IN THE
SUPREME COURT OF THE UNITED STATES

No.

JON HALL
Petitioner,

v.

TONY MAYS, Warden,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

*****CAPITAL CASE*****

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Re: Case No. 10-5658/15-5436, *Jon Hall v. Tony Mays*
Originating Case No. : 1:05-cv-01199

Dear Counsel:

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Patricia J. Elder
Senior Case Manager
Direct Dial No. 513-564-7034

cc: Mr. Thomas M. Gould

Enclosure

Nos. 10-5658 & 15-5436

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JON HALL,)
)
Petitioner-Appellant,)
)
v.) ORDER
)
TONY MAYS, Warden,)
)
Respondent-Appellee.)
)
)

Before: BATCHELDER, CLAY, and GRIFFIN, Circuit Judges.

Jon Hall, a Tennessee death row inmate represented by counsel, appeals from a federal district court order and judgment denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. On October 11, 2016, this court issued an order granting Hall's motion to proceed in forma pauperis and certifying several claims for appellate review. On March 31, 2017, Hall filed a motion to hold his cases in abeyance based upon the United States Supreme Court's grant of certiorari in *Buck v. Stephens*, 136 S. Ct. 2409 (2016) (Mem.), and *Turner v. United States*, 137 S. Ct. 614 (2016) (Mem.). This court granted the motion and ordered that a motion to expand the certificate of appealability ("COA") be filed by July 17, 2017. The Court has issued opinions in each case, *see Buck v. Davis*, ___ U.S. ___, 137 S. Ct. 759 (2017), and *Turner v. United States*, ___ U.S. ___, 137 S. Ct. 1885 (2017). Hall has filed a timely motion to expand the COA.

Hall was convicted of first-degree murder and sentenced to death. The conviction and sentence were affirmed on direct appeal. *State v. Hall*, No. 02C01-9703-CC-00095, 1998 WL 208051, at *1 (Tenn. Crim. App. Apr. 29, 1998), *aff'd*, 8 S.W.3d 593, 606 (Tenn. 1999). In December 2000, Hall filed a pro se petition for post-conviction relief, which he amended in

November 2001 following the appointment of counsel. The trial court conducted an evidentiary hearing and denied relief. The Tennessee Court of Criminal Appeals affirmed the decision on appeal. *See Hall v. State*, No. W2003-00669-CCA-R3-PD, 2005 WL 22951, at *1 (Tenn. Crim. App. Jan. 5, 2005) (unpublished). In October 2003, Hall unsuccessfully filed a petition for a writ of habeas corpus in the trial court. *See Hall v. State*, No. M2005-00572-CCA-R3-HC, 2006 WL 2000502, at *1 (Tenn. Crim. App. July 19, 2006) (unpublished). In June 2006, the trial court denied Hall's motion to reopen his post-conviction petition, and his appeal was denied as untimely. *Hall v. State*, No. W-2007-02656-CCA-R3-PD, 2009 WL 1579243, at *1 (Tenn. Crim. App. June 5, 2009) (unpublished). Hall unsuccessfully filed a petition for a writ of error coram nobis or, alternatively, a motion to set aside judgment pursuant to Tennessee Rule of Civil Procedure 60. *Id*. at *2-*3.

In July 2005, Hall filed a petition for a writ of habeas corpus in district court. In April 2006, Hall filed an amended petition. Hall again amended the petition. The district court denied the petition without conducting an evidentiary hearing and did not grant a COA. Hall filed a notice of appeal (Case No. 10-5658). We remanded the case to the district court for consideration of various claims pursuant to *Martinez v. Ryan*, 566 U.S. 1 (2012). The district court denied relief and did not grant a COA. Hall filed a notice of appeal (Case No. 15-5436). Upon Hall's application, we granted a partial COA.

Following the Supreme Court's decisions in *Buck* and *Turner*, Hall now seeks to expand the COA to include the following claims: (1) whether the prosecution denied him a fair trial by withholding material, exculpatory pretrial statements; and (2) whether the trial court denied him a fair trial by submitting improper instructions about intoxication to the jury.

"A COA may not issue unless 'the applicant has made a substantial showing of the denial of a constitutional right.'" *Treesh v. Bagley*, 612 F.3d 424, 439 (6th Cir. 2010) (citing 28 U.S.C. § 2253(c)(2)). A substantial showing is made where the applicant demonstrates that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve

encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003). However, the "threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims." *Id*. at 336. If the district court denies a petition on procedural grounds only, "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

Upon review, we **DENY** Hall's motion to expand his COA. The Clerk's Office shall therefore issue a briefing schedule for the following claims: (1) in Case No. 10-5658, (a) whether the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963), by withholding evidence of Chris Dutton's mental illness, and (b) whether trial counsel rendered ineffective assistance of counsel by failing to present evidence of Hall's family and social history; and (2) in Case No. 15-5436, (a) whether trial counsel was ineffective for failing to object to jury instructions concerning the consideration of Hall's intoxication, and (b) whether trial counsel was ineffective for failing to challenge Hall's competency to stand trial.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Re: Case No. 10-5658/15-5436*, Jon Hall v. Tony Mays*
Originating Case No. : 1:05-cv-01199

Dear Counsel,

The court today announced its decision in the above-styled case.

Enclosed is a copy of the court's opinion together with the judgment which has been entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Yours very truly,

Deborah S. Hunt, Clerk

Cathryn Lovely
Deputy Clerk

cc: Mr. Thomas M. Gould

Enclosures

Mandate to issue.

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 21a0172p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JON HALL,
Petitioner-Appellant,

v.

TONY MAYS, Warden,
Respondent-Appellee.

Nos. 10-5658/15-5436

Appeal from the United States District Court
for the Western District of Tennessee at Jackson.
No. 1:05-cv-01199—J. Daniel Breen, District Judge.

Argued: January 30, 2019

Decided and Filed: August 3, 2021

Before: BATCHELDER, CLAY, and GRIFFIN, Circuit Judges.

COUNSEL

ARGUED: Kelley J. Henry, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Nashville, Tennessee, for Appellant. John H. Bledsoe, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee. **ON BRIEF:** Paul R. Bottei, Kristen M. Stanley, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Nashville, Tennessee, for Appellant. John H. Bledsoe, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee.

OPINION

ALICE M. BATCHELDER, Circuit Judge. Jon Hall, a Tennessee death row inmate, has appealed the district court's denial of his petition for a writ of habeas corpus, filed under

28 U.S.C. § 2254. In this appeal, Hall sought and we granted a certificate of appealability ("COA") on claims that: (1) the state prosecutor withheld exculpatory evidence of a state witness's mental illness; (2) Hall's trial counsel was ineffective for failing to challenge Hall's competency to stand trial; and (3) Hall's trial counsel was ineffective for failing to present certain family- and social-history evidence. Finding that Hall cannot prevail on any of these claims, we AFFIRM.

I.

In July 1994, Hall murdered his estranged wife, Billie Jo, by attacking her in her home, dragging her to the backyard swimming pool while at least one of her children looked on, and drowning her there. In February 1997, a jury in a Tennessee state trial court convicted Hall of premeditated first-degree murder and sentenced him to death, finding that the murder was especially heinous, atrocious, or cruel, and involved torture or serious physical abuse beyond that necessary to cause death. *See* T.C.A. § 39-13-204(i)(5). The Tennessee Court of Criminal Appeals and the Tennessee Supreme Court affirmed the conviction and sentence. *Tennessee v. Hall*, No. 02C01-9703-CC-00095, 1998 WL 208051 (Tenn. Crim. App., Apr. 29, 1998); *Tennessee v. Hall*, 8 S.W.3d 593 (Tenn. 1999). The Tennessee Supreme Court recounted the facts as follows:

> When she met [Hall], Billie Jo [] had two daughters . . . from a former relationship. After their marriage, she and [Hall] had two more daughters. . . . The youngest [] suffered from cerebral palsy. At the time of her murder, [Billie Jo] and [Hall] were estranged and living separately.
>
> On the night of July 29, 1994, [Hall] went to [Billie Jo]'s house to discuss a reconciliation. He brought a $25.00 money order made out to [Billie Jo] as a payment toward child support. Prior to entering the house, [Hall] disconnected the telephone line at the utility box on the outside wall of the house. When [Billie Jo] answered the door, [Hall] pushed his way into the room where she and the children were watching television. [Hall] told the girls to go to bed. When they did not immediately obey his order, [Hall] tipped over the chair in which [Billie Jo] was sitting. [Hall] and [Billie Jo] then went back into her bedroom. The children, who had gone into their bedrooms, could hear things slamming around and [Hall and Billie Jo] yelling at each another. When the children tried to enter the room, they found the door blocked. The three oldest children [] persisted in their efforts to get into the room and finally succeeded. They attempted to stop [Hall] from hurting their mother. When [Billie Jo] told the children to go to a

neighbor's house, [Hall] told them that if they went for help, 'he was going to kill Mama.' He also told [Billie Jo], a college student, that she would never live to graduate. [Two of the daughters] tried to use the telephone to call for help, but they discovered the telephones would not work. At that point, they went to a neighbor's house where they called 911. [T]he oldest child[] was the last to leave [Billie Jo's] house, [and was] carrying her [youngest] sister []. Before she left, she saw her mother and [Hall] leave the bedroom and go outside. She watched [Hall] drag her mother, 'kicking and screaming,' to the small pool in the back yard.

The first officer to arrive on the scene . . . was directed by a neighbor to check the pool where he found [Billie Jo]'s body floating face down in the water. He immediately called Emergency Medical Services and [the] Tennessee Bureau of Investigation. . . . [A TBI agent] arrived on the scene shortly after midnight.

[The TBI Agent] entered the house and found the master bedroom in disarray. Bloodstains marked the bed, a counter top, and a wedding dress. The telephones inside the house were off their hooks. A $25.00 money order made out to [Billie Jo] and dated the day of the murder was found inside the house. No weapons were found. A trail of drag marks and bloodstains led from the master bedroom, out the front door, over the driveway, past the sandbox, and down to the pool in the back yard. [Billie Jo]'s t-shirt was lying beside the pool. Clumps of grass ripped from the ground floated in the blood-tinged water of the pool. Outside the front door of the house the telephone junction box was opened and the phone line was disconnected. The grass and weeds near this box were matted down.

[T]he forensic pathologist who performed the autopsy on [Billie Jo] testified that the primary cause of death was asphyxia resulting from a combination of manual strangulation and drowning. He could not say with certainty that either strangulation or drowning was the exclusive cause of death. Evidence supporting strangling as a contributing cause of death included bruising on the left and right sides of [Billie Jo]'s neck, hemorrhaging in the neck muscles around the hyoid bone in the neck, and bleeding in the thyroid gland, which indicated that extensive compression had been applied to the neck. Evidence supporting drowning as a contributing cause of death was water found in both [Billie Jo]'s stomach and in her bloodstream. The water in her stomach could have collected when [Billie Jo] swallowed water as she was being drowned. The water in her bloodstream would have entered when she took water into her lungs, and the water passed through the lungs into her bloodstream.

Before dying, [Billie Jo] sustained at least eighty-three separate wounds, including several blows to the head, a fractured nose, multiple lacerations, and bruises and abrasions to the chest, abdomen, genitals, arms, legs and back. Abrasions on [Billie Jo]'s back were consistent with having been dragged across pavement. [The forensic pathologist] used a mannequin during his testimony to demonstrate the size and location of the various wounds on [Billie Jo]'s body. . . .

He described some of the injuries to [Billie Jo]'s arms, legs and hands as defensive wounds. He characterized the injuries to the neck, face and head as intentional 'target' wounds. Except for the physical trauma associated with the strangulation, however, none of the injuries would have proven fatal.

Chris Dutton, who was confined in a cell next to [Hall], testified that while both men were incarcerated, [Hall] confided in him about [Billie Jo]'s murder. When describing what happened on the night of the murder, [Hall] told Dutton that he had tried to talk with [Billie Jo] about reconciling but 'all she was interested in was the money.' When she refused to consider his plea for reconciliation and demanded that he leave, 'his temper got the best of him and he began to strike her.' According to Dutton, [Hall] had determined, even before he arrived at [Billie Jo]'s house, 'to make her . . . suffer as he did, feel the helplessness that he was feeling because she took his world away from him.' [Hall] told Dutton that he hit [Billie Jo] in the head until he panicked, threw her in the swimming pool, then re-entered the house, took the car keys, and drove away in [Billie Jo]'s minivan.

On cross-examination, Dutton admitted that [Hall] also told him that he was depressed and had been drinking since he telephoned [Billie Jo] earlier that day[,] . . . that he was very concerned about the welfare of his two daughters, especially [the youngest with cerebral palsy, and] . . . that he disconnected the telephone line, because, when he and his wife argued in the past, she had called the police.

Two witnesses testified on [Hall]'s behalf during the guilt phase of trial. Dr. Lynn Donna Zager, a clinical psychologist, interviewed [Hall] several times after his arrest[,] diagnosed him as depressed and suffering from alcohol dependence[, and] noted personality characteristics of paranoia and dependency. In Dr. Zager's opinion, at the time of the killing[,] [Hall] suffered from depression and alcohol intoxication. These factors were compounded by his personality characteristics and various psycho-social stressors, including a sick child, loss of employment with the resulting financial problems, his impending divorce, and the terminal illness of a brother. Dr. Zager testified that, in her opinion, [Hall] acted in an impulsive manner in killing his wife, rather than pursuant to a preconceived plan.

On cross-examination, Dr. Zager admitted that she based her opinion concerning [Hall]'s intoxicated state on statements he made to her and statements of other witnesses who saw him drinking on the day of the murder. She agreed that no one she interviewed remarked on whether [Hall] exhibited any of the typical physical signs of intoxication, such as slurred speech or lack of coordination.

[The other defense witness was Hall's boss.] [He] testified [that] . . . , prior to the killing[,] [Hall] had been severely depressed because of his family problems.

> [Hall] . . . call[ed] his sister, [S]heryl Arbogast, to testify regarding his state of mind at the time of the murder, but she had no first-hand knowledge of [Hall]'s state of mind on the night of the murder. In fact, [she] admitted she had not spoken to [Hall] for several months prior to the murder. Her testimony regarding [Hall]'s state of mind was based on a conversation she had with her [other] brother[], since deceased, on the day of the murder. The trial court would not permit this hearsay testimony to be admitted before the jury. At the conclusion of the evidence, the jury found [Hall] guilty as charged of first degree premeditated murder.
>
> During the sentencing phase[,] the State recalled [the forensic pathologist] to testify in more detail concerning the extent of [Billie Jo]'s injuries. The State introduced photographs of the injuries taken at the autopsy to illustrate [the forensic pathologist]'s testimony. These photographs depicted the numerous external wounds [Hall] inflicted while struggling with [Billie Jo].
>
> [Hall] called Dr. Zager and Dr. Joe Mount, a psychological examiner who counseled [Hall] at Riverbend Maximum Security Institution. Both described [Hall] as depressed, remorseful, suicidal and extremely concerned about his children. Dr. Mount testified that [Hall] had been diagnosed as suffering from an adjustment disorder with mixed emotional features (anxiety and depression) and substance abuse of dependence by history.
>
> [Hall's boss] also testified again. He described [Hall] as a good, dependable employee and told how [Hall] had cared for his children when he brought them to work with him. [Hall's boss] stated that [Hall] loved his wife and children and had hoped to reconcile with [Billie Jo].
>
> [Hall] also presented his three sisters and his mother to recount the history of [Hall] and his family. [Hall] was the youngest of seven children. His father, an alcoholic, physically and verbally abused his wife until he died from a heart attack in 1974 when [Hall] was ten. [Hall]'s father [had] denied that [Hall] was his son and snubbed [Hall]. The witnesses' descriptions of the fights between [Hall]'s parents eerily paralleled [Hall]'s final confrontation with his own wife. All of [Hall]'s relatives described him as a good father who loved his children.

Hall, 8 S.W.3d at 596-99 (editorial marks, certain quotation marks, and footnotes omitted).

Following his unsuccessful direct appeals, Hall actively but unsuccessfully pursued post-conviction relief in the Tennessee state courts, both pro se and with counsel. In July 2005, having exhausted his state-court proceedings, Hall filed a pro se § 2254 petition in federal court, raising 24 claims. After obtaining counsel, he filed an amended, 74-page petition in April 2006, asserting 20 claims, many with multiple sub-claims. A new counsel amended Hall's petition again in June 2007 to add a *Brady* claim about witness Chris Dutton. The district court declined

to hold a hearing and, in April 2010, issued a meticulous 134-page opinion that denied Hall any relief and denied him a COA for any of his claims. We granted an initial COA on two of those claims, which are now before us in this appeal: (1) the *Brady* claim concerning prison records about Chris Dutton's mental illness and (2) an ineffective-assistance-of-counsel (IAC) claim concerning evidence of Hall's family and social history.

In his *Brady* claim, Hall asserted that the prosecutor withheld prison records for state witness Chris Dutton that would have impeached Dutton's testimony by showing his long history of mental illness. The district court recognized that Hall procedurally defaulted this claim by failing to raise it in the Tennessee courts, but analyzed it on the merits anyway because Hall argued that the *Brady* claim itself overcame the procedural default. The district court found that Dutton's prison records were never actually in the prosecutor's possession because they were records of the Tennessee Department of Corrections (TDOC), which was not an agency acting under the prosecutor's control, so the prosecutor did not know about them, actually or constructively. Hall argued that the prosecutor had a duty to investigate, discover, obtain, and disclose the TDOC's records because Dutton was an inmate and a state witness, but the district court disagreed, finding that *Brady* does not impose such an unlimited duty to pursue that type of inquiry with uninvolved government agencies. The district court found that, because Hall had "not allege[d] . . . any connection between the TDOC and the prosecution in the investigation of this case, and none [wa]s apparent from the record," it had "no basis for imputing knowledge of the mental health information in Dutton's TDOC records to the prosecution." It then concluded that the *Brady* claim necessarily failed and Hall could not overcome the procedural default.

In his IAC claim, Hall argued that because his trial counsel "failed to obtain and present evidence from his family and other sources respecting his social history," counsel did not "submit[] a complete social history to Dr. Zager," which Dr. Zager could have used "at the guilt stage to demonstrate that Hall was not capable of forming the intent required for first degree murder and at sentencing to mitigate a sentence of death." Hall raised this claim in his state post-conviction proceedings, but the state courts determined, based on the evidentiary hearing, that Hall failed to prove that his counsel did not provide Dr. Zager with all relevant information:

> [Hall] contends that trial counsel w[ere] ineffective for failing to provide Dr. Zager with a complete mitigation history . . . [but] he fails to allege which portions of his social history were not provided. . . . It was established [] that [Hall] had been appointed investigators by the court [but] [Hall] did not present the testimony of these investigators or his pretrial attorneys at the post-conviction hearing.
>
> The mitigation assessments and reports provided [to Hall's attorneys] by Dr. Ann Charvat and Gloria Shettles were introduced as part of the post-conviction record. Dr. Charvat's assessment contained summaries of her interviews with Sheryl Arbogast and [Hall]'s mother[,] . . . a lengthy family history[,] . . . a list of potential witnesses[,] and detailed guidance for the manner in which defense counsel should prepare for a capital murder trial. . . . [Other evidence] show[ed] that both [Hall] and Sheryl Arbogast had reviewed and made corrections to Dr. Charvat's initial assessment . . . [and] that correspondence had been forwarded to [Hall]'s family for the purpose of separate interviews and additional background information. . . . [Hall did not call Shettles to testify at the hearing,] . . . provide the court with additional reports[, or] . . . establish[] that Ms. Shettles did not interview potential witnesses. . . . [C]ounsel was granted funds for a private investigator . . . [but] [t]here is no evidence [as to whether the investigator] did or did not conduct any investigation.
>
> Trial counsel testified [at the hearing] that Dr. Zager was provided all of the relevant information that they possessed. . . . [A] letter [from] Dr. Zager to one of [Hall]'s pretrial attorneys . . . stated her need for more information before she would be able to deliver a definitive assessment of [Hall]. Specifically, she inquired as to interviews with Randy Helms, Jackie and Darlene Brittain, [Hall]'s mother, Debbie Davis, Sheryl Arbogast, and Jeff Hall. The letter closed by stating, 'I will provide a complete report once the above information is received and reviewed in light of the evaluation.' [Hall did not] call Dr. Zager as a witness at the post-conviction hearing [but] [w]e can presume from the fact that she testified as to [Hall]'s mental condition at trial that she was provided sufficient information for a complete report.
>
> [Hall] has failed to establish that Dr. Zager was not provided all relevant information. Counsel cannot be found deficient when they complete an adequate investigation.

Hall v. Tennessee, No. W2003-00669-CCA-R3-PD, 2005 WL 22951, at *32-33 (Tenn. Crim. App., Jan. 5, 2005) (quotation marks and citations omitted, certain paragraph breaks omitted and inserted). In analyzing this under § 2254, the district court quoted the above passage and concluded that "[t]he Tennessee Court of Criminal Appeals' decision was neither contrary to nor an unreasonable application of clearly established federal law and was based on a reasonable determination of the facts in light of the evidence presented." The district court added that, while

a more complete social history might have provided more detail, the evidence presented would have been repetitive, so even if counsel were deficient, Hall was not prejudiced.

Hall appealed (No. 10-5658) but moved this court to hold his appeal in abeyance and to remand so that he could pursue claims under *Martinez v. Ryan*, 566 U.S. 1 (2012), and, subsequently, *Trevino v. Thaler*, 569 U.S. 413 (2013). We granted the motion. On remand, the district court painstakingly considered and denied each of Hall's numerous *Martinez*- or *Trevino*-based claims, both new and reasserted, and again denied Hall a COA for any claims. *Hall v. Carpenter*, No. 05-1199, 2015 WL 1464017, at *33 (W.D. Tenn. Mar. 30, 2015). We granted a COA on one of those claims, which is the third claim now before us in this appeal: an IAC claim concerning Hall's competency to stand trial in 1997.

In this IAC claim, Hall said his trial counsel should have moved for a competency hearing (based on his "substantial structural and functional brain damage" manifesting in behaviors "including belligerence and agitation with his counsel, the judge, and the victim's sister") to establish that Hall was "not capable of assisting in his defense." *Id.* at *18 (quotation marks omitted). Hall procedurally defaulted this claim by failing to raise it in the Tennessee courts but argued cause and prejudice to overcome the default, relying on *Martinez*/*Trevino* and alleging IAC by his post-conviction counsel. In the end, the district court accepted the State's rebuttal that Hall "was evaluated by five psychological experts throughout his state court proceedings, none of whom made findings that supported a theory of incompetence." *Id.* at *19 (citation omitted).

> [Hall] was evaluated by Western Mental Health and also by Middle Tennessee Health Institute and determined to be competent to stand trial. Lynn Zager, a clinical psychologist, also worked with defense counsel and made no determination that [Hall] was incompetent. Further she found no evidence to support an insanity defense. Additionally, in the seventeen years since [Hall]'s trial, he has been evaluated by neuropsychologist Pamela Auble, psychiatrist Keith Caruso, and psychiatrist Kimberly Stafford, none of whom expressed concerns about [his] competence. It was reasonable for [Hall]'s trial counsel to rely on the mental health professional's determination that their client was competent to stand trial.

Id. (citations omitted). Hall argued to the district court that "Dr. J. Douglas Bremner, a professor of psychiatry and behavioral sciences at Emory University School of Medicine, found that he

was not competent to stand trial," *id.* at *18, but after a careful review, the court explained that Bremner's conclusions about Hall's "competence c[a]me nine years after the trial of this matter and with no indication that Bremner ha[d] ever met [Hall]," *id.* at *20. The district court concluded:

> Given the initial determination of competence, the opinions of mental health professionals that evaluated [Hall] throughout his state court proceedings, and no finding or even question of mental incompetence being raised during that time, the [c]ourt does not find that trial counsel's performance was unreasonable in relying on the opinions of mental health professionals and failing to establish that [Hall] was incompetent to stand trial. [Hall]'s claim of ineffective assistance of counsel related to failure to establish [his] incompetence is not substantial. The claim is procedurally defaulted and DENIED.

Id. The district court issued a final judgment.

Hall appealed again (No. 15-5436), and our COA specified three issues: (1) "whether the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963), by withholding evidence of [state witness] Chris Dutton's mental illness"; (2) "whether trial counsel w[ere] ineffective for failing to challenge Hall's competency to stand trial"; and (3) "whether trial counsel rendered ineffective assistance of counsel by failing to present evidence of Hall's family and social history."[1]

II.

The district court held that Hall procedurally defaulted two of the claims before us in this appeal—his *Brady* claim and his IAC claim involving his competency to stand trial. In an appeal of a district court's finding of procedural default, "we review the district court's legal conclusions de novo and its findings of fact for clear error." *Scott v. Houk*, 760 F.3d 497, 503 (6th Cir. 2014).

A § 2254 petitioner is generally barred from asserting claims in federal court that have been "procedurally defaulted." *Woodford v. Ngo*, 548 U.S. 81, 93 (2006). "In habeas, the

[1]We initially certified four claims for appeal, but Hall subsequently moved to dismiss one of his claims. We granted that motion and formally acknowledge so here. In the meantime, Hall had moved to expand the COA to add claims based on *Buck v. Davis*, 137 S. Ct. 759 (2017), and *Turner v. United States*, 137 S. Ct. 1885 (2017). We denied that motion.

sanction for failing to exhaust properly (preclusion of review in federal court) is given the separate name of procedural default" and "state-court remedies are described as having been 'exhausted' when they are no longer available, regardless of the reason for their unavailability." *Id*. at 92-93 (citations omitted). To overcome a procedural default (here, the failure to exhaust properly), a petitioner must "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 (1991).

The other claim before us in this appeal is Hall's IAC claim concerning evidence of his family and social history. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides the standard for our review of that claim. Under AEDPA, the federal court may overturn a state-court conviction if the last reasoned opinion from the state court that adjudicated the challenged issue on the merits "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or . . . resulted in a decision that was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d).

To prevail under the "contrary to" clause, a petitioner must show that the state court "arrive[d] at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or "confront[ed] facts that are materially indistinguishable from a relevant Supreme Court precedent and arrive[d] at a result opposite" to that reached by the Court. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). To prevail under the "unreasonable application" clause, a petitioner must show that "the state court identifie[d] the correct governing legal principle from th[e] Court's decisions but unreasonably applie[d] that principle to the facts of the [petitioner's] case." *Id*. at 413. "[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Renico v. Lett*, 559 U.S. 766, 773 (2010) (quotation marks omitted). It is not enough that "the federal habeas court might conclude in its independent judgment that the state court applied clearly established federal law erroneously or incorrectly." *Gagne v. Booker*, 680 F.3d 493, 513 (6th Cir. 2012) (en banc) (internal quotation marks, editorial marks, and citation omitted). The relevant state-court decision must have applied clearly established federal law in an objectively unreasonable manner, *Renico*, 559 U.S. at 773, such that its

decision "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement," *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

A.

Hall claims the state prosecutor violated *Brady v. Maryland*, 373 U.S. 83 (1963), by withholding impeachment evidence—i.e., records of a key prosecution witness's history of mental illness—and that he has overcome his procedural default because "a petitioner who proves a *Brady* violation demonstrates cause and prejudice to excuse procedural default of the *Brady* claim." *Brooks v. Tennessee*, 626 F.3d 878, 891 (6th Cir. 2010) (citing *Banks v. Dretke*, 540 U.S. 668, 691 (2004)). On review, we may set aside a district court's factual findings only if they are clearly erroneous, "but [we] will review an alleged *Brady* violation de novo because whether a *Brady* violation occurred is a mixed question of law and fact." *Id.* (quotation marks and citation omitted).

To prevail on a *Brady* claim, Hall must prove three elements: "[1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued." *Banks*, 540 U.S. at 691 (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). The evidence at issue here comprises prison records that document Dutton's history of mental illness, which the State concedes could impeach Dutton, so it satisfies the first element. *See Wilson v. Sheldon*, 874 F.3d 470, 478 (6th Cir. 2017) ("Impeachment evidence is also encompassed within the *Brady* rule because a jury's reliance on the credibility of a witness can be decisive in determining the guilt or innocence of the accused."). The district court found that Hall did not satisfy the second element however.

The prosecution never had actual possession or actual knowledge of these records because only TDOC has these records. Nor does Hall contend that it did. Instead, Hall's claim rests on the prosecutor's duty under *Brady* to investigate, discover, obtain, and disclose certain exculpatory or impeachment evidence, namely the prosecutor's "duty to learn of any favorable

evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

In his appellate briefing, Hall argues that *Kyles* required the prosecutor to learn of Dutton's mental health records from the TDOC (and disclose them to Hall) because the TDOC was either acting on the prosecutor's behalf or the TDOC and the prosecution were working together to hold Hall in custody, convict him, and incarcerate him—given that the TDOC conveyed Dutton's offer of testimony to the prosecutor and coordinated his attendance as a prosecution witness at Hall's trial. But, in the district court, Hall "d[id] not allege . . . any connection between the TDOC and the prosecution in the investigation of this case, and none [wa]s apparent from the record," so the district court found "no basis for imputing knowledge of the mental health information in Dutton's TDOC records to the prosecution." As a finding of fact, this was not clearly erroneous and we have no basis to disturb it. As a legal theory, Hall forfeited this theory by failing to raise it to the district court. *See Frazier v. Jenkins*, 770 F.3d 485, 497 (6th Cir. 2014) ("Generally, we will not address arguments raised for the first time on appeal."). But, even assuming he had raised and preserved it, Hall does not cite any Supreme Court or Sixth Circuit precedent holding that the relationship between the jailor and the prosecutor is analogous to that between the police and the prosecutor, *see Kyles*, 514 U.S. at 437, such that the jailor necessarily acts on the prosecutor's behalf by incarcerating the defendant during trial, conveying a message from an inmate, or transporting the defendant and inmate-witness to trial.

Similarly, Hall does not cite any Supreme Court or Sixth Circuit precedent to support his proposition that *Brady* imputes this type of knowledge from the jailor to the prosecutor because both are acting under the same sovereign.[2] Instead, Hall relies on four out-of-circuit cases, three of which were decided after Hall's 1997 trial; the fourth, while decided in 1989, was an

[2]The Sixth Circuit has not precisely answered this question in a published opinion. *See United States v. Ramer*, 883 F.3d 659, 674 (6th Cir. 2018) (declining to address the question of whether "the government's *Brady* obligation created a duty for DFI's criminal prosecutors to learn of the civil division's file on Cornell"). However, in *Gulf v. Bagley*, 601 F.3d 445, 476 (6th Cir. 2010), we found that federal authority supported the proposition that a state prosecutor was not required "to inquire into the federal prosecution of a witness that is unrelated to the state case and that does not involve any persons acting on behalf of the state prosecutor." And "we have rejected *Brady* claims premised on evidence possessed by uninvolved government agencies." *Sutton v. Carpenter*, 617 F. App'x 434, 441 (6th Cir. 2010).

unpublished, two-page, per curiam ruling on a summary dismissal of a pre-AEDPA habeas petition. Moreover, these opinions do not even say what Hall represents them to say.

The first, *United States v. McGill*, 815 F.3d 846 (D.C. Cir. 2016) (per curiam), would mean—according to Hall's brief—that "where the defendant was being prosecuted by the United States, a 'psychological evaluation and a prison disciplinary report for a key government witness' should have been disclosed to the defense under *Brady*." But *McGill* says no such thing; instead, the *McGill* court rejected a claim "that the government's failure to disclose the impeachment evidence violated *Brady,*" explaining that the records were inadmissible at trial and "could not have resulted in any cognizable prejudice" because they were inapplicable, stale, or cumulative, as to the individual charge. *McGill*, 815 F.3d at 922-23. More to the point, the *McGill* opinion did not address anything to do with Hall's premise of necessary imputation: it is likely, albeit wholly undiscussed, that the *McGill* prosecutor had actual possession of the records at issue and withheld them for the reasons stated in the opinion.

Hall's next case is *Gonzalez v. Wong*, 667 F.3d 965, 981 (9th Cir. 2011), in which the witness's "psychological reports were in the possession of the prosecutor's office prior to the trial" and the prosecution conceded that it had suppressed them. This is factually distinguishable.

The third case, *Carriger v. Stewart*, 132 F.3d 463, 479-80 (9th Cir. 1997) (en banc), provides some support for Hall's position about the state's "obligation, before putting [its witness] on the stand, to obtain and review [that witness]'s corrections file, and to treat its contents in accordance with the requirements of *Brady*." But the *Carriger* court found a *Brady* violation based in part on the fact that "Dunbar was the prosecution's star witness, and was known by police and prosecutors to be a career burglar and six-time felon, with a criminal record going back to adolescence." *Id.* Given the prosecution's reliance his testimony at trial, it had an "obligation to turn over all information bearing on that witness's credibility," including his corrections file. *Id.* In contrast, Dutton's testimony was not crucial to the prosecution's case in Hall's trial.

The final case, *Sledge v. Moore*, 878 F.2d 1431 (4th Cir. 1989) (unpublished table opinion), would mean—according to Hall's brief—"that in a state prosecution, 'prison records of the prosecution's witnesses' were encompassed by the prosecution's *Brady* obligation, because such 'impeachment evidence is exculpatory in nature and should be provided to the defense pursuant to *Brady*." But this was the aforementioned two-page, per curiam ruling on the summary dismissal of a pre-AEDPA habeas petition on the finding that it was "frivolous." *Sledge* does not address anything to do with Hall's premise of necessary imputation: it is likely, albeit undiscussed, that the *Sledge* prosecutor had actual possession of the records.

The aforementioned cases do not support Hall's contention that the prosecutor had a duty to investigate, discover, and obtain Dutton's mental health records from the TDOC. And these cases certainly provide no clearly-established law that would guide a Tennessee prosecutor at the time of Hall's criminal trial in February 1997. Hall concedes that the Sixth Circuit "has held in various cases that under *Kyles*, a prosecutor does not have a duty to secure evidence from another sovereign (or state agency) that had no involvement whatsoever in a particular case," but argues that in this case the TDOC *was* involved. Regardless, Hall's view would leave our precedent, at best, undecided.

We are not inclined to break new ground by holding that the prosecutor has an affirmative duty to pursue and obtain psychological records for its witnesses, even inmate witnesses, but even if we were, Hall cannot show prejudice, the third *Brady* element. To prove prejudice, Hall must show that the suppressed evidence is "material," meaning that there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

Dutton testified that Hall had confided in him about the murder, which provided evidence of Hall's guilt and his mental state, including his premeditation. According to Dutton, Hall told him that he had disconnected the phone line in anticipation that Billie Jo would call the police if they argued and that, when she refused to consider his pleas for reconciliation and demanded that he leave, his temper got the best of him and he began to strike her; eventually he panicked, threw her in the pool, and fled. Dutton further testified that, by Hall's own admission, Hall had determined before he arrived at Billie Jo's house "to make her . . . suffer as he did, feel the

helplessness that he was feeling because she took his world away from him." On cross-examination, Dutton testified that Hall had also told him that he was depressed and had been drinking that day, and was very concerned about his daughters' welfare, especially the youngest with cerebral palsy. Hall's counsel effectively impeached Dutton, revealing that Dutton had several felony convictions for burglary and theft, had previously given information to law enforcement in exchange for favors, and had been promised that the prosecutor would speak on his behalf at his parole hearing if he testified truthfully at Hall's trial.

A petitioner does not prove materiality, for purposes of demonstrating prejudice, when the potentially exculpatory evidence is "merely cumulative" to information presented at trial to impeach his credibility. *See Brooks v. Tennessee*, 626 F.3d 878, 893-94 (6th Cir. 2010); *Carter v. Mitchell,* 443 F.3d 517, 533 n.7 (6th Cir. 2006). While records of Dutton's mental illness would have impeached his general credibility, the jury was already aware that he was a criminal willing to trade testimony for favors—and was doing so in this case—and the mental-health records did not undermine his specific testimony.

Three of Billie Jo's daughters testified and their testimony corroborated Dutton's testimony about Hall's guilt and premeditation. More importantly, the evidence against Hall was overwhelming even without Dutton's testimony—Hall disconnected the phone lines, told the daughters that he was "going to kill mama," and inflicted 83 separate wounds, including defensive wounds, target wounds, several blows to the head, a fractured nose, multiple lacerations, and bruises and abrasions to the chest, abdomen, genitals, arms, legs, and back. *See Jalowiec v. Bradshaw*, 657 F.3d 293, 313 (6th Cir. 2011) ("Evidence withheld by the prosecution must be evaluated in the context of the entire record." (citation and quotation marks omitted)).

Because Hall cannot prove all three elements of *Brady*, he cannot win a substantive *Brady* claim and, therefore, cannot establish cause and prejudice to overcome his procedural default.

B.

Hall's trial counsel did not challenge his competency to stand trial, nor did Hall's subsequent counsel raise this in his state post-conviction proceedings. Hall claims that, as a

result, both rendered ineffective assistance of counsel (IAC). He claims that IAC by his trial counsel entitles him to habeas relief and IAC by his post-conviction counsel overcomes procedural default. *See Martinez*, 566 U.S. at 14 ("[A] prisoner may establish cause for a default of an [IAC] claim . . . where appointed counsel in the initial-review collateral proceeding . . . was ineffective under the standards of *Strickland.*"). "To overcome the default, a prisoner must also demonstrate that the underlying [IAC] claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Id.*; *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984) (stating that, to prove an IAC claim, the petitioner "must show that [his counsel's] deficient performance prejudiced [his] defense"). Here, the question is whether *Strickland* required Hall's post-conviction counsel—under an objective standard of reasonableness—to raise trial counsel's failure to challenge competency as an IAC error for state-court consideration on post-conviction review.

The district court found that, prior to trial, both Western Mental Health and the Middle Tennessee Mental Health Institute (MTMHI) evaluated Hall and declared him competent to stand trial. Specifically, MTMHI assessed Hall's mental condition, his dependency on alcohol and drugs, and his intellectual functioning. In March 1995, MTMHI reported:

> After completion of the competency evaluation, the staff has determined that Mr. Hall's condition is such that he is capable of adequately defending himself in a court of law. In making this determination, it was concluded that he does understand the charges pending against him and the consequences which might follow, and he is able to advise counsel and participate in his own defense.

MTMHI further found that Hall did "not meet the criteria for an insanity defense." Similarly, the defense team's clinical psychologist, Dr. Zager, who evaluated Hall and testified in his defense both in the guilt phase and the sentencing phase of trial, never suggested that he was incompetent to stand trial and found nothing to support an insanity defense. During state post-conviction proceedings, three more experts (neuropsychologist Pamela Auble, psychiatrist Keith Caruso, and psychiatrist Kimberly Stafford) evaluated and opined about Hall, but none suggested that he had been incompetent to stand trial. The district court found that Hall's trial and post-conviction counsel relied on these expert opinions. *Hall*, 2015 WL 1464017, at *20. Because these findings are not clearly erroneous, we must accept them. *See Brooks*, 626 F.3d at 891.

Hall argues that, despite these formal evaluations and expert opinions, his behavior was so bizarre and outlandish that a reasonable attorney would have necessarily questioned his competence. He relies on anecdotal statements from four of his attorneys. One described him as being "very emotional," "waving his arms and yelling loudly," that "[n]either [his] thoughts nor his behaviors appeared to be rational," and being "non-cooperative with the judge." Another described him as engaging in "tirade[s] on issues that made little sense, followed by explosion[s] of anger," and unable to engage in "productive conversation" with counsel. A third described him as "childlike," "petulant," "naïve about the legal system, and confused about what was happening to him and why." And a fourth described him as "highly agitated," angry, and "difficult to calm down."

But Hall's pretrial and trial counsel were entitled to rely upon the opinions of experts to determine Hall's competency to stand trial. *See Morris v. Carpenter*, 802 F.3d 825, 841-42 (6th Cir. 2015); *see also Taylor v. Horn*, 504 F.3d 416, 438-39 (3d Cir. 2007) (rejecting an IAC claim for not seeking competency evaluation where counsel reasonably relied on expert evaluations that found the defendant competent); *Holladay v. Haley*, 209 F.3d 1243, 1250-51 (11th Cir. 2000) (approving of counsel's reliance on one evaluation and decision not to pursue another); *Galowski v. Berge*, 78 F.3d 1176, 1182 (7th Cir. 1996) (rejecting an IAC claim for counsel's failing to seek a competency hearing when a defense expert determined the defendant was competent); *Moran v. Godinez*, 57 F.3d 690, 699-700 (9th Cir. 1994), *superseded on other grounds by AEDPA* ("These psychiatrists provided detailed, reasoned reports which contained their individual opinions that Moran was competent to stand trial. Moran's attorneys were entitled to rely on these reports."); *Butler v. Davis*, 745 F. App'x 528, 532 (5th Cir. 2018), cert. denied, 139 S. Ct. 1545 (2019) ("[A]ttorneys may rely on the opinion of experts in assessing a defendant's mental health.").

When counsel rely on such experts—as they are entitled to do—their performance cannot be said to fall below the objective standard of reasonableness that *Strickland* requires. So too here. By relying on the opinions of the mental health experts, Hall's attorneys acted reasonably, and their decision to accept Hall's mental competency, without a formal hearing, was not deficient. For these reasons, Hall has not established a "substantial" IAC claim against his trial

counsel on this basis, and his post-conviction counsel did not render ineffective assistance by failing to raise it. Hall therefore cannot overcome his procedural default under *Martinez.*

C.

Hall's last IAC claim is that his trial counsel conducted an inadequate investigation and presented insufficient evidence regarding his family and social history. Specifically, he says trial counsel should have had his family members testify about his (1) mental disorder that caused his unruly behavior, (2) family's history of alcoholism, and (3) automobile and motorcycle accidents that might have involved "potential" head injuries;[3] and claims that, had counsel done so, it is probable that at least one juror would have voted for life instead of death. It bears mention that this is not the way Hall argued this issue in the state and district courts.[4] *See Frazier*, 770 F.3d at 497 ("Generally, we will not address arguments raised for the first time on appeal.").

But this claim would fail anyway under AEDPA review, particularly given that our review of an IAC claim under both *Strickland* and AEDPA is "doubly deferential." *Morris*, 802 F.3d at 841 (quoting *Burt v. Titlow*, 571 U.S. 12, 15 (2013)). That is, Hall must show, based on the evidence that was before the state court, *see Cullen v. Pinholster*, 563 U.S. 170, 181 (2011), that counsel's performance was deficient and that deficiency prejudiced his defense, *Strickland*, 466 U.S. at 687, and that the state court's decision that it was not deficient or did not prejudice him was "contrary to" or "an unreasonable application of" clearly established Supreme Court precedent, 28 U.S.C. § 2254(d)(1). Because AEDPA review "is limited to the record that was before the state court that adjudicated the claim on the merits," *Cullen*, 563 U.S. at 181, only

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[3] Hall also argues that that trial counsel should have produced family members to testify that Billie Jo had been physically, mentally, and emotionally abusive to him. In his state post-conviction proceedings, however, Hall asserted this as a separate claim titled "Counsel failed to establish the victim as the aggressor," *Hall*, 2005 WL 22951, at *28-29, and correspondingly raised it to the district court as a separate claim with the same title. Because we did not grant Hall a COA on that claim, we will not entertain it. *See Mitchell v. MacLaren*, 933 F.3d 526, 539 n.4 (6th Cir. 2019).

[4] In those courts, Hall argued that his trial counsel had failed to obtain and provide this family and social history evidence for Dr. Zager "to demonstrate that Hall was not capable of forming the intent required for first degree murder and . . . to mitigate a sentence of death." The district court found, as the Tennessee Court of Criminal Appeals had found during Hall's post-conviction proceedings, that Hall failed to prove that his counsel did not provide Dr. Zager with all relevant information, and added that, while a more complete social history might have provided more detail, the evidence presented would have been repetitive.

the evidence presented there is relevant to our review here. *See Moore v. Mitchell*, 708 F.3d 760, 786 (6th Cir. 2013).

On direct appeal, the Tennessee Supreme Court reported that, during the sentencing phase:

> [Hall] also presented his three sisters and his mother to recount the history of [Hall] and his family. [Hall] was the youngest of seven children. His father, an alcoholic, physically and verbally abused his wife until he died from a heart attack in 1974 when [Hall] was ten. [Hall]'s father [had] denied that [Hall] was his son and snubbed [Hall]. The witnesses' descriptions of the fights between [Hall]'s parents eerily paralleled [Hall]'s final confrontation with his own wife. All of [Hall]'s relatives described him as a good father who loved his children.

Hall, 8 S.W.3d at 599. During post-conviction, the Tennessee Court of Criminal Appeals reported:

> During the guilt phase . . . , trial counsel presented the testimony of Dr. Lynn Zager, a clinical psychologist[, who] diagnosed [Hall] as depressed and suffering from alcohol dependence. She further observed personality characteristics of paranoia and dependency. In her professional opinion, she believed that [Hall] suffered from depression and alcohol intoxication at the time of the killing. She found these factors were compounded by his personality characteristics and various psycho-social stressors, including a sick child, loss of employment with the resulting financial problems, his impending divorce, and the terminal illness of a brother. She concluded that [Hall] acted in an impulsive manner in killing his wife, rather than pursuant to a preconceived plan.
>
> Dr. Zager testified again during the penalty phase along with Dr. Joe Mount, a psychological examiner who counseled [Hall] at Riverbend Maximum Security Institution. Both doctors described him as depressed, remorseful, suicidal and extremely concerned about his children. Dr. Mount testified that [Hall] had been diagnosed as suffering from an adjustment disorder with mixed emotional features and substance abuse of dependence by history.

Hall, 2005 WL 22951, at *31 (quotation marks and citations omitted). The district court, therefore, concluded:

> Hall's mother and three sisters have testified about the alcoholism, physical and psychological abuse that he experienced as a child[,] and the fact that his father mistreated him because he did not believe [Hall] was his son. The evidence that [Hall] contends could have been obtained from a more complete social history may provide more detail, but it would have been repetitive of what was already

> presented. To the extent that counsel may have been deficient in obtaining a social history, [Hall] was not prejudiced.

Hall has not convinced us that it would have necessarily helped, and not hurt, his defense for his trial counsel to have had his family members provide lay testimony about Hall's mental disorders, even more testimony about the family's alcoholism, and gratuitous testimony about past accidents that only "potentially" involved head injuries. Trial counsel's decisions to include or exclude such testimony are inherently strategic and "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; [while] strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690–91. It is far from clear that trial counsel's decision here was objectively unreasonable or amounted to deficient performance. Regardless, this additional testimony would only have been cumulative or repetitive and, therefore, would not satisfy the prejudice requirement under *Strickland*. Finally, even if Hall's assessment were correct, the state court's judgment would not be "so lacking in justification" as to be "beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. This claim fails.

In this appeal, Hall also accuses post-conviction counsel of IAC for failing to introduce more and different family- and social-history evidence at the post-conviction evidentiary hearing. Hall attempts to introduce this now, despite its apparent procedural default, based on his interpretation of the *Martinez* exception. Putting aside that Hall did not raise this in the district court, we have already rejected this legal theory. *See Moore*, 708 F.3d at 785.[5]

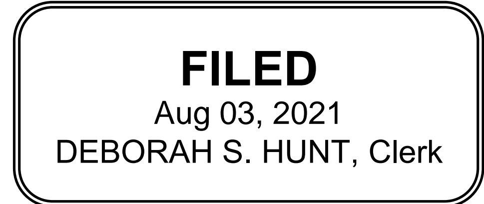
III.

For the foregoing reasons, we AFFIRM the judgment of the district court.

[5]Hall contends that *Moore* was incorrectly decided, though he concedes that this panel cannot overrule it. *See United States v. Ferguson*, 868 F.3d 514, 515 (6th Cir. 2017), *cert. denied*, 139 S. Ct. 2712 (2019) ("One panel of this court may not overrule the decision of another panel; only the *en banc* court or the United States Supreme Court may overrule the prior panel."). He raises this contention here to preserve it for possible future review.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 10-5658/15-5436



JON HALL,

Petitioner - Appellant,

v.

TONY MAYS, Warden,

Respondent - Appellee.

Before: BATCHELDER, CLAY, and GRIFFIN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Tennessee at Jackson.

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

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Nos. 10-5658/15-5436

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Sep 21, 2021
DEBORAH S. HUNT, Clerk

JON HALL,

Petitioner-Appellant,

v.

TONY MAYS, WARDEN,

Respondent-Appellee.

O R D E R

BEFORE: BATCHELDER, CLAY, and GRIFFIN, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Filed: September 21, 2021

Ms. Kelley J. Henry
Federal Public Defender's Office
810 Broadway
Suite 200
Nashville, TN 37203

Re: Case No. 10-5658/15-5436*, Jon Hall v. Tony Mays*
Originating Case No.: 1:05-cv-01199

Dear Mr. Henry,

The Court issued the enclosed Order today in these cases.

Sincerely yours,

s/Beverly L. Harris
En Banc Coordinator
Direct Dial No. 513-564-7077

cc: Mr. John H. Bledsoe

Enclosure

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

JON DOUGLAS HALL, Petitioner, V. RICKY BELL, Warden, RIVERBEND MAXIMUM SECURITY INSTITUTION, Respondent.	)))))))))))	No. 05-1199-JDB-egb

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ORDER DENYING PETITION PURSUANT TO 28 U.S.C. § 2254
ORDER GRANTING IN PART AND DENYING IN PART
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT
ORDER DENYING REQUEST FOR ORAL ARGUMENT
ORDER OF DISMISSAL
ORDER DENYING CERTIFICATE OF APPEALABILITY
AND
ORDER CERTIFYING APPEAL NOT TAKEN IN GOOD FAITH

On July 14, 2005, Petitioner Jon Douglas Hall, Tennessee Department of Corrections ("TDOC") prisoner number 238941, a death-sentenced inmate at the Riverbend Maximum Security Institution ("RMSI") in Nashville, Tennessee, filed a pro se habeas corpus petition under 28 U.S.C. § 2254, a motion for leave to proceed in forma pauperis, and a motion to appoint counsel. (Docket Entries ("D.E.") 1-4.) On December 1, 2005, the Court entered an order appointing counsel. (D.E. 5.) On December 5, 2005, the Court granted Petitioner in forma pauperis status. (D.E. 6.) On December 16, 2005, Respondent filed a motion for service of the petition. (D.E. 10.) The Court granted the motion on December 19,

2005. (D.E. 11.) On December 29, 2005, an agreed scheduling order was entered. (D.E. 13.)

On April 3, 2006, Petitioner submitted an amended petition for writ of habeas corpus, (D.E. 15) and on July 10, 2006, Respondent filed his answer. (D.E. 19.) On July 12, 2006, Respondent filed the state court record manually. (See D.E. 21.) On July 20, 2006, a second agreed scheduling order was entered. (D.E. 22.)

On June 19, 2007, Petitioner filed a motion to amend the habeas petition and the amended petition. (D.E. 53 & 54.) The motion was granted on June 20, 2007 (D.E. 63) and on September 4, 2007, Respondent filed his answer. (D.E. 69.) On September 7, 2007, Petitioner filed a reply to the answer to amended petition. (D.E. 71.)

On October 2, 2008, the Court conducted a telephonic status conference, denied Petitioner's oral motion for further discovery, and granted counsel ninety (90) days to file dispositive motions. (D.E. 85 & 86.) On December 31, 2008, Respondent filed a motion entitled "Respondent's Motion for Judgment on the Pleadings" which the Court construes as a motion for summary judgment.[1] (D.E. 90.)

[1]Respondent relies on the state court record which is evidence outside the pleadings. "[T]he mere presentation of evidence outside of the pleadings, absent the district court's rejection of such evidence, is sufficient to trigger the conversion of a Rule 12(c) motion to a motion for summary judgment." Max Arnold & Sons, LLC v. W.L. Hailey & Co., Inc., 452 F.3d 494, 502 (6th Cir. 2006); see Fed. R. Civ. P. 12(d)("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56"); see also Hauck v. Mills, 941 F. Supp. 683, 686-87 (M.D. Tenn. 1996)(discussing the appropriateness of summary judgment motions in habeas proceedings).

On August 31, 2009, Petitioner filed a response, in which he requested oral argument, and a notice of filing the exhibits in support of the response. (D.E. 100 & 102.)

I. STATE COURT PROCEDURAL HISTORY

On February 5, 1997, Hall was convicted of first-degree murder in the Circuit Court of Madison County, Tennessee for the 1994 death of his estranged wife Billie Jo Hall and sentenced to death. State v. Hall, No. 02C01-9703-CC-00095, 1998 WL 208051, at *1 (Tenn. Crim. App. Apr. 29, 1998). On April 29, 1998, the Tennessee Court of Criminal Appeals affirmed the conviction and sentence. Id. at *16. On November 15, 1999, the Tennessee Supreme Court affirmed. State v. Hall, 8 S.W.3d 593 (Tenn. 1999). The United States Supreme Court denied the petition for writ of certiorari on October 2, 2000. Hall v. Tennessee, 531 U.S. 837 (2000). The petition for post-conviction relief was denied in the state courts. Hall v. State, No. W2003-00669-CCA-R3-PD, 2005 WL 22951 (Tenn. Crim. App. Jan. 5, 2005), perm. app. denied (Tenn. June 20, 2005). The denial of the state court petition for habeas corpus relief was affirmed by the Tennessee Court of Criminal Appeals. Hall v. State, No. M2005-00572-CCA-R3-HC, 2006 WL 2000502 (Tenn. Crim. App. July 19, 2006), perm. app. denied (Tenn. Nov. 27, 2006). Hall's petition for writ of error *coram nobis* was denied. Hall v. State,

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The motion for further discovery was denied, and this case became ripe for disposition as of the October 2, 2008 telephonic status conference. Therefore, the Court finds that no additional notice was needed for Petitioner to appropriately respond to the motion.

