No.___
CAPITAL CASE

IN THE
Supreme Court of the United States

KEVIN B. BURNS,
Petitioner,

v.

TONY MAYS, WARDEN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

KEVIN B. BURNS,

Petitioner-Appellant,

v.

TONY MAYS, Warden,

Respondent-Appellee.

Nos. 11-5214/14-6089

Appeal from the United States District Court for the Western District of Tennessee at Memphis.
No. 06-02311—Samuel H. Mays, Jr., District Judge.

Argued: February 5, 2020

Decided and Filed: April 13, 2022

Before: BATCHELDER, COOK, and STRANCH, Circuit Judges.

COUNSEL

ARGUED: Richard Lewis Tennent, OFFICE OF THE FEDERAL PUBLIC DEFENDER FOR THE MIDDLE DISTRICT OF TENNESSEE, Nashville, Tennessee, for Appellant. Nicholas W. Spangler, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee. **ON BRIEF:** Richard Lewis Tennent, OFFICE OF THE FEDERAL PUBLIC DEFENDER FOR THE MIDDLE DISTRICT OF TENNESSEE, Nashville, Tennessee, for Appellant. Nicholas W. Spangler, OFFICE OF THE TENNESSEE ATTORNEY GENERAL, Nashville, Tennessee, for Appellee.

BATCHELDER, J., delivered the opinion of the court in which COOK, J., joined. STRANCH, J. (pp. 12–29), delivered a separate dissenting opinion.

OPINION

ALICE M. BATCHELDER, Circuit Judge. Kevin Burns, with five accomplices, approached a car in which Damond Dawson, Tracy Johnson, Eric Thomas, and Tommie Blackman were drinking gin and smoking marijuana. Looking for a fight due to some earlier slight, Burns and his accomplices robbed the four occupants of the car, and then began shooting them, killing two. Blackman escaped with a minor gunshot wound. Thomas, despite having been shot several times, managed to survive and his testimony played an instrumental role in the trials of Burns and his accomplices. Burns was convicted on two counts of felony murder, receiving a death sentence for the murder of Dawson and a life sentence for the murder of Johnson. In this capital habeas appeal, Burns claims that he received ineffective assistance of counsel at the sentencing stage, and that the State of Tennessee wrongfully relied on inconsistent testimony and knowingly presented false testimony at the guilt stage. We AFFIRM the judgment of the district court.

I.

On federal habeas review, "[t]he state court's factual findings enjoy a presumption of correctness, and will only be disturbed upon clear and convincing evidence to the contrary." *England v. Hart*, 970 F.3d 698, 706 (6th Cir. 2020). On direct appeal, the Tennessee Supreme Court made the following findings of fact:

> On April 20, 1992, four young men, Damond Dawson, Tracey Johnson, Eric Thomas, and Tommie Blackman, were sitting in a car in Dawson's driveway in Memphis. Dawson was in the driver's seat, Johnson was in the front passenger seat, Thomas was in the back seat behind Dawson, and Blackman was in the back seat behind Johnson.
>
> The defendant, Kevin Burns, and Carlito Adams, who knew Blackman, walked up to the passenger side of the car. Adams pulled out a handgun and told Blackman to get out of the car. When Blackman refused, Burns pulled out a handgun and went around to the driver's side of the car. Blackman got out of the car and fled. Adams said "get him," and three or four more men appeared from behind hedges and fired at Blackman.

> Eric Jones, age fourteen, was playing basketball at Dawson's house with three friends. Jones saw the men in the car removing jewelry and pulling money from their pockets. Seconds later, Jones saw Blackman running toward him. Amidst gunshots, Jones and Blackman escaped to the back of the house; Jones' three friends ran to an adjacent yard. Once inside the house, Jones heard seven or eight more gunshots.
>
> Mary Jones, Eric Jones' mother, lived across the street from the Dawsons. She saw Adams shoot Johnson once in the chest. She saw Kevin Burns shoot Dawson several times, walk to the front of the car, and then shoot Dawson again. Ms. Jones unequivocally identified Burns and stated that she got "a real good look in his face" as he ran toward her after the shootings.
>
> Tracey Johnson died at the scene. Damond Dawson, who suffered five gunshots to his arm, buttocks, chest, and hip was alive when police arrived but died after being transported to the hospital. Eric Thomas, who sustained gunshots to his chest and stomach, survived and made a photo identification of Kevin Burns two days after the incident. Thomas testified that Burns and the others had "opened fire" after robbing him and his friends of their jewelry and money. Thomas said that he initially told police he had been shot by Adams, but explained that he believed he was going to die and gave police the only name he knew, which was Adams.
>
> On June 23, 1992, Burns was found in Chicago and arrested. After being advised of his rights and signing a waiver, the defendant gave a statement in which he admitted his role in the killings. [Burns] said that he had received a telephone call from Kevin Shaw, who told him that four men had "jumped" Shaw's cousin. Burns, Shaw, and four others intended to fight the four men, and Shaw gave Burns a .32 caliber handgun. As the others approached a car with four men sitting in it, Burns stayed behind. He heard a shot, saw a man running across the yard, and fired three shots. He then left the scene with the other men.

State v. Burns, 979 S.W.2d 276, 278 (Tenn. 1998).

The Tennessee jury convicted Burns of two counts of felony murder and two counts of attempted felony murder. *Id*. at 277. "The jury imposed the death penalty for one of the felony murder convictions after finding that evidence of an aggravating factor—that the defendant knowingly created a great risk of death to two or more persons other than the victim murdered—outweighed the evidence of mitigating factors beyond a reasonable doubt." *Id*. The jury imposed a life sentence for the other felony-murder conviction. The Tennessee Court of Criminal Appeals affirmed the two felony-murder convictions and corresponding sentences but reversed the attempted-felony-murder convictions. *Id*. The Tennessee Supreme Court affirmed

the judgment of the Court of Criminal Appeals, *id*. at 278, noting, among other things, that the reversal of the attempted felony murder convictions was correct because in Tennessee, as in most jurisdictions, "the offense of attempted felony murder does not exist," *id*. at 280, but that reversal of the conviction on those counts "does not affect the jury's finding regarding the aggravating circumstance," *id.* at 281.

In 2006, Burns filed his petition for a writ of habeas corpus, under 28 U.S.C § 2254, alleging roughly two dozen grounds for relief. In 2010, the district court dismissed the petition as meritless, but granted a certificate of appealability ("COA") for only the issue of ineffective assistance of counsel at sentencing. On February 3, 2013, we granted a COA for additional issues: "(1) whether the State improperly relied on inconsistent statements from a witness concerning who shot him; (2) whether the State knowingly presented false testimony; (3) whether women were improperly under-represented in being appointed as the foreperson for Shelby County, Tennessee grand juries; and (4) whether ineffective assistance by counsel in state post-conviction proceedings can constitute cause to excuse Burns's procedural default of a claim." On July 18, 2013, we remanded Burns's case for further consideration in light of two recent Supreme Court decisions, *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013). On August 6, 2014, the district court concluded that neither *Martinez* nor *Trevino* provided a basis for granting Burns habeas relief and again denied his § 2254 petition. The district court denied Burns's motion to expand the COA, and we likewise denied him a COA to appeal the denial of relief based on *Martinez* and *Trevino*. In a subsequent motion, Burns sought a COA for several additional issues, and we denied that motion.

In this capital habeas appeal, Burns pursues only two of his claims: (1) that he received ineffective assistance of counsel at the sentencing stage, and (2) that the State of Tennessee wrongfully relied on inconsistent testimony and presented false testimony. Burns waived two other issues that were available on appeal: whether there was an underrepresentation of women in Shelby County, Tennessee, grand juries and whether his receiving ineffective assistance of counsel can constitute cause to excuse his procedural default of a claim.

II. Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d), governs habeas petitions. Section 2254(d) states that we may grant a habeas petition filed by a state prisoner with respect to "any claim that was adjudicated on the merits in State court proceedings," only if: (1) the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law," or (2) the state court decision was "based on an unreasonable determination of the facts" in light of the record before it. § 2254(d)(1)–(2). AEDPA imposes on federal courts a highly deferential standard of review of state court judgments. *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) ("[AEDPA] is a 'difficult to meet' and 'highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt.'" (citations omitted)).

"We review the district court's factual findings for clear error, and its legal conclusions de novo." *Hart*, 970 F.3d at 706. "The state court's factual findings enjoy a presumption of correctness, and will only be disturbed upon clear and convincing evidence to the contrary." *Id*.

III. Ineffective Assistance of Counsel

Burns claims that he received ineffective assistance of counsel during the sentencing phase of his trial. The state trial court, the Tennessee Court of Criminal Appeals, and the district court each concluded that this claim was meritless. Burns makes two arguments on appeal: (1) that trial counsel failed to present evidence at sentencing that Burns did not shoot one of the victims, namely Dawson, and (2) that trial counsel's performance was unreasonable and deficient because counsel failed to further cross-examine some witnesses, to call other witnesses, and to accurately portray Burns's upbringing and background.

A. "Residual Doubt" Evidence at Sentencing

Burns argues that his trial counsel could have introduced evidence that Burns did not actually fire a shot that hit Dawson. This would support his contention that, had that been presented (or available) at sentencing, it would have made the jury less likely to sentence him to death, rather than to life in prison. The State responds that this issue was not included in the

COA and thus is not reviewable in this appeal. Burns's brief on appeal, which is no model of clarity, allows two possible constructions. Under one, Burns points to his counsel's failure to present evidence during the guilt phase that Burns's shot did not hit Dawson (notwithstanding the felony murder convictions) and attributes to that failure (i.e., that absence of evidence) his sentencing counsel's inability to argue a lesser culpability theory at sentencing. That is not a claim of ineffective assistance during the sentencing phase, and it is not within the COA.

Under the other construction, Burns claims that his counsel should have introduced evidence at sentencing (despite its absence from the guilt phase) that, contrary to the jury's verdict, Burns did not actually shoot Dawson. This is commonly referred to as "residual doubt" evidence and this claim necessarily fails because Burns has no constitutional right to present residual doubt evidence at sentencing. *Oregon v. Guzek*, 546 U.S. 517, 525 (2006).

It is true that a state's death penalty statute must permit the defendant to introduce mitigating factors, including "consideration of a defendant's comparatively minor role in the offense[] or age." *Lockett v. Ohio*, 438 U.S. 586, 608 (1978). But the Supreme Court has also made it clear that it "ha[s] *not* interpreted the Eighth Amendment as providing a capital defendant the right to introduce at sentencing evidence designed to cast 'residual doubt' on his guilt of the basic crime of conviction." *Guzek*, 546 U.S. at 525.

The antecedent question, therefore, is whether this evidence—had his counsel attempted to introduce it at sentencing—would have been residual-doubt evidence. Clearly, it would have been. Burns himself, in his briefing here, frames his argument as one that addresses his guilt rather than a mitigating factor: "It was an unreasonable application of clearly established law to conclude that, had Burns's attorneys cast doubt on whether he killed Dawson and shot Thomas, this would not have influenced the jury's sentencing decision."

Evidence offered to undermine the prosecution's case, which led to the conviction, is the essence of residual-doubt evidence and the Court has never established that a capital defendant such as Burns has a constitutional right to introduce such evidence at sentencing. *Guzek*, 546 U.S. at 525. Because the Court has never established such a right, counsel did not err by failing to pursue the introduction of that residual-doubt evidence at sentencing, and Burns cannot

demonstrate ineffective assistance of counsel in this respect. *See Strickland v. Washington*, 466 U.S. 668, 688, 692 (1984) (defining ineffective assistance of counsel as a showing that "counsel's representation fell below an objective standard of reasonableness" and that the "deficiencies in counsel's performance [were] prejudicial to the defense").

B. Cross Examination and Background Evidence at Sentencing

Burns's other claims of ineffective assistance are that his counsel, at sentencing, failed to appropriately cross-examine certain witnesses, failed to call certain other witnesses, and failed to present evidence that accurately showed Burns's background. Burns's specific arguments regarding the witnesses are that his counsel: (1) should have impeached Thomas's identification of Burns as one of the shooters; (2) should not have questioned Mary Jones, a witness to the murders, in a way that led her to identify Burns, but once she made that identification, should have impeached her testimony; and (3) should have called additional witnesses to rebut Jones's identification of Burns as the shooter. As we have already explained, if these accusations are directed to counsel's conduct during the guilt phase, then they are not included in the COA. And if these accusations are directed at counsel's conduct during sentencing, the substance of that conduct clearly goes to guilt rather than mitigation and is therefore residual-doubt evidence, which the capital defendant has no constitutional right to present at sentencing.

Burns's last claim of ineffective assistance does sound in mitigation: that his sentencing counsel failed to adequately investigate his background or present an accurate portrayal of him to the jury, including the many hardships he suffered and overcame. But the record reflects that counsel did investigate and was told by Burns's parents that Burns had a normal childhood. Also, some witnesses whom counsel wanted to call were told by Burns's mother not to testify. Therefore, the information relayed to counsel from Burns's parents told a different story from the one Burns presents today.

A fair reading of the record shows that Burns's sentencing counsel did "a fair amount of investigation in preparation for the mitigation phase." *West v. Bell*, 550 F.3d 542, 555 (6th Cir. 2008). Counsel met with Burns's mother and father on several occasions and talked to Burns's parents about his background, his family history, any problems he had as a child, and his

education.[1] Counsel hired a private investigator to find supporting witnesses, evaluate them, and persuade them to testify on behalf of Burns. And, after Burns's mother prevented other family members from assisting counsel's investigation, counsel procured mitigation witnesses from the jail where Burns was held.

The result was that counsel's investigation did not uncover anything that "should have prompted further investigation." *Jackson v. Warden, Chillicothe Corr. Inst.*, 622 F. App'x 457, 464 (6th Cir. 2015). Burns's parents did not say anything to counsel that suggested a traumatic childhood or that problems during Burns's childhood influenced his actions. In fact, the evidence obtained suggested the opposite: Burns was an honor roll student; he was involved in church; and the mental health report revealed no mental health issues.[2]

To be sure, during post-conviction proceedings, it was revealed that Burns's father had a second family. But sentencing counsel already knew that Burns's father had a second family and counsel did not think that fact required further investigation because Burns's mother exercised more influence and control over Burns than did his father, who, according to sentencing counsel, had little influence over Burns. Under *Strickland*, we defer to informed decisions such as the one sentencing counsel made here. 466 U.S. at 691.

Burns's counsel was also concerned about opening the door for the State to introduce evidence about Burns's criminal history.[3] This limited the background information that counsel

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[1]At the post-conviction hearing, Burns's mother testified that she met with counsel on several occasions, but she could not recall whether they discussed Burns's family history or background.

[2]At the post-conviction hearing, Burns's counsel testified that in capital cases, mental health reports typically include an accompanying letter that indicates whether the defendant suffers from a mental illness. If it is determined that the defendant suffers from a mental illness, the letter will indicate that, even if the mental health report finds the defendant competent to stand trial. Here, the mental health report found Burns competent to stand trial, and the accompanying letter did not indicate that Burns suffered from mental illness caused by past trauma.

[3]Counsel's concern proved prescient. During the sentencing phase, counsel called Phillip Carter, Burns's brother, as a character witness who testified regarding his relationship with Burns, Burns's religious devotion, and his general character. The State approached the bench, asking to introduce evidence about Burns's criminal history to impeach Carter's credibility. After deliberations with the judge outside the jury's presence, Burns's counsel, to avoid opening the door for the State to present damaging evidence of Burns's criminal history to the jury, agreed not to present further testimony about Burns's general good character.

could introduce without risking the State's providing character witnesses who could be harmful to Burns's case. Burns's counsel instead adopted a strategy of focusing on Burns's religious background and other signs of good character. *Burns*, 979 S.W.2d at 279.

In conducting this assessment, with "a heavy measure of deference to counsel's judgments," *Strickland*, 466 U.S. at 691, we must recognize that Burns's criminal history was not meager—it included multiple arrests for burglary and illegal gun possession, multiple charges for burglary and theft, and a theft conviction, all of which occurred after Burns turned 18. Counsel's deliberate decision not to pursue further investigation to prevent introduction of this damaging evidence is a legitimate, reasonable, and well-recognized strategy. *See Darden v. Wainwright*, 477 U.S. 168, 186–87 (1986); *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (counsel need not "mount an all-out investigation into petitioner's background" if supported "by reasonable professional judgment").

Hence, a difference of opinion regarding which approach would have been the better strategy at sentencing is not sufficient to support an ineffective-assistance-of-counsel claim. "Because advocacy is an art and not a science, and because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment." *Strickland*, 466 U.S. at 681. Moreover, "[c]ounsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Id*. at 691.

Finally, Burns argues that sentencing counsel should have completed a more thorough investigation to develop mitigation evidence. But this ignores the fact that Burns's mother limited the extent of counsel's investigation by preventing family members and friends from assisting that investigation. In fact, she made herself such an obstacle to the investigation that counsel had to resort to procuring mitigation witnesses from the jail where Burns was held. Counsel was far from unreasonable—and, in fact, was commendably diligent—considering Burn's mother's interference with the investigation.

All told, Burns's sentencing counsel was not objectively unreasonable in how they conducted the mitigation investigation or in their strategic decision not to pursue a narrative that

risked opening the door to character evidence that counsel believed could have harmed Burns in the eyes of the jury. Therefore, Burns cannot demonstrate ineffective assistance of sentencing counsel.

IV. Due Process Claims

Burns claims that the State violated the Due Process Clause when it used inconsistent testimony and when it relied upon false testimony. Both claims rest on whether the government could rely on testimony of a witness who allegedly contradicted that witness's testimony in the earlier trial of Derrick Garrin, one of Burns's accomplices. The State disputes whether the statements are, in fact, inconsistent, and if so, whether that inconsistency violates the Due Process Clause. Because the record reveals that Burns has the facts wrong, and our analysis concludes that he has the law wrong, we must reject both his inconsistent-testimony and false-testimony claims.

Factually, it is debatable whether the witness's testimony is inconsistent or false. At Garrin's trial, Eric Thomas (one of the two surviving victims) testified that the "big fellow in glasses" shot him and Dawson, and the prosecution argued that Garrin was the "big fellow." At Burns's trial, Thomas identified "Picture No. 5" as the individual who shot him and Dawson, and the prosecution later showed that Burns was the individual in "Picture No. 5." The Tennessee Court of Criminal Appeals held that the State had not suborned perjury nor was it clear that Thomas had even perjured himself. *Burns*, 2005 WL 3504990, at *47. Burns argues that it is impossible to reconcile the claim that Garrin was the "big fellow" who shot Thomas and Dawson as the government argued at Garrin's trial, with the claim that Burns shot Thomas and Dawson as the government argued at Burns's trial. The government argues that the statements Thomas gave at the two trials are not necessarily irreconcilable: it is possible that more than one person—not only the "big fellow with glasses"—shot Dawson and Thomas. Moreover, even if the statements were irreconcilable, it is not clear which statement would be false; it is possible Thomas's testimony at the Garrin trial, as opposed to his testimony at the Burns trial, was false, in which case Burns would not be prejudiced and would have no grounds to challenge the former testimony.

Legally, the government may use different strategies in different trials. *Bradshaw v. Stumpf*, 545 U.S. 175, 186–87 (2005) (finding that the "Court of Appeals was also wrong to hold that prosecutorial inconsistencies between the Stumpf and [his accomplice] cases required voiding Stumpf's guilty plea," though the Court expressed "no opinion on whether the prosecutor's actions amounted to a due process violation" affecting Stumpf's sentence); *Stumpf v. Robinson*, 722 F.3d 739, 750 (6th Cir. 2013) (en banc) ("The mere fact that the State argued for different inferences in different cases does not make either argument so unfair that it violates the Due Process Clause."); *Blalock v. Wilson*, 320 F. App'x 396, 417–18, 418 n.26 (6th Cir. 2009) (finding that "the prosecutor took unconstitutionally inconsistent positions in two separate trials," but holding that there was no "'clearly established' Supreme Court or Sixth Circuit precedent, including *Bradshaw*, showing that such a prosecutorial strategy would violate a defendant's due process rights"); *see also Fotopoulos v. Sec., Dep't of Corr.*, 516 F.3d 1229, 1235 (11th Cir. 2008) (finding that "the *Bradshaw* Court did not hold that the use of inconsistent theories in the prosecution of two defendants violates the right to due process"). Even if Thomas's statements in the Garrin trial and the Burns trial were inconsistent, "mere inconsistencies in testimony by government witnesses do not establish knowing use of false testimony." *United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989). And this is not a situation where the State is seeking to convict two defendants for an offense that only one person could commit. *See In re Sakarias*, 106 P.3d 931, 944 (Cal. 2005).

In short, Burns fails to establish (1) that the testimony was actually inconsistent or false, (2) that even if the statements were inconsistent, that it was the testimony in Burns's trial (as opposed to Garrin's trial) that was false, (3) that the government knew that the testimony was false, (4) that the government's taking inconsistent positions at different trials is a due-process violation, or (5), even if there were clearly established federal law supporting Burns's claim, that the state court was unreasonable in rejecting that claim. On the whole, Burns cannot demonstrate a due process violation on this basis.

V. Conclusion

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

DISSENT

JANE B. STRANCH, Circuit Judge, dissenting. Investigation is at the heart of the Sixth Amendment right to counsel. In a capital trial it may be the difference between life or death. The Supreme Court has held—time and again—that investigation must precede and inform trial strategy, and that trial counsel has a duty to pursue promising leads. *E.g.*, *Strickland v. Washington*, 466 U.S. 668 (1984). At issue here is trial counsel's constitutional duty to investigate, prepare for, and present a mitigation case at the penalty phase of Kevin Burns's capital trial. In Burns's capital trial, the penalty-phase strategy, if one existed at all, was an afterthought—assembled in the few hours between the guilty verdict and the start of the penalty phase. Despite readily available evidence that Burns suffered abuse and neglect as a child, counsel presented none of this evidence to the sentencing jury. Instead, counsel called six lay witnesses to testify to Burns's good character, amounting to only 14 pages of transcript. Had trial counsel investigated and presented an accurate narrative of Burns's traumatic family history, there is a reasonable probability that at least one juror would have voted for life instead of death. The conclusion of the Tennessee Court of Criminal Appeals ("TCCA") to the contrary rests on an unreasonable determination of the facts in the record, and significant errors of constitutional law regarding counsel's duty to investigate, entitling Burns to resentencing. The majority fails to engage with the substantial mitigation evidence presented during Burns's postconviction proceedings but never presented at trial. Like the TCCA, the majority ignores the record and fails to apply binding Supreme Court precedent. I respectfully dissent because I would remand to the state court for a new penalty-phase trial.

To prevail on his *Strickland* claim, Burns "must show that counsel's performance was deficient[.]" *Strickland*, 466 U.S. at 687. In other words, he must show that it "fell below an objective standard of reasonableness." *Id.* at 688. Under *Strickland*, "counsel has a duty to make reasonable investigations or make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations

on investigation." *Id*. at 690–91. The record belies the majority's conclusion that Burns's counsel made an informed, strategic decision to present only evidence of Burns's religious background and previous reputation as a "good guy," and to omit all evidence of his disturbing and troubled family history. Counsel's investigation in preparation for the mitigation case was wholly inadequate and prejudiced Burns.

A. DEFICIENT PERFORMANCE

1. Counsel Failed to Timely or Adequately Prepare for the Penalty Phase of Trial

The totality of trial counsel's mitigation investigation and preparation amounted to subpoenaing a dozen lay witnesses—primarily friends, family members and acquaintances gathered by Burns's mother—to the courthouse after the conclusion of the guilt-phase trial. Although the subpoenas were served by an investigator before trial, counsel did not recall interviewing any mitigation witnesses prior to the start of the penalty phase, nor preparing any penalty-phase witnesses to testify. While counsel had previously spoken with Burns's parents about plea negotiations, counsel did not discuss mitigation with Burns's parents, nor prepare them to take the witness stand.

After the guilt-phase verdict, the trial court asked counsel how many witnesses Burns would call at the penalty phase. Counsel answered that he did not yet know, and left the courtroom to figure it out. Trial counsel then, *for the first time*, spoke to the mitigation witnesses who had been subpoenaed to the courthouse. Counsel described the preparation for the penalty phase, which undisputedly commenced after the jury rendered a guilty verdict, as follows:

> The best of my recollection is we had about twelve individuals here [at the courthouse], and I think this subpoena reflects maybe fourteen people I think, and it was [a] decision after talking to all of the people that were here and talking to Mr. Burns and talking to his parents, which ones we wanted to use, which ones were the best witnesses, which ones we thought would be more convincing to the jury and whether some were redundant.

Counsel then "chose to testify . . . the ones who could say the most positive things about Mr. Burns, that is, he was a decent human being, and basically who deserved to live in their opinion." Six mitigation witnesses were called to the stand.

The undisputed timeline contradicts the TCCA's factual conclusion that trial counsel conducted a mitigation investigation and developed a theory based on that investigation. The jury rendered a guilty verdict at 4:20 p.m. When proceedings resumed that same evening after a short break, the prosecution put on two victim-impact witnesses. Defense counsel then called a church elder and two prison officials who testified very briefly about Burns's religiosity. Burns's brother did the same. His mother and father also took the stand to tell the jury that they loved Burns and that he was a good son. Following is the TCCA's summary of the defense testimony in mitigation:

> During the sentencing portion of the petitioner's trial, counsel presented the testimony of six witnesses. *See Burns,* 979 S.W.2d at 279. Leslie Burns, the petitioner's mother, testified that he was twenty-six years of age, had twelve brothers and sisters, had graduated from high school, and had presented no disciplinary problems while in school. *Id.* His father, Obra Carter, testified that his son had always been obedient and well-mannered. *Id.* Phillip Carter, the petitioner's half-brother, testified that the petitioner had been active in church and had always tried to avoid trouble. *Id.* Norman McDonald, the petitioner's Sunday School teacher, testified that the petitioner was a "faithful" young man who attended church regularly. *Id.* Mary Wilson, a captain with the Shelby County Sheriff's Department, and Bennett Dean, a volunteer chaplain, both testified that the petitioner had actively participated in religious services while in custody for these offenses. *Id.* The petitioner complains that this evidence "failed to say much, if anything, about Kevin Burns."

Burns v. State, No. W2004-00914-CCA-R3-PD, 2005 WL 3504990, at *62–63 (Tenn. Crim. App. Dec. 21, 2005). The total mitigation case amounted to less than 14 transcript pages—an average of 2.5 transcript pages per witness. The entire penalty-phase trial—instructions, proof, and argument—was over by 9:20 p.m., a mere five hours after the jury returned its guilt-phase verdict.

The Sixth Amendment guarantees capital defendants the effective assistance of counsel during the penalty phase of trial. This right includes counsel's "obligation to conduct a thorough investigation of the defendant's background," *Williams v. Taylor*, 529 U.S. 362, 396 (2000), so as "to uncover and present . . . mitigating evidence" to the jury at sentencing. *Wiggins v. Smith*, 539 U.S. 510, 522 (2003); *see also Andrus v. Texas,* 140 S. Ct. 1875, 1881 (2020); *Sears v. Upton*, 561 U.S. 945, 956 (2010) (per curiam); *Porter v. McCollum*, 558 U.S. 30, 39–41 (2009)

(per curiam); *Rompilla v. Beard*, 545 U.S. 374, 393 (2005). Likewise, our court has repeatedly found investigation into background and family history to be an important mitigation factor. *See, e.g.*, *Harries v. Bell*, 417 F.3d 631, 639 (6th Cir. 2005) (family violence and instability in the home relevant mitigating evidence); *Hamblin v. Mitchell*, 354 F.3d 482, 490 (6th Cir. 2002) (same).

The mitigation case put forth by Burns's counsel falls short of the investigations undertaken in a number of cases where the Supreme Court found counsel's performance deficient. In *Williams*, counsel began to prepare for its mitigation case a week before trial, 529 U.S. at 395; here, counsel waited until the guilt phase had concluded and the mitigation phase was set to begin. Like *Wiggins*, Burns's "counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources," 539 U.S. at 524–25, with no sign that counsel obtained and reviewed Burns's medical, educational, and employment records. Rompilla's trial counsel consulted experts for mitigation purposes but failed to present the jury with more than a "few naked pleas for mercy." *Rompilla*, 545 U.S. at 390–91. Porter's counsel failed to unearth mitigating details concerning his mental health, military service, and discipline at the hand of his father. *Porter*, 558 U.S. at 39–40; *see also Foust v. Houk*, 655 F.3d 524, 536 (6th Cir. 2005). In *Andrus*, trial counsel missed stockpiles of mitigating evidence, presenting instead a rosy and one-dimensional portrait of Andrus's youth. 140 S. Ct. at 1882–84; *see also Greer v. Mitchell*, 264 F.3d 663, 677–79 (6th Cir. 2001). Counsel's investigation here also fell short of the investigation we found to be deficient in *Harries*:

> [W]e cannot escape the conclusion that Harries's counsel failed to conduct a constitutionally adequate investigation. Counsel limited their investigation to contacting by telephone Harries's mother and brother, sending requests for information to some of the institutions in which Harries had been confined, and interviewing Harries's codefendant, and two state witnesses. Although counsel requested two court-ordered competency evaluations, they declined to seek the assistance of a mental health expert or conduct a thorough investigation of Harries's mental health, even after Harries's mother alerted them that Harries suffered from mental illness. Nor did counsel adequately investigate Harries's family background, despite indications of Harries troubled childhood.

417 F.3d at 638. The TCCA found counsel's investigation into Burns's past adequate, as does the majority. Under both Supreme Court precedent and our caselaw, it clearly was not.

The Supreme Court has looked to the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("ABA Guidelines") to determine what constitutes objectively reasonable performance. *Wiggins*, 539 U.S. at 524. Under these professional guideposts, "investigations into mitigating evidence 'should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" *Id*. (quoting ABA Guidelines 11.4.1(C) (1989)).

The reasonableness of trial counsel's investigation is assessed from counsel's perspective at the time and in light of contemporaneous professional norms. *Hinton v. Alabama*, 571 U.S. 263, 273 (2014); *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). At the time of Burns's trial, it was commonly accepted, as reflected in the 1989 ABA Guidelines, that capital defense lawyers were obligated to investigate and prepare for a penalty phase presentation long before the case went to trial. *Rompilla*, 545 U.S. at 387 n.7; *Wiggins*, 539 U.S. at 524. The ABA Guidelines in place at the time of Burns's trial stated that "[c]ounsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial. *Both investigations should begin immediately upon counsel's entry into the case* and should be pursued expeditiously." ABA Guideline 11.4.1 (1989) (emphasis added). ABA Guideline 10.7 states that counsel has "an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty." The commentary to this guideline clarifies that this investigation should include "members of the client's immediate and extended family;" medical history, which includes physical injury and neurological damage; and "family and social history," which includes "physical . . . abuse, . . . domestic violence [and] exposure to criminal violence."

Based on trial counsel's deficient performance in the penalty phase under the then-prevailing law and norms, Burns alleged in the postconviction proceedings in Tennessee state court that his counsel had been ineffective during the penalty phase for failing to investigate, discover, and present readily available mitigation evidence concerning his chaotic and traumatic

childhood. Burns was granted an evidentiary hearing, during which he presented extensive mitigation evidence and the testimony of expert psychologists, none of which were presented at trial. The contrast between the evidence presented at the evidentiary hearing and the evidence presented by trial counsel is stark, and demonstrates that trial counsel failed to investigate even the most basic information about Burns and his background.

Among the most significant information omitted in the mitigation case due to counsel's failure to uncover it was the fact that Burns's father, Obra Carter, had a second family that also lived in West Memphis, a situation known to everyone in the Burns's family and much of the community. Knowing this fact would have put effective counsel on notice that further investigation into Burns's home life during childhood was required, and that expert witnesses such as a social worker and a psychologist or psychiatrist would be needed to explain the repercussions suffered by family members living in such an environment. The embarrassment and anger suffered by Burns's mother, Leslie, due to the fact that Obra had a wife and other children elsewhere in the city manifested as an inability to care for her many children. Also significant is the fact that Obra physically and mentally abused Leslie, abuse continuously viewed by her children, including Burns. As demonstrated by postconviction counsel, minimal investigation into Burns's family circumstances would have presented to the jury a much different, and likely more sympathetic, picture of Burns, starkly contrasting with the rosy picture painted by his parents and the other lay witnesses approved by Burns's mother.

If trial counsel had not been constitutionally inadequate, Burns's sentencing jury would have also learned, among many more life-history details, that Burns lived in eight different houses and apartments before the age of 12; that he took care of his nine siblings, including a severely handicapped older brother; that his father would come to his second family's home only to physically and emotionally abuse Burns, his siblings and their mother; and that Burns's father broke his mother's jaw in the family home, landing her in the hospital for three weeks and in a brace for four months.

In contrast, the evidence given by lay witnesses focused on the fact that Burns was a good guy with a normal upbringing. None of the six witnesses at the penalty phase testified about Burns's troubled childhood, and, even if they had been questioned about the circumstances

of Burns's childhood, they were not equipped to testify about the psychological problems stemming from Burns's troubled background. Experts, such as a social worker and a mental-health professional, would have explained how the family dysfunction affected Burns in his formative years and shaped him as an adult. Despite the availability of funding to procure experts at the mitigation phase, Burn's trial counsel nevertheless relied solely upon the services of a private investigator, not a mitigation specialist or mental-health expert.

In *Andrus*, the Supreme Court held that the quantity and character of mitigation evidence presented in postconviction proceedings, when compared to that presented by trial counsel, unmistakably demonstrated ineffective assistance of counsel. In a passage that bears a striking resemblance to the record in Burns's case, the Court reasoned:

> Although counsel nominally put on a case in mitigation in that counsel in fact called witnesses to the stand after the prosecution rested, the record leaves no doubt that counsel's investigation to support that case was an empty exercise.
>
> To start, counsel was, by his own admissions at the habeas hearing, barely acquainted with the witnesses who testified during the case in mitigation. Counsel acknowledged that the first time he met Andrus' mother was when she was subpoenaed to testify, and the first time he met Andrus' biological father was when he showed up at the courthouse to take the stand. Counsel also admitted that he did not get in touch with the third witness until just before *voir dire*, and became aware of the final witness only partway through trial. . . . [C]ounsel did not prepare the witnesses or go over their testimony before calling them to the stand.
>
> Over and over during the habeas hearing, counsel acknowledged that he did not look into or present the myriad tragic circumstances that marked Andrus' life. . . . Instead, he "abandoned his investigation of Andrus' background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Wiggins*, 539 U.S. at 524. On top of that, counsel "ignored pertinent avenues for investigation of which he should have been aware," and indeed was aware. . . . Yet counsel disregarded, rather than explored, the multiple red flags. . . . The untapped body of mitigating evidence was, as the habeas hearing revealed, simply vast.
>
> Despite repeated questioning, counsel never offered, and no evidence supports, any tactical rationale for the pervasive oversights and lapses here. Instead, the overwhelming weight of the record shows that counsel's "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." *Wiggins*, 539 U.S. at 526.

140 S. Ct. at 1882–83 (cleaned up). Andrus also argued, like Burns here, that trial counsel's brief mitigation case, and its presentation of his upbringing as a normal and pleasant one when it was not, served to increase the jury's assessment of his moral culpability. The Court agreed:

> No doubt due to counsel's failure to investigate the case in mitigation, much of the so-called mitigating evidence he offered unwittingly aided the State's case in aggravation. Counsel's introduction of seemingly *aggravating* evidence confirms the gaping distance between his performance at trial and objectively reasonable professional judgment.
>
> The testimony elicited from Andrus' mother best illustrates this deficiency. First to testify during the case in mitigation, Andrus' mother sketched a portrait of a tranquil upbringing, during which Andrus got himself into trouble despite his family's best efforts. . . . Even though counsel called Andrus' mother as a defense witness, he was ill-prepared for her testimony.

Id. at 1883–84.

