.A. § 40-30-106(h). Regardless of whether a petitioner actually does so, "[a] full and fair hearing has occurred where the petitioner is afforded the opportunity to call witnesses and otherwise present evidence[.]" *Id.*; *see also* Tenn. Sup. Ct. R. 28, § 2(E). Petitioner raised this exact claim of prosecutorial misconduct on direct appeal. *See Nichols*, 877 S.W.2d at 732-33. Additionally, Petitioner raised several claims of ineffective assistance of trial counsel during his original

post-conviction proceedings. *See Nichols*, 90 S.W.3d at 587-605. Because ineffective assistance of counsel is a single ground for relief that may not be relitigated by presenting additional factual allegations, *see Cone v. State*, 927 S.W.2d 579, 581-82 (Tenn. Crim. App. 1995), the issue cannot be relitigated through a motion to reopen after having been presented in the original post-conviction proceedings. *See Coleman*, 341 S.W.3d at 257-58. Because Petitioner's claim of prosecutorial misconduct during closing argument, as well as the related claim of ineffective assistance of counsel, cannot overcome the hurdle of having been previously determined, consideration of these issues is procedurally barred. T.C.A. § 40-30-106(f).

Acknowledging the post-conviction court's determination that these issues were previously determined, Petitioner argues that due process concerns and the exceptions to the "law of the case" doctrine overcome the Post-Conviction Procedure Act's bar on previously determined issues. While this Court has previously recognized that due process concerns may "overcome the Act's bar on previously determined issues in some instances," *William G. Allen v. State*, No. M2009-02151-CCA-R3-PC, 2011 WL 1601587, at *7 (Tenn. Crim. App. Apr. 26. 2011), *perm. app. denied* (Tenn. Aug. 25, 2011), Petitioner has pointed us to no case where it has successfully been invoked. *See id.* at *9 (concluding that due process did not require relaxation of the bar against previously determined issues). As interpreted in the context of tolling the statute of limitations, due process requires that petitioners "be provided an opportunity for the presentation of claims at a meaningful time and in a meaningful manner" before claims may be terminated for failure to comply with procedural requirements. *See Harris v. State*, 301 S.W.3d 141, 145 (Tenn. 2010). However, by their very definition, previously determined issues have been presented at a "full and fair hearing." *See* T.C.A. § 40-30-106(h); Tenn. Sup. Ct. R. 28, § 2(E). Even if due process may be invoked to overcome the bar on previously determined issues, Petitioner has not alleged how he was prevented from presenting these claims at a meaningful time and in a meaningful manner. *Cf. Whitehead v. State*, 402 S.W.3d 615, 631 (Tenn. 2013) (holding that due process tolling of the statute of limitations requires a showing of "some extraordinary circumstance" that prevented timely filing).

***10** Moreover, the law of the case doctrine prevents the reconsideration of claims that have been decided in a prior appeal of the same case. *See State v. Jefferson*, 31 S.W.3d 558, 560-61 (Tenn. 2000). Although it has been cited in some opinions by this Court to support a post-conviction court's refusal to reconsider previously determined issues, the exceptions to the law of the case doctrine have never been applied in a post-conviction context. *William G. Allen*, 2011 WL 1601587, at *8; *see Jefferson*, 31 S.W.3d at 561 (stating that the limited exceptions to the law of the case doctrine include substantially different evidence, a clearly erroneous resulting in manifest injustice, and a change in the controlling law). Even if the exceptions did apply, Petitioner's claim of substantially different evidence is based on inadmissible juror affidavits about the effect of the prosecutor's argument on their deliberation, which would not justify reconsideration of the issue. *See Hutchison v. State*, 118 S.W.3d 720, 740-41 (Tenn. Crim. App. 2003) (citing Tenn. R. Evid. 606(b)) (holding post-conviction court's exclusion of juror affidavit regarding effect missing evidence would have had on verdict was proper).

Finally, even if Petitioner could overcome the procedural hurdle of these claims having been previously determined, they do not fall under one of the exceptions to either the one-year statute of limitations or the one-petition rule. *See* T.C.A. §§ 40-30-102(b), - 117(a). Petitioner's claims of prosecutorial misconduct and ineffective assistance of counsel are procedurally barred under the Post-Conviction Procedure Act. Petitioner is not entitled to relief on either claim.