No. W2007-02656-CCA-R3-PD, 2009 WL 1579243 (Tenn. Crim. App. June 5, 2009), perm. app. denied (Tenn. Nov. 23, 2009).

To assess the Petitioner's claims, it is necessary briefly to set forth the proof from the trial in the Circuit Court, as found by the Tennessee Court of Criminal Appeals:

> The petitioner and the victim were married, and the victim had two daughters, Jennifer and Cynthia, from a previous relationship of the victim. The couple had two more daughters, Stephanie and Jessica. The youngest, Jessica, suffered from cerebral palsy. In 1994, the victim and the petitioner began having marital problems and were living separately.
>
> On the night of July 29, 1994, the petitioner went to the victim's house to discuss a reconciliation. He brought a $25.00 money order made out to the victim as a payment toward child support. Prior to entering the house, the petitioner disconnected the telephone line at the utility box on the outside wall of the house. When the victim answered the door, the petitioner pushed his way into the room where she and the children were watching television. The petitioner told the girls to go to bed. When they did not immediately obey his order, the petitioner tipped over the chair in which the victim was sitting. The petitioner and the victim went back into her bedroom. The children, who had gone into their bedrooms, could hear "[t]hings slamming around" and their parents yelling at each another. When the children tried to enter the room, they found the door blocked. The three oldest children, Jennifer, Cynthia and Stephanie, persisted in their efforts to get into the room and finally succeeded. They attempted to stop the petitioner from hurting their mother. Cynthia jumped on the petitioner's back and bit him. This did not stop the petitioner's attack. When the victim told the children to go to a neighbor's house, the petitioner told them that if they went for help, "he was going to kill Mama." He also told the victim, a college student, that she would never live to graduate. Cynthia and Stephanie tried to use the telephone to call for help, but they discovered the telephones would not work. At that point, they went to a neighbor's house where they called 9-1-1. Jennifer, the oldest child, was the last to leave the house, carrying her sister Jessica.

Before she left, she saw her mother and the petitioner leave the bedroom and go outside. She watched the petitioner drag her mother, "kicking and screaming," to the small pool in the back yard.

The first officer to arrive on the scene was Chief Jerry Bingham of the Henderson County Sheriff's Department. Upon his arrival, he found the victim's body floating face down in the water. He immediately called Emergency Medical Services and a Tennessee Bureau of Investigation (TBI) investigator. TBI Agent Brian Byrd arrived on the scene shortly after midnight.

Agent Byrd entered the house and found the master bedroom in disarray. Bloodstains marked the bed, a counter top, and a wedding dress. The telephones inside the house were off their hooks. A $25.00 money order made out to the victim and dated the day of the murder was found inside the house. No weapons were found. A trail of drag marks and bloodstains led from the master bedroom, out the front door, over the driveway, past the sandbox, and down to the pool in the back yard. The victim's t-shirt was lying beside the pool. Clumps of grass ripped from the ground floated in the blood-tinged water of the pool. Outside the front door of the house the telephone junction box was opened, and the telephone line was disconnected. The grass and weeds near this box were matted down.

Dr. O'Brien Clay Smith, the forensic pathologist who performed the autopsy, testified that the primary cause of death was asphyxia resulting from a combination of manual strangulation and drowning. He could not say with certainty that either strangulation or drowning was the exclusive cause of death. Evidence supporting strangling as a contributing cause of death included bruising on the left and right sides of the victim's neck, hemorrhaging in the neck muscles around the hyoid bone in the neck, and bleeding in the thyroid gland, which indicated that extensive compression had been applied to the neck. Evidence supporting drowning as a contributing cause of death was water found in both the victim's stomach and in her bloodstream.

Before dying, the victim sustained at least eighty-three separate wounds, including several blows to the head, a fractured nose, multiple lacerations, and bruises and abrasions to the chest, abdomen, genitals, arms, legs and

back. Abrasions on the victim's back were consistent with having been dragged across pavement. Dr. Smith described some of the injuries to the victim's arms, legs and hands as defensive wounds. He characterized the injuries to the neck, face and head as intentional "target" wounds. Except for the physical trauma associated with the strangulation, however, none of the injuries would have proven fatal.

Chris Dutton, who was confined in a cell next to the petitioner, testified that while both men were incarcerated, the petitioner confided in him about his wife's murder. When describing what happened on the night of the murder, the petitioner told Dutton that he had tried to talk with the victim about reconciling but "[a]ll she was interested in was the money." When she refused to consider his plea for reconciliation and demanded that he leave, "his temper got the best of him and he began to strike her." According to Dutton, the petitioner had determined, even before he arrived at his wife's house, "to make her feel as he did. He wanted her to suffer as he did, feel the helplessness that he was feeling because she took his world away from him." The petitioner told Dutton that he hit his wife in the head until he panicked, threw her in the swimming pool, then reentered the house, took the car keys, and drove away in the victim's minivan.

On cross-examination, Dutton admitted that the petitioner told him that he was depressed and had been drinking since he telephoned his wife earlier that day. The petitioner also told Dutton that he was very concerned about the welfare of his two daughters, especially Jessica. The petitioner explained that he disconnected the telephone line because when he and his wife argued in the past, she had called the police.

Two witnesses testified on the petitioner's behalf during the guilt phase of trial. Dr. Lynn Donna Zager, a clinical psychologist, interviewed the petitioner several times after his arrest. She diagnosed him as depressed and suffering from alcohol dependence. In addition, she noted personality characteristics of paranoia and dependency. In Dr. Zager's opinion, at the time of the killing, the petitioner suffered from depression and alcohol intoxication. These factors were compounded by his personality characteristics and various psycho-social stressors, including a sick child, loss of employment

with the resulting financial problems, his impending divorce, and the terminal illness of a brother. Dr. Zager testified that, in her opinion, the petitioner acted in an impulsive manner in killing his wife, rather than pursuant to a preconceived plan.

On cross-examination, Dr. Zager admitted that she based her opinion concerning the petitioner's intoxicated state on statements he made to her and statements of other witnesses who saw him drinking on the day of the murder. She agreed that no one she interviewed remarked on whether the petitioner exhibited any of the typical physical signs of intoxication, such as slurred speech or lack of coordination.

Randy Helms, the petitioner's prior employer, also testified on behalf of the petitioner. Mr. Helms said that before the killing, the petitioner had been severely depressed because of his family problems.

The petitioner attempted to call his sister, Sheryl Arbogast, to testify regarding his state of mind at the time of the murder, but she had no first-hand knowledge of the petitioner's state of mind on the night of the murder. In fact, Ms. Arbogast admitted she had not spoken to the petitioner for several months before the murder. Her testimony regarding the petitioner's state of mind was based on a conversation she had with her brother, Jeff Hall, since deceased, on the day of the murder. The trial court would not permit this hearsay testimony to be admitted before the jury. At the conclusion of the evidence, the jury found the petitioner guilty of first degree premeditated murder.

During the sentencing phase the state recalled Dr. Smith to testify in more detail concerning the extent of the victim's injuries. The state introduced photographs of the injuries taken at the autopsy to illustrate Dr. Smith's testimony. These photographs depicted the numerous external wounds the petitioner inflicted while struggling with the victim.

The petitioner called Dr. Zager and Dr. Joe Mount, a psychological examiner who counseled the petitioner at Riverbend Maximum Security Institution. Both described the petitioner as depressed, remorseful, suicidal, and extremely concerned about his children. Dr. Mount testified that the petitioner had been diagnosed as

> suffering from an adjustment disorder with mixed emotional features (anxiety and depression) and "substance abuse of dependence by history."
>
> Randy Helms also testified again. He described the petitioner as a good, dependable employee and told how the petitioner had cared for his children when he brought them to work with him. Helms stated that the petitioner loved his wife and children and had hoped to reconcile with the victim.
>
> The petitioner also presented his three sisters and his mother to recount the history of the petitioner and his family. The petitioner was the youngest of seven children. His father, an alcoholic, physically and verbally abused his wife until he died from a heart attack in 1974 when the petitioner was ten. The petitioner's father denied that the petitioner was his son and snubbed the petitioner. The witnesses' descriptions of the fights between the petitioner's parents eerily paralleled the petitioner's final confrontation with his own wife. All of the petitioner's relatives described him as a good father who loved his children.

Hall, 2005 WL 22951, at **1-4.

II. PETITIONER'S FEDERAL HABEAS CLAIMS

Hall raises the following claims:

1. The conviction and death sentence violate the Sixth, Eighth and Fourteenth Amendments to the United States Constitution because they are void (D.E. 15 at 48);

2. The prosecution's decision to seek the death penalty was not guided by a standard and violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution (id.);

3. Petitioner was incompetent to stand trial (id. at 49);

4. The state withheld material, exculpatory evidence (id. at 49-50);

5. The state knowingly presented perjured testimony and false evidence at trial and relied on that testimony in closing argument (id. at 50-52);

6. The trial court did not receive a knowing and voluntary waiver of Petitioner's right to testify (id. at 52);

7. The jury was prejudiced by improper extraneous influences (id. at 52-53);

8. The conviction and death sentence are based on false evidence (id. at 53-54);

9. The trial judge gave the jury unconstitutional instructions (id. at 54);

10. The application of the heinous, atrocious, or cruel aggravating circumstance violated the Sixth, Eighth and Fourteenth Amendments to the United States Constitution (id. at 55);

11. The trial judge did not exercise impartial, independent judgment in Petitioner's trial proceedings (id.)

12. The evidence is insufficient to support Petitioner's conviction of intentional, premeditated, first-degree murder (id.);

13. Ineffective assistance of counsel (id. at 55-61);

14. Petitioner is actually innocent of intentional, deliberate, premeditated, first-degree murder (id. at 61);

15. The State disregarded Petitioner's rights accorded by international law (id. at 61-66);

16. The Tennessee appellate courts' proportionality review violated the Sixth, Eighth and Fourteenth Amendments to the United States Constitution (id. at 66);

17. Petitioner is incompetent to be executed (id. at 66-67);

18. Death by lethal injection and/or electrocution constitutes cruel and unusual punishment (id. at 67-73);

19. The death sentence violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution (id. at 73); and

20. The cumulative effect of constitutional errors renders Petitioner's first-degree murder conviction and death sentence unconstitutional (id.).

III. ANALYSIS OF THE MERITS

A. Waiver and Procedural Default

Twenty-eight U.S.C. § 2254(b) states, in pertinent part:

> (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that --
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or
>
> (B) (i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

A habeas petitioner must first exhaust available state remedies before requesting relief under § 2254. See, e.g., Granberry v. Greer, 481 U.S. 129, 133-34 (1987); Rose v. Lundy, 455 U.S. 509, 519 (1982); Rule 4, Rules Governing Section 2254 Cases in the United States District Courts ("Section 2254 Rules"). A petitioner has failed to exhaust his available state remedies if he has the opportunity to raise his claim by any available state procedure. 28 U.S.C. § 2254(c); Preiser v. Rodriguez, 411 U.S. 475, 477, 489-90 (1973).

To exhaust his state remedies, the petitioner must have presented the very issue on which he seeks relief from the federal courts to the courts of the state that he claims is wrongfully confining him. Picard v. Connor, 404 U.S. 270, 275-76 (1971); Rust v. Zent, 17 F.3d 155, 160 (6th Cir. 1994). "[A] claim for relief in habeas corpus must include reference to a specific federal constitutional guarantee, as well as a statement of the facts which entitle the petitioner to relief." Gray v. Netherland, 518 U.S. 152, 162-63 (1996). "'[T]he substance of a federal habeas corpus claim must first be presented to the state courts.'" Id. at 163 (quoting Picard, 404 U.S. at 278). A habeas petitioner does not satisfy the exhaustion requirement of 28 U.S.C. § 2254(b) "by presenting the state courts only with the facts necessary to state a claim for relief." Id.

Conversely, "[i]t is not enough to make a general appeal to a constitutional guarantee as broad as due process to present the 'substance' of such a claim to a state court." Gray, 518 U.S. at 163. When a petitioner raises different factual issues under the same legal theory, he is required to present each factual claim to the highest state court in order to exhaust his state remedies. O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999); Pillette v. Foltz, 824 F.2d 494, 496 (6th Cir. 1987). A petitioner has not exhausted his state remedies if he has merely presented a particular legal theory to the courts without presenting each

factual claim. Pillette, 824 F.2d at 497-98. Each claim must be presented to the state courts as a matter of federal law. "It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." Anderson v. Harless, 459 U.S. 4, 6 (1982) (internal citation omitted); see also Duncan v. Henry, 513 U.S. 364, 366 (1995) (per curiam) ("If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court").

The state court decision must rest primarily on federal law. Coleman v. Thompson, 501 U.S. 722, 734-35 (1991). If the state court decides a claim on an independent and adequate state ground, such as a procedural rule prohibiting the state court from reaching the merits of the constitutional claim, a petitioner ordinarily is barred by this procedural default from seeking federal habeas review. Wainwright v. Sykes, 433 U.S. 72, 87-88 (1977). However, the state-court decision need not explicitly address the federal claims; instead, it is enough that the petitioner's brief squarely presents the issue. Smith v. Digmon, 434 U.S. 332 (1978) (per curiam).

When a petitioner's claims have never been actually presented to the state courts, but a state procedural rule prohibits the state court from extending further consideration to them, the

claims are deemed exhausted, but procedurally barred. Coleman, 501 U.S. at 752-53; Teague v. Lane, 489 U.S. 288, 297-99 (1989); Wainwright, 433 U.S. at 87-88; Rust, 17 F.3d at 160.

A petitioner confronted with either variety of procedural default must show cause for the default and prejudice to obtain federal court review of his claim. Teague, 489 U.S. at 297-99; Wainwright, 433 U.S. at 87-88. Cause for a procedural default depends on some "objective factor external to the defense" that interfered with the petitioner's efforts to comply with the procedural rule. Coleman, 501 U.S. at 752-53; Murray v. Carrier, 477 U.S. 478, 488 (1986).

A petitioner may avoid the procedural bar, and the necessity of showing cause and prejudice, by demonstrating "that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 750 (internal citations and quotation marks omitted). The petitioner must show that "'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" Schlup v. Delo, 513 U.S. 298, 327 (1995) (quoting Murray, 477 U.S. at 496). "To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." Schlup, 513 U.S. at 327.

The conduct of Petitioner's post-conviction proceedings was governed by the then-current version of Tennessee's Post-Conviction

Procedure Act, Tennessee Code Annotated §§ 40-30-101 to -122. That act specified types of procedural default that might bar a state court from reviewing the merits of a constitutional claim. A one-year statute of limitations governed the filing of petitions. Tenn. Code Ann. § 40-30-102. The statute also stated a standard by which state courts were to determine whether to consider the merits of post-conviction claims:

> Upon receipt of a petition in proper form, or upon receipt of an amended petition, the court shall examine the allegations of fact in the petition. If the facts alleged, taken as true, fail to show that the petitioner is entitled to relief or fail to show that the claims for relief have not been waived or previously determined, the petition shall be dismissed. The order of dismissal shall set forth the court's conclusions of law.

Tenn. Code Ann. § 40-30-106(f).[2]

The Sixth Circuit has upheld the dismissal of a Tennessee prisoner's habeas petition as barred by a procedural default caused

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[2]Section 40-30-106 continued:

(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.

by failing to file within the Tennessee statute of limitations on post-conviction relief. Hannah v. Conley, 49 F.3d 1193, 1194-96 (6th Cir. 1995) (construing pre-1995 statute and stating "the language of Tenn[essee] Code Ann[otated] § 40-30-102 is mandatory"). In this case, Petitioner's right to file any further state post-conviction petition is barred by the one-year statute of limitations and, therefore, he does not have the option of returning to state court to exhaust any claim presented in this § 2254 petition.

B. Legal Standard for Merits Review

The standard for reviewing a habeas petitioner's constitutional claims on the merits is stated in 28 U.S.C. § 2254(d). That section provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (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.

This Court must determine whether the state court adjudications of the claims that were decided on the merits were "contrary to" or an "unreasonable application of" "clearly established" federal law as

determined by the United States Supreme Court. This Court must also determine whether the state court decision on each issue was based on an unreasonable determination of the facts in light of the evidence presented in the state proceeding.

The Supreme Court has issued a series of decisions setting forth the standards for applying § 2254(d)(1).[3] In (Terry) Williams v. Taylor, 529 U.S. 362, 404 (2000), the Supreme Court emphasized that the "contrary to" and "unreasonable application of" clauses should be accorded independent meaning. A state-court decision may be found to violate the "contrary to" clause under two circumstances:

> A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. . . . A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent. Accordingly, in either of these two scenarios, a federal court will be unconstrained by § 2254(d)(1) because the state-court decision falls within that provision's "contrary to" clause.

Williams, 529 U.S. at 405-06 (citations omitted); see also Price v. Vincent, 538 U.S. 634, 640 (2003) (same); Lockyer v. Andrade, 538 U.S. 63, 73 (2003) (same); Bell v. Cone, 535 U.S. 685, 694 (2002)

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[3]By contrast, there is little case law addressing the standards for applying § 2254(d)(2).

(same).[4] The Supreme Court has emphasized the narrow scope of the "contrary to" clause, explaining that "a run-of-the-mill state-court decision applying the correct legal rule from our cases to the facts of a prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." Williams, 529 U.S. at 406; see also id. at 407 ("If a federal habeas court can, under the 'contrary to' clause, issue the writ whenever it concludes that the state court's *application* of clearly established federal law was incorrect, the 'unreasonable application' test becomes a nullity.") (emphasis in original).

A federal court may grant the writ under the "unreasonable application" clause "if the state court correctly identifies the governing legal principle from [the Supreme Court's] decisions but unreasonably applies it to the facts of the particular case." Cone, 535 U.S. at 694; see also Andrade, 538 U.S. at 75 (same); Williams, 529 U.S. at 408-09 (same).[5] "[A]n *unreasonable*

[4]The Supreme Court has noted that this standard "does not require citation of our cases -- indeed, it does not even require awareness of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam) (emphasis in original).

[5]Although the Supreme Court in Williams recognized, in dicta, the possibility that a state-court decision could be found to violate the "unreasonable application" clause when "the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply," the Supreme Court expressed a concern that "the classification does have some problems of precision." Williams, 529 U.S. at 407-08. The Williams Court concluded that it was not necessary "to decide how such 'extension of legal principle' cases should be treated under § 2254(d)(1)." Id. at 408-09. In Yarborough v. Alvarado, 541 U.S. 652, 666 (2004), the Supreme Court stated:

> Section 2254(d)(1) would be undermined if habeas courts introduced

application of federal law is different from an *incorrect* application of federal law." Williams, 529 U.S. at 410 (emphasis in original).[6] "[A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." Id. at 409.[7]

Section 2254(d)(1) refers to "clearly established" federal law, "as determined by the Supreme Court of the United States." This provision "expressly limits the source of law to cases decided by the United States Supreme Court." Harris v. Stovall, 212 F.3d

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> rules not clearly established under the guise of extensions to existing law. Cf. Teague v. Lane, 489 U.S. 288 (1989). At the same time, the difference between applying a rule and extending it is not always clear. Certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt.

[6]See also Andrade, 538 U.S. at 75 (lower court erred by equating "objectively unreasonable" with "clear error"; "[t]hese two standards, however, are not the same. The gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness"); Woodford v. Visciotti, 537 U.S. 19, 25 (2002) (per curiam) (holding that the lower court "did not observe this distinction [between an incorrect and an unreasonable application of federal law], but ultimately substituted its own judgment for that of the state court, in contravention of 28 U.S.C. § 2254(d)"); Cone, 535 U.S. at 698-99 ("For [a habeas petitioner] to succeed . . . , he must do more than show that he would have satisfied Strickland's test if his claim were being analyzed in the first instance, because under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied Strickland incorrectly"); Williams, 529 U.S. at 411 ("Under § 2254(d)(1)'s 'unreasonable application' clause, then, a federal habeas court may not issue the writ 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").

[7]See also Brown v. Payton, 544 U.S. 133, 147 (2005) ("Even were we to assume the '"relevant state-court decision applied clearly established federal law erroneously or incorrectly,"' . . . there is no basis for further concluding that the application of our precedents was 'objectively unreasonable.'") (citations omitted).

940, 943 (6th Cir. 2000), reh'g and suggestion for reh'g en banc denied (July 7, 2000). As the Sixth Circuit has explained:

> This provision marks a significant change from the previous language by referring only to law determined by the Supreme Court. A district court or court of appeals no longer can look to lower federal court decisions in deciding whether the state decision is contrary to, or an unreasonable application of, clearly established federal law.

Herbert v. Billy, 160 F.3d 1131, 1135 (6th Cir. 1999), reh'g and suggestion for reh'g en banc denied (Jan. 21, 1999) (citing 17A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4261.1 (2d ed. Supp. 1998)); see also Harris, 212 F.3d at 944 ("It was error for the district court to rely on authority other than that of the Supreme Court of the United States in its analysis under § 2254(d)."). In determining whether a rule is "clearly established," a habeas court is entitled to rely on "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." Williams, 529 U.S. at 412.

There is almost no case law about the standards for applying § 2254(d)(2), which permits federal courts to grant writs of habeas corpus where the state court's adjudication of a petitioner's claim "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." In a decision applying this standard, the Supreme Court observed that § 2254(d)(2) must be read in

conjunction with 28 U.S.C. § 2254(e)(1), which provides that a state court's factual determinations are presumed to be correct unless rebutted by clear and convincing evidence. Miller-El v. Dretke, 545 U.S. 231, 240 (2005).[8] It appears that the Supreme Court has, in effect, incorporated the standards applicable to the "unreasonable application" prong of § 2254(d)(1). Rice v. Collins, 546 U.S. 333, 341-42 (2006) ("Reasonable minds reviewing the record might disagree about the prosecutor's credibility, but on habeas review that does not suffice to supersede the trial court's credibility determination."). That is consistent with the approach taken by the Sixth Circuit, which has stated that

> a federal habeas court may not grant habeas relief under § 2254(d)(2) simply because the court disagrees with a state trial court's factual determination. Such relief may only be granted if the state court's factual determination was "objectively unreasonable" in light of the evidence presented in the state court proceedings. Moreover . . . , the state court's factual determinations are entitled to a presumption of correctness, which is rebuttable only by clear and convincing evidence.

Young v. Hofbauer, 52 F.App'x 234, 236 (6th Cir. 2002) (citing 28 U.S.C. § 2254(e)(1));[9] see also Matthews v. Ishee, 486 F.3d 883, 889 (6th Cir.), cert. denied, 552 U.S. 1023 (2007) (same); Stanley v. Lazaroff, 82 F.App'x 407, 416-17 (6th Cir. 2003) (same).

C. Summary Judgment Standard

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[8]But cf. Rice v. Collins, 546 U.S. 333, 338-39 (2006) (recognizing that it is unsettled whether there are some factual disputes where § 2254(e)(1) is inapplicable).

[9]See also Sumner v. Mata, 449 U.S. 539, 546-47 (1981) (applying presumption of correctness to factual determinations of state appellate courts).

Summary judgment shall be rendered "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). As the Supreme Court has articulated:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, 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. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of [his] case with respect to which [he] has the burden of proof.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986) (citation omitted).

Under Rule 56(e)(2), "[w]hen a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must -- by affidavits or as otherwise provided in this rule -- set out specific facts showing a genuine issue for trial." In considering a motion for summary judgment, "the evidence as well as the inferences drawn therefrom must be read in the light most favorable to the party opposing the motion." Kochins v. Linden-Alimak, Inc., 799 F.2d 1128, 1133 (6th Cir. 1986) (citations

omitted); see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986) (same).

A genuine issue of material fact exists "if the evidence [presented by the nonmoving party] is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see also id. at 252 ("The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict"); Matsushita, 475 U.S. at 586 ("When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts") (footnote omitted). The Court's function is not to weigh the evidence, judge credibility, or in any way determine the truth of the matter, however. Liberty Lobby, 477 U.S. at 249. Rather, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52.

IV. ANALYSIS OF PETITIONER'S CLAIMS

A. The Conviction and Death Sentence are Void. (Claim 1)

Petitioner contends that the Madison County Court lacked jurisdiction over his case because he never consented to a change of venue from Henderson County, Tennessee. (D.E. 15 at 48.) He claims that the trial court's lack of jurisdiction causes his conviction and death sentence to be void and makes imposition of the conviction and sentence a violation of his Sixth, Eighth and Fourteenth Amendment rights. (Id.)

Respondent asserts that this claim is procedurally defaulted because (1) Petitioner failed to present this claim on direct appeal or in his post-conviction proceeding, and there is no available procedure under Tennessee law to present the claim; and (2) Petitioner raised the issue in his state habeas proceeding on state law grounds only, not as a federal constitutional violation. (D.E. 90-1 at 5-6.) He argues that he repeatedly asserted his federal due process right to be tried only by a court that possesses jurisdiction in his appellate brief and cited two federal cases discussing standards used to determine whether an individual has waived a federal constitutional right. (D.E. 100 at 125-26.)

Petitioner's brief to the Tennessee Court of Criminal Appeals argued that the "judgment of guilty . . . was issued in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution" (D.E. 21, Add. 9, Vol. 2, p. 1), that Petitioner did not waive his constitutional right to a jury trial before an impartial jury in the county in which the crime was committed (id. at 8, 10), and

that it would violate due process for the right to be waived "absent his personal relinquishment" (id. at 8-9). The inmate relied on Estrada v. United States, 457 F.2d 255, 256 (7th Cir.), cert. denied, 409 U.S. 858 (1972), to address the waiver of a right to jury trial, and on Taylor v. Illinois, 484 U.S. 400 (1988), reh'g denied, 485 U.S. 983 (Mar. 28, 1988), a case dealing with the Sixth Amendment compulsory process clause, for the proposition that "certain constitutional rights, such as the right to a jury trial, are so essential to the concept of due process that no lawyer can waive them for a defendant." (D.E. 21, Add. 9, Vol. 2, p. 8.) The Court finds that Petitioner raised the federal constitutional issues of whether his due process and Sixth Amendment rights were violated by the trial court granting the change of venue and whether Petitioner made a knowing and voluntary waiver of his constitutional right to be tried before a jury in Henderson County. The Court concludes that these issues are not procedurally defaulted and must be reviewed on the merits.

On appeal from the denial of state court habeas relief, the Tennessee Court of Criminal Appeals held:

> As indicated, the petitioner asserts that he is entitled to habeas corpus relief because "he did not agree to a change of venue and the venue change was contrary to established law and procedure depriving the receiving court of jurisdiction." The record demonstrates that the petitioner filed two motions seeking a change of venue with the Henderson County trial court. The state apparently consented to the second of these motions and the trial court authorized the change to Madison County under Rule 21 of the Tennessee Rules of Criminal

> Procedure. While the petitioner now claims that his trial counsel did not have his permission to file the second motion, that is not a cognizable claim for habeas corpus relief. See Archer, 851 S.W.2d at 164. In our view, the petitioner has failed to establish that the Madison County trial court was without jurisdiction. Thus, the trial court did not err by dismissing the petition without a hearing.

Hall, 2006 WL 2000502, at *2.

A motion for change of venue was filed by Petitioner's counsel and denied at a hearing on November 8, 1995. (See D.E. 21, Add. 9, Vol.2, p. 5.) Petitioner's counsel argued that venue should be changed to "some county that has not been exposed to the newspaper articles, the television news items." (Id.) On September 12, 1996, the motion for change of venue was renewed (see id. at Add. 1, Vol. 1, p. 150), and Circuit Judge Whit LaFon granted the motion on September 16, 1996 (id. at Add. 1, Vol. 2, p. 152). Petitioner claims that Judge LaFon overruled his objection to the change of venue. (See id. at Add. 6, Vol. 1, p. 24.)

There was some testimony regarding the change of venue issue at the post-conviction hearing. The Tennessee Court of Criminal Appeals noted:

> Regarding the change of venue, Mr. Ford recalled reading newspaper articles and determining that a change of venue was "absolutely necessary." He said that this matter was discussed with the petitioner at length and that a motion was filed with the petitioner's permission. Mr. Ford stated that Judge LaFon granted the change without a hearing. Mr. Ford only became aware of the petitioner's dissatisfaction with the change of venue after the fact.

Hall, 2005 WL 22951, at *13. Hall testified that he never asserted that he wanted to change the venue to Madison County. Id. at *19.

Petitioner's claim arises under the vicinage right of the Sixth Amendment,[10] which provides "the right to a . . . jury of the . . . district wherein the crime shall have been committed, which district shall have been previously ascertained by law." U.S. Const., amend. VI. The Sixth Circuit has determined that the "districts" mentioned in the Sixth Amendment refer only to federal judicial districts and have never been defined to apply to states. See Caudill v. Scott, 857 F.2d 344, 345-46 (6th Cir. 1988);[11] see also Cook v. Morrill, 783 F.2d 593, 595 (5th Cir. 1986) (same).

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[10]Petitioner has not briefed this claim on the merits. Respondent has only briefed this issue as it relates to his assertions of procedural default. (See D.E. 90-1 at 5-6.)

[11]At the time of the Sixth Amendment's adoption, the Bill of Rights applied only to the federal government and therefore only to federal prosecutions. Cf. Barron v. City of Baltimore, 32 U.S. 243, 247 (1833). However, the Fourteenth Amendment Due Process Clause extended certain rights guaranteed by the Bill of Rights to protection against state action. Duncan v. Louisiana, 391 U.S. 145, 147-48 (1968). Only those rights that are "fundamental to the American scheme of justice" or "essential to a fair trial" were made applicable to the states. Id. at 148-49. The Supreme Court has not decided whether the Fourteenth Amendment incorporated the Sixth Amendment's vicinage right. The only circuits to squarely address the issue have concluded that the Fourteenth Amendment did not extend federal vicinage protection to the states. See Stevenson v. Lewis, 384 F.3d 1069, 1071 (9th Cir. 2004), cert. denied, 543 U.S. 1191 (2005); see also Bossett v. Walker, 41 F.3d 825, 830 (2d Cir. 1994), cert. denied, 514 U.S. 1054 (1995) (expressing "considerable doubt" as to whether state venue issues raise a Sixth Amendment claim); Cook v. Morrill, 783 F.2d 593, 594-96 (5th Cir. 1986) (Though the United States Supreme Court has not yet decided whether the venue provision of the Sixth Amendment applies to the states, the Fifth Circuit has decided that it does not); Zicarelli v. Dietz, 633 F.2d 312, 320-26 (3d Cir. 1980) (providing a historical perspective about whether the vicinage right was one of the "fundamental principles of liberty and justice" that was incorporated into the Fourteenth Amendment's due process clause), cert. denied, 449 U.S. 1083 (1981); Nuh Nhuoc Loi v. Scribner, 671 F. Supp. 2d 1189, 1193-94 (S.D. Cal. 2009) (denying habeas relief because the Sixth Amendment's vicinage right has not been incorporated into the Fourteenth Amendment's due process clause).

Thus, Petitioner has no federal constitutional right to be tried in Henderson County.[12]

Hall is entitled to relief only if he can demonstrate that the trial court's change of venue denied him due process. Cook, 783 F.2d at 595-96; see Simon v. Epps, No. 2:04 CV26-P, 2007 WL 4292498, at *26 (N.D. Miss. 2007) (finding that moving the trial to a county forty miles from where the crime occurred did not violate petitioner's constitutional rights).

> [T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. A fair trial in a fair tribunal is a basic requirement of due process.

Irvin v. Dowd, 366 U.S. 717, 722 (1961) (citations omitted). A petitioner must show the actual existence of prejudice to prove he was denied the due process guarantee of a fundamentally fair trial. Id. at 723.

There is no evidence that the Madison County jury was so prejudiced against Petitioner as to invade a constitutionally protected right. See Hack v. Elo, 38 F.App'x 189, 196 (6th Cir. 2002) (petitioner was not entitled to a presumption of prejudice when he failed to demonstrate the "'actual existence' of partiality in some juror"). The Tennessee Court of Criminal Appeals'

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[12]To the extent Petitioner had any right to be tried in Henderson County, once he filed a motion for a change of venue, he relinquished that right. Nichols v. Bell, 440 F. Supp. 2d 730, 825 (E.D. Tenn. 2006).

determination of the Sixth and Fourteenth Amendment issues is neither contrary to nor an unreasonable application of clearly established federal law as determined by the United States Supreme Court and was based on a reasonable determination of the facts in light of the evidence presented.

Petitioner failed to address this issue as an Eighth Amendment claim in the state courts. He has not asserted cause and prejudice for his failure to exhaust an Eighth Amendment claim, nor has he demonstrated that a miscarriage of justice would result from the failure of this Court to consider this claim. Petitioner's claim of an Eighth Amendment violation is procedurally defaulted.

Claim 1 is DENIED.

B. Lack of Standards Governing the Prosecution's Decision to Seek the Death Penalty (Claim 2)

Petitioner asserts that prosecuting agencies in Tennessee do not have or follow a statewide objective standard for determining when to seek the death penalty and that the Fourteenth Amendment's Equal Protection Clause precludes subjecting fundamental rights to differing, arbitrary standards throughout a state. (D.E. 15 at 48). He argues that the United States Supreme Court's ruling in Bush v. Gore, 531 U.S. 98 (2000), prevents counties from subjecting fundamental rights to differing, arbitrary standards -- what happens when local prosecutors make individual determinations of whether to seek the death penalty. (D.E. 100 at 145-48.)

Respondent contends that this claim has not been exhausted in the Tennessee courts and is procedurally defaulted. (D.E. 19 at 16; D.E. 90-1 at 6.) Respondent asserts that the claim is without merit because the Supreme Court in Gregg v. Georgia, 428 U.S. 153, 199 (1976) held that prosecutorial discretion in selecting candidates for the death penalty does not present a constitutional deprivation. (D.E. 90-1 at 6.)

Without making a determination of whether the claim has been procedurally defaulted, the Court finds that this issue is without merit. The Supreme Court has refused to strike down various death penalty statutes on the ground that those laws grant prosecutors discretion in determining whether to seek the death penalty. See Proffitt v. Florida, 428 U.S. 242, 254 (1976) (rejecting argument that arbitrariness is inherent in the Florida criminal justice system because it allows for discretion at each stage of a criminal proceeding); Gregg, 428 U.S. at 199 (petitioner's argument "that the state prosecutor has unfettered authority to select those persons whom he wishes to prosecute for a capital offense" does not indicate that the system is unconstitutional); Campbell v. Kincheloe, 829 F.2d 1453, 1465 (9th Cir. 1987), cert. denied, 488 U.S. 948 (1988) (Supreme Court has rejected argument that death penalty statute is unconstitutional because it vests unbridled discretion in prosecutor to decide when to seek the death penalty). The decision in Bush, a case involving the method of counting

ballots for a presidential election, does not require a different result. See Chi v. Quarterman, 223 F.App'x 435, 439 (5th Cir. 2007), cert. denied, 551 U.S. 1193 (2007) (discussing the Bush case's "utter lack of implication in the criminal procedure context"); see also Wyatt v. Dretke, 165 F.App'x 335, 339-40 (5th Cir. 2006), cert. denied sub nom. Wyatt v. Quarterman, 548 U.S. 932 (2006) (the Bush holding is "limited to the facts at issue there -- the 2000 presidential election"); Black v. Bell, 181 F. Supp. 2d 832, 879 (M.D. Tenn. 2001) (rejecting petitioner's due process and equal protection claims that Bush establishes a new rule of law, to be applied retroactively, which would require Tennessee prosecutors to be guided by "hard and fast standards in determining whether to seek the death penalty"). Petitioner's claim is without merit.

Claim 2 is DENIED.

C. Incompetence to Stand Trial (Claim 3)

Hall asserts that he "believed that he could not testify on his own behalf because a Flag of War" was placed in the courtroom and that he "refused to testify on his own behalf because of his belief that a Flag of War" was in the courtroom. (D.E. 15 at 49.) Respondent contends that this claim was not exhausted in state court and is procedurally defaulted. (D.E. 19 at 16-17; D.E. 90-1 at 7.)

On direct appeal, Petitioner raised the issue of whether the trial court's refusal to remove a United States flag with gold

fringe from the courtroom denied him of his right to testify. See Hall, 8 S.W.3d at 596. The questions of Petitioner's competence to stand trial based on his beliefs about the flag and his refusal to testify were not addressed in the state courts. Petitioner has not exhausted this claim. He has not claimed cause and prejudice for his failure to exhaust this claim, nor has he demonstrated that a miscarriage of justice would result from the failure of this Court to consider this claim. Petitioner's claim is procedurally defaulted.

Claim 3 is DENIED.

D. Brady[13] Claims (Claim 4)

Petitioner alleged that the state withheld evidence that (1) Chris Dutton had been convicted of providing law enforcement authorities false information; (2) the investigation into Billie Hall's homicide was characterized by misconduct including the creation of Michelle Hays Elliott, Latasha Whittington-Barrett, and Darlene Brittain's stories; and (3) certain testimony of Chris Dutton, Billie Hall's daughters Cynthia and Jennifer Lambert, and Dr. O. C. Smith was false. (D.E. 15 at 49-52.) Petitioner alleges that the prosecution withheld evidence and information which could have been used to impeach Dutton and prove that he was lying about his conversation with Hall, including evidence of Dutton's mental illness and that the witness sought and received favorable

[13] Brady v. Maryland, 373 U.S. 83, 87 (1963).

treatment for his work as an informant. (D.E. 54 at 1-6.) Petitioner asserts that the State withheld evidence and information obtained from the Tennessee Bureau of Investigation ("TBI") which would have impeached prosecution witnesses about the events at the house on the night of the murder and established reasonable doubt about whether the offense was premeditated, deliberate, first-degree murder and/or worthy of the death penalty. (Id. at 6-8.)

Respondent contends that Petitioner's claims that the State withheld material -- exculpatory evidence -- were not raised in the Tennessee courts and are procedurally defaulted. (D.E. 90-1 at 7-8.) Respondent also argues that Petitioner's Brady claims are without merit. (Id. at 8.)

The inmate maintains that he can show cause and prejudice for any procedural default of his Brady claims. (D.E. 100 at 49.) Relying on Apanovitch v. Houk, 466 F.3d 460 (6th Cir. 2006), he insists that the withholding of evidence in violation of Brady establishes a per se excuse or "cause" for the procedural default. (D.E. 100 at 49-50.) Petitioner asserts that prejudice is shown if the withholding of the evidence "materially prejudiced" the defense. (Id.) He also contends that he establishes prejudice because his Brady claims have merit, and there is a reasonable probability that at least one juror would have voted to acquit for first degree murder and voted for life had this information been disclosed. (Id. at 52.) Failure to review these claims, Hall

asserts, results in a miscarriage of justice. (Id. at 71.) The Court will address the merits of Petitioner's Brady claims because he relies on the merits of those claims to excuse the asserted procedural default.

The Supreme Court held in Brady "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." This duty to disclose "is applicable even though there has been no request by the accused . . . and . . . the duty encompasses impeachment evidence as well as exculpatory evidence." Strickler v. Greene, 527 U.S. 263, 280 (1999) (citations omitted). A Brady violation can also arise from the prosecution's knowing use at trial of perjured testimony. Kyles v. Whitley, 514 U.S. 419, 433 (1995) (citing United States v. Agurs, 427 U.S. 97, 103-04 (1976)); accord Coe v. Bell, 161 F.3d 320, 343 (6th Cir. 1998), cert. denied, 528 U.S. 842 (1999) ("'The burden is on the defendant[] to show that the testimony was actually perjured, and mere inconsistences in testimony by government witnesses do not establish knowing use of false testimony'") (quoting United States v. Lochmondy, 890 F.2d 817, 822 (6th Cir. 1989)).

A Brady violation has three components: "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, 527 U.S. at 281-82.[14] Evidence is "material" for Brady purposes if "there is a reasonable probability that the suppressed evidence would have produced a different verdict." Id. at 281; see also United States v. Bagley, 473 U.S. 667, 682 (1985) (adopting the Strickland formulation of the Agurs test that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different").[15]

> [A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant. . . . Bagley's touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

Kyles, 514 U.S. at 434 (citations omitted). This standard is similar to the "prejudice" component of an ineffective assistance of counsel claim. See id. at 436; see also Bagley, 473 U.S. at 682

[14]The Supreme Court noted that, where a claim was not raised in state court because of an allegation that the prosecutor suppressed evidence, a showing of "cause and prejudice [for the procedural default] parallel two of the three components of the alleged Brady violation itself." Strickler, 527 U.S. at 282.

[15]Materiality pertains to the issue of guilt or innocence, and not to the defendant's ability to prepare for trial. Agurs, 427 U.S. at 112 n.20.

(noting that the reviewing court should consider any adverse effect the nondisclosure had on the preparation or presentation of the defendant's case).[16] Moreover, materiality is to be evaluated "in terms of suppressed evidence considered collectively, not item by item." Kyles, 514 U.S. at 436 (footnote omitted).

1. Dutton

Petitioner asserts that the prosecution withheld material exculpatory evidence showing that (1) Dutton testified falsely at trial when he claimed that Hall made damaging admissions to him, that Dutton didn't know what an informant was, that he was not an informant, that he did not testify to obtain benefits, and that he was only promised that the prosecution would speak at his parole hearing; (2) Dutton had been convicted of providing false information to law enforcement authorities; (3) Dutton had a history of mental illness; (4) he engaged in extensive work as an informant; (5) the witness received benefits for his testimony against Hall, including release from segregation and favorable transfers and treatment within the TDOC; and (6) Dutton expected favorable parole as consideration for his testimony against Petitioner. (D.E. 100 at 46, 48, 50.) The inmate claims that the prosecution withheld evidence from Dutton's TDOC records that could have been used to impeach the witness by showing his long history

[16] The Court further explained that, unlike other types of trial error, a harmless error analysis is not appropriate. Kyles, 514 U.S. at 435-36.

of mental illness, evidence of Dutton's work as an informant, and evidence of his receipt of benefits for his testimony against Petitioner. (Id. at 50; see also D.E. 71 at 1-3.)

a. Dutton As An Informant

Petitioner alleges that the prosecution withheld evidence that Dutton's testimony was false about the following: (1) he did not hear from anyone, after writing his letter to the State, until District Attorney Jerry Woodall contacted him shortly before Hall's trial; (2) the only consideration provided Dutton for his testimony was Woodall's agreement to speak at Dutton's parole hearing; (3) at the time that Dutton testified, he had not received any benefit for agreeing to testify against Petitioner; (4) Dutton did not know what an informant was; and (5) favorable treatment had nothing to do with Dutton's decision to provide information to authorities and to testify against Petitioner. (D.E. 15 at 49-51.) Petitioner also argues that the prosecution withheld evidence of "a tacit or formal understanding" that Dutton would receive benefits for his testimony against Petitioner and of the favorable treatment that the witness, in fact, received in exchange for his testimony. (D.E. 54 at 1, 4-6.) The evidence that Petitioner contends should have been disclosed under Brady includes TDOC printouts of activities related to attempts to contact the Federal Bureau of Investigation ("FBI") and the North Carolina Attorney General (D.E. 102-19 at 2; D.E. 102-26), various TDOC records related to Dutton's

transfers, classifications, and program assignments (D.E. 102-20 through -22; D.E. 102-28 through -33), information related to Dutton's parole (D.E. 10-23), and other TDOC records which would provide background information regarding Dutton's convictions and state of depression at various points that might arguably demonstrate that he was motivated to seek a benefit by testifying as an informant (D.E. 102-24, 102-25, & 102-27). (D.E. 100 at 57-60.) Respondent contends that the TDOC records are not discoverable under Brady because they were not in the possession of the prosecutor or an agency involved in the investigation of Petitioner's case and are not material under Brady. (D.E. 90-1 at 9-11.)

The document which Petitioner contends demonstrates Dutton's efforts to contact the FBI to become an informant states, "Met w. Mr. Dutton in D Pod. He asked about FBI address, copies" on November 8, 1994. (D.E. 102-19 at 2.) Respondent argues that this document has no bearing on the case and that Petitioner's claim that it is exculpatory is based on "rank speculation." (D.E. 90-1 at 10.) Respondent notes that Dutton's request for the FBI address occurred several years prior to Dutton's testimony in Petitioner's case and that Petitioner has presented no evidence that the FBI was involved in this case or that Dutton acted as an informant for the FBI. (Id.) In rebuttal, Petitioner insists that this document demonstrates that Dutton knew what an informant was, that he

testified falsely at trial, and that he was motivated to lie against Petitioner to help law enforcement and the prosecution. (D.E. 100 at 68.) The Court finds that evidence that Dutton requested the FBI's address more than a year prior to Petitioner's confession to Dutton,[17] without any indication of why Dutton wanted the FBI's address, to be too tangential to require disclosure under Brady. For the same reason, the TDOC printout (D.E. 102-26) which states that on November 8, 1994, Dutton "wants address of of (sic) attorney gen (sic) office in N.C." is not material under Brady. Petitioner's Brady claims related to these two documents also fail because knowledge of the TDOC records cannot be imputed to the prosecution. See infra pp. 43-45.

With regard to Hall's Brady claims about TDOC records concerning Dutton's transfers, classifications, and program assignments, Petitioner alleges that Dutton started looking for an opportunity to provide information to law enforcement after being placed in administrative segregation at RMSI, the time period when he claims that he spoke to Petitioner about the details of the murder. (D.E. 54 at 5.) Petitioner claims that on November 2, 1995, though Dutton was still in administrative segregation, he was "hastily recommended for release and transfer to West Tennessee High Security Prison." (Id.) Petitioner infers that this

[17]At trial on February 4, 1997, Dutton testified that his conversation with Petitioner occurred "probably better than a year ago, going on a year" which would mean that the conversation occurred around February 1996. (See D.E. 21, Add.2, Vol. 2, p. 229.)

transfer, Dutton's release from administrative segregation on November 30, 1995, Dutton's transfer to medium custody at Fort Pillow Farm in March 1996, and his transfer to Cold Creek Correctional Facility -- a minimum security facility on March 28, 1996, all stemmed from his agreement to testify against Petitioner. (Id. at 5-6.) In an attempt to show additional benefits received by Dutton in exchange for his testimony, Petitioner alleges that Dutton's release eligibility date was June 28, 1999, that Dutton testified against Petitioner in February 1997, that on August 14, 1998, Assistant District Attorney Earls wrote a letter to the Tennessee Board of Paroles on Dutton's behalf, and that Dutton was paroled on December 16, 1998. (Id. at 6.)

Respondent argues that Petitioner's claim of Dutton being "hastily recommended for release and transfer" to the West Tennessee High Security Prison is contradicted by Dutton's prison records. (D.E. 90-1 at 10.) Respondent correctly notes that the TDOC records indicate that Dutton made his request for transfer around December 1995 because he was afraid of retaliation for his refusal to pass drugs in the unit; this request was made prior to his correspondence with the Attorney General and his meeting with the District Attorney. (Id. at 11; see also D.E. 40-32 & 40-33.) Respondent notes that Dutton was not transferred until three to four months after his initial request. (D.E. 90-1 at 11.) Further, the Court finds that Petitioner has not presented any

evidence of an agreement related to these transfers to demonstrate that Dutton negotiated these transfers in exchange for his testimony.

Respondent maintains that the evidence that the District Attorney General agreed to recommend parole if Dutton testified truthfully was not withheld. (Id.) At trial, Dutton testified

> Q In exchange for your truthful testimony, did I make any promises to you?
>
> A You told me as long as I testified truthfully that you would speak at my parole hearing when the time came.
>
> Q Is that the only promise you received from me?
>
> A Yes.
>
> . . .
>
> Q Have you received any benefit at all at this point from providing that information to the authorities?
>
> A No, sir.
>
> Q Have you provided any information to any other law enforcement agency which has required your testimony?
>
> A. Yes, sir.
>
> Q And was that information -- When did you transmit that information?
>
> A In 1989. It would have been probably middle of 1990.
>
> Q So you helped the authorities once in 1989 or '90.
>
> A Yes, sir.
>
> Q And when you transmitted the information concerning the Defendant Jon Hall to the Attorney General's office in Nashville, did you also convey information involving any other area or state or individual?

A Yes, sir.

Q And what would that be? Which state?

A North Carolina.

Q And as a result of that information provided to the Attorney General in Nashville, have you testified in the state of North Carolina?

A Yes.

(D.E. 21, Add. 2, Vol. 2, pp. 230-32.) On cross-examination, Petitioner's attorney questioned Dutton regarding whether he was an informant.

Q Mr. Dutton, would it be a safe assumption that you would be classified as an informant in the prison system?

A I'm not sure of the definition of that, sir.

Q Isn't that your role?

A Excuse me?

Q Isn't that your role with the authorities, to inform them of certain things that you have heard?

A No.

Q In exchange for favorable treatment in the prison system?

A No, sir.

Q That had nothing to do with your motivation, did it?

A No.

(Id. at 232-33.)

Petitioner pieces together seemingly disconnected information to contrive a theory that Dutton's transfers, classification and assignments all resulted from his testimony against Petitioner.

Petitioner has not demonstrated that there was any agreement related to Dutton's parole or any benefit that was given to Dutton in exchange for his testimony other than that disclosed at trial.

Petitioner asserts that the prosecution withheld evidence that Dutton had been convicted of providing false information to law enforcement. (D.E. 15 at 49.) The jury was made aware that Dutton had been convicted in Bradley County of burglary, theft of property and burglary of an automobile, again in Bradley County of theft of property, and in Hamblin County of theft, aggravated assault and escape. (D.E. 21, Add. 2, Vol. 2, at 222-23.) Dutton also testified that he had spent fourteen or fifteen years of his life behind bars. (Id. at 223.)

In State v. Thompson, 420 S.E.2d 395, 399 (N.C. 1992), the opinion indicated that Dutton had previously been convicted of providing false testimony to law enforcement. The record in this habeas case contains no evidence of this fact. Petitioner has not demonstrated that the conviction for providing false information was known to the prosecution or was withheld.

Hall has not demonstrated that the information related to Dutton's transfers, classifications and program assignments, and the convictions for providing false information to law enforcement were required to be disclosed under Brady or that the failure to disclose this information prejudiced Petitioner. His argument regarding the benefits that Dutton received is speculative.

Further, the jury was aware that Dutton was a criminal, that he sought parole in exchange for his testimony, and that he testified in other cases. This information was sufficient to alert the jury that Dutton's testimony may not be credible. Petitioner's Brady claims about benefits received by Dutton and his conviction for providing false information are without merit.

b. Dutton's Mental Health Issues

Petitioner asserts that certain TDOC records which include a letter, inmate intake forms, classification summaries, health screenings, and other documents which establish Dutton's history of mental illness were withheld, in violation of Brady, by the prosecution. (D.E. 100 at 56-57; see also D.E. 102-10 through -18.) Respondent asserts that the TDOC records related to Dutton's mental health are not Brady material. (D.E. 90-1 at 9.) Respondent claims that the prosecutor did not have a duty to learn about this evidence, that the TDOC records were not in the possession of an agency or actor acting on the State's behalf, that TDOC was not involved in the investigation of Petitioner's case, and that the knowledge of these records should not be imputed to the State. (Id. at 9-10.)

Hall has not presented any evidence that the prosecution had knowledge of Dutton's mental health issues. Instead, he attempts to impose a duty on the prosecutor to obtain and review the TDOC records because Dutton is a criminal witness. (See D.E. 100 at

66.) Petitioner argues, based on Carriger v. Stewart, 132 F.3d 463 (9th Cir. 1997), cert. denied, 523 U.S. 1133 (1998) that

> when the state decides to rely on the testimony of such a witness, it is the state's obligation to turn over all information bearing on that witness's credibility. This must include the witness's criminal record, *including prison records, and any information therein which bears on credibility*.

Carriger, 132 F.3d at 480 (emphasis added). Carriger differs from the instant case because the only direct evidence of Carriger's guilt was the testimony of an informant who had been granted immunity in exchange for his testimony, admitted on several occasions and once under oath that he was the one who committed the robbery and murder, was well known by state authorities to be a liar, and had a pattern of lying to police and shifting blame to others. Id. at 470-71, 480. Carriger involved a situation where the evidence, especially the informant's confessions, was more likely to undermine the court's confidence in the outcome of the trial than Hall's case.

Petitioner cites other cases from the Third, Fifth and Ninth Circuits that he contends supports [sic] his proposition. (See D.E. 100 at 66-67.) Notably, no Sixth Circuit cases were mentioned. In Benge v. Johnson, 474 F.3d 236 (6th Cir.), cert. denied, 552 U.S. 1028 (2007), the Sixth Circuit emphasized that "Brady requires the government to 'turn over evidence *in its possession* that is both favorable to the accused and material to guilt or punishment,' including evidence that could be used to

impeach the credibility of a government witness." Benge, 474 F.3d at 243 (internal citation omitted) (emphasis added). An individual prosecutor is presumed to have knowledge of the information gathered in connection with his office's investigation of the case and indeed "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Kyles, 514 U.S. at 437; see United States v. Payne, 63 F.3d 1200, 1208 (2d Cir. 1995), cert. denied, 516 U.S. 1165 (1996) (Under Brady and its progeny, the government has an affirmative duty to disclose favorable evidence known to it and is presumed to have knowledge of all information gathered in connection with the government's investigation). An unlimited duty to inquire of other government offices with potentially exculpatory information is not imposed on a prosecutor. United States v. Gambino, 835 F. Supp. 74, 95 (E.D.N.Y. 1993), aff'd, 59 F.3d 353 (2d Cir. 1995). This Court has found no Sixth Circuit precedent which imposes the duty that Petitioner attempts to apply in this case.