The evidence uncovered by postconviction counsel demonstrates the inadequacies of trial counsel's investigation under applicable case law, as well as the ABA Guidelines and commentary, which explicitly recognize that competent counsel would have investigated and discovered much of the evidence that Burns's counsel failed to unearth. At the evidentiary hearing, Burns presented 210 pages of witness testimony that conveyed a full portrait of Burns. The details that the jury would have learned absent trial counsel's deficient performance would have presented a complete picture of Burns, and, as the Supreme Court has said, "humaniz[ing]" details can be among the most compelling mitigation evidence. *Porter*, 558 U.S. at 41.[1]

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[1]The dissent cites to two cases from the 1980s to argue that Burns's trial counsel made a deliberate decision not to pursue investigation of further possible mitigating factors in Burns's background to prevent introduction of "damaging evidence" of Burns's prior arrests for burglary and illegal gun possession. Maj. Op. at 9. In *Darden v. Wainwright*, counsel's decision to pursue an alternate strategy at sentencing was reasonable because evidence regarding defendant's background could have opened the door to his prior convictions. 477 U.S. 168, 186 (1986). This case differs from *Darden*. First, counsel's decision must be "strategic"—meaning that the decision was made after proper investigation. Despite the majority's statement to the contrary, Maj. Op. at 7, the record clearly demonstrates that Burns's counsel did not conduct an adequate or timely investigation into Burns's background that would have made any decision "strategic." Second, in *Strickland*, the Supreme Court held it was reasonable for counsel to fail to introduce evidence that would "barely have altered the sentencing profile" and would have opened the door to potentially damaging aggravating evidence. 466 U.S. at 700. That was not the situation confronted by Burns's counsel. Given the paucity of evidence presented at mitigation, evidence of Burns's abusive childhood would have dramatically altered his sentencing profile for the jury. As the Supreme Court has recognized, omission of critical mitigating evidence such as childhood trauma and abuse can prejudice a capital defendant. *See Williams*, 529 U.S. at 395. The majority also cites to *Burger v. Kemp*, 483 U.S. 776 (1987), to

2. Counsel Cannot Blame Burns's Mother for the Failure to Investigate

At the evidentiary hearing, trial counsel sought to shift the blame for the failure to investigate Burns's family and background to Burns's mother. Counsel stated that she prohibited family members from talking to counsel. The TCCA adopted this reasoning, holding that Burns and his family were, in effect, responsible for trial counsel's failure to investigate mitigation evidence. *Burns*, 2005 WL 3504990, at *67 ("We disagree with the argument that trial counsel's duty to investigate was not "governed" by the petitioner's own cooperation or lack thereof."). Yet, *Rompilla* and *Porter* dictate that trial counsel's independent duty to investigate mitigation evidence remains even where a defendant or family members are "actively obstructive." *Rompilla*, 545 U.S. at 382; *Porter* 558 U.S. at 40; *accord Harries*, 417 F.3d at 638 ("defendant['s] resistance to disclosure of information does not excuse counsel's duty to independently investigate.") (quoting *Coleman v. Mitchell*, 268 F.3d 417, 449–50 (6th Cir. 2001)); *Carter v. Bell*, 218 F.3d 581, 596 (6th Cir. 2000). Moreover, where a defendant's family alerts counsel to certain mitigation witnesses, counsel must do more than simply call those witnesses to the stand as counsel did in this case. *Sears*, 561 U.S. at 952–53; *Andrus*, 140 S. Ct. at 1882–83.

Likewise, the majority adopts this flawed excuse for counsel's deficient investigation by stating that "the record reflects that counsel did investigate and was told by Burns's parents that Burns had a normal childhood. Also, some witnesses whom counsel wanted to call were told by Burns's mother not to testify." Maj. Op. at 7; *see also id*. at 9. Counsel's deficiency cannot be excused by blaming Burns's parents. The ABA Guidelines address lack of cooperation by a client—and by extension his family. They specifically state that mitigating evidence must be pursued "regardless of any statement by the client [or his family] that evidence bearing upon penalty is not to be collected or presented." 2003 Guidelines, Guideline 10.7(A)(2); *id*. at Guideline 10.7 commentary ("The duty to investigate exists regardless of the expressed desires of a client."). The ABA Guidelines recognize that when pursuing mitigating evidence,

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conclude that we must defer to counsel's penalty-phase strategy if "supported by reasonable professional judgment." Maj. Op. at 9. But, again, there is no evidence in the record that trial counsel conducted the required independent and thorough mitigation investigation that would lead to "reasonable professional judgment" regarding a mitigation strategy. Deference is therefore unwarranted here.

"[o]btaining such information typically requires overcoming considerable barriers, such as shame, denial, and repression, as well as other mental or emotional impairments from which the client [and his family] may suffer." *Id.*; *see also* ABA Standards for Criminal Justice 4–4.1 cmt. at 4–55 (2d ed. 1980) ("While not directly addressing a situation where a client purportedly seeks to prohibit an attorney from investigating his background, these guidelines suggest that a lawyer's duty to investigate is virtually absolute, regardless of a client's expressed wishes."). While the majority would excuse otherwise deficient performance because counsel claims that Burns's mother made it difficult for them to find mitigating evidence, case law and the ABA Guidelines require that defense counsel investigate despite barriers that the client or his family may erect.

Regardless of whether a breakdown in communication occurred between Burns's mother and counsel, the attorneys remained obligated to investigate fully potential mitigation evidence. Postconviction counsel managed to find ways to investigate Burns's family, including extensive discussions with Burns's mother Leslie. This suggests that Leslie may have been more forthcoming if trial counsel had presented the evidence to her and explained its significance to the life-or-death decision the jury would make concerning her son. It is not unusual for family members to desire to hide unflattering details about the family from strangers. Leslie's purported opposition to interviewing family members does not excuse counsel's performance.

3. Counsel's Mitigation Case Was Not a Strategy Based on Reasonable Investigation

If trial counsel's decision to present an incomplete picture of Burns's childhood is justified as "strategic," as the majority contends, it can only be so if counsel had previously conducted a thorough investigation. The record demonstrates that it had not. Instead, counsel's apparent mitigation strategy was to present Burns as a good person who acted "out of character" on the day of the murders. Counsel failed to present testimony about Burns's abusive childhood, and the jury did not learn anything substantial about his troubled formative years. Almost all of the testimony at the sentencing phase involved good deeds by Burns as an adult. The witnesses described Burns as "religious" and church-going. But their discussion of Burns's background was perfunctory, and none of the witnesses shed any light on his traumatic childhood or family history. Even if a decision to "emphasize the good rather than the bad" was a reasonable

mitigation strategy in the abstract, it was not reasonable in this case because counsel were not fully aware of their options. *See Sowell v. Anderson*, 663 F.3d 783, 794 (6th Cir. 2011). Our "principal concern in deciding whether counsel exercised reasonable professional judgment is whether the investigation supporting counsel's decision not to introduce mitigation evidence of [defendant's] background was itself reasonable." *Wiggins*, 539 U.S. at 523. In this case, as in *Wiggins,* "counsel were not in a position to make a reasonable strategic choice . . . because the investigation supporting their choice was unreasonable." *Id*. at 536; *Austin v. Bell*, 126 F.3d 843, 849 (6th Cir. 1997) (finding counsel's failure to investigate and present mitigating evidence at sentencing "an abdication of advocacy" amounting to ineffective assistance rather than a "strategic decision" because of the number and kinds of people willing to testify on petitioner's behalf).

In *Williams v. Taylor*, the Supreme Court found that trial counsel's failure to "fulfill their obligation to conduct a thorough investigation" of the defendant's "nightmarish" background and mental state could not be "justified by a tactical decision" to focus on his remorse and cooperation with police, or to prevent comparatively meager unfavorable evidence—specifically, past juvenile records—from being admitted. 529 U.S. at 395–96, 398. If counsel had investigated, he would have found, among a "voluminous" amount of mitigating evidence, that the defendant was "borderline mentally retarded" and criminally neglected as a child, and that while incarcerated, he was among the inmates "least likely to act in a violent, dangerous or provocative way" and had "thrive[d] in a more regimented and structured environment." *Id*. at 396. In *Wiggins*, 539 U.S. at 522, the Court explained that "[e]ven assuming [counsel] limited the scope of their investigation for strategic reasons, *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy" and "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further," measured objectively "under prevailing norms." *Id*. at 523, 527 (citing *Strickland*, 466 U.S. at 691). The record, including counsel's own testimony at the evidentiary hearing, demonstrate that essentially no background investigation was conducted. *Williams*, 529 U.S. at 396 ("[T]he failure to introduce the comparatively voluminous amount of evidence that did speak in

Williams' favor was not justified by a tactical decision . . . [Instead, these omissions] clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background.").

While there is nothing inherently wrong with a mitigation strategy that emphasizes a capital defendant's redeeming qualities, Burns's trial attorneys did not make a conscious choice among available alternative strategies because they overlooked an entire category of compelling mitigating evidence—evidence that might have caused the jury to rethink its assessment of Burns's moral culpability. Trial counsel failed to discover highly relevant mitigating evidence of his family background. Had trial counsel conducted even the most basic interviews with Burns's family members, they would have found ample evidence that Burns grew up in a deeply troubled home. As demonstrated at the evidentiary hearing, trial counsel appeared to be unfamiliar with nearly all of the potential sources of mitigating evidence from Burns's background. It is not surprising that trial counsel's "strategy" focused simplistically on highlighting that Burns was religiously inclined and a "good guy." Those were the only topics that the assembled lay witnesses, all apparently pre-approved by Burns's mother, could reasonably address. What the TCCA labeled "strategy" was more likely the result of trial counsel's failure to "fulfill their obligation to conduct a thorough investigation of [Burns]'s background." *Id.* at 396. The TCCA's conclusion that counsel performed a mitigation investigation that then determined its penalty-phase strategy and presentation is flatly contradicted by a record that shows the exact opposite—a "strategy" driven by the fact that no pretrial preparation had been undertaken, leaving counsel to present only unprepared acquaintances and family members to testify briefly about Burns's regular church attendance and "good-guy" character. Nor can the record support the majority's conclusion that this case is simply a matter of "a difference of opinion regarding which approach would have been the better strategy." Maj. Op. at 9.

Taken together, these Supreme Court cases reveal the timing, scope, and quality of a constitutionally adequate mitigation investigation. The professional norms that prevailed at the time of Burns's trial required counsel to (1) begin a broad mitigation investigation upon entry into the case; (2) pursue all avenues of reasonable mitigation until it was reasonable to curtail particular investigations; and (3) present a mitigation theory informed by investigation, not

convenience or the wishes of the client's mother. Counsel's investigation was clearly deficient in light of these norms. I cannot conclude "that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 691. Trial counsel failed to discover important mitigating information that was reasonably available. When Burns's counsel failed to develop this information and present it to the trial court, their performance fell below an objective standard of reasonableness.

B. PREJUDICE

Turning to the second prong of *Strickland*, Burns was prejudiced by his counsel's performance because there is a reasonable likelihood that at least one juror would have voted in favor of a sentence less than death had the jury been informed of Burns's difficult and dysfunctional childhood.

We begin with the decision of the TCCA. First, the TCCA's articulation of constitutional prejudice is simply wrong. The hurdle for establishing prejudice is not high: "Petitioner 'need not show that counsel's deficient conduct more likely than not altered the outcome in the case,' rather, only that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Lundgren v. Mitchell*, 440 F.3d 754, 770 (6th Cir. 2006) (quoting *Strickland*, 466 U.S. at 694). Instead, the TCCA held Burns to an unduly heightened prejudice standard. It repeatedly required Burns to show that his proffered mitigation evidence "would have changed the outcome" of the penalty-phase trial. *Burns*, 2005 WL 3504990, at *58 ("The petitioner cannot establish that his sentence would have been different."); *id.* at *68 ("[W]e cannot conclude that [the post-conviction] evidence would have persuaded the jury not to impose the death penalty.").

When a habeas petitioner is arguing that the presentation of mitigation evidence during the penalty phase of a capital case was prejudicial, the question is whether "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537. This standard does not require Burns to demonstrate that all of the jurors would have come to a different conclusion. The Supreme Court has been clear: whether "it is possible that a jury could have heard [the mitigating evidence] and still have decided on the death penalty . . . is not

the test." *Rompilla*, 545 U.S. at 393 (quoting *Wiggins*, 539 U.S. at 538). The test is whether "mitigating evidence, taken as a whole might have influenced the jury's appraisal of [Burns's] culpability." *Id.* Prejudice is established where there is a "*reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different; a reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694 (emphasis added). The TCCA put the burden on Burns to present mitigating evidence that would precipitate a different sentencing result. In doing so it unreasonably applied Supreme Court precedent and rendered a decision contrary to federal law. *See Williams*, 529 U.S. at 398; *Porter*, 558 U.S. at 44 ("We do not require a defendant to show 'that counsel's deficient conduct more likely than not altered the outcome' of his penalty proceeding." (quoting *Strickland*, 466 U.S. at 693–94)).

The evidence the jury did not hear—specific details about Burns's traumatic childhood—is the kind of evidence that the Supreme Court has held undermines a court's confidence in the outcome of a capital sentencing proceeding. In *Williams*, 529 U.S. at 395, the Supreme Court found prejudice where counsel failed to present evidence that Williams had a "nightmarish" childhood, that his "parents were imprisoned for the criminal neglect" of their children, and that Williams "had been severely and repeatedly beaten by his father." Similarly in *Wiggins*, 539 U.S. at 535, the Court found prejudice where counsel failed to discover "powerful" evidence of "severe privation and abuse in the first six years of [Wiggins'] life while in the custody of his alcoholic, absentee mother," as well as evidence of "physical torment, sexual molestation, and repeated rape during his subsequent years in foster care." Again in *Rompilla*, the Court considered counsel's failure "to present significant mitigating evidence about Rompilla's childhood," as well as his "mental capacity and health, and alcoholism." 545 U.S. at 378, 391–392. It concluded that "the undiscovered mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of Rompilla's culpability, and the likelihood of a different result" sufficient to undermine confidence in the outcome actually reached. And in *Porter*, 558 U.S at 33–34, the Court found prejudicial counsel's failure to present evidence of Porter's "abusive childhood" and "horrible family life," including an incident in which "Porter's father shot at him for coming home late, but missed and just beat Porter instead," and another in which Porter's pregnant mother was beaten "so severely that she had to go to the hospital and lost a child."

In *Sears*, 561 U.S. at 948, the Court found prejudicial counsel's failure to present evidence that Sears's home life was "physically abusive" and that he "suffered sexual abuse at the hands of an adolescent male cousin."

A finding that Burns was prejudiced by counsel's failure to develop and present evidence of Burns's dysfunctional childhood is therefore squarely in line with the Supreme Court decisions addressing ineffective assistance during the penalty phase of a capital trial. Our court has also repeatedly found that ignorance of specifics about a defendant's formative years undermines confidence in the outcome of a capital sentencing proceeding. In *Goodwin v. Johnson*, 632 F.3d 301, 329 (6th Cir. 2011), we deemed prejudicial counsel's failure to present evidence that Goodwin suffered "severe privation and abuse in the early years of his life and while in the custody of his alcoholic and drug using mother," including evidence that he was "frequently beaten, sexually molested, and abandoned by both of his parents." Likewise in *Mason v. Mitchell*, 543 F.3d 766, 780 (6th Cir. 2008), we held that the petitioner was prejudiced where counsel did not present evidence of Mason's "abusive and unhealthy" childhood, including evidence that his parents were "daily drug users as well as traffickers," that his mother "shot at his father because of his involvement with prostitution," and that Mason's parents "regularly abused Mason and isolated all of their children from anyone not associated with the parents' drug dealing activities." And in *Harries*, 417 F.3d at 639, we upheld the district court's finding of prejudice where counsel failed to discover evidence that Harries suffered "significant physical abuse" during his "traumatic" childhood, including an incident in which he was "hit . . . on the head with a frying pan," and another in which he was "choked so severely that his eyes hemorrhaged." Like the additional mitigating evidence presented in these cases, failing to present evidence of Burns's abusive childhood prejudiced Burns and undermines confidence in the outcome of the sentencing proceeding.

Consequently, there is a reasonable probability that a juror would have weighed the mitigation evidence differently if he or she had heard the true nature and extent of the deprivations of Burns's childhood. Even allowing for the highly deferential standard of review, the failure of trial counsel to present critically relevant evidence about Burns's early family history violated his right to constitutionally effective counsel. This failure could not have been

the product of sound trial strategy, and there is a reasonable probability that one juror would have reached a different decision if he or she had heard this evidence.

1. No "Rationale" Needed for Mitigation Evidence to Have Effect

The TCCA also improperly discounted the effect of Burns's proposed mitigation because it misconstrued its purpose. The court found that Burns's mitigation evidence might have altered the jury's recommendation only if it "explained" or provided some "rationale" for his conduct. The TCCA quoted the state postconviction trial court:

> This court heard a full week's worth of testimony from mitigation witnesses; family, friends, teachers, a sociologist/mitigation expert and a neuro-psychiatrist. . . . [T]he proof presented showed that this was a well-adjusted young man who committed a crime that was out of character for him. After listening to all of the mitigation proof . . . *this court heard nothing about the petitioner that offered any better insight into why this crime occurred or why the petitioner chose to act the way he did on the day in questio*n. The bulk of the mitigation proof dealt with the petitioner's father. *There was no proof offered . . . that his upbringing played any role in the commission of this offense*.

Burns, 2005 WL 3504990, at *57 (emphasis added). The TCCA then repeated the error when it said, "[t]he post-conviction court concluded that the petitioner failed to offer any better insight at the evidentiary hearing into why this crime occurred or why the petitioner chose to act the way he did on the day of the double homicide." *Id.* at *65. Contrary to the TCCA's statements, the Supreme Court has made it clear that mitigation does not play so limited a role. In *Lockett v. Ohio*, 438 U.S. 586 (1978), the Court held that the sentencer in a capital case must be given a full opportunity to consider, as a mitigating factor, "any aspect of a defendant's character or record," in addition to "any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id*. at 604. Mitigation evidence can be any evidence that may lessen the jury's assessment of a capital defendant's moral culpability—such evidence need not relate to the crime or the prosecution's death-eligibility case. *See, e.g., Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (The decision to impose a death sentence must be "a reasoned moral response to the defendant's background, character, and crime."); *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) ("[A] mitigating factor [is] any aspect of a defendant's character or record that the defendant proffers as a basis for a sentence less than death."). Mitigation evidence is not only

about the depth of hardship in a defendant's past; instead, it provides detail and nuance that humanize the defendant before the jury and it paints a textured portrait of the defendant's life history, which is especially compelling within the *Strickland* prejudice analysis. *See, e.g.*, *Andrus*, 140 S. Ct. at 1882–83; *Porter*, 558 U.S. at 41; *Rompilla*, 545 U.S. at 391–93.

The Supreme Court, moreover, has explicitly rejected a "nexus" requirement as one we have "never countenanced." *Smith v. Texas*, 543 U.S. 37, 45 (2004). The evidence of Burns's unfortunate upbringing need not have offered any "rationale" for the murder he committed in order for the jury to have considered it as weighty mitigation. It would be enough if there were a "reasonable probability" that, because of Burns's past, the jury's "reasoned moral response" would instead have been to spare his life and sentence him to life imprisonment instead. By imposing a nexus requirement, the TCCA's decision on *Strickland*'s prejudice prong was contrary to Supreme Court law.

2. The Evidence Presented in the Postconviction Proceedings Was Not Cumulative

Furthermore, the TCCA erred in holding that the failure to present the evidence offered during the postconviction proceedings did not prejudice Burns because the omitted evidence was merely cumulative and would not have created a "reasonable probability" that the jury would have recommended a life sentence. Burns's trial counsel failed at the mitigation phase to present any evidence of the mental and physical abuse suffered by Burns in childhood. Evidence about the abuse could not be "cumulative" because no evidence of abuse was presented at trial. In every way, the evidence offered at the evidentiary hearing was qualitatively different from that presented at trial. *Hill v. Mitchell*, 400 F.3d 308, 319 (6th Cir. 2005) (evidence not cumulative that "differ[s] in a substantial way–in strength and subject matter–from the evidence actually presented at sentencing"); *see also Jells v. Mitchell*, 538 F.3d 478, 501 (6th Cir. 2008) ("In short, rather than being cumulative, this evidence provides a more nuanced understanding of Jells's psychological background and presents a more sympathetic picture of Jells."). The mitigation presented—his so-called "normal" childhood and the good deeds Burns had done as an adult—provided an incomplete picture of his life and served only to highlight the terrible nature of his crime. The additional mitigating evidence presented—a lifetime of neglect and abuse, beginning in early childhood and continuing throughout the formative years of Burns's life—is

categorically different and would have provided the jury a way to see Burns's "background, character, and crime," *Penry*, 492 U.S. at 319, as a reason for a sentence less than death.

C. CONCLUSION

The mitigation phase of a capital case is premised on "the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse." *Foust v. Houk*, 655 F.3d 524, 534–36 (6th Cir. 2011) (omission in original) (quoting *Penry*, 492 U.S. at 319), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002). Because Burns's trial counsel provided constitutionally deficient performance at the mitigation phase of his capital trial, and that failure resulted in prejudice to Burns, I would remand Burns's case to the district court with directions to remand his case to the state court for a new penalty-phase trial. I therefore respectfully dissent.

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

KEVIN B. BURNS, Petitioner, vs. RICKY BELL, Warden, Riverbend Maximum Security Institution, Respondent.	)	No. 06-2311-SHM-dkv

ORDER DIRECTING CLERK TO OPEN CASE
ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT
ORDER DENYING PETITIONER'S MOTION FOR PARTIAL SUMMARY JUDGMENT
ORDER DENYING PETITION PURSUANT TO 28 U.S.C. § 2254
ORDER OF DISMISSAL
ORDER GRANTING LIMITED CERTIFICATE OF APPEALABILITY
AND
ORDER CERTIFYING LIMITED APPEAL WOULD BE TAKEN IN GOOD FAITH

On May 23, 2006, Petitioner Kevin B. Burns, Tennessee Department of Corrections prisoner number 254315, 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 appointment of counsel, and a motion for leave to proceed in forma pauperis. (Docket Entries ("D.E.") 1-3.) On June 1, 2006, the Court entered an order appointing counsel, denying leave to proceed in forma pauperis, and directing Petitioner to pay the habeas filing fee. (D.E. 4.) On June 15, 2006, Petitioner paid the habeas filing fee. On July 20, 2006, the Court granted the parties' joint motion for a scheduling order. (D.E. 7.) On February

20, 2007, Petitioner, through counsel, filed an amended petition for writ of habeas corpus. (D.E. 8.) On June 14, 2007, Respondent Ricky Bell filed a notice of manual filing of documents. (D.E. 28.) On June 29, 2007, Respondent filed an answer to the amended petition. (D.E. 33.) On April 1, 2008, Petitioner filed a motion to abate all proceedings related to his habeas corpus petition in federal court. (D.E. 52.) On May 13, 2008, Respondent filed a motion for summary judgment and supporting memorandum. (D.E. 57 & 58.) On July 2, 2008, the Court denied the motion to abate all proceedings without prejudice. (D.E. 70.) On January 30, 2009, Petitioner filed a motion for partial summary judgment[1], a supporting memorandum, and a response to the Respondent's motion for summary judgment. (D.E. 84-86.) On March 11, 2009, the Court entered an order administratively closing this case until such time as the parties had fully briefed Respondent's May 13, 2008 motion for summary judgment. (D.E. 90.) On March 27, 2009, Respondent filed a response in opposition to Petitioner's motion for partial summary judgment. (D.E. 91.) On May 27, 2009, Respondent filed a reply to Petitioner's response in opposition to Respondent's motion for summary judgment. (D.E. 94.)

The May 13, 2008 motion for summary judgment has been fully briefed. The Court DIRECTS the Clerk to open this case for further proceedings.

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[1] Petitioner's motion for summary judgment addresses only the claim asserting that counsel's failure to challenge the testimony of Eric Thomas and Mary Jones amounted to ineffective assistance of counsel at the sentencing hearing (Claim 11B). (D.E. 84 at 1.)

I. STATE COURT PROCEDURAL HISTORY

Burns was indicted on two counts of murder in the perpetration of a robbery (felony murder), two counts of premeditated murder, two counts of attempted first-degree murder during the perpetration of a robbery (attempted felony murder), and two counts of attempted premeditated first-degree murder. State v. Burns, No. 02C01-9605-CR-00170, 1997 WL 418492, *1 (Tenn. Crim. App. July 25, 1997). The jury convicted Burns on two counts of felony murder and two counts of attempted felony murder and sentenced Burns to death for the murder of Damond Dawson. Id. at **1, 16. On July 25, 1997, the Tennessee Court of Criminal Appeals affirmed the felony murder convictions and sentences, reversed and dismissed the convictions for attempted felony murder, and remanded the case for retrial on the two counts of attempted premeditated first-degree murder. Id. at **1, 9-12. On automatic review, the Tennessee Supreme Court affirmed Burns' convictions and sentences for first-degree felony murder. State v. Burns, 979 S.W.2d 276, 278 (Tenn. 1998), cert. denied, 527 U.S. 1039 (1999). Burns' application for post-conviction relief was denied. Burns v. State, No. W2004-00914-CCA-R3-PD, 2005 WL 3504990 (Tenn. Crim. App. Dec. 21, 2005), perm. app. denied (Tenn. Apr. 24, 2006).[2]

[2] Burns attempted to reopen his state court post-conviction proceedings to address Claim 16 - that he was denied due process because of discrimination in the selection of the grand jury foreperson, and Claim 18 - that the death penalty is unconstitutional. (See D.E. 56 at 1-2.) On April 9, 2008, the Shelby County Criminal Court denied the motion to reopen. (D.E. 54.) On May 29, 2008, the Tennessee Court of Criminal Appeals denied relief. (D.E. 86-37.) On July 25, (continued...)

To assess the claims Burns raises in this petition, it is necessary briefly to set forth the proof, as found by the Tennessee Supreme Court:

> On April 20, 1992, four young men, Damond Dawson, Tracey Johnson, Eric Thomas, and Tommie Blackman, were sitting in a car in Dawson's driveway in Memphis. Dawson was in the driver's seat, Johnson was in the front passenger seat, Thomas was in the back seat behind Dawson, and Blackman was in the back seat behind Johnson.
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> The [petitioner] and Carlito Adams, who knew Blackman, walked up to the passenger side of the car. Adams pulled out a handgun and told Blackman to get out of the car. When Blackman refused, Burns pulled out a handgun and went around to the driver's side of the car. Blackman got out of the car and fled. Adams said "get him," and three or four more men appeared from behind hedges and fired at Blackman.
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> Eric Jones, age fourteen, was playing basketball at Dawson's house with three friends. Jones saw the men in the car removing jewelry and pulling money from their pockets. Seconds later, Jones saw Blackman running toward him. Amidst gunshots, Jones and Blackman escaped to the back of the house; Jones' three friends ran to an adjacent yard. Once inside the house, Jones heard seven or eight more gunshots.
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> Mary Jones, Eric Jones' mother, lived across the street from the Dawsons. She saw Adams shoot Johnson once in the chest. She saw Kevin Burns shoot Dawson several times, walk to the front of the car, and then shoot Dawson again. Ms. Jones unequivocally identified Burns and stated that she got "a real good look in his face" as he ran toward her after the shootings.
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> Tracey Johnson died at the scene. Damond Dawson, who suffered five gunshots to his arm, buttocks, chest, and

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[2] (...continued)
2008, Burns notified this Court that he had filed an application for permission to appeal the denial of his motion to reopen to the Tennessee Supreme Court. (D.E. 73 at 2.) On September 29, 2008, the Tennessee Supreme Court denied that application. (D.E. 86 at 123.) On June 15, 2009, the United States Supreme Court denied a petition for writ of certiorari. Burns v. Tennessee, 129 S.Ct. 2791 (2009).

hip was alive when police arrived but died after being transported to the hospital. Eric Thomas, who sustained gunshots to his chest and stomach, survived and made a photo identification of Kevin Burns two days after the incident. Thomas testified that Burns and the others had "opened fire" after robbing him and his friends of their jewelry and money. Thomas said that he initially told police he had been shot by Adams, but explained that he believed he was going to die and gave police the only name he knew, which was Adams.

On June 23, 1992, [the petitioner] was found in Chicago and arrested. After being advised of his rights and signing a waiver, the [petitioner] gave a statement in which he admitted his role in the killings. He said that he had received a telephone call from Kevin Shaw, who told him that four men had "jumped" Shaw's cousin. Burns, Shaw, and four others intended to fight the four men, and Shaw gave Burns a .32 caliber handgun. As the others approached a car with four men sitting in it, Burns stayed behind. He heard a shot, saw a man running across the yard, and fired three shots. He then left the scene with the other men.

After the guilt phase of the trial, the jury deliberated and returned verdicts of guilty for two counts of felony murder and two counts of attempted felony murder. The trial moved into the penalty phase of the proceedings for the jury to determine the punishment for each of the felony murder convictions.

....

Jonnie Dawson, mother of Damond Dawson, testified that Damond was the youngest of her three children and seventeen years of age when he was killed. She said he was a good son who was very good at athletics. The neighborhood had changed after the killings; people locked their doors and were afraid. Ms. Dawson testified that she no longer knew what it was like to be happy.

Brenda Hudson, mother of Tracey Johnson, testified that Tracey was the oldest of her three children and twenty years of age when he was killed. He had been working at Wal-Mart and saving money for his four-month-old daughter. Tracey's death had greatly affected Ms. Hudson' (sic) other two children, Tracey's grandfather, and Tracey's young daughter:

> When you go over to her house to see her, she has a picture in a frame and she will show you. She'll say, "this is my father-this is my daddy, Tracey. He lives in God's house up in heaven." And it's hard for me to go see her a lot because it breaks my heart to hear her say that.
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> In mitigation, Leslie Burns, the [petitioner's] mother, testified that the [petitioner] was twenty-six years of age and had twelve brothers and sisters. He had graduated from high school and presented no disciplinary problems while in school. The [petitioner's] father, Reverend Obra Carter, testified that his son had always been obedient and well-mannered. Phillip Carter, the [petitioner's] brother, testified that the [petitioner] had been active in the church and had always tried to avoid trouble.
>
> Norman McDonald, the [petitioner's] Sunday School teacher, testified that he had known Kevin Burns for several years. According to McDonald, Burns was a "faithful" young man who had always attended church regularly. Mary Wilson, a Captain with the Shelby County Sheriff's Department, and Bennet Dean, a volunteer chaplain, both testified that Burns had actively participated in religious services while in custody for these offenses.
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> The prosecution relied on two aggravating circumstances to seek the death penalty for the felony murder convictions-that the [petitioner] knowingly created a great risk of death to two or more persons, other than the victim murdered, during the act of murder, and that the murder had been committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another. Tenn. Code Ann. § 39-13-204(i)(3) and (6) (1997 & Supp. 1998). With regard to the felony murder of Damond Dawson, the jury imposed the death penalty after finding that the evidence supported the "great risk of death" aggravating circumstance and that this factor outweighed the evidence of mitigating factors beyond a reasonable doubt. With regard to the felony murder of Tracey Johnson, the jury imposed a sentence of life imprisonment.

Burns, 2005 WL 3504990, at **1-3 (quoting Burns, 979 S.W.2d at 278-79 (footnote omitted)).

II. PETITIONER'S FEDERAL HABEAS CLAIMS

Burns raises the following issues:

1. Ineffective assistance of counsel at the guilt stage, as follows:

   a. Trial counsel failed to investigate and present available evidence (D.E. 8 at 15-17);

   b. Trial counsel failed to cross-examine Eric Thomas, Mary Jones and Federal Bureau of Investigation ("FBI") agents involved in the creation of Burns' statement effectively (id. at 17-18);

   c. Trial counsel failed to have Thomas' identification testimony suppressed (id. at 18-19); and

   d. Trial counsel failed to have Burns' FBI statement suppressed (id. at 19);

2. The state withheld material, exculpatory evidence (id. at 20-23);

3. The state offered inconsistent statements about who shot and killed Dawson (id. at 23-24);

4. The state knowingly presented Eric Thomas' false testimony (id. at 24-25);

5. The state presented false testimony that a robbery occurred (id. at 25-26);

6. The state presented identification testimony based on an unduly suggestive photographic array (id. at 26);

7. The court entered Petitioner's statement into evidence (id. at 26-27);

8. The state knowingly presented the false testimony of FBI agents who took Burns' statement (id. at 27-28);

9. The trial judge provided unconstitutional jury instructions at the guilt stage (id. at 28-30);

10. Extraneous, improper influences affected the jury's

verdict (id. at 30-31);

11. Ineffective assistance of counsel at the sentencing stage, as follows:

    a. Counsel failed to challenge the aggravating circumstance (id. at 31-32);

    b. Counsel failed to investigate and present mitigating evidence (id. at 32-44);

    c. Counsel failed to present mental health evidence (id. at 44-45); and

    d. Counsel failed to present evidence about Petitioner's relative culpability (id. at 45);

12. The state presented victim impact testimony at the sentencing hearing (id. at 46);

13. The trial judge's sentencing jury instructions violated the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution (id. at 46-47);

14. The prosecution made improper remarks during closing arguments at the sentencing stage (id. at 47-48);

15. The trial court did not answer questions that the jury asked during sentencing deliberations (id. at 48);

16. Burns was indicted by a grand jury from which women were systematically excluded as grand jury forepersons (id. at 48-50);

17. The indictments did not allege aggravating circumstances (id. at 50);

18. Burns' death sentence is unconstitutional (id. at 50);

19. Tennessee prosecutors do not have uniform standards for deciding whether to seek the death penalty and no standards governed the prosecutor in this case (id.);

20. Burns' death sentence is arbitrary (id. at 51);

21. Burns' conviction and death sentence violated the United States Constitution because the state disregarded the rights accorded him by international law (id. at 51-56);

22. Burns is actually innocent (id. at 56);

23. Burns is incompetent to be executed (id. at 56-57);

24. Appellate counsel rendered ineffective assistance (id. at 57); and

25. The cumulative effect of constitutional errors renders Burns' first-degree murder convictions and sentences 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–
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> (A) the applicant has exhausted the remedies available in the courts of the State; or
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> (B) (i) there is an absence of available State corrective process; or
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> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
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> (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). 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." Id. 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, 842-45 (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) (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 claim; 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 753; 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. 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 Burns' postconviction proceedings was governed by the then-current version of Tennessee's Post-Conviction Procedure Act, Tenn. Code Ann. §§ 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).[3]

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[3] 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

(continued...)

The Sixth Circuit has upheld the dismissal of a Tennessee prisoner's habeas petition as barred by a procedural default caused by failing to file within the Tennessee statute of limitations on postconviction relief. Hannah v. Conley, 49 F.3d 1193, 1195-97 (6th Cir. 1995) (construing pre-1995 statute and stating "the language of Tenn. Code Ann. § 40-30-102 is mandatory"). In this case, Burns' right to file any further state postconviction 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–
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> (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
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> (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.

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[3] (...continued)
the petitioner is afforded the opportunity to call witnesses and otherwise present evidence, regardless of whether the petitioner actually introduced any evidence.

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).[4] 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.

Id. 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

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

(2003) (same); Bell v. Cone, 535 U.S. 685, 694 (2002) (same).[5] 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).[6] "[A]n unreasonable application of

[5] The Supreme Court emphasized 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).

[6] 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," 529 U.S. at 407, the Supreme Court expressed a concern that "the classification does have some problems of precision," id. 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 (continued...)

federal law is different from an incorrect application of federal law." Williams, 529 U.S. at 410 (emphasis in original).[7] "[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.[8]

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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[6] (...continued)
Yarbrough v. Alvarado, 541 U.S. 652, 666 (2004), the Supreme Court stated:

> Section 2254(d)(1) would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law. Cf. Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (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.

[7] See also Andrade, 538 U.S. at 75 (lower court erred by equating "objectively unreasonable" with "clear error"; "These 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.").

[8] 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, 944 (6th Cir. 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) (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).[9] 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. 231, 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));[10] 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 406, 416-17 (6th Cir. 2003) (same).

C. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show

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[9] 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).

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

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 explained:

> 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).

Under Fed. R. Civ. P. 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); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986).

A genuine issue of material fact exists "if the evidence [presented by the non-moving party] is such that a reasonable jury could return a verdict for the non-moving party." Anderson v.

Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see 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."); see also 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. Anderson, 477 U.S. at 249-50. 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. Procedural Default

Burns has asserted multiple reasons why this Court should review his unexhausted habeas claims on the merits. (See D.E. 86 at 119-51.) To narrow the claims that must be addressed on the merits, the Court will summarily address some of Burns' arguments that his unexhausted claims are not procedurally defaulted.

1. Implicit Review

Burns argues that the Tennessee Supreme Court, pursuant to

Tenn. Code Ann. § 39-2-206(c)(1)(repealed)[11], considered the following Eighth Amendment claims on direct appeal to determine whether the death sentence was imposed in "*any* arbitrary fashion." (D.E. 86 at 124-25.)

- Claim 7 - introduction of Burns' statement into evidence
- Claim 8 - false testimony of FBI agents
- Claims 9 & 13 - guilt and sentencing phase jury instructions
- Claim 14 - prosecution's remarks at closing argument
- Claim 15 - trial court's failure to answer jury's questions

(Id. at 125.)[12] Burns asserts that these claims were exhausted because the Tennessee Supreme Court acknowledged, consistent with Tenn. Code Ann. § 39-2-206(c)(1), that it "considered the *entire record* and conclude(d) that (Mr. Burns's) sentence of death was not imposed arbitrarily or capriciously . . . ." (Id. at 124.) See Burns, 979 S.W.2d at 286.

A petitioner does not "fairly present" a federal claim to a state court for exhaustion purposes if the court must look beyond a petition or brief to find material alerting it to the claim. Baldwin v. Reese, 541 U.S. 27, 30-32 (2004); see Hodges v. Bell, 548 F. Supp. 2d 485, 560 (M.D. Tenn. 2008) ("For those claims for

[11] The present statute is Tenn. Code Ann. § 39-13-206(c)(1), which states, "In reviewing the sentence of death for first degree murder, the reviewing courts shall determine whether . . . [t]he sentence of death was imposed in any arbitrary fashion." State v. Cauthern, 967 S.W.2d 726, 741 (Tenn. 1998).