III. Canceling the Evidentiary Hearing

At the conclusion of the January 31, 2018 hearing, the post-conviction court reset the hearing to March 14, 2018, for either the entry of the proposed settlement agreement or an evidentiary hearing on the merits of Petitioner's claims. However, one week prior to the rescheduled hearing, the post-conviction court entered its order summarily denying post-conviction relief on all of Petitioner's claims. On appeal, Petitioner argues that the post-conviction court violated his right to due process by failing to provide him with notice and an opportunity to be heard. The State responds that Petitioner had multiple opportunities to be heard and that the Post-Conviction Procedure Act compelled summary dismissal of a petition that failed to raise meritorious claims.

The Post-Conviction Procedure Act details the review process that precedes an evidentiary hearing. First, the post-conviction court considers the petition itself to determine

whether it asserts a colorable claim for relief. T.C.A. § 40-30-106(f). A colorable claim is "a claim that, if taken as true, in the light most favorable to the petitioner, would entitle petitioner to relief under the Post-Conviction Procedure Act." Tenn. Sup. Ct. R. 28. § 2(H). If the facts alleged in the petition, taken as true, fail to show that the petitioner is entitled to relief, the petition shall be dismissed. T.C.A. § 40-30-106(f). Additionally, the post-conviction court must determine whether the petition has been timely filed and whether any claims for relief have been waived or previously determined. T.C.A. § 40-30-106(b), (f). If the petition survives this initial review, the post-conviction court may afford an indigent pro se petitioner the opportunity to have counsel appointed and to amend the petition, if necessary. T.C.A. § 40-30-107(b)(1). The State then has an opportunity to file a response. T.C.A. § 40-30-108. In the final stage of the process preceding an evidentiary hearing, the post-conviction court reviews the entire record, including the petition, the State's response, and any other files and records before it. T.C.A. § 40-30-109(a). If, upon reviewing these documents, the post-conviction court determines conclusively that the petitioner is not entitled to relief, the petition shall be dismissed. *Id.* Thus, "the Post-Conviction Procedure Act clearly affords the [post-conviction] court the authority to dismiss a petition without holding an evidentiary hearing, notwithstanding the fact that the petition may have survived earlier dismissal." *Burnett v. State*, 92 S.W.3d 403, 407 (Tenn. 2002); *see also Swanson v. State*, 749 S.W.2d 731, 736 (Tenn. 1988) (holding that when a colorable claim for relief has been presented, a hearing may not be necessary after the petitioner has had the assistance of counsel to amend the petition, by which the court may then fully evaluate the merits of the claim); *Andre Benson v. State*, No. W2016-02346-CCA-R3-PC, 2018 WL 486000, at *3 (Tenn. Crim. App. Jan. 19, 2018) ("A post-conviction court may also dismiss the petition later in the process but still prior to a hearing ... on the basis that a petitioner is conclusively not entitled to relief."), *no perm. app. filed.*

***11** In this case, the post-conviction court determined that Petitioner, who was already represented by counsel, raised a colorable claim for relief in his motion to reopen and allowed Petitioner the opportunity to submit an amended petition. At the January 31, 2018 hearing, the post-conviction court indicated its concern that Petitioner had not asserted a meritorious ground for relief and allowed Petitioner the opportunity to submit supplemental briefing. Thereafter, the post-conviction court "reviewed the pleadings of the parties, the record, and applicable law" and determined that Petitioner's claims were "appropriate for disposition without a hearing." As we have already concluded, the post-conviction court did not err in denying relief on any of the claims raised by Petitioner. The *Johnson* claim was the only one that was not procedurally barred; because that claim raised only a question of law and statutory interpretation, there was no need for an evidentiary hearing. *See Sowell v. State*, 724 S.W.2d 374, 378 (Tenn. Crim. App. 1986) (affirming post-conviction court's dismissal of petition without a hearing when "[t]he only valid issue raised was a legal question which has been decided adversely to defendant's contention by the case law of this State"). The post-conviction court, despite its earlier finding that Petitioner had raised a colorable claim, was clearly authorized by the Post-Conviction Procedure Act to dismiss the amended petition without an evidentiary hearing upon conclusively determining that Petitioner was not entitled to relief. *See Burnett*, 92 S.W.3d at 407; *Swanson*, 749 S.W.2d at 736.