Petitioner's argument fails because knowledge of information in the possession of one government entity is not automatically imputed to the prosecution. Garcia v. McDonough, No. 07-20843-CIV, 2008 WL 954278, at **24-25 (S.D. Fla. Apr. 8, 2008). An analysis of the connection between the pertinent agencies is required. United States v. Antone, 603 F.2d 566, 569-70 (5th Cir. 1979). In

this case, Petitioner does not allege there was any connection between the TDOC and the prosecution in the investigation of this case, and none is apparent from the record. See United States v. Phibbs, 999 F.2d 1053, 1088 (6th Cir. 1993), cert. denied, 510 U.S. 1119 (1994) (prison records were never in the prosecution's control, and the government was not otherwise aware of any exculpatory information within these records). As there is no basis for imputing knowledge of the mental health information in Dutton's TDOC records to the prosecution, this Brady claim lacks merit.

2. Testimony of Lambert Girls

Hall alleges that the State withheld evidence that Jennifer and Cynthia Lambert testified falsely about Petitioner pushing his way into the house, his blocking access to the bedroom, that Petitioner did not take care of the children, that he said he would kill Billie if the children called the police, and that he told Billie she would not live to graduate. (D.E. 15 at 49-51.) Petitioner contends that the TBI handwritten notes indicate that Jennifer told the TBI that Billie let Petitioner in the house, that he said he did not want to fight, that Petitioner drank two or three beers in the house, and that he did not immediately attack Billie but struck her after about an hour long discussion. (D.E. 54 at 7; D.E. 100 at 32.) Petitioner also asserts that the TBI notes reveal that he entered the house with a bag of beer. (D.E. 54 at 7.)

The only discrepancies between the testimony, the TBI statements, and the TBI notes deal with whether Petitioner pushed his way into the home and how much time passed between his arriving at the home and the altercation between Petitioner and Billie. At trial, Jennifer was simply asked to tell what happened that night. (D.E. 21, Add. 2, Vol. 2, pp. 276-77.) Her testimony did not reveal the amount of time from Petitioner's entry into the home until the altercation began with Billie. (See id. at 277-82.) She

also does not say anything about whether Billie let Petitioner in the house or whether he forced his way in. (Id.)

Cynthia initially testified that Petitioner pushed his way in the house (D.E. 21, Add. 2, Vol. 2, p. 260), but she admitted on cross-examination that she did not remember whether he forced his way in. (Id. at 269-70.) Cynthia also related that Petitioner and Billie did not fight when he first got to the house and that Petitioner brought some beer and drank it. (Id. at 269.) Petitioner's counsel did not ask about how much time passed between his client's arrival and the altercation.

The amount of time that passed after Petitioner's arrival was addressed in the TBI statements. Cynthia indicated that "after a while" the girls went to bed and Petitioner and Billie began to fight. (D.E. 102-9.) The details from the TBI notes regarding Jennifer's statement that Petitioner stayed about an hour and he drank two or three beers (see D.E. 103-1) were not included in the typewritten TBI statement. However, evidence that Petitioner was drinking and that time lapsed from his arrival was presented at trial. Therefore, Petitioner was not prejudiced by the state's failure to disclose the TBI notes.

Additionally, this is not information about which Petitioner can claim that he had no knowledge. Hall was present for these events and able to either advise his counsel of the discrepancies in information or testify himself. There is no Brady violation if

the defendant "knew or should have known the essential facts permitting him to take advantage of any exculpatory information or where the evidence is available to defendant from another source." United States v. Clark, 928 F.2d 733, 738 (6th Cir.), cert. denied, 502 U.S. 846 (1991) & 502 U.S. 885 (1991) (internal citations and quotation marks omitted). The Court finds that the omission from the TBI notes was not "of sufficient significance to result in the denial of defendant's right to a fair trial." Spirko v. Mitchell, 368 F.3d 603, 610 (6th Cir. 2004), cert. denied, 544 U.S. 948 (2005) (internal citations and quotation marks omitted).

3. Crime Scene Diagram

Petitioner alleged that the prosecution withheld evidence of a crime scene diagram identifying a sack of beer found in the house. (D.E. 54 at 8.) He references in his reply the crime scene diagram which was purportedly withheld, indicating that it was made available through the TBI file (D.E. 71 at 2), but he has not put the crime scene diagram in the record.

Respondent asserts that Petitioner has not established that this document was withheld. (D.E. 90-1 at 13.) Respondent notes that even if the diagram was withheld, Petitioner was not prejudiced by this information because Cynthia testified about Petitioner bringing beer to the house on the day of the murder. (Id.; see D.E. 21, Add. 2., Vol. 2, p. 270.) Petitioner has not established that he was prejudiced by the failure to disclose the

crime scene diagram which indicated that there were beer bottles in the house, as there was evidence on the record that he had been drinking beer at the house.

Hall does not assert an excuse other than the miscarriage of justice for the procedural default of his Brady claims related to the stories of Michelle Hays Elliott, Latasha Whittington-Barrett and Darlene Brittain. (D.E. 100 at 42.) Petitioner has not established that the Court's failure to review these claims will result in a miscarriage of justice. These claims are procedurally defaulted.

The Court finds that none of Petitioner's asserted Brady violations are deserving of habeas relief, and that Petitioner was not denied a fair trial.[18] Claim 4 is DENIED.

E. False Testimony and Evidence (Claim 5)

Petitioner alleges that the prosecution presented the perjured testimony of Dutton, Cynthia and Jennifer Lambert, and O.C. Smith, that the State used photographs that misrepresented the crime scene, and that the State relied on this false evidence in closing arguments. (D.E. 15 at 50-52.) Respondent contends that these claims have not been raised in any Tennessee courts and are

[18]Hall, relying on Cone v. Bell, 129 S. Ct. 1769 (2009), asserts that the Court should consider the cumulative effect of the alleged Brady violations to determine whether he received a fair trial. In Cone, the case was remanded because the lower court did not thoroughly review the suppressed evidence or consider the cumulative effect of the evidence on the jury. Cone, 129 S. Ct. at 1784, 1786. The instant case differs from Cone because a review of the allegedly suppressed evidence, even considered collectively, does not establish a Brady violation.

procedurally defaulted and also that the Petitioner has not met his burden in pleading these claims. (D.E. 90-1 at 13.)

Petitioner does not dispute that his false testimony claims were not exhausted in state court. He claims that Respondent's procedural default argument fails because the State has no legitimate interest in presenting false testimony, there is cause and prejudice because the prosecution misled Petitioner with false evidence and withheld proof that the evidence was false, and Petitioner has established a fundamental miscarriage of justice because he is actually innocent of first-degree murder. (D.E. 100 at 35-36.) Petitioner relies on Banks v. Dretke, 540 U.S. 668 (2004) to argue that he has established "ample cause" for the procedural default of his false testimony and false evidence claims. (D.E. 100 at 41.)

The Sixth Circuit in Henley v. Bell, 487 F.3d 379, 388 (6th Cir. 2007), cert. denied, 128 S. Ct. 2962 (2008) forecloses the argument based on Banks that a defendant has "little responsibility to inquire into the facts" of his Brady and false evidence claims. A defendant must still show good cause based on "events or circumstances 'external to the defense'" and resulting prejudice to excuse the failure to exhaust a claim. Henley, 487 F.3d at 388 (quoting Banks, 520 U.S. at 696).

Petitioner's related Brady claims do not establish cause for the procedural default of these false evidence claims because the

Court has determined that these Brady claims are not entitled to habeas relief. See supra p. 49. Petitioner has not demonstrated cause and prejudice for the failure to exhaust these claims or that a miscarriage of justice would result from the Court's failure to review these claims. His false evidence and false testimony claims are procedurally defaulted.

Claim 5 is DENIED.

F. Right to Testify (Claim 6)

Hall asserts violations of his Sixth, Eighth and Fourteenth Amendment rights because the trial court did not obtain a knowing and voluntary waiver of his right to testify. (D.E. 15 at 52.) He claims that he believed he could not testify on his own behalf because a "Flag of War"[19] was present in the Madison County courtroom and that he informed Judge LaFon he was not going to

[19]The Tennessee Supreme Court stated,

> the defendant apparently perceived gold fringe ornamentation on the courtroom flag to be symbolic of martial law jurisdiction. We note that the display of the United States flag with gold fringe is common in many ceremonial settings, including courtrooms. From a historical and legal standpoint, the use of fringe on the flag has no inherent or established symbolism. It has nothing to do with the jurisdiction of the court or with martial law. It is purely a decorative addition to enhance the appearance of the flag.

Hall, 8 S.W.3d at 604 n.6; see Bricker v. Superintendent of Sci-Mercer, No. 1:CV-09-01552, 2009 WL 3241682, at *2 n.2 (M.D. Pa. Oct. 2, 2009)(explaining the petitioner's belief that the "state courtrooms are under military occupation . . . because the courtrooms do not fly 'the American flag of peace of the (u)nited States of America . . .', and instead fly 'gold-fringed military flag of war' . . . ."); see also State v. Foss, No. 03-S-426, 2003 WL 23145493, at *3 (N.H. Super. Oct. 23, 2003) (rejecting claim that the court is a military court because of fringe on the flag).

testify for that reason. (Id.) Petitioner alleged that Judge LaFon refused to remove the flag. (Id.)

Respondent acknowledges that on appeal to the Tennessee Supreme Court, Petitioner raised the issue that the "flag of war" prevented him from exercising his right to testify in violation of his Fifth, Sixth and Fourteenth Amendment rights.[20] (D.E. 90-1 at 14.) However, Respondent contends that Petitioner never raised the claim of a violation of his Eighth Amendment rights by the presence of the United States flag with the gold fringe. (Id.)

The inmate contends that his Eighth Amendment claim is not procedurally defaulted because, based on Woodson v. North Carolina, 428 U.S. 280, 305 (1976), he "necessarily invoked" the Eighth Amendment by asserting that the trial court denied him due process. (D.E. 100 at 126-27.) Petitioner's Eighth Amendment claim has not been fairly presented to the state court and is procedurally defaulted. See Hodges v. Bell, 548 F. Supp. 2d 485, 560 (M.D. Tenn. 2008) ("For those claims for which Petitioner now relies upon constitutional amendments that were not cited and briefed in the state courts, the Court concludes that those claims were not fairly presented to the state courts and will be considered as unexhausted and defaulted"). Woodson does not stand for the proposition that any denial of due process in a capital case automatically invokes the Eighth Amendment. As to Petitioner's implicit review theory,

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[20]Petitioner does not assert a violation of his Fifth Amendment rights in his habeas petition.

in Webb v. Mitchell, 586 F.3d 383 (6th Cir. 2009), the Sixth Circuit noted that it had accepted an implicit review theory previously in Cone v. Bell, 359 F.3d 785, 790-94 (6th Cir. 2004), rev'd, 543 U.S. 447 (2005) but that holding was limited to Eighth Amendment vagueness challenges. See Webb, 586 F.3d at 400. The Court declines to extend that theory to excuse the procedural default of Petitioner's Eighth Amendment claim that he did not receive a knowing and voluntary waiver of his right to testify.

Petitioner argues that the Tennessee Supreme Court, pursuant to Tennessee Code Annotated § 39-2-205(c)(repealed), considered his Eighth Amendment claim on direct appeal because the claim raised the possibility that Petitioner's death sentence was arbitrary. (D.E. 100 at 129.) In Coe, the Sixth Circuit indicated that the proposition that a claim has been exhausted because § 39-2-205 requires the supreme court to review significant errors is "too broad, as it would eliminate the entire doctrine of procedural bar in Tennessee in capital cases." Coe, 161 F.3d at 336. Similarly, the Court finds that Petitioner's contention that the claim is not procedurally defaulted because the Tennessee Supreme Court reviewed the claim pursuant to Rule 52 of the Tennessee Rules of Appellate Procedure for fundamental error is without merit. (See D.E. 100 at 131-32.)

Petitioner asserts that ineffective assistance of appellate counsel establishes cause and prejudice for the failure to exhaust

his Eighth Amendment claim because it is an "arguably meritorious" claim which should have been presented on appeal. (Id. at 135-37.) He did not raise a claim of ineffective assistance of appellate counsel in the state court. Petitioner has not demonstrated cause and prejudice for the failure to exhaust his ineffective assistance claims. As a result, these claims are procedurally defaulted and do not establish cause for the failure to exhaust Petitioner's right to testify claims. See Edwards v. Carpenter, 529 U.S. 446, 451-52 (2000) ("'[A] claim of ineffective assistance,' . . . generally must 'be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default.'") (quoting Murray, 477 U.S. at 489).

On direct appeal, the Tennessee Supreme Court held:

> At the conclusion of proof in both the guilt phase and the penalty phase, the trial court sought to have the defendant take the stand to confirm that he knowingly and intelligently decided not to testify at trial after consultation with his attorneys. On both occasions, the defendant refused to be sworn to testify unless the trial court removed "the flag of war," i.e., the United States flag, from the courtroom. The trial court refused to remove the flag and proceeded to inquire of defense counsel whether counsel had explained the defendant's right to testify and whether the defendant had knowingly and voluntarily waived this right. Counsel indicated that they fully explained to the defendant the complementary rights to testify in one's own defense and to be free from self-incrimination, after which he chose not to testify.
>
> The defendant now asserts that the trial court's refusal to remove the flag infringed on his right to testify in his own defense. We note that the defendant did not file any motion during either the guilt or sentencing phase expressly requesting removal of the flag so that he could

> exercise his right to testify. This issue was not raised in either the Motion for New Trial or in the Court of Criminal Appeals. Technically, the issue has been waived. Tenn. R. App. P. 3(e), 36(a). In any event, a trial court's refusal to remove the United States flag from the courtroom does not violate anyone's constitutional rights. This issue is wholly without merit.

Hall, 8 S.W.3d at 603-04 (footnote omitted).

The Tennessee Supreme Court's decision that the issue had been waived would normally constitute an adequate and independent state law ground which bars habeas relief. See Hutchison v. Bell, 303 F.3d 720, 738 (6th Cir. 2002) ("This Court has previously determined that Tennessee's waiver rule, Tennessee Code Annotated § 40-30-206(g), which provides that claims not raised in a prior proceeding are barred, constitutes an adequate and independent state-law rule precluding habeas relief."). Since the Tennessee Supreme Court also addressed this issue on the merits, the Court will consider whether Petitioner's fundamental right to testify was violated.

The right of a defendant to testify at trial is a fundamental constitutional right and is subject only to a knowing and voluntary waiver by the defendant; it is a right essential to the due process of law under the Fifth and Fourteenth Amendments. Rock v. Arkansas, 483 U.S. 44, 51-52, 53 n.10 (1987). "The right may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. But restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the

purposes they are designed to serve." Id. at 55-56 (internal citations and quotation marks omitted).

A defendant's rights under the Constitution may be waived, provided that waiver is voluntary, knowing and intelligent. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). The trial court generally has no duty to ask whether the waiver is voluntary. United States v. Davis, 332 F.App’x 247, 249 (6th Cir. 2009); United States v. Campbell, 86 F.App’x 149, 153 (6th Cir. 2004). A defendant is presumed to have waived his right to testify unless the record contains evidence indicating otherwise. Hodge v. Haeberlin, 579 F.3d 627, 639 (6th Cir. 2009); United States v. Webber, 208 F.3d 545, 551 (6th Cir.), cert. denied, 531 U.S. 882 (2000).

The record reveals the colloquy at trial about Petitioner’s concern with testifying with a “flag of war” in the courtroom.

> THE COURT: Mr. Hall, would you please stand? Would you stand and raise your right hand?
>
> THE DEFENDANT: Are you trying to coerce me inside the bar -- the sanctuary of the bar? See, you didn’t remove that flag of war.
>
> THE COURT: Mr. Hall, I order you to raise your right hand. You refuse?
>
> THE DEFENDANT: Your Honor, they’re trying to take my life away. I have my constitutional rights. What do I have to be sworn in for? You know who I am.
>
> . . .

MR. WOODALL: Your Honor, I think it needs to be on the record it's his decision not to testify on his own behalf.

THE COURT: Well, Mr. Ford, have you told this man the possibility about testifying and not testifying?

MR. FORD: We fully discussed that, Your Honor, and of course, we rested our case.

THE COURT: And then what did he tell you? What was his -- Did he agree, or did he tell you that he agreed not to take the stand?

MR. FORD: Well, Your Honor, that may be privileged communication and a decision that we may have arrived at discussing strategies of the case. I don't know if I'm allowed to --

THE COURT: Well you go ahead. Listen to this. Did you discuss it with him?

MR. FORD: Yes, sir.

THE COURT: And then after the discussion, was he advised with regard to what the decision was going to be as to whether he would testify or not?

MR. FORD: Yes, sir.

THE COURT: In your opinion was that made freely?

MR. FORD: Yes, sir, after -- We've discussed that issue numerous -- on numerous occasions.

THE COURT: Anything else, General?

MR. WOODALL: No, sir, that's fine.

THE COURT: Call the jury back.

THE DEFENDANT: Your Honor, I'll testify if you take down the flag of war or sign that judicial contract.

THE COURT: I don't know what -- Do you mind advising your client I'm not aware of a --

> THE DEFENDANT: I sent it to you and you signed it certified receipt.
>
> THE COURT: Call the jury back. The case is already closed.

(D.E. 21, Add. 2., Vol, 3, pp. 346-49.)

The record reveals that Petitioner discussed the issue of testifying at trial with his counsel, was advised by his counsel, and refused to testify. See Hall, 2005 WL 22951, at *13. The evidence does not reflect that Petitioner's waiver of his right to testify was invalid. The trial court did not restrict Petitioner's right to testify. He attempted to place a condition on the court about the circumstances under which he was willing to testify. The Tennessee Supreme Court's determination of this issue is neither contrary to, nor an unreasonable application of clearly established federal law as decided by the United States Supreme Court and was based on a reasonable finding of the facts in light of the evidence presented.

Claim 6 is DENIED.

G. Improper Extraneous Influences on the Jury (Claim 7)

Hall alleges that in violation of his Sixth, Eighth and Fourteenth Amendment rights, the jury was subjected to the following improper extraneous influences:

> (1) the family members of Billie Hall sat among prospective jurors during jury selection, resulting in a prospective juror hugging one of Billie Hall's family members;

(2) prospective jurors were repeatedly told during voir dire that should they find Hall guilty of first-degree murder, he had to receive a death sentence;

(3) Judge LaFon told prospective jurors that the jury's verdict would be advisory;

(4) prospective jurors were told during voir dire that Hall's children will testify and the jury should presume that their testimony is truthful;

(5) a co-worker of Billie Hall's gave hugs to fellow jurors;

(6) Billie Hall's family member(s) embraced a juror during a break in trial;

(7) Billie Hall's mother started wailing during the State's closing argument at the guilt stage and was removed from the courtroom, but her cries were still heard while the State continued the closing argument;

(8) The jury saw Petitioner in shackles; and

(9) the State presented excessive autopsy photographs (in number, size, and subject-matter) causing one juror to become physically ill.

(D.E. 15 at 52-53.) Respondent argues that all of these claims[21] are procedurally defaulted for failure to exhaust them in the Tennessee courts. (D.E. 90-1 at 17.)

Hall does not address Respondent's contentions that sub-claims 1, 5, 6 and 8 are procedurally defaulted. Petitioner did not raise these issue before the Tennessee courts. He has not demonstrated cause and prejudice for the procedural default of these claims or

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[21]With regard to Petitioner's claim related to the autopsy photographs, Respondent admits that he challenged the introduction of autopsy photographs before the Tennessee Supreme Court. (D.E. 90-1 at 17.) However, Petitioner did not challenge the autopsy photographs as being excessive or assert that their admission violated a federal constitutional right. (Id.) Petitioner objected to the autopsy photographs based on state evidentiary principles. (Id.) Therefore, Respondent contends that this claim is also procedurally defaulted.

that the Court's failure to review them would result in a miscarriage of justice. Sub-claims 1, 5, 6 and 8 are procedurally defaulted.

Petitioner contends that sub-claims 2, 3, 4, 7 and 9 were considered by the Tennessee Supreme Court on direct appeal, pursuant to § 39-23-205(c) (repealed), for a determination of whether the sentence was arbitrary, and whether there was fundamental error based on Rule 52. (D.E. 100 at 129-32, 136.) For the reasons stated, supra p. 53, the Court declines to consider Petitioner's implicit review theories.

The inmate also avers that Tennessee Code Annotated § 39-13-204(c) disabled the rules of evidence leaving the Tennessee Supreme Court with only a constitutional basis for addressing Petitioner's claim. (D.E. 100 at 130-31.) The Court finds Petitioner's argument that the Tennessee Supreme Court necessarily reviewed this issue on constitutional grounds because of § 39-13-204(c) without merit.

The Court finds that Petitioner's constitutional claims related to the effect of the autopsy photographs on the jury were not exhausted in the state court. He has not demonstrated cause and prejudice for the failure to exhaust sub-claims 2, 3, 4 and 7 or that the Court's failure to review these claims would result in

a miscarriage of justice.[22] Sub-claims 2, 3, 4 and 7 are procedurally defaulted.

Petitioner argues that he fairly presented his habeas claim related to the autopsy photographs (sub-claim 9) to the Tennessee Supreme Court in his direct appeal brief by referencing three times the specific number of such photographs admitted and by labeling the introduction of these photographs as "cumulative." (D.E. 100 at 127.) He defined the issue in his brief as, "Did the trial court improperly admit gruesome autopsy photographs, which were needlessly cumulative, and served no purpose other than to inflame and impassion the jury?" (D.E. 21, Add. 4. Vol. 1, at 1.) Despite Petitioner's reference to the autopsy photographs as "needlessly cumulative," he did not assert a violation of a federal constitutional right in his brief, nor did the Tennessee Supreme Court address such a violation in its opinion. See Hall, 8 S.W.3d at 601-02 (footnote omitted).[23] Sub-claim 9 is procedurally defaulted as Petitioner has not presented an excuse for his failure to exhaust this claim.

Claim 7 is DENIED.

H. False Evidence (Claim 8)

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[22]Petitioner's allegation that ineffective assistance of appellate counsel establishes cause (see D.E. 100 at 135-36) for the failure to exhaust fails because he has not independently exhausted any ineffective assistance of appellate counsel claims. See supra pp. 53-54.

[23]The Tennessee Supreme Court noted that the Court of Criminal Appeals applied Rules 401 and 403 of the Tennessee Rules of Evidence and weighed the probative value of the photographs against their prejudicial effect on the defendant's case. Hall, 8 S.W.3d at 602 n.5.

Petitioner reargues his assertions in Claim 5 related to false evidence in the instant claim. This claim is procedurally defaulted for the same reasons stated for Claim 5. See supra pp. 49-51.

I. Unconstitutional Jury Instructions (Claims 9 & 10)

Hall alleges that the trial court's jury instructions at the guilt phase on reasonable doubt, intent, and intoxication, and that the instructions at sentencing on the heinous, atrocious and cruel aggravating circumstance, on unanimity, and that the jury should consider only aggravating circumstances were unconstitutional. (D.E. 15 at 54.)

a. Guilt Phase Instructions

Respondent contends that Petitioner's claims relating to the errors in the jury instructions given at the guilt phase are procedurally defaulted for failure to raise them in any state court. (D.E. 90-1 at 20.) Petitioner does not dispute that his claims regarding the guilt phase instructions for reasonable doubt and intent are procedurally defaulted. He did not raise these claims in the Tennessee state courts. Petitioner has not demonstrated cause and prejudice for the procedural default of these claims or that the Court's failure to address these issues would result in a miscarriage of justice. Petitioner's claims related to the jury instructions for reasonable doubt and intent are also procedurally defaulted.

The intoxication instruction was raised as an issue during oral argument on direct appeal, and Petitioner asserts that the claim is not procedurally defaulted. (D.E. 100 at 5.)[24] The Tennessee Supreme Court found that the issue was waived for failure to raise it in a motion for new trial. The Tennessee Supreme Court stated:

> During oral argument, the defendant raised . . . for the first time: . . . whether the trial court erred during the guilt phase by instructing the jury, in reference to the intoxication defense, that "[i]ntoxication is irrelevant [sic] to the issue of the essential element of the Defendant's culpable mental state." Neither the use of the mannequin nor the misstatement of the pattern jury instruction were objected to at trial. Moreover, they were not listed as errors in either the Motion for New Trial or in the appeal to the Court of Criminal Appeals. We find that the failure to raise these issues in previous proceedings constitutes waiver, and we decline to address them at this time. Tenn. R. App. P. 3(e); Tenn. R. App. P. 36(a).

Hall, 8 S.W.3d at 596 n.1.

The Sixth Circuit has held that "Tennessee's waiver rule, [Tennessee Code Annotated] § 40-30-206(g), which provides that claims not raised in a prior proceeding are barred, constitutes an adequate and independent state-law rule precluding habeas relief."

[24]In a petition for declaratory judgment filed in the Chancery Court of Davidson County, Tennessee, Petitioner argued that certain corrections officers removed his attorney's phone number from his calling list depriving him of his constitutional rights. Hall v. McLesky, 83 S.W.3d 752, 754 (Tenn. 2001), perm. app. denied (Tenn. July 8, 2002). In a petition for rehearing, he asserted that if his attorney had timely briefed the question of the erroneous intoxication jury instruction, the Tennessee Supreme Court would have been compelled to reduce his conviction from first degree to second degree murder or to order a new trial. Id. at 759-60. The Tennessee Court of Appeals disagreed based on the Supreme Court's review of the evidence surrounding Petitioner's claim of diminished capacity. Id. at 760-61. The Tennessee Court of Appeals determined that this claim was subject to a harmless error standard, and that the erroneous jury instruction would not have led to a different result. Id.

Hutchison v. Bell, 303 F.3d 720, 738 (6th Cir. 2002); Cone v. Bell, 243 F.3d 961, 969 (6th Cir. 2001), rev'd on other grounds, 535 U.S. 685 (2002). Hall contends that the waiver rule is not an "adequate" state law ground because this is a capital case and Petitioner had the right to raise this issue on direct appeal. (D.E. 100 at 6.) He argues that, in State v. Rimmer, 250 S.W.3d 12, 32 (Tenn. 2008), cert. denied, 129 S. Ct. 111 (2008), the Tennessee Supreme Court recognized a capital case exception to the rule that an issue is waived if not raised in a motion for new trial. Petitioner also insists that the rule of waiver is not "strictly and regularly" applied. (D.E. 100 at 11.) The Court declines to make a determination that this claim is procedurally defaulted and will address this issue on the merits.

The jury instruction about intoxication stated,

> Intoxication itself is generally not a defense to prosecution for an offense. If a person voluntarily becomes intoxicated and while in that condition commits an act which would be a crime if he or she were sober, he or she is fully responsible by his or her conduct. It is the duty of person to remain (sic) from placing themselves in a condition which poses a danger to others.
>
> Intoxication means disturbance of mental or physical capacity resulting from introduction of any substance in the body.
>
> Voluntary intoxication means intoxication caused by a substance that the person knowingly introduced into the person's body, the tendency of which to cause intoxication was known or ought to have been known.
>
> Intoxication is *irrelevant* to the issue of the essential element of the Defendant's culpable mental state.

(D.E. 21, Add. 2, Vol. 3, p. 367) (emphasis added). Petitioner argues, quoting Wiley v. State, 183 S.W.3d 317, 333 (Tenn. 2006), that "[e]vidence of a defendant's intoxication is relevant to negate a culpable mental state of a charged offense." (D.E. 100 at 14-15.) He claims that the jury instruction violates his due process rights, based on Sandstrom v. Montana, 442 U.S. 510 (1979), because the instruction that intoxication was not relevant relieved the prosecution of proving Petitioner's mens rea beyond a reasonable doubt. (D.E. 100 at 14-16.) Petitioner contends that the jury instruction denied him of his right to present a full defense under Crane v. Kentucky, 476 U.S. 683 (1986). (D.E. 100 at 18-19.) Hall further argues that the error was highly prejudicial because his defense was that he did not act with the requisite mens rea to establish first degree premeditated and deliberate murder. (Id. at 20.)

The Supreme Court set forth the standard habeas courts must use when evaluating claims concerning constitutional errors in jury instructions:

> The only question for us is whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process. . . . It is well established that the instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record. . . . In addition, in reviewing an ambiguous instruction such as the one at issue here, we inquire whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution. . . . And we also bear in

> mind our previous admonition that we have defined the category of infractions that violate fundamental fairness very narrowly.

Estelle v. McGuire, 502 U.S. 62, 72-73 (1991) (citations and internal quotation marks omitted); see also Coe, 161 F.3d at 329 ("To warrant habeas relief, the jury instructions must have been so infirm that they rendered the entire trial fundamentally unfair. An ambiguous, potentially erroneous instruction violates the Constitution only if there is a reasonable likelihood that the jury has applied the instruction erroneously.").

The burden on a habeas petitioner who challenges an erroneous jury instruction "is even greater than that required to demonstrate plain error on direct appeal." Scott v. Mitchell, 209 F.3d 854, 882 (6th Cir.), cert. denied, 531 U.S. 1021 (2000). "Allegations of 'trial error' raised in challenges to jury instructions are reviewed for whether they had a substantial and injurious effect or influence on the verdict, and are subject to harmless-error analysis." Id. (footnote omitted); see also Brecht v. Abrahamson, 507 U.S. 619, 638 (1993) (the harmless error standard applies to "constitutional error of the trial type"); Coe, 161 F.3d at 335 (applying the Brecht harmless-error standard of a substantial and injurious effect on the verdict to determine whether habeas relief was required for a jury instruction).

In Montana v. Egelhoff, 518 U.S. 37 (1996), the United States Supreme Court held that the right to have a jury consider evidence

of voluntary intoxication to determine whether the accused possessed the requisite mental state was not a "fundamental principle of justice" which if not provided would violate due process. Egelhoff, 518 U.S. at 51. The Sixth Circuit in Hill v. Mitchell, 400 F.3d 308 (6th Cir.), cert. denied, 546 U.S. 1039 (2005) noted it has "traditionally recognized a trial judge's discretion as to whether to instruct a jury on intoxication as a defense," especially in cases where the evidence does not reasonably raise intoxication as an issue. Hill, 400 F.3d at 322 (internal citation and quotation marks omitted).

The Tennessee Supreme Court, when considering the sufficiency of the evidence in this case, held that

> [o]ur Code provides that while voluntary intoxication is not a defense to prosecution for an offense, evidence of such intoxication may be admitted to negate a culpable mental state. See Tenn[essee] Code Ann[otated] § 39-11-503(a) (1991); see also State v. Phipps, 883 S.W.2d 138, 148 (Tenn. Crim. App. 1994). The defendant's argument that his intoxication rendered him unable to form the mental state necessary for first degree murder, however, is not persuasive. The defendant's own statements to Dutton and Dr. Zager constitute the only evidence of intoxication. No witness described the defendant as drunk or intoxicated. Furthermore, the defendant's conduct in traveling to Mrs. Hall's house, disconnecting the telephone, barricading the bedroom door, and completing his escape after the killing belies the claim that he was incapable of premeditation and deliberation.

Hall, 8 S.W.3d at 600. The Court notes that Petitioner attempted to put on additional evidence during the post-conviction hearing of his drinking on the night of the murder. Margie Diana Pearson

testified that she was at a bar that night, but she barely recalled drinking with Petitioner. Hall, 2005 WL 22951, at *10. Alice Jo Pearson remembered having a few drinks with him. Id. However, the limited evidence presented was not sufficient for the Tennessee courts to determine that Petitioner's intoxication negated premeditation and deliberation. See Hill, 400 F.3d at 322 ("[I]ntoxication is not raised as a defense . . . merely because the evidence suggested reduced inhibitions, impaired judgment or blurred appreciation by the Defendant of the consequences of his conduct").

Hall has not satisfied his burden of establishing that the alleged erroneous jury instruction about voluntary intoxication "had a substantial and injurious effect on the jury's verdict." Brecht, 507 U.S. at 627 (internal citation and quotation marks omitted). Though that portion of the jury instruction which stated that intoxication was "irrelevant" was improper, Petitioner has not demonstrated that he is entitled to habeas relief.

b. Sentencing Phase Instructions

1. Heinous, Atrocious or Cruel Aggravating Circumstance

In Claims 9 and 10, Petitioner alleged a violation of his Sixth, Eighth and Fourteenth Amendment rights due to the vagueness of jury instructions about the heinous, atrocious or cruel (HAC) aggravating circumstance and that the HAC aggravating circumstance did not fulfill its constitutionally mandated function of directing

the jury's sentencing discretion. (D.E. 15 at 54-55.) Petitioner contends that the trial court's definitions of "heinous," "atrocious" and "cruel" could apply to any murder and do not satisfy the Eighth and Fourteenth Amendment narrowing concerns. (D.E. 100 at 153.) Petitioner argues that the jury instruction did not provide that the jury had to find that Petitioner intended to torture Billie Hall or inflict serious physical abuse in order to find the HAC aggravating circumstance. (Id.)

Judge LaFon instructed the jury,

> Tennessee law provides that no sentence of death or sentence of imprisonment for life without possibility of parole shall be imposed by a jury but upon a unanimous finding that the State has proved beyond a reasonable doubt the existence of one or more of the following statutory aggravating circumstances which are limited to the following
>
> (1) The murder was especially heinous, atrocious or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death; . . .
>
> In the instruction, heinous means grossly wicked or reprehensible, abominable, odious or vile.
>
> Atrocious means extremely evil or cruel, monstrous, exceptionally bad, abominable.
>
> Cruel means disposed to inflict plan or suffering, causing suffering, painful.
>
> Torture means the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious.
>
> Serious physical abuse means or alludes to a matter or degree. The abuse must be physical as opposed to mental, and it must be beyond that which makes improper use of a thing, or which uses a thing in a manner contrary to the natural or legal rules for its use.

(D.E. 21, Add. 2., Vol. 4, pp. 440-41.)

On direct appeal, Petitioner raised the constitutionality of the HAC aggravating circumstance and the sufficiency of evidence related to the HAC aggravating circumstance as issues. Hall, 1998 WL 208051, at *1. On the issue of the constitutionality of the HAC aggravating circumstance, the Tennessee Court of Criminal Appeals held:

> The defendant argues that the language of T.C.A. § 39-13-204(i)(5) (Supp. 1994) is unconstitutionally vague. In his brief, the defendant relies upon Rickman v. Dutton, 854 F. Supp. 1305 (M.D. Tenn. 1994), a federal district court opinion interpreting the language of the pre-1989 aggravating circumstance. The defendant in this case was sentenced under the new language of this aggravator. The Rickman opinion, therefore, is inapplicable here. Moreover, our Supreme Court has recently found the language of this aggravating circumstance constitutionally sufficient to narrow the class of offenders eligible for the death penalty. State v. Odom, 928 S.W.2d 18, 26 (Tenn. 1996). The jury was properly instructed according to the wording of the statute and the definitions provided in State v. Williams, 690 S.W.2d 517, 529 (Tenn. 1985) and Odom, 928 S.W.2d at 26. Thus, there is no error.

Hall, 1998 WL 208051, at *14. On appeal of the post-conviction determination, the Tennessee Court of Criminal Appeals noted that the trial court rejected this claim finding it previously determined. Hall, 2005 WL 22951, at *38.

On the issue of the sufficiency of the evidence as to the HAC aggravating circumstance, the Tennessee Supreme Court held:

> The defendant also contends that the evidence was insufficient to support the jury's finding of aggravating circumstance (i)(5) that the murder was "especially heinous, atrocious, or cruel in that it involved torture

or serious physical abuse beyond that necessary to produce death." Pursuant to Tenn[essee] Code Ann[otated] § 39-13-206(c) (1997), this Court must review the sufficiency of the aggravating evidence against the mitigating evidence offered and determine the following: whether the sentence of death was imposed in an arbitrary fashion; whether the evidence supports the jury's finding of the existence of each aggravating circumstance beyond a reasonable doubt; whether the evidence supports the jury's finding that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt; and whether the sentence of death is disproportionate.

The "especially heinous, atrocious or cruel" aggravating circumstance may be proved under either of two prongs: torture or serious physical abuse. This Court has defined "torture" 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). The terms "serious physical abuse beyond that necessary to produce death" are self-explanatory; the abuse must be physical rather than mental in nature. "Abuse" is defined as "an act that is 'excessive' or which makes 'improper use of a thing,' or which uses a thing 'in a manner contrary to the natural or legal rules for its use.' " Odom, 928 S.W.2d at 26 (quoting Black's Law Dictionary 11 (6th ed. 1990)).

The evidence presented in this case supports a finding of the "heinous, atrocious or cruel" aggravating circumstance under either, or both, of the two prongs. We agree with the Court of Criminal Appeals that Mrs. Hall suffered mental torture over the welfare of her children as the defendant beat her in their presence. After hearing the defendant's threats to kill her if the children went for help, she most certainly would have feared for her own fate as well. This Court has repeatedly held that the anticipation of physical harm to one's self or a loved one constitutes mental torture. State v. Carter, 988 S.W.2d 145, 150 (Tenn. 1999); Nesbit, 978 S.W.2d at 886-87; State v. Cauthern, 967 S.W.2d 726, 732 (Tenn. 1998); State v. Hodges, 944 S.W.2d 346, 358 (Tenn. 1997). The evidence here clearly supports a finding of mental torture.

Furthermore, the extent and severity of the beating support a finding of either physical torture or "serious

> physical abuse beyond that necessary to produce death" due to the pain Mrs. Hall suffered before she finally died. Therefore, we find the evidence sufficient to support the existence of the (i)(5) aggravating circumstance beyond a reasonable doubt.
>
> As proof of mitigating circumstances, the jury may reasonably have found that the defendant did not have a significant history of prior criminal activity, that he was a good worker and employee, and that he was a caring and nurturing father. Nevertheless, we agree with the jury's conclusion that the aggravating circumstance outweighed the mitigating circumstances beyond a reasonable doubt. This issue is wholly without merit.

Hall, 8 S.W.3d at 600-02 (footnote omitted).

The Eighth Amendment requires that a state's capital sentencing scheme "channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death." Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (footnotes and quotation marks omitted). A state's definition of aggravating circumstances must be sufficiently specific to avoid the arbitrary and capricious infliction of the death penalty.

In Godfrey, the United States Supreme Court determined that the aggravating circumstance that the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim" was unconstitutionally vague. Id. at 422, 432-33 (internal citation and quotation marks omitted).[25] The trial court's instructions to

[25]Previously, the Supreme Court held that this statutory aggravating circumstance was not unconstitutional on its face. Gregg, 428 U.S. at 202-03.

the jury did not elaborate on this aggravating circumstance, and the jury recited that a death sentence was imposed because the murder was "outrageously or wantonly vile, horrible or inhuman." Id. at 426, 428-29. The Court, in reaching its decision that the jury's finding was not sufficiently specific, stated:

> There is nothing in these few words [outrageously or wantonly vile, horrible and inhuman], standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of § (b)(7)'s terms . . .

Id. at 428-29; see Maynard v. Cartwright, 486 U.S. 356, 359, 361-64 (1988) (a statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty).

A state appellate court may cure an unconstitutionally vague aggravating circumstance by adopting a narrowing construction on appeal. The Supreme Court has specifically held that a state satisfies the constitutional requirement that it limit sentencing discretion by adopting a constitutionally narrow construction of a facially vague aggravating circumstance, and by applying that construction to the facts of a particular case. Richmond v. Lewis, 506 U.S. 40, 46-47 (1992); Lewis v. Jeffers, 497 U.S. 764, 779

(1990); Walton v. Arizona, 497 U.S. 639, 652-53 (1990), overruled by Ring v. Arizona, 526 U.S. 584 (2002).

The Tennessee Supreme Court adopted a narrowing construction of the statutory HAC aggravating circumstance in State v. Williams, 690 S.W.2d at 517, 529-30 (Tenn. 1985). The trial court in Petitioner's case appropriately instructed the jury, using the definitions of "heinous," "atrocious," "cruel" and "torture" enunciated in Williams. The Tennessee Supreme Court's decision cites Williams as the applicable narrowing construction. Hall, 8 S.W.3d at 601.[26] Further, the Tennessee Supreme Court correctly applied Jackson v. Virginia, 443 U.S. 307, 318-19 (1979)[27] in determining that the evidence was sufficient to support the jury's determination that the HAC aggravating circumstance was proven beyond a reasonable doubt.

The Tennessee Supreme Court's decision was neither contrary to nor an unreasonable application of clearly established federal law and was based on a reasonable determination of the facts in light of the evidence presented. Claim 9, as it relates to the HAC aggravating circumstance, and Claim 10 are without merit.

2. Instruction to Consider Only Aggravating Circumstances

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[26]See also Hall, 1998 WL 208051, at *14 (The Tennessee Court of Criminal Appeals found no error where "[t]he jury was properly instructed according to the wording of the statute and the definitions provided in" Williams.)

[27]See infra pp. 79, 81-82.

Hall claims that Judge LaFon instructed the jury to consider only aggravating circumstances in deciding whether the death penalty was an appropriate punishment. (D.E. 15 at 54.) Respondent asserts that this claim has been procedurally defaulted. (D.E. 90-1 at 20.) Petitioner's contentions that this issue is not procedurally defaulted based on § 39-2-205(c) (repealed), Rule 52, and ineffective assistance of Petitioner's appellate counsel (D.E. 100 at 129-32, 135-37) are without merit. See supra pp. 53-54.

3. Unanimity Instruction

Petitioner alleges that Judge LaFon instructed the jury that a life verdict required a unanimous decision. (D.E. 15 at 54.) Respondent notes that Petitioner challenged the constitutionality of the unanimity instruction under the Eighth Amendment on appeal to the Tennessee Supreme Court, but not under the Sixth or Fourteenth Amendments. (D.E. 90-1 at 21.) Petitioner asserts that he fairly presented his Eighth and Fourteenth Amendment claims in state court by citing McKoy v. North Carolina, 494 U.S. 433 (1990), and Mills v. Maryland, 486 U.S. 367 (1988), cases that consider Eighth and Fourteenth Amendment challenges to jury instructions, in his Tennessee Supreme Court brief. (D.E. 100 at 128.) Petitioner's Sixth Amendment claim related to the unanimity instruction is procedurally defaulted.[28]

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[28]To the extent Petitioner claims that § 39-2-205(c), Rule 52, and ineffective assistance of appellate counsel provide a basis for this Court's review of the unexhausted Sixth Amendment claim (see D.E. 100 at 129-32, 135-36), this argument fails. See supra pp. 53-54.

The Tennessee Supreme Court ruled on the Eighth Amendment claim, as follows:

> The defendant argues that the trial court's instruction to the jury that they must unanimously agree on whether the statutory aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt violates his Eighth Amendment right to have each juror consider and give effect to mitigating circumstances. See McKoy v. North Carolina, 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990), and Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). In McKoy and Mills, the Court held that sentencing schemes that permit jurors to consider only unanimously found mitigating circumstances in determining whether the aggravating circumstances are sufficient to justify imposition of death penalty impermissibly limit the jurors' consideration of mitigating evidence in violation of the Eighth Amendment. See McKoy, 494 U.S. at 438-44, 110 S. Ct. 1227; Mills, 486 U.S. at 383-84, 108 S. Ct. 1860.
>
> The challenged instruction read as follows:
>
> If you unanimously determine that at least one statutory aggravating circumstance have [sic] been proven by the State beyond a reasonable doubt and said circumstance or circumstances have been proven by the State to outweigh any mitigating circumstance or circumstances beyond a reasonable doubt, the sentence shall be death.
>
> We note that the defendant did not object to this instruction when it was given, nor did he raise it as an issue in his Motion for New Trial or in the Court of Criminal Appeals. Normally, the defendant's failure to take any action to call this issue to the trial court's attention will preclude review on appeal. Tenn. R. App. P. 3(e), 36(a). In any event, we note that this instruction fully complied with the requirements of Tenn[essee] Code Ann[otated] § 39-13-204(g)(1) (1991), requiring proof of at least one aggravating circumstance beyond a reasonable doubt and a determination that such aggravating circumstances outweigh any mitigating circumstances beyond a reasonable doubt. Furthermore, the trial court also instructed the jurors that "[there is no requirement of jury unanimity as to any particular mitigating circumstance or that you agree on the same

> mitigating circumstance." This instruction satisfies any Eighth Amendment concerns under McKoy or Mills. This issue is without merit.

Hall, 8 S.W.3d at 602-03.

In Mills, the Supreme Court held that sentencing instructions that create a substantial likelihood that reasonable jurors might think that they are precluded from considering any mitigating evidence in the absence of unanimity are constitutionally invalid. Mills, 486 U.S. at 384. The Court looked at whether a reasonable jury might have interpreted the instruction in a way that is constitutionally impermissible. Id. at 373-76; see also Boyde v. California, 494 U.S. 370, 380 (1990) ("whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence").

Petitioner's argument that the jury was erroneously told that the decision to impose a life sentence requires a unanimous verdict has been rejected by the Sixth Circuit. See Abdur'Rahman v. Bell, 226 F.3d 696, 711-13 (6th Cir. 2000); Coe, 161 F.3d at 339-40. In Coe, the Sixth Circuit considered whether jury instructions were unconstitutional because they could have been interpreted as requiring the jury unanimously to find mitigating circumstances. Coe, 161 F.3d at 337. The Sixth Circuit determined that jury instructions similar to those at issue were constitutional based on Mills. Id. at 338. The Sixth Circuit reasoned that the jury

instructions "require[] unanimity as to the results of the *weighing*, but this is a far different matter than requiring unanimity as to the *presence* of a mitigating factor." Id. (emphasis in original). Accordingly, the court concluded that nothing in the language of the jury instructions could reasonably be taken to require unanimity as to the presence of a mitigating factor. Id. Given the similarity in the sentencing phase instructions in Coe and the instant case, the Court concludes that the state court's decision was not an unreasonable application of federal law as determined by the United States Supreme Court. Petitioner's claim is without merit.

Claims 9 and 10 are DENIED.

J. Trial Judge Lacked Impartial and Independent Judgment (Claim 11)

Hall alleges that Judge LaFon did not exercise impartial and independent judgment, but merely did what District Attorney Woodall told him to do. (D.E. 15 at 55.) He asserted that, prior to the sentencing hearing, Woodall stated, "Thank goodness (Judge LaFon will) do what I tell him to do . . . ." (Id. at 44.)

Respondent asserts that Petitioner's claim is procedurally defaulted for failure to raise the issue in the Tennessee state courts. (D.E. 90-1 at 23.) Petitioner did not raise this claim in the Tennessee courts. He has not demonstrated cause and prejudice for the failure to exhaust this claim or that the Court's failure to review these claims would result in a miscarriage of justice.

Claim 11 is procedurally defaulted and DENIED.

K. Sufficiency of the Evidence (Claim 12)

Petitioner asserts that Billie Hall died in "a tragic, passionate, domestic disturbance," not from a deliberate, premeditated plan and that his Sixth, Eighth and Fourteenth Amendment rights were violated because the evidence does not support the first degree murder conviction and resulting sentence. (D.E. 15 at 55; D.E. 100 at 154.)

On direct appeal, the Tennessee Supreme Court held:

> The defendant contends that the record establishes a killing premised on anger, passion, and alcohol rather than a premeditated and deliberate murder. His is a two-part argument: first, he claims that the passion and anger aroused by his fight with his wife had not subsided when he killed her; second, he claims that his intoxication rendered him unable to form the mental state necessary for first degree murder.
>
> When the sufficiency of the evidence is challenged, the standard for review by an appellate court is whether, after considering the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Burns, 979 S.W.2d 276, 286-87 (Tenn. 1998); Tenn. R. App. P. 13(e). On appeal, the State is entitled to the strongest legitimate view of the evidence and to all reasonable and legitimate inferences that may be drawn therefrom. See State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). In determining the sufficiency of the evidence, this Court does not reweigh the evidence, see id., or substitute its inferences for those drawn by the trier of fact, see Liakas v. State, 199 Tenn. 298, 286 S.W.2d 856, 859 (1956). A guilty verdict rendered by the jury and approved by the trial judge accredits the testimony of the witnesses for the State, and a presumption of guilt replaces the presumption of innocence. See Burns, 979 S.W.2d at 287; State v. Grace,

493 S.W.2d 474, 476 (Tenn. 1973). On appeal, the appellant bears the burden of proving that the evidence is insufficient to support the jury verdict. See State v. Pike, 978 S.W.2d 904, 914 (Tenn. 1998); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

At the time of this homicide, the Code defined first degree murder as "[a]n intentional, premeditated and deliberate killing of another." Tenn[essee] Code Ann[otated] § 39-13-202(a)(1) (1991). A homicide, once proven, is presumed to be second degree murder, and the State has the burden of proving the elements of premeditation and deliberation to raise the offense to first degree murder. State v. Nesbit, 978 S.W.2d 872, 898 (Tenn. 1998).

["Intentional" is defined as the "conscious objective or desire to engage in the conduct or cause the result." Tenn. Code Ann. § 39-11-106(a)(18) (1991). Proving premeditation requires evidence of "a previously formed design or intent to kill," Nesbit, 978 S.W.2d at 898; State v. West, 844 S.W.2d 144, 147 (Tenn. 1992), and "the exercise of reflection and judgment." Tenn. Code Ann. § 39-13-201(b)(2) (1991) (repealed 1995). Proving deliberation requires evidence of a cool purpose formed in the absence of passion or provocation. See Tenn. Code Ann. § 39-13-201(b)(1) (1991) (repealed 1995) & Sentencing Commission Comments; State v. Brown, 836 S.W.2d 530, 539-40 (Tenn. 1992) (citations and internal quotations omitted). Deliberation also requires "some period of reflection during which the mind is free from the influence of excitement." Brown, 836 S.W.2d at 540. A killing committed during a state of passion, however, may still rise to the level of first degree murder if the State can prove that premeditation and deliberation preceded the struggle. See Franks v. State, 187 Tenn. 174, 213 S.W.2d 105, 107 (1948); Leonard v. State, 155 Tenn. 325, 292 S.W. 849 (1927).

The evidence in this case, when viewed in the light most favorable to the State, demonstrates the following. The defendant contacted Mrs. Hall on the day of the murder to arrange for a meeting. Although the defendant arranged the meeting under the guise of delivering a child-support check, he actually wanted to meet with Mrs. Hall to attempt to persuade her to reconcile. As the defendant later told fellow prisoner Dutton, if Mrs. Hall were unwilling to reconcile, he intended "to make her feel as

> he did. He wanted her to suffer as he did, feel the helplessness that he was feeling because she took his world away from him." Prior to entering the house, the defendant disconnected the telephone lines to prevent Mrs. Hall from calling for help. At some point either before or during his attack, the defendant told Mrs. Hall that she "would never live to graduate." Finally, during the attack, the defendant told the children that he would kill their mother if they went for help. The evidence of planning, the expression of defendant's intent to kill or hurt Mrs. Hall, the severity of the beating, and the manner of death establish the existence of pre-meditation and deliberation and support a conviction for first degree murder beyond a reasonable doubt.
>
> . . .
>
> Having reviewed the entire record, we conclude that a rational trier of fact could have found the essential elements of premeditated and deliberate first degree murder beyond a reasonable doubt. Tenn. R. App. P. 13(e). This issue, therefore, is without merit.

Hall, 8 S.W.3d at 599-600.[29] The Tennessee Supreme Court also addressed the sufficiency of the evidence as it related to the HAC aggravating circumstance and found the issue to be without merit. See infra pp. 70-74.

In Jackson, the Supreme Court held that,

> in a challenge to a state criminal conviction brought under 28 U.S.C. § 2254 –- if the settled procedural prerequisites for such a claim have otherwise been satisfied –- the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof beyond a reasonable doubt.

[29]The Tennessee Supreme Court also discussed Petitioner's involuntary intoxication argument and whether there was sufficient evidence to negate a culpable mental state. Hall, 8 S.W.3d at 600. This Court previously determined that Petitioner is not entitled to habeas relief regarding evidence of involuntary intoxication. See supra pp. 62-68.

Jackson, 443 U.S. at 324. This standard requires a federal district court to examine the evidence in the light most favorable to the State. Id. at 324, 326 ("a federal habeas corpus court faced with a record of conflicting facts that supports conflicting inferences must presume -- even if it does not affirmatively appear in the record -- that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution").

The Tennessee Supreme Court, expressly referring to Jackson, reviewed the evidence presented at trial and applied that clearly established precedent correctly and in an objectively reasonable manner. As set forth in the opinion, there is no question that, viewed in the light most favorable to the prosecution, a rational juror could find Petitioner guilty of first degree murder. The jury heard the testimony of all the witnesses. Any conflicts in that testimony were resolved against Petitioner. The testimony and evidence, including the evidence that Petitioner planned to go to the house to attempt to get Billie to reconcile, to cause her to suffer if she would not reconcile, the severity of the beating prior to Billie's death, and the manner of death, were sufficient to establish the existence of premeditation and deliberation.

Additionally, evidence that Billie Hall suffered mental torture because of Petitioner's threats to kill her children and physical torture or serious physical abuse based on the extent and severity of the beating was sufficient to establish proof of the

aggravating circumstances. See Hall, 8 S.W.3d at 601. Further, the Tennessee Supreme Court held that the aggravating circumstance outweighed the mitigating circumstances beyond a reasonable doubt. Id. Even if a possibility existed that Petitioner could clear the hurdle erected by § 2254(d), this Court would be bound by the Tennessee Supreme Court's factual determinations, and those findings require the conclusion that the jury verdict and sentence complied with Jackson.

Claim 12 is without merit and is DENIED.

L. Ineffective Assistance of Counsel (Claim 13)

Hall contends that his Sixth, Eighth and Fourteenth Amendment rights were violated due to ineffective assistance of counsel on multiple grounds. (See D.E. 15 at 55-61.)