[12] Burns also argues that his Eighth Amendment claim related to the identification testimony of Eric Thomas falls into this category, but he incorrectly identifies this issue as Claim 8, instead of Claim 4. (See id.)

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"). "Exhaustion simply has not occurred where the state courts have not been provided a 'fair opportunity' to consider and decide the same claims of constitutional error presented to a federal habeas court." Miller v. Bell, 655 F. Supp. 2d 838, 869 (E.D. Tenn. 2009).

Implicit review theories based on the statutorily-mandated review that the Tennessee Supreme Court conducts pursuant to Tenn. Code Ann. § 39-13-206(c)(1) in capital cases have been rejected by the federal courts. Miller, 655 F. Supp. 2d 838, 869 (E.D. Tenn. 2009). The Sixth Circuit has indicated that the proposition that a claim has been exhausted because Tenn. Code Ann. § 39-2-205 requires the Tennessee 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 v. Bell, 161 F.3d 320, 336 (6th Cir. 1998). In Zagorski v. Bell, 326 F. App'x 336, 342 (6th Cir. 2009), the Sixth Circuit rejected a petitioner's implicit review argument that his claim was not procedurally defaulted because the Tennessee Supreme Court reviewed the record for "*all* possible claims" and found no reversible error. In Webb v. Mitchell, 586 F.3d 383, 400 (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), but the holding in Cone was limited to Eighth Amendment vagueness challenges. The Court declines to extend Burns' implicit review theory to excuse the procedural default of the above-referenced Eighth Amendment claims.[13]

2. The Post-Conviction Process

Burns argues that Claims 1B as it relates to Agent Bakken, 1C, 1D, 2, 5, 10 as it relates to group prayer and the use of Bibles[14], 11A, and 24 are not procedurally defaulted because Burns' post-conviction process was inadequate to air his federal claims. (D.E. 86 at 125-34.) Burns contends that the only discovery available to him was that already provided pre-trial and that the inability to conduct independent discovery rendered the post-conviction process inadequate. (Id. at 130.) Burns has not identified any facts he might have discovered before federal habeas review that would have permitted him to exhaust these claims. Burns has not demonstrated cause based on a lack of discovery procedures as it relates to the

[13] In addition to the implicit review argument, Burns asserts ineffective assistance of counsel to excuse the procedural default of the Eighth Amendment portion of Claim 7 and Claims 9, 13, 14, and 15. (See D.E. 86 at 139.) He asserts state misconduct and ineffective assistance of post-conviction counsel to excuse the procedural default of Claim 8. (See id. at 136-38, 143.)

[14] Respondent claims that "the factual basis for Petitioner's claim was never properly established and the proof adduced in the post-conviction hearing made no mention of 'group prayer' or the presence of any more than the foreman's personal Bible in the jury room." (D.E. 58 at 10.) Respondent acknowledges that Burns asserted this claim in his second amended post-conviction petition, but claims that the "group prayer" issue was not preserved on appeal and is procedurally defaulted. (Id.) Lloyd Davis, the jury foreman, testified at the post-conviction hearing about a biblical passage that was read, but no evidence was presented about group prayer. (D.E. 28, Add. 13, Vol. 4, pp. 405-19.)

failure to exhaust these claims. See Alley v. Bell, 101 F. Supp. 2d 588, 618 n.11 (W.D. Tenn. 2000) (holding that lack of discovery procedures in the post-conviction process was not external cause for procedural default).

Burns asserts that the post-conviction process was inadequate and judicially biased because the Chief Justice of the Tennessee Supreme Court denied Burns the continued expert services of Dr. Lee Norton, a mitigation specialist. (D.E. 86 at 131-32.) Initially, the Chief Justice approved Norton for $5,000 at $100 an hour; another fifty (50) hours of work was approved later. Burns, 2005 WL 3504990, at *25. On July 17, 2003, a request for pre-approval of $15,000 for services and $2,524.00 for travel expenses was denied. Id. (D.E. 28, Add. 14, p. 134.) The Chief Justice's reason for the denial was

> Funding for experts and services in post-conviction proceedings should be approved if facts alleged establish that the funding is necessary "to establish a ground for post-conviction relief, and that the petitioner is unable to establish that ground for post-conviction relief by other available evidence." Owens v. State, 908 S.W.2d 923, 929 (Tenn. 1995). The facts outlined in the order authorizing funding indicate that the information likely to be obtained from interviewing or re-interviewing Betty Douglas, Zettie Carter, Teresa Carter, Henry Clark, Steve Ball and the Dawson family is already available to counsel.

(Id.) The Chief Justice approved funding in the total amount of $4875 at the hourly rate of $65 for services, not including out-of-state travel. (Id.) Norton would not agree to work at the $65 rate, and Norton's work stopped. Burns, 2005 WL 3504990, at *25.

Burns filed an application for permission to appeal the curtailment of the trial court's grant of expert services to the Tennessee Court of Criminal Appeals. (Id. at 130-31.) That court held that it was without authority to review the Chief Justice's decision. (Id. at 131.)

The Tennessee Court of Criminal Appeals addressed the denial of additional funds in the appeal of the denial of post-conviction relief.

> We disagree with the petitioner's claim that he was denied sufficient funds for the preparation of proof at the evidentiary hearing. He was granted $5,000 for fifty hours of Dr. Norton's services, at $100 per hour. The post-conviction court then granted an additional $15,000 for 150 hours of Dr. Norton's services at $100 per hour. However, the Chief Justice reduced the amount of these additional funds to $4,875 for seventy-five hours, at $65 per hour, a rate which Dr. Norton found unacceptable. Thus, the "court" did not deny the petitioner funds for expert services. Rather, Dr. Norton refused to work for the hourly rate which had been authorized. The petitioner has failed to establish that he could not employ another mitigation specialist at the $65 hourly rate. We will not assign constitutional error to a "court" when funds were provided but rejected by the one expert selected. Thus, the petitioner has failed to establish that the "court's" denial of funds for Dr. Norton denied him a full and fair hearing.
>
> Moreover, Dr. Norton testified that the scope of her contract with the petitioner's counsel was limited to her assistance in conducting interviews, although she did perform some functions of the traditional mitigation specialist. She considered herself a "consultant" in this case. Dr. Norton acknowledged she was surprised at being subpoenaed to testify as an expert and, had she been aware this would occur, she would have prepared differently. With regard to Dr. Woods's evaluation, he clarified that when he referred to the investigation as "incomplete," he meant it was incomplete with regard to the way that "these things unfold" rather than incomplete

> due to a "lack of thoroughness." As such, there is no evidence to support a conclusion that Dr. Woods's opinion would have been different had Dr. Norton completed her interviewing process. This issue is without merit.

Burns, 2005 WL 3504990, at *37.

Respondent asserts and the Court agrees that the record does not support Burns' allegations of judicial bias based on Norton's funding. (See D.E. 94 at 77.) The record reveals that the Chief Justice's decision was based on a determination that the information sought was available to counsel.[15] Burns has not presented any evidence that the decision was motivated by judicial bias or indicated how the lack of continued funding at the initial level prevented him from exhausting the enumerated claims.

Burns also asserts that the post-conviction process was inadequate because the post-conviction trial court demonstrated judicial bias when it refused to consider mitigating facts about Obra Carter's violent treatment of Burns, the whipping or spanking of his siblings, and the effect of Carter's intermittent contact with Burns and his family. (D.E. 86 at 132-33.) Burns does not point to specific examples of bias in the record. The Tennessee Court of Criminal Appeals held that Burns' claim that he was denied a full and fair hearing because rulings and statements made by the post-conviction court demonstrated bias and because that court failed to consider and give effect to the mitigation evidence was

[15] Norton interviewed Betty Douglas and Zettie (Carter) Thomas, two of the interviews for which additional funding was requested. See Burns, 2005 WL 3504990, at *24, 40.

without merit. Burns, 2005 WL 3504990, at **37-44.

Burns has presented no record evidence to indicate judicial bias. Burns has not established cause for the failure to exhaust Claims 1B as it relates to Agent Bakken, 1C, 1D, 2, 5, 10 as it relates to group prayer and the use of Bibles, 11A, and 24. Claim 24 is procedurally defaulted and DENIED.[16]

3. Ineffective Assistance of Counsel as Cause

Burns takes the Court on an "admittedly obtuse journey" in which he asserts ineffective assistance of counsel as cause for the procedural default of the following claims that were not presented during trial and/or on direct appeal:

> Claim 6 - unduly suggestive photo array
>
> Claim 7 - Eighth Amendment claim about Burns' statement
>
> Claim 9 - unconstitutional jury instructions at the guilt stage
>
> Claim 13 - unconstitutional jury instructions at the sentencing stage
>
> Claim 14 - prosecutorial misconduct during closing argument
>
> Claim 15 - failure to answer the jury's questions during sentencing deliberation; and
>
> Claim 16 - sex discrimination in the selection of the grand jury foreperson.

(D.E. 86 at 139.) Burns did not exhaust in state court the

[16] In addition to his inadequate post-conviction process argument, Burns asserts ineffective assistance of post-conviction counsel as cause for the procedural default of claims 1, 2, 5, 10 as it relates to group prayer and the use of Bibles, and 11. (D.E. 86 at 143.) Burns asserts actual innocence as cause for claims 2, 5, and 11A. (Id. at 147-50.)

ineffective assistance of counsel issues he now asserts as cause for the above-enumerated claims. (Id. at 140.)[17] Burns asserts the violation of his Fourteenth Amendment right to effective representation in the post-conviction proceedings[18] as cause for his failure to exhaust the ineffective assistance of counsel claims arising from his trial and direct appeal. (Id. at 140.) Burns contends that "[b]ecause such an IAC claim was first available for review during the first post-conviction proceeding, this case presents the issue *Coleman* left open." (Id. at 141.)

There is no constitutional right to effective representation of counsel in post-conviction and collateral proceedings, whether under the Sixth or the Fourteenth Amendment. Coleman, 501 U.S. at 752-53; Wooten v. Norris, 578 F.3d 767, 778 (8th Cir. 2009) (same). "The right to appointed counsel extends to the first appeal of right, and no further." Pennsylvania v. Finley, 481 U.S. 551, 555 (1987). The petitioner must "bear the risk of attorney error that results in a procedural default." Coleman, 501 U.S. at 752-53. This is true even when a claim can only be raised for the first-time in state post-conviction proceedings. Thompson v. Rone, Nos. 92-5839,

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[17] Burns' ineffective assistance of counsel claims on appeal of the denial of post-conviction relief were limited to claims that counsel failed to investigate thoroughly and present evidence of Burns' lesser culpability; failed to select a jury competently; failed to object to the presentation of victim impact evidence; failed to use the services of experts for mitigation; failed to investigate thoroughly and present sufficient mitigation evidence; and failed to prepare defense witnesses to testify. Burns, 2005 WL 3504990, at *48.

[18] Burns acknowledges that the Sixth Circuit does not recognize a Sixth Amendment claim for ineffective assistance of post-conviction counsel and as such the claim cannot serve as cause for procedural default. (Id. at 140 n.121.)

92-5840, 1994 WL 36864, at *4 (6th Cir. Feb. 8, 1994); see Bishop v. Epps, No. 1:04CV319-MPM, 2007 WL 2363465, at *20 (N.D. Miss. Aug. 16, 2007) (quoting Matchett v. Dretke, 380 F.3d 844, 849 (5th Cir. 2004) ("Contrary to Matchett's suggestion, a state prisoner may not cite the ineffective assistance of state habeas counsel as 'cause' for a procedural default even for 'cases involving constitutional claims that can only be raised for the first time in state post-conviction proceedings")). Because Burns has no constitutional right to effective assistance of post-conviction counsel, he cannot establish cause to prevent the procedural default of his trial and direct appeal ineffective assistance of counsel claims. Coleman, 501 U.S. at 752-55 (1991) (ineffective assistance of counsel during state post-conviction proceedings cannot serve as cause to excuse factual or procedural default); see Stojetz v. Ishee, 389 F. Supp. 2d 858, 901 (S.D. Ohio 2005) (same). Because the ineffective assistance claims on which Burns relies to establish cause for claims 6, 7, 9, and 13-16, as enumerated above, are themselves procedurally defaulted, the Eighth Amendment portion of claim 7 and claims 6, 9, 13, 14, and 16 are procedurally defaulted and DENIED.[19]

Burns also asserts ineffective assistance of post-conviction

[19] Burns asserts that Claim 15 is not procedurally defaulted because the state court's determination that he waived that claim was not based on an adequate state law ground for the default. (D.E. 86 at 134-35.) Because the state court addressed the claim on the merits, the Court will address the claim on the merits later in this opinion, infra pp. 100-105.

counsel as cause for the procedural default of claims 1, 2, 5, 8, 10 about the use of the Bible and group prayer, and 11. (D.E. 86 at 143.) As stated supra pp. 29-30, ineffective assistance of post-conviction counsel does not establish cause for the failure to exhaust a claim. Claims 1B as it relates to Bakken and Harbaugh, 1C, 1D, and 10 about the use of the Bible and group prayer are procedurally defaulted and DENIED.[20]

B. Ineffective Assistance of Trial Counsel (Claim 1)

Burns asserts in Claim 1A that trial counsel failed to investigate and present available evidence (D.E. 8 at 15-17) and in Claim 1B that trial counsel failed to cross-examine Eric Thomas and Mary Jones effectively (id. at 17-18).[21]

A claim of ineffective assistance of counsel under the Sixth Amendment is controlled by the standards in Strickland v. Washington, 466 U.S. 668, 687 (1984):

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the

[20] Burns has asserted additional bases for the Court to address claims 2, 5, 8, and 11 on the merits, supra p. 24 n.13 & p. 28 n.16.

[21] Claim 1B, as it relates to Bakken and Harbaugh, and claims 1C and 1D were procedurally defaulted, supra pp. 27-28, 31.

> conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

To demonstrate deficient performance by counsel, a defendant must demonstrate that "counsel's representation fell below an objective standard of reasonableness." Id. at 688.

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Id. at 689 (citation omitted); see also Coe, 161 F.3d at 342 (6th Cir. 1999) ("The specifics of what Coe claims an effective lawyer would have done for him are too voluminous to detail here. They also largely miss the point: just as (or more) important as what the lawyer missed is what he did not miss. That is, we focus on the adequacy or inadequacy of counsel's actual performance, not counsel's (hindsight) potential for improvement."); Adams v. Jago, 703 F.2d 978, 981 (6th Cir. 1983) ("a defendant 'has not been denied effective assistance by erroneous tactical decisions if, at the time, the decisions would have seemed reasonable to the

competent trial attorney'"). The Court should "assess counsel's overall performance throughout the case in order to determine whether the 'identified acts or omissions' overcome the presumption that counsel rendered reasonable professional assistance." Kimmelman v. Morrison, 477 U.S. 365, 386 (1986); see also Rogers v. Kohler, No. 86-1857, 1987 WL 37783, at *2 (6th Cir. June 23, 1987) ("The habeas lawyer is usually not the trial lawyer and it is very easy for one person's strategy to emerge years later as another person's error. Therefore, we evaluate on the total performance and the question of prejudice.")

A prisoner attacking his conviction bears the burden of establishing that he suffered some prejudice from his attorney's ineffectiveness. Lewis v. Alexander, 11 F.3d 1349, 1352 (6th Cir. 1993); Isabel v. United States, 980 F.2d 60, 64 (1st Cir. 1992). "[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.

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." Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. Additionally, however,

in analyzing prejudice,

> the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of the challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated.

Lockhart v. Fretwell, 506 U.S. 364, 368 (1993) (citing United States v. Cronic, 466 U.S. 648, 658 (1984)); see Mickens v. Taylor, 535 U.S. 162, 165 (2002) (the Sixth Amendment right has been accorded "because of the effect it has on the ability of the accused to receive a fair trial. It follows from this that assistance which is ineffective in preserving fairness does not meet the constitutional mandate . . . and it also follows that defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation.") (citations omitted); see also Williams, 529 U.S. at 391 ("[W]hile the Strickland test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims, there are situations in which the overriding focus on fundamental fairness may affect the analysis. Thus, on the one hand, as Strickland itself explained, there are a few situations in which prejudice may be presumed. And, on the other hand, there are also situations in which it would be unjust to characterize the likelihood of a different outcome as legitimate 'prejudice'.") (citation omitted); see also Strickland, 466 U.S. at 686 ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so

undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."). "Thus analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." Lockhart, 506 U.S. at 369.

1. Failure to investigate and present available evidence (Claim 1A)

Burns asserts that his trial counsel failed to investigate and present available evidence at the guilt stage in violation of his Sixth, Eighth, and Fourteenth Amendment rights. (D.E. 8 at 15.) Burns contends that trial counsel's investigation of the case was limited to visiting the crime scene, interviewing Burns, and meeting with Burns' parents. (Id. at 16.) Counsel did not interview available eyewitnesses and failed to use the limited discovery from the State and the transcripts from Derrick Garrin's and Carlito Adams' trials. (Id.) Burns claims that, had trial counsel recognized the significance of information in the documents that they possessed, counsel would have presented evidence that Burns did not have the intent to commit a robbery, that it was questionable whether a robbery occurred, that Burns did not shoot Dawson or anyone else, and that the authorities did not prosecute Kevin Shaw, Benny Buckner or

Richard Morris[22] in exchange for information and/or services. (Id. at 16-17.)

Burns addressed his counsel's alleged failure to investigate and present a defense in his post-conviction petition (D.E. 28, Add. 14, pp. 30-33) and on appeal of the denial of post-conviction relief (id. at Add. 26, pp. 23-26). The Tennessee Court of Criminal Appeals held:

> The post-conviction court found that trial counsel had not been ineffective in their preparation for the guilt phase of the trial:
>
> > Petitioner alleges that counsel failed t[o] interview witnesses to the crime. Both attorneys testified that their investigator attempted to locate and talked to witnesses. Tomm[ie] Blackm[a]n refused to talk to them. He was successful on some and not on others. [Senior counsel] also testified that he and the investigator canvassed the neighborhood door to door for witnesses but to no avail. However, he testified that his investigator had secured the entire police department file and copies of all of the witnesses' statements pre-trial. Further, they were able to convince the State to try [the petitioner] after defendants Garrin and Adams so that they would have the testimony of the witnesses as well. The Court feels the attorneys were not ineffective for failing to interview witnesses. It appears they were well prepared for trial. This issue has no[ ] merit.
> >
> > Petitioner alleges that counsel failed to talk to co-defendants, Garrin and Adams.... The testimony at the evidentiary hearing was that one co-defendant, name unknown, refused to talk to the investigator and another named the Petitioner as the "Trigger man".... There has been no proof presented that ... [Garrin and/or Adams] wanted to testify [for the petitioner at

[22] Morris' name is sometimes spelled "Morrise" in the pleadings. Richard Morris is also referred to as "Marqueis". (D.E. 86-13 at 4.)

> trial] or that the[ir] testimony would have been helpful to the Petitioner and they were available to testify at this hearing. This Court therefore concludes that this issue is without merit.
>
> Petitioner alleges ineffectiveness for not interviewing all of the co-defendants. The attorneys testified that they had each co-defendant's statement, as well as the statements of those present but not charged.... [C]ounsel had reviewed the testimony of those who had been tried and those who had testified in the earlier trials. Adams described the Petitioner as a shooter and described him as wearing a 3/4 length black coat. Shaw gave the same description, Buckner, who was arrested and charged as a participant by order of the court after his testimony, said the [petitioner] was present when the proceeds of the robbery were divided, Garrin said the petitioner fired shots and may have been the one to take the jewelry. This court has not seen any testimony or a statement from Richard Morris other than a small portion of his testimony placing the Petitioner on the scene with a gun. This Court has not heard testimony from any of these co-participants or co-defendants, which would have been beneficial to Petitioner or would have affected the verdict of the jury. This Court sees nothing beneficial that would have been offered by any of those present and nothing has been presented to the Court to indicate that due to the failure of defense counsel to interview these parties the outcome of the trial would have been different. This issue has no merit.

As found by the post-conviction court, the testimony showed that trial counsel and their investigator attempted to interview witnesses to the crimes. Tommie Blackman refused to talk to them. Counsel also had the entire file of the prosecution and had the transcripts of the trials of Carlito Adams and Derrick Garrin. One codefendant specifically identified the petitioner as the "trigger man.” Both Carlito Adams and Kevin Shaw described the shooter as wearing a black trench coat. Buckner and Garrin both stated that the petitioner shared in the proceeds of the robbery, and Garrin stated that the petitioner fired

> shots. There is no proof that the petitioner provided trial counsel with the names of any of the numerous witnesses who could have testified that he had short hair. One witness identified the petitioner two days after the incident by photographic lineup in which the petitioner had a short hairstyle. Another witness described the petitioner as having a jheri curl. The petitioner refused to cooperate with counsel by changing his hairstyle or providing counsel with witnesses regarding his hairstyle or manner of dress. Further, he hampered any attempt to establish his lesser culpability by suddenly refusing to testify on his own behalf.
>
> There was no proof presented that any of the participants other than the petitioner was wearing a trench coat during the shootings. The petitioner asserts that Kevin Shaw had a jheri curl at the time of the offenses. In support thereof, defense witness Rodney Weatherspoon identified Kevin Shaw as wearing longer hair with "the little curl." Notwithstanding, defense witness Kevin Whitaker testified that Kevin Shaw wore his hair in a "high-top fade." This conflicting evidence fails to identify Kevin Shaw as wearing a black trench coat or wearing a long jheri curl at the time of the offenses. The post-conviction court properly concluded that the petitioner failed to present evidence establishing that he was mistakenly identified as the shooter.
>
> The conflicting testimony of the codefendants, the petitioner's refusal to cooperate with counsel, his statement to FBI agents, and his decision not to testify at trial hindered trial counsel's efforts to pursue a theory of lesser culpability. Even if, as the petitioner claims, trial counsel were deficient in not presenting witnesses to testify regarding the length of his hairstyle, it is clear that the identification of him as the shooter does not rest solely upon his hairstyle. The proof, including the petitioner's statement to the FBI, established, beyond a reasonable doubt, that he was guilty of the felony murders of the victims, Johnson and Dawson. Thus, he has failed to show that he was prejudiced by counsel's alleged failure to further investigate his lesser culpability and the alleged failure to present evidence of his lesser culpability.

Burns, 2005 WL 3504990, at **56-57.

Burns argues that the state court's decision was an unreasonable

determination of the facts and an unreasonable application of federal law. (D.E. 86 at 57, 61.) Burns claims that the Tennessee Supreme Court's findings of fact on direct appeal, as cited by the Tennessee Court of Criminal Appeals in the post-conviction proceedings, are "belied by evidence that was presented to the post-conviction court that Johnson and Wright admitted they had in their possession." (Id. at 57.) Burns claims that the Tennessee Supreme Court's misunderstanding of the facts is evidence of counsel's inadequate representation and prejudice to Burns. (Id. at 57-59.) Burns asserts that the Tennessee Supreme Court's conclusion that Burns approached the car with Adams contradicted Adams', Buckner's, Shaw's, Garrin's, and Burns' statements, all of which indicated that Shaw approached the car with Adams and also that the Tennessee Supreme Court's conclusion that Burns pulled a gun and walked around the car is unsupported. (Id. at 59.)

Burns' focus is improperly placed on the Tennessee Supreme Court's factual findings on direct appeal. The Court of Criminal Appeals recited the Tennessee Supreme Court's factual findings in its opinion. Burns, 2005 WL 3504990, at **1-3. However, the Tennessee Court of Criminal Appeals relied heavily on testimony and evidence presented in the post-conviction proceedings in making its findings. See id. at **3-30. The Court of Criminal Appeals noted the testimony of Attorney Glen Wright about the lack of consistency in evidence about the various participants' roles in the incident and questions

about the identity of the "other perpetrator" that Eric Thomas described.

> At Garrin's trial, Thomas described codefendant Carlito Adams "as being five-seven or five-eight and 170 pounds" and the other perpetrator as "[f]ive-eight, slim build, dark complexion, curl-like fade." In counsel's opinion, the other perpetrator's description matched the petitioner. Counsel acknowledged there was not "one hundred percent consistency among the witnesses and victims as to each role each player position [sic] around the car. They were mostly consistent in that [the petitioner] was not generally considered to be one of the first two people to arrive at the car, but I read that to mean when he gave that description because it didn't fit the description of somebody else, that that's who he was talking about."

Burns, 2005 WL 3504990, at *6. (See D.E. 28, Add. 13, Vol. 2, at 96-98.) The Court of Criminal Appeals also noted Burns' counsel's testimony about Burns' culpability and that some co-defendants identified Burns as the trigger person.

> On cross-examination, senior counsel acknowledged that the petitioner's statements placing him at the scene eliminated any use of an alibi defense, the statement being "that he was there, and that he was shooting at one of the victims, but he didn't hit the victim." Counsel added that the codefendants, with the exception of Garrin, "said that [the petitioner] was the trigger person." Codefendant Garrin said he saw the petitioner take jewelry from one of the victims. . . . Counsel did not believe that the petitioner was less culpable because additional people were involved.

Id. at *8. The Court of Criminal Appeals acknowledged that there was inconsistency in the evidence about Burns' role in the incident in general and, in particular, on the issue of whether Burns shot Dawson. See id. at **34-35. The Court of Criminal Appeals' factual findings are based on a reasonable determination of the facts in

light of the evidence presented.

Burns presents several "plausible" scenarios about how this incident might have occurred. (D.E. 86 at 38.) However, the Tennessee Supreme Court found sufficient evidence to support the felony murder conviction. Burns, 979 S.W.2d 287-88; see infra pp. 54-56. Burns admitted that he was present and fired his gun. Burns, 2005 WL 3504990, at *2. Witnesses identified Burns as one of the individuals who took money and jewelry, and Burns' counsel testified that Burns told him he received jewelry from the incident. (D.E. 28, Add. 13, Vol. 1, p. 61.) Burns did not have to fire a fatal shot to be guilty of felony murder; his participation in the robbery was sufficient.

Burns contends that the Tennessee Court of Criminal Appeals' determination was a flawed application of law because that court examined the inconsistencies between the post-conviction and trial records and the conflicts in evidence and determined that counsel's performance was not deficient because Burns was the reason for any ineffectiveness. (D.E. 86 at 61-62.) A fair reading establishes, however, that the Court of Criminal Appeals focused on Burns' conduct to determine whether Burns was prejudiced by his counsel's performance, not to determine the reasonableness of counsel's performance. See Burns, 2005 WL 3504990, at *57.

The Tennessee Court of Criminal Appeals stated the correct legal standard from Strickland and applied that standard to the evidence. Burns, 2005 WL 3504990, at **48-57. The Court of Criminal Appeals'

decision was neither contrary to nor an unreasonable application of clearly established Supreme Court precedent and was based on a reasonable determination of the facts in light of the evidence presented. Claim 1A is DENIED.

2. Failure to cross-examine Eric Thomas and Mary Jones effectively (Claim 1B)

a. Eric Thomas

Burns argues that his counsel should have used Eric Thomas' prior testimony at Garrin's trial that Garrin shot him (D.E. 8 at 18; D.E. 86 at 32) to cross-examine Thomas about his statement that Carlito Adams shot him (D.E. 8 at 18). Although Burns acknowledges that his counsel cross-examined Thomas about his identification of Adams as the shooter (D.E. 8 at 18; see also D.E. 28, Add. 2, Vol. 3, pp. 382-84), Burns contends that Thomas gave his statement the day after the incident when he was in stable condition and not in fear of dying. (D.E. 8 at 17-18.) Burns contends that cross-examination about the circumstances surrounding Thomas' statement could have cast doubt on his veracity. (D.E. 86 at 32-33.) Burns contends that his counsel did not use the available evidence to impeach Thomas' story or his credibility and that the falsehood of Thomas' "dying declaration" is plain. (Id. at 41, 59.)

Thomas made a tape-recorded victim's statement at the Regional Medical Center in Memphis on April 21, 1992. (D.E. 86-8 at 2.) He identified Adams as the person who shot him and described the three other men who came to the car with Adams. (Id. at 2-3.)

> Q. Could you describe any of these other parties that was with Carlito when he came to the car?
>
> A. Yes, a young male, a little taller than Carlito, but a little slimmer, very dark complection (sic) and maybe like a curl fade haircut.
>
> Q. Ok. And could you describe any of the other ones?
>
> A. Yes, heavy build, one was bright with badly kind of shaven with bumpy face from shaving, heavy set, and it was another one that looked just like the first one, kind of slim build, slim, dark complection (sic).

(Id. at 3.) Thomas stated that "about 4 males got out the car and walked up to the driveway." (Id.) They took money and jewelry and Thomas was shot once in the chest and once in the stomach. (Id.) "They then fired another shot" hitting Thomas in the thigh. (Id.) Thomas was shown photographs and was able to identify two people in the photographs, Burns being one of them. (Id. at 4.)

At Garrin's trial, Thomas testified that Adams and a guy, "[a]pproximately 5'8", slim build, dark complexion, curl-like fade" were the first two to come up to the car. (D.E. 85-6 at 9.) The slim fellow positioned himself on the passenger's side (Johnson's side) at the front door and pulled out his gun. (Id. at 10.) Three other men then came from the hedgerow to the driver's side. (Id. at 11-14.) Two men were at the door, and one was running back and forth from both doors. (Id. at 14.) Thomas described these three men as follows:

> One of them was kind of a big fellow, heavy build with glasses. The other one was kind of dark complexion, slim build, short and another one was kind of bright, bumpy faced from shaving, that one had a hat, possibly a trench coat on.

(Id.) The guy with the trench coat came up the driveway shooting at Blackman. (Id. at 17-18.) Then, they came to Thomas' and Dawson's side of the car. (Id. at 18-20.) The tall slim fellow with the curl-like fade demanded Johnson's necklace. (Id. at 20.) Thomas testified that he got shot first, in the stomach, by the "big fellow with the glasses" who was leaning in Dawson's door and then in the chest. (Id. at 21.) After Thomas had been shot twice, he noticed Johnson and Dawson were being shot. (Id. at 22.) Thomas testified that the "slim build" person was shooting at Tracy, and the big fellow with glasses was shooting at Damon. (Id. at 22.) Thomas stated, "I don't know who hit Tracy, but the big fellow with glasses, I'm sure he hit Damon." (Id. at 22-23.) Thomas testified that he tried to play dead, but someone else came and shot him again. (Id. at 23.)

At Burns' trial, Thomas testified that he identified Burns' picture, No. 5 in the lineup, as the person who shot him, shot "somebody else", and took his money. (D.E. 28, Add. 2, Vol. 3, pp. 369-70.) On cross-examination, Thomas stated, "They told me to give 'em everything we had, ... And after we gave 'em everything we had, they opened fire." (Id. at 378.) Thomas stated that more than one person fired. (Id.)

Burns' counsel questioned Thomas about his ability to see the shooters when he was "playing dead." (Id. at 379-80.) Thomas said that he "could see anybody that walked up to the rear driver's or the front driver's door." (Id. at 380.) Thomas stated that two people

came back the second time and shot. (Id. at 381.)

At the post-conviction proceedings, Attorney William Johnson[23] testified that Thomas' statement at Garrin's trial that the "big fellow with the glasses" shot him was contrary to his testimony at Burns' trial. (D.E. 28, Add. 13, Vol. 3, p. 280.) Johnson stated,

> How (sic) look at that, to be quite frank with you that's strong evidence, but like I say, you take it all with a grain of salt because – and I'm operating from memory because and this – we tried to impeach Eric because Eric claimed he actually laid down in the backseat and didn't actually see the other person coming up and doing the shooting, and I do remember that, and like I say, we tried everything we could think of to try to impeach Eric Thomas' testimony because Eric Thomas and Ms. Jones were strong witnesses.

(Id. at 283.)

The Tennessee Court of Criminal Appeals noted trial counsel's testimony that he reviewed the transcripts of codefendant Garrin's trial before Burns' trial; that Thomas identified Garrin as the person who shot him and Dawson during Garrin's trial; that Thomas identified Burns as the person who shot him at Burns' trial; and that in counsel's opinion, "the other perpetrator's description matched the petitioner." Burns, 2005 WL 3504990, at **6, 10. The court determined that counsel had attempted to impeach Eric Thomas' identification by use of Thomas' statement to police identifying Carlito Adams as the shooter. Id. at *10. The court noted that counsel indicated that the discrepancies in identification testimony

[23] Attorneys Glenn Wright and William Johnson represented Burns at trial. (D.E. 28, Add. 13, Vol.2, p. 40; id. at Vol. 3, p. 206.)

had been a focus of trial preparation and that witnesses confused Burns and Shaw. Id. The Court of Criminal Appeals agreed with the post-conviction court's finding that, without seeing the petitioner's theories of effective cross-examination tested on Thomas to clarify the apparent inconsistencies in testimony, the court could not conclude that questioning Thomas as Burns contends counsel should would have changed the outcome of the case. Id. at **34-35.

Burns contends that trial counsel's performance was objectively unreasonable and notes counsel's duty to investigate possible methods of impeaching a prosecution witness. (D.E. 86 at 49.) Burns cites cases where an attorney's failure to impeach a co-defendant or key prosecution witness was deemed deficient performance prejudicial to the petitioner. (Id. at 49-56.) He argues that counsel could have left the jury with

> (1) an eyewitness who had already testified that someone else robbed and shot him, had initially not identified Mr. Burns as his shooter, and testified falsely about the statement he gave to the police; (2) another eyewitness who gave a description of the shooter that could not have been Mr. Burns and named a different suspect who had been a ringleader and was the first person to pull a gun; (3) and a police investigation that yielded conflicting eyewitness accounts; suspects who gave self-servicing statements after conferring with one another; no positive, inculpatory identifications by a disinterested witness; and the premature release of admitted participants and evidence after barely 46 hours.

(Id. at 56-57.)

Burns disputes the Tennessee Court of Criminal Appeals' factual findings that Burns' counsel "attempted" to impeach Thomas at trial,

that most of the witnesses and participants said that Burns was the trigger man, and that Burns' counsel believed the description of the "other perpetrator" matched Burns. (D.E. 86 at 60-61.) The issue before the Court is not whether counsel attempted to impeach Thomas, but whether counsel was unreasonable in his cross-examination of Thomas. The Court of Criminal Appeals noted that the post-conviction court "would have liked to have heard from Mr. Thomas" and that it was "left to speculate" about what Thomas' testimony would have been if he had been cross-examined more thoroughly. Burns, 2005 WL 3504990, at *34. The post-conviction court suggests that counsel's cross-examination might have been insufficient, noting the "apparent in[]consistencies" in testimony. Id. The court determined, however, that there was no constitutional violation because it was unable to find prejudice. Id. The Court of Criminal Appeals' findings that most of the witnesses and participants said that Burns was the trigger man and that Burns' counsel believed the description of the "other perpetrator" matched Burns are not unreasonable based on the evidence presented. Still, these findings are less consequential to the determination of guilt because Burns admitted to a role in the incident that resulted in felony murder. Burns cannot establish prejudice.

Burns asserts that the Tennessee Court of Criminal Appeals applied a standard that was "contrary to" and an unreasonable application of Supreme Court precedent when it decided Burns had

failed to prove that questioning Thomas further based on his previous testimony "would have changed the outcome of the trial." (Id. at 63-64.) Burns asserts that the Court of Criminal Appeals used a standard other than that established in Strickland, namely whether Burns had demonstrated a "reasonable probability that . . . the result of the proceeding would have been different." (D.E. 86 at 63). The Court of Criminal Appeals cited the Strickland standard, see Burns, 2005 WL 35094990, at **49-50, and concluded that the evidence would have to change the outcome of the trial. See Burns, 2005 WL 3504990, at **34-35. Given Burns' admitted involvement in the incident, he has not demonstrated that further cross-examination would have met Strickland's prejudice standard: that there is a reasonable probability that the result of the proceeding would have been different. Strickland, 466 U.S. at 694. Burns' ineffective assistance of counsel claim about the cross-examination of Eric Thomas is without merit.

b. Mary Jones

Burns contends that trial counsel failed to cross-examine Mary Jones based on the asserted fact that Burns did not have enough hair for a jheri curl at the time of the murder. (D.E. 8 at 18.) Burns contends there was available evidence that Shaw stated Burns had a "low fade hairstyle" and that Benny Brown said Burns did not have a

jheri curl when Brown drove him to Chicago[24]. (D.E. 86 at 33.) Burns raised this issue in his post-conviction petition (D.E. 28, Add. 14, p. 32) and addressed it at the evidentiary hearing (id. at Add. 13, Vol. 2, pp. 33-37). The Tennessee Court of Criminal Appeals held:

> At the post-conviction hearing, the petitioner presented the testimony of various witnesses who said that he did not have a jheri curl at the time of the offenses. Kevin Whitaker testified that, in 1992, Kevin Shaw wore his hair "kind of like a high top, kind of like a high-top fade type of deal" and often wore a trench coat. Whitaker said that the petitioner wore his hair "low on the scalp." Samuel G. Brooks testified that he could not recall the petitioner wearing a "jheri curl," but the last time he saw the petitioner was in March 1992. Rodney Weatherspoon testified that Kevin Shaw "sometimes" wore a trench coat, adding that the people from West Memphis wore their hair in fades, while those from Memphis had "chemical processes" in their hair. He described Kevin Shaw as having "bushy hair," "longer hair" with "the little curl." Weatherspoon stated that he never saw the petitioner with long hair or a jheri curl. The petitioner's mother, Leslie Burns, who testified at the petitioner's trial, said that the petitioner wore his hair short at the time of the incident and did not start growing his hair long until after his arrest. She said she saw no reason for her son to change his hairstyle for trial. Renita Burns said that the petitioner never wore his hair long or used chemicals in his hair. Steve Carter said that the petitioner "always kept short hair." George Michael Hissong said that the petitioner wore his hair short.