IV. Proposed Settlement Agreement

Petitioner argues that the post-conviction court erred by denying the proposed settlement agreement wherein Petitioner's sentence would be modified from death to life imprisonment. According to Petitioner, "post-conviction courts are empowered to settle a case for less than death without determining a likelihood of prevailing on a specific claim." Petitioner asserts that the post-conviction court abused its discretion and acted arbitrarily and without legal authority in concluding that it was "not appropriate to accept such a proposed agreement under the circumstances of this case where there is no claim for post-conviction relief before this Court which should survive this Court's statutorily required preliminary order." Despite the fact that the District Attorney General was prepared to enter into this settlement agreement and concede relief on the *Johnson* and *Hurst* claims in the post-conviction court, the State argues on appeal that these claims are meritless and that "only the Governor has the authority to unwind a criminal judgment absent a judicial finding that the judgment is infirm." We agree with the State's position on appeal that the post-conviction court lacked jurisdiction to entertain the settlement agreement.

Under the Post-Conviction Procedure Act,

> [i]f the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable, ... the court shall vacate and set

> aside the judgment or order a delayed appeal as provided in this part and shall enter an appropriate order and any supplementary orders that may be necessary and proper.

T.C.A. § 40-30-111(a). Petitioner focuses on the portion of the statute regarding the entry of "an appropriate order" and argues that this language gives the post-conviction court the authority to accept a settlement agreement in a capital case without making any findings as to the merits of the post-conviction claims. Relying heavily upon several trial court orders in other capital post-conviction cases wherein the court accepted the parties' agreement to modify a death sentence, Petitioner argues that there is a consistent practice among trial courts of granting the requested relief without hearing any proof, requiring the State to make any concessions, or making any findings regarding the merits of the underlying post-conviction claims. However, these unappealed trial court orders hold no binding precedential value upon our Court or any other court. *See State v. Candra Ann Frazier*, No. 03C01-9904-CC-00146, 1999 WL 1042322, at *2 (Tenn. Crim. App. Nov. 18, 1999) (noting that "the circuit court's opinion merely constitutes persuasive authority and is not binding, under the theory of stare decisis, upon other judicial circuits").

More importantly, Petitioner's argument overlooks and completely ignores the first clause of the statute: "*If* the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable ...." T.C.A. § 40-30-111(a) (emphasis added). Clearly, the post-conviction court's authority to vacate a judgment, order a delayed appeal, or enter any other "appropriate order" is contingent upon the court's finding that the judgment is void or voidable due to an infringement of the petitioner's constitutional rights. *See Wilson v. State*, 724 S.W.2d 766, 768 (Tenn. Crim. App. 1986) (holding that trial court's grant of delayed appeal was inappropriate where there was no finding of constitutional deprivation on the face of the order). Only upon a finding that either the conviction or sentence is constitutionally infirm can the post-conviction court vacate the judgment and place the parties back into their original positions, whereupon they may negotiate an agreement to settle the case without a new trial or sentencing hearing. *See State v. Boyd*, 51 S.W.3d 206, 211-12 (Tenn. Crim. App. 2000). As this Court has noted, "the post-conviction law is not for the purpose of providing sentence modifications" but for remedying constitutional violations. *Leroy Williams v. State*, No. 03C01-9209-CR-00306, 1993 WL 243869, at *3 (Tenn. Crim. App. July 6, 1993) (citing *State v. Carter*, 669 S.W.2d 707 (Tenn. Crim. App. 1984)).