1. Failed to obtain and present evidence from Hall's family and other sources including Carol Alexander, Kathy Hugo, Debbie Davis, Jay Hall, Jeff Hall, Sheryl Arbogast, Joel Hall, Beth Hall, Carla Ulery, Scott Smith, school records) respecting Mr. Hall's social history;

2. Failed to obtain and present evidence from Hall's family, friends, acquaintances, doctors, prison and jail personnel providing an explanation for the homicide;

3. Failed to obtain and present evidence that at the time of the offense, a biologically driven deficit interfered with his ability to exercise reflection and judgment for his actions;

4. Failed to get a change of venue;

5. Failed to keep the trial in Henderson County;

6. Selected a jury consisting of eleven women and one man;

7. Failed to correct District Attorney Woodall's voir dire intimation that a first-degree murder required a death sentence;

8. Failed to correct Judge LaFon's statement that the jury sentence would be advisory;

9. Failed to correct Judge LaFon's statement that the only purpose of the trial would be to ascertain guilt;

10. Agreed to the striking for cause of juror Bozza;

11. Failed to object to Billie Hall's family members sitting with prospective jurors during voir dire;

12. Failed to establish that Hall disconnected telephone lines to Billie Hall's house so Billie Hall wouldn't call the police and inform them that Hall was violating a protection order;

13. Failed to establish that Chris Dutton's testimony was a lie;

14. Failed to establish that the testimonies of Hall's daughters were not accurate;

15. Failed to demonstrate that crime scene photographs presented to the jury were inaccurate;

16. Failed to establish that Dr. O.C. Smith's testimony was inaccurate and unfounded;

17. Failed to preserve Jeff Hall's testimony about Hall's mental state in the days and weeks prior to the Billie Hall homicide;

18. Failed to present at the sentencing stage the testimony of Sheryl Arbogast about what Jeff Hall told her about Hall's mental state in the days and weeks prior to the homicide;

19. Failed to establish that Hall was not capable of assisting in his defense;

20. Told Judge LaFon that Hall had knowingly and voluntarily waived his right to testify;

21. Failed to recognize the difference between premeditation and deliberation under Tennessee law;

22. Inaccurately referred to a Bible passage respecting the crucifixion of Jesus Christ;

23. Failed to challenge proportionality review; and

24. Failed to raise at trial and on appeal any claim that "this Court rules is procedurally defaulted."

(Id.)

Respondent contends that Petitioner raised the following Sixth Amendment ineffective assistance of counsel claims in the state court:

1. Failing to properly present an intoxication defense;

2. Failing to establish that the victim was the aggressor;

3. Failing to present the testimony of Jeff Hall;

4. Failing to present evidence of the petitioner's habit of disconnecting telephone lines;

5. Failing to properly present the mental health issue;

6. Failing to present evidence that Hall was a good father and evidence of other good acts;

7. Failing to develop a defense strategy; and

8. Failing to interview all potential witnesses.

(D.E. 90-1 at 26-27.) Respondent acknowledges that these claims are "arguably interspersed through Petitioner's ineffective assistance of counsel" claims in his habeas petition. (D.E. 90-1 at 26.) The Warden contends that claims not raised in the state

courts, including Petitioner's Eighth and Fourteenth Amendment claims, are procedurally defaulted. (Id. at 26-27.)

Petitioner submits that Respondent has waived the procedural default defense because he failed to identify which portions of Claim 13 are procedurally defaulted. (D.E. 100 at 123.) The type of specificity Petitioner seeks for Respondent to assert the defense of procedural default is not required.

Hall does not show cause and prejudice for the failure to exhaust the claims not raised in the state court, or that a miscarriage of justice would result from the Court's failure to review the unexhausted ineffective assistance of counsel claims. He merely addresses certain issues on the merits. (See D.E. 100 at 72-119.)

Even to the extent Respondent may not have raised the issue of procedural default properly, district courts are permitted to raise this issue sua sponte if the petitioner has been afforded the opportunity to respond. See Palmer v. Bagley, 330 F.App'x 92, 105 (6th Cir. 2009), cert. denied, 78 U.S.L.W. 3521, 2010 WL 757725 (U.S. Mar. 8, 2010) (holding that the court did not abuse its discretion in raising procedural default sua sponte where petitioner had been given a fair opportunity to advance his argument prior to the ruling);[30] Howard v. Bouchard, 405 F.3d 459,

[30]The Supreme Court has not decided the issue of whether district courts are entitled to dismiss claims sua sponte for procedural default. Flood v. Phillips, 90 F.App'x 108, 114 (6th Cir. 2004). The Supreme Court has ruled that federal appellate courts are not required to raise procedural default sua sponte

476 (6th Cir. 2005), cert. denied, 546 U.S. 1100 (2006) ("The main concern with raising procedural default sua sponte is that a petitioner not be disadvantaged without having had an opportunity to respond"); Lorraine v. Coyle, 291 F.3d 416, 426 (6th Cir. 2002), cert. denied, 538 U.S. 947 (2003) (courts of appeal may raise procedural default sua sponte). Petitioner has had the opportunity to respond to assertions of procedural default since the answer was filed. The Court will examine those claims that are clearly exhausted and determine to what extent Petitioner has raised the exhausted claims in the context of its habeas petition.

1. Failure to present an intoxication defense

During the post-conviction proceedings, Hall alleged that his counsel was ineffective for failing to present an intoxication defense and for not calling Diana and Alice Pearson as witnesses. (D.E. 21, Add. 8, Vol. 1, pp. 26-27.) In his habeas petition, Petitioner claimed that his counsel did not obtain evidence from Diana and Alice Pearson that would explain the homicide (D.E. 15, ¶ 260) and failed to present evidence that Petitioner "consumed numerous beers, smoked marijuana and ingested Stay alert pills" prior to the homicide (id. at ¶ 260.6).

In its opinion, the Tennessee Court of Criminal Appeals first addressed the Sixth Amendment standard for assistance of counsel and Strickland v. Washington, 466 U.S. 668 (1984). Hall, 2005 WL

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when the state fails to do so. Trest v. Cain, 522 U.S. 87, 89 (1997).

22951, at **25-27. Then, the Tennessee Court of Criminal Appeals found as follows:

> The petitioner contends that trial counsel failed to present evidence of intoxication properly to negate his ability to form the requisite intent to establish premeditation. He complains that trial counsel "failed to produce one shred of evidence regarding intoxication." In this regard, the petitioner contends that trial counsel was ineffective for failing to locate and present the testimony of Diana Pearson and Alice Pearson. At the post-conviction hearing, the petitioner presented their testimony. Both said that they were at a bar on July 29, 1994, and that they could barely recall having drinks with the petitioner.
>
> Mr. Ford testified that intoxication, while not a defense to murder, was a part of their defense theory. He said that he was unsuccessful in his attempt to locate witnesses who knew of the petitioner's alcohol problem. Moreover, the petitioner refused to testify. Mr. Ford stated that the defense was unable to pursue this avenue at trial based on these factors.
>
> The trial transcript reveals that evidence of intoxication was presented through the testimony of several witnesses:
>
> 1. On cross-examination, Chris Dutton acknowledged telling the authorities that the petitioner had stated that he had started drinking after he spoke with the victim on the telephone on the day of the murder and that he was drunk at the time of the incident.
>
> 2. On cross-examination, one of the petitioner's daughters, Cynthia Lambert, admitted that he had brought beer with him to the victim's home and that he started drinking one of the beers in her presence.
>
> 3. Dr. Lynn Zager, a defense witness, testified to the petitioner's alcohol dependence problem and that, at the time of the incident, he was intoxicated on alcohol. On cross-examination, Dr. Zager stated that her information as to the petitioner's intoxication at the time of the offense was not based solely upon the petitioner's self-report, but also on interviews of persons with the petitioner "shortly before the incident" that were

> conducted by Mike Mosier, previous counsel for the petitioner.
>
> Additionally, Dr. Zager relied upon information provided by the petitioner's family regarding his alcohol problem.
>
> We conclude, as did the trial court, that the trial transcript directly refutes the petitioner's claim that trial counsel failed to present any evidence of intoxication. Moreover, we cannot conclude that counsel was deficient for failing to present the testimony of either Alice or Diana Pearson. Neither witness could testify regarding the amount of alcohol consumed by the petitioner. Neither witness could testify as to whether the petitioner appeared intoxicated. Indeed, both witnesses could barely remember sharing drinks with him at all. The petitioner has failed to establish how the testimony of these witnesses was relevant to a theory of intoxication, and he has failed to establish either deficient performance or resulting prejudice.
>
> Additionally, while the petitioner could have testified as to the level of his intoxication before the murder, the petitioner decided not to testify. Counsel cannot be found ineffective for the petitioner's decision not to testify. The petitioner is not entitled to relief on this claim.

Hall, 2005 WL 22951, at **27-28.

This is "a run-of-the-mill state-court decision applying the correct legal rule" from Strickland to the facts of Petitioner's case and, therefore, it does not "fit comfortably within § 2254(d)(1)'s 'contrary to' clause." Williams v. Taylor, 529 U.S. 362, 406 (2000). The Tennessee Court of Criminal Appeals' decision was neither contrary to nor an unreasonable application of clearly established federal law and was based on a reasonable determination of the facts in light of the evidence presented. Petitioner's claim is without merit.

2. Failed to establish the victim as the aggressor

During the post-conviction proceedings, Petitioner alleged that the testimony of his sisters and Jackie and Darlene Brittain clearly established that Billie Hall was "capable of goading the Petitioner," that this evidence was essential to present a case of manslaughter, and that there was no rational reason not to present the testimony. (D.E. 21, Add. 8, Vol. 1, p. 27.) In his habeas petition, Petitioner argued that his counsel failed to obtain and present evidence from his family and the Brittains that "Billie Hall physically, verbally, and mentally abused Mr. Hall" (D.E. 15, ¶ 260.1); that "[a]ny time Mr. Hall made an effort to leave Billie Hall, she interfered to ensure that she maintained control over Mr. Hall" (id. at ¶ 260.2); and that Petitioner's relationship with Billie Hall was deteriorating (id. at ¶ 260.3.4).

On this issue, the Tennessee Court of Criminal Appeals held:

> The petitioner asserts that the post-conviction testimony of his siblings "and the Brittains clearly establish[s] that the victim was capable of goading the petitioner." He contends that this evidence established provocation and was essential to establish the circumstances for voluntary manslaughter. Trial counsel testified that they made a strategic decision not to attack the character of the victim because it ran the risk of alienating the jury. Mr. Mayo also said that as best as he could recall, the victim's acts against the petitioner were not severe enough to imply that his conduct was reasonable. Both Mr. Mayo and Mr. Ford stated that the petitioner was the only reliable source to establish the victim's acts of violence but that he refused to testify.
>
> Briefly summarized, the facts established that the petitioner disconnected the telephone lines, forced his way into the victim's home, and violently attacked her as

> the children jumped on his back, bit him, and pleaded for him to stop hurting their mother. The fight continued outside, where the petitioner dragged the victim across the driveway and to the back of the house. There, he held her under the water in the children's swimming pool. No evidence showed that the victim provoked the petitioner immediately before his actions that resulted in her death. The trial court concluded that in light of these facts, evidence of the victim's prior acts of aggression upon the petitioner would not have assisted counsel in establishing that the victim was the first aggressor on this occasion. Additionally, the trial court found that the testimony of Dr. Zager and Randy Helms communicated to the jury that the petitioner was emotionally distraught and acting in an impulsive manner.
>
> During the petitioner's trial, counsel attempted to negate the element of premeditation by presenting evidence of mental health issues and intoxication rather than attempt to establish the provocation necessary to support a voluntary manslaughter verdict. The state possessed a sufficient amount of information reflecting prior acts of violence by the petitioner against the victim, but did not seek introduction of this evidence at trial. However, had the defense attempted to establish the victim as the first aggressor, the state could have presented such information to discredit any indication that the victim provoked the petitioner. The defense strategy not to portray the victim as the aggressor was reasonable, given the risk of the backlash from attacking the deceased victim's character. See, e.g., Heiman v. State, 923 S.W.2d 622, 627 (Tex. Crim. App. 1995) (stating it was sound trial strategy to refrain from attacking the victim's character as it was conceivable that the jury would have found this strategy repugnant). Accordingly, the petitioner has failed to establish that counsel was deficient by failing to pursue this theory of defense. He is not entitled to relief as to this claim.

Hall, 2005 WL 22951, at **28-29.

Petitioner asserts that he was denied the effective assistance of counsel because his counsel failed to fully investigate, prepare and present the "facts and circumstances of their tempestuous relationship," and other evidence which was indispensable to the

jury's decision on the core issue. (D.E. 100 at 110.) He contends that his counsel's failure to present proof of their turbulent relationship prejudiced him because it was crucial to determining his mens rea. (D.E. 100 at 113.)

During the post-conviction hearing, Petitioner's sister Debbie Davis testified,

> Just —- Their relationship was kind of funny. I can tell you one instance where they were in the driveway. . . . Billie came over to the house. She was upset about -- I don't know whether he had the wrong car or what was going on. But anyway, I saw her get out of the car. I was in the house. And she was angry about something. I've seen her -- then she started like kicking at him at his groin area, and then he just kind of like pushed her away and was turning around and then she would go after him, hitting --
>
> . . .
>
> So whenever he was putting her in a headlock, I came out of the house and said, "What are you guys doing," and then they just pretended they were horsing around. So, it was like they didn't exactly want you to know that they were fighting or arguing. That was just the nature of their relationship. They did that kind of stuff all the time. And on occasions I would see her kick -- go try to kick him in the groin or -- They just were like that.

(D.E. 21, Add. 7, Vol. 1, pp. 40, 43.) Davis also provided that, "Yes, she did put Jon down. She would tell him he was stupid, yes." (Id. at 45, 54.) She indicated that the attorney told them not to say anything negative about Billie because she was the victim and it would make them look bad in court. (Id. at 46.)

Petitioner's sister Sheryl Arbogast also testified at the post-conviction hearing as follows:

> She (Billie) berated him all the time. She just constantly was saying negative things about him, whether he was in the room or whether he wasn't. She was brow-beating him. She was saying things like he wasn't able to provide for the family and that he wasn't pulling his weight and she had to do everything, but what I observed was Jon doing the child care and the cooking and the cleaning of the house and all of those things.

(Id. at Add. 7, Vol, 2, pp. 166-67.) Arbogast also related that she told the attorneys there had been altercations when Billie had left bite marks on Petitioner, but she was not asked about this at trial. (Id. at 173-74.) Arbogast admitted that she did not personally observe the bite marks, but she heard about them from her mother. (Id. at 206.) She also testified that Petitioner's brother Jeff Hall had told her about the times when Billie had pointed a gun in Petitioner's face after he went to the house to pick up some things. (Id. at 190, 194.)

Hall presented Arbogast's affidavit which stated,

> Billie was abusive to Jon. She bit him and kicked him in the balls. Billie even pulled a gun on him. When the police gave him the restraining order he showed them his bruises. She was violent and she provoked him. . . .

(D.E. 102-43 at 6.) She noted,

> Jon told Jeff how Billie was trying to coax him into killing himself, and also how at one point Billie had even pulled a gun on him while the girls were present.

(Id.)

Petitioner's sister Kathy Hugo testified that on the night before the trial, Petitioner's attorney told them not to say anything bad about Billie. (D.E. 21, Add. 7, Vol. 2, at 273.)

Hugo was never at Petitioner's house, and most of what she knew about the Hall marriage came from her mother or sisters. (Id. at 283-84.)

Jackie Brittain testified at the post-conviction hearing that he knew Billie had asked Petitioner to leave the house and had obtained a restraining order against him. (Id. at 219.) He also stated that he "got to see (the) restraining order being broke by the deceased coming by to try to talk to him." (Id.) On cross-examination, Brittain admitted that he made a statement to the TBI that Petitioner had threatened to hurt his wife, but he claimed that he and Petitioner were joking around at the time. (Id. at 241, 243.)

Pamela Brittain testified that Billie Hall treated Petitioner "like shit" and that she was "extremely commanding and demanding and abusive to him." (Id. at 250.) Billie allegedly hit and kicked Petitioner. (Id.) Pamela stated,

> She was constantly bitching at him, you know. She would downgrade him, like he wasn't worth anything, that he couldn't do anything right.

(Id. at 251.) Pamela claimed that she never provided this information to any of Petitioner's attorneys because she was never asked. (Id.) Pamela also testified that Billie would come to her house to see Hall and try to provoke him, despite the protective order. (Id. at 253-54.) Pamela claims that she went to the trial, but Petitioner's attorney told her that they did not want to use

her testimony because of a statement she made to the TBI about Petitioner turning Billie into "ground hamburger meat." (Id. at 257-58.) She denied making that statement. (Id. at 256-57.)

Petitioner's trial attorney Mr. Mayo testified, "Mr. Hall I remember wanted us to argue self-defense, but that was -- I think would have definitely alienated the jury and inflamed them, which we didn't want to do." (D.E. 21, Add. 7, Vol. 3, at 302.) Mayo expressed that they thought Petitioner's testimony was the only way to put on evidence of provocation, but they were concerned because his "demeanor in the courtroom was very bad, very scary, and having him on the stand strategically would have been horrible." (Id. at 307, 311-12.)[31] Mayo expressed that he thought it was impossible to get voluntary manslaughter. (Id. at 310-11.)

> Q So in that regard, if you'd had any testimony that Billie had been violent toward Jon, you would have probably reasonably used that; would you not?
>
> A You know, again, that's -- I think that my recollection again is not real specific. I can't tell you exactly what occurred back then, but I think that we're getting into the area of strategy, and I can think of reasons that we would not have tried to develop any past incidences of violence between the two of them. For example, if I may, if they weren't very severe, and we tried to promote or imply that Mr. Hall's conduct was reasonable, you know, strategically I think we're looking at the jury, trying to convince them that what he did that day was reasonable in light of the provocation, and I think that would have been impossible. So, yeah, you

[31]Petitioner's other trial attorney, Jesse Ford, testified that the only reliable evidence that Billie Hall was abusive toward Petitioner was his own testimony and that Petitioner refused to testify despite their advice. (D.E. 21, Add. 7, Vol. 3, at 393-95.)

> know, you want to move downward. You want to move down past second degree and get voluntary, but realistically, I mean, come on. There was no chance.

(Id.) Mayo recalled that Petitioner and Billie had been in fights before, but he had no specific recollection of a witness with evidence of provocation. (Id. at 312, 353-54.)

This is "a run-of-the-mill state-court decision applying the correct legal rule" from Strickland to the facts of Petitioner's case and, therefore, it does not "fit comfortably within § 2254(d)(1)'s 'contrary to' clause." Williams, 529 U.S. at 406. Petitioner makes no effort to demonstrate that the state-court decision is objectively unreasonable, rather than merely incorrect. Id. at 410. Further, the information provided by Petitioner does not demonstrate provocation or that Billie acted aggressively toward Petitioner. See Callins v. Collins, 998 F.2d 269, 278 (5th Cir. 1993), cert. denied, 510 U.S. 1141 (1994) (no ineffective assistance of counsel where petitioner failed to introduce any evidence of provocative or aggressive actions).

In Matylinski v. Budge, 577 F.3d 1083, 1088 (9th Cir. 2009), a case factually similar to Petitioner's, the petitioner returned home to his pregnant wife after an evening of drinking and ingesting illicit substances. Domestic violence ensued resulting in the victim receiving as many as forty blows to her head, her hair was torn from her scalp, and blood was splattered throughout the house. Matylinski, 577 F.3d at 1088-89. The petitioner claims

that his counsel was ineffective because of a strategic decision not to use provocation as an excuse to mitigate murder to manslaughter. Id. at 1091. The petitioner claimed that his counsel "should have argued manslaughter as opposed to murder because Peggy provoked him, causing him to repeatedly beat her in self defense." Id. The petitioner's trial counsel explained that he chose the intoxication defense as opposed to provocation because "it's contrary . . . to human nature to believe there is any adequate provocation for what we see [in the pictures of the victim]." Id. at 1092 n.3. The Ninth Circuit found the petitioner's claim was without merit because counsel was reasonable in his belief that efforts to pursue a strategy that the petitioner was provoked would have further harmed the petitioner's case. Id. at 1092.

Similarly, in the instant case, Petitioner has not demonstrated that the state court's decision that there was no ineffective assistance of counsel for failure to show Billie Hall as the aggressor was an unreasonable application of federal law. Petitioner has not presented any evidence, even with the submission of additional affidavits in the habeas proceeding from Petitioner's sisters, that reflects that counsel could have found additional information, other than Petitioner's own testimony, that would have proved provocation to the extent that the jury would have convicted him of a lesser offense. The Tennessee Court of Criminal Appeals's

decision was neither contrary to nor an unreasonable application of clearly established federal law and was based on a reasonable determination of the facts in light of the evidence presented.

3. Failed to preserve the testimony of Jeff Hall

During the post-conviction proceedings, Petitioner alleged his counsel failed to preserve the testimony of Jeff Hall, Petitioner's brother who was dying with AIDS. (D.E. 21, Add. 8, Vol. 1, p. 27.) In his habeas petition, the inmate claimed that his counsel did not obtain Jeff's statement concerning Petitioner's mental state in the days and weeks prior to the homicide (D.E. 15 at ¶ 262.14) and that counsel failed to present Arbogast's testimony at the sentencing stage about what Jeff would have said on this same subject (id. at ¶ 262.15). (See id. at ¶¶ 133-34, 154, 160, 169 & 209.11.) Hall also argues that his counsel did not secure and present evidence from Petitioner's family and friends about the stressors in his life, such as his brother's health, his daughter's health and special needs, financial problems, and the deterioration of his relationship with Billie. (Id. at ¶ 260.3.)

These claims were all addressed in Petitioner's post-conviction arguments related to the failure to preserve Jeff's testimony. The Tennessee Court of Criminal Appeals held:

> The petitioner's brother, Jeff Hall, died from complications of AIDS on July 4, 1995. The petitioner claims that trial counsel were ineffective for failing to preserve his testimony. It is undisputed that Mr. Ford and Mr. Mayo were not counsel of record at the time of Jeff Hall's death. The record reflects that during the

guilt phase of the trial, counsel attempted to introduce the affidavit [of Jeff Hall] through the testimony of Sheryl Arbogast. See Hall, 8 S.W.3d at 603. The trial court excluded the testimony because Ms. Arbogast had no personal knowledge of the facts regarding her brother's mental state. The issue was raised on direct appeal. Both this court and the Tennessee Supreme Court affirmed the trial court's exclusion of this statement. In affirming the trial court's exclusion of the statement, our supreme court reasoned:

Rule 804 provides for certain exceptions to the hearsay, exclusionary rule when a witness is "unavailable." "Unavailability" is defined at a subsection (a)(4) as including situations in which the declarant "[i]s unable to be present or to testify at the hearing because of the declarant's death or then existing physical or mental illness or infirmity." However, under a subsection (b) of Rule 804, the hearsay exception for unavailable witnesses applies only to (1) former testimony, (2) statements under belief of impending death, (3) statements against interest, and (4) statements of personal and family history. See Tenn. R. Evid. 804(b). Jeff Hall's descriptions to Arbogast of the defendant's mental state do not fall within any of these exceptions.

Id. Mr. Ford and Mr. Mayo were not deficient in failing to secure introduction of Jeff Hall's testimony.

Notwithstanding, the issue arises as to whether pretrial counsel were ineffective for failing to interview or preserve the testimony of Jeff Hall. Before his death, Sheryl Arbogast traveled to Texas and obtained an affidavit from him. In the affidavit, he said that the petitioner had visited him in June 1994. During this visit, he observed that the petitioner was "very depressed/suicidal over family and money problems." The affidavit reflects Mr. Hall's belief that the petitioner loved his wife and children. He also believed that if his brother was guilty of murder, the murder was "invoked and induced by someone." He said that "Jon acted under strong provocation, stress, pressure, and seemed to be dysfunctional during his visit with me. . . ." Mr. Hall closed by stating that his brother's attorneys had never contacted him about testifying as a character witness.

The petitioner failed to call his former attorneys as witnesses during the post-conviction evidentiary hearing.

> As such, he has failed to satisfy his burden of proving his allegation by clear and convincing evidence. Neither the trial court nor this court have any way of knowing the circumstances relevant to the issue and former counsel or whether a tactical reason existed to withhold this information from the jury absent testimony from pretrial counsel. The petitioner is not entitled to relief on this claim.

Hall, 2005 WL 22951, at **29-30.

Hall argues that his lawyers' failure to preserve and present evidence regarding Petitioner's family's efforts to have him committed just prior to the homicide was inexcusable. (D.E. 100 at 115.) He insists that this lapse was crucial to the sole issue at trial -- Petitioner's mens rea. (Id.) Petitioner also claims that trial counsel mistakenly believed that this testimony, which was admissible hearsay, was not admissible at sentencing. (Id. at 115-16.)

This is "a run-of-the-mill state-court decision applying the correct legal rule" from Strickland to the facts of Petitioner's case and, therefore, it does not "fit comfortably within § 2254(d)(1)'s 'contrary to' clause." Williams, 529 U.S. at 406. Petitioner disagrees with the state-court decision, however, he does not analyze the particular deficiencies in that decision in light of Strickland. He makes no effort to demonstrate that the state-court decision is objectively unreasonable, rather than merely incorrect. Id. at 410. His argument focuses solely on the fact that the evidence was crucial to mens rea and admissible at sentencing. However, he has not shown that he was prejudiced by

failure to preserve this evidence, especially in light of Dr. Zager's testimony that Petitioner was in a depressed and intoxicated mental state at the time of the murder (D.E. 21, Add. 2, Vol. 3, p. 333-35, 337-38, 342) and that he was suffering from psycho-social stressors because of his daughter’s and brother’s health issues, as well as domestic and financial problems (id. at 334-35; id. at Vol. 4, p. 404). The Tennessee Court of Criminal Appeals’ decision was neither contrary to nor an unreasonable application of clearly established federal law and was based on a reasonable determination of the facts in light of the evidence presented.

4. Failed to present evidence of Hall’s habit of disconnecting telephone wires

During the post-conviction proceedings, Petitioner alleged that his counsel was ineffective for failing to present evidence that “it was common for Petitioner to disconnect the phone lines to a home just to get the undivided attention of someone to talk to” and that it was not a “sinister” act. (D.E. 21, Add. 8, Vol. 1, p. 27.) In his habeas petition, Petitioner maintained that his counsel did not establish that he disconnected the telephone lines to Billie’s house so she wouldn’t call the police and inform them that he was violating a protection order. (D.E. 15 at ¶ 262.9.)

The Tennessee Court of Criminal Appeals found on this issue as follows:

At the post-conviction hearing, the petitioner maintained that the act of disconnecting telephone lines, by itself, appeared sinister. He presented testimony that it was common for him to disconnect telephone lines in order to obtain the undivided attention of the person he was confronting. The petitioner maintained that none of the prior incidents where he disconnected telephone lines resulted in him inflicting harm. His position at the post-conviction hearing was that introduction of these prior incidents would have taken away the "sting" of the wires being disconnected and would have negated premeditation. He maintains that trial counsel were ineffective for failing to introduce evidence establishing that it was the petitioner's habit to disconnect telephone lines.

At the post-conviction hearing, trial counsel disagreed with the petitioner's theory on his habit of disconnecting telephone lines. Mr. Mayo testified that the act of disconnecting telephone lines to a house, no matter for what purpose, "paints a picture of someone who is on the edge." While he agreed that the act of disconnecting the wires appeared sinister, he believed that it looked sinister whether or not someone was harmed. He said that he could not conclude that this information would have been helpful to the petitioner. Mr. Ford testified that counsel was aware of the petitioner's practice of disconnecting telephone lines because it was contained in Carroll County police reports. Mr. Ford testified that evidence of a habit of disconnecting telephone lines established that the petitioner wanted to control situations and planned to do the same again. He disagreed with the position that this evidence would have negated premeditation.

The trial transcript reflects that during cross-examination of Chris Dutton, trial counsel elicited the fact that the petitioner had explained that he had disconnected the telephone line on previous occasions to prevent the victim from calling the police. See Hall, 8 S.W.3d at 598. Thus, information was conveyed to the jury that the petitioner had previously disconnected telephone lines with no harm resulting to the person he was confronting. We conclude, as did the trial court, that trial counsel was not deficient for failing to introduce multiple instances showing the petitioner's habit of disconnecting telephone lines. See Hellard, 629

> S.W.2d at 9. The petitioner is not entitled to relief on this claim.

Hall, 2005 WL 22951, at **30-31.

The state court credited Mr. Mayo's testimony that the fact that Petitioner had cut the phone wires before "doesn't change things very much" when you look at everything that happened that day. (D.E. 21, Add. 7, Vol. 3, p. 307.) Mr. Ford testified, that they knew Petitioner cut the phone line, and that "If you're sitting in that jury box it surely is [a sinister thing]." (Id. at 398-400.) Ford stated, "If he disconnected the phone line, that goes to premeditation, goes to planning." (Id. at 400.) He felt that the disconnection of the phone lines was "very sinister" and "just perfect for the prosecutor." (Id.) Ford stated,

> No. I don't' think you can say that that's a habit or custom when -- and convince a jury that he's got a habit of cutting phone lines to get people's attention when he has killed his wife. That just doesn't -- That's not going to fly. A jury's not going to buy that.
>
> . . .
>
> I see it goes to the exact opposite. It goes to his wanting to control the situation and have, just like you said, complete control and be one-on-one with them where there can be no other interference. It tells me that he's planned to do something.

(Id. at 401-02.) The decision not to present evidence of Petitioner disconnecting phone lines in other circumstances was based upon a reasonable trial strategy, and the state court's decision was a reasonable application of Strickland. The Tennessee Court of Criminal Appeals' decision was neither contrary to nor an

unreasonable application of clearly established federal law and was based on a reasonable determination of the facts in light of the evidence presented.

5. Failed to present the mental health issue properly

During the post-conviction proceedings, Hall alleged that his counsel was ineffective for not obtaining a competent psychiatrist to evaluate Petitioner and failure to collect a complete social history for mitigation purposes. (D.E. 21, Add. 8, Vol. 1, pp. 27-29.) The Tennessee Court of Criminal Appeals set forth the factual background for this claim:

> During the guilt phase of the petitioner's trial, trial counsel presented the testimony of Dr. Lynn Zager, a clinical psychologist. See Hall, 8 S.W.3d at 598. Dr. Zager diagnosed the petitioner as depressed and suffering from alcohol dependence. She further observed "personality characteristics of paranoia and dependency." In her professional opinion, she believed that the petitioner suffered from depression and alcohol intoxication at the time of the killing. She found these factors were compounded by his personality characteristics and various psycho-social stressors, including a sick child, loss of employment with the resulting financial problems, his impending divorce, and the terminal illness of a brother. She concluded that the petitioner acted in an impulsive manner in killing his wife, rather than pursuant to a preconceived plan.
>
> Dr. Zager testified again during the penalty phase along with Dr. Joe Mount, a psychological examiner who counseled the petitioner at Riverbend Maximum Security Institution. Hall, 8 S.W.3d at 598. Both doctors described him as "depressed, remorseful, suicidal and extremely concerned about his children." Dr. Mount testified that the petitioner had been diagnosed as suffering from an adjustment disorder with mixed emotional features and "substance abuse of dependence by history." Id. at 599.

At the post-conviction evidentiary hearing, the petitioner presented the testimony of Dr. Pamela Auble and Dr. Keith Caruso, who examined the petitioner at the request of post-conviction counsel. Both doctors testified that a complete social history, including interviews with more than one family member, was necessary in order to competently evaluate a client.

Dr. Auble's evaluation of the petitioner resulted in several conclusions: (1) certain results were consistent with attention deficit disorder, (2) results indicated the petitioner has difficulty controlling emotions in emotional situations, (3) the petitioner exhibited low self-esteem, (4) evidence of internal anger existed, (5) the petitioner may have had trouble understanding people and perceiving them in accurate ways, and (6) evidence existed of tension from his current situation. Dr. Auble stated that a low serotonin level would be consistent with Intermittent Explosive Disorder. On cross-examination, Dr. Auble conceded that a diagnosis of Intermittent Explosive Disorder is made only after other mental disorders and alcohol or drug abuse are excluded. Alcohol abuse, drug abuse, and other mental disorders could not be excluded as the cause of the petitioner's aggressive behavior. She conceded that her conclusions were basically the same as those reached by Dr. Zager.

Dr. Caruso concluded that because of Intermittent Explosive Disorder, major depression, and intoxication, but mostly Intermittent Explosive Disorder the petitioner was unable to achieve a mental state absent of passion and excitement. He said that recent research by Dr. Emil Coccaro revealed a correlation between low levels of serotonin in the brain and violent acts. He stated that the petitioner's serotonin level is in the bottom five percent and is, therefore, consistent with someone having Intermittent Explosive Disorder. On cross-examination, Dr. Caruso conceded that Dr. Coccaro's findings relative to serotonin level and Intermittent Explosive Disorder were neither available in 1995 nor at the time of the trial because Dr. Coccaro's theory was not presented until 2001. He further conceded that this information is not contained in the current DSM4. Dr. Caruso agreed that the petitioner's act of disconnecting the telephone line established that he was capable of some degree of planning.

> The state presented the testimony of Dr. Kimberly Stalford to rebut the conclusions of Dr. Auble and Dr. Caruso. Dr. Stalford defined Intermittent Explosive Disorder and stated that she did not diagnose the petitioner as having the disorder. She concluded that the petitioner's behavior was better explained with a diagnosis of passive/aggressive traits, dependant traits, and anti-social traits, including a reckless disregard for other people and agitated and potentially violent acts. She also diagnosed the petitioner with alcohol dependence.
>
> Dr. Stalford discounted the correlation between low serotonin levels and Intermittent Explosive Disorder. Specifically, she said that a low serotonin level is not a useful diagnostic tool for three reasons: (1) many medical, neurological, and psychiatric conditions have been linked to altered serotoninergic levels so as to rebut the assertion that a low level of serotonin is undoubtedly linked only to Intermittent Explosive Disorder; (2) serotonin levels measured in the spinal fluid are not an accurate indication of the serotonin activity in the synapses which is where it works; and (3) much question exists as to what are "normal" levels of serotonin.
>
> The petitioner contends that trial counsel was ineffective for failing to provide Dr. Zager with a complete mitigation history of the petitioner, which prohibited a complete evaluation of the petitioner's mental condition. Additionally, he asserts that counsel was ineffective for relying upon the evaluation of Dr. Zager, a psychologist, rather than obtaining the services of a psychiatrist.

Hall, 2005 WL 22951, at **31-32. The Tennessee Court of Criminal Appeals then addressed the issue in two parts: 1) failure to provide a complete mitigation history; and 2) failure to obtain the services of a psychiatrist. The court ultimately held that Petitioner was not entitled to relief for either aspect of his ineffective assistance of counsel claim as it had framed the issue. Id. at *34.

a. Failure to prepare a complete mitigation history

In his post-conviction petition, Hall asserted that Mayo was the only attorney who spoke to any of his family, and that he only talked to Arbogast. (D.E. 21, Add. 8, Vol. 1, p. 29.) In his habeas petition, Petitioner alleged that his counsel failed to obtain and present evidence from his family and other sources respecting his social history. (D.E. 15 at ¶ 259.)

Petitioner argues that had counsel conducted an adequate mitigation investigation and submitted a complete social history to Dr. Zager, this information could have been presented at the guilt stage to demonstrate that Hall was not capable of forming the intent required for first degree murder and at sentencing to mitigate a sentence of death. (D.E. 100 at 89.) He contends that even a cursory investigation would have revealed that he was born early with the umbilical cord around his neck, a malfunctioning liver, and a blood group incompatibility. (Id. at 90.) As an infant and toddler, Petitioner had problems with severe diarrhea. (Id. at 91.) His father and paternal grandfather both abused alcohol and were physically abusive. (Id. at 93-95.) The family also had financial problems (id. at 96-97) and there were arguments and violence in the family home (id. at 97-101). Petitioner was abused by his older siblings and shunned by his father (id. at 102-05), had anger management issues as a child, and suffered from alcohol-related effects on his behavior as an adult (id. at 106).

On this point, the Tennessee Court of Criminal Appeals held:

> *2. Failure to provide complete mitigation history*
>
> In his brief, the petitioner makes several statements regarding counsel's "duty to investigate thoroughly a complete mitigation history of the client." However, he fails to allege which portions of his social history were not provided to Dr. Zager. At the post-conviction hearing, three of the petitioner's sisters and several of his friends testified that trial counsel failed to interview them until the evening before their testimony. It was established, however, that the petitioner had been appointed investigators by the court. The petitioner did not present the testimony of these investigators or his pretrial attorneys at the post-conviction hearing.
>
> The mitigation assessments and reports provided by Dr. Ann Charvat and Gloria Shettles were introduced as part of the post-conviction record. Dr. Charvat's assessment contained summaries of her interviews with Sheryl Arbogast and the petitioner's mother. Dr. Charvat compiled a lengthy family history and her report also contained a list of potential witnesses and detailed guidance for the manner in which defense counsel should prepare for a capital murder trial. Additionally, the post-conviction record contains one memorandum completed by Gloria Shettles, the mitigation specialist, showing that both the petitioner and Sheryl Arbogast had reviewed and made corrections to Dr. Charvat's initial assessment. The memorandum also indicates that correspondence had been forwarded to the petitioner's family for the purpose of separate interviews and additional background information. The memorandum reflects Gloria Shettles' conclusion that the petitioner may have suffered from Intermittent Explosive Disorder. The petitioner failed to present the testimony of Ms. Shettles and failed to provide the court with additional reports. The petitioner has not established that Ms. Shettles did not interview potential witnesses. Finally, there is evidence that defense counsel was granted funds for a private investigator, Tammy Askew. There is no evidence before the court that Ms. Askew did or did not conduct any investigation.
>
> Trial counsel testified that Dr. Zager was provided all of the relevant information that they possessed. The record does contain a letter written on November 19,

> 1995, by Dr. Zager to one of the petitioner's pretrial attorneys, which stated her need for more information before she would be able to deliver a definitive assessment of the petitioner. Specifically, she inquired as to interviews with Randy Helms, Jackie and Darlene Brittain, the petitioner's mother, Debbie Davis, Sheryl Arbogast, and Jeff Hall. The letter closed by stating, "I will provide a complete report once the above information is received and reviewed in light of the evaluation." The petitioner failed to call Dr. Zager as a witness at the post-conviction hearing. We can presume from the fact that she testified as to the petitioner's mental condition at trial that she was provided sufficient information for a complete report. The petitioner has failed to establish that Dr. Zager was not provided all relevant information. Counsel cannot be found deficient when they complete an adequate investigation.

Hall, 2005 WL 22951, at **32-33.

Hall's mother and three sisters have testified about the alcoholism, physical and psychological abuse that he experienced as a child and the fact that his father mistreated him because he did not believe Petitioner was his son. The evidence that Petitioner contends could have been obtained from a more complete social history may provide more detail, but it would have been repetitive of what was already presented. To the extent that counsel may have been deficient in obtaining a social history, Petitioner was not prejudiced. The Tennessee Court of Criminal Appeals' decision was neither contrary to nor an unreasonable application of clearly established federal law and was based on a reasonable determination of the facts in light of the evidence presented.

b. Failure to obtain services of a psychiatrist

In his habeas petition, Petitioner recharacterizes this claim as counsel failed to obtain and present evidence that "at the time of the offense, a biologically driven deficit . . . interfered with Mr. Hall's ability to exercise reflection and judgment for his actions." (D.E. 15 at ¶ 261.)

The Tennessee Court of Criminal Appeals held as follows on this issue:

> *3. Failure to obtain services of a psychiatrist*
>
> The petitioner complains that trial counsel were ineffective for failing to seek the services of a psychiatrist. The petitioner was provided the services of Dr. Zager, a clinical psychologist. The evidence does not indicate whether Dr. Zager had Gloria Shettles' report mentioning Intermittent Explosive Disorder available to her. Evidence at the post-conviction hearing reflected that Ms. Shettles discussed the possibility of the petitioner's suffering from Intermittent Explosive Disorder with Sheryl Arbogast. Ms. Arbogast apparently agreed with Ms. Shettles' assessment. However, neither Ms. Shettles nor Ms. Arbogast [was] qualified to provide a diagnosis as to the petitioner's mental condition, and Dr. Zager was not bound to adopt their opinions. Dr. Zager's qualifications as a clinical psychologist are not disputed, and there is noting indicating that Dr. Zager's diagnosis would have changed had she been provided additional information. Accordingly, we believe that the only complaint concerning Dr. Zager's diagnosis is that it is not the diagnosis now desired by the petitioner. In effect, the petitioner is contending that trial counsel were deficient for failing to present evidence of Intermittent Explosive Disorder.
>
> Nothing in the record indicates that Dr. Zager did not consider the possibility that the petitioner suffered from Intermittent Explosive Disorder. Additionally, had Dr. Zager believed that a serotonin test was necessary, she could have informed trial counsel that she did not have the authority to order such a test and that a psychiatrist should be contacted to conduct further

> evaluations. Dr. Zager did not make any such indication to trial counsel. Additionally, the petitioner has failed to present any evidence establishing that trial counsel should not have relied upon Dr. Zager's professional opinion.
>
> Dr. Zager did not diagnose the petitioner with Intermittent Explosive Disorder. The Middle Tennessee Mental Health Institute team, which included a psychiatrist, did not diagnose the petitioner with Intermittent Explosive Disorder. Finally, the state's post-conviction psychiatrist did not diagnose the petitioner with the disorder. Thus, the petitioner's claim, at best, amounts to an assertion that counsel should have obtained an expert who would have diagnosed the petitioner with Intermittent Explosive Disorder. The Constitution does not require attorneys to "shop around" for more favorable expert testimony. See Panner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992).
>
> Although the petitioner has now presented the testimony of two experts to support his theory of Intermittent Explosive Disorder, he still has not established that counsel was deficient for failing to present such testimony at trial. Dr. Caruso conceded that research relative to the correlation of low serotonin levels and Intermittent Explosive Disorder was unavailable at the time of the petitioner's trial. Additionally, the trial court determined that the testimony of both Dr. Auble and Dr. Caruso was effectively impeached through cross-examination of these witnesses and by the testimony of Dr. Stalford. The petitioner has failed to establish that trial counsel should have presented evidence of Intermittent Explosive Disorder. He is not entitled to relief on this claim.

Hall, 2005 WL 22951, at **33-34.

Hall contends that the failure to present additional evidence of his mental health, which "unquestionably establishes" that he, as a result of brain damage and intoxication, did not deliberate and premeditate Billie's murder is ineffective assistance of counsel. (D.E. 100 at 74.) Petitioner asserts that he lacked the

ability to control his behavior and control and regulate his emotions because of the brain damage. (Id. at 76.) He also claims that due to the combination of brain damage and intoxication, he is "less likely than normal persons to act in a deliberate fashion, with a cool purpose, or to exercise normal reflection and judgment," and thus can only be guilty of second-degree murder. (D.E. 100 at 81-82.) Petitioner asserts that counsel did not effectively investigate the mens rea defense because counsel did not present evidence of Hall's brain damage and resulting mental health problems. (Id. at 83.)

In support of his habeas petition, the inmate presented a summary from Dr. Ruben Gur, the Director of Neuropsychology at the University of Pennsylvania, who, in February 2008, performed a quantitative analysis of magnetic resonance imaging (MRI) and positron emission tomograph (PET) studies of Petitioner. (D.E. 102-35 at 13-18.) Dr. Gur found that Petitioner's "brain revealed abnormalities in frontal, limbic and associated regions relevant to behavior, especially related to the interpretation of emotionally relevant information and regulation of response." (Id. at 15-16.) Dr. Gur noted that Petitioner's abnormalities may have been related to traumatic brain injury, but some of the abnormalities indicate that Petitioner was "neurodevelopmentally compromised," specifically the large ventricles which are strongly associated with neurodevelopmental disorders such as schizophrenia. (Id. at

16.) Dr. Gur further stated that his analysis was based on data, and he would need to review medical, school and offense records and interview and test Petitioner to make a diagnosis. (Id. at 16.)

Petitioner also presented the declaration of Dr. J. Douglas Bremner, professor of Psychiatry and Behavioral Sciences at Emory University School of Medicine, in support of his habeas petition. (See D.E. 102-37 through -39.) Dr. Bremner stated, "The fact that he (Petitioner) had been drinking was an additional factor, added onto his abnormal brain function, that would contribute to his inability to properly regulate emotion, as well as to think properly and act in a logical and deliberate manner." (D.E. 102-39 at 4.) Dr. Bremner concluded that, based on the traumatic stress, abuse and neglect Petitioner experienced and the documented alterations in his brain, Petitioner "would be less likely than normal persons to act in a deliberate fashion, with a cool purpose, or to exercise normal reflection and judgment." (Id. at 6.) In summary, Dr. Bremner found:

> It is my opinion that in the case of Jon Hall there are a number of factors that go against the conclusion that he committed murder in the first-degree, i.e.[,] coolly planned, deliberate, intentional, and with cool purpose, and after reflection, judgment and planning. Brain and neuropsychological testing by Dr. Gur show abnormalities in brain areas involved in the regulation of thinking, emotion and behavior, which would impair his ability to think in a cool and deliberate fashion, and to adequately use reflection and judgment to plan and execute a pre-meditated murder. Severe childhood abuse and neglect affected his neurodevelopment, leading to changes in brain regions involved in mood and emotion including frontal cortex, amygdala, hippocampus and corpus

> callosum. These findings are consistent with a wide range of evidence from both animal and human studies of the effects of traumatic stress and early neglect on the brain, showing that trauma affects brain areas involved in regulation of emotion, thinking, and deliberate planning. The evidence presented is not consistent with a planned, intentional and calculated pattern of behavior involving a premeditated plan to kill his wife. For instance, children's statements that there was a period of calm discussion before violent argument, that he brought a money order for his wife, that he wanted to be reconciled with his wife, etc., are not consistent with coolly planned, intentional murder executed after calm reflection. He also had strong affections for his children that would not lead him to purposively kill their mother. These findings, in additional to the circumstances related to abnormalities of the brain, and the effect of alcohol intoxication, show that he did not act in a deliberate, coolly planned, and intentional way, or after planning and reflection, in order to kill his wife. Early trauma has been associated with changes in function and structure of brain areas including frontal cortex, amygdala and hippocampus, that were shown to be abnormal in Mr. Hall and that play an important role in violence, emotion, aggression and behavioral control.

Id. at 9.

Petitioner relies on Jacobs v. Horn, 395 F.3d 92 (3d Cir.), cert. denied sub nom. Jacobs v. Beard, 546 U.S. 962 (2005) and Frazier v. Huffman, 343 F.3d 780 (6th Cir. 2003), cert. denied, 541 U.S. 1095 (2004) to demonstrate that he is entitled to relief for his counsel's failure to obtain and present evidence of his brain damage and resulting mental health issues. (D.E. 100 at 84-87.) However, Hall's case differs from both Jacobs and Frazier because, unlike the counsel in those cases, his counsel presented evidence through Dr. Zager that Petitioner suffered from depression and alcohol dependence, had personality characteristics of paranoia and

dependence, suffered psycho-social stressors, and acted in "an impulsive manner versus a well-thought out plan." (D.E. 21, Add. 2, Vol. 3, p. 333-35.) Dr. Zager's diagnosis of Petitioner is consistent with the conclusions of Drs. Gur and Bremner. Neither Dr. Gur nor Dr. Bremner diagnosed Petitioner with a particular mental illness, but they explained how the physical structure of his brain may have affected his behavior. Ultimately, their opinion was no different from Dr. Zager's that the inmate could not form the specific intent to commit first degree murder and that he acted in an impulsive manner. Even if counsel were found deficient because he did not investigate and present evidence of brain damage, Petitioner was not prejudiced.

He has not demonstrated that the Tennessee Court of Criminal Appeals' opinion was contrary to or an unreasonable application of clearly established federal law, or an unreasonable determination of the facts. Petitioner's claim is without merit.

6. <u>Failed to present evidence that Petitioner was a good father and of other good acts</u>

In his post-conviction petition, Petitioner asserted that counsel could have obtained valuable testimony from the Stanfields, Brittains and Foremans. (D.E. 21, Add. 8, Vol. 1, at 30.) In his habeas petition, Petitioner alleges that his counsel failed to

obtain and present evidence from Jackie Brittain, Darlene Brittain and Valene McKinney Foreman. (D.E. 15 at ¶ 260.)[32]

The Tennessee Court of Criminal Appeals held on this claim:

> The petitioner asserts that he has presented "massive amounts of 'good guy' and 'good father' evidence" during the post-conviction evidentiary hearing. The record reflects that he presented the testimony of (1) Sheryl Arbogast and Kathy Hugo, the petitioner's sisters, who could have testified to his aptitude as a father, (2) Clarence Stanfill, Joe Henry Stanfill, Valene Foreman, Paula Foreman, and Pamela Foreman who could have testified to the petitioner's ability to care for his children, and (3) Jackie and Darlene Brittain who could have testified to good acts performed by the petitioner. He contends that trial counsel were deficient for failing to investigate and interview favorable witnesses and for failing to introduce their testimony at trial.
>
> In the context of capital cases, a defendant's background, character, and mental condition are unquestionably significant. "[E]vidence about the defendant's background and character is relevant because of the belief . . . that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." California v. Brown, 479 U.S. 538, 545, 107 S. Ct. 837, 841, 93 L. Ed. 2d 934 (1987); see Eddings v. Oklahoma, 455 U.S. 104, 113-15, 102 S. Ct. 869, 876-77, 71 L. Ed. 2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 604-05, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) (plurality opinion); Zagorski v. State, 983 S.W.2d 654, 657-58 (Tenn. 1998); Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996). The right that capital defendants have to present a vast array of personal information in mitigation at the sentencing phase, however, is constitutionally distinct from the question whether counsel's choice of information to present to the jury was professionally reasonable.
>
> There is no constitutional imperative that counsel must offer mitigation evidence at the penalty phase of a

[32] Petitioner references a "Vic Stanfield" in his habeas petition, but it is unclear whether he is one of the Stanfields involved in the post-conviction proceedings.

capital trial. Nonetheless, the basic concerns of counsel during a capital sentencing proceeding are to neutralize the aggravating circumstances advanced by the state and to present mitigating evidence on behalf of the defendant. Although there is no requirement to present mitigating evidence, counsel does have the duty to investigate and prepare for both the guilt and the penalty phase. See Goad, 938 S.W.2d at 369-70.

To determine whether trial counsel was ineffective for failing to present mitigating evidence, the reviewing court must consider several factors. First, the reviewing court must analyze the nature and extent of the mitigating evidence that was available but not presented. Goad, 938 S.W.2d at 371 (citing Deutscher v. Whitley, 946 F.2d 1443 (9th Cir. 1991); Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988); State v. Adkins, 911 S.W.2d 334 (Tenn. Crim. App. 1994); Cooper v. State, 847 S.W.2d 521, 532 (Tenn. Crim. App. 1992)). Second, the court must determine whether substantially similar mitigating evidence was presented to the jury in either the guilt or penalty phase of the proceedings. Id. (citing Atkins v. Singletary, 965 F.2d 952 (11th Cir. 1992), cert. denied, 515 U.S. 1165, 115 S. Ct. 2624, 132 L. Ed. 2d 865 (1995); Clozza v. Murray, 913 F.2d 1092 (4th Cir. 1990), cert. denied, 499 U.S. 913, 111 S. Ct. 1123, 113 L. Ed. 2d 231 (1991); Melson, 722 S.W.2d at 421)). Third, the court must consider whether there was such strong evidence of applicable aggravating factors that the mitigating evidence would not have affected the jury's determination. Id. (citing Fitzgerald v. Thompson, 943 F.2d 463, 470 (4th Cir. 1991), cert. denied, 502 U.S. 1112, 112 S. Ct. 1219, 117 L. Ed. 2d 456 (1992); Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987), cert. denied, 485 U.S. 1014, 108 S. Ct. 1487, 99 L. Ed. 2d 715 (1988)).

Trial counsel developed a mitigation theory that was supported by both expert and lay witnesses. During the penalty phase of the petitioner's trial, Dr. Zager testified that the petitioner's children "meant everything" to the petitioner. She stated that he was the children's primary caretaker and that he was very protective of them. Dr. Zager recognized the relationship the petitioner shared with his daughter who suffered from cerebral palsy. Dr. Joe Mount testified that the petitioner was extremely concerned about his children. He expressed his opinion that the petitioner cared a great deal for his children. Dr. Mount also

acknowledged the petitioner's concerns about his daughter who suffered from cerebral palsy. Randy Helms, the petitioner's former employer, described the petitioner as a good, dependable employee and conveyed how he had cared for his children. He affirmed the petitioner's love for his wife and children. The petitioner's sister, Debbie Davis, described him as "a wonderful person at home, very helpful. He would help anybody do anything." Ms. Davis testified that the petitioner "just adored the children," noting that "[h]e was a wonderful daddy. He was just absolutely wonderful." She stated, "He played with all of them. . . . He loved them equally. He loved them all." Finally, the petitioner's mother stated that he took care of his children and loved them all. She also related how the petitioner took special care of his daughter with cerebral palsy.

In addition to this testimony, defense counsel elicited favorable character information during cross-examination of several of the state's witnesses. Chris Dutton testified that the petitioner was concerned about his children, especially his daughter with cerebral palsy. During the examination of TBI Agent Byrd, defense counsel elicited testimony that the petitioner expressed remorse over causing his wife's death.