Burns, 2005 WL 3504990, at *55. The post-conviction court noted that, although Burns presented proof at his evidentiary hearing that he had short hair at the time of the incident, there was no proof that the names of the persons with this evidence were given to Burns' counsel before trial. (Id. at *35.) The Tennessee Court of Criminal Appeals

[24] (See D.E. 86-30.)

stated,

> Counsel acknowledged that the petitioner had told him that he did not have a jheri curl at the time of the crime but, instead, had a "regular hair cut." However, the petitioner was unable to provide counsel with any witnesses to verify that he had "a normal haircut at the time that this incident occurred." Counsel said that not even the petitioner's parents would testify that the petitioner had a short haircut at the time of the incident. Moreover, the eyewitness (Mary Jones) could not identify the petitioner from a mugshot in which he had short hair, although she identified him at trial while he had a longer hairstyle. While the petitioner did provide counsel with a photograph of himself "with short hair, or a nonjheri curl hair, ... that photograph appeared to be of a much younger Kevin Burns and not Kevin Burns at the time of this incident ."

Id. at **6; see id. at **55. The court held that, “Even if, as the petitioner claims, trial counsel were deficient in not presenting witnesses to testify regarding the length of his hairstyle, it is clear that the identification of him as the shooter does not rest solely upon his hairstyle”. Thus, the court concluded that Burns had failed to demonstrate prejudice. Id. at *57.

Burns asserts that counsel’s performance was objectively unreasonable based on counsel’s duty “to bring to bear such skill and knowledge *as will render the trial a reliable adversarial testing process*” and “to investigate possible methods for impeaching a prosecution witness.” (D.E. 86 at 49.) The Tennessee Court of Criminal Appeals applied the correct legal standard to the evidence presented. Burns, 2005 WL 3504990, at **56-57. At trial, Burns’ counsel cross-examined Jones about her inability to identify anyone from the photo line-up, her reference to Burns as Kevin Shaw, and the

distance from which she viewed the incident. (D.E. 28, Add. 2, Vol. 4, pp. 465-468.) Jones testified, "I may have his name mixed up, but I know his face, and I know how he looked – he had Gheri (sic) curl. And that's him. I know his face." (Id. at 466.) On re-direct examination, Jones confirmed that Burns was the one who shot Dawson, stating that she was looking right at him. (Id. at 470-71.) At the post-conviction hearing, Jones testified that she saw Burns, wearing a shoulder length jheri curl and a black trench coat, shoot Dawson. (D.E. 28, Add. 13, Vol. 2, pp. 34-36.) See Burns, 2005 WL 3504990, at *35.

Burns relies on the purported fact that he had a short haircut at the time of the incident. Even with the additional evidence presented at the post-conviction hearing about Burns' hair, Burns' post-conviction counsel did not demonstrate that Jones' identification of Burns as Dawson's shooter was inaccurate. Therefore, this Court cannot determine that a more thorough cross-examination of Jones at trial would have resulted in a determination that Burns was not Dawson's shooter.

The determination of Burns' hair length does not establish his guilt or innocence. Burns cannot demonstrate prejudice because Burns was guilty of felony murder by his own admission. The conclusion of the Tennessee Court of Criminal Appeals was 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. Claim 1B is DENIED.

C. Brady Violation (Claim 2)

Burns alleges that, in violation of the Sixth, Eighth, and Fourteenth Amendments, the State withheld documents containing material, exculpatory information including, but not limited to, the following:

1. The April 2, 2002 statement of Tyrone Jones;
2. The April 20, 1992 statement of Eric D. Jones;
3. The May 1, 1992 statement of Mary Lee Jones;
4. The April 20, 1992 statement of Tommie Blackman;
5. The April 21, 1992 statement of Benny Buckner;
6. The April 22, 1992 statement of Kevin Shaw;
7. The April 24, 1992 statement of Richard Morris;
8. A May 23, 1991 Memphis Police Department Firearms Release Form;
9. A May 5, 1994 pre-sentence report on Derrick Garrin; and
10. The March 21, 1995 indictments charging Benny Buckner with Dawson and Johnson's murders.

(D.E. 8 at 20-22.) Burns also alleges that the State withheld the following information:

1. No robbery occurred at 1550 David;
2. Any robbery that did occur was the result of Kevin Shaw's spur of the moment decision;
3. Burns did not intend for a robbery to occur;

4. Burns did not fire any weapon he had at the scene;

5. Burns did not shoot Dawson or anyone else;

6. Derrick Garrin shot Dawson;

7. Kevin Shaw shot Dawson;

8. Carlito Adams shot Dawson;

9. Adams, Shaw, Buckner, Garrin, and/or Morris fired weapons at the scene;

10. Prior to any shots being fired, Dawson reached for a handgun tucked in the waistband of his pants;

11. In exchange for information and/or service, authorities did not charge or prosecute Shaw, Buckner, and Morris, and, indeed returned to Shaw's father handguns that Shaw and Buckner brandished during the incident;

12. F.B.I. Agents took the Burns Statement before advising Burns of his Fifth Amendment rights; and

13. Burns did not make the statements the Burns Statement attributes to him.

(D.E. 8 at 22-23.) Burns argues that, if the State had not withheld this evidence, there is a reasonable probability that the jury would not have convicted him on two counts of first degree murder and/or sentenced him to death. (Id. at 23.)

Respondent contends that this claim is procedurally defaulted. (D.E. 58 at 7-8.) Burns argues that procedural default should be excused[25] because the portions of his Brady claim related to Burns' intent to commit the robbery are tied to a colorable showing of

[25] The Court has previously addressed Burns' argument that his failure to exhaust this claim should be excused because of the inadequacy of the post-conviction process and ineffective assistance of post-conviction counsel, see supra pp. 27, 30.

actual innocence based on Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986). (D.E. 86 at 147-48.) Burns argues that he intended to settle a personal dispute, not to commit a robbery. (Id. at 148.) He contends that the State presented the false testimonies of Eric Thomas and Eric Jones that money and jewelry were demanded and taken before Dawson and Johnson were shot. (Id.) To demonstrate a colorable showing of actual innocence, Burns relies on statements from Blackman, Buckner, Shaw, and Morris that the group went to David Street because of an altercation between Adams and Blackman at a basketball game; Garrin's pre-sentence report stating, "This was not a robbery attempt"; and the eyewitness statements of Tyrone and Mary Jones that they did not see anything but shooting. (Id. at 148-50.)

Burns ignores the substantial evidence that a robbery did occur, that he participated in the robbery, and that he shared in the proceeds. The Tennessee Supreme Court, in addressing the sufficiency of the evidence related to the perpetration of the robbery and whether Burns was criminally responsible for Dawson's and Johnson's murders, stated:

> The record establishes that Johnson, Dawson and Thomas were robbed as they sat in Dawson's car, and that they were all shot as soon as the robbery was complete. Thomas testified that Carlito Adams and several other individuals had surrounded the car, "[p]ulled out their pistols, had their pistols aimed at us. Took money from me; took jewelry from [Johnson]; took jewelry from [Dawson]." Upon being asked what happened next, he testified, "they opened fire, and they started shooting us." Shortly after the shootings, Thomas identified one of the assailants from a photo spread. He testified at trial that this had been the man who had taken his property and then shot him. Although

Thomas did not make an in-court identification of the defendant, this photo spread was provided to the jury members and they were able to determine with their own eyes whether or not the photo was of the defendant. Moreover, agent Harbaugh testified that the photo appeared to be of the defendant. Thus, the jury could properly have concluded from Thomas' testimony alone that the defendant participated in the robbery and shot at the car's occupants. However, the jury also had before it Mary Jones' testimony that she had seen the defendant shoot Dawson, that she had been "looking right at him" and that "[a]s [the defendant] was running down the driveway, after he finished shooting [Dawson], that's when I got a real good look in his face." And Eric Jones' testimony corroborated Thomas' testimony that Thomas, Johnson and Dawson had all been robbed and then fired upon. Johnson's mother testified that she had seen her son wearing a jewelry chain the morning of his murder. When he was found by the police, immediately after the shooting occurred, there was no jewelry.

Taken in the light most favorable to the State, this proof was more than sufficient to establish beyond a reasonable doubt that the defendant had participated in a robbery of Thomas, Johnson and Dawson and that, immediately following the robbery, he shot and killed Dawson. And although there was no direct proof that the defendant shot at and killed Johnson, the evidence established that Johnson had been shot while in the car following the robbery in which the defendant participated. Thus, although one or more of the other men surrounding the car and robbing its occupants may have actually fired the bullet that killed Johnson, the defendant remains responsible for Johnson's murder:

The Tennessee offense [of felony murder during the perpetration of a robbery] extends both to the killer and his accomplices. A defendant who is a willing and active participant in a robbery becomes accountable for all of the consequences flowing from the robbery and may be convicted of first-degree murder where a co-perpetrator of the felony is the actual killer.

State v. Middlebrooks, 840 S.W.2d 317, 336 (Tenn. 1992).

The felony murder statute dealt with in *Middlebrooks* was slightly different from the one at issue in this case, providing, "Every murder ... committed in the perpetration of, or attempt to perpetrate, any murder in the first

> degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb, is murder in the first degree." T.C.A. § 39-2-202(a) (1982). In 1989, the statute was amended to provide that the killing in the perpetration of the enumerated felonies be "reckless." T.C.A. § 39-13-202(a)(2) (1989 Supp). "Reckless" in turn refers to a person who, although aware of a substantial and unjustifiable risk that a person or persons will be killed as a result of his conduct, nevertheless consciously disregards that risk and engages in the conduct. *See* T.C.A. § 39-11-106(31) (1991 Repl). This Court has previously held that this addition of the word "reckless" to the felony murder statute "does not alter the principle that an accomplice to the underlying felony may also be guilty of felony murder even though the killing has been committed by a co-felon. The jury need only find that the defendant was a participant in the perpetration of the underlying felony and that his conduct as to the killing was 'reckless.'" State v. Timothy D. Harris, C.C.A. No. 02C01-9211-CR-00258, Shelby County, 1994 WL 123647 (Tenn. Crim. App. filed April 13, 1994, at Jackson), *rev'd on other grounds* (1996). And, as our Supreme Court noted in *Middlebrooks*, "one who purposely undertakes a felony that results in a death, almost always can be found reckless." 840 S.W.2d at 345.
>
> In this case, the strongest legitimate view of the proof in favor of the State is that the defendant approached Dawson's car with a loaded pistol, participated in a robbery in which other armed individuals were also participating, and then shot several times into the car. The defendant's actions satisfy the statutory definition of "reckless." Accordingly, the proof at trial was sufficient to prove beyond a reasonable doubt that the defendant murdered Dawson in the perpetration of a robbery, and that he was criminally responsible for Johnson's murder in the perpetration of the same robbery. Both convictions are supported by the evidence and this issue is therefore without merit.

Burns, 979 S.W.2d at 287-88.

Burns has not made a colorable showing of actual innocence to excuse his failure to exhaust the portions of his Brady claim related to the robbery. Burns failed to exhaust the claims in his post-

conviction petition that the State withheld evidence. Burns has not established cause and prejudice or that a miscarriage of justice would result from the Court's failure to review this claim. Claim 2 is procedurally defaulted and DENIED.

D. Inconsistent Testimony About the Shooter (Claims 3 & 4)

Burns alleges that the State, in violation of his Sixth, Eighth, and Fourteenth Amendment rights, asserted inconsistent theories about who shot and killed Dawson at Burns' and Garrin's trials and knowingly presented Eric Thomas' false testimony that Burns shot Thomas and Dawson at Burns' trial. (D.E. 8 at 23-25; D.E. 86 at 64-65.) The Tennessee Court of Criminal Appeals considered these arguments:

> The petitioner argues that the State denied him a fair trial by "the use of conflicting theories between the [petitioner's trial and codefendant Garrin's trial] and the knowing use of perjured testimony." To support this claim, he inserted in his appellate brief charts containing excerpts from the testimony of Eric Thomas in the trials of the petitioner and of Derrick Garrin, asking that we "review" this testimony and conclude that it proves his claim.
>
> In our consideration, we first note that the petitioner was convicted of two counts of felony murder for the shooting deaths of Damond Dawson and Tracey Johnson, but his convictions for the attempted murders of Eric Thomas and Tommie Blackman were reversed, this court finding that attempted felony murder is not a criminal offense. Thus, it is unclear as to how the issue of inconsistent theories as to who shot Eric Thomas is relevant to the petitioner's convictions for the first degree murders of Damond Dawson and Tracey Johnson. The petitioner attempts to make this connection by arguing that "[t]he State wanted to show that the person on trial was the most culpable, and, therefore, the most deserving of the death penalty." However, he makes no references to the record to support

this theory.

In codefendant Garrin's trial, according to the petitioner's chart, Eric Thomas testified that he was shot by "[t]he big fellow with the glasses," the petitioner asserting that "[t]he record in the case is clear that [sic] big fellow with glasses is Derrick Garrin." However, he does not identify where in the appellate record, which consists of transcripts of testimony in two boxes, the information establishing this clarity can be located. Further, he asserts that "[t]he record is clear, including from the statements of Adams and Shaw to the police, PC Exhibits 7 and 8, that Kevin Shaw was with Adams when Adams first approached the car." He does not explain how we can make this determination solely from the confusing statements of these witnesses. He makes no references to the record as to questioning trial counsel or any other witnesses as to why Eric Thomas was not cross-examined in the way he believes should have occurred.

Additionally, the petitioner claims on appeal that the Shelby County District Attorney's Office suborned the perjured testimony of Eric Thomas:

> This is the intentional use of perjured testimony. There can be no question that Eric Thomas' alternative descriptions of the person who shot him involved perjury. Nor can there be any question that the State's attorneys were aware of the perjury.

We disagree with the petitioner's claims that he has shown the State suborned perjury by Eric Thomas or even established that Thomas perjured himself. Again, we note that it is difficult for this court to review issues where, as here, we are referred broadly to documents and not to the specific portion which, he claims, supports his accusations of subornation of perjury. The statement of Kevin Shaw consists of six pages and, by our reading, does not support the petitioner's claims. As we understand the statement, Shaw said that, upon hearing two shots, without identifying who fired them, he turned and ran, as "Kevin and Derrick" apparently ran up to the car. Shaw said, "I ran down the street. I heard a whole lot of shots after that as I was running down the street." In his statement, Carlito Adams said that he and Shaw approached the driver's side of the vehicle occupied by the victims and both began running as shots were fired, the first shot

being fired by the man wearing "the big black nylon 3/4 jacket."

The post-conviction court found that no proof had been presented as to the petitioner's conflicting theories claim and, thus, it was without merit:

> The next allegation by Petitioner is that the State's action denied him a fair trial and appeal. He first argues that the State had alternative theories of prosecution in the three separate trials. No proof has been presented as to contradictory theories by the [S]tate in the trial of the co-defendants. The petitioner admitted he was present on the scene armed with a gun and that he fired his gun. The testimony presented was that 5 or 6 people participated in this killing. At least 4 or 5 of them were armed. Several were identified as firing shots into the car containing the victims. The petitioner was identified by several witnesses as being "a shooter." No alternative theories were offered by the State as to Petitioner's role based upon what proof was presented to this Court. Since no proof has been presented regarding alternative theories [,] this issue has no merit.

In his appellate brief, the petitioner has neither acknowledged nor addressed this specific finding, nor has he made any references to the transcript of the evidentiary hearing as to whether his trial counsel, or any other witnesses, agreed with his claim that the State pursued differing theories in the two prosecutions. We conclude that the record supports the findings of the post-conviction court.

Burns, 2005 WL 3504990, at **47-48.

Respondent contends that the evidence taken as a whole supports the allegation that Burns fired into the car from the driver's side. (D.E. 94 at 24.) Respondent notes that Thomas was never called by Burns to explain the inconsistency in this testimony and that the post-conviction court suggests Thomas may have believed he was shot

by both Garrin and Burns. (Id. at 24-25.) See Burns, 2005 WL 3504990, at *34 (Thomas described Garrin as one of the people who shot him and then said someone else shot him).

A conviction obtained by the knowing use of perjured testimony must be set aside if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury. . . ." Giglio v. United States, 405 U.S. 150, 154 (1972) (internal quotation marks omitted); United States v. Agurs, 427 U.S. 97, 103 (1976) (same).[26] A false-testimony claim is cognizable on habeas review because the "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice." Abdus-Samad v. Bell, 420 F.3d 614, 625 (6th Cir. 2005) (quoting Giglio, 405 U.S. 150 at 153). To prevail, Burns must show (1) that the prosecution presented false testimony; (2) that the prosecution knew the testimony was false; and (3) that the testimony was material. Akrawi v. Booker, 572 F.3d 252, 265 (6th Cir. 2009); Rosencrantz v. Lafler, 568 F.3d 577, 583-84 (6th Cir. 2009). The subject testimony must be "indisputably false" rather than "merely misleading." Akrawi, 572 F.3d at 265; see 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

[26] A Brady violation can arise from the prosecution's knowing use at trial of perjured testimony. Kyles v. Whitley, 514 U.S. 419, 433 (1995) (citing Agurs, 427 U.S. at 103-04); Agurs, 427 U.S. at 103 (the knowing use of perjured testimony is one of three situations where Brady applies).

witnesses do not establish knowing use of false testimony,'" (quoting United States v. Lochmondy, 890 F.2d 817, 822 (6th Cir. 1989)).

Burns has not established that Thomas' testimony, although inconsistent and worthy of further clarification, was patently false. The Tennessee Court of Criminal Appeals' determination was 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. Claims 3 and 4 are DENIED.

E. False Testimony About the Robbery (Claim 5)

Burns alleges that the State knowingly presented the false testimony of Eric Thomas and Eric Jones that "persons outside Dawson's car demanded and/or took from them money and jewelry." (D.E. 8 at 25.) Respondent contends that this claim is procedurally defaulted. (D.E. 58 at 8.) Burns argues that the procedural default of this claim should be excused[27] because his "robbery false testimony" claim is tied to a colorable showing of actual innocence based on Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986). (D.E. 86 at 147.) For the reasons stated, supra pp. 54-56, Burns has not made a colorable showing of actual innocence.

Burns argues that the state's misconduct in knowingly presenting the false testimony of Eric Thomas and Eric Jones establishes cause

[27] The Court has addressed Burns' argument that his failure to exhaust this claim should be excused because of the inadequacy of the post-conviction process, supra pp. 27-28.

for the procedural default of this claim. (D.E. 86 at 136.) Burns has not demonstrated that Thomas and Jones' testimony was perjured, and substantial evidence indicates that a robbery occurred. Claim 5 is procedurally defaulted, without merit, and DENIED.

F. Trial Court's Failure to Suppress Burns' Statement (Claim 7)

On direct appeal, the Tennessee Supreme Court addressed Burns' Fifth and Sixth Amendment claims about the trial court's denial of Burns' motion to suppress his statement to the FBI and affirmed the trial court's resolution of the motion.[28]

SUPPRESSION OF DEFENDANT'S STATEMENT

> The defendant next complains that the trial court erred when it denied his motion to suppress his statement. The defendant was apprehended in Chicago by FBI agents. He testified at the suppression hearing that he had been read his rights when he was first arrested and handcuffed. He also testified that he had understood his rights before making his statement, that he had not been promised anything in return for his statement, and that he had not been threatened into making his statement. However, when asked at the suppression hearing, "you knew you didn't have to talk to [the agent]?", the defendant responded, "I didn't really understand, but I did because he was asking me questions." This is the crux of the defendant's contention that he did not waive his constitutional rights freely and voluntarily.
>
> It is the duty of the trial judge to determine the voluntariness and the admissibility of a defendant's pretrial statement. State v. Pursley, 550 S.W.2d 949, 952 (Tenn. 1977). Moreover, the trial court's determination that a confession was given knowingly and voluntarily is binding on the appellate courts unless the appellant can show that the evidence preponderates against the trial

[28] The Eighth Amendment portion of claim 7 is procedurally defaulted, supra p. 30.

court's ruling. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). In the instant case, the defendant has failed to demonstrate how the evidence preponderates against the trial court's ruling.

At the conclusion of the testimony at the suppression hearing, the trial court stated the following:

The defendant says the person that handcuffed him gave him his rights on the scene-he didn't read them from a card, but he said them to him. He said he understood his rights. He doesn't remember all of them, but he knows that he was advised, 'You have a right to remain silent and anything you say can and will be used against you.'

He doesn't recall the one about right to counsel, as is complained of in the motion; but he, too, does not deny that he was not [sic] told this. He admits, freely, that he was advised of his rights when he was initially handcuffed. Through his own statement, he was advised of his rights; he understood them; he's a high-school graduate; he was not coerced; he was not pressured; he was not threatened; nobody promised him anything.

. . . .

But from what the court has . . . seen here, it would appear that, on all fours, the defendant freely and voluntarily, understandingly, knowingly, advisedly, and intelligently waived his rights free from any coercion, threats, pressures of any kind that would have induced him or caused him to have abandoned his rights.

He claims he understood them, and from his testimony, the court would have to find that even if his recall is more accurate than that of Agent Landman, through his own evidence, the statement that is purportedly given by the defendant to Agent Landman would be admissible into evidence. The motion to suppress, respectfully, will be denied.

This ruling by the trial court was proper. Although he claims in his brief that he "did not understand his rights," the defendant admitted during the suppression hearing that he had understood the waiver form and that he had freely and voluntarily talked to the agents. There is nothing before this Court which preponderates against the trial court's findings. Accordingly, this issue is without

merit.

Burns, 979 S.W.2d at 288-89.

Burns argues that the evidence showed that he was not advised of his rights before the FBI agents questioned him and that he did not knowingly waive his rights. (D.E. 86 at 75.) In support, he points to alleged contradictions in Landman's testimony at the suppression hearing and Bakken's testimony about who drove Burns to the FBI office, stops that were made, and whether the incident was discussed during the ride. (Id.) Burns emphasizes his own testimony at the suppression hearing that Landman spoke to him during the entire car ride to the FBI office and that he "didn't really understand that [I didn't have to talk to Landman], but I did because [he] was asking me questions." (Id.) Burns contends that his rights, as stated in Miranda v. Arizona, 384 U.S. 436, 445 (1966), were violated. (Id. at 76.)

Burns' allegations do not give the full picture of the evidence before the trial court at the hearing on the motion to suppress.[29] Landman testified that the FBI obtained the names and addresses of Burns' brother and sister, whose apartments were about seventy five (75) yards apart in the same complex. (D.E. 28, Add. 1, Vol. 2, pp. 4-5.) Two arrest teams of about four people each searched both locations simultaneously. (Id. at 5.) Landman testified that the

[29] Burns previously asserted that he did not know who was involved in his arrest, reading his rights, and what rights were supposedly read. (D.E. 43 at 6.) Burns was denied discovery on this claim for failure to demonstrate good cause. (D.E. 51 at 7-9.)

other arrest team found Burns at his sister's apartment and took him into custody. (Id. at 6.) Landman testified that Burns was placed in Landman's car and that Agent Harbaugh rode with them downtown. (Id. at 7.) Landman testified that they did not speak to Burns during the ride. (Id.) Landman did not recall whether Burns talked to them. (Id.) Landman testified that once Burns was placed in the interview room, they began the advice of rights form. (Id. at 9.) Landman testified that the advice of rights was read to Burns and provided to him for his reflection. (Id. at 12.) According to Landman, Burns had no questions and signed the advice of rights freely and voluntarily, without coercion, promises, or threats. (Id. at 12-14.) Landman testified that Burns was calm and cooperative and did not ask for a lawyer. (Id. at 14-15.)

The interview was reduced to a typewritten statement. (Id. at 15.) Landman stated that if Burns had talked to them while in the car, he would have reflected that information in the statement. (Id. at 19.) Landman testified that Burns was not in his custody when the statement was transcribed and that Burns did not have a chance to look at the transcript. (Id. at 23.)

Burns testified that when he was first arrested and handcuffed, "they read me my rights" inside the apartment. (Id. at 29.) He only remembered "you have a right to remain silent, and anything you say can be held against you in court." (Id. at 29-30.) "The whole trip – the whole trip we conversated (sic)." (Id. at 28.) Burns claimed

that Landman initiated the conversation when Landman asked Burns questions about what happened in Memphis. (Id. at 29.) When they got to FBI headquarters and placed Burns in the interview room, Landman read him his rights from a sheet. (Id. at 30-31.) Burns had the opportunity to review the sheet and sign it. (Id. at 31.) Burns testified that he understood what his rights were. (Id.) Burns testified that the statements he made in the car were basically what was transcribed, that he was not threatened, and no promises were made in exchange for the statement. (Id. at 35.) Burns testified that he knowingly, voluntarily, and intelligently talked to Landman and Harbaugh. (Id. at 36, 38.) After Burns admitted that his statements were voluntary, knowing, and intelligent, Burns claimed that he answered the agents' questions because he was asked, and he didn't really understand that he didn't have to talk to the agents. (Id. at 39.)

The Sixth Circuit has summarized the law governing custodial interrogations as follows:

> The Fifth Amendment provides that a defendant cannot be "compelled in any criminal case to be a witness against himself." Consistent with this right against self incrimination, the Supreme Court's decision in Miranda v. Arizona, 384 U.S. 436, 478-479 . . . (1966), ruled that suspects cannot be subjected to a custodial interrogation until they have been advised of their rights. In order to encourage compliance with this rule, incriminating statements elicited from suspects in custody cannot be admitted at trial unless the suspect was first advised of his or her Miranda rights. Stansbury v. California, 511 U.S. 318, 322 . . . (1994).

United States v. Salvo, 133 F.3d 943, 948 (6th Cir. 1998). To be

effective, a Miranda waiver must be "made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." Moran v. Burbine, 475 U.S. 412, 421 (1986). To determine whether a Miranda waiver was knowing and intelligent, courts apply a totality of the circumstances test. Smith v. Mitchell, 567 F.3d 246, 257 (6th Cir. 2009); see United States v. Adams, 583 F.3d 457, 467 (6th Cir. 2009) ("Only if the 'totality of the circumstances surrounding the investigation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived."). The Sixth Circuit has held that a Miranda "waiver may be clearly inferred . . . when a defendant after being properly informed of his rights and indicating that he understands them, nevertheless does nothing to invoke those rights" and speaks. Adams, 583 F.3d 457, 467 (6th Cir. 2009) (quoting United States v. Nichols, 512 F.3d 789, 798-99 (6th Cir. 2008)). A waiver of Miranda rights need not be in writing or expressly made, and an implied waiver may be inferred from the actions and words of the persons being interrogated. Id. at 467.

Despite Burns' contentions that Landman's and Bakken's testimony about who drove Burns to FBI headquarters is contradictory, nothing in the agents' testimony or Burns' indicates that Burns' statement was not knowingly, voluntarily, and intelligently made. Burns testified that he was read his rights before being transported and was again given an advice of rights once he reached headquarters.

The decision of the Tennessee Supreme Court is not an unreasonable application of clearly established federal law. 28 U.S.C. § 2254(d)(1). The "contrary to" clause is inapplicable because the state court relied on the correct rule of law from Miranda and its progeny, the relevant Supreme Court precedent governing claims of trial error in deciding whether to suppress a defendant's statement. The Tennessee Supreme Court applied that clearly established precedent correctly and in an objectively reasonable manner. See Burns, 979 S.W.2d at 288-89. Based on this Court's review of the transcript of testimony at the suppression hearing and during the trial, including Burns' testimony, the decision of the Tennessee Supreme Court was not "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Claim 7 is DENIED.

G. False Testimony of FBI Agents (Claim 8)[30]

Burns alleges that the State knowingly presented the false testimony of FBI Agents Landman, Bakken, and Harbaugh. (D.E. 8 at 27-28.) Burns contends that Landman falsely testified that: Burns was placed in a car that Landman was driving after Burns' arrest, Harbaugh rode with Burns and Landman to the downtown headquarters, Harbaugh and Landman did not speak to Burns during the drive to headquarters, Harbaugh and Landman took Burns into an interrogation

[30] The Court has declined to accept Burns' implicit review theory to excuse the procedural default of the Eighth Amendment portion of Claim 8, supra pp. 21-23.

room and for the first time advised Burns of his Fifth Amendment rights, Burns then gave his statement, and the written statement accurately reflects statements that Burns made. (Id.) Burns contends that Bakken falsely testified that: after Burns' arrest he was placed in a car Bakken was driving, Bakken drove Burns to a scene where Bakken made another arrest, and Bakken then drove Burns to headquarters where he turned Burns over to Landman and Harbaugh. (Id. at 28.) Burns asserts that Harbaugh falsely testified that: Harbaugh spoke with Burns when he was brought to headquarters, Burns was advised of his Fifth Amendment rights, and Burns then gave a statement. (Id.)

Respondent argues that the claim was not exhausted in state court and is procedurally barred. (D.E. 58 at 9.) Burns asserts that the false testimony claims "contain a concomitant withheld evidence" or Brady claim, that Burns was entitled to believe that that the state's witnesses were truthful, and that the state's misconduct is cause for the procedural default of this false testimony claim. (D.E. 86 at 136-38.)

A petitioner who has procedurally defaulted a Brady claim satisfies the "cause and prejudice" test for overcoming the default by satisfying the second and third prongs of the Brady test; that is, by showing that "the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence," and that "the suppressed evidence is 'material' for Brady

purposes." Banks v. Dretke, 540 U.S. 668, 691 (2004); Strickler v. Greene, 527 U.S. 263, 282 (1999). In the instant case, the testimony being compared is the testimony from the suppression hearing and the trial testimony. Burns became aware of any contradiction in testimony at trial. Burns could have made his false testimony claim on direct appeal or in the post-conviction proceedings. Burns cannot satisfy the second prong of Brady, that the reason for his failure to develop this claim was the State's suppression of evidence. See Henley v. Bell, 487 F.3d 379, 388 (6th Cir. 2007) (to demonstrate cause "some external impediment over which he (the petitioner) had no control" must have prevented him from developing the claim in state court). Burns has not established that the Court's failure to review this claim would result in a fundamental miscarriage of justice. Claim 8 is procedurally defaulted and DENIED.

H. Extraneous Influence on Jury/ Improper Use of the Bible During Jury Deliberations (Claim 10)

Burns asserts that his Sixth, Eighth, and Fourteenth Amendment rights were violated because extraneous, improper influences affected the jury's verdict. (D.E. 8 at 30.) Burns alleges that one juror held out at the guilt stage of the proceedings and that the jury foreman read from the Bible to that juror, "My thoughts are not your thoughts and my ways are not your ways" until the holdout juror relented and voted guilty. (Id. at 30-31.)[31] Burns contends that the use of the

[31] Burns asserts that there were two or three Bibles in the jury room and that jurors read them and quoted passages from them during deliberations at (continued...)

Bible passage to bring unanimity among the jurors violated his rights. (D.E. 86 at 85.) Burns argues the Court should grant relief because the Bible reading violated the principle in Turner v. Louisiana, 379 U.S. 466, 472-73 (1965), that

> trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.

(Id.)

The Tennessee Court of Criminal Appeals considered this issue:

> The petitioner contends his right to a fair trial was violated by jury misconduct because the jury foreman recited a Bible verse during deliberations and the jury considered the potential sentencing during the guilt/innocence phase of deliberations. We will review these claims.
>
> The petitioner alleges "the jurors in his case consulted extrajudicial materials-a Bible," explaining that the jury foreman brought a Bible into deliberations and "used" a Bible verse to ease "another juror's concern that if she voted to convict [the petitioner], and thereby sentence him to death, God would never forgive her." . . .
>
> In our review, we first will set out the post-conviction hearing testimony of jury foreman Lloyd Davis. He said that at the trial he had a Bible with him and during deliberations "recited" a verse to another juror:
>
> Q [Did] you have that Bible with you in the jury room during the jury deliberations?
>
> A Every day.

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[31] (...continued)
both the guilt and sentencing stages. (Id. at 31.) The Court has previously determined that these claims about group prayer and the use of Bibles are procedurally defaulted. See supra pp. 24-28.

Q And at some point during the jury deliberations did you have occasion to cite certain Bible verses to the jury?

A Yes, I did.

Q Do you recall what Bible verses were cited, Mr. Davis?

A I don't believe I recited but one.... That was in Isaiah.... I wouldn't know the verse, the chapter or the verse. I just know what it says.

Q Do you remember the contents of the verse?

A Yes, it was about God was telling that his thoughts were not our thoughts, and his ways were not our ways. Something like that.

Davis then explained that he recited the verse to the juror because she had expressed religious concerns about deciding guilt or innocence: "[S]he just stated something about God wouldn't want her to ... make a certain decision ... [and] wouldn't allow her to make her decision to give somebody the death penalty...." The State then objected to further testimony about the jurors' "internal communications," asserting that "the rules of evidence are very clear that jurors cannot testify about what they do in the jury room...." The court sustained the objection but allowed the petitioner's counsel to continue questioning to preserve the issue for appeal. It is the testimony of Mr. Davis during this proffer upon which the petitioner bases his claim that the jury improperly considered punishment during the guilt/innocence phase.

In issuing its order denying relief, the post-conviction court found that the "reciting" of a Bible verse was not prejudicial to the petitioner:

> This court does not believe that asking for divine intervention and comfort from God during the deliberation process is what was meant or intended as outside influence. We ask jurors to make life and death decisions and many jurors look to God for guidance in their everyday life and the daily decisions, which they face. This Court fails to see how asking God to help a juror make the right decision violates [the petitioner's] right to a fair trial. Frankly, this Court takes great comfort in the fact that

> before a jury would make such a monumental decision that they would seek guidance from God.

Tennessee Rule of Evidence 606(b) limits the circumstances under which jurors may be questioned about their deliberations:

> (b) Inquiry Into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon any juror's mind or emotions as influencing that juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes, except that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention, whether any outside influence was improperly brought to bear upon any juror, or whether the jurors agreed in advance to be bound by a quotient or gambling verdict without further discussion; nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

The commentary to this rule sets out the circumstances to which this subsection is applicable:

> After verdict, part (b) would come into play. A juror may testify or submit an affidavit in connection with a motion for new trial, but only in the limited circumstances of:

(1) "extraneous prejudicial information" finding its way into the jury room,

(2) improper outside pressure on a juror, or

(3) a quotient or gambling verdict.

In sum, the pertinent part of Tennessee Rule of Evidence 606(b) provides that a juror may not testify "to the effect of anything upon any juror's mind or emotions as influencing that juror to assent to or dissent from the

verdict," but is allowed to testify "whether extraneous prejudicial information was improperly brought to the jury's attention, whether any outside influence was improperly brought to bear upon any juror...." Tenn. R. Evid. 606(b). In Walsh, 166 S.W.3d at 646-47, the Tennessee Supreme Court addressed the application of Rule 606 in a case where a juror testified about the mental and emotional effects of a deputy's statement to the juror during deliberations that she "had to" make a decision. The court concluded that Rule "606(b) permits juror testimony to establish the fact of extraneous information or improper influence on the juror; however, juror testimony concerning the effect of such information or influence on the juror's deliberative processes is inadmissible." *Id.* at 649.

Additionally, according to *Walsh*, once the petitioner proves "a juror was exposed to extraneous prejudicial information or subjected to improper influence, a rebuttable presumption of prejudice arises, and the burden shifts to the State to explain the conduct or demonstrate that it was harmless." *Id.* at 647 (citing State v. Blackwell, 664 S.W.2d 686, 689 (Tenn. 1984)).

As we will explain, we conclude, as did the post-conviction court, that the petitioner failed to establish that the jury at his trial was exposed to extraneous prejudicial information. While Davis responded "[e]very day," when asked if he had a Bible with him in the jury room during deliberations, he was not asked if he displayed the Bible to the other jurors or whether they even were aware that he possessed it. Likewise, although he said that he "believe[d] [he] recited" only one Bible verse, he described it as "[t]hat was in Isaiah ... I wouldn't know the verse, chapter or the verse. I just know what it says," and was not asked if his knowledge of the verse was more precise at the time of the jury deliberations. Additionally, although saying that he "recited" the verse, he was not asked whether he had read the verse from his Bible, quoted it verbatim, paraphrased it, simply gave the gist of it, or whether he even had identified the verse as being from the Bible. Thus, we conclude that the petitioner has failed to make an initial showing that, in the language of Rule 606(b), "extraneous prejudicial information was improperly brought to the jury's attention" so as to create a rebuttable presumption of prejudice and shift the burden to the State "to explain the conduct or demonstrate that it was harmless." *See*

> Walsh, 166 S.W.3d at 647. Accordingly, the additional questions asked Davis, which the petitioner claims show that the jury improperly considered the verdict during the guilt phase of the trial, were properly disallowed by the court as not being permitted by Rule 606(b).