***12** Moreover, the post-conviction court did not abuse its discretion in refusing to accept the District Attorney General's concession of error on Petitioner's post-conviction claims. *See State v. Hester*, 324 S.W.3d 1, 69 (Tenn. 2010) (holding that a court is not required to accept the State's concession). Indeed, the post-conviction court acted well within its authority by independently analyzing the issues to determine whether the concession reflected an accurate statement of the law. *See Barron v. State Dep't of Human Servs.*, 184 S.W.3d 219, 223 (Tenn. 2006); *see also State v. Shepherd*, 902 S.W.2d 895, 906 (Tenn. 1995) (independently analyzing the defendant's death sentence after finding "no legal basis in this record for outright modification of the sentence to life," despite the State's concession at oral argument). The Post-Conviction Procedure Act requires the post-conviction court to "state the findings of fact and conclusions of law with regard to each ground" in its final order disposing of the post-conviction petition, regardless of whether it is granting or denying relief. T.C.A. § 40-30-111(b); Tenn. Sup. Ct. R. 28, § 9(A); *see State v. Swanson*, 680 S.W.2d 487, 489 (Tenn. Crim. App. 1984) (noting that this is a mandatory requirement designed to facilitate appellate review of the post-conviction proceedings). The post-conviction court did not act arbitrarily or abuse its discretion in following the statutory requirements of the Post-Conviction Procedure Act.

In the absence of a finding of constitutional violation sufficient to grant post-conviction relief, the post-conviction court is without jurisdiction to modify a final judgment. *See Delwin O'Neal v. State*, No. M2009-00507-CCA-R3-PC, 2010 WL 1644244, at *2 (Tenn. Crim. App. Apr. 23, 2010) (affirming trial court's finding that it lacked jurisdiction over a post-conviction petitioner's request for a reduction of sentence after constitutional claims were abandoned), *perm. app. denied* (Tenn. Sept. 3, 2010). Petitioner's reliance on case law addressing a trial court's authority to accept a plea agreement to resolve pending charges pre-trial is misplaced given that Petitioner's convictions have long since become final. "[O]nce the judgment becomes final in the trial court, the court shall have no jurisdiction or authority to change the sentence in any manner[,]" T.C.A. § 40-35-319(b), except under certain limited circumstances "authorized by statute or rule." *State v. Moore*, 814 S.W.2d 381, 383 (Tenn. Crim. App. 1991); *see, e.g.*, T.C.A. § 40-35-212; Tenn. R. Crim. P. 35, 36, 36.1; *see also Taylor v. State*, 995 S.W.2d 78, 83 (Tenn. 1999) (noting the availability of habeas corpus and post-conviction to collaterally attack a conviction or sentence that has become final). "[J]urisdiction to modify a

final judgment cannot be grounded upon waiver or agreement by the parties." *Moore*, 814 S.W.2d at 383 (citing *State v. Hamlin*, 655 S.W.2d 200 (Tenn. Crim. App. 1983)). "It is well-settled that a judgment beyond the jurisdiction of a court is void." *Boyd*, 51 S.W.3d at 210 (citing *State v. Pendergrass*, 937 S.W.2d 834, 837 (Tenn. 1996)); *see also Lonnie Graves v. State*, No. 03C01-9301-CR-00001, 1993 WL 498422, at *1 (Tenn. Crim. App. Dec. 1, 1993) (citing *State v. Bouchard*, 563 S.W.2d 561, 563 (Tenn. Crim. App. 1977)) (holding that "[t]he purported modification of an order that has 'ripened' into a final judgment is void" despite the agreement of the parties). To hold otherwise would effectively allow the trial court to exercise the pardoning and commutation power, which is vested solely in the Governor under Article 3, section 6 of the Tennessee Constitution. *See Workman v. State*, 22 S.W.3d 807, 808 (Tenn. 2000); *State v. Dalton*, 109 Tenn. 544, 72 S.W. 456, 457 (Tenn. 1903). Thus, the post-conviction court did not err in refusing to accept the proposed settlement agreement and modify a final judgment when it lacked the statutory authority to do so under the Post-Conviction Procedure Act.

V. Cumulative Error

Finally, Petitioner argues that "all claims of error coalesced into a unitary abridgment of [Petitioner's] constitutional rights." "To warrant assessment under the cumulative error doctrine, there must have been more than one actual error committed in the trial proceedings." *State v. Hester*, 324 S.W.3d 1, 77 (Tenn. 2010). Because Petitioner has not established any error in the post-conviction proceedings, he is not entitled to relief via the cumulative error doctrine.

Conclusion

***13** Based on the foregoing, we affirm the judgment of the post-conviction court.

All Citations

Slip Copy, 2019 WL 5079357

Footnotes

1 The trial court subsequently imposed consecutive sentences of 60 years for aggravated rape and 15 years for first degree burglary.