The petitioner presented seven witnesses during the penalty phase of the trial. Contrary to the petitioner's assertions, trial counsel did introduce evidence to rebut the state's portrayal of him as a "monster." At the post-conviction hearing, the petitioner maintained that trial counsel did not adequately explore potential mitigation witnesses and he presented numerous witnesses to demonstrate the type of mitigating evidence which he believed should have been presented during the penalty phase. These witnesses testified regarding their perceptions of the petitioner as a father and a person. These witnesses were cumulative and expounded upon testimony presented by the seven witnesses presented at the penalty phase. In this regard, we conclude that trial counsel identified and presented testimony supporting the relevant mitigating themes. The only question is whether trial counsel should have introduced more mitigating evidence. We cannot conclude that a reasonable probability exists that more testimony of this nature would have led the jury to conclude that the "balance of aggravating and mitigating circumstances did not warrant death." Nichols, 90 S.W.3d at 602.

> Additionally, we conclude that trial counsel strategically elected not to present the testimony of several witnesses. With regard to the testimony of Jackie and Darlene Brittain, we agree with trial counsel's assessment that any valuable testimony that they could have provided for the petitioner was outweighed by the danger of the state cross-examining these witnesses as to prior threats made by the petitioner against the victim, including that he "was going to grind his wife up into hamburger meat." We also question the importance of several witnesses, i.e., Valene Foreman, Pamela Foreman, and Paula Foreman, who indicated from their testimony that they did not know the petitioner very well. Additionally, some of their testimony contradicted the petitioner's claim that he always cared for the children when the victim was at work or at school. Again, the petitioner has failed to establish that counsel's performance was deficient.
>
> Finally, with regard to the claims of post-conviction witnesses that trial counsel failed to contact them regarding their potential testimony, we again refer to the fact that the defense team consisted of three investigators. None of these investigators were called to testify at the post-conviction hearing. There is evidence that defense counsel was aware of these potential witnesses. For instance, Darlene Brittain testified that trial counsel informed her that they would not call her as a witness because of the petitioner's "hamburger" statement; Jackie Brittain stated that the state had subpoenaed him as a witness as he had provided information that the petitioner had made threats against the victim. He conceded that trial counsel had talked with him at the courthouse. The petitioner has failed to establish that he is entitled to relief on this claim.

Hall, 2005 WL 22951, at **34-37.

Petitioner makes no effort to demonstrate why he is entitled to habeas relief on this claim. The Tennessee Court of Criminal Appeals' decision was neither contrary to nor an unreasonable application of clearly established federal law and was based on a

reasonable determination of the facts in light of the evidence presented.

7. Failed to present a theory of defense

In the post-conviction proceedings, Hall asserts that his trial counsel failed to properly present an intoxication defense. (D.E. 21, Add. 8, Vol. 1, p. 26.) Petitioner argued that his counsel did not produce "one shred of evidence" regarding intoxication. (Id. at 26-27.) In his habeas petition, Petitioner asserts that prior to his trial, Mayo did not think that voluntary intoxication was a defense to first degree murder. (D.E. 15 at ¶ 204.) Ford believed that Petitioner had five or six beers before the incident and decided to present voluntary intoxication as a defense at the guilt stage. (Id. at ¶ 205.) Petitioner alleges that counsel failed to obtain and present evidence that he consumed numerous beers, smoked marijuana and ingested Stay Alert pills prior to the homicide to demonstrate the severity of his intoxication on that night. (Id. at ¶ 260.6.)

The Tennessee Court of Criminal Appeals held:

> The petitioner asserts that trial counsel failed to develop and present a theory of defense. Specifically, he complains that trial counsel failed to present evidence of intoxication, evidence that the murder was the result of a continuing domestic dispute, or any other evidence favorable to the petitioner. The petitioner's allegation is not supported by either the record of the post-conviction hearing or the record of the petitioner's trial. Mr. Ford testified that the defense relied upon a theory that the petitioner was acting in an impulsive manner. Trial counsel attempted to convince the jury that the petitioner was distraught, depressed, and

> intoxicated. Trial counsel argued that the petitioner's behavior reflected an impulsive act as opposed to a planned act. Counsel asserted that the state had failed to meet its burden of proving premeditation and deliberation beyond a reasonable doubt. During opening argument, trial counsel focused on the petitioner's domestic problems with the victim, suggested that the petitioner went to the victim's residence hoping for a reconciliation, and emphasized the fact that the petitioner did not take a weapon with him. Counsel supported this position throughout their examination of the witnesses. These theories continued throughout the penalty phase. The petitioner's claims are clearly not supported by the record. The petitioner has not presented any other evidence that the defense was not adequate. Therefore, the petitioner has not met the requirements to be granted post-conviction relief on this claim.

Hall, 2005 WL 22951, at *37.

Hall focuses on intoxication as it relates to whether the trial court's jury instruction on intoxication violated his constitutional rights. (See D.E. 100 at 3-6.). He did not address whether counsel was ineffective in developing a theory of a defense based on intoxication. Petitioner makes no effort to establish that the state-court decision is objectively unreasonable, rather than merely incorrect. Williams, 529 U.S. at 410. Petitioner concedes that counsel presented sufficient evidence to support the intoxication argument. He states, "In fact, the evidence of intoxication was so substantial that in closing argument, the State attempted to minimize and obscure the importance of intoxication evidence to the jury's charge." (D.E. 100 at 22 n.3.) The Tennessee Court of Criminal Appeals' decision was neither contrary to nor an unreasonable application of clearly established federal

law and was based on a reasonable determination of the facts in light of the evidence presented.

8. Remaining Ineffective Assistance of Counsel Claims

Petitioner's claims in his habeas petition, to the extent that they have not been addressed above, are procedurally defaulted because Petitioner failed to exhaust these claims and failed to demonstrate cause and prejudice or that a miscarriage of justice would result if the Court fails to review these claims.

Claim 13 is DENIED.

N. Actual Innocence (Claim 14)

Hall alleges that he is actually innocent of intentional, deliberate, premeditated first degree murder because he lacked the requisite mental state. (D.E. 15 at 61.) "A claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Herrera v. Collins, 506 U.S. 390, 404 (1993) (internal citation and quotation marks omitted). The actual innocence exception is very narrow in scope and requires proof of factual innocence, not just legal insufficiency. Bousley v. United States, 523 U.S. 614, 623 ("It is important to note . . . that 'actual innocence' means factual innocence, not mere legal insufficiency"). Herrera noted that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant

unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." Herrera, 506 U.S. at 417; Wright v. Stegall, 247 F.App'x 709, 711-12 (6th Cir. 2007). The threshold showing for such a right would "necessarily be extraordinarily high." Wright, 247 F.App'x at 712 (internal citation and quotation marks omitted). In House v. Bell, 547 U.S. 518, 554-55 (2006), the Supreme Court declined the opportunity to resolve the issue that freestanding innocence claims in death penalty cases are possible. Petitioner has not demonstrated a basis for habeas relief.

Claim 14 is DENIED.

O. Violation of International Law (Claim 15)

Petitioner claims that his conviction and sentence violate Article 6, Section 2 of the United States Constitution because the State disregarded his rights under international law. (D.E. 15 at 61-66.) Petitioner argues that his rights under various treaties ratified by the United States, entered into and signed by the President of the United States, and his rights under customary international law have been violated. (Id.) Respondent asserts that this claim was never presented in the Tennessee state courts and is barred by procedural default. (D.E. 90-1 at 43.) As this issue was not raised in the state court proceedings, and Petitioner has not presented an excuse for not doing so, the claim is procedurally defaulted.

CLAIM 15 is DENIED.

P. Proportionality Review (Claim 16)

Hall argues that his Sixth, Eighth and Fourteenth Amendment rights were violated because the Tennessee appellate courts relied on a Rule 12 form which was not filled out in its entirety and contained inaccurate information. (D.E. 15 at 46-47, 66.) The Supreme Court has held that the Constitution only requires proportionality between the punishment and the crime, not between the punishment in this case and that exacted in other cases. Pulley v. Harris, 465 U.S. 37, 42-44 (1984) (Traditionally, "proportionality" refers to an "abstract evaluation of the appropriateness of a sentence for a particular crime." The Eighth Amendment does not require a state appellate court to conduct a proportionality review which involves comparing the sentence in the case before it with penalties imposed in similar cases.). "There is no constitutional requirement that a state appellate court conduct a comparative proportionality review." Id. at 49-50. The Supreme Court has generally rejected claims that a petitioner's death sentence is disproportionate to the sentences received by individuals convicted of similar crimes. See, e.g., McCleskey v. Kemp, 481 U.S. 279 (1987) (rejecting Equal Protection and Eighth Amendment claims challenging racially disproportionate imposition of capital punishment); Gregg, 428 U.S. at 199 (rejecting claim that discretionary decision made with respect to the imposition of

capital punishment, including the fact that "the state prosecutor has unfettered authority to select those persons whom he wishes to prosecute for a capital offense and to plea bargain with them," violates the Eighth Amendment); see also Pulley, 465 U.S. at 42-44 (the Eighth Amendment does not require judicial proportionality review). "Since proportionality review is not required by the Constitution, states have great latitude in defining the pool of cases used for comparison"; therefore "limiting proportionality review to other cases already decided by the reviewing court in which the death penalty has been imposed" falls within this wide latitude. Williams v. Bagley, 380 F.3d 932, 962-63 (6th Cir. 2004), cert. denied sub nom. Williams v. Bradshaw, 544 U.S. 1003 (2005) (citing seven prior Sixth Circuit cases upholding Ohio's limited proportionality review against constitutional challenges). In Coe, the Sixth Circuit held that the Tennessee mandatory death-penalty review statute did not create a liberty interest or a due process right. Coe, 161 F.3d at 351-52. No constitutional right was violated by the proportionality review.

Claim 16 is DENIED.

Q. Incompetence for Execution (Claim 17)

Petitioner alleges he will not comprehend the punishment he is about to receive or the reason for that punishment at the time of his execution. (D.E. 15 at 66-67.) In Panetti v. Quarterman, 551 U.S. 930, 947 (2007), the Supreme Court held that a petitioner's

claim of incompetency to be executed because of his mental condition, based on Ford v. Wainwright, 477 U.S. 399 (1986), is not one that is required to be brought in an initial habeas petition on pain of being treated as a second or successive petition. See Tompkins v. Sec'y, Dep't of Corr., 557 F.3d 1257, 1259 (11th Cir. 2009), cert. denied sub nom. Tompkins v. McNeil, 129 S. Ct. 1305 (2009) (Generally , a Ford claim does not become ripe until after the time has run to file the first federal habeas petition). The setting of an execution date, which causes a Ford incompetency claim to become ripe, has not occurred in this case. Panetti, 551 U.S. at 942-43.[33]

Claim 17 is DENIED.

R. Death by lethal injection and/or electrocution constitutes cruel and unusual punishment (Claim 18)

The inmate claims that electrocution and lethal injection constitute cruel and unusual punishment and violate the Sixth, Eighth and Fourteenth Amendments. (D.E. 15 at 67-73.) Respondent contends that these claims were never raised in the Tennessee courts and are now barred from federal review due to procedural default. (D.E. 90-1 at 45.) Petitioner does not address the procedural default of this claim.[34] As Petitioner has not presented

[33]Both parties acknowledge that this claim is not ripe for the Court's consideration. (See D.E. 90-1 at 44-45; D.E. 100 at 157-58.)

[34]Instead, Petitioner argues that the claim is cognizable because Hill v. McDonough, 547 U.S. 573 (2006) allowed a § 1983 claim related to the execution protocol and "did not, however, hold that an inmate *must* bring his claim under § 1983 rather than in a habeas action pursuant to 28 U.S.C. § 2254." (D.E. 100 at 143) (emphasis added). In Hill, the Supreme Court determined that method-of-

an excuse for his failure to exhaust this claim, the claim is barred by procedural default.

Claim 18 is DENIED.

S. Petitioner's death sentence violates his fundamental right to life. (Claim 19)

Hall asserts that by offering a life sentence, the State demonstrated that there were less restrictive means than the death sentence to effectuate its interests in punishing Petitioner. (D.E. 15 at 73.) He also avers that by seeking a death sentence, the State unconstitutionally burdened his trial right. (Id.)

The post-conviction court held that Petitioner waived issues regarding the constitutionality of the conviction and death sentence by not raising them on direct appeal. (D.E. 21, Add. 6, Vol. 7, p. 1011.) The Tennessee Court of Criminal Appeals agreed that these issues were waived, and specifically held:

> The petitioner challenges the constitutionality of Tennessee's death penalty statutes, contending that (1) the heinous, atrocious, or cruel aggravating factor is unconstitutionally vague and overbroad; (2) the sentence of death cannot be fairly imposed and administered; and (3) the sentence of death unconstitutionally infringes upon the petitioner's right to life. The trial court rejected these claims, finding them previously determined, waived, or not supported with evidence. The trial court also determined that the claims raised by the

execution claims are appropriately brought under 42 U.S.C. § 1983. 547 U.S. at 580. The Sixth Circuit, relying on Hill and Nelson v. Campbell, 541 U.S. 637 (2004), ruled "that § 1983 proceedings are the proper means of a challenging a lethal injection protocol. These are not claims that sound in habeas." Cooey v. Strickland, 489 F.3d 775, 776 (6th Cir. 2007). Prior to Hill, the Sixth Circuit barred method-of-execution claims brought pursuant to 42 U.S.C. § 1983 holding that these challenges sounded in habeas. Cooey v. Strickland, 479 F.3d 412, 425-26 (6th Cir. 2007).

> petitioner have been rejected by Tennessee's appellate courts on numerous occasions. We agree on all points.

Hall, 2005 WL 22951, at *38.

Petitioner contends, based on Harris v. Reed, 489 U.S. 255 (1989), that the claim must be reviewed on the merits because the Tennessee Court of Criminal Appeals' opinion does not contain a plain statement on which this Court can base a ruling of procedural default. (D.E. 100 at 133.) The Court finds that the Tennessee Court of Criminal Appeals' decision appears to be a sufficiently clear statement to warrant a finding of a procedural bar. Scott, 209 F.3d at 877; Coe, 161 F.3d at 330-31. The ruling raises an independent and adequate state procedural bar to this Court's consideration of the claim. See King v. Bell, 392 F. Supp. 2d 964, 1013 (M.D. Tenn. 2005) (finding that the state court, by determining that a claim had been waived, had erected an independent and adequate procedural bar to the habeas court's consideration of the claim).

The claim is procedurally defaulted.

Claim 19 is DENIED.

T. Cumulative error (Claim 20)

Petitioner alleges that "[t]o the extent this Court finds two or more constitutional errors, yet determines that those errors are individually harmless, the cumulative effect of those errors renders Mr. Hall's conviction and/or death sentence unconstitutional." (D.E. 15 at 73.) Because he has not

established any error of consequence in his state criminal proceedings, the cumulative effect of those alleged deficiencies is likewise insufficient to merit federal habeas relief. See Baze v. Parker, 371 F.3d 310, 330 (6th Cir. 2004), cert. denied, 544 U.S. 931 (2005) (denying habeas relief because petitioner could not establish any errors other than harmless error). Furthermore, the Supreme Court has not held that distinct constitutional claims can be cumulated to grant habeas relief. Lorraine, 291 F.3d at 447; see Scott v. Elo, 302 F.3d 598, 607 (6th Cir. 2002), cert. denied, 538 U.S. 995 (2003) ("The Supreme Court has not held that constitutional claims that would not individually support habeas relief may be cumulated in order to support relief.").

Claim 20 is DENIED.

U. Conclusion

Because Petitioner's claims are either noncognizable, devoid of substantive merit, or procedurally barred, disposition of this petition without an evidentiary hearing is proper. Rule 8(a), Section 2254 Rules. The petition is DENIED in its entirety and DISMISSED.[35] Petitioner's request for oral argument is DENIED.

V. APPELLATE ISSUES

The Court must also determine whether to issue a certificate of appealability ("COA"). Twenty-eight U.S.C. § 2253(a) requires a district court to evaluate the appealability of its decision dismissing a § 2254 habeas petition and to issue a COA only if "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); see also Fed. R. App. P. 22(b); Lyons v. Ohio Adult Parole Auth., 105 F.3d 1063, 1073 (6th Cir. 1997), cert. denied, 520 U.S. 1224 (1997) (district judges may issue COAs). No § 2254 petitioner may appeal without this certificate.

In Slack v. McDaniel, 529 U.S. 473, 483-84 (2000), the Supreme Court stated that § 2253 is a codification of the standard announced in Barefoot v. Estelle, 463 U.S. 880, 893 (1983), which requires a showing that "reasonable jurists could debate whether

[35]The Court accepted Respondent's arguments in his motion for summary judgment on Claims 2 and 5-20, and the motion is GRANTED as to these claims. Though the Court denied habeas relief as to Claims 1, 3 and 4, relief was denied for reasons other than those stated in Respondent's motion for summary judgment. To that extent, Respondent's motion for summary judgment is DENIED as to Claims 1, 3 and 4.

(or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Slack, 529 U.S. at 484 (quoting Barefoot, 463 U.S. at 893 & n.4).

The Supreme Court has cautioned against undue limitations on the issuance of COAs:

> [O]ur opinion in Slack held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application of a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in Slack would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner "'has already failed in that endeavor.'"

Miller-El v. Cockrell, 537 U.S. 322, 337 (2003) (quoting Barefoot, 463 U.S. at 893 n.4). Thus,

> [a] prisoner seeking a COA must prove "'something more than the absence of frivolity'" or the existence of mere "good faith" on his or her part. . . . We do not require petitioners to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.

Id. at 338 (quoting Barefoot, 463 U.S. at 893); see also Miller-El, 537 U.S. at 342 (cautioning courts against conflating their analysis of the merits with the decision of whether to issue a COA;

"[t]he question is the debatability of the underlying constitutional claim, not the resolution of that debate.").[36]

In this case, the issues presented by Petitioner's petition are without merit for the reasons previously stated. Because he cannot present a question of some substance about which reasonable jurists could differ, the Court DENIES a COA.

The Sixth Circuit has held that the Prison Litigation Reform Act of 1995, 28 U.S.C. § 1915(a)-(b), does not apply to appeals of orders denying § 2254 petitions. Kincade v. Sparkman, 117 F.3d 949, 951 (6th Cir. 1997). Rather, to appeal in forma pauperis in a § 2254 case, and thereby avoid the $455 appellate filing fee required by 28 U.S.C. §§ 1913 and 1917, Petitioner must seek permission from the district court under Federal Rule of Appellate Procedure 24(a). Kincade, 117 F.3d at 952. Rule 24(a) provides that a party seeking pauper status on appeal must first file a motion in the district court, along with a supporting affidavit. Fed. R. App. P. 24(a)(1). However, Rule 24(a) also provides that, if the district court certifies that an appeal would not be taken in good faith, or otherwise denies leave to appeal in forma pauperis, Petitioner must file his motion to proceed in forma pauperis in the appellate court. See Fed. R. App. P. 24(a) (4)-(5).

[36]The Supreme Court also emphasized that "[o]ur holding should not be misconstrued as directing that a COA always must issue." Miller-El, 537 U.S. at 337. Instead, the COA requirement implements a system of "differential treatment of those appeals deserving of attention from those that plainly do not." Id.

In this case, for the same reasons the Court denies a COA, the Court determines that any appeal would not be taken in good faith. It is therefore CERTIFIED, pursuant to Rule 24(a) of the Federal Rules of Appellate Procedure, that any appeal in this matter would not be taken in good faith, and leave to appeal in forma pauperis is DENIED. If Petitioner files a notice of appeal, he must also pay the full $455 appellate filing fee or file a motion to proceed in forma pauperis and supporting affidavit in the Sixth Circuit Court of Appeals within thirty (30) days.

IT IS SO ORDERED this 14th day of April 2010.

s/ J. DANIEL BREEN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

JON HALL,	)	
Petitioner,	)	
vs.	)	No. 05-1199-JDB-egb
WAYNE CARPENTER, Warden, Riverbend Maximum Security Institution,	)	
Respondent.	)	

ORDER DENYING PETITION PURSUANT TO 28 U.S.C. § 2254,
CERTIFYING APPEAL NOT TAKEN IN GOOD FAITH,
DENYING CERTIFICATE OF APPEALABILITY
AND
DENYING LEAVE TO PROCEED *IN FORMA PAUPERIS* ON APPEAL

On February 4, 2013, the United States Court of Appeals for the Sixth Circuit remanded this case in light of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). (Electronic Case Filing ("ECF") No. 128.) The Court initially directed Petitioner, Jon Hall, to brief the issues related to *Martinez*, but subsequently held the briefing in abeyance pending the decision of the United States Supreme Court addressing a related issue in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). (ECF Nos. 129 & 131.) On May 28, 2013, the Supreme Court decided *Trevino*. On August 30, 2013, Hall filed a brief on the *Martinez* issues. (ECF No. 136.) On October 15, 2013, Petitioner filed a notice of filing for the declaration of Frankie Stanfill, Petitioner's pre-trial counsel. (ECF No. 139.) On October 30, 2013, Respondent[1] filed a supplemental brief addressing *Martinez* and *Trevino*.

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[1] The Respondent at that time was Warden Ricky Bell, (*See* ECF Nos. 140 & 142), but is now Warden Wayne Carpenter.

(ECF No. 140.) On November 20, 2013, Hall filed a notice of supplemental authority. (ECF No. 141.) On February 4, 2014, Respondent, Wayne Carpenter, submitted documents related to the state post-conviction proceedings. (ECF No. 144.) On March 19, 2014, Petitioner filed a notice of supplemental authority, (ECF No. 146), and on July 11, 2014, a notice of additional supplemental authority. (ECF No. 147.)

I. BACKGROUND

On February 5, 1997, Hall was convicted of first-degree murder in the Circuit Court of Madison County, Tennessee for the 1994 death of his estranged wife, Billie Jo Hall, and sentenced to death. *State v. Hall*, No. 02C01-9703-CC-00095, 1998 WL 208051, at *1 (Tenn. Crim. App. Apr. 29, 1998). Petitioner had the same counsel at trial, for the new trial motion, and on direct appeal. (*See* ECF No. 136 at 4.)

A. *Pro Se* Petition for Post-Conviction Relief

On December 7, 2000, the inmate filed a *pro se* petition for relief from conviction or sentence in the Circuit Court of Madison County, Tennessee. (ECF No. 144-1 at PageID 1842–73.)[2] He alleged ineffective assistance of counsel at a "critical stage" related to his arrest and extradition process, preliminary hearing, bail proceedings, illegal search and seizure. (*Id.* at PageID 1847–60.) Petitioner addressed the "denial of right to be heard" and complained of his counsel's ineffectiveness in relation to cross-examination of the State's witnesses, the failure to rebut misleading evidence/testimony, and the lack of "basic facts" or evidence "needed to present a clear picture of the hardships and conditions that caused the Petitioner to experience a very confused state of mind, subjecting him to abnormal behavior." (*Id.* at PageID 1867.) He

[2] "PageID" references are used for ease of location with documents filed as part of the state court record or as exhibits.

asserted that his trial counsel failed to: (1) protect various state and federal rights; (2) subject the State's case to any meaningful adversarial testing; (3) suppress illegally obtained evidence; (4) try and obtain a bail; (5) suppress Chris Dutton's testimony as the fruit of the exploitation of no bail; and (6) present sufficient evidence in support of Petitioner's defense theory. (*Id.* at PageID 1868.) Hall complained of pre-trial counsel, Frank Stanfill's, lack of experience, the resulting "unreasonable prejudicial delays in obtaining a fair and speedy trial," and of the prejudice Petitioner suffered from an early psychiatric evaluation. (*Id.*) He alleged numerous other incidents of ineffective assistance related to counsel's failure to have him transferred to a local county jail to prepare for trial, inform him of the nature of a court-ordered psychiatric examination, record the examination, require that he be present at hearings, and file a motion to compel identification of the psychiatrist or psychologist treating key witnesses. (*Id.* at PageID 1871–72.)

Petitioner alleged that his trial counsel, Jesse Ford and Clayton Mayo, were ineffective because they failed to:

1. Select a jury consisting of a fair cross section of the community of the petitioner's race and gender;

2. Utilize all peremptory and cause challenges and allow Juror Rucker from Jackson Madison County General Hospital;

3. Have the jury sequestered away from the victim's family;

4. Represent Petitioner effectively in all aspects in presenting his case;

5. Stand up for Petitioner's rights to be heard by himself and counsel and require the court clerk to make out a verbatim transcript depicting this request;

6. Make proper objections and move to suppress or strike the testimony of TBI Agent Byrd and Chris Dutton as fruits of the poisonous tree;

7. Present evidence in their custody and control to corroborate Petitioner's defense;

8. Rebut or correct misleading circumstantial evidence, especially evidence that had nothing to do with the facts or crime;

9. Give up investigative files produced for the defense to thwart Petitioner's desire to represent himself;

10. Learn basic facts and listen to Petitioner's flag argument;

11. Include motions by previous attorneys in the technical record;

12. Investigate facts;

13. Object to "nude" autopsy photos that made a female juror too sick to continue;

14. Present proof in support of Sheryl Arbogast's testimony and admit this same evidence at the sentencing phase;

15. Object to the judge's fundamental error or impermissible comment on the evidence during jury instructions; and

16. Appeal the judge's erroneous order refusing to let trial attorneys withdraw.

(*Id.* at PageID 1872–73.)

On November 1, 2001, Hall filed an affidavit to support the ineffective assistance of counsel claim regarding a misstatement of law. (*Id.* at PageID 1981–83.)

B. Amended Petition for Post-Conviction Relief

On November 1, 2001, Petitioner's counsel filed an amended petition for post-conviction relief. (ECF No. 144-2 at PageID 2071–2121.) In Issue 1 of the Amended Petition, the inmate presented the following ineffective assistance of counsel claims:

1. Counsel failed to adequately investigate the mental history of Defendant. Had they done so, they could have prepared adequate psychiatric testimony showing a diminished mental capacity that was consistent with a charge of manslaughter, perhaps insanity, and certainly a Defendant undeserving of the death penalty.

2. Counsel failed to adequately petition for funds for various experts, including psychiatric experts.

3. Counsel failed to establish the proper working relationship with Petitioner. Counsel met with Petitioner only a few times prior to the trial[,] and they did not consistently maintain communication with Petitioner. Had Counsel fulfilled this duty, (ABA Def Funct. 4-3.1; ABA Death Penalty Guidelines 11.4.2) Petitioner would have been able to provide Counsel with valuable investigative assistance, including details that would support defense strategies, including facts which established this crime to be manslaughter or possibly insanity.

4. Counsel failed to be aware of (through experience, training-or research) the law applicable to Petitioner's case, as evidenced by the deficiencies in Counsel's performance outlined in this petition. Had Counsel fulfilled this duty (ABA Def. Funct. 4-3.8; ABA Death Penalty Guidelines 9.1) they would have prepared and presented the legitimate defenses available to Petitioner, such as manslaughter or insanity.

5. Counsel failed to maintain their workload at the level acceptable to handling a capital murder trial (ABA Death Penalty Guidelines 6:1). Counsel continued to carry their full criminal practice throughout their representation of Petitioner and neither withdrew from nor declined representation in other matters.

6. Counsel failed to adequately prepare for their representation of Petitioner, including but not limited to:

   a) Counsel failed to properly interview Petitioner (ABA Def. Funct. 4-3.2; ABA Death Penalty Guidelines 11.4.2). Counsel met with Petitioner only a few times during the course of representation of Petitioner. Had Counsel fulfilled this duty they would have established the rapport necessary to elicit from Petitioner valuable information leading to and supporting defense theories and mitigation.

   b) Counsel failed to properly investigate (ABA Def. Funct. 4-4.1; ABA Death Penalty Guidelines 11.4.1), including but not limited to:

      (1) Counsel failed to identify, locate and interview all relevant witnesses (ABA Death Penalty Guidelines ll.4.l(D)(l)(3)(a)-(c)),including but not limited to crime scene witnesses, expert witness and mitigation witnesses.

      (2) Counsel failed to identify, gather and examine the necessary documents, records and physical evidence (ABA 11.4.1(D)(l)(a)-(c), (D)(2)(a)-(e), (D)(4)-(6)), including but not limited to: arrest reports, reports of forensic testing, any recorded or memorialized version of statements made by Petitioner and others, autopsy reports, physical evidence seized by the state, viewing the

crime scene, and prior criminal records of Petitioner and other witnesses.

Had Counsel fulfilled this duty they would have uncovered legitimate defenses for Petitioner. Proper preparation also would have produced valuable evidence tending to impeach the testimony and credibility of the state's witnesses. Had Counsel prepared properly, they also would have strengthened Petitioner's position in any plea negotiations. Campbell v. Marshall, 769 F.2d 314, 318 (6th Cir. 1985) (The Court noted in dicta that certain evidence would have "borne upon the defense counsel's negotiating power in arriving at a plea.").

7. Counsel failed to engage in the motions practice necessary to protect Petitioner's rights (ABA Def. Funct. 4-3.6; ABA Death Penalty Guidelines 11.5.l(B)), including but not limited to:

(a) Counsel failed to file sufficient pre-trial motions challenging the constitutionality of the sentencing provisions of Tennessee's murder statute, especially the portions relating to the death sentence and the manner in which it is to be carried out. Had Counsel fulfilled this duty Petitioner would not have faced the death penalty. Tennessee's sentencing statute is arbitrary and capricious and is therefore a violation of the Eighth and Fourteenth Amendments to the Untied (sic) States Constitution and Article I, §§ 6, 7, 8, 9, 10, 16, 17 and 19 Article XI, § 8 of the Tennessee Constitution.

(1) The sentencing statute provides insufficient guidance to the jury concerning what standard of proof the jury should use in making the determination that the aggravating factors outweigh the mitigating circumstances.

(2) The sentencing statute does not sufficiently narrow the population of defendants convicted of first degree murder who are eligible for a sentence of death.

(3) The sentencing statute does not sufficiently limit the jury's discretion because once the jury finds the existence of one aggravating factor, the jury can impose a sentence of death no matter what evidence of mitigation is shown.

(4) The sentencing statute limits the jury's discretion to exercise mercy by requiring the jury to impose a sentence of death if it finds that the aggravating factors outweigh the mitigating factors.

(5) The sentencing statute fails to ensure that non-statutory mitigating factors are given the same weight as statutory mitigating factors by not requiring that the jury be given written instructions on the equal weight of non-statutory mitigating factors.

(6) The sentencing statute does not require the jury to make the ultimate determination that the appropriate punishment is a death sentence.

(7) The sentencing statute does not require that the jury be instructed in writing that it may impose a life sentence on the basis of mercy alone.

(8) The sentencing statute does not provide a way to correct, by written instructions or the presentation of evidence, juror's common misperceptions regarding the actual terms of a life-sentence and the death sentence, the cost of incarceration and the cost of executions, the death penalty's failure to deter murders, and the painful nature of death by electrocution.

(9) The sentencing statute prevents effective review on appeal because it does not require the jury to make specific findings with respect to the presence or absence of mitigating circumstances and with specificity regarding the presence of aggravating circumstances.

(10) The sentencing statute provides for a punishment, death, which is cruel and unusual.

(11) The sentencing statute provides for methods of execution, electrocution and lethal injection, which are cruel and unusual.

(12) The sentencing statute is applied in a discriminatory manner - unfairly affecting racial, gender, geographic, economic and political classes.

(13) The sentencing statute does not provide an adequate method for proportionality and arbitrariness review by the Tennessee Supreme Court.

(14) The sentencing statute has been applied by prosecutors in a manner that represents an abuse of their discretion because the statutes do not provide uniform standards for application of the death sentence.

(15) The sentencing statute has produced violations of the equal protection clauses of the state and federal constitutions because they do no[t] provide uniform standards for qualifying jurors for service

on capital juries.

(16) The sentencing statute permits the introduction of unreliable evidence in support of aggravating circumstances and in rebuttal of mitigating factors.

(17) The sentencing statute allows the state to make the final closing argument to the jury in the penalty phase of the trial.

(18) The sentencing statute does not require that the jury be instructed in writing regarding the consequences of its failure to reach a unanimous verdict in the penalty phase.

(19) The sentencing statute requires the jury to agree to a unanimous verdict in order to impose a life sentence.

(20) By restricting the discretion of the jury to life (which the jury might believe is any number of years, including as low as five or six) or death, and not allowing the jury to fix the penalty at life without parole or life without parole for a fixed number of years the statute denies the discretion of the sentencer mandated by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 8 and 16 of the Constitution of Tennessee. Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L.Ed.2d 973 (1978).

(21) The statute did not require the court to instruct the jury on all mitigating circumstances raised by the evidence.

(22) The statute violates the Sixth, Eighth and Fourteenth Amendment to the United States Constitution and Article I, §§ 6, 8, 9, and 16 of the Tennessee Constitution, because the heinous, atrocious or cruel aggravating factor under Tenn. Code Ann. § 39-13-204(i)(5) is vague and overbroad and thus fails to narrow the scope of those individuals guilty of first degree or felony murder who are eligible of the death penalty. Moreover, the definitions provided in the instructions in this case, as required by State v. Williams, 690 S.W.2d 517 (Tenn. 1985), are a mere tautology and do not provide the necessary clarity to provide the required narrowing of those eligible for death.

(23) The statute violates Petitioner's rights because death by electrocution and lethal injection constitute cruel and unusual punishment, and because it requires the Petitioner to elect his method of execution.

(a) Execution by electrocution or lethal injection is neither immediate nor painless and therefore is cruel and unusual punishment under Article I, § 16 of the Tennessee Constitution and the Eighth Amendment to the United States Constitution. See, Fierro v. Gomez, 77 F.3d 301 (9th Cir. l996) (holding that death by lethal gas is cruel and unusual punishment).

(b) Electrocution using Tennessee's electric chair and protocol is particularly cruel and unusual as according to Dr. John P. Wikswo, Jr., Professor of Living State Physics and Professor of Physics at Vanderbilt University, and others, the peculiar design of Tennessee's electric chair and procedures recommended for the use of Tennessee's electric chair would result in prolonged and agonizing pain to the person being electrocuted.

(24) The statute violates the Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 8 and 16 of the Constitution of Tennessee as the requirements of Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972), that the discretion to impose death must be closely confined to avoid arbitrariness, those of Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L.Ed.2d 973 (1978) that the sentencer must have unlimited discretion not to impose death, and of Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L.Ed.2d 1 (1982), that the death penalty must be imposed "fairly, and with reasonable consistency or not at all,["] have proven impossible to administer in practice, and thus, there is no way to constitutionally administer the death penalty. Callins v. Collins, 510 U.S. 1141, 114 S. Ct. 1127, 1128-1138, 127 L.Ed.2d 435 (l994) (Justice Blackm[u]n, dissenting from the denial of certiorari).

(25) The statute violates the Fourth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution and Article I, §§ 6, 7, 8, 9, 16 and 17 of the Tennessee Constitution as it impinges on Petitioner's fundamental right to life. The right to life is a fundamental constitutional right and the punishment of death is not necessary to promote any compelling state interest in punishing Petitioner nor has the state shown that there are no less restrictive means of punishing him.

(a) Counsel filed inadequate pre-trial motions seeking the state's compliance with constitutional, statutory and local discovery obligations. Had Counsel fulfilled this duty they

would have obtained valuable mitigation evidence and evidence which would impeach the state's witnesses.

(b) Counsel failed to file pre-trial motions seeking preservation of all law enforcement rough notes and a complete copy of the District Attorney General's file, both for in camera inspection and later use on post-conviction. Counsel's failure to file such a motion severely handicapped Petitioner's post-conviction efforts from which Petitioner should be granted relief.

(c) Counsel filed inadequate and untimely pre-trial motions seeking the resources necessary for their representation of Petitioner, including appropriate sentencing investigative assistance, appropriate funding for a mitigation specialist who could guide the preparation of a sentencing case, jury selection assistance and expert witnesses able to address forensic issues in this case, Petitioner's life history and Petitioner's mental condition. See Tenn. Sup. Ct. R. 13; Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L.ED.2d 53 (1985). Had Counsel fulfilled this duty, valuable mitigation evidence would have been developed and presented.

(d) Counsel filed inadequate pre-trial motions seeking special voir dire rules, including but not limited to the right to submit a comprehensive jury questionnaire and the right to conduct individual voir dire as to death qualification of the venire members. Had Counsel fulfilled this duty they would have been able to develop the information necessary to properly select the jury.

(e) Counsel failed to file pre-trial motions charging the prosecution with abuse of discretion in seeking the death penalty and asserting the disproportionate application of the death penalty in Petitioner's case. Had Counsel fulfilled this duty[,] the death notice in Petitioner's case may have been withdrawn or dismissed.

(f) Counsel failed to file pre-trial motions challenging the proportionality of the death sentence in Petitioner's case. Had Counsel fulfilled this duty[,] the case may have been dismissed.

(g) Counsel failed to file objections challenging jury instructions and failed to file proposed jury instructions,

including but not limited to the following:

(1) Counsel failed to object to jury instructions which equated "reasonable doubt" with "moral certainty" and permitted conviction upon a "satisfactory conclusion" of Petitioner's guilt.

(2) Counsel failed to object to a jury instruction which misstated the law regarding the necessity for a unanimous verdict in order for Petitioner to receive a life sentence.

(3) Counsel failed to seek an instruction clarifying that a life sentence means "life" and that a death sentence means "death" that these sentences will be carried out.

(4) Counsel failed to seek an instruction clarifying that the decision regarding sentence is to be made by individual jurors; that the jury does not have to be unanimous regarding sentence.

(5) Counsel failed to seek instructions clarifying the law regarding sentencing factors: (i) an instruction clarifying that only statutory aggravating factors are to be considered; (ii) an instruction defining aggravating factors; (iii) an instruction defining mitigating circumstances, including listing all non-statutory mitigating circumstances; (iv) an instruction clarifying how aggravating circumstances are to be weighed; (v) an instruction establishing that the jury must find, unanimously, the existence of aggravating circumstances beyond a reasonable doubt; (vi) an instruction establishing that mitigating circumstances may be found by a single juror; (vii) an instruction clarifying that Petitioner began the sentencing phase of the trial under the presumption that no aggravating circumstances existed in his case; (viii) an instruction that the first degree murder conviction itself is not an aggravating circumstance; (ix) an instruction clarifying that evidence put on to establish mitigating circumstances cannot be used to establish aggravating circumstances.

(6) Counsel failed to seek an instruction establishing that lingering doubt regarding Petitioner's guilt may serve as a non-statutory mitigating circumstance.

(7) Counsel failed to seek an instruction establishing that doubts regarding the appropriate sentence are to be resolved in favor of a life sentence.

(8) Counsel failed to seek an instruction establishing that the jury may base its decision on mercy, sympathy and compassion.

(9) Counsel failed to file a proposed verdict form that listed all mitigating circumstances raised by the evidence, statutory and non-statutory, and which required to jury to specifically state what mitigating circumstances were found to exist by any juror, and failed to object to the verdict form used by the court.

Had Counsel fulfilled this duty[,] prejudicial and/or illegal jury instructions may have been kept from the jury and accurate, fair instructions may have been presented. Moreover, an appropriate verdict form would have preserved issues for appeal and collateral attack.

(h) Counsel failed to file pre-trial motions seeking the right to allocution for Petitioner. Had Counsel fulfilled this duty Petitioner may have been ·able to speak for his own life, providing valuable insight into his life history and background.

(i) Counsel failed to file pre-trial motions seeking to limit the state's proof at the sentencing hearing to specific aggravating circumstances. See Cozzolino v. State, 584 S.W.2d 765, 767-68 (Tenn. 1979). Had Counsel fulfilled this duty, improper and prejudicial evidence presented by the state during the sentencing may have been excluded.

(j) Counsel failed to timely subpoena witnesses or evidence. Tenn. R. Crim. P. 17. Had Counsel fulfilled this duty, valuable evidence would have been available to support defense theories and mitigation.

(k) Counsel failed to properly file motions to preserve the testimony produced at the preliminary hearing. Had they

done so, valuable impeachment testimony would have been preserved for future use.

(l) Counsel failed to file pre-trial sufficient motions challenging Petitioner's illegal arrest, detention, and interrogation in Texas, and his subsequent transfer from Texas to Tennessee. Had Counsel done so, Petitioner's indictment may have been dismissed and/or all evidence gathered pursuant to Petitioner's illegal arrest and interrogation would have been suppressed.

(m) Counsel failed to file pre-trial motions challenging the constitutionality of Tennessee's murder statute. Had Counsel fulfilled this duty Petitioner's indictment may have been dismissed and/or these constitutional issues would have been preserved in the record for consideration on appeal and in post-conviction. Specifically, Counsel did not file motions challenging the constitutionality of Tennessee's murder statute on these grounds:

(1) Tennessee's murder statute is applied in a discriminatory manner, unfairly affecting racial, gender, geographic, economic and political classes.

(2) Tennessee's murder statute has produced violations of equal protection guarantees of the state and federal constitutions because it does not provide uniform standards for qualifying jurors for service in murder juries.

(3) Tennessee's murder statute was vague and failed to fulfill the requirements of Article II, § 17 of the Tennessee Constitution, which prohibits the enactment of any bill which embraces more than one subject which is to be expressed in the title of the bill. Tenn. Code Ann. § 39-13-202 contains more than one subject and the title of the statute gives no notice of some of the subjects addressed by the statute. State v. Hailey, 505 S.W.2d 712 (Tenn. 1974).

(n) Counsel failed to file a pre-trial motion seeking a bill of particulars pursuant to Tenn. R. Crim. P. 7(c). Had counsel fulfilled this duty they would have been able to identify evidence supporting viable defense theories and would have

been better equipped to rebut the state's case.

(o) Counsel failed to file adequate pre-trial motions seeking the state's compliance with constitutional, statutory and local rules governing the disclosure of discovery. Had Counsel fulfilled this duty they would have obtained all of the available evidence, some of which would have supported viable defense theories and some of which would have impeached state witnesses. Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963); California v. Trombetta, 467 U.S. 479, 104 S. Ct. 2528, 81 L.Ed.2d 413 (1984); Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2574, 91 L.Ed.2d 305 (1986); Tenn. R Crim. P. 16.

(p) Counsel failed to file adequate pre-trial motions and motions in limine seeking special voir dire rules, including but not limited to the right to submit a jury questionnaire and the right to conduct individual voir dire. State v. Claybrook, 736 S.W.2d 95 (Tenn. 1987). Had Counsel fulfilled this duty they would have been able to develop the information necessary to properly select the jury.

(q) Counsel failed to file pre-trial motions challenging the legality and constitutionality of the process by which the grand and petit juries were selected in Petitioner's case. Specifically, Counsel failed to assert that the venire did not represent a cross-section of the community. Had Counsel fulfilled this duty the ·indictment in this case may have been dismissed and the jury ultimately seated in Petitioner's case would have been more free of biases for the prosecution.

(r) Counsel failed to file objections to the jury instructions proffered by the state and given by the court and failed to file proposed jury instructions, including but not limited to the following:

(1) Counsel failed to object to jury instructions which shifted the burden of proof of an element of the crime to the Petitioner.

(2) Counsel failed to object in a pre-trial motion to jury instructions which required the jury to presume the truthfulness of witnesses, thereby violating the jury's

prerogative to assess the credibility of witnesses and determine facts.

(3) Counsel failed to request in a pre-trial motion that the court instruct the jury on the elements of all lesser included offenses.

(4) Counsel failed to object to jury instructions that improperly defined premeditation and the presumption of innocence.

(5) Counsel were ineffective for not objecting to the failure to instruct the jury that it must find, as an element of the (i)(5) aggravating factor of "heinous atrocious or cruel (HAC)," that the Petitioner *intended* to inflict serious physical abuse. Absent such instructions, the HAC aggravating circumstance found by the jury in this case was unconstitutional. Wade v. Calderon, 29 F.3d 1312, 1320 (9th Cir.), *cert. denied*, 115 S. Ct. 923 (1995). The Petitioner asserts that trial counsel was constitutionally ineffective under the Sixth Amendment to the United States Constitution and Article I, § 9 of the Tennessee Constitution for not requesting such a clarifying instruction.

Had Counsel fulfilled this duty prejudicial and/or illegal jury instructions may have been kept from the jury and accurate, fair instructions may have been presented in their place.

(s) Counsel failed to timely subpoena witnesses or evidence. See Tenn. R. Crim. P. 17. Had Counsel fulfilled this duty, valuable evidence would have been available at the trial to support viable defense theories.

(t) Counsel failed to file an adequate motion for judgment of acquittal. Had Counsel fulfilled this duty, the court would have entered a judgment of acquittal regarding the premeditated murder charge in this matter.

(u) Counsel failed to file a motion seeking an order which would have required the state to elect which of two murder counts as to each deceased would go to the jury. Had Counsel fulfilled this duty[,] they would have been able to more narrowly present a defense[,] and the court may have

dismissed the case against Petitioner.

(v) Counsel failed to file necessary post-trial motions, including but not limited to:

(1) Counsel failed to file adequate motions seeking a continuance of the date for filing a motion for new trial and for the hearing on the motion for new trial. Counsel failed to secure the time necessary to adequately investigate, develop and present new evidence that supported viable defense theories.

(2) Counsel failed to file a motion seeking production of a complete transcript of the trial prior to the date for filing a motion for new trial.

(3) Counsel failed to file an adequate and comprehensive motion for new trial, neglecting to assert significant evidence and numerous legal issues.

Had Counsel fulfilled this duty[,] the court may have granted a motion for new trial. Moreover, counsel would have preserved additional issue[s] for appeal and collateral review which would have resulted in Petitioner's being relieved from his conviction and sentence.

(w) Counsel failed to file a motion to dismiss and/or a motion to arrest the judgment on the ground that Tennessee's murder statute was unconstitutional.

8. Counsel failed to develop and pursue a comprehensive defense theory for the trial. (ABA Death Penalty Guidelines 11.7.l(A) and (B)). Significant evidence which supported a viable defense theory, including Petitioner's crime being that of mansla[u]ghter or possibly insanity, was available to Counsel.

9. Counsel failed to competently select the jury for the trial (ABA Death Penalty Guidelines l l.7.2(A) and (B)), including but not limited to:

(a) Counsel failed to conduct an adequate voir dire which would have exposed biases prejudicial to Petitioner which were held by some of the jurors: failing to discover jurors who were relatives and close friends of law enforcement officials, failing to discover jurors who had been victims of crime or were close to crime victims. Had

Counsel fulfilled this duty[,] they would have been able to more effectively exercise peremptory strikes to exclude jurors with biases against Petitioner.

(b) Counsel failed to challenge, for cause, those jurors who held some kind of bias against Petitioner, his case, or any class or group to which he belongs. Had Counsel fulfilled this duty[,] the jurors with biases against Petitioner would have been excluded and Petitioner's peremptory strikes could have been strategically applied.

(c) Counsel failed to object to the state's discriminatory use of its peremptory challenges to strike African-Americans, men, poor people or the unemployed, and other cognizable groups. Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986); State v. Butler, 795 S.W.2d 680 (Tenn. Crim. App. 1990). Had Counsel fulfilled this duty[,] the jury in Petitioner's case would have represented a fair cross-section of the community.

(d) Counsel failed to conduct an adequate voir dire, especially with respect to the "death qualification" of the jurors. Counsel failed to object to the exclusion of jurors who held general opposition to the death penalty and failed to properly voir dire those jurors in an effort to rehabilitate them as viable panelists. In the same vein, Counsel failed to seek to exclude jurors whose opinions would lead them to impose the death penalty in every case. Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L.Ed.2d 776 (1968). Had Counsel fulfilled this duty[,] Petitioner's jury would have been composed of a fair cross-section of society, including those with reservations about capital punishment, a fact relevant to the guilt/innocence phase of the trial because it is well established that jurors who are inclined to impose the death penalty are also more inclined to convict.

(e) Counsel failed to object to the state's incorrect presentation, during voir dire, of the definitions of the elements of the charge, burdens of proof, and definitions of sentencing terms.

10. Counsel failed to competently argue motions at the pre-trial and post-trial motions hearings. Specifically, Counsel failed to present evidence in support of the various motions. Counsel also failed to cite legal authority in support of some of the various motions.

11. Counsel did not competently perform during opening and closing arguments during the guilt/innocence phase of the trial, including but not limited to:

(a) Counsel failed to object to the state's improper, inflammatory, prejudicial, inappropriate and misleading or inaccurate statements concerning the law, the evidence and Petitioner during opening and closing arguments. Had Counsel fulfilled this duty[,] the court may have corrected the errors in the state's comments and presentation of evidence.

(b) Counsel failed to adequately and accurately argue the evidence and law in their opening and closing arguments to the guilt/innocence phase of the trial. Had Counsel fulfilled this duty the jury would have been better exposed to the defensive theory that this case was manslaughter or that the Defendant was insane at the time of the commission of the offense.

12. Counsel failed to adequately object to the state's presentation of prejudicial, misleading, false and inappropriate evidence at the guilt/innocence phase of the trial. Counsel also failed to adequately object to the state's inappropriate methods of introducing evidence at the guilt/innocence phase of the trial, including but not limited to the state's extensive practice of leading witnesses on direct-examination. Counsel did not move for a mistrial on the basis that the state's extensive practice of leading witnesses rendered the state's evidence unreliable and the entire proceeding fundamentally flawed.

13. Counsel failed to adequately cross-examine the state's witnesses during the guilt/innocence phase of the trial. Significant opportunities existed for Counsel to demonstrate the falsity of the testimony of the state's witnesses and to impeach the credibility of the state's witnesses. (ABA Def. Funct. 4-7.6). Had Counsel fulfilled this duty[,] the jury may have concluded that the state had not met its burden of proof.

14. Counsel failed to present, during Petitioner's case at the guilt/innocence phase of the trial, significant evidence in existence at that time which supported viable defense theories, including but not limited to: manslaugh[t]er or insanity.

15. Counsel failed to conduct post-trial juror interviews, in order to develop potential issues for Petitioner's motion for a new trial.

16. Counsel failed to raise the objections necessary to preserve issues for appellate review. Had Counsel fulfilled this duty, error in Petitioner's trial proceedings may have been available for consideration on appeal and in post-conviction proceedings.

17. Counsel failed to properly challenge the admissibility of the testimony of

the minor children who testified in this case. Counsel failed to properly object and make the court aware of the proper test for the admissibility of the testimony of children of tender years.

18. Counsel failed to withdraw from this case. At the time of trial, a conflict had developed between counsel and the Petitioner so as to cause Petitioner to file a grievance against counsel with the Tennessee Board of Professional Responsibility. Knowing this, counsel failed to try to have themselves properly excused from representation. The subsequent performance reflects this hostility toward Petitioner.

19. Counsel failed to secure the preliminary hearing testimony. Failing to do so left valuable impeachment testimony of the state's witnesses unusable.

20. Counsel held numerous hearings without fully informing Petitioner.

21. Counsel failed to properly withdraw a change of venue motion when instructed to do so by Petitioner. Failing this caused this trial to be tried in Madison County, where publicity and conditions were far worse than Henderson County, Tennessee. Counsel failed to object to the trial proceeding in Madison County. Had Counsel acted consistent with the wishes of their client, a different result would have been obtained.

22. Counsel failed to properly introduce much testimony that should have been known to them at the time of trial. Specifically, mitigation investigations had been done which had alerted them to much mitigation testimony which was ignored by them. Additionally, Counsel failed to introduce the dying declaration of Petitioner's brother. Had they properly used this testimony and presented it in a history to a psychiatrist, the outcome of this trial would have been different.

23. Counsel failed to properly inform the Petitioner of the consequences of testifying in his own behalf. Had they done so, Petitioner would have testified and the result of the trial would have been different.

24. Counsel asked for continuances against the wishes of Petitioner. Petitioner desired a speedy trial and was denied one because of the actions of counsel.[3]

(ECF No. 144-2 at PageID 2077–98.)

An evidentiary hearing was held over the course of four days: May 15–16, 2002,

[3] There appear to be additional allegations of ineffective assistance of trial counsel, but the top of the page seems to be cut off on the copy scanned into CM-ECF. (*See* ECF No. 144-2 at PageID 2098–99.)

September 4, 2002, and November 4, 2002. (*See* ECF No. 144-7 at PageID 2822.) On February 20, 2003, the post-conviction trial court denied post-conviction relief. (*Id.* at PageID 2822–74.)

C. Post-Conviction Appeal

Hall filed a notice of appeal on March 4, 2003. (*Id.* at PageID 2875.) The Tennessee Court of Criminal Appeals addressed the following ineffective assistance of trial counsel claims on appeal of the denial of post-conviction relief:

1. failure to properly present an intoxication defense;
2. failure to establish the victim as the aggressor;
3. failure to preserve the testimony of Jeff Hall;
4. failure to submit evidence of the petitioner's habit of disconnecting telephone lines;
5. failure to adequately present the mental health issue;
6. failure to present proof that the petitioner was a good father and evidence of other good acts of the petitioner;
7. failure to develop a defense strategy; and
8. failure to interview all potential witnesses.