Burns, 2005 WL 3504990, at **44-46 (footnote omitted).

The Sixth and Fourteenth Amendments to the Constitution guarantee a criminal defendant the right to an impartial jury. Morgan v. Illinois, 504 U.S. 719, 726 (1992).

> In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties.

Remmer v. United States, 347 U.S. 227, 229 (1954). The Supreme Court in Remmer prohibited jurors from being subjected to "private communication, contact, or tampering" and considered any such external influences presumptively prejudicial. Id.; Turner, 379 U.S. at 472-73 (same). Whether an influence is "external" or "internal" depends on the facts of each case, but at its core the distinction amounts to an examination of the "nature of the allegation" of an improper influence on the jury. Oliver v. Quarterman, 541 F.3d 329, 335-36 (6th Cir. 2008) (citing Tanner v. United States, 483 U.S. 107, 117 (1987)).

The right to due process does not require a new trial in every instance in which a juror potentially is biased. Smith v. Phillips, 455 U.S. 209, 217 (1982) ("it is virtually impossible to shield jurors from every contact or influence that might theoretically

affect their vote"). A defendant who alleges implied juror bias is entitled to a hearing in which he has "the opportunity to prove actual bias." Id. at 215. The burden rests on the government to establish, after notice and a hearing, that such contact with the juror was harmless to the defendant. Remmer, 347 U.S. at 229.

The post-conviction court conducted a hearing at which Burns had an opportunity to establish actual juror bias. The Tennessee Court of Criminal Appeals, like the post-conviction court, concluded that Burns failed to establish that the jury was exposed to "extraneous prejudicial information." Burns, 2005 WL 3504990, at *46.

Supreme Court precedent related to external and internal influences on the jury informs the analysis of whether Bible references, reading, or study in the jury room constitutes extraneous prejudicial information that requires habeas relief. Several circuits have determined that the presence of the Bible in the jury room is an external influence on the jury. Oliver, 541 F.3d at 336-340; United States v. Lara-Ramirez, 519 F.3d 76, 88 (1st Cir. 2008) (the district court erred in "treat[ing] the Bible in the jury room as qualitatively different from other types of extraneous materials or information that may taint a jury's deliberation"); see Fields v. Brown, 503 F.3d 755, 781-82 (9th Cir. 2007) (en banc) (juror's notes for and against the death penalty based on the Bible had no "substantial and injurious effect or influence in determining the jury's verdict"); see also Robinson v. Polk, 438 F.3d 350, 364 (4th Cir. 2006) (holding that "reading the Bible is analogous to the

situation where a juror quotes the Bible from memory, which assuredly would not be considered an improper influence"). The mere presence of the Bible or a reading of a Bible passage does not necessarily entitle a petitioner to habeas relief if the State can overcome the presumption of prejudice. McNair v. Campbell, 416 F.3d 1291, 1307-08 (11th Cir. 2005); see Coe, 161 F.3d at 351 (implying, in dicta, that the presence of the Bible in the jury room might prejudice deliberations). In Oliver, the Fifth Circuit made a distinction between Bible passages that addressed the juror's understanding of religious law and morality or "generally inform a juror's moral understanding of the world" and passages stating that a particular act required that a person be put to death. 541 F.3d at 339-40.

In McNair, the jury foreman, a Christian minister, brought the Bible into the jury room during deliberations, read it aloud, and led the jurors in prayer. 416 F.3d at 1301. The two Bible verses read

were Psalm 121[32] and Luke 6:37[33]. Id. at 1307-08. The court held that it was undisputed that the jurors considered extrinsic evidence during the guilt phase deliberations and focused its analysis on whether the State had rebutted the presumption of prejudice. Id. at 1308. The court held that there was no evidence that the "innocuous" Bible passages in question had the effect of influencing the jury's decision. Id. at 1309. The Eleventh Circuit noted that the two passages the foreman read did not contain "material which would encourage jurors to find a defendant guilty or to recommend the death penalty." Id. at 1308.

The Sixth Circuit in Arnett v. Jackson, 393 F.3d 681 (6th Cir. 2005), a case involving the rape of a child, addressed whether the state trial judge's reference to a Biblical passage during sentencing

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[32] Psalm 121 (King James Version) states,

I will lift up mine eyes unto the hills,
from whence cometh my help.
My help cometh from the LORD,
which made heaven and earth.
He will not suffer thy foot to be moved:
he that keepeth thee will not slumber.
Behold, he that keepeth Israel
shall neither slumber nor sleep.

The LORD is thy keeper:
the LORD is thy shade upon thy right hand.
The sun shall not smite thee by day,
nor the moon by night.
The LORD shall preserve thee from all evil:
he shall preserve thy soul.
The LORD shall preserve thy going out and thy coming in
from this time forth, and even for evermore.

[33] Luke 6:37 states,

Judge not, and ye shall not be judged; condemn not and ye shall not be condemned; forgive, and ye shall be forgiven . . . .

Id. at 1308 n.16.

violated Arnett's right to due process. At the sentencing hearing, the trial judge stated,

> And in looking at the final part of my struggle with you, I finally answered my question late at night when I turned to one additional source to help me. . . . And that passage where I had the opportunity to look is Matthew 18:5, 6. "And whoso shall receive one such little child in my name, receiveth me. But, whoso shall offend of these little ones which believe in me, it were better for him that a milestone were hanged about his neck, and he were drowned in the depth of the sea."

Id. at 684. The Sixth Circuit noted that there must be clearly established Supreme Court precedent prohibiting a judge from citing a religious text during a sentencing hearing to allow habeas relief. Id. at 686. Although the court noted that the right to a fair trial in a fair tribunal is a basic requirement of due process, it emphasized that the Supreme Court had never specifically decided this issue. Id. The Sixth Circuit's inquiry then focused on whether the state court unreasonably refused to extend a legal principle from Supreme Court precedent to a new context where it should apply. Id. The court found that the Bible was not the "final source of authority" for the judge's decision, and given the totality of the circumstances at the sentencing hearing and the fact that the Biblical principle of not harming children was consistent with Ohio's sentencing consideration, the state trial court's Biblical reference during sentencing did not entitle Arnett to habeas relief. Id. at 688.

The Tennessee Court of Criminal Appeals' finding that the Bible quotation was not extraneous prejudicial information is entitled to

a presumption of correctness because Burns has not demonstrated by clear and convincing evidence that this finding is erroneous. 28 U.S.C. § 2254(e)(1). There is no clear Supreme Court precedent addressing this issue. The Court recognizes Burns' right to a fair trial, but the facts presented do not show that Burns was prejudiced by the jury foreman's reading of one innocuous Biblical passage to the alleged holdout juror. The passage did not address Burns' criminal conduct, did not suggest what the penalty for that conduct should be, and related to a general understanding of religious law and morality. At the guilt/innocence phase of the proceeding, substantial evidence was presented to establish Burns' guilt, further demonstrating the improbability that this passage prejudiced Burns' right to a fair trial. The Tennessee Court of Criminal Appeals' decision was 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. Claim 10 is DENIED.

I. Ineffective Assistance of Counsel at Sentencing (Claim 11)

Burns alleges that his counsel at sentencing failed to challenge the sole aggravating circumstance, failed to investigate and present mitigating evidence, and failed to present evidence of Burns' relative culpability. (D.E. 8 at 31-45.)

1. "Great Risk of Death" Aggravating Circumstance (Claim 11A)

Burns asserts that his counsel rendered ineffective assistance in the investigation and presentation of evidence about the facts and circumstances of the crime and failed to present evidence that Burns was not responsible for the threat of harm to persons other than Dawson and/or Johnson during the incident. (D.E. 8 at 32.) Burns contends that, if counsel had not rendered ineffective assistance at the sentencing stage, the jury would not have found the sole aggravating circumstance. (D.E. 86 at 151.)

Respondent contends that counsel's failure to challenge the application of the "great risk of death" aggravator was not exhausted in state court and is procedurally defaulted. (D.E. 58 at 11.)[34] Burns asserts that his claim of ineffective assistance at sentencing as it relates to counsel's failure to challenge the sole aggravating circumstance is tied to a colorable showing that he is actually

[34] Respondent failed to assert procedural default as a defense in his answer to the amended petition. (See D.E. 33 at 37-38.) Procedural default is a defense that may be waived if not asserted. See Johnson v. Mitchell, 585 F.3d 923, 936 (6th Cir. 2009). However, 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)

innocent of the death penalty. (D.E. 86 at 150-51.)[35]

To determine whether Burns can demonstrate that he was actually innocent of the death penalty, the Court looks to whether the aggravating factor was proven. The Tennessee Court of Criminal Appeals addressed the "great risk of death" aggravator based on the sufficiency of the evidence.

> Regarding the penalty phase, the proof established, under the testimony of Thomas and Jones, that the petitioner shot into a vehicle, creating a great risk of death. According to the petitioner's FBI statement, he shot at Blackman, admitting that three children were in his line of fire. This statement also supports application of the factor of creating a great risk of death to two or more persons other than the victim. Under either theory, the aggravating circumstance is still established. The petitioner cannot establish that his sentence would have been different. The record supports the determination of the post-conviction court that this claim is without merit.

Burns, 2005 WL 3504990, at *58.

Respondent is correct (see D.E. 94 at 35-36) that Burns' admission in his FBI statement that he shot at Blackman, together with the additional evidence that four boys were playing basketball in the direction Blackman was running, is sufficient to establish the sole aggravating factor. Burns has not demonstrated actual innocence as it relates to this aggravating circumstance and has not demonstrated that a miscarriage of justice would result from the Court's failure to review this claim. Burns' claim of ineffective

[35] The Court has previously decided that Burns' arguments that the claim is not procedurally defaulted because the post-conviction process was inadequate and post-conviction counsel was ineffective fail, supra pp. 27-28, 30.

assistance of counsel as it relates to this aggravating factor is procedurally defaulted. Burns' claim fails on the merits because the reasons that prevent Burns from demonstrating actual innocence also prevent him from establishing prejudice on his guilt phase ineffective assistance of counsel claim. Claim 11A is DENIED.

2. Failure to investigate and present mitigating evidence (Claim 11B)

Burns asserts this claim in the following subparts: (a) failure to investigate and present evidence relevant to the facts and circumstances of the crime; (b) failure to investigate and present evidence relevant to Burns' background and character; and (c) failure to present mental health evidence.

a. Failure to investigate and present evidence relevant to the facts and circumstances of the crime[36]

Burns argues that he was sentenced to life for Johnson's murder because the jury determined that he did not shoot Johnson and to death for Dawson's murder because the jury determined that he shot Dawson. (D.E. 8 at 32; D.E. 85 at 1.) Burns asserts that his counsel did not investigate and present evidence demonstrating that he did not shoot Dawson. (D.E. 8 at 32.) Burns contends that the only evidence that he shot Dawson came from the testimony of Eric Thomas and Mary Jones, both of whom he asserts his counsel failed to cross-examine effectively. (Id.) Burns states that there was a strong

[36] Burns addressed this issue in his motion for partial summary judgment and supporting memorandum. (D.E. 84 & 85.)

inference that Kevin Shaw actually shot Dawson. (D.E. 86 at 86.) Burns contends that, if his counsel had effectively impeached the State's witnesses, there would have been a legitimate and substantial basis to argue that Burns was not in the category of offenders who deserve death. (Id. at 87.) Burns argues that his counsel failed to argue and present evidence relevant to the facts and circumstances of the crime, specifically that residual doubt about who shot Dawson makes the death penalty an inappropriate punishment. (Id. at 86.)

Respondent asserts that, to the extent this claim is related to claim one of ineffective assistance at the guilt stage based on counsel's alleged failure to properly investigate and present evidence, this claim should be denied for the same reasons. (D.E. 58 at 32.) Respondent distinguishes the cases Burns cites and argues that he has not established prejudice because Thomas' testimony was not "entirely inconsistent" at the two trials, the evidence revealed that "both men (Garrin and Burns) shot into the car and . . . bullets were recovered showing that two different weapons were used", Burns' identification was established by multiple sources, and "his presence and participation" were irrefutable. (D.E. 91 at 6-11.).

When a defendant alleges that counsel provided ineffective assistance during the penalty phase of a capital trial, the question is whether there is a "reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695. There is an insufficient showing of

prejudice where "one is left with pure speculation on whether the outcome of the trial or the penalty phase could have been any different." Slaughter v. Parker, 450 F.3d 224, 234 (6th Cir. 2006) (quoting Baze v. Parker, 371 F.3d 310, 322 (6th Cir. 2004)). There is no prejudice if the newly available evidence is merely cumulative or not substantially different from the evidence presented during the penalty phase. Beuke v. Houk, 537 F.3d 618, 645 (6th Cir. 2008).

Counsel's performance related to the investigation of the crime, supra pp. 35-41, and counsel's cross-examination of Thomas and Jones, supra pp. 41-51, have been addressed by the Court.[37] The Court can only speculate about what further cross-examination of Eric Thomas and Mary Jones would have revealed. Further cross-examination would not negate the fact of Burns' presence and participation, nor would it negate Thomas' and other witnesses' testimony that more than one person fired a weapon[38] (see D.E. 28, Add. 2, Vol. 3, p. 378). Burns has not demonstrated prejudice where the Court can only speculate about the effect of additional testimony that might have been presented through further cross-examination of Thomas and Jones. See Poindexter v. Mitchell, 454 F.3d 564, 571-73 (6th Cir. 2006) (no ineffective assistance of counsel because regardless of the witness' inconsistent testimony, there is an insufficient showing of prejudice

[37] The Court has determined that counsel's performance did not prejudice Burns' guilt determination, supra p. 51.

[38] At Garrin's trial, an expert examining the projectiles recovered from Dawson's body determined that Dawson was shot once with a revolver and four times with a semi-automatic pistol. Garrin, 1996 WL 275034, at *2.

where the facts still demonstrate an attempt on the victim's life).

The Tennessee Court of Criminal Appeals' determination was 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. Claim 11B is DENIED.[39]

b. Failure to present evidence of Burns' background and character

Burns alleges that his trial counsel failed to create a working relationship with his mother Leslie Burns, treated her with "subservient disdain", and met with her only a handful of times; met with his father once immediately before trial; failed to investigate Burns' neighborhood; did not interview or present evidence from available witnesses; and did not obtain relevant documents, such as social service, welfare, school, medical, family, and criminal records. (D.E. 8 at 32-33.) Burns asserts that counsel could have presented mitigating evidence about the extreme poverty and abusive relationships that his mother endured, including the dysfunctional and abusive relationship she had with Burns' father Reverend Obra Carter; the fact that Burns' father had two families; the manner in which Carter treated Leslie Burns and her children; the condition of Burns' home and the surrounding community; Burns' character at school, home and work; and the mental condition of Burns and his family members. (Id. at 34-35.) Burns contends that his counsel were

[39] Petitioner's motion for partial summary judgment is DENIED.

ineffective because they did not try to discover mitigation evidence, acquiesced in Burns' mother's decision to excuse mitigation witnesses, did not meet his father until just before the trial, and conducted no mitigation interviews other than with his mother. (D.E. 86 at 100.)

The Tennessee Court of Criminal Appeals addressed counsel's performance during the penalty phase of the trial and Burns' assertion that his counsel failed to present significant mitigation evidence.

> The petitioner asserts that trial counsel "failed to present significant mitigation evidence." This mitigation proof included testimony that he was a decent person; that his father, Obra Carter, abused the women in his life and his children; and that his mother, Leslie Burns, had significant deficiencies as a parent due to the number of children in her household, the presence of a severely handicapped child, and the sum of problems she had leading to bouts with depression. He further argues that no evidence was presented regarding the nature of the neighborhood in which the petitioner was raised. In addition to lay testimony, he asserts, further, that trial counsel failed to adequately utilize the services of experts in investigating and presenting a mitigation defense, specifically, that not employing a mitigation specialist and a neuropsychologist resulted in counsel's performance falling below the expected standards for counsel in a capital proceeding.
>
> 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); Zagorski v. State, 983 S.W.2d 654, 657-58 (Tenn. 1998). 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 of whether counsel's choice of what information to present to the jury was professionally reasonable.

There is no constitutional imperative, however, that counsel must offer mitigation evidence at the penalty phase of a 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 v. State, 938 S.W.2d 363, 369-70 (Tenn. 1996).

. . .

The post-conviction court concluded that the petitioner failed to offer any better insight at the evidentiary hearing into why this crime occurred or why the petitioner chose to act the way he did on the day of the double homicide.

"While '[i]t should be beyond cavil that an attorney who fails altogether to make any preparations for the penalty phase of a capital murder trial deprives his client of reasonably effective assistance of counsel by any objective standard of reasonableness' it is unclear how detailed an investigation is necessary" under *Strickland* to ensure effective counsel. White v. Singletary, 972 F.2d 1218, 1224 (11th Cir. 1992) (internal citation omitted). The right to present and have a sentencer consider any and all mitigating evidence means little if defense counsel fails to look for mitigating evidence or fails to present a case in mitigation at the capital sentencing hearing. Thus, although "no absolute duty exists to investigate particular facts or a certain line of defense," *see* Chandler v. United States, 218 F.3d 1305, 1317 (11th Cir. 2000), counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691, 104 S.Ct. 2052, 80 L.Ed.2d 674. In determining whether counsel breached this duty, "we must conduct an objective review of [counsel's] performance, measured for reasonableness under prevailing professional norms, which includes a context-dependent consideration of the challenged conduct as seen from

> counsel's perspective at the time." Wiggins, 539 U.S. at 523, 123 S.Ct. at 2536 (internal citation and quotation marks omitted). It is also necessary to be mindful that defense counsel is not required to "investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing" or "to present mitigating evidence at sentencing in every case." Id. at 533, 123 S.Ct. at 2540. Moreover, counsel does not have the duty to interview every conceivable witness. Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995). In sum, counsel's investigation will not be found deficient for failing to unveil all mitigating evidence, if, after a reasonable investigation, nothing has put counsel on notice of the existence of that evidence. *See* Babbitt v. Calderon, 151 F.3d 1170, 1174 (9th Cir. 1998).
>
> The petitioner presented witnesses at the post-conviction evidentiary hearing who arguably could have provided mitigation evidence had they been called to testify. However, the fact that additional witnesses such as these might have been available or that other testimony might have been elicited from those who testified does not establish ineffective assistance of counsel. Waters v. Thomas, 46 F.3d 1506, 1513-14 (11th Cir. 1995).
>
> The post-conviction court found that the mitigation evidence presented by trial counsel "showed that this was a well-adjusted young man who committed a crime that was out of character for him." Additionally, the court concluded that "[t]he bulk of the mitigation proof dealt with the petitioner's father" but "offered [no] better insight into why this crime occurred or why the petitioner chose to act the way he did on the day in question." Thus, the post-conviction court found that, although the petitioner established that additional witnesses were available, the "bulk" of them testified about his father and did not offer any explanation as to why he had committed the crimes. Thus, the court concluded that the petitioner failed to show that he was prejudiced by the fact these witnesses had not testified at the trial. The record supports these conclusions.

Burns, 2005 WL 3504990, at **62-66.

Burns relies on American Bar Association ("ABA") Guidelines to establish a standard for reasonable performance in the penalty phase.

(D.E. 86 at 91.) Burns argues that, according to ABA Guidelines, counsel should take account of witnesses familiar and evidence relating to the client's life and development, demonstrative evidence that humanize the client or portray him positively, and circumstances that may have caused or explained the charged conduct. (Id. at 91-92.) Burns emphasizes that it is imperative that counsel make "reasonable investigations" related to the mitigation case. (Id.)

Johnson testified that his preparation for the mitigation phase was "[j]ust talking to his mother and father." (D.E. 28, Add. 13, Vol. 3, p. 285.) Johnson said that Burns' "mother kind of cut us off from anything that we could get from West Memphis." (Id.) However, Johnson also testified that he never did any investigating in West Memphis or attempted to get anyone else to investigate there. (Id. at 285-86.)[40]

> The mother was the key. We didn't need anybody to go to West Memphis to interview the mother. The mother was cooperative with me in regards she would always come in, and she would always talk. So I didn't need an investigator to go to West Memphis to talk to her. She was the key to get the other people in West Memphis to be able to talk to the investigator to give us the information that we needed.

(Id. at 286.)

Although there were communication issues with Burns' mother,

[40] Similarly, Wright testified that he did not investigate the culture of West Memphis; that there was no investigation into the neighborhood other than talking to Burns, his parents, and a neighbor; and that he was not aware that Burns' home was directly behind project housing, that Burns had lived in the projects himself, or that shots had been fired into Burns' home. (D.E. 28, Add. 13, Vol. 2, pp. 115-16, 147-48.) Wright was under the mistaken belief that Leslie Burns and Obra Carter were divorced and indicated no real knowledge of the Burns' family situation. (Id. at 116-18.)

Johnson indicated that he never had problems communicating with Burns. (Id.) Burns gave Johnson a list of people from the community to interview, but those people were not interviewed. (Id. at 304.) Johnson testified that Burns' mother told counsel that they had decided they did not want to participate. (Id.)[41] Johnson testified that he met with Burns' father only once "right before trial." (Id. at 300.)

Leslie Burns testified that she first learned she was going to testify during the mitigation phase when she was called at the trial; her testimony had not been discussed previously. (Id. at Vol. 5, pp. 80-81.) Ms. Burns disagreed with counsel's testimony and said she did not tell potential mitigation witnesses they did not have to testify or not to cooperate with her son's attorneys. (Id. at 83.)

Counsel's investigation of Burns' family and background was minimal. Counsel relied on a mitigation theme that Burns' behavior was out of character.

> During the sentencing portion of the petitioner's trial, counsel presented the testimony of six witnesses. *See* Burns, 979 S.W.2d at 279. Leslie Burns, the petitioner's mother, testified that he was twenty-six years of age, had twelve brothers and sisters, had graduated from high school, and had presented no disciplinary problems while in school. Id. His father, Obra Carter, testified that his son had always been obedient and well-mannered. Id. Phillip Carter, the petitioner's half-brother, testified that the petitioner had been active in church and had always tried to avoid trouble. Id. Norman McDonald, the petitioner's Sunday School teacher, testified that the petitioner was a "faithful" young man who attended church

[41] Johnson did not subpoena any of these individuals to testify. (Id. at 314.)

> regularly. Id. Mary Wilson, a captain with the Shelby County Sheriff's Department, and Bennett Dean, a volunteer chaplain, both testified that the petitioner had actively participated in religious services while in custody for these offenses. Id.

Burns, 2005 WL 3504990, at *63. Counsel stated that certain mitigation witnesses were not used because their testimony was cumulative, and counsel did not want to open the door to Burns' prior criminal record. Id. at *64.

The evidence presented in the post-conviction proceedings does not demonstrate that there is a reasonable probability that a jury, having been given additional evidence about the family situation, poverty, abuse suffered by Burns' mother, and the strict/abusive nature of Obra Carter's treatment of his children, would have given Burns a life sentence. Despite any lack of information presented in mitigation at trial, Burns was not prejudiced by counsel's failure to search deeper into Burns' development and family background. The Tennessee Court of Criminal Appeals' determination 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.

c. Failure to present mental health evidence

Burns asserts that, after Midtown Mental Health Center made a determination that he was competent to stand trial and that an insanity defense could not be supported, counsel did not investigate further to determine whether Burns had a mental impairment. (D.E. 8

at 44.) Burns contends that counsel would have discovered that he demonstrates a "defensive denial that could contribute to difficulty understanding the implications of his circumstances and behavior"; has trouble processing new information quickly; fails to grasp the implications of his behavior when under stress; and fails to gather all the necessary information before making a decision. (Id. at 45.) Burns contends that counsel would have discovered that he has the psychological profile of a follower and does not recognize individuals' motivations and intentions. (Id.) Burns also asserts that he and his family suffer mood disorders, like bipolar disorder and depression, and he has a biologically driven deficit that interferes with his ability to exercise reflection and judgment. (Id.)

The Tennessee Court of Criminal Appeals considered this issue:

> The petitioner also criticizes trial counsel's decision not to retain a mental health expert. As before, we must determine whether counsel's decision in this regard constituted ineffective assistance. The evidence at the post-conviction hearing revealed that trial counsel, upon their initial appointment in this matter, filed motions requesting the assistance of several experts, including a psychologist. The petitioner's first senior counsel appointed explained that the motions were filed in anticipation of presenting proof at the penalty phase, saying that he interviewed the petitioner regarding his medical history, school activities, drug or alcohol use, and prior criminal history. The petitioner never spoke of a drug or alcohol problem. The first junior counsel appointed testified that a mental evaluation of the petitioner was requested out of an abundance of caution, and the evaluation concluded that he was competent and that an insanity plea could not be supported. This information was provided to successor counsel who actually represented the petitioner at trial. After reviewing the petitioner's background, childhood problems, and school

> and family history, senior counsel concluded that nothing indicated that a further check into the petitioner's mental status was necessary and nothing caused them to believe that the petitioner did not understand the various plea offers. Senior counsel said that had anything been discovered to question the petitioner's mental condition, counsel would have made further inquiry. Junior counsel confirmed that there was no indication that the petitioner suffered from any mental or personality defects.
>
> Trial counsel's being unfamiliar with much of the information presented at the evidentiary hearing as to the petitioner's alleged family history of mental illness and the petitioner's "impaired judgment" was not unreasonable. Counsel and their investigator spoke with the petitioner, his family members, and others who might have had such information, and none of them suggested there was any history of mental illness in the petitioner's family or that he suffered from any mental defect. Other courts have held that "counsel is not deficient for failing to find mitigating evidence if, after a reasonable investigation, nothing has put the counsel on notice of the existence of that evidence." Matthews v. Evatt, 105 F.3d 907, 920 (4th Cir. 1997). This comports with the principle that a lawyer may make reasonable decisions that render particular investigations unnecessary. The absence of any information from the petitioner, his family members, or others indicating any mental defect/illness in conjunction with a mental evaluation of the petitioner which did not provide any indication of a potential mental illness supports counsel's decision that further investigation with a mental health expert was not necessary. *See* Babbitt, 151 F.3d at 1174.
>
> A review of the record indicates that trial counsel's decisions not to employ either a mitigation specialist or a mental health expert were reasonable considering the information amassed by counsel through their investigation. Accordingly, counsel were not deficient in their investigation in this matter.

Burns, 2005 WL 3504990, at *68.

After considering the overwhelming proof related to the aggravating circumstance and the "cumulative and corroborative" nature of the mitigation evidence presented at the post-conviction

hearing, the Tennessee Court of Criminal Appeals could not "conclude that this evidence would have persuaded the jury not to impose the death penalty." Id.

Dr. Woods, a psychiatrist, testified on behalf of Burns at the post-conviction evidentiary hearing. Id. at **27-30. Dr. Woods was unable to make a psychiatric diagnosis, but he opined that Burns suffered symptoms of defensive denial, bizarre thinking, unusual religious experience, poor coping skills, and impaired judgment and that there are "real questions about mood disorders in this family." (D.E. 28, Add. 13, Vol. 8, p. 597-99, 604, 627.) When questioned about the role that these symptoms played in the offense committed, Dr. Woods responded that the offense was an anomaly in Burns' history and that the consistency as it relates to the offense was that Burns' judgment was impaired while making an effort to do something for a friend. (Id. at 630.) Burns, 2005 WL 3504990, at *30. This testimony is consistent with the defense theory that Burns' actions were out of character.

Burns contends that the Tennessee Court of Criminal Appeals used a standard to analyze prejudice, namely that "[t]he petitioner cannot establish that his sentence would have been different", that directly contradicted or was contrary to Supreme Court precedent. (D.E. 86 at 100-101.) See id. at *58. To the contrary, the Court of Criminal Appeals cited and was clearly aware of the appropriate standard for prejudice from Strickland, that "there must be a reasonable

probability that, but for counsel's error, the result of the proceeding would have been different." Id. at **61-62. The evidence presented at the post-conviction hearing, although showing a more complete picture of Burns' life than that presented at trial, provides little information that mitigates his case and does not establish that there is a reasonable probability that Burns' sentence would have been different. Claim 11 is DENIED.

J. Victim Impact Evidence (Claim 12)

Burns alleges that the State, in violation of his Sixth, Eighth, and Fourteenth Amendment rights, presented victim impact testimony from Dawson's and Johnson's mothers that improperly influenced the jury to vote for the death penalty. (D.E. 8 at 46.) This issue was addressed on direct appeal by the Tennessee Supreme Court.

VICTIM IMPACT EVIDENCE

> The defendant argues that the trial court erred in admitting testimony of the victims' mothers during the penalty phase of the trial and by allowing the prosecutor to emphasize this evidence during its closing argument. The defendant contends that so-called "victim impact" evidence and argument is inflammatory, irrelevant to the sentencing determination in a capital proceeding, inadmissible under our death penalty statutes, and violative of Article I, §§ 8 and 16 of the Tennessee Constitution and the Eighth and Fourteenth Amendments to the United States Constitution. The State maintains that the evidence is relevant and admissible in the penalty phase of a capital trial.
>
> In State v. Nesbit, 978 S.W.2d 872 (Tenn. 1998), we recently held that victim impact evidence and argument is not *per se* improper under either statutory or constitutional law. Our analysis of the sentencing statutes began with Tenn. Code Ann. § 39-13-204(c), which states:

> In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, *the nature and circumstances of the crime*; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i); and any evidence tending to establish or rebut any mitigating factors. Any such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence; provided, that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitution of the United States or the constitution of Tennessee.
>
> (emphasis added).

This statute delineates a procedure which enables the sentencing jury to be informed about the presence of statutory aggravating circumstances, the presence of mitigating circumstances, and the nature and circumstances of the crime. As we said in Nesbit, "the impact of the crime on the victim's immediate family is one of those myriad factors encompassed within the statutory language 'nature and circumstances of the crime.'" 978 S.W.2d at 889. The statute, therefore, allows the sentencing jury to be reminded that "just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." Payne v. Tennessee, 501 U.S. 808, 825, 111 S.Ct. 2597, 2608, 115 L.Ed.2d 720 (1991).

We also, in Nesbit, recognized that the United States Supreme Court has held that Eighth Amendment to the United States Constitution does not constitute a *per se* bar to the admission of victim impact evidence and argument:

> We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant.

Nesbit, 978 S.W.2d at 889 (quoting Payne, 501 U.S. at 825,

111 S.Ct. at 2608). Our recent decisions have followed Payne and have held that victim impact evidence and argument is likewise not precluded by the Tennessee Constitution. *E.g.,* Nesbit, 978 S.W.2d at 889.

Not all victim impact evidence and argument, however, is appropriate. It should be limited to "information designed to show those unique characteristics which provide a brief glimpse into the life of the individual who has been killed, the contemporaneous and prospective circumstances surrounding the individual's death, and how those circumstances financially, emotionally, psychologically or physically impacted upon members of the victim's family." *Id.* at 891 (citing, Payne, 501 U.S. at 822, 111 S.Ct. at 2607) (footnote omitted).

Moreover, any evidence that threatens to render the trial fundamentally unfair or poses a risk of unfair prejudice may violate the due process provisions of the United States and Tennessee Constitutions and must be excluded. *Id.* The trial court should also exclude any evidence where its probative value is substantially outweighed by its unfair prejudice. Tenn. R. Evid. 403. Finally, the prosecutor and the trial court should ensure that the prosecution's argument is restrained and reasoned, fairly based on the evidence, and not merely an appeal to the bias or emotional responses of the jury. Nesbit, 978 S.W.2d at 891.

Here, the victims' mothers testified during the penalty phase. Each related a few details about their deceased sons. Ms. Dawson testified that the shootings had a negative effect on her own life: she had divorced, moved to another house, and no longer knew what it was like to feel happy. Johnson's mother, Ms. Hudson, testified that "it had been hard to let go" of the killings, and she cried every day. She also testified that the killing affected her other two children, her father, and the victim's young daughter.

Although evidence regarding the emotional impact of the murder "should be most closely scrutinized," Nesbit, 978 S.W.2d at 891, nearly all of this evidence was limited in scope to a glimpse into the lives of Dawson and Johnson and the effects of the killings on their immediate families. This testimony was reserved in nature and not inflammatory, and its admission was not barred by the capital sentencing statutes or the Constitutions of the

> United States and Tennessee. Moreover, the prosecutor did not extensively discuss or emphasize this evidence in summation. Accordingly, neither the admission of this evidence nor the prosecution's argument was improper.
>
> Ms. Dawson also testified, however, that the killings had adversely affected the entire community-for instance, people were afraid and kept their doors locked. The prosecutor emphasized this testimony during closing: . . . .
>
> This evidence and argument went beyond "information designed to show those unique characteristics which provide a glimpse into the life of the individual who has been killed, the contemporaneous and prospective circumstances surrounding the individual's death, and how those circumstances financially, emotionally, psychologically or physically impacted upon member's of the victim's family." Nesbit, 978 S.W.2d at 891 (footnote omitted)(emphasis added). The testimony was not objected to by the defendant, however, and the prosecutor's argument was based on this evidence. Although beyond the scope of *Nesbit*, neither the evidence nor the argument was inflammatory, and it did not render the proceedings fundamentally unfair or unduly prejudicial to the defendant. *See* Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). Thus, we conclude the defendant is not entitled to relief on this issue.

Burns, 979 S.W.2d at 281-83.

The Supreme Court in Payne v. Tennessee, 501 U.S. 808, 825 (1991), held, "[v]ictim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime" and serves entirely legitimate purposes.[42]

> We thus hold that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar. A State may legitimately conclude that evidence about the victim and about the impact of the

[42] The Supreme Court overruled its prior decision in Booth v. Maryland, 482 U.S. 496 (1987), which held that victim impact evidence leads to the arbitrary imposition of the death penalty.

> murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.

Payne, 501 U.S. at 827. However, the Supreme Court recognized that relief under the Due Process Clause would be appropriate if victim impact evidence introduced in the sentencing phase of a criminal case "is so unduly prejudicial that it renders the trial fundamentally unfair." Id. at 825.

The Tennessee Supreme Court determined that the victims' mothers' testimony was limited to a glimpse into Dawson and Johnson's lives and the effects of the murders on their families and the community, reserved in nature, and not inflammatory. Burns, 979 S.W.2d at 282. The record does not support Burns' claim that his rights were violated by the victim impact evidence presented in this case. The Tennessee Supreme Court's decision was 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. Claim 12 is DENIED.

K. Trial Court's Failure to Give Direction to the Jury (Claim 15)[43]

Burns alleges that the trial court violated his Sixth, Eighth, and Fourteenth Amendment rights when it refused to answer questions

[43] The Court has refused to accept Burns' implicit review theory to excuse the procedural default of the Eighth Amendment portion of Claim 15, supra pp. 21-23.

that the jury asked during deliberations. (D.E. 8 at 48.) Burns states that the result of the judge's failure to respond to the jury's questions and clarify the jury instructions was that the jury chose death because they were uncertain about what lesser options were available. (D.E. 86 at 106.) Burns cites Boyde v. California, 494 U.S. 370, 380 (1990), for the proposition that a defendant is denied due process where there is a "reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." (Id.)

Respondent asserts that no objection was made at trial when the trial court directed the jury to the written instructions or when the trial court failed to clarify the instructions for the jury. (D.E. 58 at 12.) Respondent acknowledges that Burns raised this issue on appeal (id. at 12-13), but he contends that the claim was waived and that it lacks merit (D.E. 94 at 45-47).

Both the Tennessee Court of Criminal Appeals and the Tennessee Supreme Court held that the issue had been waived and that it lacked merit. Burns, 1997 WL 418492, at *15; Burns, 979 S.W.2d at 295-96. The Tennessee Supreme Court stated,

TRIAL COURT'S RESPONSE TO JUROR QUESTIONS

> In his next issue, the defendant asserts that the trial court erred in its response to the jury when the jury asked certain questions during its deliberations in the penalty phase of the trial. Those questions propounded by the jury to the trial court were as follows:
>
> (1) How many years for life?

(2) What does 'life sentence' mean?

(3) Can we ask for life without parole? Can we stipulate life plus so many years?

(4) Can we ask for consecutive life sentences?

(5) What does it mean if you're sentenced to death and life?

In response to these questions, the trial court stated, "All right. You're directed to refer to the charges and instructions that are contained in the jacket. Thank you. You may retire to continue your deliberations." The defendant contends that the questions posed indicated that the jury was considering improper matters, and that the trial court "should have directed the jury that the questions posed were not proper considerations in the determination of the sentence." The defendant concedes that there is no authority for the requirement that the trial court give this direction prior to referring the jury to the charge and instructions given initially. The State responds, first, that this issue is waived because the defendant did not object to the trial court's response to the jury's questions at the time it was given, and second, that the trial court's response was proper and that this issue is therefore without merit even if we should consider it.

. . .