2 Petitioner also filed a post-conviction petition challenging his non-capital convictions for the rapes of the four other victims, which had served as the basis of the prior violent felony aggravating circumstance. The post-conviction court granted partial relief in the form of a new sentencing hearing in the non-capital rape cases. *See Nichols v. State*, 90 S.W.3d 576, 586-87 (Tenn. 2002). Petitioner ultimately received an effective sentence of 25 years in those four cases, as well as an effective sentence of 225 years for the rapes or attempted rapes of five other victims. *See State v. Harold Wayne Nichols*, No. E2008-00169-CCA-R3-CD, 2009 WL 2633099, at *3 (Tenn. Crim. App. Aug. 27, 2009), *perm. app. denied* (Tenn. Mar. 1, 2010).

3 "The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person." T.C.A. § 39-13-204(i)(2) (1988).

4 "The defendant was previously convicted of one (1) or more felonies, other than the present charge, whose statutory elements involve the use of violence to the person." T.C.A. § 39-13-204(i)(2) (Supp. 1990). As noted below, Petitioner has not challenged this jury instruction as error.

5 We note that even though the post-conviction court in this case applied the "colorable claim" standard, which is less stringent than the clear and convincing evidence standard that should be applied to motions to reopen under section 40-30-117(a), *see Howell v. State*, 151 S.W.3d 450, 460 (Tenn. 2004), the State has not challenged the propriety of the post-conviction court's decision to grant the motion to reopen on the *Johnson* claim.

6 Noting that this matter was initiated as a motion to reopen post-conviction proceedings, this Court directed the parties to submit supplemental briefing addressing whether we had jurisdiction to hear this appeal. *See Timothy Roberson v. State*, No. W2007-00230-CCA-R3-PC, 2007 WL 3286681, at *9 (Tenn. Crim. App. Nov. 7, 2007) (holding that there is no appeal as of right from the denial of a motion to reopen under Tenn. R. App. P. 3(b) and that the failure to follow the procedural requirements for seeking permission to appeal under T.C.A. § 40-30-117(c) "deprives this Court of jurisdiction to entertain such matter"), *perm. app. denied* (Tenn. Apr. 14, 2008). Both parties agreed that the post-conviction court's March 7, 2018 order was not a denial of the motion to reopen but was a denial of post-conviction relief on the merits. We agree that this Court has jurisdiction over this appeal under Tennessee Code Annotated section 40-30-117(b) and Tennessee Rule

of Appellate Procedure 3. *Accord. Michael Angelo Coleman v. State*, No. W2007-02767-CCA-R3-PD, 2010 WL 118696 (Tenn. Crim. App. Jan. 13, 2010), ***aff'd in part, vacated in part***, 341 S.W.3d 221 (Tenn. 2011); *Byron Lewis Black v. State*, No. M2004-01345-CCA-R3-PD, 2005 WL 2662577 (Tenn. Crim. App. Oct. 19, 2005), ***perm. app. denied*** (Tenn. Feb. 21, 2006); *contra Floyd Lee Perry, Jr. v. State*, No. W2013-00901-CCA-R3-PC, 2014 WL 1377579, at *4 (Tenn. Crim. App. Apr. 7, 2014) (holding that there was "a procedural error in bringing this appeal before this court" when the petitioner filed a Rule 3 notice of appeal rather than an application for permission to appeal under section -117(c) even though the post-conviction court determined that the motion to reopen presented a colorable claim, appointed counsel, allowed amendment of the motion, and held a hearing prior to denying relief), *perm. app. denied* (Tenn. Sept. 18, 2014).

7 The pre-1982 aggravating factor applied in *Moore* contained identical language to the pre-1989 aggravating factor at issue herein.

8 We note there was some discussion at the October 4, 2016 hearing regarding the possibility of filing either an amended or a second motion to reopen, presumably with regard to the *Hurst* claim, depending on the post-conviction court's ruling on the pending motion to reopen with respect to the *Johnson* claim. There is no limit on the number of motions to reopen that may be filed, only a limit on the types of claims that may be brought. *See* T.C.A. § 40-30-117. If Petitioner had raised this claim as a separate motion to reopen and it had been denied by the post-conviction court, our jurisdiction to hear the appeal would be dependent on whether Petitioner followed the proper procedure for seeking permission to appeal pursuant to Tennessee Code Annotated section 40-30-117(c). *See Timothy Roberson*, 2007 WL 3286681, at *9. Additionally, our standard of review would be abuse of discretion rather than de novo. *See* T.C.A. § 40-30-117(c); *Fletcher v. State*, 951 S.W.2d 378, 383 (Tenn. 1997).