Jon Hall v. State, No. W2003-00669-CCA-R3-PD, 2005 WL 22951, at *27 (Tenn. Crim. App. Jan. 5, 2005) (*See* ECF No. 144-17 at PageID 3952–57.) On January 5, 2005, the Tennessee Court of Criminal Appeals affirmed the decision of the post-conviction trial court. *Hall*, 2005 WL 22951 at *1, *38. (ECF No. 144-19.) Petitioner's application for permission to appeal to the Tennessee Supreme Court was denied on June 20, 2005. (*Id.*)

D. Habeas Petition

The inmate alleged ineffective assistance of trial counsel in Claim 13 of his amended habeas petition, specifically alleging that defense counsel:

1. Failed to obtain and present evidence from Hall's family and other sources (including Carol Alexander, Kathy Hugo, Debbie Davis, Jay Hall, Jeff Hall, Sheryl Arbogast, Joel Hall, Beth Hall, Carla Ulery, Scott Smith, school records) respecting Mr. Hall's social history (¶ 259);

2. Failed to obtain and present evidence from Hall's family, friends, acquaintances, doctors, prison and jail personnel providing an explanation for the homicide (¶ 260);

3. Failed to obtain and present evidence that at the time of the offense, a biologically driven deficit interfered with his ability to exercise reflection and judgment for his actions (¶ 261);

4. Failed to obtain a change of venue (¶ 262.1);

5. Failed to keep the trial in Henderson County (¶ 262.2);

6. Selected a jury consisting of eleven women and one man (¶ 262.3);

7. Failed to correct District Attorney Woodall's voir dire intimation that a first-degree murder required a death sentence (¶ 262.4);

8. Failed to correct Judge LaFon's statement that the jury sentence would be advisory (¶ 262.5);

9. Failed to correct Judge LaFon's statement that the only purpose of the trial would be to ascertain guilt (¶ 262.6);

10. Agreed to the striking for cause of juror Bozza (¶ 262.7);

11. Failed to object to Billie Hall's family members sitting with prospective jurors during voir dire (¶ 262.8);

12. Failed to establish that Hall disconnected telephone lines to Billie Hall's house so Billie Hall wouldn't call the police and inform them that Hall was violating a protection order (¶ 262.9);

13. Failed to establish that Chris Dutton's testimony was a lie (¶ 262.10);

14. Failed to establish that the testimonies of Hall's daughters were not accurate (¶ 262.11);

15. Failed to demonstrate that crime scene photographs presented to the jury were inaccurate (¶ 262.12);

16. Failed to establish that Dr. O.C. Smith's testimony was inaccurate and unfounded (¶ 262.13);

17. Failed to preserve Jeff Hall's testimony about [Jon] Hall's mental state in the days and weeks prior to the Billie Hall homicide (¶ 262.14);

18. Failed to present at the sentencing stage the testimony of Sheryl Arbogast about what Jeff Hall told her about [Jon] Hall's mental state in the days and weeks prior to the homicide (¶ 262.15);

19. Failed to establish that [Jon] Hall was not capable of assisting in his defense (¶ 262.16);

20. Told Judge LaFon that Hall had knowingly and voluntarily waived his right to testify (¶ 262.17);

21. Failed to recognize the difference between premeditation and deliberation under Tennessee law (¶ 262.18);

22. Inaccurately referred to a Bible passage respecting the crucifixion of Jesus Christ (¶ 262.19);

23. Failed to challenge proportionality review (¶ 262.20); and

24. Failed to raise at trial and on appeal any claim that "this Court rules is procedurally defaulted." (¶ 264).

(ECF No. 15 at 55–61.) Hall alleged that trial counsel were rendered ineffective by the State's pre-trial manufactured evidence that Michelle Hays Elliott said that he said "I'm going to kill that bitch;" that Petitioner told Latasha Whittington-Barrett that he killed Billie Hall to have sole possession of money he expected to accrue from a lawsuit; and that the inmate told Darlene Britain that he intended to grind Billie Hall into "hamburger meat." (ECF No. 15 at 60–61, ¶ 263.)

E. Habeas Proceedings Related to Petitioner's Ineffective Assistance of Trial Counsel Claims

Respondent argued that Petitioner raised only eight of the twenty-five grounds of ineffective assistance of counsel alleged in his habeas petition in the Tennessee state courts. (ECF No. 19 at 30.) Respondent filed a motion for judgment on the pleadings in this case. (ECF

No. 90-1.) He averred that, in the Tennessee state courts, Petitioner raised ineffective assistance of trial counsel claims alleging that counsel failed to:

(1) properly present an intoxication defense;
(2) establish the victim as the aggressor;
(3) preserve the testimony of Jeff Hall;
(4) present evidence of the petitioner's habit of disconnecting telephone lines;
(5) properly present the mental health issue;
(6) present evidence that petitioner was a good father and evidence of other good acts;
(7) develop a defense strategy; and
(8) interview all potential witnesses.

(*Id*. at 26.) Warden Carpenter insisted that these claims were "arguably interspersed through petitioner's ineffective assistance of counsel claim," but all other claims not contained within these eight claims were procedurally defaulted. (*Id.*)

The issues identified by Respondent are those specified in the Tennessee Court of Criminal Appeals' decision affirming the post-conviction trial court. *See Hall*, 2005 WL 22951, at *27. This Court examined those claims that were clearly exhausted on the merits. (ECF No. 110 at 88.)

Petitioner maintained that the state failed to meet its burden of showing that portions of his ineffective assistance of counsel claims (Claim 13) were procedurally defaulted. (ECF No. 100 at 121–23.)[4] This Court held that Petitioner failed to demonstrate cause and prejudice with regard to the unexhausted ineffective assistance of counsel claims:

> 8. Remaining Ineffective Assistance of Counsel Claims
>
> Petitioner's claims in his habeas petition, to the extent that they have not been addressed above, are procedurally defaulted because Petitioner failed to exhaust these claims and failed to demonstrate cause and prejudice or that a miscarriage of justice would result if the Court fails to review these claims.

[4] Petitioner did not argue ineffective assistance of post-conviction counsel as cause to excuse the procedural default.

(ECF No. 110 at 123.) This Court addressed the allegations in ¶¶ 259–62 of the Amended Petition on the merits. (*Id.* at 88–123.)[5]

II. *MARTINEZ & TREVINO*

In 2012, the United States Supreme Court issued its decision in *Martinez*, which recognized a narrow exception to the rule stated in *Coleman*[6] "[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding . . . ." *Martinez*, 132 S. Ct. at 1320. In such cases, "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Id.* The Supreme Court emphasized that "[t]he rule of *Coleman* governs in all but the limited circumstances recognized here. . . . It does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial . . . ." *Id.* The requirements that must be satisfied to excuse a procedural default under *Martinez* are as follows:

> (1) the claim of "ineffective assistance of trial counsel" was a "substantial" claim; (2) the "cause" consisted of there being "no counsel" or only "ineffective" counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the "initial" review proceeding in respect to the "ineffective-assistance-of-trial-counsel claim"; and (4) state law *requires* that an "ineffective assistance of trial counsel [claim] ... be raised in an initial-review collateral proceeding."

Trevino, 133 S. Ct. at 1918 (emphasis and revisions in the original).

Martinez arose under an Arizona law that did not permit ineffective assistance claims to be

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[5] The Court made specific references to ¶¶ 259, 260, 260.1, 260.2, 260.3, 260.3.4, 260.6, 261, 262.9, 262.14, 262.15 in the order denying the petition. (*Id.* at 88, 91, 99, 102, 108, 111, 117, 121.)

[6] *Coleman v. Thompson*, 501 U.S. 722 (1991).

raised on direct appeal. In its subsequent decision in *Trevino*, the Supreme Court extended its holding in *Martinez* to states in which a "state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal . . . ." *Id.* at 1921. Thus, *Trevino* modified the fourth requirement stated for overcoming a procedural default. Recently, the Sixth Circuit in *Sutton v. Carpenter*, 745 F.3d 787 (6th Cir. 2014), held that ineffective assistance of state post-conviction counsel can establish cause to excuse a Tennessee prisoner's procedural default of a substantial federal habeas claim that his trial counsel was constitutionally ineffective. *Id.* at 789; *Wallace v. Sexton*, 570 F. App'x 443, 453 (6th Cir. 2014) ("Tennessee's procedural framework directs defendants to file ineffective-assistance claims in post-conviction proceedings rather than on direct appeal, and thus it falls into the *Martinez–Trevino* framework.").

In *Martinez*, the Supreme Court stated, "[t]o overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." 132 S. Ct. at 1318–19 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003)); *see Miller-El*, 537 U.S. at 336 ("[R]easonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'") (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). *Martinez* elaborated on what it meant for a claim to be "substantial":

> When faced with the question whether there is cause for an apparent default, a State may answer that the ineffective-assistance-of-trial-counsel claim is insubstantial, *i.e.*, it does not have any merit or that it is wholly without factual support, or that the attorney in the initial-review collateral proceeding did not perform below constitutional standards.

132 S. Ct. at 1319. *Martinez* requires that a petitioner's claim be rooted in "'a potentially legitimate claim of ineffective assistance of trial counsel.'" *Cook v. Ryan*, 688 F.3d 598, 610 (9th Cir. 2012) (quoting *Lopez v. Ryan*, 678 F.3d 1131, 1138 (9th Cir. 2012)), *cert. denied*, 133 S. Ct. 55 (2012). The petitioner must show a "substantial" claim of ineffective assistance, and this requirement applies as well to the prejudice portion of the ineffective assistance claim. *McGuire v. Warden, Chillicothe Corr. Inst.*, 738 F.3d 741, 752 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 998 (2014). *See Hoak v. Idaho*, No. 1:09-CV-00389-EJL, 2013 WL 5410108, at *7 (D. Idaho Sept. 25, 2013) ("*Martinez* requires the district court to review but not determine whether trial counsel's acts or omissions resulted in deficient performance and in a reasonable probability of prejudice, and to determine only whether resolution of the merits of the claim would be debatable among jurists of reason and whether the issues are deserving enough to encourage further pursuit of them."); *see also Gunter v. Steward,* No. 2:13-CV-00010, 2014 WL 2645452, at *13 (M.D. Tenn. June 13, 2014) ("[I]n many habeas cases seeking to overcome procedural default under *Martinez*, it will be more efficient for the reviewing court to consider in the first instance whether the alleged underlying ineffective assistance of counsel was 'substantial' enough to satisfy the 'actual prejudice' prong of *Coleman*."). The Supreme Court and the Sixth Circuit have not provided guidance as to how district courts reviewing habeas petitions are to implement the rulings in *Martinez* and *Trevino*. *See id.* at *12.

This Court must take into account the standards related to ineffective assistance of trial counsel to determine whether a claim is "substantial." To be "substantial" under *Martinez*, a claim must have "some merit" based on the controlling standard for ineffective assistance of counsel stated in *Strickland v. Washington*, 466 U.S. 668 (1984). 132 S. Ct. at 1318–19. To demonstrate deficient performance by counsel, a petitioner must demonstrate that "counsel's

representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687–88. "A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington v. Richter*, 562 U.S. 86, 194 (2011) (citing *Strickland*, 466 U.S. at 689). "The challenger's burden is to show 'that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" *Id.* (quoting *Strickland*, 466 U.S. at 687). To demonstrate prejudice, a prisoner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.[7] "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.'" *Richter*, 131 S. Ct. at 787–88 (quoting *Strickland*, 466 U.S. at 693). "Counsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Id.* (quoting *Strickland*, 466 U.S. at 687). "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

III. ANALYSIS

Hall argues that *Martinez* and *Trevino* apply to:

- procedurally defaulted claims of ineffective assistance of trial counsel;
- procedurally defaulted claims of ineffective assistance of appellate counsel, prosecutorial misconduct, and/or withholding of exculpatory evidence; and
- unexhausted assertions of ineffective assistance of counsel as cause for the default

[7] "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant[.]" *Strickland*, 466 U.S. at 697. If a reviewing court finds a lack of prejudice, it need not determine whether, in fact, counsel's performance was deficient. *Id.*

of other substantive claims.

(ECF No. 136 at 17–18.) Petitioner outlines the claims that Respondent or the Court have found to be procedurally defaulted and asserts that he can show cause and prejudice under *Martinez* for such issues. (*Id.* at 18–20.)[8]

A. Ineffective Assistance of Appellate Counsel Claims (Amended Petition ¶ 264)

The allegation in Claim 13, Paragraph 264, is a general assertion of ineffective assistance of counsel for failure to raise at trial and/or on appeal any claim that this Court rules is procedurally defaulted. (ECF No. 15 at 61.) The holding in *Martinez* does not encompass claims that appellate counsel was ineffective. *See Martinez*, 132 S. Ct. at 1319 ("*Coleman* held that an attorney's negligence in a postconviction proceeding does not establish cause, and this remains true except as to initial-review collateral proceedings for claims of ineffective assistance of counsel at trial."). The Sixth Circuit in *Hodges v. Colson*, 727 F.3d 517, 531 (6th Cir. 2013), stated "[u]nder *Martinez*'s unambiguous holding our previous understanding of *Coleman* in this regard is still the law—ineffective assistance of post-conviction counsel cannot supply cause for procedural default of a claim of ineffective assistance of appellate counsel." *But see Ha Van Nguyen v. Curry*, 736 F.3d 1287, 1295–96 (9th Cir. 2013) (extending the equitable principle in *Martinez* to Sixth Amendment claims of appellate-counsel ineffective assistance). Petitioner is denied relief under *Martinez* to the extent he seeks review of his procedurally defaulted ineffective assistance of appellate counsel claims.

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[8] Hall refers to multiple claims of ineffective assistance of trial (Claim 13) and other "non-ineffectiveness" claims (Claims 1–9, 11, 14, 15, 18, and 19). (ECF No. 136 at 19.) However, he fails to make a specific argument about how *Martinez* allows him to overcome procedural default for each of these claims. The Court will only address those specific claims for which Petitioner has presented a *Martinez* argument.

B. "Non-Ineffectiveness" Claims

The inmate also contends that the "non-ineffectiveness" claims that the Court found to be procedurally defaulted should be reevaluated under *Martinez* because ineffective assistance of trial and/or appellate counsel provide cause for the default. (ECF No. 136 at 16–20.) He relies on Justice Scalia's dissent in *Martinez* to argue that the rationale of *Martinez* is not limited to ineffective assistance of trial counsel cases. (*Id.* at 15–16, 52–53.) Petitioner argues Scalia's rationale for the application of *Martinez* as it relates to his claims of prosecutorial misconduct, withheld exculpatory evidence, false testimony, and false evidence. (*See* ECF No. 15, Claims 4, 5, & 8, Amended Petition ¶¶ 227–40, 247–48; *see* ECF No. 136 at 52–53.) The Warden responds that the Supreme Court and Sixth Circuit have made clear that *Martinez* and *Trevino* do not apply to any type of claim other than for ineffective assistance of trial counsel. (ECF No. 140 at 17–18.)

Martinez is limited to ineffective assistance of trial counsel claims, *see* supra pp. 24–25. *See Martinez*, 132 S. Ct. at 1320; *see Moore v. Mitchell*, 708 F.3d 760, 784–85 (6th Cir. 2013) ("[T]he Court repeatedly emphasized the 'limited nature' of its holding, which 'addresse[d] only the constitutional claims' present where the state has banned a defendant from raising his ineffective assistance of trial counsel claim on direct appeal.") (quoting *Martinez*, 132 S. Ct. at 1320); *Gore v. Crews*, 720 F.3d 811, 816 (11th Cir. 2013) ("By its own emphatic terms, the Supreme Court's decision in *Martinez* is limited to claims of ineffective assistance of trial counsel that are otherwise procedurally barred due to the ineffective assistance of post-conviction counsel."). The Court will not give *Martinez* an expansive holding to grant Petitioner merits review of procedurally defaulted "substantive, non-ineffectiveness claims" for which he argues ineffective assistance of trial counsel "as cause" to excuse a procedural default.

C. Ineffective Assistance of Trial Counsel Claims

1. Failure to Establish Petitioner's Incompetence to Stand Trial (Amended Petition ¶ 262.16)

Hall alleges that trial counsel "[f]ailed to establish that Mr. Hall was not capable of assisting his defense." (ECF No. 15 at 60.) He asserts that the prosecution and his appointed counsel saw red flags indicating that he was not competent to stand trial. (ECF No. 136 at 20–30.) Petitioner argues that that Dr. J. Douglas Bremner, a professor of psychiatry and behavioral sciences at Emory University School of Medicine, found that he was not competent to stand trial "[i]n fact and law" "because he did not have the ability to consult with his many lawyers with a reasonable degree of rational understanding so as to assist them in preparing his defense and he did not [have] a rational as well as factual understanding of the proceedings against him." (ECF No. 136 at 21; *see* ECF No. 136-2 at PageID 1735.) The inmate states that Terry A. Maroney, a tenured professor of law and a professor of medicine, health, and society at Vanderbilt University, stated:

> I saw a number of red flags that suggest that Mr. Hall has been, and likely remains, adjudicatively incompetent. In my view, it is very likely that he suffers from both cognitive distortions and major emotional pathology. Either of these factors might in isolation be sufficient to destroy competence. In combination, which is what I perceive to be likely in Mr. Hall's case, they are even more pernicious.

(ECF No. 136 at 21; *see* ECF No. 136-3 at PageID 1738.) Petitioner relies on Dr. Ruben Gur's findings that he has substantial structural and functional brain damage, that 61% of his brain regions function abnormally, and that he was likely unable "to modulate his emotional behavior in response to situational demands." (ECF No. 136 at 23; *see* ECF Nos. 102-34 through 102-36.) He contends that the "real world behaviors and cognitive abilities" resulting from the brain damage were Petitioner's striking behaviors including belligerence and agitation with his counsel,

the judge, and the victim's sister. (ECF No. 136 at 23–25; *see* ECF No. 136-4.)

Petitioner concludes that he was "simply unable to communicate with his attorneys, and they with him," suffered distorted perceptions about the criminal process, could not identify his own best self-interest, and was unable to reason through options. (ECF No. 136 at 25–28.) He claims that the effect of his inability to communicate or reason was "particularly devastating given his lack of a criminal history," the murder arising from a tempestuous marriage, and the death penalty. (*Id.* at 27–28.) The inmate insists, based on Bremner's observations, that his behavior was "not willful but evidence of Mr. Hall's incapacity for logical thought and his cognitive deficits and emotional misperceptions." (*Id.* at 28; ECF No. 136-2 at PageID 1734.)

Petitioner argues that there is significant medical evidence of his brain damage and that the behavioral evidence of his inability to work with his attorneys is even more compelling. (ECF No. 136 at 28.) He submits that the legal principles governing competency to stand trial have been settled for decades and the facts demonstrate that he was not competent to stand trial at every stage of the proceedings including in post-conviction. (*Id.* at 28–30.) Petitioner asserts that the issue of competence was never raised, never investigated with prior counsel, and appropriate mental health testing was never pursued. (*Id.* at 29–30.) Hall maintains that he has a substantial claim that trial counsel was ineffective for failing request a competency hearing and to establish that he was incompetent to stand trial. (*Id.* at 30.)

The Warden counters that Petitioner raised a related claim of ineffectiveness for failure to properly evaluate Petitioner's mental health which was found to be meritless by the post-conviction court and on appeal of the denial of post-conviction relief, *see* supra pp. 20 and 23. (ECF No. 140 at 18 n.6.); *See Hall*, 2005 WL 22951, at *31–34. Respondent contends that Petitioner has "navigated the Tennessee Court system raising legal claims through numerous *pro*

se appeal*s"* and "littered" the trial court technical record with "his reasonably cogent *pro se* legal analysis." (ECF No. 140 at 19.) According to Respondent, Petitioner was evaluated by five psychological experts throughout his state court proceedings, none of whom made findings that supported a theory of incompetence. (*Id.*); *See Hall*, 2005 WL 22951, at *3, 12, 14–18. Thus, Petitioner's claims that he was not competent to stand trial are not credible and not supported by the evidence. (ECF No. 140 at 19.)

Various attorneys were appointed to represent Hall throughout the pretrial proceedings. (*See* ECF No. 136-8 at PageID 1749–50.) He provides the declaration of pre-trial counsel Stephen Spracher, Carthel Smith, and Michael Mosier to support his claim that he was incompetent to stand trial. (ECF Nos. 136-5, 136-8, & 136-10.) Jesse Ford and Clayton Mayo were the attorneys who represented Petitioner at trial. He was evaluated by Western Mental Health and also by Middle Tennessee Health Institute and determined to be competent to stand trial. *Hall*, 2005 WL 22951, at *8. Lynn Zager, a clinical psychologist, also worked with defense counsel and made no determination that Petitioner was incompetent. *See id.* at *3. Further she found no evidence to support an insanity defense. *See id.* at *10. Additionally, in the seventeen years since Petitioner's trial, he has been evaluated by neuropsychologist Pamela Auble, psychiatrist Keith Caruso, and psychiatrist Kimberly Stafford, none of whom expressed concerns about Petitioner's competence. *Id.* at *14–21. It was reasonable for Petitioner's trial counsel to rely on the mental health professional's determination that their client was competent to stand trial.

Although Bremner now provides a declaration in support of Petitioner's ineffective assistance claim, Bremner's September 2008 report was filed as an exhibit in response to the motion for judgment on the pleadings and did not address the inmate's competence. (*See* ECF No. 102-39.) Bremner addressed the effect of childhood neglect and abuse on the development of

Petitioner's brain and whether he had the ability to commit first-degree premeditated murder. (*Id.* at PageID 1269, 1277.) It was not until the August 27, 2013 declaration that Bremner was "informed of facts about Mr. Hall's representation and his behaviors" and came to the conclusion that Petitioner was incompetent to stand trial. (ECF No. 136-2 at PageID 1732.) Bremner does not appear to have reviewed the conclusions of mental health professionals who evaluated Petitioner at or near the time of his trial to determine his competence at the time of trial.[9] The professor's conclusions about Petitioner's competence come nine years after the trial of this matter and with no indication that Bremner has ever met Petitioner. (*See* ECF No. 102-39 at PageID 1269 (the terms of engagement were "to review certain psychological evaluations . . ., including a neuropsychological report by Dr. Ruben Gur, an overview of Mr. Hall's personal history, and the facts and circumstances surrounding the death of Mr. Hall's wife . . . .")); *see also* ECF No. 136-2 at PageID 1732 ("In addition to the information set out in the 2008 Report, I have been informed of facts about Mr. Hall's representation about his behaviors, information upon which psychiatrists customarily rely to reach a medical opinion. . . . I also had brief telephone conversations with Mr. Hall's federal counsel.").

Given the initial determination of competence, the opinions of mental health professionals that evaluated Petitioner throughout his state court proceedings, and no finding or even question of mental incompetence being raised during that time, the Court does not find that trial counsel's performance was unreasonable in relying on the opinions of mental health professionals and failing to establish that Petitioner was incompetent to stand trial. Petitioner's claim of ineffective assistance of counsel related to failure to establish Petitioner's incompetence is not substantial.

[9] Bremner reviewed a summary of Auble's 2002 testing and a 2008 letter from Gur. (*See* ECF No. 102-39 at PageID 1269.)

The claim is procedurally defaulted and DENIED.

2. Jury Instructions (Amended Petition ¶¶ 250, 250.1, 250.2, 250.3, 264)

Hall claims that *Martinez* applies to his otherwise procedurally-defaulted challenges and ineffective assistance claims involving jury instructions in which the trial court improperly and unconstitutionally limited consideration of intoxication evidence, misdefined "intentional", and improperly defined "reasonable doubt." (ECF No. 136 at 30.) Respondent asserts that Petitioner raised the failure to object to jury instructions as a claim in the initial review post-conviction proceeding. (ECF No. 140 at 18.) He avers that *Martinez* does not apply to appellate counsel's failure to pursue a claim on post-conviction appeal. (*Id.*) Respondent further points out that this Court denied Petitioner's freestanding jury instruction claims because the inmate was not prejudiced from any error. (*Id.* at 19; *see* ECF No. 110 at 65–69.)

a. The Intoxication Instruction (Amended Petition ¶¶ 209.19.3 & 250.3)

The allegation in Claim 13 ¶ 264 of the Amended Petition is a general assertion of ineffective assistance of counsel for failure "to raise at trial and/or on appeal any claim that 'this Court rules is procedurally defaulted.'" (ECF No. 15 at 61.) Petitioner presents this argument in conjunction with Amended Petition ¶ 209.19.3 and Claim 9 ¶ 250.3, neither of which allege ineffective assistance of trial counsel. (*See* ECF No. 136 at 30–36; *see* ECF No. 15 at 43, 54.) Paragraph 209.19.3 is a factual allegation related to the jury instruction on intoxication:

> 209.19.3. Intoxication itself is generally not a defense to prosecution for an offense. If a person voluntarily becomes intoxicated and while in that condition commits an act which would be a crime if he or she were sober, he or she is fully responsible for his or her conduct. It is the duty of persons to refrain from placing themselves in a condition which poses a danger to others . . . . Intoxication is irrelevant to the issue of the essential element of the Defendant's culpable mental state. Judge LaFon said the last sentence of this quote twice.

(ECF No. 15 at 43.) Paragraph 250.3 states that, at the guilt stage, Judge LaFon "[g]ave an intoxication instruction that nullified Mr. Hall's intoxication defense." (*Id.* at 54.) As stated supra pp. 24, 29–30, *Martinez* is limited to ineffective assistance of trial counsel claims. Petitioner generically alleges a Sixth Amendment violation in Amended Petition ¶ 250.3, but fails to specifically include a claim of ineffective assistance of trial counsel in the Amended Petition. (*See* ECF No. 15 at 54.)[10]

Trial counsel's failure to object to jury instructions was raised in the initial post-conviction proceedings, *see* supra pp. 11–12. (*See* ECF No. 144-2 at PageID 2086–88.)[11] The inmate's post-conviction appellate counsel did not exhaust the claim on appeal, *see* supra p. 20. Because ineffective assistance of counsel related to the jury instructions was raised by post-conviction counsel in the initial-review collateral proceeding, *Martinez* does not apply.

Further, the claim is not "substantial" under *Martinez* because the Court determined that Petitioner did not suffer "substantial and injurious effect" from the intoxication jury instruction. (*See* ECF No. 110 at 69.) Without the ability to show prejudice, he is not entitled to *Martinez* relief. The allegation of ineffective assistance of counsel related to the intoxication jury instruction is procedurally defaulted and DENIED.

b. "Intentional" Jury Instruction (Amended Petition ¶¶ 209.19.2 & 250.2)

[10] Pursuant to Rule 2(c) of the Rules Governing Section 2254 Cases in the United States District Courts ("Habeas Rules"), Petitioner must "specify all grounds for relief available" and "state the facts supporting each ground."

[11] Petitioner's allegations of ineffective assistance of trial counsel that were raised in the post-conviction proceedings did not specifically relate to the intoxication jury instruction. (*See* ECF No. 144-2 at PageID 2086–88.) The post-conviction appellate court addressed the issue of whether counsel failed to present an intoxication defense properly. *See Hall*, 2005 WL 22951, at *20, 27–28.

Petitioner uses the general assertion of ineffective assistance of counsel for failure "to raise at trial and/or on appeal any claim that this Court rules is procedurally defaulted" under Claim 13 ¶ 264 to assert an ineffective assistance of counsel claim related to the jury instruction about intent. (*See* ECF No. 136 at 35–37; *see* ECF No. 15 at 61.) He argues that his trial and appellate counsel were ineffective for failing to properly challenge the definition of "intentional" because it relieved the prosecution of its burden of proof. (*See* ECF No. 136 at 35.) In ¶ 250.2 of the Amended Petition, the inmate claims that Judge LaFon gave a jury instruction on intent that allowed the jury to find Petitioner intentionally killed Billie Hall when he only intended to strike her. (ECF No. 15 at 54.)[12] Paragraph 209.19.2 is a factual allegation that is tied to ¶ 250.2 and provides the jury instruction at issue:

> 209.19.2. A person acts intentionally with respect to the nature of his conduct or the result of his conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result;

(ECF No. 15 at 43.) The Court will not grant *Martinez* relief for Petitioner's allegations of a substantive trial error or ineffective assistance of appellate counsel related to this instruction, *see* supra pp. 28–30.

Hall generally posits a Sixth Amendment violation, but fails to specifically state a claim of ineffective assistance of trial counsel in the amended habeas petition. (*See* ECF No. 15 at 43, 54.) Trial counsel's failure to object to jury instructions directly related to "the burden of proof of an element of the crime" was raised in the initial post-conviction proceedings, *see* supra p. 14. (*See* ECF No. 144-2 at PageID 2091.) Petitioner's post-conviction appellate counsel did not exhaust

[12] To say that Petitioner merely intended to strike Billie Hall is an understatement. In addition to the drowning and manual strangulation, Billie Hall suffered a fractured nose, blunt trauma to the head, skin tears, bruises, scrapes to the chest, abdomen, genitals, extremities, arms, legs, and back with "eighty-three areas of separate wounds to the body indicat[ing] that the victim had received an extensive and painful beating." *Hall*, 1998 WL 208051, at *4.

the claim on appeal, *see* supra p. 20. Because ineffective assistance of counsel related to the jury instructions was raised by post-conviction counsel in the initial-review collateral proceeding, *Martinez* does not apply.

The jury instruction read:

> A person acts intentionally with respect to the nature of his conduct or the result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result.

(*See* ECF No. 136 at 36.) Petitioner argues that, in defining the essential element of "intentional," the instruction allowed the jury to find that Petitioner "intentionally" killed the victim merely by concluding that he intended to "engage in the conduct" that caused her death. (*Id.*) He maintains that this instruction is unconstitutional and that his claim has some merit and is substantial under *Martinez*. (*Id.* at 36–37.)

The Tennessee Supreme Court has held that a proper jury instruction defining "intentionally" would not include the nature-of-conduct and circumstances surrounding the conduct language. *State v. Faulkner*, 154 S.W.3d 48, 58 (Tenn. 2005). The court stated that first degree premeditated murder is a "result-of-conduct" offense, but found no authority that the erroneous instruction lessened the State's burden of proof. *Id.* at 58–61. Counsel cannot be deemed ineffective for failing to object to the jury instruction. *See Davidson v. State*, No. M2010-02663-CCA-R3-PD, 2013 WL 485222, at *39 (Tenn. Crim. App. Feb. 7, 2013), *aff'd in part, rev'd in part & remanded*, ___ S.W.3d ____, No. M2010-02663-SC-R11-PD, 2014 WL 6645264 (Tenn. Nov. 17, 2014), *petition for cert. filed*, No. 14-8522 (U.S. Feb. 23, 2015). Petitioner's claim that counsel's failure to object to the "intentional" jury instruction is also not substantial under *Martinez* because he cannot demonstrate prejudice.

The allegations related to the definition of "intentional" in the jury instructions are

procedurally defaulted and DENIED.

c. Reasonable Doubt Jury Instruction (Amended Petition ¶¶ 209.19.1 & 250.1)

Petitioner uses the general assertion of ineffective assistance of counsel for failure "to raise at trial and/or on appeal any claim that this Court rules is procedurally defaulted" under Claim 13 ¶ 264 to assert an ineffective assistance of counsel claim related to the "reasonable doubt" jury instruction. (*See* ECF No. 136 at 37–39.) Paragraph 209.19.1 is a factual allegation that provides the jury instruction that is connected to Claim 9:

> 209.19.1 Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability after such an investigation to let the mind rest easily as to the certainty of guilt. Reasonable doubt does not mean a capricious, possible or imaginary doubt. 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;

(ECF No. 15 at 43, 54.) Hall insists that Amended Petition ¶ 209.19.1 and Claim 9, ¶ 250.1 assert a claim of ineffective assistance of trial and appellate counsel related to the meaning of "reasonable doubt" and "moral certainty" as stated in the jury instruction. (*See* ECF No. 136 at 37–39; *see* ECF No. 15 at 43, 54.) The Court will not grant *Martinez* relief for Petitioner's allegations of a substantive trial error or ineffective assistance of appellate counsel related to this instruction, *see* supra pp. 28–30.

The inmate alleges a Sixth Amendment violation in Amended Petition ¶ 250.3, but fails to specifically state a claim of ineffective assistance of trial counsel in the Amended Petition. (*See* ECF No. 15 at 54.) His post-conviction counsel alleged that trial counsel failed to object to jury instructions related to reasonable doubt and moral certainty in the initial review post-conviction proceeding, *see* supra p. 11. (*See* ECF No. 140 at 18; ECF No. 144-2 at PageID 2086.) Petitioner's post-conviction appellate counsel did not exhaust the claim on appeal, *see* supra p. 20.

Because ineffective assistance of counsel related to the jury instructions was raised by post-conviction counsel in the initial-review collateral proceeding, *Martinez* does not apply.

Petitioner's argument that his claim related to the "reasonable doubt" jury instruction is substantial also fails. The Sixth Circuit has upheld the constitutionality of a similar reasonable doubt jury instruction. *Austin v. Bell*, 126 F.3d 843, 847 (6th Cir. 1997)[13]; *see Morris v. Bell*, No. 07-1184-JDB, 2011 WL 7758570, at *33–36 (W.D. Tenn. Sept. 29, 2011) (finding that the reasonable doubt penalty phase jury instruction had been upheld by the Sixth Circuit and the inmate's arguments were without merit). In *Coleman v. Mitchell*, 268 F.3d 417 (6th Cir. 2001), the Sixth Circuit held that "[c]haracterizing reasonable doubt as 'substantial doubt' or 'not a mere possible doubt' does not violate due process." *Id.* at 436–37 (citing *Victor v. Nebraska*, 511 U.S. 1, 5 (1994)); *see also White v. Mitchell*, 431 F.3d 517, 533–34 (6th Cir. 2005) (finding there was no constitutional violation based on an instruction advising that "[r]easonable doubt is not mere possible doubt, because everything relating to human affairs or depending upon moral evidence is open to some possible or imaginary doubt"). Therefore, Petitioner cannot demonstrate prejudice for his counsel's failure to challenge this jury instruction.

Hall argues that his claim is substantial based on the trial court's use of the language "satisfactory conclusion" of guilt and instruction to the jurors to decide the case "as you think truth

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[13] The trial court instructed the jury as follows:

> 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.

Austin, 126 F.3d at 846.

and justice dictate" to bolster his argument related to the reasonable doubt jury instruction. (ECF No. 136 at 38–39.) However, Petitioner did not present these allegations in his habeas petition and, therefore, is not entitled to habeas relief based on these contentions. *See* Habeas Rule 2. Further, the inmate alleged that counsel failed to object to the jury instruction that permitted conviction upon a "satisfactory conclusion" of Petitioner's guilt in his Amended Petition for Post-Conviction Relief. (ECF No. 144-2 at PageID 2086.) Therefore, even if the Court were to consider this claim adequately pled, ineffective assistance of post-conviction counsel cannot be "cause" for the procedural default under *Martinez*.

The allegations related to the reasonable doubt jury instruction are procedurally defaulted and DENIED.

3. Failure to Challenge the False and Misleading Testimony of Chris Dutton (Amended Petition ¶ 262.10)

Petitioner claims that his trial counsel "[f]ailed to establish that Chris Dutton's testimony was a lie." (ECF No. 15 at 59.) He also argues that Dutton made "all sorts of outlandish claims about what he claimed Jon Hall told him about the offense." (ECF No. 136 at 40.) Petitioner further asserts that his trial counsel failed to investigate Dutton's background to establish that he was mentally ill, a liar, and that his testimony was false. (*Id.*) He insists that "[h]ad trial counsel simply looked into Dutton's criminal history and obtained Dutton's prison records, trial counsel would have uncovered extensive evidence that could have been used [to] devastate Dutton on cross-examination" including information that

- Dutton admitted he was possessed by a legion of demons (ECF No. 102-10 at PageID 1116–17);
- Dutton suffered hallucinations, a history of psychotic thinking, suicide attempts, a long history of using LSD, PCP, and heroin (ECF No. 102-11 at PageID 1124; ECF No. 102-12);

- Dutton hears voice and demons "telling him all kinds of stuff" and has been hearing voices since he was twelve years old (ECF No. 102-13[14]);
- Dutton attempted suicide and was housed in a prison psychiatric unit (ECF Nos. 102-14 through ECF No. 102-16); and
- Dutton has a long history of mental health problems including antisocial personality disorder and a treatment with numerous psychotropic medications (ECF Nos. 102-17 & 102-18).

(ECF No. 136 at 40–41.)

Hall asserts that, had counsel properly investigated, they would have been able to cross-examine the witness with extensive evidence that he was lying when he claimed to not be "looking for benefits and had no idea what an informant was." (*Id.* at 41.) Petitioner contends that counsel could have cross-examined Dutton with proof that he was working for the government, seeking benefits, and knew that he could get assistance based upon his story against Petitioner, including evidence that:

- Dutton boasted that he knew how the informant system worked and was ready to become an informant for the FBI (ECF No. 102-2);
- when Dutton was trying to get out of administrative segregation, he again sought to contact the FBI for assistance (ECF No. 102-19 at PageID 1139);
- Dutton testified for the State of North Carolina in the *State v. Tammie Thompson* and received numerous benefits, including being quickly released from maximum security in Tennessee, sent to the Knox Community Service Center, given two furloughs, and released early from prison (ECF Nos. 102-20 through 102-23);
- Dutton received additional prison time including time for assaulting a corrections officer (ECF Nos. 102-24 through 102-26);
- Dutton was depressed and looking to get out of segregation when he claimed he obtained information on Petitioner in late 1995[15]; and

[14] Petitioner incorrectly cited ECF No. 102-32.

[15] Petitioner's reference to ECF No. 102-29 may be incorrect.

- Dutton "was lavished with extraordinary benefits by the Tennessee Department of Correction" after he provided information against Petitioner including quick release from administrative segregation, hasty transfer from Riverbend Maximum Security Institution to minimum security at Cold Creek Correctional Facility, and a job "after which he boasted that he was going to be paroled." (ECF Nos. 102-28 through 102-33);

(ECF No. 136 at 41–43.)

He insists that "[g]iven this abundance of impeachment evidence", counsel was ineffective for failing to cross-examine Dutton using this evidence. (*Id.* at 43.) Respondent did not directly address Petitioner's argument as it relates to Dutton except to note that this Court found "the claims related to the impeachability of state witnesses were found to be non-material" in regard to Petitioner's *Brady* claims. (ECF No. 140 at 19.)

This Court determined that much of the information that the inmate asserts was impeachment evidence that trial counsel should have used to impeach Dutton was not material under *Brady* and the state's failure to disclose such information did not prejudice Petitioner. (ECF No. 110 at 35–46.) Hall's trial counsel questioned Dutton about being an informant. (ECF No. 21, Add. 2, Vol. 2, pp. 232–33; *see* ECF No. 110 at 41.) The Court stated, "the jury was aware that Dutton was a criminal, that he sought parole in exchange for his testimony, and that he testified in other cases. This information was sufficient to alert the jury that Dutton's testimony may not be credible." (*Id.* at 43.) Just as Petitioner cannot demonstrate prejudice from the failure to disclose this information, he cannot establish prejudice from counsel's failure to impeach Dutton on this evidence. His claim is not substantial under *Martinez*.

Petitioner's allegations related to trial counsel's failure to challenge Dutton's testimony are procedurally defaulted and DENIED.

4. Failure to Challenge the Misleading Testimony of Petitioner's Daughters (Amended Petition ¶ 262.11)

Hall contends that his trial counsel failed to establish that Petitioner's daughters' testimony was not accurate. (ECF No. 15 at 59.) He argues that his trial counsel could have secured evidence for use to cross-examine Petitioner's daughters and demonstrate that he attacked and killed Billie Hall "following a drunken blow-up, wherein [Petitioner] didn't deliberate or premeditate or act intentionally, as required for a finding of first-degree murder." (ECF No. 136 at 43–44.) Petitioner submits that his counsel would have learned that he did not barge into the house and immediately attack and kill the victim. (*Id.* at 44.) He asserts that the investigation would have established that "Momma let [Petitioner] in"; "[h]e promised not to fight" and did not immediately attack her. (*Id.*) The inmate contends that he "stayed somewhere around an hour" and "drunk two or three beers" before a fight erupted. (*Id.*) Because he was in "a drunken rage", he maintains he was guilty of "at most, second-degree murder." (*Id.*)

Respondent did not directly address Petitioner's argument about ineffective assistance of counsel related to Petitioner's daughter's testimony. The Warden argues that this Court found "the claims related to the impeachability of state witnesses were found to be non-material" in regard to Petitioner's *Brady* claims. (ECF No. 140 at 19.) This Court stated that evidence that Petitioner was drinking and that time lapsed from his arrival at Billie Hall's home was presented at trial. (ECF No. 110 at 48.) The Court further noted, "this is not information about which Petitioner can claim he had no knowledge. [Petitioner] was present for these events and able to advise his counsel of the discrepancies in information or testify himself." (*Id.*) The Court held that the omission was not "of sufficient significance to result in the denial of defendant's right to a fair trial." (*Id.* at 49 (internal quotation marks and citation omitted)).

Similar to the *Brady* claim about Petitioner's daughters' testimony, counsel's performance with regard to their testimony did not prejudice him. Cynthia Lambert initially testified that Petitioner pushed his way in the house (ECF No. 21, Add. 2, Vol. 2, p. 260), but on cross-examination, she admitted that she did not remember whether he forced his way in. (*Id.* at 269–70.) Lambert also related that Petitioner and Billie Hall did not fight when he first arrived at the house and that he brought some beer and drank it. (*Id.* at 269.) On cross-examination, she admitted that Petitioner had brought beer with him to the house and started drinking in her presence. *Hall*, 2005 WL 22951, at *27.

The post-conviction trial court and the Tennessee Court of Criminal Appeals addressed Petitioner's claims that counsel failed to establish the victim as the aggressor including the evidence related to whether he forced his way into the home and immediately attacked Billie Hall,

> The petitioner contended that trial counsel should have presented evidence that the victim was the aggressor in their relationship. The trial court acknowledged the facts as presented at trial, including that the petitioner forced his way into the victim's home, attacked her as her children watched in horror, informed the children that he would kill their mother if they called for help, chased the victim after she escaped, dragged her down the walkway, and held her under the water in the children's swimming pool. The trial court concluded that trial counsel were aware of the relevant facts and that they made a tactical decision not to attack the victim at trial. It also concluded that introduction of any evidence as to the victim's role as first aggressor would have had little to no legal significance as there was no proof that the victim provoked the petitioner at the time of her murder and that any attempt to argue to the contrary would have resulted in the immediate and irrevocable alienation of the jury. In a related issue, the trial court noted that the state possessed a great deal of negative information about the petitioner that was not introduced at the trial. The trial court concluded that had trial counsel pursued an attack of the victim's character, the state would have taken the opportunity to reveal many facts which would have harmed the petitioner much more than presenting evidence concerning the victim's past behavior would have benefitted him.

Id. at *24.

The post-conviction appellate court addressed Petitioner's argument that the victim was the

aggressor; counsel's strategic decision not to attack the victim; and the argument that he was intoxicated and acting in an impulsive, rather than intentional and premeditated manner;

> *B. Counsel failed to establish the victim as the aggressor*
>
> The petitioner asserts that the post-conviction testimony of his siblings "and the Brittains clearly establish that the victim was capable of goading the petitioner." He contends that this evidence established provocation and was essential to establish the circumstances for voluntary manslaughter. Trial counsel testified that they made a strategic decision not to attack the character of the victim because it ran the risk of alienating the jury. Mr. Mayo also said that as best as he could recall, the victim's acts against the petitioner were not severe enough to imply that his conduct was reasonable. Both Mr. Mayo and Mr. Ford stated that the petitioner was the only reliable source to establish the victim's acts of violence but that he refused to testify.
>
> Briefly summarized, the facts established that the petitioner disconnected the telephone lines, forced his way into the victim's home, and violently attacked her as the children jumped on his back, bit him, and pleaded for him to stop hurting their mother. The fight continued outside, where the petitioner dragged the victim across the driveway and to the back of the house. There, he held her under the water in the children's swimming pool. No evidence showed that the victim provoked the petitioner immediately before his actions that resulted in her death. The trial court concluded that in light of these facts, evidence of the victim's prior acts of aggression upon the petitioner would not have assisted counsel in establishing that the victim was the first aggressor on this occasion. Additionally, the trial court found that the testimony of Dr. Zager and Randy Helms communicated to the jury that the petitioner was emotionally distraught and acting in an impulsive manner.
>
> During the petitioner's trial, counsel attempted to negate the element of premeditation by presenting evidence of mental health issues and intoxication rather than attempt to establish the provocation necessary to support a voluntary manslaughter verdict. The state possessed a sufficient amount of information reflecting prior acts of violence by the petitioner against the victim, but did not seek introduction of this evidence at trial. However, had the defense attempted to establish the victim as the first aggressor, the state could have presented such information to discredit any indication that the victim provoked the petitioner. The defense strategy not to portray the victim as the aggressor was reasonable, given the risk of the backlash from attacking the deceased victim's character. *See, e.g.*, Heiman v. State, 923 S.W.2d 622, 627 (Tex. Crim. App. 1995) (stating it was sound trial strategy to refrain from attacking the victim's character as it was conceivable that the jury would have found this strategy repugnant). Accordingly, the petitioner has failed to establish that counsel was deficient by failing to pursue this theory of defense. He is not entitled to relief as to this claim.

Id. at *28–29.

There was clearly evidence presented at trial, even on cross-examination, that Petitioner arrived at the home with beer, was drinking, and attacked Billie Hall after some period of time passed. Hall's trial counsel stated that he made a strategic decision not to attack the victim Billie Hall because of the information that might be presented about his character. Further, counsel was able to address credibility issues with Cynthia Lambert without alienating the jury by attacking a child who has lost her mother in a gruesome murder. Trial counsel attempted to negate the intent aspect of the crime with evidence of intoxication and impulsivity. Trial counsel's performance was reasonable, and given the facts, of the case, Petitioner cannot demonstrate prejudice. His claim is not substantial under *Martinez*.

The allegations related to trial counsel's failure to challenge Petitioner's daughter's testimony are procedurally defaulted and DENIED.

5. Failure to Have Petitioner Testify and Allowing an Invalid Waiver of Hall's Right to Present Such Testimony (Amended Petition ¶ 262.17)

The inmate alleges that trial counsel was ineffective for telling Judge LaFon that he had knowingly and voluntarily waived his right to testify. (ECF No. 15 at 60.) Petitioner claims that he possessed a fundamental constitutional right to testify on his own behalf, and only a knowing and intelligent waiver by Petitioner himself could waive that right. (ECF No. 136 at 45.) He asserts that his trial counsel "not only failed to protect and enforce [his] fundamental right to testify, he became an accomplice in depriving Mr. Hall of that right." (*Id.*) Petitioner further argues that he clearly expressed his desire to testify on his own behalf although he placed "nonsensical conditions" of removing the "flag or war" or signing a "judicial contract" on that desire. (*Id.* at 46.) He insists that "no sentient jurist could consider those conditions a knowing

and intelligent exercise of reason." (*Id.*) Petitioner states that his counsel failed to argue that Petitioner's "bizarre demands demonstrated that Hall was not knowingly and intelligently doing anything, let alone waiving a fundamental right." (*Id.*) He also submits that his counsel did not ask the trial court if it were willing to take down the flag that Petitioner found offensive and "sign a harmless piece of paper" that he deemed important or assert that a failure of the court to do so would result in the arbitrary denial of Petitioner's fundamental right to testify. (*Id.* at 46–47.) He contends that, instead of protecting Petitioner, his counsel stripped him of that right by telling the Court that he and Petitioner fully discussed the matter and the client was freely giving up his right to testify. (*Id.* at 47.)

Petitioner maintains that he was prejudiced because, had he testified, he would have told the jury that:

- he did not go to Billie Hall's house to kill her, but to reconcile;
- he did not barge into the house and force his way into the back bedroom;
- he did not plot Billie's homicide;
- he was besieged by circumstances troubling his life, including the pending death of his brother, the special needs of his daughter, the anxiety of severe financial strain, the deterioration of his relationship with Billie, and the struggle of trying to get by without an automobile, job, or home; and
- the events in his life "had just piled up, and after suffering sleep deprivation, drinking beer, smoking marijuana, and taking Stay Alert pills, he lost it."

(*Id.* at 47–48.) He asserts that, after hearing his testimony, at least one juror would have refused to find him guilty of premeditated murder. (*Id.* at 48.)

Petitioner further argues that he could have told the jury about the tragic events of his life and the events that led to Billie Hall's death had he testified at the sentencing stage. (*Id.*) He contends that at least one juror would have voted to sentence him to a sentence less than death had

the jury heard this testimony. (*Id.*) Respondent answers that Petitioner refused to testify because there was an American flag in the courtroom, and he has not stated why his counsel is responsible for that choice. (ECF No. 140 at 19.)

This Court addressed Petitioner's right to testify and whether there had been a valid waiver of that right and found no constitutional violation. (ECF No. 110 at 56–59.) Further, much of the evidence that Petitioner claims he would have testified about was in the record. There was evidence that he went to the house to discuss a reconciliation, that he disconnected the phone lines outside the house, and that he pushed his way into the room where Billie Hall and the children were watching television. *Hall*, 2005 WL 22951, at *1, 2, 24, 28. There was testimony that Petitioner had made comments about his threats "to grind [his wife] up as hamburger meat" and that he wanted his wife to suffer. *Id.* at *13, 37. There was also evidence that the inmate was depressed, had been drinking that night and that he suffered personality characteristics of paranoia and dependency and "psycho-social stressors including a sick child, loss of employment with the resulting financial problems, his impending divorce, and the terminal illness of a brother." *State v. Hall*, 8 S.W.3d 593, 598 (Tenn. 1999). There was expert testimony that Petitioner was "depressed, remorseful, suicidal and extremely concerned about his children" and that he suffered "an adjustment disorder with mixed emotional features (anxiety and depression) and 'substance abuse of dependence by history.'" *Id.* at 598–99.

In contrast to the proof that Petitioner views as favorable to him, there is the evidence that

> the victim sustained at least eighty-three separate wounds, including several blows to the head, a fractured nose, multiple lacerations, and bruises and abrasions to the chest, abdomen, genitals, arms, legs and back. Abrasions on the victim's back were consistent with having been dragged across pavement. Dr. Smith described some of the injuries to the victim's arms, legs and hands as defensive wounds.

Hall, 2005 WL 22951, at *2. Still, these injuries did not result in Billie Hall's death:

> the primary cause of death was asphyxia resulting from a combination of manual strangulation and drowning. [Smith] could not say with certainty that either strangulation or drowning was the exclusive cause of death. Evidence supporting strangling as a contributing cause of death included bruising on the left and right sides of Mrs. Hall's neck, hemorrhaging in the neck muscles around the hyoid bone in the neck, and bleeding in the thyroid gland, which indicated that extensive compression had been applied to the neck. Evidence supporting drowning as a contributing cause of death was water found in both Mrs. Hall's stomach and in her bloodstream. The water in her stomach could have collected when Mrs. Hall swallowed water as she was being drowned. The water in her bloodstream would have entered when she took water into her lungs, and the water passed through the lungs into her bloodstream.

Hall, 8 S.W.3d at 597. The evidence also revealed that:

> When the children tried to enter the room, they found the door blocked. The three oldest children, Jennifer, Cynthia and Stephanie, persisted in their efforts to get into the room and finally succeeded. They attempted to stop the defendant from hurting their mother. When Mrs. Hall told the children to go to a neighbor's house, the defendant told them that if they went for help, "he was going to kill Mama." He also told Mrs. Hall, a college student, that she would never live to graduate. Cynthia and Stephanie tried to use the telephone to call for help, but they discovered the telephones would not work. At that point, they went to a neighbor's house where they called 911. Jennifer, the oldest child, was the last to leave the house, carrying her sister Jessica. Before she left, she saw her mother and the defendant leave the bedroom and go outside. She watched the defendant drag her mother, "kicking and screaming," to the small pool in the back yard.

Id. at 596–97.

Petitioner's testimony, if presented, would have been subject to a credibility determination and a weighing and balancing against the aggravating factors and evidence presented in the case. His testimony would not have created a reasonable probability of a different outcome. Because his right to testify was not violated and he suffered no prejudice from his failure to testify, Petitioner's claim of ineffective assistance of counsel related to his right to testify is not substantial under *Martinez*.

6. Failure to Keep the Venue in Henderson County (Amended Petition ¶ 262.2)

Hall alleged that his counsel failed to keep the trial in Henderson County. (ECF No. 15 at 59.) He argues that his claim that trial counsel was ineffective for failing to keep the venue in Henderson County when it was Petitioner's wish to be tried in Lexington is a substantial claim. (ECF No. 136 at 49.) Petitioner insists that he did not waive, "*and there is no record*" that he waived, his right to be tried in Henderson County, Tennessee. (*Id.* at 51.) He claims that he was not given an opportunity to be heard on the issues and that Madison County simply had no jurisdiction to try him. (*Id.* at 51–52.)

The Warden counters that Petitioner's counsel's failure to request a change of venue was raised as an ineffectiveness claim in the initial-review post-conviction proceeding. (ECF No. 140 at 18.) Respondent contends that appellate counsel's failure to raise the issue on post-conviction appeal is outside the scope of *Martinez*. (*Id.*)

Respondent is correct. In the Amended Petition for Post-Conviction Relief, counsel alleges that he "failed to properly withdraw a change of venue motion when instructed to do so by Petitioner." (ECF No. 144-2 at PageID 2098.) Therefore, ineffective assistance of post-conviction counsel cannot serve as cause for the procedural default of the claim. *Martinez* does not apply.

Respondent also argues that the Court previously determined that Petitioner's venue claims were properly exhausted in state court but were without merit. (ECF No. 140 at 19; *see* ECF No. 110 at 24–28.) The Court found that the Sixth Amendment vicinage right refers to federal judicial districts and have never been defined to apply to states. (*Id.* at 26.) The Court further stated that Petitioner is entitled to relief only if he can demonstrate that he was denied due process in the form

of "a fundamentally fair trial." (*Id.* at 27.) The Court also held that Hall had not shown that being tried before a Madison County jury prejudiced any constitutional right. (*Id.*) Petitioner has not demonstrated prejudice from being tried before a Madison County jury, especially where there were issues related to pretrial publicity. His trial counsel determined that a change of venue was "absolutely necessary" after reading newspaper articles. *See Hall*, 2005 WL 22951, at *13. Petitioner's claim of ineffective assistance related to the change of venue is also not substantial under *Martinez*.

The allegations of ineffective assistance of counsel related to the change of venue are procedurally defaulted and DENIED.