Even if the defendant had not waived this "error," however, this issue has no merit. As the defendant acknowledges, the trial court followed the proper method of fielding the jury's questions. *See* State v. Mays, 677 S.W.2d 476, 479 (Tenn. Crim. App. 1984) ("The proper method of fielding questions propounded by the jury during deliberations is to recall the jury, counsel, the defendant(s), and the court reporter back into open court and to take the matter up on the record.") Additionally, contrary to the defendant's contention, the trial court responded properly to the jury's inquiry. *See, e.g.*, State v. Johnson, 698 S.W.2d 631 (Tenn. 1985). In *Johnson*, a capital case, our Supreme Court addressed a situation in which one of the jurors had asked questions regarding parole during voir dire. The Court stated, "the preferable response to a juror's inquiry about parole is to instruct the jury to limit their deliberations to the instructions given them at the close of the evidence." Id. at 633. That

> is exactly what the trial court did in this case. In *State v. Smith*, 857 S.W.2d 1 (Tenn. 1993), another capital case, our Supreme Court again addressed the proper response to jury inquiries about sentencing and parole. The trial court had refused to supplement its original instructions. The defendant argued that information about parole eligibility might operate as mitigating evidence and the trial court's refusal to give additional instructions "somehow create[d] a non-statutory aggravating factor of future dangerousness." 857 S.W.2d at 11. The Court rejected this argument, opining "that to provide a jury with the sort of information requested by defendant could result in sentences of death based on sheer speculation and on factors other than those enumerated in T.C.A. § 39-2-203 and sanctioned under either [the Tennessee or United States] Constitution." Id. The trial court did not err in its response to the jury's questions in this case, and this issue is therefore without merit.

Burns, 979 S.W.2d at 295-96.

The scope of review on a habeas petitioner's claim that he was deprived of a fair trial by errors in the charge to the jury is very narrow. Estelle v. McGuire, 502 U.S. 62, 73 (1991). The Supreme Court in United States v. Bayer, 331 U.S. 532, 537-38 (1947), addressed when it becomes necessary for the court to amplify what was stated in a jury charge:

> Once the judge has made an accurate and correct charge, the extent of its amplification must rest largely in his discretion. The trial judge, in the light of the whole trial and with the jury before him, may feel that to repeat the same words would make them no more clear, and to indulge in variations of statement might well confuse. How far any charge of technical questions of law is really understood by those of lay background would be difficult to ascertain, but it is certainly more evident in the living scene than in a cold record.

The determination of the appropriate answer to a jury question rests within the discretion of the trial court, so long as the answer does

not deprive the defendant of a constitutional right. McShall v. Henderson, 526 F. Supp. 158, 161 (S.D.N.Y. 1981); see Emerson v. Shaw, 575 F.3d 680, 685 (7th Cir. 2009) (judges are within their discretion to refer a jury back to the original instructions when the jury evinces possible confusion as long as the original instructions accurately and understandably state the law).[44]

In Weeks v. Angelone, 528 U.S. 225, 227 (2000), the Supreme Court held that the Constitution is not violated when a trial judge directs a capital jury's attention to a specific paragraph of a constitutionally sufficient instruction in response to a question about the proper consideration of mitigating circumstances. In Weeks, the jury asked,

> Whether, if they believed Weeks guilty of at least one of the aggravating circumstances, it was their duty to issue the death penalty or whether they must decide whether to issue the death penalty or a life sentence.

Id. at 225. The judge directed the jury to an instruction stating,

> If you find from the evidence that the Commonwealth has proved, beyond a reasonable doubt, either of the two [aggravating circumstances], and as to that alternative, you are unanimous, then you may fix the punishment . . . at death, or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment at [life] imprisonment.

Id.

Burns does not contend that the original jury charge was incorrect. He has not demonstrated that the trial court's decision

[44] Jury instructions come from pattern instructions that have withstood appellate analysis and deviating from these instructions creates a risk of reversible error. Id.

to direct the jury back to the original charge prejudiced him or deprived him of a constitutional right. The Tennessee Supreme Court's determination 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. Claim 15 is DENIED.

L. Systematic Exclusion of Women as Jury Forepersons (Claim 16)

Burns alleges that the foreperson for his grand jury in May 1992 was male, that Tenn. R. Crim. P. 6 gave the judge the discretion to personally select the grand jury foreperson, that such discretion was susceptible to abuse, that women were under-represented as grand jury forepersons, and that women were systematically excluded from the grand jury that indicted him. (D.E. 8 at 48-49.) Respondent asserts that the claim was not exhausted in the state court and is procedurally defaulted. (D.E. 58 at 13.)

Burns raised the issue in a motion to reopen the post-conviction proceedings. (D.E. 54 at 2-3; D.E. 86 at 123.) The state court relied on State v. Bondurant, 4 S.W.3d 662 (Tenn. 1991)[45], and denied Burns' motion to reopen. (D.E. 54 at 8.) The court stated that it "need not even reach the merits of such an argument because it finds

[45] The Tennessee Supreme Court in Bondurant disagreed with the United States Supreme Court's determination, stated in Rose v. Mitchell, 443 U.S. 545 (1979), and Hobby v. United States, 468 U.S. 339 (1984), that the foreperson in Tennessee performs more than ministerial duties and asserts that the Supreme Court's interpretation of the role and power of the grand jury foreperson in Tennessee is the result of a misperception. 4 S.W.3d at 674.

petitioner's contention that this court's rejection of *Bondurant* in favor of a return to the *Rose/Hobby* interpretation of the grand jury forepersons powers would result in the establishment of an new constitutional right as contemplated by Tenn. Code Ann. § 40-30-117 (a)(1) to be without merit." (D.E. 54 at 5-6.) The court noted that Tenn. Code Ann. § 40-30-117(a)(1) requires a "final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial" to sustain a motion to reopen the post-conviction proceeding. (Id. at 5.) The court decided that "a holding by this court reinterpreting State law in favor of a previously rejected proposition does not constitute a 'final ruling of an appellate court'" and that Burns sought to make an "end run" around the statutory requirements for reopening a post-conviction proceeding. (Id. at 6.) Burns filed an application for permission to appeal, which was also denied. (D.E. 86-37.)[46] A procedural rule barred the court from consideration of this claim on the merits. Claim 16 is procedurally defaulted and DENIED.

M. Failure of Indictment to Allege Aggravating Circumstances (Claim 17)

Burns alleges that his indictment did not allege aggravating circumstances in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (D.E. 8 at 50.) Respondent contends that the

[46] Respondent notes Burns claims that discrimination in the selection of the grand jury foreperson entitles him to habeas relief, without asserting any specific prejudice from having been indicted by a grand jury whose foreperson was a man or that he would have been treated more fairly or favorably if the foreperson had been a woman. (D.E. 86 at 47.)

United States Supreme Court has never announced a federal constitutional requirement that States charge the aggravating factors to be relied on for sentencing in an indictment. (D.E. 58 at 39.) Burns fails to address this contention in his response to Respondent's motion for summary judgment.

Burns initially raised this issue as a due process violation under the Fifth and Eighth Amendments in his post-conviction proceedings, relying on Apprendi v. New Jersey, 530 U.S. 466 (2000)[47], and Ring v. Arizona, 536 U.S. 584 (2002)[48]. (D.E. 28, Add. 26, pp. 131-35.)[49] Burns asserted that the aggravating factor had to be presented in the indictment to raise the offense to the level of a capital offense. (Id. at 134-35.) The Tennessee Court of Criminal Appeals held:

B. Failure to Charge Aggravating Circumstance in Indictment Violates Due Process

The petitioner next asserts that his being sentenced to

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[47] In Apprendi, the Supreme Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490.

[48] In Ring, the trial judge imposed a capital sentence under the then-existing Arizona sentencing statute, which assigned to the trial judge, rather than to the jury, the task of determining the presence of aggravating factors that made a defendant eligible for the death penalty. 536 U.S. 584. The Supreme Court in Ring held Apprendi required that the existence of an aggravating factor be proven to a jury, rather than a judge. Id. at 603-09.

[49] Respondent contends that, to the extent Burns alleges any constitutional basis other than due process for his claim, his constitutional claim is procedurally barred. (D.E. 33 at 50-51; D.E. 58 at 40.) Burns fails to offer any argument in response to Respondent's assertion of procedural default. To the extent Petitioner attempts to assert any claim other than the due process claim presented in the post-conviction proceedings, that claim is procedurally defaulted.

> death violates the Due Process Clause, Article I, § 8 of the Tennessee Constitution and the Fourteenth Amendment to the United States Constitution. Relying upon Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), he argues that his indictment was flawed because the aggravating circumstances which made him eligible for the death penalty were not submitted to the grand jury nor returned in the indictment.
>
> The petitioner's argument is based upon the premise that first degree murder is not a capital offense unless accompanied by aggravating factors. Thus, he alleges that to satisfy the requirements of *Apprendi*, the indictment must include language of the statutory aggravating circumstances to elevate the offense to capital murder. This argument has recently been rejected by our supreme court in State v. Holton, 126 S.W.3d 845 (Tenn. 2004); *see also* State v. Berry, 141 S.W.3d 549, 558-562 (Tenn. 2004) (concluding also that the Supreme Court's decision in Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), does not alter the court's analysis on whether statutory aggravating circumstances must be pled in the indictment). The petitioner is not entitled to relief on this issue.

Burns, 2005 WL 3504990, at *70.

The federal right to presentment or indictment by a grand jury does not extend to the States through the Fourteenth Amendment. Hurtado v. California, 110 U.S. 516, 520-21 (1884). See Branzburg v. Hayes, 408 U.S. 665, 688 n. 25 (1972) (“indictment by grand jury is not part of the due process of law guaranteed to state criminal defendants by the Fourteenth Amendment”). A conclusion that Apprendi requires state prosecutions to employ indictments listing all elements of a crime runs afoul of the repeated holdings of the Supreme Court that the Fifth Amendment grand jury right does not apply to state prosecutions. Williams v. Haviland, 467 F.3d 527, 531-33 (6th Cir. 2006). A state court decision denying relief in a death

penalty case for failure to allege aggravating factors in an indictment is not "contrary to" or an "unreasonable application" of relevant Supreme Court precedent. Hall v. Bell, No. 2:06-CV-56, 2010 WL 908933, at **42-43 (E.D. Tenn. Mar. 12, 2010). The Tennessee Court of Criminal Appeals' determination is neither contrary to nor an unreasonable application of clearly established federal law as determined by the United States Supreme Court. Claim 17 is DENIED.

N. Death Sentence Violated Fundamental Right to Life and Due Process (Claim 18)

Burns alleges that his fundamental right to life was violated and that the State demonstrated that it had a less restrictive means to punish Burns for Dawson's death when it offered Burns a life sentence. (D.E. 8 at 50.) Burns alleges that his right to trial was unconstitutionally burdened when the State sought a death sentence because he chose to go to trial. (Id.; D.E. 86 at 112-15.)

Although Respondent asserts that Burns failed to raise this claim on direct appeal and that the claim is waived pursuant to Tenn. Code Ann. § 40-30-102(g), Respondent acknowledges that the Tennessee Court of Criminal Appeals reviewed the issue on the merits as part of Burns' allegation of ineffective assistance of appellate counsel and found that the issue lacked merit. (D.E. 58 at 40-41.) The Court of Criminal Appeals held:

> The petitioner contends that his sentence of death should be set aside because it infringes upon his fundamental right to life. In support of this position, he asserts that the punishment of death is not necessary to promote any compelling state interest in punishing him and that

> the State has not shown there are no less restrictive means of punishing him. The petitioner's complaint that his death sentence must be reversed because it violates his "fundamental right to life" is contrary to settled precedent as reflected in Cauthern, 145 S.W.3d at 629 (citing Nichols, 90 S.W.3d at 604; State v. Mann, 959 S.W.2d 503, 536 (Tenn. 1997) (Appendix); State v. Bush, 942 S.W.2d 489, 523 (Tenn. 1997)). Accordingly, this argument is without merit.

Burns, 2005 WL 3504990, at *70.

The Tennessee Court of Criminal Appeals addressed this issue when Burns filed an application for permission to appeal the denial of his motion to reopen the post-conviction proceedings.

> Petitioner Burns next argues that the death sentence imposed is invalid under the Sixth, Eighth, and Fourteenth Amendments, because the prosecution offered Burns a life sentence prior to trial but sought and obtained the death sentence at trial, thereby burdening the exercise of his right to a jury and the right to not plead guilty, and resulting in an arbitrary death sentence which, by definition, is not necessary to promote any compelling state interest and/or the least restrictive means of achieving any state interest in punishing him. The Petitioner explains that, "once the prosecution acknowledged that life was the appropriate sentence here, the only conceivable reason for seeking the death penalty at trial was to penalize Burns for the exercise of his constitutional rights." Petitioner Burns contends that his sentence of death was imposed in direct violation of *United States v. Jackson,* 390 U.S. 570, 88 S. Ct. 1209 (1968). He asserts that, under *Jackson*, it is unconstitutional for the government to employ a death-penalty regime which "permit[s] imposition of the death sentence only upon a jury's recommendation and thereby ma[kes] the risk of death the price of a jury trial."
>
> In *State v. Mann*, the capital defendant challenged the jury's imposition of the death sentence after he rejected a plea offer of a life sentence. 959 S.W.2d 503 (Tenn. 1997). In support of his argument, the defendant relied upon the United States Supreme Court holding in *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209 (1968). In *Jackson,* the high court reviewed a federal

kidnapping statute. Under the statute at issue, a convicted defendant could be sentenced to death if he had requested a jury trial, but could be sentenced to no more than a life sentence if he had either pleaded guilty or pleaded not guilty and waived his right to a jury trial. Under the statute, only those who insisted upon a jury trial faced a sentence of death. The United States Supreme Court, however, recognized that, unlike the statute at issue in *Jackson,* "Tennessee law does not reserve the maximum punishment for murder for those who insist on a jury trial." *Mann,* 959 S.W.2d at 511. The Tennessee court noted that the State is free to seek the death penalty following entry of a guilty plea. *Id.* The Petitioner claims that the holding in *Mann* should not be applied to his case because "the death penalty *was* in fact reserved for Burns only if he sought a trial, because the prosecution did not seek death following a plea." (Emphasis in original).

The Petitioner again asks this Court to grant relief by first acknowledging the existence of rights not previously recognized by Tennessee and not recognized at the time of Burns' trial. The Petitioner asserts that he has met the standard of section 40-30-117(a), Tennessee Code Annotated, because "the Tennessee courts have yet to apply the settled federal law governing his claims (having to this point erroneously failed to apply governing precedent from the United States Supreme Court)." The Petitioner maintains that, "[b]y properly applying the United States Supreme Court precedent . . . this Court will establish rights not recognized at the time of Burns' trial, though fully retroactive because they involve settled principles of federal law which were clearly dictated at the time Burns' case became final on direct appeal." The Petitioner states that, "to date, notwithstanding the Supreme Court's decision in *United States v. Jackson,* Tennessee has yet to apply *Jackson* to invalidate any death sentence imposed in violation of *Jackson* under the circumstances presented here." Similarly, the petitioner adds that "the Tennessee courts (like the trial court) [has never] acknowledged that under principle[s] of substantive due process and equal protection, the fundamental right to life can only be taken when necessary to promote a compelling state interest and the least restrictive means of achieving any state interest."

The Petitioner essentially asks this Court to

> disregard the holding of our supreme court in *State v. Mann*; we decline to do so. . . . . We decline to do so, noting that, even if this Court accepted the Petitioner's argument and rejected the holding in *Mann*, our ruling would not constitute a "**final ruling.**"
>
> The case law relied upon by the Petitioner was established in 1968 (*United State (sic) v. Jackson*) and 1976 (*Gregg v. Georgia*), respectively. Our supreme court distinguished its holding in *Mann*, upholding a death sentence after the rejection of an offer of a sentence of life, from the United States Supreme Court's invalidation of a federal kidnapping statute in *United States v. Jackson*. The Petitioner could have made the same challenge as Defendant Mann raised in his original trial and appeal. Moreover, the Petitioner could have again made the challenge within his post-conviction petition. The Petitioner failed to raise the issue at these times.

(D.E. 86-37 at 6-8.)

The State is not required to demonstrate that it has a compelling state interest which cannot be satisfied by less restrictive means. In Gregg v. Georgia, 428 U.S. 153, 174-75 (1976), the Supreme Court stated,

> (W)hile we have an obligation to insure the Constitutional bounds are not overreached, we may not act as judges as we might as legislators.... Therefore, in assessing a punishment selected by a democratically elected Legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

Claims that the state's death penalty scheme encourage capital defendants to plead guilty and imposes an impermissible risk of death on defendants who choose to exercise their right to trial have been rejected as without merit. Landrum v. Anderson, No. 1:96-CV-641, 2005

WL 3965399, *88 (S.D. Ohio Nov. 1, 2005); see Williams v. Bagley, 380 F.3d 932, 966 (6th Cir. 2004) (same); see also Greer v. Mitchell, 264 F.3d 663, 690 (6th Cir. 2001) (denying petitioner's claim that the death penalty was neither the least restrictive punishment nor an effective means of deterrence).

The Tennessee Court of Criminal Appeals' decision is neither contrary to nor an unreasonable application of clearly established federal law as determined by the United States Supreme Court. Claim 18 is DENIED.

O. Absence of Uniform Standards to Guide Prosecutors in Determining the Propriety of Seeking the Death Penalty (Claim 19)

Burns alleges that Tennessee does not have statewide standards to guide prosecutors in deciding whether to seek the death penalty against a person charged with murder. (D.E. 8 at 50.)

On appeal of the denial of post-conviction relief, the Tennessee Court of Criminal Appeals stated:

> The petitioner contends that the imposition of the death penalty violates both the state and federal constitutions because the statute grants absolute discretion to each individual district attorney general to indiscriminately seek the death penalty. The petitioner concedes that this issue was raised and rejected on direct appeal as part of a general challenge to the Tennessee death penalty statute. *See* Burns, 979 S.W.2d at 297. Our supreme court has not altered its opinion and has continued to reject this claim since the petitioner's direct appeal. *See, e.g.*, State v. Thomas, 158 S.W.3d 361, 407 (Tenn. 2005). Notwithstanding, the petitioner asserts that the issue should be reconsidered in light of the principles set forth in Bush v. Gore, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). The petitioner asserts that the prosecutorial function is analogous to a state court's

issuance of a remedy and implies a duty to ensure that prosecution of crimes is implemented fairly.

The petitioner's claim fails for numerous reasons. First, the opinion in *Bush* was not released until 2000, two years after our supreme court's affirmance of the petitioner's convictions and death sentence. Thus, *Bush* is inapplicable to the petitioner's case unless the holding established a new rule of law which is to be applied retroactively.

In *Bush*, the United States Supreme Court held that when a state court orders a remedy, such as a recount of votes, there must be some assurance the implementation of the remedy will comport with "the rudimentary requirements of equal treatment and fundamental fairness...." Id. at 109, 121 S.Ct. at 532. The potential sweep of the Supreme Court's holding is limited by the opinion's own words: "Our consideration is limited to the present circumstances...." Id. Thus, we decline the invitation to conclude that *Bush* established a new rule of constitutional criminal procedure. *Bush*, a voting rights case, does not apply to this criminal prosecution. *See generally* Black v. Bell, 181 F. Supp. 2d 832, 879 (M.D. Tenn. 2001). Moreover, the petitioner's claim, on its merits, has been rejected on numerous occasions. The United States Supreme Court has refused to strike down various death penalty statutes on the ground that those statutes grant prosecutors discretion in determining whether to the seek the death penalty. Gregg v. Georgia, 428 U.S. 153, 199, 96 S.Ct. 2909, 2937, 49 L.Ed.2d 859 (1976) (The 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 system is unconstitutional.); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 2967, 49 L.Ed.2d 913 (1976) (same). Applying the United States Supreme Court decision in Gregg, 428 U.S. at 198-99, 96 S.Ct. at 2937, the Tennessee Supreme Court has held that:

> opportunities for discretionary action occurring during the processing of a murder case, including the authority of the state prosecutor to select those persons for whom he wishes to seek capital punishment do not render the death penalty unconstitutional on the theory that the opportunities for discretionary action render imposition of the death penalty arbitrary or freakish.

> State v. Cazes, 875 S.W.2d 253, 268 (Tenn. 1994); *see also* State v. Brimmer, 876 S.W.2d 75, 86 (Tenn. 1994); State v. Hall, 958 S.W.2d 679, 716 (Tenn. 1997). Moreover, in *Hall*, our supreme court expressly rejected the assertion that prosecutorial discretion to seek the death penalty violated the separation of powers doctrine found in Article II, § 2 of the Tennessee Constitution. 958 S.W.2d at 716-17. Accordingly, we conclude that the decision in *Bush*, a case involving the method of counting ballots for a presidential election, does not invalidate the discretion of the prosecutor in determining whether to seek the death penalty. This claim is without merit.

Burns, 2005 WL 3504990, at **71-72.

The United States 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 discretion at each stage of a criminal proceeding); Gregg, 428 U.S. 153, 199 (1976) ("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) (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), cert. denied, 488 U.S. 948 (1988). The decision in Bush, a case considering the method of counting ballots cast in a presidential election, does not require a different result. See Chi v. Quarterman, 223 F. App'x 435, 439 (5th Cir. 2007) (discussing the Bush case's

"utter lack of implication in the criminal procedure context"), cert. denied, 551 U.S. 1193 (2007); see also Wyatt v. Dretke, 165 F. App'x 335, 339-40 (5th Cir. 2006) (the Bush holding is "limited to the facts at issue there -- the 2000 presidential election"), cert. denied sub nom. Wyatt v. Quarterman, 548 U.S. 932 (2006); 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, that would require Tennessee prosecutors to be guided by "hard and fast standards in determining whether to seek the death penalty").

The Tennessee Court of Criminal Appeals' decision is neither contrary to nor an unreasonable application of clearly established federal law as determined by the United States Supreme Court. Claim 19 is DENIED.

P. Burns' Death Sentence is Arbitrary (Claim 20)

Burns alleges that his death sentence is arbitrary and violates the Eighth and Fourteenth Amendments because Burns was subjected to the death penalty, unlike Kevin Shaw, Richard Morris, Benny Buckner, Derrick Garrin, and Carlito Adams. (D.E. 8 at 50-51.) Respondent characterizes this issue as "another version of the attack on the discretion of prosecutors to seek the death penalty" addressed in Claim 19. (D.E. 58 at 44.) For the same reasons Claim 19 has been denied, supra pp. 113-16, this claim is without merit.

In response to the motion for summary judgment, Burns argues

that, by offering life pretrial and seeking death at trial, the prosecution violated the Eighth Amendment proscription against the arbitrary imposition of the death penalty in violation of both Furman and Gregg. (D.E. 86 at 115-16.) This issue has been addressed in discussing Claim 18, supra p. 112, and is without merit. For the same reasons, Burns' argument supporting Claim 20 is without merit. Claim 20 is DENIED.

Q. Burns' Conviction and Sentence Violate International Law (Claim 21)

Burns alleges 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. (D.E. 8 at 51-56.)

The Tennessee Court of Criminal Appeals held:

> The petitioner asserts that Tennessee's imposition of the death penalty violates United States treaties as well as the Supremacy Clause of the United States Constitution. It appears that he argues that the Supremacy Clause was violated when his rights under treaties and customary international law to which the United States is bound were disregarded. Arguments that the death penalty is unconstitutional under international laws and treaties have systematically been rejected by the courts. *See* State v. Odom, 137 S.W.3d 572, 600 (Tenn. 2004). This claim is without merit.

Burns, 2005 WL 3504990, at *72.

The United States Supreme Court has not decided this question. In a near-treatise on the subject, the Sixth Circuit dismissed a similar challenge to the death penalty and held that the body of customary international law to which the petitioner refers does not

render the death penalty unconstitutional. Buell v. Mitchell, 274 F.3d 337, 370-76 (6th Cir. 2001) ("To the extent that the [ICCPR[50]] ban[s] cruel and unusual punishment, the United States has included express reservations preserving the right to impose the death penalty within the limits of the United States Constitution."). The Tennessee Court of Criminal Appeals' determination is neither contrary to nor an unreasonable application of clearly established federal law as determined by the United States Supreme Court. Claim 21 is DENIED.

R. Actual Innocence (Claim 22)

Burns alleges that he is actually innocent of felony-murder because he did not have the requisite intent to support the underlying felony of robbery. (D.E. 8 at 56.) He asserts that he is actually innocent of the death penalty because only one aggravating circumstance supports his death sentence and because he was not responsible for whatever harm threatened persons other than Dawson and/or Johnson during the incident. (Id.; D.E. 86 at 117.) Burns does not rely on newly discovered evidence to demonstrate his innocence. (D.E. 86 at 117.)

Respondent argues that Petitioner's claim is "a confused misstatement of his 'actual' position". (D.E. 58 at 46.) Respondent asserts that Burns' guilt is a matter determined by the state courts based on credible evidence and that Burns is attempting to "shoe-horn" his argument that he is unworthy of the death penalty into an

[50] International Covenant on Civil and Political Rights ("ICCPR").

argument of innocence. (Id. at 46.)

The Tennessee Court of Criminal Appeals[51] addressed the issue of Burns' conviction and sentence based on sufficiency of the evidence. See Burns, 1997 WL 418492, at **6-7. It cited Jackson v. Virginia, in which 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.

Jackson, 443 U.S. 307, 324 (1979). 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 Court of Criminal Appeals, expressly referring to Jackson, reviewed the evidence presented at trial and applied that clearly established precedent correctly and in an objectively reasonable manner. Burns, 1997 WL 418492, at **5-7. Viewed in the light most favorable to the prosecution, a rational juror could find Burns guilty of first degree murder beyond a reasonable doubt. The

[51] The Tennessee Supreme Court did not specifically address the issue of the sufficiency of the evidence for Burns' conviction and sentence, but affirmed the Court of Criminal Appeals' decision. Burns, 979 S.W.2d at 286-88.

jury heard the testimony of all the witnesses. Any conflicts in that testimony were resolved against Burns. The testimony and evidence, including evidence identifying Burns as a participant in the robbery, identifying Burns as one of the shooters, and Burns' admission that he fired his gun three times, support the conviction of felony murder. The evidence that four young boys were playing basketball in the area where the shooting occurred established the aggravating circumstance allowing imposition of the death penalty. The Tennessee Court of Criminal Appeals' decision about the sufficiency of the evidence is neither contrary nor an unreasonable application of Supreme Court precedent and is based on a reasonable determination of the facts.

The Court must also determine the extent to which Burns may have a viable claim of actual innocence. "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). The actual innocence exception is very narrow in scope and requires proof of factual innocence, not just legal insufficiency. Bouseley v. United States, 523 U.S. 614, 623 (1998) ("It is important to note . . . that 'actual innocence' means factual innocence, not mere legal insufficiency."). The Herrera court noted that "a truly persuasive demonstration of 'actual innocence' made after a 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." 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." Id. at 712. In House v. Bell, 547 U.S. 518, 554-55 (2006), the Supreme Court declined to decide whether freestanding innocence claims in death penalty cases are possible.

Burns contends that his claim is not barred under Herrera because it is not based on new evidence. (D.E. 86 at 117.) Burns asserts that his claim falls within the narrow exception to Herrera where a persuasive demonstration of actual innocence made after trial would render the petitioner's execution unconstitutional. (Id. at 117.) Because there was sufficient evidence to support Burns' conviction and sentence, the Court is not persuaded that Burns has demonstrated factual innocence. Claim 22 is DENIED.

S. Burns is Incompetent to Be Executed (Claim 23)

Burns asserts that he will not comprehend the punishment he is to receive or the reason for it at the time of his execution. (D.E. 8 at 56-57.) 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 a claim that must be brought in an initial habeas petition on pain of being treated as a second or successive petition. See Tompkins v. Sect'y, Dept. of Corr., 557

F.3d 1257, 1258 (11th Cir. 2009). 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. The parties agree that this claim is not ripe for consideration. (D.E. 58 at 47; D.E. 86 at 151.) Claim 23 is not ripe for habeas relief and is DENIED.

T. Cumulative Error (Claim 25)

Burns 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 Burns' conviction and or death sentence unconstitutional." (D.E. 8 at 57.) Respondent contends that this claim was not properly exhausted in the state courts, is procedurally defaulted, and is without merit. (D.E. 58 at 15.) The Supreme Court has not held that distinct constitutional claims can be cumulated to grant habeas relief. Lorraine v. Coyle, 291 F.3d 416, 447 (6th Cir. 2002); Moore v. Parker, 425 F.3d 250, 256 (6th Cir. 2005); Williams v. Anderson, 460 F.3d 789, 816 (6th Cir. 2006)[52]. Claim 25 is DENIED.

V. CONCLUSION

Because Burns' claims are noncognizable, devoid of substantive merit, or procedurally barred, disposition of this petition without an evidentiary hearing is proper. Rule 8(a), Section 2254 Rules.

[52] The Sixth Circuit in Williams notes that the Supreme Court has repeatedly stated that fundamentally unfair trials violate due process and notes that "common sense dictates that cumulative errors can render trial fundamentally unfair." Id. The Court further states, "Nonetheless, the law of this Circuit is that cumulative error claims are not cognizable on habeas because the Supreme Court has not spoken on this issue. No matter how misguided this case law may be, it binds us." Id. (citations omitted).

Respondent's motion for summary judgment is GRANTED. The petition is DENIED in its entirety and DISMISSED.

VI. 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 certificate of appealability ("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)(district judges may issue certificates of appealability). 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 (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 certificates of appealability:

> [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). 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 id. at 342 (cautioning courts against conflating their analysis of the merits with the decision of whether to issue a COA; "The question is the debatability of the underlying constitutional claim, not the resolution of that debate.").[53]

In this case, reasonable jurists could differ about the issue of ineffective assistance of counsel at sentencing. The Court GRANTS a limited certificate of appealability on that issue. Reasonable jurists could not disagree about the remaining issues. The Court

[53] The Supreme Court also emphasized that "[o]ur holding should not be misconstrued as directing that a COA always must issue." Id. 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.

DENIES a certificate of appealability on the remaining issues in the petition.

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).

The Court CERTIFIES, pursuant to Fed. R. App. P. 24(a), that an appeal in this matter would be taken in good faith to the extent the appeal addresses the issue of ineffective assistance of counsel at sentencing. An appeal that does not address the issue of ineffective assistance of counsel at sentencing is not certified as taken in good faith, and Burns should follow the procedures of Fed. R. App. P. 24(a)(5) to obtain in forma pauperis status.

IT IS SO ORDERED this 22nd day of September, 2010.

s/Samuel H. Mays, Jr.
SAMUEL H. MAYS, JR.
UNITED STATES DISTRICT JUDGE

2005 WL 3504990
Only the Westlaw citation is currently available.

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

Court of Criminal Appeals of Tennessee,
at Jackson.

Kevin B. BURNS
v.
STATE of Tennessee.

No. W2004-00914-CCA-R3-PD.
|
Dec. 21, 2005.
|
Application for Permission to Appeal
Denied by Supreme Court
April 24, 2006.

Direct Appeal from the Criminal Court for Shelby County, No. P-21820; James C. Beasley, Jr., Judge.

Attorneys and Law Firms

Donald E. Dawson and Marjorie Bristol, Nashville, Tennessee, for the appellant, Kevin B. Burns.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; Michelle Chapman McIntire, Assistant Attorney General; William L. Gibbons, District Attorney General; and John Campbell, Assistant District Attorney General, for the appellee, State of Tennessee.

ALAN E. GLENN, J., delivered the opinion of the court, in which DAVID G. HAYES and THOMAS T. WOODALL, J.J., joined.

OPINION

ALAN E. GLENN, J.

***1** The petitioner, Kevin B. Burns, appeals the judgment of the Shelby County Criminal Court denying his petition for post-conviction relief. He was convicted of two counts of felony murder and two counts of attempted felony murder and sentenced to death on one count of felony murder and to life imprisonment on the second count of felony murder. His convictions and sentences for first degree felony murder, including the sentence of death, were affirmed on direct appeal by the Tennessee Supreme Court. *See* *State v. Burns,* 979 S.W.2d 276 (Tenn.1998). However, this court reversed the attempted felony murder convictions and sentences, finding these convictions did not constitute a crime in this state. *See State v. Kevin Burns,* No. 02C01-9605-CR-00170, 1997 WL 418492, at *9 (Tenn.Crim.App., at Jackson, July 25, 1997), *aff'd,* 979 S.W.2d 276 (Tenn.1998). The *pro se* petition for post-conviction relief resulted in the appointment of counsel and the filing of two amended petitions. An evidentiary hearing was conducted, and the post-conviction court denied the petitions. On appeal, the petitioner presents a number of claims in four broad categories: (1) he was denied a fair post-conviction evidentiary hearing; (2) he was denied due process; (3) trial counsel were ineffective; and (4) the imposition of the death penalty is unconstitutional. Following our review, we affirm the judgment of the post-conviction court.

FACTS

The proof, as set forth in our supreme court's decision, established the following:

> On April 20, 1992, four young men, Damond Dawson, Tracey Johnson, Eric Thomas, and Tommie Blackman, were sitting in a car in Dawson's driveway in Memphis. Dawson was in the driver's seat, Johnson was in the front passenger seat, Thomas was in the back seat behind Dawson, and Blackman was in the back seat behind Johnson.
>
> The [petitioner] and Carlito Adams, who knew Blackman, walked up to the passenger side of the car. Adams pulled out a handgun and told Blackman to get out of the car. When Blackman refused, Burns pulled out a handgun and went around to the driver's side of the car. Blackman got out of the car and fled. Adams said "get him," and three or four more men appeared from behind hedges and fired at Blackman.
>
> Eric Jones, age fourteen, was playing basketball at Dawson's house with three friends. Jones saw the men in the car removing jewelry and pulling money from

their pockets. Seconds later, Jones saw Blackman running toward him. Amidst gunshots, Jones and Blackman escaped to the back of the house; Jones' three friends ran to an adjacent yard. Once inside the house, Jones heard seven or eight more gunshots.

Mary Jones, Eric Jones' mother, lived across the street from the Dawsons. She saw Adams shoot Johnson once in the chest. She saw Kevin Burns shoot Dawson several times, walk to the front of the car, and then shoot Dawson again. Ms. Jones unequivocally identified Burns and stated that she got "a real good look in his face" as he ran toward her after the shootings.

***2** Tracey Johnson died at the scene. Damond Dawson, who suffered five gunshots to his arm, buttocks, chest, and hip was alive when police arrived but died after being transported to the hospital. Eric Thomas, who sustained gunshots to his chest and stomach, survived and made a photo identification of Kevin Burns two days after the incident. Thomas testified that Burns and the others had "opened fire" after robbing him and his friends of their jewelry and money. Thomas said that he initially told police he had been shot by Adams, but explained that he believed he was going to die and gave police the only name he knew, which was Adams.

On June 23, 1992, [the petitioner] was found in Chicago and arrested. After being advised of his rights and signing a waiver, the [petitioner] gave a statement in which he admitted his role in the killings. He said that he had received a telephone call from Kevin Shaw, who told him that four men had "jumped" Shaw's cousin. Burns, Shaw, and four others intended to fight the four men, and Shaw gave Burns a .32 caliber handgun. As the others approached a car with four men sitting in it, Burns stayed behind. He heard a shot, saw a man running across the yard, and fired three shots. He then left the scene with the other men.

After the guilt phase of the trial, the jury deliberated and returned verdicts of guilty for two counts of felony murder and two counts of attempted felony murder. The trial moved into the penalty phase of the proceedings for the jury to determine the punishment for each of the felony murder convictions.

....

Jonnie Dawson, mother of Damond Dawson, testified that Damond was the youngest of her three children and seventeen years of age when he was killed. She said he was a good son who was very good at athletics. The neighborhood had changed after the killings; people locked their doors and were afraid. Ms. Dawson testified that she no longer knew what it was like to be happy.

Brenda Hudson, mother of Tracey Johnson, testified that Tracey was the oldest of her three children and twenty years of age when he was killed. He had been working at Wal-Mart and saving money for his four-month-old daughter. Tracey's death had greatly affected Ms. Hudson' other two children, Tracey's grandfather, and Tracey's young daughter:

> When you go over to her house to see her, she has a picture in a frame and she will show you. She'll say, "this is my father-this is my daddy, Tracey. He lives in God's house up in heaven." And it's hard for me to go see her a lot because it breaks my heart to hear her say that.

In mitigation, Leslie Burns, the [petitioner's] mother, testified that the [petitioner] was twenty-six years of age and had twelve brothers and sisters. He had graduated from high school and presented no disciplinary problems while in school. The [petitioner's] father, Reverend Obra Carter, testified that his son had always been obedient and well-mannered. Phillip Carter, the [petitioner's] brother, testified that the [petitioner] had been active in the church and had always tried to avoid trouble.

***3** Norman McDonald, the [petitioner's] Sunday School teacher, testified that he had known Kevin Burns for several years. According to McDonald, Burns was a "faithful" young man who had always attended church regularly. Mary Wilson, a Captain with the Shelby County Sheriff's Department, and Bennet Dean, a volunteer chaplain, both testified that Burns had actively participated in religious services while in custody for these offenses.

The prosecution relied on two aggravating circumstances to seek the death penalty for the felony murder convictions-that the [petitioner] knowingly created a great risk of death to two or more persons, other than the victim murdered, during the act of murder, and that the murder had been committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another. Tenn.Code Ann. § 39-13-204(i)(3) and (6)

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(1997 & Supp.1998). With regard to the felony murder of Damond Dawson, the jury imposed the death penalty after finding that the evidence supported the "great risk of death" aggravating circumstance and that this factor outweighed the evidence of mitigating factors beyond a reasonable doubt. With regard to the felony murder of Tracey Johnson, the jury imposed a sentence of life imprisonment.