End of Document

APPENDIX N

TENNESSEE CODE

Annotated

The Official Tennessee Code as Enacted by the Seventy-ninth General Assembly, Chapter 6, Public Acts 1955, With Supplemental Enactments, Amendments and New Laws

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Completely Annotated

SAM B. GILREATH, Lebanon, Tennessee
Editorial Consultant to Original Code

VOLUME 7
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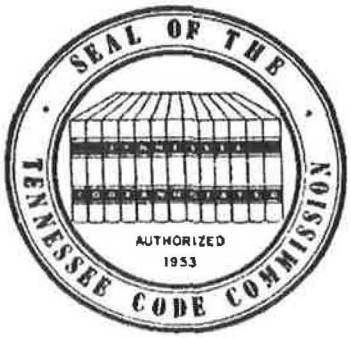
Prepared Under the Supervision of the
Tennessee Code Commission



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Killing done by one resisting felony of the defendant, criminal liability. 56 A.L.R.3d 239.

"Lying in wait," what constitutes. 89 A.L.R.2d 1140.

Mental or emotional condition as diminishing responsibility for crime. 22 A.L.R.3d 1228.

Premeditation or deliberation, presumption from the fact of killing. 86 A.L.R.2d 656.

Retreat, duty where assailant and assailed share the same living quarters. 26 A.L.R.3d 1296.

Spouse's confession of adultery as affecting degree of homicide involved in killing spouse or his or her paramour. 93 A.L.R.3d 925.

What constitutes murder by torture. 83 A.L.R.3d 1222.

39-2-203. Sentencing for first-degree murder. — (a) Upon a trial for murder in the first degree, should the jury find the defendant guilty of murder in the first degree, they shall not fix punishment as part of their verdict, but the jury shall fix the punishment in a separate sentencing hearing to determine whether the defendant shall be sentenced to death or life imprisonment. The separate sentencing hearing shall be conducted as soon as practicable before the same jury that determined guilt, subject to the provisions of subsection (k) relating to certain retrials on punishment.

(b) In the sentencing proceeding, the attorney for the state shall be allowed to make an opening statement to the jury and then the attorney for the defendant shall also be allowed such statement, provided that the waiver of opening statement by one party shall not preclude the opening statement by the other party.

(c) In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i) below; and any evidence tending to establish or rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the state of Tennessee.

(d) In the sentencing proceeding, the state shall be allowed to make a closing argument to the jury; and then the attorney for the defendant shall also be allowed such argument, with the state having the right of closing.

(e) After closing arguments in the sentencing hearing, the trial judge shall include in his instructions for the jury to weigh and consider any mitigating circumstances and any of the statutory aggravating circumstances set forth in subsection (i) of this section which may be raised by the evidence at either the guilt or sentencing hearing, or both. These instructions and the manner of arriving at a sentence shall be given in the oral charge and in writing to the jury for its deliberations.

(f) If the jury unanimously determines that no statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, or if the jury unanimously determines that a statutory aggravating circumstance or

circumstances have been proved by the state beyond a reasonable doubt but that said circumstance or circumstances are outweighed by one or more mitigating circumstances, the sentence shall be life imprisonment. The jury shall then return its verdict to the judge upon a form provided by the court which may appear substantially as follows:

PUNISHMENT OF LIFE IMPRISONMENT

(1) We, the jury, unanimously find that the punishment shall be life imprisonment.