7. Failure to Investigate and Introduce Evidence of Brain Damage and Mental Illness (Amended Petition ¶¶ 259-61)

The inmate argues that, to the extent this Court has denied relief on his claim that counsel was ineffective for failing to investigate and introduce evidence of Petitioner's brain damage and mental illness and/or Petitioner's social history, *Martinez* allows full consideration of the mitigating evidence and the grant of habeas relief. (ECF No. 136 at 53–56.) He relies on the Ninth Circuit's ruling in *Dickens v. Ryan*, 688 F.3d 1054 (9th Cir. 2012), to assert that his post-conviction counsel failed to present all the evidence in support of his claims, and he is entitled to a full hearing on his ineffectiveness claim under *Martinez* with consideration of all the new evidence not presented in the post-conviction proceedings. (*Id.* at 53–54.) Petitioner asserts that for the guilt-phase claims, the new evidence includes: the testimony of Bremner and Ruben Gur and Magnetic Resonance Imaging (MRI) and Positron Emission Topography (PET) scans. (*Id.* at 54.) He contends that this evidence shows that Petitioner suffers significant brain damage which limits his ability to control his behavior and modulate his impulses; that the brain damage rendered

him unable to act with deliberation; and that Petitioner was incompetent to stand trial. (*Id.* at 54–55.) Petitioner also asserts that this evidence supports the sentencing phase ineffectiveness claims also and that additional evidence from Professor Terry Maroney[16], and the psycho-social history of Petitioner including the testimony of Petitioner's family members should be presented. (*Id.* at 55.) He submits that his trial counsel failed to conduct an adequate mitigation investigation and failed to prepare a complete psycho-social history which resulted in the failure to uncover severe childhood abuse and neglect which likely caused Petitioner's significant brain damage from which his ability to regulate and control his responses is disrupted. (*Id.* at 55–56.)

In the Amended Petition for Post-Conviction Relief, Petitioner's post-conviction counsel alleged that his trial counsel failed to adequately investigate the mental history of Defendant and was ineffective as it relates to the mitigation investigation, *see* supra pp. 4–5, 9–10, 12, and 19. (ECF No. 144-2 at PageID 2077–78, 2085, 2088–89, 2098.) Petitioner alleged that, "had counsel done so, they could have prepared adequate psychiatric testimony showing a diminished mental capacity that was consistent with a charge of manslaughter, perhaps insanity, and certainly a Defendant undeserving of the death penalty." (*Id.* at 2077.) On post-conviction appeal, Petitioner alleged that his trial counsel failed to present the mental health issue properly, provide a complete mitigation history, and obtain services of a psychiatrist. *See Hall*, 2005 WL 22951, at *31–34. Because these issues were raised in the initial post-conviction proceedings, ineffective assistance of post-conviction counsel under *Martinez* does not apply to these claims.

Further, this Court addressed the evidence presented by Bremner and Gur in the context of evaluating Petitioner's post-conviction ineffectiveness claims related to his mental health and the

[16] Maroney had not personally evaluated Petitioner and was not "professionally qualified to proffer a diagnosis of mental illness or other disability." (*See* ECF No. 136-3 at PageID 1738 n.2.)

mitigation case. (ECF No. 110 at 105–16.) The evidence revealed that Petitioner was evaluated by several mental health professionals at trial and in the post-conviction proceedings: Lynn Zager, Joe Mount, Keith Caruso, and Pamela Auble, and the State presented the testimony of Kimberly Stalford to rebut their conclusions. (*Id.* at 105–07.) The Court stated

> his counsel presented evidence through Dr. Zager that Petitioner suffered from depression and alcohol dependence, had personality characteristics of paranoia and dependence, suffered psycho-social stressors, and acted in "an impulsive manner versus a well-thought out plan." (D.E. 21, Add. 2, Vol. 3, p. 333–35.) Dr. Zager's diagnosis of Petitioner is consistent with the conclusions of Drs. Gur and Bremner. Neither Dr. Gur nor Dr. Bremner diagnosed Petitioner with a particular mental illness, but they explained how the physical structure of his brain may have affected his behavior. Ultimately, their opinion was no different from Dr. Zager's that the inmate could not form the specific intent to commit first degree murder and that he acted in an impulsive manner. Even if counsel were found deficient because he did not investigate and present evidence of brain damage, Petitioner was not prejudiced.

Id. at 115–16. The Court also found that that the evidence Petitioner claims could have been presented to obtain a more complete social history was repetitive of what had already been presented, and the failure to present that evidence was not prejudicial to Petitioner. *Id.* at 110.

Hall's claim is not substantial for the reasons stated. The allegations of failure to investigate and introduce evidence of brain damage and mental illness are not entitled to further consideration based on *Martinez*.

D. Discovery Issues

Petitioner asserts that he is entitled to discovery to establish cause for the procedural default of his claims. (ECF No. 136 at 56–60; *see* ECF No. 147.) As his claims are not entitled to merits consideration under *Martinez*, Petitioner's request for discovery deserves no further attention.

IV. CONCLUSION

Upon further consideration on remand, Petitioner is not entitled to habeas relief based on *Martinez.* Thus, the amended petition is DENIED.

V. APPEAL ISSUES

There is no absolute entitlement to appeal a district court's denial of a § 2254 petition. *Miller-El*, 537 U.S. at 335; *Bradley v. Birkett*, 156 F. App'x 771, 772 (6th Cir. 2005). The Court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to a § 2254 petitioner. Habeas Rule 11. A petitioner may not take an appeal unless a circuit or district judge issues a COA. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b)(1).

A COA may issue only if the petitioner has made a substantial showing of the denial of a constitutional right, and the COA must indicate the specific issue or issues that satisfy the required showing. 28 U.S.C. §§ 2253(c)(2) & (3). A "substantial showing" is made when the petitioner demonstrates that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 336; *see also Henley v. Bell*, 308 F. App'x 989, 990 (6th Cir. 2009) (per curiam) (same). A COA does not require a showing that the appeal will succeed. *Miller-El*, 537 U.S. at 337 (internal quotation marks omitted); *Caldwell v. Lewis*, 414 F. App'x 809, 814–15 (6th Cir. 2011). Courts, however, should not issue a COA as a matter of course. *Bradley*, 156 F. App'x at 773.

The Court previously denied Petitioner a COA. (*See* ECF No. 110 at 131–34.) On remand, the Court again finds that reasonable jurists could not disagree about the resolution of his claims and DENIES a COA.

Federal Rule of Appellate Procedure 24(a)(3) provides that a party who was permitted to

proceed *in forma pauperis* in the district court may proceed on appeal *in forma pauperis* unless the district court certifies that an appeal would not be taken in good faith or otherwise denies leave to appeal *in forma pauperis*. In this case, for the same reasons it denies a COA, the Court determines that any appeal would not be taken in good faith. It is therefore CERTIFIED, pursuant to Fed. R. App. P. 24(a), that any appeal in this matter would not be taken in good faith, and leave to appeal *in forma pauperis* is DENIED.[17]

IT IS SO ORDERED this 30th day of March, 2015.

s/ J. DANIEL BREEN
CHIEF UNITED STATES DISTRICT JUDGE

[17] If Petitioner files a notice of appeal, he must also pay the full $505 appellate filing fee or file a motion to proceed *in forma pauperis* and supporting affidavit in the Sixth Circuit Court of Appeals within thirty (30) days of the date of entry of this order. *See* Fed. R. App. 24(a)(5)

EXHIBIT 2

MAR 0 8 1996
LEGAL COUNSEL

1 2/10/96

Sir:

This is in response to your reply, and though I thought I was descriptive enough for some interest to be sparked, being this is about murder case. I read the copy of what I sent you, and I in no way gave the impression that the case involving Jon Hall took place in prison. Jon Hall killed his wife, Billie Hall; in July of 1993. He did so by beating her to death (head trauma) and then dumped her in a swimming pool. He then stoled her van to escape capture, which he crashed. At the scene he then stoled the car of persons who stopped to give him assistance, which was occupied by a young boy; who was forced out a short time after. Jon Hall then drove that car to Texas, where his brother turned him in. Your office then sent agents to serve extradition papers and escort him back to Tn. While in the county jail he caused much trouble and was found in posession of a hack saw blade, which he had used to start sawing out. I know that all of this information is easily excessable to most anyone, And is not the information I feel is of importance. Its on page #2! Oh yes, Jon Hall deconnected the phone line, or a pool I think; it was outside of the trailer house though.

2. CHutt 4/14/90

Jon was in a rage when he arrived to the trailer, and was drunk. He had been drinking since he called Billie earlier. He had been at the trailer everyday for about a week, working on his car; while all the time trying to get Billie to take him back again.

Jon said, the only way she'd even let me back in the yard is because I told her I was bringing her some money (order). I was living on the streets, couldn't work steadly. She wanted everything and I had nothing, nowhere to live, no car and I couldn't be with my children, I was the one who raised them (I think 1 girl had MR), I took care of them. Now that I can't do anything for her, she has no use for me.

I disconnected the phone line, shit I did it alot of times, or she'd call the cops. Playing games with my life, it was time she knew how it felt to feel what did. Helpless and afraid, it was my game I wanted her to feel the fear, her and her games She lost that one, she hated me and forced me to hate! I tried to show her I could change, and she used me. She had to pay once I started, I couldn't stop.

When I first met Jon, he told me that he was a safekeeper. He was in here for killing his old lady, the bitch played me too many games with me, and paid this price, lost her life.

3 [illegible] 2/10/96

He did mention something about a ltl. pisto but he was moved to another unit before I could get it right, I won't make stories or tell you what you want to hear. I let him feed me information as he felt comfortable, and I gained his trust. I was giving him information and help (supposid), trust comes easy when you give them something to hold against you.

I do know that Billie was going out to reconnect the phone line. She knew Jon was drun and on the verge of losing it.

He accused her of having another man, his girls could call him daddy; like her girls did him. She never loved him and now she had use for him, like he was a damn fool.

Right off, that's it. Besides my first hand knowledge. He blew up in here twice, the second time for the barber cutting his hair too short. He ended up being restrained by officers and still attacked them. Threatening to kill the barber and Sgt Hunt (O.I.C.)!

He is a dangerous man, he was raging over so ltl.! And will kill Billie's sister, his brother, neighbor and the living mother fuckers who came got him and the ones who beat him up in jail. His eyes and demeanor all that of a cold hearted killer. I wouldn't become his friend in here, too likely to turn, and no matter, he wouldn't even be behind me.

4 [illegible]

You be the judge, but whatever the case, I am now minimum security; awaiting transfer to Ft. Pillow. And I don't want to jeopardize that. I've been on max too long, it's getting in me bad (20 months)!

Unfortunately I sent the copies of the first letter home, forgetting to write down the agent's name who was/is directly involved.

I can't remember what city the murder took place in. And as for the D.A.'s name in Raleigh N.C., I dealt directly with the:

Attorney General not D.A.

I can't find the address or name.
I did send for it last year though, and I got a letter back in a short time, offering their aid.
I gave them this info: about the contract murder case I testified at! (3rd after 2 hung juries) Tammy Thompson hired a man named Joe to kill his wife's boyfriend in Fayetteville N.C. Trial took place in early 1991 (month? think), Tammy got a life sentence. And I was the only additional evidence in 3rd trial. Tammy [illegible] from Panama Beach Fla., Joe worked for Tammy (roofing)
The information on pages 2, 3 & 4 are not from any documents or newspapers, all from Jor. Hall's mouth, I may know bits and pieces more, but not right off. I know the drill and what can be used in court, been there, done this!

As for the second incident, it was to
give Roscoe Clayton the incentive to help
because I would help with any R.M.S.I. staff.
He would [illegible] a man named Benny [illegible]
who killed [illegible] at [illegible]
[illegible] last year. After being [illegible]
[illegible] by [illegible] Quintana. Because
the [illegible] had stolen from Quintana,
[illegible] money [illegible]
in the [illegible]. [illegible] bragged to me about
it [illegible] another
And Chico (Gomez) confirmed it by telling me
that he had [illegible] Liberty Quintana) [illegible]
made him [illegible] and he [illegible]
[illegible] to [illegible]. And
that Liberty was putting himself out by bragging
and not keeping to the story they agreed on. Then
Chico told me to tell Liberty to keep his mouth
shut, and not to worry about him [illegible] any
thing to [illegible] good, take
anyone [illegible] really knows [illegible] (Chico said)
And another [illegible]
[illegible]
15th time that month. [illegible]

EXHIBIT 6

3/-/96

[N. I've Told you about] Safe Keeper RMSI 1-C-208

Sir:
As I said, I will not do anything to keep me here at RMSI; nothing. I am awaiting a transfer to another prison (minimum). And what I ask for, for my testimony, I can get through the judicial system. I was given concurrent sentences, but I'm doing consecutive sentences. If my contract plea bargains were honored, I would have already been up for parole. When I get to Fort Pillow, I will begin the process to have my plea bargains honored and begin an inner state compact to parole to another state. I could be of great use within the prison system as a reliable informant. And then use this and N.C. as a chance to become an informant for the F.B.I.! I know that I am not a priority in this battle against crime. And I have no delusions about my importance. But I do have a conscience and want to do some good. And I'm a survivor. I fit in places where most wouldn't or couldn't. I'm good at gaining the trust of the outlaw type, and as I said; I fit and well.

About N.C., just write the attorney general's office in Raliegh. Give them my name and the therefore about the case I testified in (3/15/90 approx) Later Chris Sutton

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

JON HALL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 05-01199-JDT
	)	
RICKY BELL, Warden, Riverbend Maximum Security Institution,	)	
	)	
	)	
Respondent.	)	

MEMORANDUM IN SUPPORT OF
MOTION FOR LEAVE TO CONDUCT DEPOSITIONS

I. INTRODUCTION

This Court granted Jon Hall leave to serve a subpoena on the Tennessee Department of Correction (TDOC) for documents respecting the State's key trial witness, former inmate Chris Dutton. R. 39: Order. In response to the subpoena Mr. Hall served, TDOC produced three categories of documents it denominates as Mr. Dutton's Central Office File, Mr. Dutton's Institutional File, and Mr. Dutton's Medical File.

When Mr. Hall asked if TDOC had any Internal Affairs documents respecting Mr. Dutton, TDOC expressly stated that a search revealed none. Documents TDOC did produce, however, contain numerous references to Internal Affairs's involvement with Mr. Dutton. Mr. Hall therefore respectfully requests that this Court grant him leave to depose persons familiar with Internal Affairs's record keeping practices; persons involved in the TDOC search for Internal Affairs documents respecting Dutton; and persons involved in Internal Affairs's contacts with Dutton.

II. PROCEDURAL BACKGROUND

As discussed in Mr. Hall's Memorandum In Support Of Leave To Serve Subpoenas, the key issue at Mr. Hall's trial was whether Mr. Hall killed his estranged wife Billie with premeditation or whether he "just lost it." See R. 28: Memorandum, at 5. Inmate Chris Dutton provided crucial testimony, telling Mr. Hall's jury that when Hall and he were incarcerated together at the Riverbend Maximum Security Institution (RMSI), Hall said he went to Billie's home to make her suffer. See R. 2, 228, 236. To bring credibility to his story, Dutton claimed that (1) the only consideration he received for his help in the Hall prosecution was the prosecution's promise to speak on his behalf at a parole hearing, R. 2, 230; (2) he had not received any benefit from the State prior to his testimony, R. 2, 231; and (3) getting favorable treatment had nothing to do with his decision to provide authorities information on Mr. Hall. R. 2, 233.

In his habeas petition, Mr. Hall asserts that the State withheld evidence that favorable treatment motivated Dutton's involvement in the Hall prosecution while it presented Dutton's false testimony that such was not the case. R. 15: Amended Petition For Writ Of Habeas Corpus at ¶¶ 230, 234.1.5-9, 248. This Court concluded that Mr. Hall demonstrated good cause for leave to serve discovery on these allegations, including a subpoena commanding TDOC to produce documents respecting Dutton.

While TDOC produced documents respecting Dutton, it expressly stated that it could not locate any Internal Affairs documents respecting Dutton. Exhibit 1: 1/10/07 Letter From Inglis To Minton. The documents TDOC produced, however, contain numerous Internal Affairs

references, including Internal Affairs's apparent involvement in key events surrounding Dutton and his claim that Hall made incriminating statements to him.

III. DOCUMENTS TDOC PRODUCED CONTAIN REFERENCES TO INTERNAL AFFAIRS'S INVOLVEMENT WITH DUTTON AND HIS CLAIM THAT HALL MADE INCRIMINATING STATEMENTS TO HIM

On February 4, 1997, Chris Dutton testified at Mr. Hall's trial. Dutton came to the State's attention through letters he sent to prosecutors in February and March 1996. See R. 28: Memorandum, at Exhibits 2, 6. Documents TDOC produced place these events and Internal Affairs's involvement with Dutton in a context indicating that, contrary to his testimony, favorable treatment motivated Dutton to offer and give his assistance to the State.

A. Dutton's First Voyage From Brushy To The Free World

On November 14, 1990, the State convicted Chris Dutton of numerous counts of burglary and theft involving fifty-two firearms. Exhibit 2: Judgments; Exhibit 3: 11/2/90 Presentence Report, at 2 (fifty-two firearms stolen). The State court sentenced Dutton to eight years, and TDOC incarcerated him at the Brushy Mountain State Penitentiary (Brushy), a maximum security facility. Exhibit 4: Accept Of Inmate; see Exhibit 5: Brushy Mountain State Penitentiary Web Site Page. Dutton promptly demonstrated his capability at improving his lot.

By January 1991, the State of North Carolina had already twice tried Tammie Lee Thompson for first-degree murder. Both times the jury deadlocked. At Mr. Thompson's third trial, however, the State had a new witness.

On January 23, 1991, Dutton left Brushy to testify at Mr. Thompson's trial. Exhibit 6: Transfer Form; Exhibit 7: Arrival/Departure Printout. In testimony he would parrot at Mr. Hall's trial, Dutton told Thompson's jury that while Thompson and he were confined together,

Thompson made incriminating statements to him. See State v. Thompson, 420 S.E.2d 395, 399 (N.C. 1992). Dutton's testimony proved to be the difference. The jury convicted Thompson of first-degree murder. Thompson, 420 S.E. 2d at 397.

On February 6, 1991, Dutton returned to Brushy. Exhibit 7: Arrival/Departure Printout. Two days later, TDOC held an impromptu classification hearing. Dutton waived his right to forty-eight-hour notice, Exhibit 8: Waiver, and TDOC reclassified him from Brushy, a maximum security institution, to Southeastern Tennessee State Regional Correctional Facility, a medium security institution. Exhibit 9: Classification Summary; see Exhibit 10: Southeastern Tennessee State Regional Correctional Facility Web Site Page.

Less than ten months later, TDOC again reclassified Dutton, this time to the Knox Community Service Center, a pre-release facility. Exhibit 11: Transfer Form; see Exhibit 12: Historical Timeline, at 13. On January 14, 1992, Dutton walked out into the free world on parole. Exhibit 13: Certificate Of Parole.

B. Dutton Returns To Brushy

Dutton did not put his time in the free world to good use. He committed (and was subsequently convicted and sentenced to fifteen years on) two counts of burglary/theft over $500, two counts of burglary/theft over $1,000, and one count of theft $10,000 - $60,000. Exhibit 14: Judgments. On March 18, 1992, the State declared him a parole delinquent, Exhibit 15: 3/18/92 Letter From Bradley to Clerk, and on July 10, 1992, Dutton arrived at the Hamblen County Jail. Exhibit 16: Inmate Arrival Or Departure Information.

Lacking the patience to wait for circumstances he could parlay into early release, Dutton took matters into his own hands. He and another inmate assaulted a Hamblen County Jailor with

a deadly weapon and escaped. Again, Dutton made a poor choice. He was promptly captured, convicted of aggravated assault of a law enforcement official and escape, and sentenced to five years. Exhibit 17: Indictments; Exhibit 18: Judgments; Exhibit 19: Mittimus. TDOC sent Dutton back to Brushy. Exhibit 20: Arrival/Departure Printout.

C. Mr. Dutton, Meet Mr. Hall

On February 18, 1993, TDOC transferred Dutton from Brushy to RMSI. Exhibit 21: Transfer Form. Yet again, Dutton took a wrong turn.

On May 28, 1994, a RMSI Officer discovered a shank in Dutton's cell. Exhibit 22: 5/28/94 Disciplinary Report. RMSI officials stored Dutton's shank in the Internal Affairs safe, id., and placed Dutton in segregation. Exhibit 23: Disciplinary Report Hearing Summary, at 1. The Disciplinary Board found Dutton guilty of possessing a shank, a Class A infraction, commenting that

> The purpose for poss. a knife in an institutional setting is to inflict injury or death to another. Due to the unknown fact of how the knife was going to be used, or who the intended victim might be, the Board feels (Administrative Segregation) is required.

Exhibit 24: 6/22/94 Involuntary Administrative Segregation Placement Report. RMSI Warden Bell agreed, stating that

> Based on the seriousness of the offense and the intent, I feel that maximum custody supervision is required for the protection of staff/inmates.

Id.

In the late Summer of 1995, the State transferred Mr. Hall to RMSI for pre-trial detention. Given his pre-trial status, TDOC classified Mr. Hall as a "Safekeeper." See Exhibit 25: TDOC Policy 404.11 at IV.C; Exhibit 26: RMSI Notes For Jon Hall, at (1)0/20/94 Entry. Policy required TDOC to house Safekeeper inmates such as Mr. Hall in a single cell, in a unit

with only other Protective Custody inmates. See Exhibit 27: TDOC Policy 506.16 at IV.C & D, VI.A.1.

On November 6, 1995, RMSI provided Dutton a periodic Administrative Segregation Review procedure. That review concluded with Warden Bell's decision that Dutton should remain in segregation "on 60 day phase down." Exhibit 28: Administrative Segregation Review. On November 21, 1995, however, Dutton's lot suddenly improved. He was approved for release from segregation and for transfer to TDOC's West Tennessee High Security facility (WTHS), another TDOC Maximum Security facility, on close custody. Exhibit 29: Administrative Segregation Review; Exhibit 30: West Tennessee State Penitentiary Web Site Page; Exhibit 12: Historical Timeline, at 14

On November 30, 1995, a RMSI officer told Dutton he was released from segregation and ordered him to prepare for moving to a RMSI housing unit. Dutton refused, stating that Internal Affairs was aware of his situation. Exhibit 31: Protective Services Investigation Routing Sheet. RMSI thereafter placed Dutton in Protective Custody pending his transfer to WTHS, notwithstanding the conflicting stories Dutton proffered in support of his need for such placement.[1] TDOC's placement of Dutton in Protective Custody gave him the ability to converse with Safekeepers such as Mr. Hall. See Exhibit 27: TDOC Policy 506.16 at VI.A.1.

In February and March 1996, Dutton wrote his letters to prosecutors about Mr. Hall's alleged incriminating statements to him. Promptly thereafter, Warden Bell authorized Dutton's

---

[1] Dutton alternatively claimed that he required Protective Custody because he refused to pass drugs for fellow inmates, Exhibit 31: Protective Services Investigation Routing Sheet, and because he had been a drug conduit for fellow inmates. Exhibit 32: Offender Classification Summary.

transfer, not to close custody at the maximum security WTHS facility, but to a less restrictive medium security classification at the medium security Fort Pillow/Cold Creek Correctional Facility. Exhibit 33: Protective Custody Review Report; Exhibit 34: Offender Classification Summary; see Exhibit 12: Historical Timeline, at 14. On March 28, 1996, Dutton - a man who escaped incarceration by assaulting a jailor with a deadly weapon, a man who was convicted less than two years earlier of possessing a shank in prison - arrived at Fort Pillow and began working in the kitchen. Exhibit 35: Personal Property Inventory; Exhibit 36: Program Assignment Notice.

On January 16, 1997, Dutton was recommended for minimum security classification at Fort Pillow. Exhibit 37: Offender Classification Summary. Less than a month later, he testified at Jon Hall's February 1997 trial.

4. Dutton Returns To The Free World

In the months after Mr. Hall's trial, Dutton apparently reverted to his old habit of making bad choices. A June 18, 1997, Offender Classification Summary reports that Dutton was housed at that time back at Brushy and "was placed on a seven-day investigation." Exhibit 38: Offender Classification Summary. Internal Affairs, however, interceded and recommended Dutton's release and transfer to the Lake County Regional Correctional Facility (LCRCF), a minimum security educational facility. Id.; see Exhibit 39: Northwest Correctional Complex Web Site Page. When LCRCF refused to accept Dutton, TDOC sent him to Turney Center Industrial Prison with a minimum security classification. Exhibit 40: Offender Classification Summary.

On August 14, 1998, one of the men who prosecuted Jon Hall wrote the Parole Board that Dutton had assisted in the Hall prosecution and Dutton "was very polite and seemed to have

the kind of attitude that will be necessary for his successful completion of parole." Exhibit 41: 8/14/98 Letter From Earls To Trauber. On December 16, 1998, Dutton once again walked out into the free world on parole. Exhibit 42: Parole Certificate.

IV. BECAUSE DOCUMENTS TDOC PRODUCED CONTAIN REFERENCES TO INTERNAL AFFAIRS'S INVOLVEMENT WITH DUTTON, THIS COURT SHOULD GRANT MR. HALL LEAVE TO DEPOSE THE RELEVANT INTERNAL AFFAIRS DOCUMENT CUSTODIAN(S) AND INVESTIGATOR(S)

Dutton documents TDOC produced contain repeated references to Dutton's involvement with Internal Affairs. Most strikingly, a TDOC Protective Services Investigation document (Exhibit 30) reports that when a RMSI officer informed Dutton to prepare to move from segregation to a RMSI housing unit, Dutton balked, informing the officer that Internal Affairs was aware of his situation. TDOC subsequently placed Dutton in Protective Custody, a placement that enabled him to have contact with Safekeepers such as Mr. Hall. And after Dutton wrote his letters of Hall's purported incriminating statements to him, Internal Affairs interceded in an investigation of Dutton, recommending and securing Dutton's transfer from Brushy to a lower security facility.[2]

In its communication representing that no Internal Affairs Dutton documents exist, the acting Internal Affairs Director states

> I am confident we would have record of any investigation activity conducted by our unit, and must assume that the Internal Affairs Division had no involvement in any matter related to inmate Dutton.

Exhibit 1: 1/10/07 Letter From Inglis To Minton, at Enclosed Memorandum. As discussed

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[2] In addition to the documents described in the body of this memorandum, TDOC produced additional documents referencing Internal Affairs's involvement with Dutton. See Collective Exhibit 43: 1/19/96 Incompatible Inmate Notice; 6/17/94 Incompatible Inmate Notice; 11/19/91 Memorandum From Internal Affairs Sergeant Don Dunaway To Warden Carlton.

above, however, documents TDOC produced demonstrate that Internal Affairs had repeated involvement with Dutton, including involvement during a critical, relevant, time period. Given Internal Affairs's confidence that any involvement with Dutton would have generated documents responsive to the subpoena Mr. Hall served, TDOC's representation that no such documents exist appears inaccurate. To test the accuracy of that representation, and to enable Mr. Hall to gather information that this Court has already concluded he has good cause to obtain, this Court should grant Mr. Hall leave to conduct depositions.

V. CONCLUSION

For the foregoing reasons, this Court should grant Mr. Hall's Motion For Leave To Conduct Depositions.

Respectfully Submitted,

Paul R. Bottei
Christopher M. Minton
Assistant Federal Public Defender

Office of the Federal Public Defender
Middle District of Tennessee
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047

By:/s/ Christopher M. Minton

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was filed electronically. Notice of this Filing will be sent by operation of this Court's electronic filing system to counsel for respondent, Elizabeth Ryan, Esq., 425 Fifth Avenue North, Nashville, Tennessee 37243. on this the 16th day of October, 2007.

/s/ Christopher M. Minton

EXHIBIT 1

STATE OF TENNESSEE
DEPARTMENT OF CORRECTION
4TH FLOOR RACHEL JACKSON BLDG.
320 SIXTH AVENUE NORTH
NASHVILLE, TENNESSEE 37243-0465

January 10, 2007

Christopher M. Minton
Assistant Federal Public Defender
810 Broadway
Suite 200
Nashville, TN 37203

RE: Hall v. Bell, U.S. Dist. Court, M.D. Tenn, No. 05-01199-JDT

Dear Mr. Minton:

Enclosed please find a memorandum from Acting Internal Affairs Director Jerry Lester. As indicated in the memorandum, the Internal Affairs Division has conducted an exhaustive search of the Division's records for any record related to Inmate Chris Dutton, No. 142826. No records were located.

If you have any questions, please feel free to contact me.

Sincerely,

Debra K. Inglis

Debra K. Inglis
General Counsel

Enclosure

STATE OF TENNESSEE
DEPARTMENT OF CORRECTION
INTERNAL AFFAIRS
100 BOMAR BOULEVARD
NASHVILLE, TENNESSEE 37209-1100
TELEPHONE: (615) 741-7144
FAX: (615) 741-0758

Crossville Office
53 N. Main Street
Suite 106
Crossville, TN 38555
Tel. (931) 707-0024
FAX (931) 707-5242

Dyersburg Office
1150 Henry Street
Suite 8
Dyersburg, TN 38024
Tel. (731) 288-8031
FAX (731) 288-8030

To: Debra Inglis, General Council

From: Jerry Lester, Acting Director, TDOC Internal Affairs

Date: January 5, 2007

Subject: Request for records, Chris Dutton #142826

Ms. Inglis,

The TDOC Internal Affairs Division has exhausted a search of all records dating back to January, 1996 at your request. In doing so, we were unable to find any records related to inmate Chris Dutton. I am confident we would have record of any investigative activity conducted by our unit, and must assume the Internal Affairs Division had no involvement in any matter related to inmate Dutton.

Please feel free to contact me if I can be of further assistance.

JL

Cc: File

EXHIBIT 17

NO: 92-CR-327

CHARGE: Aggravated Assault

INDICTMENT / PRESENTMENT

STATE OF TENNESSEE

VS.

CHRIS ALLEN DUTTON and LAMONT WAYNE DAILEY

WITNESSES: Summon for State

~~Jason Yount~~ PROSECUTOR

Jason Yount, HCSD 586-3781; Rita Sturm, HCSD; Chad Beck, HCSD

[signature]

C. Berkeley Bell, District Attorney General

YES / NO Yes TRUE BILL

[signature: Sam Moore]

Foreman of the Grand Jury

92 DEC 22 PM 1:35
GENERAL ... SERV.
DEPT. OF CORRECTION

DATE: 10/12/92

DATE INDICTMENT / PRESENTMENT RETURNED: 10/12/92

Witnesses: Jason Yount

were sworn and examined by me in the Grand Jury room.

This 12th day of October, 19 92.

[signature: Sam Moore]

Foreman of the Grand Jury

4106 - F Ward

STATE OF TENNESSEE
HAMBLEN COUNTY CRIMINAL COURT, GRAND JURY OCTOBER 12, 19 92

FIRST COUNT

The Grand Jurors of the aforesaid State and County duly empaneled and sworn, upon their oath, present that:

CHRIS ALLEN DUTTON AND LAMONT WAYNE DAILEY

on or about the 18TH day of AUGUST 19 92 in the State and County aforesaid, and before the finding of this indictment, did unlawfully intentionally, knowingly, ro recklessly assault Jason Yount, a law enforcement officer performing an official duty, and used a deadly weapon, in violation of T.C.A. 39-13-102(a)(1)(B),

all of which is against the peace and dignity of the State of Tennessee.

C. Berkeley Bell, District Attorney General

NO: 92-CR-327

CHARGE: Escape, T.C.A. 39-16-605

INDICTMENT / PRESENTMENT

STATE OF TENNESSEE

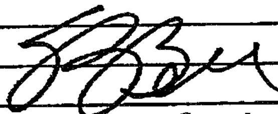
VS.

CHRIS ALLEN DUTTON

WITNESSES: Summon for State

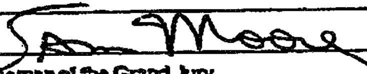
Jason Yount PROSECUTOR

Jason Yount, HCSD 989-3781; Rita Sturm, HCSD; Chad Beck, HCSD



C. Berkeley Bell, District Attorney General

YES/NO Yes TRUE BILL



Foreman of the Grand Jury

DATE: 10/12/92

DATE INDICTMENT / PRESENTMENT RETURNED: 10/12/92

Witnesses: Jason Yount

were sworn and examined by me in the Grand Jury room.

This 12Th day of October, 1992.

92 DEC 2? PM 1:35

Foreman of the Grand Jury

4106-F Ward

STATE OF TENNESSEE
HAMBLEN COUNTY

CRIMINAL COURT, GRAND JURY OCTOBER 12, 19 92

SECOND COUNT

The Grand Jurors of the aforesaid State and County duly empaneled and sworn, upon their oath, present that:

CHRIS ALLEN DUTTON

on or about the 18TH day of AUGUST 19 92 in the State and County aforesaid, and before the finding of this indictment, did unlawfully escape from the Hamblen County Jail located in Morristown, Tennessee, having been held there due to a conviction of theft, a felony, in violation of T.C.A. 39-16-605,

all of which is against the peace and dignity of the State of Tennessee.

C. Berkeley Bell, District Attorney General

4100-Ward

EXHIBIT 31

PROTECTIVE SERVICES INVESTIGATION ROUTING SHEET

TO: SHIFT CAPTAIN, AWS/Shift Commander Institution: RMSI
FROM: M.A. VOSBERG, C.M., U-3, Reporting Officer/Staff
RE: CHRIS DUTTON, Inmate, TDOC # 142826
DATE/TIME: 11 / 30 / 95 1300 am or pm

The following information has been provided by I/M Dutton 142826 and such indicates that the above inmate may require protective services:

Offender was released of Administrative Segregation and re-classed to RMSI U-4, upon telling inmate to be prepared to move, he stated that he would not go, that he feared ~~there would be trouble that would escalate from him refusing to pass drugs while he~~ worked in U-3. Furthermore he claimed I.A. was aware of his concerns and that if he had to, he would begin filing incompatables on several people to keep from moving.

TO: File
FROM: [signature], AWS/Shift Commander Date: 11 / 30 / 95

I have taken the following action(s) as the result of the above information pending an investigation by the Internal Affairs Office:

(✓) inmate has been restricted to cell and or unit.
( ) inmate's housing unit has been changed from ______ to ______.
( ) inmate has been separated from the general population pending investigation.

TO: Internal Affairs Liaison
FROM: ______, AWS/Shift Commander
DATE/TIME: ___/___/___ ______ am or pm

I hereby request that a formal investigation be conducted to determine whether the above information can be substantiated.

TO: B. Smith, Chairperson, Classification Committee
FROM: L. Jones, Internal Affairs Liaison
DATE: 12/19/95 8:00 am or pm

I have completed the investigation and attached is the report of same.

TO: Monica Vosberg, Unit # Case Mgr. ~~Correctional Classification Coordinator~~
FROM: Bill Smith, Chairperson, Classification Committee
DATE/TIME: 12/20/95 8:30 am or pm

Immediately arrange for the Protective Services panel to review the above inmate for protective services.

cc: Inmate Institutional File - Original
Internal Affairs Office - 1st copy

CR-3241(3/88)

EXHIBIT 38

8I01D018
BMSP
HODGR001

TENNESSEE DEPARTMENT OF CORRECTION
OFFENDER CLASSIFICATION SUMMARY

TOMIS ID: 00142826
OFFENDER NAME: DUTTON, CHRIS A.
INSTITUTION: BRUSHY MOUNTAIN STATE PENITENTIARY

CLASSIFICATION TYPE: SPECIAL RECLASSIFICATION

STATUS AT TIME OF HEARING: GEN.POP.___ AS___ PC___ OTHER: Rec for Reclass + Transfer. – 7 Day Investigation.

INCOMPATIBLES: YES ✓ NO ✓ STSR, MCRCF, SCCF, NECC, WTHSF.

SCORED CAF RANGE: ~~MEDIUM~~ Minimum. CURRENT CUSTODY LEVEL: MINIMUM RESTRICTED

PANELS' MAJORITY RECOMMENDATION:

FACILITY ASSIGNMENT: LCRCF TRANSFER: YES ✓ NO___ EXPLAIN BELOW:

CUSTODY LEVEL: Min/Restricted CLASSIFICATION SEQUENCE NO: 16

OVERRIDE TYPE: ____________

JUSTIFICATION, PROGRAM RECOMMENDATIONS, COMMENTS, AND SUMMARY:

Was placed on 7 Day Investigation. Was not charged with disciplinary. However I.A. Recommends Reclass + Transfer

UPDATED PHOTO NEEDED: YES___ NO ✓

OFFENDER SIGNATURE: X Chris A Dutton APPEAL: YES___ NO X
IF YES, PROVIDE APPEAL & COPY TO INMATE

PANEL MEMBER SIGNATURES: DATE: 6/18/97

[signature] CHAIRPERSON — [signature] SECURITY MEMBER — [signature] TREATMENT MEMBER

IF PANEL MEMBER DISAGREES WITH MAJORITY RECOMMEND, STATE SPECIFIC REASONS:

APPROVING AUTHORITY:

[signature] SIGNATURE — 6/18/97 DATE — APPROVE ✓ DENY___

IF DENIED, REASONS INCLUDE: ____________

EXHIBIT 42

State of Tennessee

Board of Paroles

Division of Board Operations

Parole Certificate

89414

Parole Type

Certificate Type
Regular

Dutton, Chris A. – PRISON NUMBER 142826,

is eligible to be paroled from Middle Tennessee Correctional Complex--Annex,

and there is reasonable probability that said prisoner will remain at liberty without violating the law. It further being the opinion of the Tennessee Board of Paroles that the parole of this prisoner is not incompatible with the welfare of society.
It is hereby ordered that said prisoner be and hereby is paroled, subject to the following conditions, effective: **December 16, 1998**

1. I will proceed directly to my destination and upon arrival report immediately to my parole officer or in any event no later than 72 hours after release.
2. I will obey the laws of the United States or any state in which I may be, as well as any municipal ordinances.
3. I will report all arrests, including traffic violations, immediately, regardless of the outcome, to my parole officer. I will, when away from my residence, have on my person my parole identification card and present it to the proper authority.
4. I will not own, possess, or carry any type of deadly weapon (guns, rifles, knives, or any illegal weapons).
5. I will work steadily at a lawful occupation. If I become unemployed, I will immediately report this to my parole officer and then begin to look for another job.
6. I will get the permission of my parole officer before changing my residence or employment, or before leaving the county of my residence or the state.
7. I will allow my parole officer to visit my home, employment site, or elsewhere, and will carry out all lawful instructions he/she gives and report to my parole officer as instructed, and will carry out all lawful instructions of the Administrative Case Review Committee, and will submit to electronic monitoring or community service if required.
8. I will not use intoxicants (beer, whiskey, wines, etc.) of any kind to excess. I will not use or have in my possession illegal drugs or marijuana. I will submit to drug screens or drug tests as directed by my parole officer.
9. I hereby waive all extradition rights and process and agree to return to Tennessee if at any time prior to my release from parole, the Board of Paroles directs that I do so.
10. I agree to pay all required fees to the supervision and criminal injuries fund.
11. I will not engage in any assaultive, abusive, threatening or intimidating behavior. Nor will I participate in any criminal street gang related activities as defined by TCA 40-35-121. I will not behave in a manner that poses a threat to others or myself.
12. If paroled to a detainer(s), I will report to the officer designated below if released from that detainer before my Tennessee parole expiration date.

SPECIAL CONDITIONS:

1. Evaluation for Mental Health Treatment.
2. [redacted]
3.
4.
5.

Parole Officer: Angela McCain Telephone: (423)478-0310
Location: (CLVP) Cleveland Parole Office, 950 Star-Vue Drive, Cleveland, TN 37311

I fully understand this order of parole, and I agree to comply with such conditions during the period of my parole, this the 16th day of December, 1998. Further I hereby waive all extradition rights and process and agree to return to Tennessee voluntarily if at any time prior to my release the Tennessee Board of Paroles directs me to do so. Said parole shall expire upon the sentence expiration date.

WITNESS SIGNATURE

PAROLEE SIGNATURE

Distribution: Central Office, Parole Officer, Parolee, Institution

BP-0015 (REVISED 2-97)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
AT JACKSON

JON HALL,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 05-01199-JDT**
	)	**Judge Todd**
RICKY BELL, Warden,	)	
	)	
Respondent.	)	

RESPONSE IN OPPOSITION TO PETITIONER'S MOTION FOR LEAVE TO CONDUCT DEPOSITIONS

Pursuant to this Court's discovery order filed November 22, 2006, petitioner was granted leave to serve subpoenas on the Tennessee Department of Correction (the Department) concerning "any document it possesses related to Chris Dutton." (Doc. No. 39, p. 13) On November 28, 2006, petitioner subpoenaed all Dutton-related documents in the possession, custody, or control of the Department. As petitioner concedes, the Department produced a number of relevant documents in response to the subpoena. (Doc. No. 40-1, p. 1) On January 10, 2007, the Department informed petitioner that an exhaustive search of its Internal Affairs Division records dating back to January 1996 returned no documents related to Dutton.[1] (Doc. No. 40-3, pp. 2-3)

[1] The Department's central Internal Affairs Division was created on or about January 1996; thus, the Internal Affairs Division's records extend back only to January 1996.

On January 16, 2007, petitioner filed an additional discovery motion seeking to depose: "(1) persons familiar with Internal Affairs's record keeping practices; (2) persons involved in the TDOC search for Internal Affairs documents respecting Dutton; and (3) persons involved in Internal Affairs's contacts with Dutton." (Doc. No. 40-1, p. 2) Petitioner seeks this additional discovery in order to "test the accuracy of TDOC's representation that no Internal Affairs documents exist." (*Id.* at 1)

Petitioner attempts to justify his desire to exceed the scope of discovery authorized by this Court's November 22, 2006, order by claiming that the Dutton documents already turned over by the Department contain "numerous" references to Internal Affairs[2] (Doc. No. 40-2, pp. 1, 2) and that such involvement must have generated documents that the Department has failed to produce.[3] (*Id.* at 9) However, the Department has produced, and will continue to produce, any documents it possesses related to Dutton. Though the Department has completed its examination of the central

---

[2]There are in fact just three (3) "numerous" references identified by petitioner. A disciplinary report entered May 28, 1994, some two years prior to Dutton's involvement with this case, notes that a shank found in Dutton's cell was being stored in an Internal Affairs safe. (Doc. No. 40-24, p. 2) A November 30, 1995, Protective Services Routing Sheet references a claim by Dutton that Internal Affairs was aware of his concerns regarding rejoining the prison population in light of Dutton's purported prior refusal to pass drugs. (Doc. No. 40-33, p. 2) And a June 18, 1997, Offender Classification Summary notes that Internal Affairs recommended that Dutton be reclassified and transferred following an apparently unrelated disciplinary matter. (Doc. No. 40-40, p. 2) This latter document does not, as asserted by petitioner, state that Internal Affairs recommended Dutton's "release," nor does it show that Internal Affairs recommended Dutton's transfer to any particular facility.

[3]Contrary to petitioner's claim, Internal Affairs did not assert that "any involvement" with Dutton would have generated documentation. (Doc. No. 40-2, p. 9) Rather, the Acting Director's memorandum states, "I am confident we would have record of any *investigative activity* conducted by our unit, and must assume the Internal Affairs Division had no involvement in any *matter* related to inmate Dutton." (Doc. No. 40-3, p. 3) (emphasis added).

Internal Affairs Division records and found no Dutton-related documents (Doc. No. 40-3, p. 3), its examination of the Internal Affairs records of individual correctional facilities continues. Consistent with its earlier responses to the subpoena, if the Department finds any additional documents, it will produce them; if not, it will notify petitioner.

The use of subpoenas under Rule 45 is more than sufficient to accomplish the exchange of information contemplated by the Court's discovery order. Moreover, a motion for leave to conduct additional discovery is not the appropriate mechanism by which to remedy an alleged failure to obey a subpoena. If petitioner wishes to "test" his belief that the Department is in noncompliance (Doc. No. 40-2, p. 9), the rules of civil procedure afford him another remedy. *See* Fed. R. Civ. P. 45 (2006).

WHEREFORE, respondent respectfully requests that petitioner's motion for leave to conduct depositions should be denied.

Respectfully submitted,

ROBERT E. COOPER, JR.
Attorney General & Reporter

CLARENCE E. LUTZ
Assistant Attorney General

/s/ C. Daniel Lins
C. DANIEL LINS
Assistant Attorney General
P.O. Box 20207
Nashville, Tennessee 37202
Phone: (615) 741-3486
daniel.lins@state.tn.us
Tenn. B.P.R. # 024571

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2007, a copy of the foregoing RESPONSE IN OPPOSITION TO MOTION FOR LEAVE TO CONDUCT DEPOSITIONS was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to Paul R. Bottei and Christopher M. Minton, Assistant Federal Public Defenders, 810 Broadway, Suite 200, Nashville, Tennessee 37203.

/s/ C. Daniel Lins
C. DANIEL LINS
Assistant Attorney General

ASSISTANT DISTRICT ATTORNEYS GENERAL

DONALD H. ALLEN
SHAUN A. BROWN
LAWRENCE "NICK" NICOLA
JAMES W. THOMPSON
ALFRED L. EARLS
CHRISTOPHER J. SCHULTZ
ERNEST T. BROOKS, II

CRIMINAL INVESTIGATOR
JACK A. WILSON

VICTIM/WITNESS COORDINATOR
GEORGIA M. BOND

JAMES G. (Jerry) WOODALL
District Attorney General
State of Tennessee, 26th Judicial District
Criminal Division
P.O. BOX 2825
JACKSON, TENNESSEE 38302

SECRETARIES

ANGELA WINBUSH
BETTY NEWMAN
GARI LINDSEY
TONYA SHAVERS

COUNTIES

MADISON
CHESTER
HENDERSON

TELEPHONE

901-423-5800
FAX 901-424-9039

February 16, 1996

Jesse Ford
Attorney at Law
P.O. Box 1625
618 N. Highland Ave.
Jackson, Tn 38301

Dear Jesse:

Please find enclosed a copy of a statement relating admissions by Jon Hall to another inmate concerning the killing of Billie Joe Hall. The inmate's name is Latasha Marie Whittington-Barrett. Please be further advised that the State will call Latasha Whittington-Barrett as a witness at trial.

Sincerely

Assistant District Attorney

Sir
I have waited for another oppurtunity to speak
with you. I have already spoke with another man
who wears glasses, I didn't feel comfortable with him.
Nor did he give me a chance to come out of this
shell that often prevents me from expressing
myself. I had the same trouble with a specialist
who I talked to briefly. My claustrophobia was not
taken as seriously as I felt it should, but then it
seems to be as it always has when in a system
such as this, I'll take me doing or saying some-
thing stupid for anything to be done. Then I'll
be put in a room by myself to be observed. And
that is what I fear most of all, even more than
death itself. Because I'll be put on a strong med-
ication to dumby me up or I'll just go over the
edge. I learnt my lesson, what I got to answer
the "sure" plea for help, was to be demoralized by
being put in a cell bear ass naked, Being
punished for being human with human fears.
I am, I feel a longs ways from insane; but too;
I know like that again would push me farther with-
in the recesses of myself; when what I seek is
the help to become a productive member of our
society. Therefore, I must suffer inhumane
punishment by those who refuse to treat me
as a person in need in twentith century; instead
of like the eightenth century when mental health
was dealt with as if it where a crime. I am
going to give you a brief history of the six months
now and again going back in time to where con-
nections will be found! I felt your my best bet
to get any help atall.

In court when I was sentenced, the judge ordered a phsycological evaluation. When I got here, I was told this was it. Talking to three different men, each only for a brief time. I've sent for court records, and have contacted different organizations (people) on the constitutionality of this. In an evaluation, as far as I have collected information should be held over a period of time, wherein I visit one phsyc. for therapy and keep under observation. I know you all have a large case load and do have time to deal with me, therefore unable to evaluate me properly.

I am going all out to get the help I need and deserve. If a man is willing to admit he needs help, then by all humanity and compassion, he should be helped. Like I told you I don't feel that I'm insane, but in need of care to assure my mental health.

If you remember our conversation, I told you other than my claustrophobia and the out of mind panic it causes. I don't feel that I am insane, but with my mind and soul believe that I'm possessed by a minor demon or a legend of them.

My realization of my being possessed became all too real in July of 1992 while locked up in the Hamblen county jail. Everything seemed as normal as it could be for a person with claustephobia, I was suffering, but I had lots of people around me. Over the years I have found that people being around did ease the panic. One day early in that month, I read an add that said "One free magic spell" and for some reason believed it could be. I wrote and asked for a spell to set me free. Soon I got a reply that had nothing to do with my request. Almost emediately a voice starting laughing in my head and said you seek these sharlotins, sellers of lies to breaks your bonds, When I have been with you now all along for one and twenty years. Thou I was stuned and couldn't (wouldn't) believe this was just not myself as I had thought for many years. Talking to myself, through my brain, in my head instead of outloud as I have often heard. Instantly a flash back came to me of when I was twelve years old. I was locked in a cedar chest for almost a whole weekend and of the vow I made repeatidly, "Let me live and hurt them back and I'll do anything you want. Now I know who I was asking, but if I believed I don't recall. So from that moment on I believed as I do now. Our conversations where and are very one sided. Never getting a straight answer, but getting instructions almost constantly. First came the rituals, the giving of the blood and then signing of blood. At one time I asked who are you? How many are you? My answers where, the choosen one; you know me by sight. Which again took me back to my youth.

Within a weeks time of my weekend in hell.
I had fallen asleep in the living room on the floor.
When suddenly in late hours I was awakened by
I don't know. There was a little light from the
bathroom door being open slightly. I sat up and stared
as the very began to opened by someone. This some-
one was what looked like the most beautiful angel
all gold and glowing; dressed in cloak and very
large wings. It only came as far as only two steps
(distance) but I don't think it stepped. The glow was over-
powering and I found myself rising to my feet
(in out) when it began to motion me towards it with
its hand and arm. That is when I looked at it
full in the face and was overcome with horror.
Its eyes went black to red and its smile was
not a smile; but like an evil leer. It continued to
motion me and seemed as though it was coming
towards me. I ran as hard as I could, and some
how at my mother's side. I woke her and my dad
up and told them what happened. After alot of trouble
I finally went with my dad to look, and though nothing
was there; the bathroom door stood wide open.
Now that I look back rationally, that door was
never left wide open; but only a crack; so we could
see our way to it in the night time. I was then
given instruction to mark myself in faith of the
signs of faith and as a testimony of my belief. On
my own I covered a cross, and after was told to
leave the others also as testimony. For they were
(what was) the past and my new are the future "of what is
to be"! The answer to how many was "We are one
I am many; almost always like a riddle or question to a
question.

(brothers)

After I accomplished what I could and spoke out of evil. I was told that there would be a coming of one to lead me to my freedom such as it was or ever could be. There was a brief time that I was again alone and the voices like of all my life seemed meek and of myself.

Over the years I came to rely on drugs and was always told by myself. You'll be alone without drugs, no one will want to be around, no one will like you if you dont have drugs. you know you can't talk to them if your not high. Get them high they'll be your friends. you know you need friends, you can't be alone, you will be alone if you dont get high, you dont hurt anybody in what you do, its easy, so do it, sell things, you'll steal, sell drugs and you'll never be alone Drugs are your power

Sometime in August I was woke up at about 9:pm and told by an inmate that someone wanted to talk to me. I was pissed, but soon got over it when this dude I never met came up to me. The first words he said was "Your the one I've been looking for; we are getting out of here tonight. It was true, I was being taken to my freedom. His plan was to kill ~~the~~ one (inside) gaurd and take the other one hostage. I didn't say anything right then, but as I thought about it, I came back and said I'd pass. He said then how, I'll just scar the gaurd into letting us out, and he gave me the shank. And then we waited, the timing went wrong, and only he made it to the freedom I was to have. And then it said, you were told to follow, not lead; were was your faith.

For the reasons of me not being a party to murder and refuseing to hurt the gaurd during the escape. And the fact that I am now serving a term, I believe they are only minor demons. And that though they have been with me long, have not yet forced me to do harm to others. They do use my closterphobia against me, by waiting til I weaken and then cause me to panic and loose control as when I hung myself in 1988, Even now they are with me, saying that this is only going get me locked in a room alone. They did it before, they don't care, your a bad person, don't tell them, they'll lock you up alone like they did before, they'll laugh at you they always do no one will believe you you'll be alone

For the first time in my life I have come into realization of what I face. I cannot take full credit for this, cause it was by speaking of it that I have come to my conclusion. After writing down the things I have always had trouble sharing with others, I let my cellie read it, not really expecting to find an answer or even his acceptance of my ordeal. Yet hoping that I could atleast come to terms with what I face, and that, that haunts me.

After his acceptance and the following of many questions, many of which that I've asked myself. But the difference brought out answers that I've either denied or that have been hidden away from my conscience thoughts. The answers I will reveal brought me some peace of mind for there being. Yet still, they have brought new questions and new fears too. In all though, I am now better off; that is if I can solve my problems myself. Having gone through three differente states prison systems with no help so far. I can see that the over crowding of the said systems prevents such care.

In Michigan I requested such help as to my claustrophobia, and again after a suicide attempt in N.C.; steming from being locked in a cell by my self. I was just pushed through the system, being kept in overflow status where I wasn't locked down, nor forced to be alone. And finally my last term in this system where I shared a cell and only had to be locked down at night; and spent my days outside. I had hoped the court order would set me on a road to answers and help; but again; it don't appear so.