The trial court entered judgment in accordance with the jury's verdict. The Court of Criminal Appeals affirmed the convictions and sentences for the offenses of felony murder, but reversed the convictions for attempted felony murder based on our opinion in *State v. Kimbrough,* 924 S.W.2d 888 (Tenn.1996). After our review of the record and applicable authority, we affirm the Court of Criminal Appeals.

Burns, 979 S.W.2d at 278-79 (footnote omitted).

POST-CONVICTION HEARING

Harold Archibald, a Shelby County attorney, testified that he and Clim Madlock, Jr., were appointed to represent the petitioner at trial. Their representation lasted for a period of approximately seven months, during which time Archibald filed various motions requesting the assistance of experts, including ballistic experts, sociologists, psychologists, and drug-addiction experts. Archibald acknowledged that most of these motions were filed in anticipation of presenting proof during the penalty phase of the trial. Archibald and Madlock eventually withdrew as counsel when Madlock discovered that he knew some family members of one of the victims. The petitioner and his mother were informed of Madlock's acquaintances, and "the mother decided that she didn't want [Madlock and Archibald] on the case any more." Senior and junior trial counsel succeeded Archibald and Madlock as counsel of record. Archibald could not remember if he ever met with successor counsel or provided them with a copy of his file.

Archibald stated that, during the course of his representation, he met with the petitioner several times in jail to inquire about his family and background, specifically his educational background. Counsel learned that the petitioner graduated from West Memphis Senior High School in 1987 as an honor student and, later, attended Arkansas State University for half a semester. After leaving college, the petitioner remained in Jonesboro, where he worked at a Shoney's restaurant. The petitioner told Archibald that he also had worked at two restaurants in West Memphis and one in Memphis and as a carpenter for a construction company. Counsel asked the petitioner about his medical history, school activities, drug or alcohol use, and prior criminal convictions. The petitioner responded that he had suffered a broken arm, had no conduct problems while in school, had prior convictions for burglary and theft of property, had not used drugs, and had drunk beer on the date of the incident. Archibald said he would have sought further evaluation had the petitioner indicated that he had a drug or alcohol problem.

***4** Archibald negotiated an offer on behalf of the petitioner for a sentence of life imprisonment, conveyed the offer to the petitioner, and explained the meaning of a sentence of life imprisonment. Archibald further explained to the petitioner that he had the option of going to trial but that the State would seek the death penalty. However, the petitioner elected not to accept the State's offer.

During the course of his representation of the petitioner, Clim Madlock, Jr., learned that he lived across the street from members of one of the victim's family and also knew the victim. Madlock immediately told co-counsel and they informed the petitioner who requested that they talk to his mother and allow her to make the decision as to their continued representation. Madlock stated that the petitioner's mother did not want them to remain as counsel and, ultimately, they withdrew from the case.

Madlock testified that he and Archibald had filed motions requesting expert assistance but had withdrawn as counsel prior to the actual hiring of any experts. Madlock said that he "never heard anything about" the petitioner's having a drug or alcohol problem and that a mental evaluation was conducted out of an abundance of caution. The results of the evaluation showed that the petitioner was competent and that an insanity plea could not be supported.

After the petitioner's first counsel were relieved, senior and junior trial counsel were appointed as successor counsel. At the time of his appointment, senior counsel was in private practice, which was "ninety-five percent criminal." Prior to entering private practice, senior counsel had been a prosecutor in Shelby County for nine years, during which he handled as many as fifty capital cases and proceeded to trial in about twenty-five. He had been appointed in as many twenty-five

capital cases, with approximately ten going to trial. Senior counsel said that only two of these cases, one of which was the petitioner's, resulted in conviction. He could not recall attending any capital case exclusive seminars, although he had attended seminars sponsored by the Tennessee Bar Association or the local bar association that dealt with criminal law, including capital representation. He said that he had reviewed the Tennessee capital case manual produced by the Tennessee Association of Criminal Defense Lawyers.

Senior counsel testified that he and junior counsel shared equal responsibility for the entire case "up until trial, and then [at] some point [they] divided the witnesses that [they] would handle for trial both for the guilt and then for the sentencing stage." Senior counsel explained that sometimes they both met with the petitioner and, on other occasions, either he or junior counsel visited the petitioner alone. Senior counsel said he met with Archibald and Madlock on four or five occasions and they provided him with copies of the motions they had filed.

Senior counsel could not recall filing any additional pretrial motions other than the request for a private investigator, which was granted, resulting in his retaining Curtis Mull, a retired police officer. Having employed him on numerous occasions, senior counsel related that it was Mull's practice to interview all of the witnesses identified on the back of the indictment and from the State's list of witnesses. He recalled that although Mull had difficulty finding some of the witnesses, Mull was able to obtain "copies of the state's file ..., [*i.e.,*] copies of all the witnesses' statements and all the state's files that [counsel thought] existed at the time." Mull attempted to talk with the other participants but encountered difficulty. Senior counsel said that, in his opinion, Kevin Shaw should have been charged but that he never inquired as to why Shaw was not charged because the petitioner admitted he had a weapon and one of the participants had implicated the petitioner as the trigger man.

***5** Senior counsel said that he visited the crime scene on at least two occasions and "put the car where the cars were, that type of thing, and the way they were supposed to have left, the way they [sic] supposed to have arrived, and the witnesses' angles to see, just general-type crime scene investigation...." He also conducted a "door to door deal that is we go to the crime scene, and we'd go up and down the street knocking on doors ... to see anybody the police missed for instance, who may have seen something about the crime." Senior counsel said that the "door to door" was unsuccessful, as were his attempts to talk to Mary Jones and Tommie Blackman.

Senior counsel was able to convince the State not to try the petitioner first, and, in fact, he was tried last. Counsel said this was an important strategy because it allowed counsel to observe the witnesses in person and see what they were going to say under oath. Senior and junior counsel attended the first and second trials and obtained transcripts of both. Senior counsel said they "spent a considerable time in preparation for trial with [the petitioner] in term[s] [of] what [their] defense would be and in terms of trying to prepare him for trial and testify and that type of thing."

As to preparing a defense for the charges, senior counsel acknowledged that the petitioner had given a statement to the Federal Bureau of Investigation ("FBI") admitting that he was present at the scene and that he had a weapon and fired shots, this statement significantly limiting defense options. The defense was that the petitioner was a participant, but not the trigger man, and that he did not fire into the victims' car. In this regard, senior and junior counsel discussed obtaining a ballistics expert and requested funds from the trial court. However, after further discussion, counsel decided that a ballistics expert was not needed. Senior counsel said that establishing the petitioner's defense was difficult, in particular, because "nine out of ten people said he was the trigger person." Thus, the best proof that the petitioner was not the trigger person was going to come from the petitioner himself.

In formulating a mitigation strategy, counsel requested that the investigator contact approximately twelve friends, neighbors, teachers, and co-workers of the petitioner to testify on his behalf. Subpoenas were issued for Captain Mary Wilson, Officer Love, and Officer Walker, all employees at the Shelby County Jail. Senior counsel said that a teacher, two coaches, a minister, and a co-worker of the petitioner's, all from West Memphis, were subpoenaed. He said that he did not recall interviewing any witnesses in person and, if he spoke to any of them, it was by telephone. His recollection was that the witnesses were interviewed by their investigator. Of the witnesses subpoenaed, Captain Wilson, Bennett Dean, and Norman McDonald testified at the penalty phase. Senior counsel explained that twelve individuals appeared on the petitioner's behalf but, after talking to these people, counsel, with the consent of the petitioner and his parents, made a decision as to which witnesses to use.

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***6** Senior counsel recalled that the length of the petitioner's hair at the time of the crime was an issue, hone eyewitness having described the shooter as having a "jheri curl hair style that was rather lengthy." Specifically, Mary Jones said that the person who shot Damond Dawson was a "[r]eal dark man with a jheri curl ... around five-seven or five-eight, medium build ... in [his] late twenties." Counsel acknowledged that the petitioner had told him that he did not have a jheri curl at the time of the crime but, instead, had a "regular hair cut." However, the petitioner was unable to provide counsel with any witnesses to verify that he had "a normal haircut at the time that this incident occurred." Counsel said that not even the petitioner's parents would testify that the petitioner had a short haircut at the time of the incident. Moreover, the eyewitness could not identify the petitioner from a mugshot in which he had short hair, although she identified him at trial while he had a longer hairstyle. While the petitioner did provide counsel with a photograph of himself "with short hair, or a nonjheri curl hair, ... that photograph appeared to be of a much younger Kevin Burns and not Kevin Burns at the time of this incident ." Senior counsel testified that, at the time of his initial meeting with the petitioner, the petitioner had a "jheri curl style hair, and it was long...." He added that this "aggravated" him and that he attempted to persuade the petitioner to change his hairstyle for trial, but the petitioner refused to do so.

Senior counsel testified that he had maintained his files on the petitioner and, in 1999, had provided investigators with the post-conviction defender's office access to his case file. Although not accusing anyone of wrongdoing, counsel said that items were missing from his file that he knew were in the file prior to 1999. Specifically, it contained the transcripts from the trials of co-defendants Derrick Garrin and Carlito Adams.

Senior counsel said that he reviewed the transcripts of codefendant Garrin's trial prior to the petitioner's trial. During Garrin's trial, victim Eric Thomas identified Garrin as the individual who shot him and Damond Dawson, but, at the petitioner's trial, Thomas identified the petitioner as the individual who shot him. At Garrin's trial, Thomas described codefendant Carlito Adams "as being five-seven or five-eight and 170 pounds" and the other perpetrator as "[f]ive-eight, slim build, dark complexion, curl-like fade." In counsel's opinion, the other perpetrator's description matched the petitioner. Counsel acknowledged there was not "one hundred percent consistency among the witnesses and victims as to each role each player position [sic] around the car. They were mostly consistent in that [the petitioner] was not generally considered to be one of the first two people to arrive at the car, but I read that to mean when he gave that description because it didn't fit the description of somebody else, that that's who he was talking about."

***7** Senior counsel was also questioned about the statement of codefendant Carlito Adams. In his statement, Adams said he only knew two of the people he was with that day, Kevin Shaw and Benny Buckner. Accordingly, the inference could be made that when Adams referred to "Kevin," he meant Kevin Shaw and not the petitioner. Counsel agreed with post-conviction counsel that Adams' statement, in connection with Eric Thomas' statement at codefendant Garrin's trial, would place Kevin Shaw, not the petitioner, alongside Adams at the onset of the incident. Counsel explained that he did not use that assumption to argue that the petitioner was not this person, because Adams also "talk[ed] about the two individuals he [didn't] know ... as being the shooters."

Senior counsel explained his understanding of "presentation of mitigation" as "those factors that are enumerated in the statute in terms of presenting them and the defendant's case whether it be his age, his-any kind of mental problems, his role as a leader, or amount of participation in the crime involved, and thus his family history, society history ... educational background, work history." He acknowledged that he had never used the services of a mitigation specialist and that the function of such a witness was to perform the "background preparation."

Regarding mitigation investigation in the petitioner's case, senior counsel stated that only the services of Mr. Mull were employed. Although counsel could not recall the specific number of hours of work performed by Mull, he recalled that Mull was also the investigator in codefendant Garrin's case. Asked about one invoice representing that Mull performed eight hours of work, counsel said he would be surprised if "this was the only one." Counsel did not direct Mull to investigate the culture of West Memphis or the neighborhood where the petitioner grew up. He acknowledged that he did not know that the petitioner's backyard was connected to "one set of projects in West Memphis" or that gunshots had been fired into the petitioner's house. Counsel said that the petitioner's parents, Leslie Burns and Obra Carter, were divorced and that counsel attempted to interview the petitioner's siblings.

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Post-conviction counsel then inquired as to the voir dire process. Archibald had filed a motion for individual voir dire which was denied. Senior counsel explained that "the standard policy ... in Shelby County is that it's denied unless you begin to pick the jury and find that because of some pretrial publicity, individual voir dire may be warranted." He did not believe individual voir dire was requested to ascertain "people's views on the death penalty." In preparing for voir dire, senior counsel explained there were "standard questions that [counsel] try to ask in capital cases." He said they requested a jury list of the potential jurors "to get an idea of who they were, where they worked, their background, that type of thing."

***8** Following the petitioner's convictions, trial counsel presented nine issues for appellate review. Although the proportionality of the petitioner's death sentence compared to the general death sentence population was made, counsel did not argue the proportionality of the sentence compared to the sentences received by the petitioner's codefendants. Senior counsel said he believed that, although the issue was not raised, this court addressed the issue *sua sponte.* Counsel also challenged the constitutionality of Tennessee's death penalty statutes, although failing to raise the specific challenges to the unbridled discretion of the prosecutor that the death penalty statute violates the right to life. He acknowledged that a challenge to the denial of individual voir dire was not made. Senior counsel said he spent 218.9 hours on the petitioner's appeal.

On cross-examination, senior counsel acknowledged that the petitioner's statements placing him at the scene eliminated any use of an alibi defense, the statement being "that he was there, and that he was shooting at one of the victims, but he didn't hit the victim." Counsel added that the codefendants, with the exception of Garrin, "said that [the petitioner] was the trigger person." Codefendant Garrin said he saw the petitioner take jewelry from one of the victims. Counsel recalled that an unindicted participant, Benny Buckner, testified at codefendant Adams' trial. During that trial, the trial judge had Buckner arrested and charged with facilitation. Counsel did not believe that the petitioner was less culpable because additional people were involved.

Senior counsel acknowledged there was some difficulty in his relationship with the petitioner, resulting from the petitioner's refusal to change his hairstyle for the trial and rejection of what counsel believed to be an "extraordinary offer by the [S]tate ... to offer a bench trial [on both the guilt and penalty phase] ." Counsel was astounded by the offer because "[the trial judge] had a history of being opposed to the death penalty as a trial lawyer, and I mean adamantly opposed to the death penalty." He attempted to persuade the petitioner that this was a good option as, even if they lost at the guilty phase, it was unlikely that the trial judge would impose the death penalty since the two codefendants had received life sentences. Acting upon the advice of his mother, the petitioner rejected the offer. Counsel said that the petitioner relied more upon his mother's advice than that of experienced counsel. In this regard, counsel recalled that the petitioner's mother had told him that he had made up the fact that the petitioner had received property from the robbery. After this incident, the petitioner refused to discuss the facts of the case with counsel.

Senior counsel said that the petitioner was deemed to be the most important witness of the defense because he was adamant that the did not kill the victims and the jury needed to hear this testimony. The petitioner's testimony was essential, given the limited nature of the defense. Accordingly, counsel expected the petitioner to testify. However, at some point during the trial, the petitioner informed counsel that he had changed his mind about testifying. This decision of the petitioner had a great impact on counsel's trial strategy in that it removed a significant part of the defense. Counsel explained that he felt the reason they were proceeding to trial was for the petitioner to testify, *i.e.,* "[h]e wanted his day in court to tell that jury what happened out there." Counsel could not say, in hindsight, what he would have done differently to prepare for trial had he known that the petitioner would ultimately refuse to testify.

***9** Regarding mitigation evidence, counsel testified that the witnesses chosen to testify were those "who could say the most positive things about [the petitioner]." Counsel recalled that the petitioner's father was a minister and the petitioner was involved in the church. Mitigation witnesses were limited, however, to prevent cross-examination by the State into the prior criminal record of the petitioner. Counsel added that the petitioner's mother had instructed certain potential witnesses not to come to trial, specifically a next-door neighbor and perhaps someone from a school. The petitioner told counsel he agreed with his mother's decision. Counsel said that the petitioner's parents provided no indication that the petitioner had anything but a normal childhood and disagreed that a housing project located behind the petitioner's childhood home would have been worthwhile as mitigating evidence. Counsel said the petitioner never told him he had been shot; indeed, the only information of any

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injury to the petitioner was a broken arm. Questioned as to the proper amount of mitigation proof to present, counsel responded, "I think you can offend the jury with the proof that you put on a case such as this. You have to be careful what you do put on, and I have seen the juries offended with the proof that was presented to them."

Regarding counsel's planned trial strategy and handling of the case, senior counsel stated that the petitioner "had input on everything we did. Everything we did we ran by him. We got his approval or disapproval." Counsel could not recall any witness that he did not call that the petitioner wanted to testify. He did not call any of the codefendants as witnesses, for the only purpose of such testimony would have been to reveal their sentences, and counsel expected the State would have objected to this testimony. He opined that any inconsistencies between the testimony in the different trials would not have changed the fact that the petitioner was involved in the crime. He noted that the jury deliberated for two days on the guilt phase and for two days on the penalty phase.

Senior counsel said there was no indication that the petitioner had any mental problem or mental illness from the mental evaluation performed by Midtown Mental Health Center, from his family, or from his school history. Counsel said had anything been discovered that would have questioned the petitioner's mental condition, he would have sought additional assistance from the court. He rejected the idea that the petitioner did not understand the nature and consequences of his offenses. Rather, he stated that the petitioner understood the decisions to be made but refused to follow counsel's recommendations.

The post-conviction court then questioned counsel regarding the murder weapons. Counsel's recollection was that the murder weapons were not introduced during the petitioner's trial. The two weapons recovered from codefendant Garrin's porch were determined to be the murder weapons, one used to kill each victim. However, no testimony was introduced linking either weapon to the petitioner. Accordingly, counsel believed that a ballistics expert was not necessary.

***10** Junior counsel testified that he had been a practicing attorney since 1981 and was appointed to represent the petitioner in April 1993. He had worked as a public defender but at the time of his appointment was in private practice, the vast majority of which was criminal. Prior to his appointment to represent the petitioner, junior counsel had represented capital defendants, although he could not recall how many. He said that he had attended capital defense seminars presented by the Capital Case Resource Center and a three-day seminar in Atlanta that dealt exclusively with capital representation. He had a three-volume set of the *Tennessee Capital Case Defense Manual* and had consulted numerous books and references involving capital defense. He stated that he was familiar with the ABA standards for the appointment and performance of attorneys in capital cases.

Junior counsel recalled that a motion for individual voir dire was filed but was denied. Regarding the petitioner's trial, counsel stated that questions were asked to learn the potential jurors' views about the death penalty. No questions were asked to determine whether a juror would automatically impose death and not even consider a life sentence. Counsel clarified this statement, stating that he "would not ask a juror during voir dire about considering a life sentence because what that does is tell the jury that your client is already guilty all you're seeking is life." He stated that he and senior counsel had discussed the type of juror they hoped to have on the jury.

The theory of defense rested mainly upon the petitioner, specifically, his assertions that he had fired into the ground or the air, that he did not know the victims, and that he was not culpable. In this regard, a focus of the defense was to challenge the identification of the petitioner by the eyewitnesses. Junior counsel recalled that, during the petitioner's trial, victim Eric Thomas identified the petitioner as the individual who shot him. Counsel attempted to impeach Eric Thomas' identification by use of Thomas' statement to police identifying Carlito Adams as the shooter. Thomas explained that he gave Adams' name because that was the only name he knew. During the trial of codefendant Garrin, Thomas described the person who walked up to the car with Adams as "tall, probably five-eight, slim built, dark complexion, curl-like fade." Counsel acknowledged the discrepancies in the testimony was a focus during their preparation. Counsel also noted that a problem during preparation and trial was that witnesses confused the petitioner and Kevin Shaw. Counsel identified Kevin Shaw's statement, which listed Shaw's address and telephone number, and acknowledged that Shaw's telephone number matched the telephone number for "Kevin" given by Adams in his statement. Based upon Adams' statement, counsel agreed it would be "a fair assumption" that Adams was referring to Kevin Shaw when he said "Kevin and I walked up to [the victims'] car."

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***11** Junior counsel asserted that the petitioner's refusal to testify was devastating to the defense, explaining that his testimony, although an admission to participation in the offenses, would have established that his involvement was not significant enough to "get him the death penalty." Although the petitioner's testimony would have been sufficient to support a conviction for felony murder, the defense strategy was to show him as less culpable than the other participants. Counsel acknowledged that most of this information came in through the admission of the petitioner's statement to the FBI.

Junior counsel described their penalty phase defense as "[v]ery weak." Counsel had evidence that the petitioner "was in fact a good person" but were prevented from introducing the testimony of some witnesses because it was cumulative. He stated there "was a coach from the high school ... another couple of family members that we were able to get to testify." Despite these witnesses testifying that the petitioner was a good person, his prior record established that he was not.

Junior counsel said that five mitigation witnesses were presented: Elder Norman McDonald, a pastor who had known the petitioner his entire life; Mary Wilson, a captain at the Shelby County Jail; Bennett Dean, a pastor at the jail; Elder Phillip Carter, the petitioner's half-brother; the petitioner's mother; and the petitioner's father. Counsel stated that the plan was to present (1) "good-guy" mitigation evidence and (2) a picture that the petitioner did not deserve the death penalty. Counsel wanted to establish that the petitioner had a good childhood and that there was no reason for him to be involved in this situation. Counsel said the petitioner's mother prevented certain mitigation evidence from being introduced, explaining that she "basically controlled this case as far as whether or not people would talk to us, and during the negotiations and talking to her and talking to his dad at one point it got to the point that she didn't want anybody, any family members or anybody from West Memphis to anything do [sic] with us at all period." He said her actions prevented them from being able to use people from the petitioner's community who knew him as a child. Junior counsel acknowledged they did not conduct an investigation into the culture of West Memphis, Arkansas, explaining that West Memphis was "just across the river" and "not that much different" from Memphis.

Junior counsel related that the petitioner's father was a minister and "relatively strict on him in regards to what he could do and what he could not do." However, his father had a separate family with another woman that he raised alongside the petitioner's family. That is, the petitioner's father had "two sets of children all about the same age, two different women ... that he was taking care of and all right there in West Memphis." Counsel found this peculiar but not to the extent that it created mitigation evidence. Although his father played a role in his life, the petitioner was more influenced by his mother. Counsel recalled that the neighborhood in which the petitioner was raised was not a violent neighborhood. While counsel acknowledged that information that shots had been fired at the petitioner's house might have been useful in mitigation, counsel had no information that a shooting had ever occurred.

***12** Asked about the nature of the work of a mitigation specialist, junior counsel responded:

> They go out and they dig up every conceivable record of an individual's past, from birth to dropping on heads to being deprived of oxygen up until the actual day of trial, and that's [what] the mitigation specialist does, and they accumulate a vast volume of information that really has-carries very little or no weight.

He acknowledged that mitigation specialists have some degree of expertise in interviewing people in the community about someone's background.

Junior counsel recalled that, while incarcerated prior to trial, the petitioner had been "converted" and believed that "the Lord would take care of him that all would be fine and well that he had prayed." Counsel stated that the petitioner "was not ... any kind of religious fanatic."

Junior counsel explained that, in preparing this case, counsel had problems communicating with the petitioner's family, saying "[i]t was like the proverbial run into a brick wall." Certain family members refused to cooperate with counsel. Despite counsel's explaining the seriousness of the charges and the circumstances of the offenses to the petitioner's mother, she was adamant in her belief that he "had not done anything that he was totally innocent that we were the people ... trying to do something to him or trying to hurt him or whatever, and she just basically shut down." During their investigation, senior and junior counsel learned that the

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petitioner and his mother were very close and that she had "assisted him in that little trip to Chicago evading arrest."

From the onset, the petitioner was involved in creating a mitigation strategy and even informed counsel of potential witnesses. Junior counsel added that several potential witnesses refused to testify because either they did not want to be bothered or did not remember the petitioner as well as the petitioner thought they did. Counsel felt that it was bad practice to compel a witness to provide mitigation evidence. Several witnesses were present and ready during the penalty phase to give mitigation evidence but were not called out of caution that their testimony would open the door to the petitioner's prior West Memphis convictions and would have merely been cumulative to the other testimony already presented.

Junior counsel again stated that there was no indication whatsoever that the petitioner suffered from any mental or personality defects. His family had informed counsel that the petitioner had a decent childhood, knew both of his parents, attended school, and had food and clothing. From every indication, the petitioner was "very normal."

Junior counsel explained counsel's efforts to convince the petitioner to adopt a different hairstyle before trial. He stated that the petitioner had a "pretty long" "jheri curl" when he first met him. During the initial investigation, counsel discovered that one eyewitness identified the shooter as having a "jheri curl" and that "out of all the [participants] ... nobody else had a jheri curl except [the petitioner]." Counsel was unable to locate any witness that would testify that the petitioner had short hair at the time of the incident.

***13** Junior counsel argued the appeal of the case to both this court and the supreme court. He raised the issues that he felt had weight and that they might "get some relief on." He felt it unnecessary to "bog the court down with peripheral issues when if I can key in on something that may allow [the petitioner] to walk or go home, that's what I'm going to do." Counsel stated that he was successful on some grounds on appeal, for instance, the introduction of certain victim impact evidence. Additionally, the petitioner's two convictions for attempted felony murder were reversed.

Junior counsel said that he had never heard of Kevin Whitaker. He did know that, at the time of the incident, the petitioner was involved in rap music. Many questions were asked of the petitioner related to rap music, but Kevin Whitaker's name was never mentioned.

Mary Jones testified that she lived across from the Dawsons' residence and that she testified at the petitioner's trial, where she described the man she saw shoot Damond Dawson as having shoulder-length jheri curl hair and wearing a long, black trench coat. She also saw the man who shot Tracey Johnson and described him as "a brown-skinned guy, tall, ... about six-two, six-three, weighed about 250 pounds." Johnson's assailant was the "largest one" in relation to the other people she saw around the victims' car. Ms. Jones identified the petitioner as the assailant sporting the "[s]houlder length jheri curl."

Kevin Whitaker, a pastor at Mount Episcopal Baptist Church in Crawford, Arkansas, testified that he had known the petitioner for approximately sixteen years. In 1990, they, along with Derrick Garrin, were in a rap band known as S.I.R., Superior Illustrated Rappers. Whitaker also had a record company at that time called Unlimited Phonic Records. Whitaker knew Kevin Shaw and Benny Buckner, who were in a rap band called Brothers of the New World. Whitaker introduced the petitioner and Kevin Shaw. Kevin Shaw's father helped finance Mr. Whitaker's record company.

On April 20, 1992, Whitaker received a telephone call from Kevin Shaw, asking him to accompany Shaw and Carlito Adams to Memphis to help him "tak[e] care of some people that he was having a problem with." Whitaker did not go because he knew that "[Shaw] was kind of shady ... I didn't trust going nowhere [sic] with him at that time." Whitaker recalled that in April 1992, Shaw wore his hair "kind of like a high top, kind of like a high-top fade type of deal" and often wore a trench coat. Whitaker thought Benny Buckner also wore a trench coat because that "was like the nature of their group the way they dressed and everything." According to Whitaker, Buckner had the same hairstyle as Shaw. Questioned about the petitioner's hairstyle in April 1992, Whitaker responded that his hairstyle was "[l]ike mine is now," "low on the scalp." He said that, during April 1992, the band S.I.R. was in the process of changing its name to H.O.H., and no member of S.I.R. or H.O.H. ever wore trench coats as part of the band costume.

***14** Upon questioning by the post-conviction court, Whitaker stated he knew that two members of his band, the petitioner and Garrin, were indicted for murder. He said he

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had been available and would have testified at the petitioner's trial if asked.

Lloyd Davis was the jury foreman in the petitioner's 1995 trial and, during the course of his service, had a Bible in his possession. He testified that, during jury deliberations, he recited a verse from Isaiah "about God was telling that his thoughts were not our thoughts, and his ways were not our ways." He explained that he recited the verse because "there was some indecision on the parts of a juror, and she just said ... something about God wouldn't ... allow her to make her decision to give somebody the death penalty or something like that."

The petitioner was a student in Arlee Bruce's senior English class at West Memphis High School, and Ms. Bruce testified that the petitioner was never a disciplinary problem and was always "mannerly" and "very respectful." She could not recall a time when he was punished with in-school suspension. She said that the petitioner and a fellow student, Paul Burks, "were always together," and she considered the two of them to be "model students." She said the petitioner "made good grades."

Samuel G. Brooks testified that he went to school with the petitioner and played junior high football with him. After graduating from high school in 1987, Brooks entered the military but remained friends with the petitioner, visiting him when he was home on leave. He described the petitioner as one of his "main friends." Brooks was discharged from the military in 1992 and returned home to West Memphis where he was informed by the petitioner's mother and sisters that the petitioner had been arrested. He said that Paul Burks was a mutual friend of his and the petitioner's and that Burks had passed away. Brooks said that, during the "period after high school," the petitioner wore his hair in a "low fade," and could not recall a period during which the petitioner wore a "jheri curl." Brooks said the last time he saw the petitioner, in March 1992, he was wearing a "low fade." He said he was not contacted by the petitioner's trial attorneys.

Rodney Weatherspoon testified that he grew up in the same neighborhood with the petitioner. They saw each other about three times a week after they graduated from high school. At one point, they were in a rap group together known as the "Hall of Hell," which consisted of "six to eight" members, mostly from West Memphis. Kevin Shaw, a resident of Memphis, was a member of the group and wore "baggie pants" and "[s]ometimes" a trench coat and dressed "[s]omewhat" differently from the members from West Memphis. The petitioner dressed like the other members from West Memphis, *i.e.,* "T-shirt, Levis, tennis shoes." Weatherspoon said that the members from West Memphis wore their "hair in fades," while the members from Memphis preferred "the processes with the chemicals and whatever." He recalled that Kevin Shaw had longer hair and "mostly wore the little curl." Weatherspoon remarked that he never knew the petitioner to wear his hair long or to wear a jheri curl.

***15** Leslie Burns, the petitioner's mother, testified that she became involved with his case shortly after his arrest. She recalled that initially he was appointed attorneys, but they were dismissed because one of them "had a lot of involvement with the victim's families." She then retained an attorney for the petitioner, paying him a $700 retainer fee and signing an agreement to pay $17,000 for his representation. However, this attorney was dismissed by the trial court as not being qualified to handle a capital trial, and the court appointed senior and junior trial counsel. She and the petitioner's father, Obra Carter, met with senior counsel and gave him addresses, information about the family, and telephone numbers. Ms. Burns related that, at this time, two of her sons lived in Chicago, three daughters had moved out, and three daughters lived at home with her. Counsel did not seek information regarding the siblings who did not live at home.

A second meeting, lasting under an hour, was held during which both senior and junior counsel were present. Counsel discussed the petitioner's case with Ms. Burns but did not ask about the petitioner's background or for her to sign releases of information. At the conclusion of this meeting, Ms. Burns "left ... knowing what [the petitioner] was charged with but they never told [her] anything about any evidence." She understood that the petitioner had been charged with two counts of first degree murder and that the codefendants would be tried separately.

She attended the trials of Carlito Adams and Derrick Garrin, although not in their entirety, and never saw the petitioner's attorneys at those trials. She said that Derrick Garrin went to school with her son and lived in the same neighborhood, but she did not know Carlito Adams prior to this incident. During their trials, Ms. Burns took notes which she attempted to give to senior counsel, but he said he did not need them. She stated that junior counsel was "kind," but senior counsel was "always rude to [her]." She noted that she only met with junior counsel twice, with one meeting occurring in the courthouse.

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Ms. Burns recalled that senior counsel talked to her about convincing the petitioner to accept a life sentence, saying "it was the only thing he could do." She did not agree with counsel's suggestion because she believed that a death sentence was an impossibility, based on the fact that the death penalty was no longer being sought "in the young man's trial [she] was at that day ." She did not think it was "fair" for counsel to ask the petitioner to accept a life sentence because she "believed" in her son and "didn't believe he deserved that." She said that trial counsel never informed her as to the exact nature of the charges against the petitioner, *i.e.,* the elements of the offense. She did not know that the State was seeking the death penalty until the petitioner's trial had already started. Trial counsel never visited her in West Memphis or tried to contact any of her children or any of Obra Carter's children.

***16** She said she attended every day of the petitioner's trial. During the trial, senior counsel was "[r]ude as usual." The first time she learned of the bifurcated proceedings in a capital trial was the day that the jury returned guilty verdicts as to first degree murder. Prior to this, counsel had never discussed the need for evidence about the petitioner's life and background, and she did not learn that she was to testify during the penalty phase until the day she was called as a witness. She denied telling other individuals not to come to court or not to cooperate with the petitioner's attorneys.

Ms. Burns said she had five children with Nathaniel Burns: Billy Ray Burns in 1956; Brenda Fay in 1958; Nathaniel Burns, Jr. in 1959; Patricia Ann, in 1960; and Michael Anthony in 1962. They separated in 1962, and, in 1967, he left Arkansas for better employment. In November 1963, she met the petitioner's father, Obra Carter, in West Memphis, and they began dating a few months later. Although they never married, their first child, the petitioner, was born on April 20, 1969. Four more children followed: Sharon in 1971, twins Robin and Lisa in 1973, and Renita in 1974. At some point, she learned that Carter had another girlfriend, Louise Hall, who lived in Memphis, with whom he had twin boys. Ms. Hall eventually moved to West Memphis, and Carter "was just back and forth" between the two families. Her relationship with Carter ended in late 1979 or early 1980. She and her children had lived in rented two-bedroom houses in West Memphis until 1971, when she was approved for a four-bedroom apartment in a housing project in West Memphis. She resided in this apartment with her children until 1975, when she was evicted for having another child, Renita, which was against "the rules." During this time, she regularly received child support from Nathaniel Burns. Although Obra Carter never provided child support, he did take "care of some of the major things like the rent, utilities, buying food or clothing or whatever the children might need." She eventually moved to Memphis with her children; however, two incidents occurred that caused her to move back to West Memphis. Specifically, the petitioner was "lost" for approximately four or five hours one day after he was mistakenly dismissed early from school, and her daughter, Lisa, had suffered from lead poisoning caused by paint chips in the house they were living in at the time.

In 1976, Obra Carter purchased a house on East Polk Street in West Memphis for Ms. Burns and her children, and, in 1998, he transferred ownership of the house to her. The one-thousand-square-foot house contained three bedrooms, a living room, a small dining area, a kitchen, and one bathroom. When she moved into the house, Ms. Burns had seven children and one grandchild living with her. She said that Carter visited two or three times a week to check on the children but never lived with them. Carter eventually married Louise Hall, and Ms. Burns was often embarrassed by the fact that she had four children by Carter and that he was married to another woman.

***17** Ms. Burns said that her son, Nathaniel Burns, Jr., was murdered in Gary, Indiana, on July 9, 1996, by her brother, Alex. On cross-examination, Ms. Burns affirmed her trial testimony that the petitioner was "a good son, never caused any trouble."

The post-conviction court then questioned Ms. Burns regarding Archibald and Madlock's representation of the petitioner. Specifically, the court made inquiry as to Ms. Burns's basis for objecting to their continued representation. She said that, in her opinion, Madlock was more attentive to the victims' families than to her. She "was concerned that [Madlock's] friendship with them would be more than his concern for [the petitioner]." She said that, at the time of the incident, the petitioner was still living with her. She recalled trial counsel trying to get the petitioner to cut his jheri curl hairstyle, which he got while in jail. She did not know until trial that the shooter allegedly wore a jheri curl.

Regarding the petitioner's prior convictions, she said the theft conviction was the result of a misunderstanding. Her niece's husband had asked the petitioner to help him pick up an air conditioner, but it turned out that the air conditioner was stolen. The petitioner was placed on probation for this offense.

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She acknowledged that the petitioner was arrested for the instant offenses in Chicago and had given a statement to law enforcement officials there.

Ms. Burns, on redirect examination, confirmed that, at the time of the incident, the petitioner wore his hair "short" and only started growing his hair long after he was arrested. She did not know why he was growing his hair longer, but she had observed that "just about every young man that [she] saw when [she'd] come to visit this facility had that Jheri Curl in their hair and they got it here from somewhere upstairs where they were incarcerated."

Louise Carter, the petitioner's stepmother, testified that she met Obra Carter in May 1959 in West Memphis. She knew that he had a girlfriend, Zettie Clark (Thomas), at the time who he married in 1961 because she was pregnant. Mrs. Carter continued to see Mr. Carter "off and on" during his marriage to Zettie Clark and later became pregnant, giving birth to twins, Reginald and Ronald, in September 1962. The following month, she and the twins moved in with Carter. More children followed: Marcus Antonio, 1965; Frederick, 1966; Yolando, 1967; Phillip, 1968; Michael, 1971; Steve, 1972; and Dericus, 1985. Mrs. Carter stated that she and Mr. Carter had never really separated and explained that their times apart were because his job took him out of the area.

In 1964, Mrs. Carter heard rumors that Mr. Carter was seeing Leslie Burns. At that time, Mr. and Mrs. Carter had a "common law" union but were not legally married until 1979. Mrs. Carter questioned Mr. Carter about Leslie Burns, but he denied any relationship with her. She recalled an incident at a medical clinic during which she was questioned about payment of a medical bill, the "collection agent ... ask[ing] [her] ... who is the wife. Is it you or is it Leslie Burns?" It was only when Mrs. Carter confronted Mr. Carter with the medical bills that he admitted to her that he was the father of five of Leslie Burns's children. Mrs. Carter said that, sometime after this event, Mr. Carter introduced his children by Ms. Burns to their children. Mrs. Carter said she was never contacted prior to trial by counsel for the petitioner and would have been willing to testify on the petitioner's behalf.