/s/_____ Jury Foreman	/s/_____ Juror
/s/_____ Juror	/s/_____ Juror
/s/_____ Juror	/s/_____ Juror
/s/_____ Juror	/s/_____ Juror
/s/_____ Juror	/s/_____ Juror
/s/_____ Juror	/s/_____ Juror

(g) If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, and said circumstance or circumstances are not outweighed by any mitigating circumstances, the sentence shall be death. If the death penalty is the sentence of the jury, the jury shall:

(1) Reduce to writing the statutory aggravating circumstance or statutory aggravating circumstances so found; and

(2) Signify that there were no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so found. These findings and verdict shall be returned to the judge upon a form provided by the court which may appear substantially as follows:

PUNISHMENT OF DEATH

(1) We, the jury, unanimously find the following listed statutory aggravating circumstance or circumstances:

[Here list the statutory aggravating circumstance or circumstances so found]

(2) We, the jury, unanimously find that there are no mitigating circumstances sufficiently substantial to outweigh the statutory aggravating circumstance or circumstances so listed above.

(3) Therefore, we, the jury, unanimously find that the punishment shall be death.

/s/_____ Jury Foreman	/s/_____ Juror

[SEE TABLE IN FRONT OF THIS VOLUME FOR CHANGES IN SECTION NUMBERING]

/s/_____ Juror
/s/_____ Juror
/s/_____ Juror
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/s/_____ Juror
/s/_____ Juror
/s/_____ Juror

(h) If the jury cannot ultimately agree as to punishment, the judge shall dismiss the jury and the judge shall impose a sentence of life imprisonment. The judge shall not instruct the jury, nor shall the attorneys be permitted to comment at any time to the jury, on the effect of the jury's failure to agree on a punishment.

(i) No death penalty shall be imposed but upon a unanimous finding, as heretofore indicated, of the existence of one or more of the statutory aggravating circumstances, which shall be limited to the following:

(1) The murder was committed against a person less than twelve (12) years of age and the defendant was eighteen (18) years of age, or older;

(2) The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person;

(3) The defendant knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during his act of murder;

(4) The defendant committed the murder for remuneration or the promise of remuneration, or employed another to commit the murder for remuneration or the promise of remuneration;

(5) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind;

(6) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another;

(7) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb;

(8) The murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement;

(9) The murder was committed against any peace officer, corrections official, corrections employee or fireman, who was engaged in the performance of his duties, and the defendant knew or reasonably should have known that such victim was a peace officer, corrections official, corrections employee or fireman, engaged in the performance of his duties;

(10) The murder was committed against any present or former judge, district attorney general or state attorney general, assistant district attorney general or assistant state attorney general due to or because of the exercise of his official duty or status and the defendant knew that the victim occupied said office;

(11) The murder was committed against a national, state, or local popularly elected official, due to or because of the official's lawful duties or status, and the defendant knew that the victim was such an official; and

(12) The defendant committed "mass murder" which is defined as the murder of three or more persons within the state of Tennessee within a period of forty-eight (48) months, and perpetrated in a similar fashion in a common scheme or plan.

(j) In arriving at the punishment the jury shall consider, as heretofore indicated, any mitigating circumstances which shall include, but not be limited to the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The murder was committed under circumstances which the defendant reasonably believed to provide a moral justification for his conduct;

(5) The defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;

(6) The defendant acted under extreme duress or under the substantial domination of another person;

(7) The youth or advanced age of the defendant at the time of the crime; and

(8) The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment.

(k) Upon motion for a new trial, after a conviction of first degree murder, if the court finds error in the trial determining guilt, a new trial on both guilt and sentencing shall be held, but if the court finds error alone in the trial determining punishment, a new trial on the issue of punishment alone shall be held by a new jury empanelled for said purpose. In the event that the trial court, or any other court with jurisdiction to do so, orders that a defendant convicted of first-degree murder (whether the sentence is death or life imprisonment) be granted a new trial, either as to guilt or punishment or both, said new trial shall include the possible punishments of death or life imprisonment. [Code 1858, § 4600 (deriv. Acts 1829, ch. 23, § 3); Shan., § 6441; Code 1932, § 10770; Acts 1977, ch. 51, § 2; 1981, ch. 33, § 1; T.C.A. (orig. ed.), § 39-2404.]

Section to Section References. This section is referred to in § 40-35-201.

Law Reviews. Criminal Law in Tennessee in 1979 — A Critical Survey, III. Procedure (Joseph G. Cook), 48 Tenn. L. Rev. 19.

[SEE TABLE IN FRONT OF THIS VOLUME FOR CHANGES IN SECTION NUMBERING]