My fears of being locked in a small area, or even large one for a long amount of time, along with being afraid of being alone in themselves are not of an enormous amount of concern. That that concerns me is what happens in these times of my own weakness. When I become over powered by those from within. I admitt that I have fallen to their wills while on the streets, fearing to be alone; I would go to many means to secure the attention and presence of others. But knowing so is only half of the problem. Concering these fears will be the only way to rid myself of those who possess me and drive me beyond indurance. What I seek is a way to reach someone to help me by sharing what I feel. I am scared of telling anyone, because of the way I was treated in N.C.. I was forced into a cell alone, with nothing to occupy my time but fear. I left that place a changed person, I haven't been near since; I am sure that part of me left me then, I fear what will happen to me if I don't seek help and yet; I do too if I do seek help. I do not trust people, and the time in N.C just inforced that feeling. For instance, I know that there are people in this system that wish to do me harm, but as I said earlier; there are much worse things than death. And I treasure the amount of intelligence I have, and being on drugs to keep me down or the outcome of just dealing with whats within will surely strike down my mental stability. I don't feel I am insane, but just opposite. I want to secure my sanity, by doing so; further my course of wanting to be a productive member of society.

I hope that I have expressed myself and my feeling adaquitly, As I have said, I do have problems doing so face to face, Which has also been one of the underlaying problems, along with my other fears that drugs seemed to concur, A man who deals drugs or has alot and willing to share has no lack of so called friends; and being stoned makes talking easier.

Though I've never been out spoken, I was the life of the party; being the one dishing out the good times; Looking back, I do not miss any-thing, it only ~~m~~ makes want to resolve my addictions and fears. It sounds pretty unmanly saying I have fears or that I am scared of things, But in the same, as a man; I have to face them and admitting them is the first step of many, Be-cause these fears and the results from and of them have run my life for too long. I don't know where else to turn since nothing so far has worked. I do know that though I feel I have found direction, I need the help, I myself doesn't have the knowledge, will power or what ever its going to take to come to terms with I face and rid not only myself; but society of a sore on mankind.

I wish I could, let someone feel and hear what I do; so someone would understand. Even in this plea, I can not reveal all; until I feel secure; and that is not locked away to deal with it, nor put on drugs that will ozone me, or turn me into half wit; nor zombie! Because they're all worse than death. I want to become whole and be rid of those who posess me, not just to be unaware of them, or the world.

Sincerely
Dino A Patton

TENNESSEE DEPARTMENT OF CORRECTION
PSYCHIATRIC INTAKE EVALUATION
INSTITUTION: BRUSHY MOUNTAIN STATE PENITENTIARY

NAME: Chris Dutton NUMBER 142826 DOB [redacted]59 AGE 33 SEX M RACE W
INTAKE DATE 12/2/92

PRESENTING ISSUES:
Mr. Dutton was received as a NC/PV/transfer. He is currently housed in the A Block unit. He is reporting today for intake evaluation. He (is)/~~is not~~ currently maintained on psychotropic medication. He (is)/~~is not~~ compliant with his medication regimen at the present time.

BACKGROUND INFORMATION:
Social/Educational History
Mr. Dutton was born in Muskegon, Mich. He has 2 siblings. He has completed the 12th grade in school.

He reports an employment history as a Tree Trimmer and was last self employed ~~at~~ Muskegon, Michigan. He is married/single/(divorced) with 0 children. He reports that he ~~does~~/(does not) have contact with his family at this time. He does/does not have a military history. Records indicate that he ~~does~~/(does not) have history of aggressive/assaultive behavior.

CRIMINAL/INSTITUTIONAL HISTORY
He is serving a 8 yr sentence sentence for 2 count Theft / 1 Count Burglary. His Release Eligibility Date is 9/92. His expiration date is 1998. There are 0 disciplinary infractions listed in his record, ~~of which are for assault or fighting, with the most recent being in~~ ______. This is his 7 month period of incarceration. For more information see PSI or RAP Sheet.

SUBSTANCE ABUSE HISTORY
Mr. Dutton does/does not indicate history of substance abuse. (if indicated) He indicates that his substance of choice was LSD, PCP, Heroin and that he would use seven days per week. He has/has not participated in a substance abuse program. He reported that his last substance abuse occurred March 1992.
Polysubstance abuse started at age 12.

PAST PSYCHIATRIC HISTORY
Mr. Dutton acknowledges/denies prior psychiatric treatment. He states he received past treatment at Murphy N.C. hospital for 3-4 weeks after hanging himself in Cherokee County N.C. Jail. as an (inpatient)/outpatient. He states he was treated with the following medications in the past Trazadone.

Mr. Dutton states that these medications ~~were~~/(were not) beneficial to him at that time. He (acknowledges)/~~denies~~ [auditory]/visual hallucinations at this time or in the past.

PAST MEDICAL HISTORY
He (acknowledges)/~~denies~~ a history of head injuries "Police Beat me in N.C." He is currently being treated for headaches: Ibuprofen /~~no medical conditions~~.

ALLERGIES: PCN; Codeine

MENTAL STATUS:
Mr. Dutton (is)/~~is not~~ oriented x 4. He (is)/~~is not~~ cooperative with questions. Responses (were)/~~were not~~ appropriate. Speech ~~is~~/(is not) normal in tone and content and is goal directed. He ~~acknowledges~~/(denies) suicidal/homicidal ideations or plans at this time. Hallucinations (are)/~~are not~~ acknowledged at this time. He voices ~~no~~ delusional content. There (is)/~~is no~~ evidence of acute psychotic thought disorganization. Insight and judgement are fair. He is requesting treatment for... drug treatment program

Behavioral Observations:

Appeared slightly anxious but coherent & relevant. He has some unusual/idiosyncratic thoughts but he is not psychotic.

Clinical Impression:

Polysubstance Abuse since approx age 12 appears primary with hallucinogens his drug of choice. Doesn't appear delusional but expresses unusual thoughts that appear to be fantasy/drug originated.

DIAGNOSTIC IMPRESSIONS:
Axis I: Polysubstance Abuse
Axis II: R/O Schizotypal Personality D.O.
Axis III:
Axis IV:
Axis V:

TREATMENT RECOMMENDATIONS: Follow-up w/ Dr Rodwell to continue Trazodone. Referred to chaplain for AA/NA Meetings

Psychiatrist

Psychologist

[signature], MS.
Psychological Examiner

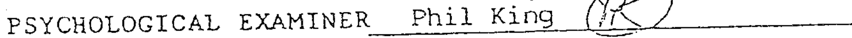
MHPS 2

ADULT SERVICES
TENNESSEE DEPARTMENT OF CORRECTION

CONFIDENTIAL

INITIAL CLASSIFICATION PSYCHOLOGICAL SUMMARY

NAME Chris Dutton NUMBER 142826

PSYCHOLOGICAL EXAMINER Phil King  DATE 12-14-90

TESTS ADMINISTERED:

Rev. BETA II X GATB ____ WRAT X CPS X TABE X

Slosson ____ WAIS-R ____ PPVT ____ MMPI ____

TESTS SYNOPSIS/ASSESSMENT COMMENTS: Mr. Dutton is a 31 year old white male committed from Bradley County who is currently serving his second period of incarceration. When asked about the charges against him at this time, Mr. Dutton does accept responsibility for having committed the crime. When asked about his alcohol and drug consumption, Mr. Dutton indicates that he will consume up to $1,000.00 worth of Cocaine, LSD, Marijuana, and Alcohol in a week's time. Testing/interview does reveal a substance abuse of alcohol/drug which was verified by Mr. Dutton. At this time, Mr. Dutton expresses an interest in working while incarcerated. He is making a fair adjustment to his incarceration at this time, and it is anticipated that he will continue to do so. At this time there is not a good family relationship.

The revised Beta suggests that Mr. Dutton is probably functioning at an average level of intellectual ability.

The following scores were obtained on the WRAT/TABE: 10 in reading, 11 in spelling, and 9 in arithmetic.

Mr. Dutton presented himself for interview in an appropriate manner appearing well oriented to time, place, person, and present circumstances. His memory for recent and remote events seemed to be intact. He reported a history of blackout periods associated with substance abuse, and he denied ever experiencing significant head trauma or seizure activity. His speech and communication were relevant, rational, coherent, and devoid of looseness of association, ideas of reference, delusional content, hallucinations, or other indices of current psychosis. He did, however, report a history of ego-dystonic auditory hallucinations associated with psycho-social stressors. His mood, affect, and overall mental status appeared unremarkable on this date.

Recommendations:

1. Referral to contract Psychiatrist.
2. A & D Treatment Program.

PK:sga
1-8-91

APPENDIX R

CR-2546 (Rev. 11-83)

TENNESSEE DEPARTMENT OF CORRECTION

PROBLEM ORIENTED - PROGRESS RECORD

ME: Dutton, Chris NUMBER 142826

SUBJECTIVE O=OBJECTIVE A=ASSESSMENT P=PLAN I=INTERVENTION E=EVALUATION

Date	Time	Prob. No.	
			Psychiatry
/4/92		S	33 y/o WM came for first contact and states
			he has been on Trazodone since end of August 92
			to keep him from going off and being
			claustrophobic. Would like to get off it for
			something milder to help c̄ "claustrophobia"
			Described claustrophobic Sx's - as wall closing
			in on him, SOB, disorganized thoughts,
			hearing voices telling him all kinds of
			stuff. Has been hearing voices since age 12
			but thought his mind was speaking to him.
			Has been drug abuser - PCP, speed, preludin
			since age 13. Also reports some visual
			hallucinations. Denies of S/H thoughts and
			denies of current hallucinations - last one
			in 8/9/92
		O	Pt c̄ fair ADL and good eye contact
			present self well. Cooperative c̄ NL
			flow of thought. Mood is euthymic c̄
293.82			congruent affect. A+O x 4
		A	I Polysubstance Abuse
			Organic Hallucinations
		P	(1) Vistaril 25 mg ÷ hs
			(2) DC Trazodone [signature]
7/30/92			Psyc Note
			I/M seen individually and reports he is doing
			better c̄ coping. Reports "they work right now" referring
			to voices c̄ demons. Some mild depression noted. He refers
			to letter attached but denied homicidal/suicidal
			ideations. He feels slightly worse "just sitting in cell." Encourage

Do Not Write on Back

therapy when classified. [signature] MS

Court Ret.
1/6

TENNESSEE DEPARTMENT OF CORRECTION

HEALTH SCREENING FORM

DOB [redacted]59
31 yrs.

Inmate's/Student's Name: Chris Allen Dutton TDOC Number: 142826

Receiving Institution: BMSP Date: 2-6-91

Inquire Into:

1. Are you currently being treated for any illness or health problem (including dental, venereal disease, or other infectious diseases)? ____ Yes ✓ No. If yes, describe:

2. Do you have any medical or dental complaints at this time? ____ Yes ✓ No. If yes, describe:

3. Are you currently on any medication(s)? ____ Yes ✓ No If yes, was the medication transferred with the inmate/student? ____ Yes ✓ No

4. Have you recently used alcohol or other drugs? ____ Yes ✓ No If yes, describe: (Include type, mode, amount, frequency, last use, problems resulting from discontinuance, detoxification involvement)

5. Have you recently or in the past received treatment or been hospitalized for any mental disturbance(s) or suicidal behavior? ✓ Yes ____ No If yes, describe: Nov. 89 Raleigh Central Prison attempted suic

6. Do you have any allergies? ____ Yes ____ No If yes, describe:

Observe:

1. Behavior (including state of consciousness, mental status, appearance, conduct, tremor and sweating): ✓ Normal ____ Abnormal If abnormal, describe:

2. Body deformities, condition of skin (including needle marks, trauma markings, bruises, lesions, jaundice, rashes and infestations): ____ Yes ✓ No If yes, describe:

Disposition:

✓ Housed with general population and instructed to make sick call for medical and/or dental care B Black

____ Housed with general population and prompt referral appointment with health provider

____ Referred to appropriate health provider on an emergency basis

Faye Jefferson
Signature and Title of Screening Staff

I have received a copy of the procedure for obtaining health care (medical, dental and/or mental health). It has been explained to me and I understand how to access treatment.

Distribution: Health Record

Chris A Dutton
Signature of Inmate/Student

APPENDIX 270

CR-2178

9/13 BK [illegible]

CONFIDENTIAL

NEW ADMISSIONS DATA

NAME: Chris A. Dutton DOC#: 142826 DOB: 6-4-59

RACE: W UNDER 21: Y ( ) N (✓) HIGHEST GRADE COMPLETED: 12 (V)

REC'D CENTER: 11-27-91 REC'D FROM: BR REC'D TDOC: 12-13-90 N/C

SENT: 8 yrs SED: 6-9-90 RED / PP: 1-12-93 EXP: 3-27-98

CHARGES: Burg - Other # 891033 ct 1, Theft / Prop # 891033 ct 2

JUDGE / COUNTY: Milburn / Bradley

****

CUSTODY LEVEL: PR / MT CAF: +1 OVERRIDE: ___ m MD to

LAST RECLASS: 11-27-91 NEEDS ASSESSMENT: S3A, B2A, W2A, L2A

CLASSIFICATION RECOMMENDATIONS: Construction Wkr

WORK CLASS: B-L DISABILITIES: Orthopedic Imp, Arthritis

ASSIGNED COUNSELOR: Towner

****

DISCIPLINARY RECORD: None

INCOMPATIBLES: None DETAINERS: None

PAROLE DATA: None Recommended FT

****

TDOC WORK EXPERIENCE: SEE ATTACHED. FREE WORLD EXPERIENCE:

****

COMMENTS: PSI indicates prior suicide attempts at NC DOC. Subject self-reports neck injury rec'd at Bradley Co Jail. Extensive history of substance abuse since youth. Testing indicates average range of intelligence, and unremarkable mental status.

Reviewed 12/2/91

STATE OF TENNESSEE
DEPARTMENT OF CORRECTION
DIVISION OF ADULT INSTITUTIONS
SOUTHEASTERN TENNESSEE STATE
REGIONAL CORRECTIONAL FACILITY
ROUTE 4, BOX 600
PIKEVILLE, TENNESSEE 37367

TENNESSEE DEPARTMENT OF CORRECTIONS
INMATE INTAKE

NAME: Dutton, Chris

SEX: M

NUMBER: 142826

DATE OF INTAKE: 8-1-91

DATE OF BIRTH: [redacted] 59

FACILITY: STSRCF

AGE: 32

INTAKE WORKER: P. Maurice Siler P.E.

PRESENTING PROBLEM

Insomnia

MENTAL STATUS EXAM:

Slender W/M who looks about his stated age. Oriented x4. Psychomotor functions operational. Good eye contact except that he held the left eye constantly due to sinus pain. Speech is clear & articulate. Thought processings are affectively appropriate & sequential. No gross M.H. pathology either emitted or elicited. Subdued, somber mood due to sinus pain.

PSYCHIATRIC HISTORY:

Pt. relates long hx of M.H. problems related to Drug abuse.

MEDICAL HISTORY

acute Sinus infection

ALCOHOL AND DRUG HISTORY:

Yes Yes

SOCIAL HISTORY

Divorced

From a broken home

Reared by Grandparents. D. Mother died when pt was 12.

M. Father " " " " 15.

On own - largely since then.

SEXUAL DEVELOPMENT:

average

EMPLOYMENT HISTORY

Tree trimming, etc,
own business

CRIMINAL HISTORY:

A. JUVENILE

B. ADULT — Multiple charges

C. FAMILY

MILITARY HISTORY

U.S. Army – 2 yrs. in Korea

PSYCHOLOGICAL EVALUATIONS:

no current testings done/available

REFERRAL RECOMMENDATIONS:

Refer to Dr. DeRuiter

DIAGNOSIS:

axis I: adjust. disorder c̄ mixed emotions

axis II: antisocial

axis III: no sinus infection

axis IV: away from loved ones: — moderate/severe

axis V: GAF 70

P. Maurice Siler
P. MAURICE SILER, P.E. II
MENTAL HEALTH PROFESSIONAL

"PAUL D. FISHER, PH.D."

310107

TENNESSEE DEPARTMENT OF CORRECTION

Psychiatric Intake Update

R.M.S.I.

Inmate: Chris Dutton Number: 142826 Facility: RMSI

DOB: ______ Sex: M Custody Status: ______ Race: W Intake Date: ______

COURSE OF TREATMENT TO DATE

Define Problem Areas: 35 y WM c Dx below tx'd c Doxepin 200 mg QHS, reports a little anxiety over upcoming parole 6/95, feels Doxepin helps control anxiety

Medications: ______

CURRENT MENTAL STATUS

Alert WM in sweat pants + no shirt c multiple tattoos, cooperative + interactive, speech nl in rate + rhythm, thoughts logical + goal directed, ØAH/VH/delusions, affect euthymic, I/J intact for population,

DIAGNOSTIC IMPRESSIONS

Axis I: Dysthymia, Anxiety D/O NOS
Axis II: Antisocial Personality D/O
Axis III: Sinus HA
Axis IV: severe - incarceration
Axis V: 70

TREATMENT RECOMMENDATIONS

will continue Sinequan @ 200 mg po QHS, f/u i - ii month

Signature: [signature], MD 1/12/95
Staff Psychiatrist Date

Signature: ______ ______
Staff Psychologist Date

Signature: ______ ______
Registered Nurse Date

Signature: ______ ______
Psychological Examiner/MHPS Date

Original: Health Record
Yellow: Programmatic Record
Pink: Warden

APPENDIX W

RDA 1458

CR- 3487 (4/92)

TENNESSEE DEPARTMENT OF CORRECTION

Psychiatric Intake Update

Inmate: Chris Dutton Number: 142826 Facility: CCCF

DOB: [redacted] 1959 Sex: Male Custody Status: Minimum Race: Cau Intake Date: 4-15-96

COURSE OF TREATMENT TO DATE

Define Problem Areas: Depression + anxiety since childhood: No crying spell, loss of appetite or wt loss. Suicide attempt 1989 – Attempted to hang self while incarcerated. History of alcoholism, LSD, PCP, but has tried everything. Long history

Medications: ~~incarcerated - since age 30 yrs old.~~ doxepin 100 mg 4:00 PM – 8:00 PM

CURRENT MENTAL STATUS

WD, WN, W/M – Tattoo on forearm. Hygiene adequate. Mood neutral. Affect appropriate. Thought content coherent. ... have doxepin reduced. No AOBs. Not psychotic or thought disorder. Average intelligence. Impression –

DIAGNOSTIC IMPRESSIONS

Axis I: Dysthymia ; Polysubstance Abuse, Remission

Axis II: Antisocial personality Disorder

Axis III:

Axis IV:

Axis V:

TREATMENT RECOMMENDATIONS

↓ doxepin 100 mg po midnight

Signature: [signature] DO 4/15/96 Signature: ______
Staff Psychiatrist Date Staff Psychologist Date

Signature: ______ Date Signature: [signature] 4-15-96
Registered Nurse Date Psychological Examiner/MHPS Date

Original: Health Record
Yellow: Programmatic Record
Pink: Warden

APPENDIX W

 RDA 1458

CR- 3487 (4/92)

PHYSICIAN'S ORDERS

[redacted]59

372-78-9523

Drug Allergies

NAME Du Hon Chris

ROOM NO. (ADDRESS) 142826

HOSP. NO. BMSP

PHYSICIAN Littel

Date & Time	Another brand of drug identical in form and content may be dispensed unless checked ☐ / DO NOT USE THIS SHEET UNLESS A RED NUMBER SHOWS →	Nurse's Initials
DEC 03 1992	Desyrel 150 QHS	
~~DEC 03 1992~~		
	DELVIN E LITTELL MD	
DEC 15 1992	D/c Desyrel	
	Vistaril 50mg QHS X 30	
	Motrin 800 TID	
DEC 15 1992	[signature]	
	DELVIN E LITTELL MD	
JAN 12 1993	Vistaril 50mg QHS	
	Motrin 800 TID	
	[signature]	
JAN 12 1993	DELVIN E LITTELL MD	
	Vistaril 50mg QHS	
	Motrin 800 TID	
	[signature]	
FEB 09 1993	8:00 A DELVIN E LITTELL MD	

1PAGE 7

	ID_TOMIS	DTE_CNTCT_NOTE	TME_CNTCT_NOTE	NBR_SEQ	NBR_LINE
155_	00142826	08/18/1994	15:00:00	1	6
156_	00142826	08/27/1994	12:00:00	1	1
157_	00142826	08/27/1994	12:00:00	1	2
158_	00142826	08/27/1994	12:00:00	1	3
159_	00142826	08/29/1994	15:00:00	1	1
160_	00142826	08/29/1994	15:00:00	1	2
161_	00142826	08/29/1994	15:00:00	1	3
162_	00142826	09/01/1994	10:00:00	1	1
163_	00142826	09/01/1994	10:00:00	1	2
164_	00142826	09/01/1994	10:00:00	1	3
165_	00142826	09/01/1994	15:00:00	1	1
166_	00142826	09/01/1994	15:00:00	1	2
167_	00142826	09/01/1994	15:00:00	1	3
168_	00142826	09/01/1994	15:00:00	1	4
169_	00142826	09/01/1994	15:00:00	1	6
170_	00142826	09/01/1994	15:00:00	1	7
171_	00142826	09/01/1994	15:00:00	1	8
172_	00142826	09/03/1994	14:00:00	1	1
173_	00142826	09/03/1994	14:00:00	1	2
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1PAGE 8

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155_	APPEARED EMOTIONAL SEVERAL TIMES DURING INTERVIEW.	B142217	1994-11-08-23.56.56.720000
156_	CONTACTED BY: CM	B142217	1994-08-30-15.59.30.169920
157_	MET W/MR.DUTTON IN D POD. HE ASKED FOR PAPER FOR LEGAL	B142217	1994-11-08-23.56.56.720000
158_	CORRESPONDENCE.	B142217	1994-11-08-23.56.56.720000

159_| CONTACTED BY: IRC | B142060 | 1994-08-29-13.34.32.071990 |
160_| TALKED WITH INMATE CONCERNING PROPERTY, WITH- | B142060 | 1994-11-08-23.56.56.710000 |
161_| DRAW FOR LEGAL MAIL, AND MAILING OF PACKAGE. | B142060 | 1994-11-08-23.56.56.720000 |
162_| CONTACTED BY: CM | B142166 | 1994-09-28-16.31.27.687000 |
163_| CONDUCTED REQUIRED 30 DAY REVIEW. RECOMMENDED CONTINUE | B142166 |
1994-11-08-23.56.56.690000 |
164_| ON IAS PLACEMENT. | B142166 | 1994-11-08-23.56.56.700000 |
165_| CONTACT TYPE: ASRV | B142060 | 1994-10-02-11.06.27.787000 |
166_| CONTACTED BY: CM | B142060 | 1994-10-02-11.06.27.787000 |
167_| CONDUCTED REQUIRED 30 DAY REVIEW AND RECOMMEND CONTINUED | B142060 |
1994-11-08-23.56.56.690000 |
168_| AS PLACEMENT. | B142060 | 1994-11-08-23.56.56.690000 |
169_| CONTACT TYPE: JOIC | B142060 | 1994-09-01-13.21.46.506150 |
170_| CONTACTED BY: IRC | B142060 | 1994-09-01-13.21.46.506150 |
171_| DID IAS REVIEW. | B142060 | 1994-11-08-23.56.56.710000 |
172_| CONTACTED BY: CM | B142217 | 1994-09-07-10.29.05.544730 |
173_| MET W/MR.DUTTON IN D POD. NO QUESTIONS OR PROBLEMS AT THIS | B142217 | 1994-11-08-23.56.56.710000
|
174_| TIME. | B142217 | 1994-11-08-23.56.56.710000 |
175_| CONTACTED BY: CM | B142217 | 1994-09-24-14.50.16.015590 |
176_| MET W/MR.DUTTON IN D POD. HE ASKED ABOUT FBI ADDRESS, COPIES | B142217 | 1994-11-08-23.56.56.710000
|
177_| OF POLICIES, AND JOBS. | B142217 | 1994-11-08-23.56.56.710000 |
178_| CONTACT TYPE: ASRV | B142060 | 1994-10-10-15.04.51.290650 |
179_| CONTACTED BY: CM | B142060 | 1994-10-10-15.04.51.290650 |
180_| CONDUCTED REQUIRED 30 DAY REVIEW AND RECOMMEND CONTINUED | B142060 |
1994-11-08-23.56.56.690000 |
181_| AS PLACEMENT WITH LONG RANGE PHASE DOWN PROGRAM. | B142060 | 1994-11-08-23.56.56.690000 |
182_| CONTACT TYPE: JOIC | B142060 | 1994-09-29-15.18.29.709370 |
183_| CONTACTED BY: IRC | B142060 | 1994-09-29-15.18.29.709370 |
184_| DID AS REVIEW WITH INMATE. | B142060 | 1994-11-08-23.56.56.710000 |
185_| CONTACTED BY: CM | B142217 | 1994-10-27-18.40.00.999670 |
186_| MET W/MR.DUTTON IN D POD. HE ASKED ABOUT FOOD SNACKS. | B142217 | 1994-11-08-23.56.56.710000 |
187_| CONTACTED BY: CM | B142217 | 1994-10-27-18.41.32.091520 |
188_| MET W/MR.DUTTON IN D POD. HE ASKED ABOUT ARTS/CRAFTS SUPPLIE | B142217 |
1994-11-08-23.56.56.710000 |
189_| S. BEHAVIOR CONTINUES TO BE APPROPRIATE. | B142217 | 1994-11-08-23.56.56.710000 |
190_| CONTACTED BY: SGT. OMTVEDT | B142A87 | 1994-10-15-09.11.27.086530 |
191_| HAVING PROBLEMS WITH THE SECOND SHIFT STAFF, AND FOOD | B142A87 | 1994-11-08-23.56.56.710000 |
192_| SERVICE ABOUT PM SNACK.EVERYTHING ELSE OKAY. | B142A87 | 1994-11-08-23.56.56.710000 |
193_| CONTACTED BY: CM | B142217 | 1994-10-22-13.38.21.901340 |
194_| MET W/MR.DUTTON PRIOR TO GRIEVANCE HEARING. HE ASKED ABOUT | B142217 |
1994-11-08-23.56.56.710000 |
195_| JOB, EVENING SNACK PROBLEMS AND THE STATUS OF HIS PRIOR | B142217 | 1994-11-08-23.56.56.710000 |
196_| GRIEVANCES. | B142217 | 1994-11-08-23.56.56.710000 |
197_| CONTACTED BY: CM | B142217 | 1994-10-27-18.42.43.163240 |
198_| MET W/MR.DUTTON IN D POD. HE ASKED ABOUT STATUS OF GRIEVANCE | B142217 |
1994-11-08-23.56.56.710000 |
199_| , ABOUT JOB AND COPY OF INCOMPATIBLES. | B142217 | 1994-11-08-23.56.56.710000 |
200_| CONTACTED BY: CM | B142217 | 1994-11-03-15.41.01.060750 |
201_| MET W/MR.DUTTON IN D POD. HE ASKED ABOUT STATUS OF HIS | B142217 | 1994-11-08-23.56.56.710000 |
202_| GRIEVANCES,INCOMPATIBLES,AND JOB. | B142217 | 1994-11-08-23.56.56.710000 |
203_| CONTACTED BY: IRC | B142060 | 1994-10-31-14.34.41.881330 |
204_| CONTINUE A/S PLACEMENT WITH LONG RANGE PHASE DOWN PROGRAM. | B142060 |
1994-11-08-23.56.56.690000 |
205_| CONTINUE TO MONITOR BEHAVIOR. | B142060 | 1994-11-08-23.56.56.690000 |
206_| CONTACTED BY: CM | B142217 | 1994-11-03-16.31.00.059710 |
207_| MET W/MR.DUTTON IN OFFICE. HE ASKED ABOUT GRIEVANCE STATUS. | B142217 |
1994-11-08-23.56.56.700000 |
208_| HE WAS UPSET ABOUT INCOMPATIBLES PRINTOUT AND SAID HE WAS NO | B142217 |
1994-11-08-23.56.56.700000 |
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1PAGE 9

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ARRIVAL/DEPARTURE
SELECT

DATE 01 [illegible]
TIME [illegible]

TOMIS ID: 00238741 HALL, JOHN
STATUS: ACTV SEX: M RACE: W AGE: 33 DOB [illegible]/05/19[illegible]

S	MOVE DATE/TIME	A/D	FROM/TO		MOVE REASON	
	03/20/1997 10:00 PM	A	059	RMSI	RETNO	RETURN - NO CHARGES
	03/19/1997 12:30 PM	D	RMSI	057	OUTNO	OUT TO COURT - NO CHARGES
	02/06/1997 11:30 AM	A	057	RMSI	NEWAD	NEW ADMISSION
	12/05/1996 03:30 PM	D	RMSI	057	SARET	SAFEKEEPING RETURNED
	04/09/1996 04:45 PM	A	039	RMSI	SAREC	SAFEKEEPING RECEIVED
	04/09/1996 07:19 AM	D	RMSI	057	SARET	SAFEKEEPING RETURNED
	02/09/1996 04:21 PM	A	039	RMSI	SAREC	SAFEKEEPING RECEIVED
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	11/03/1995 04:07 PM	A	039	RMSI	SAREC	SAFEKEEPING RECEIVED
	11/03/1995 06:41 AM	D	RMSI	039	SARET	SAFEKEEPING RETURNED

SEARCH
NEXT FUNCTION: DATA:
F1-HELP F8-PAGEDOWN F9-QUIT F11-SUSPEND

TOP OF LIST

COV - EXHIBIT [J]

19

IN THE CIRCUIT COURT OF HENDERSON COUNTY, TENNESSEE
DIVISION I

STATE OF TENNESSEE,	)		FILED
Plaintiff,	)		KENNY CARDESS - CIRCUIT CT. CLERK
VS.	)	NO. 94-342	MAR 07 1996
JON HALL,	)		BY ______ DEPUTY CLERK
Defendant.	)		

MOTION TO TRANSFER TO MADISON COUNTY PENAL FARM

Comes the Defendant, JON HALL, by and through his attorneys of record, Jesse H. Ford, III and Clayton F. Mayo, and hereby moves this Honorable Court to transfer Defendant from Riverbend Maximum Security Institution in Nashville, Tennessee, to the Madison County Penal Farm for the following reasons:

1. That Defendant has been charged with First Degree murder and notice has been entered by the District Attorney General's Office seeking the Death Penalty;

2. That Attorneys for Defendant have just been recently appointed to this case and Attorneys most definitely need to spend time meeting with Defendant regarding this case;

3. That Attorneys feel that they will be not be able to competently and adequately prepare for this case with Defendant being incarcerated such a far distance away from Attorneys;

4. That Attorneys for Defendant and Defendant believe that this would be in everyone's best interest;

5. That Defendant is a pretrial detainee but is being treated the same as if he has already been convicted and is subject to twenty-three (23) hour lockdown;

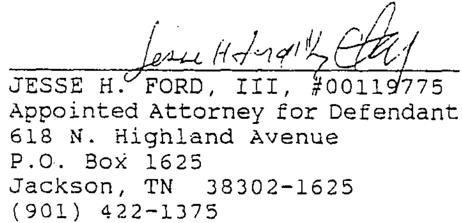
6. That there is no reason regarding Defendant's conduct as to why he should be in lockdown for twenty-three hours a day and located such a far distance from his attorneys.

BASED UPON THE FOREGOING REASONS, Attorneys for Defendant, Jesse H. Ford, III and Clayton F. Mayo, and Defendant, JON HALL, respectfully request that this Honorable Court transfer Defendant from the Riverbend Maximum Security Institution and the Department

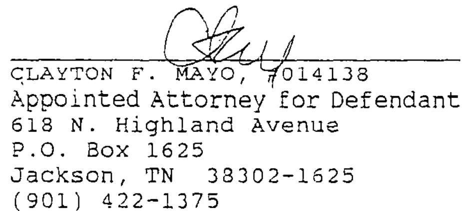
of Corrections' custody to the Madison County Penal Farm to facilitate the attorney/client relationship.

DATED this the 6th day of March, 1996.

Respectfully submitted,



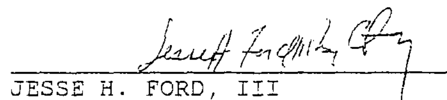
JESSE H. FORD, III, #00119775
Appointed Attorney for Defendant
618 N. Highland Avenue
P.O. Box 1625
Jackson, TN 38302-1625
(901) 422-1375



CLAYTON F. MAYO, #014138
Appointed Attorney for Defendant
618 N. Highland Avenue
P.O. Box 1625
Jackson, TN 38302-1625
(901) 422-1375

CERTIFICATE OF SERVICE

I hereby certify that I have either mailed or personally delivered a true copy of the foregoing to Mr. James Thompson, Assistant District Attorney, P.O. Box 2825, Jackson, TN 38302, this the 6th day of March, 1996.



JESSE H. FORD, III

CLAYTON F. MAYO

IN THE CIRCUIT COURT OF HENDERSON COUNTY, TENNESSEE
DIVISION I

FILED
KENNY CAVNESS - CIRCUIT CT. CL
AUG 2 9 1996
BY ________
DEPUTY CLERK

STATE OF TENNESSEE,)
)
Plaintiff,)
)
VS.) NO. 94-342
)
JON HALL,)
)
Defendant.)

MOTION TO HAVE DEFENDANT TRANSFERRED
TO MADISON COUNTY PENAL FARM OR MADISON COUNTY JAIL

Comes the Defendant, JON HALL, by and through his attorneys of record, Clayton F. Mayo and Jesse H. Ford, III, and hereby moves this Honorable Court to transfer Defendant from Riverbend Maximum Security Institution in Nashville, Tennessee, to the Madison County Jail or the Madison County Penal Farm for the following reasons:

1. That Defendant has been charged with First Degree murder and notice has been entered by the District Attorney General's Office seeking the Death Penalty;

2. That a trial date in this matter has been scheduled for October 15, 1996;

3. That Attorneys work in Jackson, Tennessee, and Defendant is incarcerated in Nashville, Tennessee;

4. That Attorneys must take an entire day from their schedule for their meetings with Defendant, of which approximately five (5) hours of work are being spent driving to and from Riverbend;

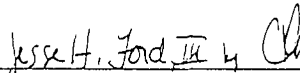
5. That Attorneys feel they will be not be able to competently and adequately prepare for this case with Defendant being incarcerated such a far distance away from Attorneys;

6. That Attorneys feel that in order to prepare a competent and adequate defense, Defendant should be brought to Madison County at least one month prior to trial.

BASED UPON THE FOREGOING REASONS, Attorneys for Defendant, Clayton F. Mayo ad Jesse H. Ford, III, and Defendant, JON HALL, respectfully request that this Honorable Court transfer Defendant from the Riverbend Maximum Security Institution and the Department

of Corrections' custody to the Madison County Jail or the Madison County Penal Farm at least one month prior to trial in order to prepare a competent and adequate defense for the trial in this matter scheduled for October 15, 1996.

DATED this the 7th day of August, 1996.



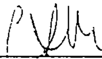
Respectfully submitted,

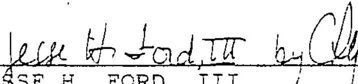
CLAYTON F. MAYO, #014138
Appointed Attorney for Defendant
618 N. Highland Avenue
P.O. Box 1625
Jackson, TN 38302-1625
(901) 422-1375

JESSE H. FORD, III, #00119775
Appointed Attorney for Defendant
618 N. Highland Avenue
P.O. Box 1625
Jackson, TN 38302-1625
(901) 422-1375

CERTIFICATE OF SERVICE

I hereby certify that I have either mailed or personally delivered a true copy of the foregoing to Mr. Al Earls, Assistant District Attorney, P.O. Box 2825, Jackson, TN 38302, this the 7th day of August, 1996.





CLAYTON F. MAYO

JESSE H. FORD, III

FILED
MAY 22 1995
BY ____ DEPUTY CLERK

IN THE CIRCUIT COURT OF HENDERSON COUNTY, TENNESSEE
DIVISION I

STATE OF TENNESSEE)
) Nos. 94-342; 94-452 & 94-454
VS.)
)
JON HALL)

ORDER ALLOWING PUBLIC DEFENDER'S OFFICE TO WITHDRAW
AND APPOINTING PRIVATE COUNSEL

This matter came on to be heard before the Honorable Whit LaFon, Circuit Judge, on the 19th day of May, 1995, and it appearing to the Court that the Defendant, Jon Hall, is charged with First Degree Murder, that a death penalty notice has been filed by the State of Tennessee and that an irreconcilable conflict exists between the Defendant and the Public Defender, such that private counsel should be appointed.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Public Defender's Office of the 26th Judicial District is hereby allowed to withdraw from representation of Defendant, Jon Hall.

IT IS FURTHER ORDERED that Carthel Smith, Attorney at Law, of Lexington, Tennessee is appointed to represent Defendant, Jon Hall. After Mr. Smith has had time to review the file in this case, the Court will consider appointing an additional attorney to assist Mr. Carthel Smith as co-counsel. Furthermore, Mr. Smith is authorized mileage expense at the regular state rate to visit Mr. Hall since this would be necessary for the defense in this case and no less expensive alternative is available for consultation and preparation in this death penalty matter. Mr. Hall is currently being held pre-trial at the Riverbend Facility in Nashville, Tennessee.

ENTER this 22 day of May, 1995.

Whit LaFon, Circuit Judge

GEORGE MORTON GOOGE
DISTRICT PUBLIC DEFENDER

JIM THOMPSON
ASSISTANT DISTRICT ATTORNEY

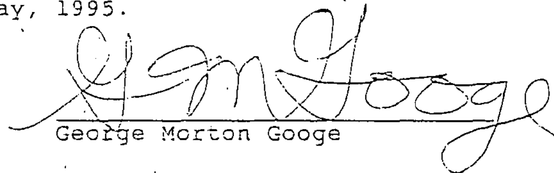
CERTIFICATE OF SERVICE

I hereby certify that I have forwarded by U. S. Mail, postage prepaid a true and correct copy of the foregoing Order to the following:

1. Carthel Smith, Attorney at Law, 85 E. Church Street, Lexington, TN 38351, and

2. Jon Hall, Inmate No. 238941, Riverbend Maximum Security Institute, Unit 1 A-209, 7475 Cockrill Bend Ind. Rd., Nashville, TN 37209-1010.

This 22 day of May, 1995.



George Morton Googe

IN THE CIRCUIT COURT OF MADISON COUNTY, TENNESSEE
DIVISION I

FILED
OCT 02 1996
JOE GAFFNEY, CIRCUIT COURT CLERK
A.M. DEPUTY CLERK

STATE OF TENNESSEE,	)	
Plaintiff,	)	
VS.	)	NO. 96-589
JON HALL,	)	
Defendant.	)	

MOTION FOR HEARING ON TRANSFER OF DEFENDANT

Comes your Defendant, JON HALL, by and through his attorneys of record, Clayton F. Mayo and Jesse H. Ford,III, and hereby requests that this Honorable Court have a hearing on Defendant's Motion to have Defendant Transferred to the Madison County Penal Farm or Madison County Jail in the above matter and in support of this Motion, Defendant and Attorneys would state and show unto the Court as follows:

1. That this matter is scheduled for trial on October 15, 1996;

2. That Attorneys filed a Motion to have Defendant transferred to Madison County at least thirty days prior to trial;

3. That this Motion and an Order for same were sent to Assistant District Attorney on August 27, 1996, with no reply as of the date of filing this Motion;

4. That when Attorneys' office contacted the District Attorney's office regarding the signing of this Order, we were advised that the Assistant District Attorney prepared a "Go-Get" Order to have Defendant brought to Madison County on October 7, 1996;

5. That Attorneys feel Defendant should be brought back to Madison County as soon as possible in order to adequately and competently prepare to represent Defendant at his trial;

6. That according to an Order entered with this Court on April 27, 1996, regarding a hearing held on April 9, 1996, it was ordered, "that in the event a local isolation cell becomes available at the Madison County Jail or the Madison County Penal Farm or within this district, such as Chester County Jail or

McNairy County Jail, JON HALL shall be put on a list so as to put him in line for one of these isolation cells so his attorneys and he can communicate with each other more effectively" and "that this matter may be reviewed again as the trial date approaches";

BASED UPON THE FOREGOING, Defendant's attorneys, Clayton F. Mayo and Jesse H. Ford, III, respectfully requests that this Honorable Court have a hearing on Defendant's Motion to have Defendant Transferred to the Madison County Penal Farm or Madison County Jail.

DATED this the 27th day of September, 1996.

Respectfully submitted,

CLAYTON F. MAYO, #014138
Appointed Attorney for Defendant
618 N. Highland Avenue
P.O. Box 1625
Jackson, TN 38302-1625
(901) 422-1375

Jesse H. Ford III by CFM

JESSE H. FORD, III, #00119775
Appointed Attorney for Defendant
618 N. Highland Avenue
P.O. Box 1625
Jackson, TN 38302-1625
(901) 422-1375

CERTIFICATE OF SERVICE

I hereby certify that I have either mailed or personally delivered a true copy of the foregoing to Mr. Al Earls, Assistant District Attorney, P.O. Box 2825, Jackson, TN 38302, this the ~~27th~~ 1st day of ~~September~~ October, 1996.

CLAYTON F. MAYO

1 A To the best of my recollection, yes, sir.

2 MR. MAYO: Thank you, Investigator Byrd.

3 - - - - -

4 **REDIRECT EXAMINATION**

5 **BY MR. EARLS:**

6 Q Investigator Byrd, you testified about the

7 van that was taken and that that belonged or was titled

8 to Billie Jo Hall; is that correct?

9 A Yes, sir.

10 Q Was there anything in that --

11 MR. EARLS: That's all I have.

12 **(WITNESS EXCUSED.)**

13 - - - - -

14 **CHRIS DUTTON** was called and being first duly

15 sworn, was examined and testified as follows:

16 **DIRECT EXAMINATION**

17 **BY MR. WOODALL:**

18 Q State your name, please, sir.

19 A Chris Dutton.

20 Q Mr. Dutton, where are you currently

21 incarcerated?

22 A Cole Creek Correctional Facility.

23 Q Now are you the same Chris A. Dutton that's

24 been convicted in Bradley County of burglary, theft of

25 property, burglary, theft of property and burglary of

1 an automobile?

2 A Yes, sir.

3 Q And also the same Chris A. Dutton that was

4 convicted again in Bradley County of a theft of

5 property and then in Hamblin County of theft,

6 aggravated assault and escape?

7 A Yes, I am.

8 Q How old are you, Chris?

9 A I'm 37 years old.

10 Q How many years of your life have you spent

11 behind bars?

12 A Approximately I'd say about 14 or 15.

13 Q Now, I notice that there was an escape charge

14 in this from Hamblin County.

15 A Yes, sir.

16 Q And as a result of that conviction, what

17 level of incarceration did you receive?

18 A Maximum security.

19 Q And where were you in maximum security?

20 A Riverbend.

21 Q And where is Riverbend located?

22 A Nashville, Tennessee.

23 Q Now you said that currently you're at is it

24 Cole Water?

25 A Cole Creek.

1 Q Cole Creek Institution. What level of
2 security are you there?
3 A Minimum restricted.
4 Q All right, now, what is the -- tell us what
5 the levels of security are in the institution.
6 A That would be minimum trustee, minimum
7 direct, minimum restricted, medium, close, levels one
8 through five, and then max.
9 Q Okay. So you started out at max as a result
10 of your escape and last conviction and you've worked
11 your way down to --
12 A Minimum restriction.
13 Q Now, at the time that you were incarcerated
14 at Riverbend in maximum security, tell us how prisoners
15 are confined in maximum security.
16 MR. FORD: I object to the relevancy of that,
17 Your Honor. I don't know. Are we going to have a
18 prison lecture here?
19 THE COURT: I don't see the relevancy of it.
20 General, if he had some contact with this man, you
21 could ask him where, but how they're restricted and
22 what ...
23 MR. WOODALL: Thank you, Your Honor. I'll
24 try to move this along.
25 Q Are there one-man cells?

1 A Yes, sir.
2 Q Now, can you see who is in the cell next to
3 you when you're in your cell?
4 A No.
5 Q Can you communicate with the individual in
6 the cell next to you?
7 A Yes.
8 Q And how can you communicate?
9 A Through the ventilation system by standing on
10 the sink.
11 Q Is this common practice?
12 A Yes, it's our telephone system.
13 Q That's the prisoners' telephone system.
14 A Yes.
15 Q Now, did you come in contact as a result of
16 this ventilation system with the individual who was
17 incarcerated next to you?
18 A Yes, sir.
19 Q And did he identify himself to you?
20 A Yes, sir.
21 Q And what name did he give you?
22 A Jon Hall.
23 Q And did you have the occasion to put a face
24 with the name, not while you were actually in the bars
25 but when you were in an exercise period or guard

1 period?
2 A Yes, sir, and also I worked in the general
3 area where the officers worked, and I came in and out
4 of my cell on regular occasions. I went to the doors
5 certain times running errands.
6 Q Now, do you see the individual in this
7 courtroom that you know to be Jon Hall?
8 A Yes, sir.
9 Q Can you point that individual out, please?
10 A Right here.
11 MR. WOODALL: Let the record reflect the
12 witness identifies the Defendant.
13 Q Had you ever heard of or seen or talked to
14 Jon Hall in your entire life prior to coming into
15 contact with him at Riverbend?
16 A No, sir.
17 Q Did you have any idea of what he was in there
18 for or what he had done or anything at all?
19 A No.
20 Q Now, did the Defendant provide certain
21 information to you concerning charges pending against
22 him in Henderson County?
23 A Yes, sir.
24 Q Was this as a result of questions that you
25 directed to him or as a result of him confiding in you?

1 A I never asked him. You don't ask questions
2 in prison like that. He confided in me.
3 Q Why would he confide in you?
4 A Loneliness.
5 MR. MAYO: Your Honor, I want to object to
6 that. That's speculation.
7 THE COURT: Why, General, I believe that's --
8 You can ask him what he did or what he said, but you're
9 asking him an opinion now as to why this man --
10 somebody else did something.
11 Q Just go ahead and irrespective of why he
12 confided in you, tell us --
13 A I confided in him also.
14 Q As a result of your mutual confiding in one
15 another, tell us at this time what he confided in you
16 about his pending charges in Henderson County,
17 Tennessee.
18 A That he was facing charges of murder, that he
19 had killed his wife.
20 Q Did he tell you how this came about and what
21 he did the day of her death?
22 A I didn't -- He said that he had contacted her
23 earlier in the day and made arrangements to take her
24 some money. When he took the money out there to her
25 house, that he tried to get her to listen to him. All

1 she was interested in was the money. He tried to talk
2 about reconciliation - that's the word I was looking
3 for - but all she was interested in was the money, and
4 when she refused to listen to him and demanded that he
5 leave, his temper got the best of him and he began to
6 strike her.
7 Q All right, now, let's back up a little bit.
8 Did he say that -- Did he tell you that he did anything
9 prior to entering her home?
10 A Yes.
11 Q What did he tell you that he did?
12 A He disconnected the wires on the pole hooked
13 to the telephone outside the trailer.
14 Q Did he tell you why he did that?
15 A So she couldn't call the cops.
16 Q Did he tell you anything that he had planned
17 to do before he even got there?
18 A That he wanted to make her feel as he did.
19 He wanted her to suffer as he did, feel the
20 helplessness that he was feeling because she took his
21 world away from him.
22 Q Now, did he tell you how many times that he
23 struck her or where he struck her or if there was
24 anyone else present in the house at the time?
25 A The girls were there, his two girls. It

1 started in the house and ended up in the yard. She was
2 -- He hit her on the head until he panicked, and then
3 he threw her in the swimming pool. He then went into
4 the house and got her keys and took her van and left.
5 Q After he threw her in the pool, let me see if
6 I understand you, he went back in the house, got the
7 keys to her van and left.
8 A Yes.
9 Q Did he tell you how he got up there?
10 A I'm not certain of that.
11 Q Now after you received this information --
12 And do you remember approximately when it was?
13 A Probably better than a year ago, going on a
14 year.
15 Q How long have you been transferred -- Or how
16 long has it been since you and the Defendant were side
17 by side at Riverbend?
18 A It's been a long time, about a year, maybe a
19 little more.
20 Q Now, after you received this information, did
21 you transmit it to anybody?
22 A Yes. I sent a letter to the Attorney
23 General's office. I think it was Nashville.
24 Q Did you send it to me?
25 A No.

1 Q Now, after you sent the information to the
2 Attorney General's office in Nashville, did you hear
3 from anybody?
4 A No, not until a week ago.
5 Q Where were you when someone contacted you?
6 A Cole Creek Correctional Facility.
7 Q And who contacted you?
8 A It was you.
9 Q All right. And did we discuss your
10 testimony?
11 A Yes, sir.
12 Q In exchange for your truthful testimony, did
13 I make any promises to you?
14 A You told me as long as I testified truthfully
15 that you would speak at my parole hearing when the time
16 came.
17 Q Is that the only promise you received from
18 me?
19 A Yes.
20 Q Now since you left Riverbend -- Let me back
21 up. How long after you received this information in
22 terms of days or weeks did you relate it to the D.A. in
23 Nashville?
24 A Week or two.
25 Q Was the Defendant still in the adjacent cell

1 when you transmitted this information to the D.A.'s
2 office in Nashville?
3 A No, he had been moved to another unit.
4 Q Have you seen or talked to the Defendant
5 since that time?
6 A No, sir.
7 Q Have not.
8 A No, sir.
9 Q Have you received any benefit at all at this
10 point from providing that information to the
11 authorities?
12 A No, sir.
13 Q Have you provided any information to any
14 other law enforcement agency which has required your
15 testimony?
16 A Yes, sir.
17 Q And was that information -- When did you
18 transmit that information?
19 A In 1989. It would have been probably middle
20 of 1990.
21 Q So you helped the authorities once in 1989 or
22 '90.
23 A Yes, sir.
24 Q And when you transmitted the information
25 concerning the Defendant Jon Hall to the Attorney

1 General's office in Nashville, did you also convey
2 information involving any other area or state or
3 individual?
4 A Yes, sir.
5 Q And what would that be? Which state?
6 A North Carolina.
7 Q And as a result of that information provided
8 to the Attorney General in Nashville, have you
9 testified in the state of North Carolina?
10 A Yes.
11 MR. WOODALL: Your witness.
12 - - - - -
13 **CROSS-EXAMINATION**
14 **BY MR. FORD:**
15 Q Mr. Dutton, would it be a safe assumption
16 that you would be classified as an informant in the
17 prison system?
18 A I'm not sure of the definition of that, sir.
19 Q Isn't that your role?
20 A Excuse me?
21 Q Isn't that your role with the authorities, to
22 inform them of certain things that you have heard?
23 A No.
24 Q In exchange for favorable treatment in the
25 prison system?

1 A No, sir.
2 Q That had nothing to do with your motivation,
3 did it?
4 A No.
5 Q When is your parole hearing?
6 A June of '99.
7 Q And Mr. Woodall is going to testify at your
8 parole hearing. Is that what you were to understand?
9 A Excuse me?
10 Q Mr. Woodall, he is --
11 A Yes, sir.
12 Q -- going to come and testify on your behalf.
13 Did he say what he was going to say about you?
14 A No.
15 Q Jon told you that he was drunk when he got to
16 the trailer, didn't he?
17 A I'm not certain, sir. I ...
18 MR. FORD: Approach the witness, Your Honor?
19 THE COURT: Pass it up.
20 A Yes.
21 Q Did that refresh your recollection, Mr.
22 Dutton?
23 A Yes, sir.
24 Q That he had been drinking all day before he
25 had contacted Billie to come out and pay his child

1 support?
2 A I wrote here that he was drunk and had been
3 drinking since he called Billie earlier.
4 Q He was extremely depressed about his family
5 situation; was he not?
6 A Yes, sir.
7 Q And that he'd been out there earlier in the
8 week working on Billie's car for her, trying to repair
9 her vehicle?
10 A That's what I recall.
11 Q And that he was concerned about his children?
12 A Yes, especially the little girl. I think she
13 had M.D.
14 Q C.P. or muscular dystrophy? A special needs
15 -- They had a special needs child, didn't they?
16 THE DEFENDANT: Cerebral palsy.
17 A Yes, sir.
18 Q He was really concerned about the child, and
19 he went out there to try to reconcile with Billie, to
20 try to discuss their problems.
21 A Yes.
22 Q And that's why he went out there.
23 A To give her money.
24 Q Yes, sir. And also did he tell you that on
25 past occasions when he had gone out there that he had

1 disconnected the phone because sometimes there would be
2 arguments and that Billie would call the police and
3 things of that nature?
4 A Yes, sir.
5 Q He didn't go out there with any weapons, did
6 he, that you know of or did he tell you about?
7 A No.
8 Q So now you've been transferred to a minimum
9 security.
10 A No, I'm still in regular security. I'm on
11 minimum restricted status.
12 Q What is your security status now?
13 A Minimum, which means I have two more levels
14 to go down, minimum direct and minimum trustee.
15 Q And when were you reclassified? Was it after
16 you communicated with the Attorney General?
17 A No, it was the first of January. I can't
18 remember what date for sure, first week.
19 Q Mr. Dutton, from what you gathered in your
20 conversations with Mr. Hall, and I'm assuming you had
21 more than one.
22 A Yes.
23 Q That you fellows had plenty of time to talk.
24 That's really all you had, wasn't it?
25 A Yes.

1 Q Did you gather that the real reason he went
2 out there was to try to reconcile with his wife and pay
3 child support?
4 A No.
5 Q No? That's what he told you, didn't he?
6 A Yes.
7 MR. FORD: That's all.
8 - - - - -
9 **REDIRECT EXAMINATION**
10 **BY MR. WOODALL:**
11 Q That question having been asked by Mr. Ford,
12 what did he tell you what was the reason that he went
13 out there? What was he going to do?
14 A Make her feel the way she made him feel.
15 Q If she didn't reconcile with him, what was he
16 going to do to her?
17 A He was going to make her hurt the way she
18 made him hurt, feel as helpless as he felt.
19 MR. WOODALL: Thank you.
20 **(WITNESS EXCUSED.)**
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