***18** Renita Jo Burns, the petitioner's sister, testified that, in 1992, she lived at her mother's home along with the petitioner. She had never known the petitioner to have shoulder-length hair or use chemicals on his hair. She recalled that, at certain times, there was as many as twelve people living in their home. She recalled hearing gunshots "[a]lmost every day" coming from the projects. The gunshots, which occurred mainly at night, frightened her because she feared one of the bullets would strike their house. When she was about fourteen years old, one bullet did strike their house, shattering a mirror in her mother's room. Although they never had to call the police to their neighborhood, she saw "police cars all the time over in the projects." There was a liquor store directly behind their house where numerous fights occurred, and men often relieved themselves in their backyard, all of which frightened her.

She said she and the petitioner had a good relationship, the two being "real close" and spending much time together. She regarded the petitioner, her oldest brother, as the man of the house because their father was not there, and he acted as a chaperone to his younger siblings. They saw their father "every two weeks or something like that. Not often." Renita added that their father never attended their birthday celebrations, nor did they receive birthday gifts from him. When their father did visit them, he was "real strict" with them, often yelling at their mother. She learned of her father's other family when she was about five or six years old when he took all of the Burns children to meet the Carter children. She said she was never contacted by trial counsel and would have testified at trial.

On cross-examination, Renita Burns stated that, although her home was crowded, they all loved one another, got along with one another, and took care of one another. She conceded that her mother had raised them well. On redirect, she explained the difference between her mother and father's method of discipline. She stated that Obra Carter threatened the children with a "whipping" if they disobeyed and recalled one incident when her father "whipped" her with a switch, leaving marks on her legs. Their mother established rules and the children basically obeyed her.

Robin Michelle Burns, another of the petitioner's sisters, confirmed that Mr. Carter "whip[ped]" them for things such as leaving the house or playing with the neighbors. She described the "whippings" as Mr. Carter striking the children's legs or arms with a switch or belt. If the children were not at home when Mr. Carter arrived, they were punished because he wanted them at the house at all times. She said that their father whipped the petitioner on several occasions, once striking him with a belt by his ear. She said she was never contacted by trial counsel and would have testified at the trial if asked to do so. Upon examination by the post-conviction court, she stated that Mr. Carter spanked her and her siblings "a lot"

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during their childhood. Their mother, however, never spanked the children. Rather, she took away the children's play time or imposed other restrictions as a means of punishment. When their mother worked at night, the children locked the door and stayed in the back watching television. When their mother was not at home, they were not allowed outside of the house. She said she dropped out of high school in the eleventh grade. She had no knowledge of the rap band that the petitioner was involved in at the time of his arrest, although both were still living in their mother's house. She did not think that the petitioner was employed in 1992.

***19** Brenda Burns, the petitioner's half-sister and the oldest daughter of Leslie and Nathaniel Burns, testified that Obra Carter visited her mother's house once or twice a week, sometimes spending the night. Her mother returned to work after Sharon was born in 1972, leaving her in charge of the younger children. Ms. Burns could not recall a time when their electricity had been disconnected because of non-payment. She denied ever hearing gunshots coming from the projects while at her mother's house but said she had been in the projects and heard gunshots. Ms. Burns lived with her mother until 1979; her children, however, remained at her mother's house.

Phillip Carter, a son of Obra and Louise Carter and the petitioner's half-brother, testified that he was employed as a Crittenden County, Arkansas, juvenile probation officer and also as a deputy sheriff. He testified at the petitioner's trial in 1995, at both the guilt and the penalty phase. He first met the petitioner's attorneys "minutes prior to [his] testimony," saying that he was in the courthouse because he had already planned to attend the petitioner's trial. He was not advised as to the nature or scope of his testimony and was not questioned as to his relationship with the petitioner.

Phillip Carter recalled that his 1995 testimony was limited to whether he grew up with the petitioner, what schools he attended, and what kind of person the petitioner was. Carter recalled being questioned as to whether the petitioner had ever moved away, to which he responded that he had in 1991, but was never asked the reason for this move. He explained to post-conviction counsel that the petitioner had moved to Jonesboro to gain employment with a Shoney's restaurant. At the time, both Carter and the petitioner had been working at the Shoney's restaurant in West Memphis. The petitioner was asked by the executive manager, who had been transferred to the Jonesboro location, to accompany her to that location as her assistant and he accepted this offer. The petitioner returned to West Memphis a year later, where he worked at the local Shoney's restaurant. Mike Hissong, the district manager, offered the petitioner a position at a Shoney's restaurant in Memphis, which the petitioner accepted. The petitioner was still employed by Shoney's at the time of the incident leading to his arrest. Phillip said trial counsel never asked him about the petitioner's employment.

Regarding "house rules" during his childhood, Phillip Carter explained that they were not allowed to leave the yard without permission, had to make their beds as soon as they awakened, and had to complete all of their household chores and homework assignments. Fighting was not tolerated. He said the rules, especially the one about not leaving the yard, were strictly enforced. In rationalizing his father's rules, Phillip explained that their neighborhood was "somewhat dangerous." He said they walked to school, which was about five blocks from their home. The children referred to their yard as "Alcatraz or imprisonment." When their father was not at home, his mother allowed the children to leave the yard with the understanding that they return at a designated time. He said that failure to obey his father's rules resulted in "corporal punishment." He described "corporal punishment" as "[w]hippings" with a belt or, on one or two occasions, "extension cords." Although the whippings sometimes caused "a small welt," they never broke the skin.

***20** Phillip Carter described an incident during which he, Michael, Steve, and the petitioner were playing basketball in the backyard and "tempers flared up," resulting in a physical confrontation. Their father "called it to a halt" and directed the children to come to him, but Phillip refused. This incident resulted in Phillip leaving the home to stay at his sister's house for the night. He returned home the next day and was disciplined along with his brothers.

Phillip Carter further testified that the Carter children were allowed to participate in extracurricular activities and that his neighborhood was considered better than the petitioner's because there were gang members, "[t]he Rayfield Posse," near the petitioner's neighborhood. He stated that area had a high crime rate and was "still the highest crime area in West Memphis." Phillip testified that there was another gang, "the Delta Dogs," that operated near his neighborhood. The "Delta Dogs" and the "Rayfield Posse" were rival gangs and fought often, with most of the fights occurring at school sporting events. The gangs fought with brass knuckles, bats, sticks, guns, knives, and ice picks. He added that much gang activity, including robberies, occurred at the market

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behind the petitioner's house. In this regard, Phillip recalled an incident where a friend of the petitioner's, Paul Burks, was "jumped on" by the Delta Dogs as he got off of the bus. The petitioner witnessed this beating and fled for his own safety. Phillip stated that neither the petitioner nor Burks was associated with the Rayfield Posse, although most people in the neighborhood were associated with one of the two gangs.

When he was twenty-one years old, Phillip Carter purchased and registered a gun which was later destroyed by the City of West Memphis. He explained that the petitioner had asked to borrow his hair clippers and he kept his gun in the same bag as the clippers. Forgetting about the location of his gun, he gave the petitioner the bag and the petitioner was arrested for carrying the weapon. In lieu of fines for the petitioner, Carter agreed to let the city destroy the gun. Carter stated that the petitioner did not have long hair prior to his arrest.

On cross-examination, Phillip Carter stated that the petitioner was never in trouble as a juvenile and that no one in either family got into trouble because their father would have been extremely upset if any of them broke the law. Carter also admitted to the post-conviction court that both he and the petitioner were raised to know the difference between right and wrong. There were nine children in the Carter home. Carter described their house as a four-bedroom house with two full bathrooms. He stated that the Carter house was "a bit larger" than the Burns house.

Steve Carter, the second to youngest child of Louise and Obra Carter, testified that he previously had been convicted of selling drugs and had spent time in prison for this conviction. At the time of the hearing, he lived in West Memphis and was employed as a forklift operator. He recalled his first meeting with the petitioner and his siblings. After that meeting, the petitioner played sports and attended church activities with the Carter children. Carter also visited the petitioner at his house and described the neighborhood as "pretty good." He stated there were "[a] few gangs" around the neighborhood, but the petitioner was not involved in them, and there were "quite a few gangs" in his own neighborhood. The gang associated with the petitioner's neighborhood was the "Rayfield Posse," and the gang in his own neighborhood was known as "NWA," "Niggers with Attitude," of which he was a member. The petitioner was associated with "NWA" because he was Carter's brother. Carter's membership in "NWA" caused the petitioner problems in his neighborhood on one or two occasions, and once shots were fired at the petitioner.

***21** Steve Carter reiterated the testimony of his brother, Phillip, regarding Obra Carter's rules for his children. To his brother's list of rules, Carter added several, including the children had to eat what their mother cooked, attend every church activity, and not share food with other people. Regarding this last rule, he explained that they could not accept a cookie from a friend and described an incident that happened at a football game where he took a bite of a friend's pickle. His father observed the incident from the stands and later took him home and beat him. Carter testified that he received "beatings" with a belt or extension cord "almost every day." He described the beatings as "[n]onstop. I mean he had to get tired before it would stop." Carter added that the beatings caused "[b]ad bruises and welts" and that the petitioner received beatings also. Obra Carter hit their mother, Louise Carter, "[p]lenty of times" and often embarrassed Mrs. Carter and all of the children, including the petitioner, in public. He said that their father would embarrass the children by making them come inside the house when they were playing ball with their friends. He also recalled hearing about an incident when Obra Carter broke Leslie Burns's jaw.

Questioned by the post-conviction court, Steve Carter stated that some of his brothers, Reginald, Ronald, and Fred, had been incarcerated for various misdemeanors. He knew about the petitioner's involvement in a rap band and knew Derrick Garrin from school. He watched the band perform and attended a recording session. Carter said he had never known the petitioner to wear long hair, saying "[h]e always kept short hair. Real short."

George Michael Hissong, a senior vice-president with Shoney's Restaurant, testified that in 1991 the petitioner was employed at the West Memphis location, where he was general manager. Hissong recalled that the petitioner was a good worker and "mov[ed] up through the ranks." He added that the petitioner had no difficulty learning his job duties and was dependable and polite. Hissong stated that, at the time of the petitioner's arrest, the petitioner wore his hair "short." He was surprised to learn of the petitioner's involvement in a killing because it was contrary to the petitioner he knew. He stated that he was never contacted by the petitioner's trial counsel or an investigator. In 1995, he was in Memphis, Tennessee, employed at Shoney's.

Thomas Bloom, a Nashville-based attorney, testified that he "had run an ad ... in the Tennessee Bar Journal advertising [his] services as an appellate attorney, as well as a research

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and writing attorney." After he was contacted by senior trial counsel to prepare the petitioner's initial appellate brief for the Tennessee Supreme Court, he obtained a copy of senior counsel's brief that was submitted to the Court of Criminal Appeals. He said that the appellate issues were developed by senior and junior counsel and that he was not at liberty to add any other issues. He filed the brief with the Supreme Court on behalf of senior and junior counsel.

***22** Dr. Lee Norton, a clinical social worker, testified as to the duties of a mitigation specialist:

> The primary role of the mitigation specialist is to assist the attorney by conducting a comprehensive social history evaluation of the client. Other roles that the mitigation expert may play are to educate the attorneys about areas concerning mental health issues, issues of working with impaired clients and their family members and individuals who know them and have information about them, working with developing a team that's going to be best suited for the needs of the client, conducting research into special topics.

Dr. Norton recognized that attorneys and their staff, including investigators and paralegals, are trained to gather relevant information, yet they are not trained to detect signs of mental illness or other problems. This factor may inadvertently impede the ability to gather sensitive information. Dr. Norton opined that another crucial task is to gather social history information of the defendant's family before the defendant's birth. Dr. Norton stated that "three generations of research [is completed] in order to find out important patterns," known as a genogram, or annotated family tree. Dr. Norton stated that the genogram of the petitioner was incomplete because the research was not complete. She said the background information not only includes interviews but also securing various documents, and she explained that it took her three years to obtain one document from the FBI.

Dr. Norton testified that she was asked by post-conviction counsel to conduct interviews and locate documentation that could assist counsel in learning about the petitioner's family. Immediately, barriers to communication were apparent. Dr. Norton noted that some of the petitioner's siblings had problems and that there was an unusually large number of people in the family. She further noted that "it wasn't a traditional family in the sense that [the petitioner's] father was married and had a relationship with [the petitioner's] mother and children were born to both." There were also suspicions of problems in the neighborhood that could have influenced the petitioner.

As her investigation continued, Dr. Norton discovered that there had been a communication problem between trial counsel and the petitioner and his family. She acknowledged that this was evidence of counsel's "improper skills" or "inability to recognize barriers." She opined that trial counsel were unable to establish trust and rapport with the petitioner's family. She stated that neither she nor the post-conviction defender's investigator had any problems establishing a rapport with Ms. Burns. Dr. Norton stated that Ms. Burns was always willing to talk with her and never refused to discuss anything pertaining to herself, her family, or the petitioner. Dr. Norton said, however, that she relied upon her clinical skills in interviewing Ms. Burns, in order to let Ms. Burns "set the pace" and discuss matters in her own way. She stated that she interviewed Ms. Burns four times, gathering new information at each meeting. During these interviews, Ms. Burns was cooperative and related her difficulty with trial counsel. In interviewing Ms. Burns, Dr. Norton found it significant that she discussed her own childhood and her relationships with men. Dr. Norton also found it significant that Ms. Burns had been injured by Obra Carter. Trial counsel were not privy to this relevant information.

***23** Dr. Norton related that Ms. Burns had experienced trauma "throughout her lifetime." One of the earliest traumatic experiences was when her sister fell into a fireplace and was badly burned. This accident affected the dynamics of the family because their grandmother, who raised them, treated the two sisters differently. Ms. Burns had an excessive amount of chores and had to balance school work with her work in the cotton fields. At age fourteen, Ms. Burns left her grandmother's home and became involved with Nathaniel Burns. They subsequently had five children together; the first, Billy, was born with severe brain damage and diagnosed with cerebral palsy. Dr. Norton related that the presence in a home of a child with Billy's disabilities creates a "risk factor" as to the other children in the household. Other "risk factors" included the fact that Ms. Burns "had so many children in quick succession" and her resultant physical problems, the

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fact that she was not legally married to Nathaniel Burns, a catastrophic injury sustained by Nathaniel Burns and the impact of this injury on his earning capacity, and the couple's eventual separation.

Regarding the relevance of these events that occurred prior to the petitioner's birth to Ms. Burns's ability to nurture and care for the petitioner, Dr. Norton stated that Ms. Burns "endorsed a number of the criteria for depression, for ongoing depression," *e .g.,* "[s]he was tired ... often sad ... lonely ... had negative thoughts a lot of the times ... [and] was extremely self degradating [sic]."

Dr. Norton also interviewed Louise Carter. During their initial meeting, Obra Carter was present and spoke "rapidly and mostly about religious topics" while Mrs. Carter "spoke very little." She later met alone with Mrs. Carter who described her relationship with Mr. Carter as "a very tumultuous and chaotic and hostile relationship that she quote 'felt [she] cannot get out of.' "

Dr. Norton interviewed Obra Carter at his home and was immediately "taken by how small the home was." She was shocked as to the condition of the bathroom and kitchen. The only light source in the bathroom was a candle. She felt that the house was "sub adequate housing for the number of people that had lived in the home ." She observed that Mr. Carter had a police scanner, which he kept on during the entire interview. She later learned that it was not unusual for events to occur in the neighborhood that would bring the police. The police scanner and the neighborhood activity brought some understanding to the children's reports that their father would not allow them to leave the yard. During one of the interviews, Dr. Norton learned that Mr. Carter had been married to Zettie Thomas prior to his marriage to Louise Carter. Ms. Thomas became pregnant and her father insisted that Mr. Carter marry her. Ms. Thomas explained that Mr. Carter went to work, came home, changed his clothes, went out, and did not return until 2:00 or 3:00 a.m. Ms. Thomas stated that Mr. Carter hit her without provocation and she felt "extremely lonely" and "very very isolated" during their marriage. At some point, Ms. Thomas' father learned that there was inadequate food in the apartment, came to Arkansas, had "some words with Mr. Carter," and took his daughter back home.

***24** Betty Douglas, a cousin of Leslie Burns, was interviewed during the course of Dr. Norton's investigation. The two women described each other as "extremely close, as close as sisters." Ms. Douglas reported that she lived in Ms. Burns's home for several months when the petitioner was a young child. She remarked that Obra Carter did not like her and did not like her living in Ms. Burns's home. Ms. Douglas described Mr. Carter as "mean" and "domineering and dominating." She had seen Ms. Burns "with black eyes that were so severe that her eyes were actually shut" and had heard Mr. Carter scream at Ms. Burns, calling her "a bitch, a slut, and a whore and saying that she was sleeping with other men." Since the children were in the same room with her, Ms. Douglas assumed they also heard this. Dr. Norton concluded that, in her professional opinion, Obra Carter abused Louise Carter, Leslie Burns, and Zettie Thomas both physically and emotionally.

Dr. Norton further testified that not until Obra Carter's religious conversion did he tell any of his children that he loved them. From her interviews with Steve Carter, Renita Burns, Robin Burns, Sharon Burns, and Brenda Burns, Dr. Norton identified certain facts that constituted emotional mistreatment of the children by Mr. Carter, including persistent fear of the caretaker, lack of positive reinforcement, and physical abuse of their mother. She had not had the opportunity to completely assess the petitioner with regard to whether his father's treatment had an effect on his development but felt "confident in saying that the climates in both households primarily toward the father was that of trepidation, anxiety and fear." She added that "witnessing or learning about severe physical harm especially to one's mother can cause tremendous traumatic reactions in children." Dr. Norton stated that children who live in this type of environment have "more trouble coming to understanding themselves, develop problem solving skills, use language and means of talking things through, coping mechanisms tend to be affected, relationships tend to be affected. They tend to misperceive the actions and the communications of other people."

As to other risk factors involved in the petitioner's development, Dr. Norton said that children grow up in three domains: home, school, and community. Dr. Norton characterized the petitioner's home climate as overcrowded, "an overtaxed mother with limited resources," and "a whole bunch of stressors." She described the petitioner's school climate with factors including a large amount of violence, anxiety, and fear. Finally, Dr. Norton depicted the community climate with factors including high crime rate, violence, and police presence. Dr. Norton explained that it is the "synergy of these three factors that really increases the risk for these children of being able to do well in school, to be able to take

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in, assimilate, accommodate new information, to be able to assess social cues and respond appropriately, to be able to engage in positive productive relationships and a number of other spheres."

***25** Dr. Norton reviewed the petitioner's elementary and high school records, including a health report. Dr. Norton stated that, although she was still without sufficient information to make a final conclusion, in her opinion, the petitioner's judgment was extremely poor and immature at the time he committed the crimes. She added that his "coping skills were not good" and that "his ability to engage in problem solving and project cause and effect did not appear to be good." These impairments were consistent with the risk factors present during the petitioner's developmental years.

Dr. Norton testified that she and a colleague first began working on the petitioner's case on September 28, 2002. Fifty hours of work were initially approved by the court, and another fifty hours were later approved. Dr. Norton requested funding for out-of-state travel, but her request was denied. Co-counsel asked Dr. Norton if she would agree to work for $65 an hour, but she could not, so work was stopped on the case.

On cross-examination, Dr. Norton stated that she did not take notes because she worked with an investigator who took notes. Dr. Norton did not bring her case file to court and said that it only contained information provided to her by post-conviction counsel. She acknowledged that, because her role was circumscribed in this case, she did not collect any records. She stated that she had not interviewed all necessary persons, including a number of family members and the petitioner's teachers, and that her investigation was not complete at the time of the post-conviction hearing. Dr. Norton then described her role as assisting the investigator with interviews. She denied any discussions of her being an expert witness at the hearing until the Thursday before the hearing. She added that she had not reviewed any records collected by post-conviction counsel as they were received after a request for additional funds for her were denied. She understood her role in this case was that of a consultant and said that, had she known she was going to be called to testify as an expert, she would have prepared differently. Dr. Norton clarified her job duties by explaining that her "primary role was to see if [she] could work with the investigator and the family because you had indications that there were some family systems problems and some other things that were going on that they were for one reason or another unable to articulate." She stated that her role evolved into that of a mitigation expert.

The State questioned Dr. Norton about the five-month delay between the time she was retained by post-conviction counsel and the time she first interviewed Leslie Burns. She explained that this case was "unusual" in that there was a continuance and recalled that the investigator had become ill. Finally, she stated there was lapse in the funding.

Dr. Norton stated that she never reviewed the petitioner's social history records because the investigator had discovered that many had been destroyed "because of the new rules that records only have to be kept for so long." She only interviewed the petitioner once. She acknowledged that all of the information she had regarding the petitioner was interview notes and that the witnesses interviewed were primarily neighborhood friends of the petitioner. She said that all of these people "liked" the petitioner, felt that "he was a good kid," and that he "[n]ever got in trouble." Although Dr. Norton recognized there were limitations on the petitioner's activities as a child, she acknowledged he often spent the night at the homes of different neighbors, and one neighbor provided information that the petitioner had done "all kinds of odd jobs around the neighborhood." Dr. Norton agreed that none of the initial interviews conducted in 1999 and 2000 illustrated an abusive home life and that the only negative recurrent theme in these interviews was the people that the petitioner "tended to hang out with."

***26** A statement from Kay Carter, one of the petitioner's siblings, provided that "[the petitioner's] best quality was dealing with family members. His worst quality was friends he was hanging around with." Family members also said that, when the petitioner became involved with the rap band, he stopped attending church. While Dr. Norton acknowledged these statements, she explained that the petitioner, being the only male in his household, began spending time in his father's neighborhood with his half-brothers. She explained that this neighborhood was "a rougher neck of the woods" and that the petitioner was "more of a follower." Dr. Norton acknowledged that the neighborhood in which the petitioner was raised had changed over the years.

Dr. Norton acknowledged that the petitioner's father had stated that the petitioner "was very smart, that he could fix ceiling fans and plumbing. He also said he was an artist." She said that Steve Carter was the "most explicit" witness who painted a negative image of his home life with Obra Carter.

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She agreed that "the consensus of all the statements was that [the petitioner] was a nice kid. Took care of his family. Was good to his friends. Was good in school. And what happened on the day of the killing was completely out of character for him." She commented that the petitioner "seemed to be a child who minded what he was told" and "demonstrated a lot of kindness."

Dr. Norton related that, after interviewing the petitioner, she had "concerns that [she] felt were out of [her] purview and in an abundance of caution [she] wanted to convey to the lawyers that it might be a good idea to have him evaluated by a medical doctor." One of her concerns was "[h]is speech was a little bit pressured." She explained that he spoke quickly, which was inconsistent with the gravity of the situation, and that his "religious faith ... seemed to exceed again the gravity of the situation." Another concern was that the petitioner did not appear to be depressed about his situation. She felt that "somebody who could do a more thorough mental status exam should probably take a look at [the petitioner]." In this regard, Dr. Norton acknowledged that the petitioner had been examined by a psychologist who concluded there were no signs of "any overt psychopathology" and that the Department of Correction also had examined the petitioner as part of his classification process and found no evidence of mental illness.

Dr. Norton stated that she never talked to the petitioner's trial attorneys regarding their relationship with the petitioner or his mother. She said that the petitioner's mother did her best to raise the petitioner and instill in him good values. She agreed that, prior to the commission of the crimes, "[t]here may not have been anything obvious to suggest that ... [the petitioner] was maladjusted." She further agreed that the individuals interviewed believed that the "reason he got in trouble was he was a follower and got with the wrong group."

***27** On redirect, Dr. Norton explained that the initial information gathered "seemed to be inconsistent" and that there was a "disconnect" between the crime and the petitioner's personality. An important piece in solving this puzzle was the extreme complexity of the petitioner's family system. She added that all of the positive aspects of the petitioner's life also constituted mitigation evidence as "a sharp contrast between that kind of behavior and subsequent involvement in an event as hostile as this."

Dr. George Washington Woods, Jr., a physician specializing in psychiatry, testified that he was contacted by the post-conviction defense team to evaluate the petitioner. Dr. Woods stated that a "neuropsychiatrist really focuses on the relationship between the brain and behavior to a much larger extent perhaps than the average clinical psychiatrist." While he acknowledged that he was not a neuropsychologist, Dr. Woods stated that he "certainly underst[oo]d neuropsychological testing and the uses and indications for neuropsychological testing." He worked with Dr. Kertay, a clinical psychologist; Dr. Pamela Auble, a neuropsychologist; and Dr. Norton, a mitigation specialist.

Dr. Kertay completed a psychological evaluation of the petitioner that was performed over three days, and Dr. Woods consulted with him regarding the report. Dr. Woods testified that he utilized Dr. Kertay's evaluation to determine any indication of malingering, which he defined as "the production of symptoms in order to either exaggerate or develop a psychiatric or physical illness," and to "look at the battery" of tests utilized to reach the conclusion. Dr. Woods explained that neuropsychological testing is different from psychological testing in that "[p]sychological testing is the MMPI, the Rorschach, which really looks at personality," while "[n]europsychological testing ... is really the gold standard." He explained that "neuropsychological testing done appropriately is the best that we have at this date to look at how the brain functions."

Dr. Woods said that the petitioner's testing showed that he "worked on hard on the test" and put forth "good effort." Dr. Woods said testing results reveal "islands of strengths and islands of weakness," and the petitioner's strengths were his average IQ, although his academic expertise was a slight bit below average. Dr. Kertay's report indicated that the petitioner demonstrated "a defensive denial that could contribute to difficulty understanding the implications of his circumstances and behavior." The petitioner also reported "strong unusual religious experience and visions that are not experienced by most people and that are accompanied by a sense of joy and peace out of keeping with his environment." Dr. Woods also stated that the tests revealed an "elevated score on the bizarre mentations scale of the MMPI 2 which suggests that his unusual thoughts and perceptions border on the psychotic being at the least highly id[i]osyncratic." Dr. Woods related that the petitioner's "unusual religious experience, while a genuine expression of his beliefs, are also defensive in nature and serve at least in part to shield him from difficult feelings." Dr. Woods agreed with Dr. Kertay's conclusion that the petitioner "has a tendency to deny pathology. To deny pain. To present the world in the most positive light." He

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explained that did not mean the petitioner is psychotic or has a psychiatric disorder. Dr. Kertay's evaluation also revealed that the petitioner had difficulty "processing new information quickly potentially delaying his ability to comprehend his circumstance despite quote knowing better unquote." Dr. Woods explained the relevance of this fact to the petitioner's case as the petitioner "fails to grasp the implications of his behavior when he is under stress and is required to quickly understand a complex situation."

***28** Dr. Woods testified that he met with the petitioner in jail in late March 2003 and described the petitioner as "courteous to a fault" and "interested." Dr. Woods's main concern was that the petitioner "did not seem to grasp the gravity of the situation that he was in although he understood it." In this regard, Dr. Woods stated that the petitioner was competent in terms of understanding what had occurred, the roles of the various court officers, and the charges he was facing. Notwithstanding, he opined that the petitioner denied the seriousness of his circumstances and the various interventions that could have been made.

Dr. Woods stated that prior to interviewing the petitioner he had reviewed Dr. Kertay's report, the records documenting the births of Leslie Burns's children, "some school records," and the memoranda of interviews with family members and friends. Based on this information and his two-day interview of the petitioner, Dr. Woods was of the opinion that certain issues needed further evaluation.

Dr. Woods said that further psychological testing was performed by Dr. Pamela Auble. This additional testing was necessary, according to Dr. Woods, to determine whether the petitioner's behaviors were "symptoms." One particular test performed was the Dallas Kaplan, a test of "executive functioning." Dr. Woods explained the different parts of the brain and their functions. He stated that the frontal lobes, also referred to as "the cap of the brain," develop over time and are "the part of the brain that allow people to acquire what's called executive functioning, the ability to weigh and deliberate, the ability to sequence, the ability to conceptualize, the ability to understand that all these trees are a forest." He further explained that the "frontal lobe also controls the ability of people to understand emotional input called prosody." Dr. Woods found nothing wrong with the petitioner's temporal or occipital lobes but was concerned about his frontal lobes because of "this denial, this kind of inability to sequence ... to both understand the gravity of the situation."

Dr. Woods said that Dr. Auble noted that "there was a tendency [of the petitioner] to respond quickly to superficial aspects of situations, a style that can lead to errors." He also observed that the Wechsler memory scale test, given to the petitioner by Dr. Kertay, indicated that the petitioner's "psychological profile is consistent with someone who is a quote follower unquote rather than a leader." Dr. Woods confirmed that the petitioner was "generally friendly," "eager[ ] to please," "helpful," and had "trouble understanding that others around him are not as well intentioned as he may be." Testing conducted to reveal the petitioner's learning style indicated that he did not retain much information the first time it was presented; he scored in the twenty-first percentile. Repeated exposure to the information did increase the amount retained by the petitioner; he scored in the thirty-ninth percentile. Dr. Woods stated that these scores were consistent with someone who fails to grasp the important information when it is presented quickly and for the first time. Dr. Woods opined that the test results consistently indicated that the petitioner was "someone that moves so quickly that they often don't wait and deliberate. We're talking about someone that doesn't gather all the information before they make decisions."

***29** As the evaluation proceeded further, Dr. Woods realized the impact that the petitioner's environment had on him, specifically, the relationship with his father and his father's violent tendencies. Dr. Woods also noted the importance of investigating any genetic components to one's psychological well-being. In developing a genetic link, a genogram is often used. Dr. Woods explained that a "genogram is a document that identifies generations of family members and identifies physical problems, medical problems, psychiatric disorders so that you can look at it and develop some understanding of whether there are genetic as well as social components to the person's life that you're looking at." Although the genogram was not actually completed in the petitioner's case, from what was finished, Dr. Woods stated there were indications that he would classify as behaviors rather than symptoms. Dr. Woods noted that he had "real questions about mood disorders in this family" as there are "real questions about genetically transmitted mood disorders like bipolar disorders or depression." He explained that the petitioner's poor problem-solving skills were moved from a behavior to a symptom based upon the results of the neuropsychological testing.

Dr. Woods also recognized that "a parent that suffers from trauma has no choice but to incorporate that symptomotology

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into their own parenting." Although he did not doubt Ms. Burns's love for her children, he stated that the "tragedy [was] how much she could give in so many ways and yet in other ways how little she had available." The stress encountered from Ms. Burns's adolescence and having five children in quick succession did not, in Dr. Woods's opinion, go away. He stated that, although this trauma may not have impacted her day-to-day life, it affected the way she entered into other relationships. Dr. Woods related that the overall family structure, the number of children, the size of the house, the number of people in the house, and the location of the house could have played a role in determining the effects of that environment on the petitioner. Dr. Woods explained:

> [The petitioner] has impairments in being able to weigh and deliberate. He has impairments in coping skills. He has impairments in being able to size up situations appropriately. And he has significant denial. I also know that his family constellation is a very very difficult one that had intermittent violence which as I mentioned I think is really the most disorganizing and disruptive. The memorandum of interviews ... certainly force me to include the problems in the environment in why [the petitioner] has these symptoms because the symptoms are clear.... And certainly the chaos in the family as a function of this kind of multiple duality is problematic.

Because of the incompleteness of the investigation, Dr. Woods could only state that symptoms were present; he was not able to determine how they got there.

***30** Questioned about the role the petitioner's symptoms, *i.e.,* "poor coping skills, impaired judgment," played in the offenses in this case, Dr. Woods responded that the history of the petitioner was a complete anomaly of the person convicted of the offenses. The part that was consistent was the petitioner's desire to do something for a friend. Dr. Woods noted that the petitioner's flee to Chicago was related to his "impaired judgment, poor coping skills." Another issue was the petitioner's hair length and his refusal to cut it prior to trial. Dr. Woods stated this was overwhelming evidence of the petitioner's "lack of understanding of the quality of the circumstances that he was facing." Dr. Woods could not say with the same certainty whether the petitioner's "symptoms" impaired his ability to accept or reject the various plea offers. Dr. Woods said the petitioner asserted that the intricacies of his situation were never explained to him. In other words, the petitioner, who maintained that he was not the shooter, did not understand his legal standing with regard to the principle of felony murder. As the distinctions between the petitioner's legal responsibility and moral responsibility were not explained to the petitioner or his family, Dr. Woods was unable to determine whether the petitioner's rejection of the life sentence was based upon the pathological symptoms or because his attorneys allegedly failed to inform him of the law.

On cross-examination, Dr. Woods stated he did not believe that the petitioner's "religious fervor" began contemporaneously with his incarceration. Rather, Dr. Woods stated that there was evidence that the petitioner "ha[d] been extraordinarily fervent in his religion for many years prior to the incarceration," although he conceded that it may have taken "on a greater energy" after his arrest. Dr. Woods agreed that being on death row, in itself, is a traumatic situation.

In response to questioning by the court, Dr. Woods opined that, had the petitioner been advised of the legal implications of the felony murder rule and yet continued to reject plea offers, this would have evidenced "poor verbal memory and a poor understanding of things that are taught to him without repetitive trials." Dr. Woods said that, if the petitioner had been repeatedly advised of the felony murder rule, then he would have been able to understand it eventually.

ANALYSIS

I. Standard of Review

In order to obtain post-conviction relief, the petitioner bears the burden of proving the allegations by clear and convincing evidence, *see* Tenn.Code Ann. § 40-30-110(f) (2003), meaning that there is no serious or substantial doubt about the accuracy of the conclusions drawn from the evidence. *Hicks v. State,* 983 S.W.2d 240, 245 (Tenn.Crim.App.1998). On appeal, the findings of fact made by the post-conviction court are conclusive and will not be disturbed unless the evidence contained in the record preponderates against them.

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Brooks v. State, 756 S.W.2d 288, 289 (Tenn.Crim.App.1988). The burden is on the petitioner to show that the evidence preponderated against those findings. *Clenny v. State,* 576 S.W.2d 12, 14 (Tenn.Crim.App.1978). The credibility of the witnesses and the weight and value to be afforded their testimony are questions to be resolved by the post-conviction court. *Bates v. State,* 973 S.W.2d 615, 631 (Tenn.Crim.App.1997).

***31** When, however, the claim is based on the ineffective assistance of counsel, the findings of fact are reviewed under a *de novo* standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. *See Fields v. State,* 40 S.W.3d 450, 458 (Tenn.2001) (citations omitted). In clarifying the standard, our supreme court explained that the standard for reviewing the factual findings of a trial court has always been in accordance with the requirements of the Tennessee Rules of Appellate Procedure, specifically Rule 13(d). *See Fields,* 40 S.W.3d at 456.

On appeal, the petitioner argues that this court must "review the entire record *de novo,*" asserting that "[n]o rational jurist could find that the post-conviction court made even a good faith attempt to make objective findings of fact." While we disagree with certain of the post-conviction court's conclusions, as we will explain, we likewise disagree with the petitioner's argument that we may utilize other than the standard of review set out by our supreme court in *Fields.*

Since the petitioner on appeal argues that he was denied his basic constitutional rights by the conduct of the hearing, we first will set out the chronology of this matter. The original petition was filed on August 19, 1999, and the post-conviction defender's office was notified to appear in court on September 24, 1999. Because of counsel's illness, official appointment was delayed until November 4, 1999. An amended petition was to be filed on December 6, 1999. Continuances were granted and the amended petition was filed on February 9, 2000. The matter was scheduled for an evidentiary hearing on June 19, 2000. Post-conviction counsel requested a continuance and the matter was reset for October 9, 2000. A second amended petition was filed on September 21, 2000; and, six days later, post-conviction counsel asked both for a second continuance and to have the district attorney's office recused, both of which were denied. In response, the district attorney then sought to have the post-conviction defender's office removed. This latter motion was granted, appealed, and ultimately reversed. The post-conviction hearing was then scheduled for April 2002. A continuance was requested by post-conviction counsel; and the hearing was moved to November 18, 2002. In October 2002, both parties moved to continue the case until March 31, 2003. On March 7, 2003, post-conviction counsel requested a fourth continuance, which was denied; and the hearing commenced on March 31, 2003. The first hearing lasted one week and was continued until August 4, 2003, to allow the petitioner's experts to complete their work and testify. A fifth continuance was requested by post-conviction counsel on July 25, 2003, citing an outstanding request for additional funds for their experts. This request for additional funds was denied by the Tennessee Supreme Court. The hearing then resumed on August 4, consumed another full week, and was continued to September 5, 2003, for the testimony of one witness, as well as for closing arguments. On September 5, 2003, post-conviction counsel sought to file a third amended petition, which the court refused to consider because it was untimely. At the conclusion of the hearing on September 5, 2003, the post-conviction court took the matter under advisement and subsequently entered an order denying the petition on February 20, 2004.

***32** We now will consider the issues raised by the petitioner.

A. Finding that the Petitioner Failed to Present Mental Health Evidence at the Post-Conviction Hearing

The petitioner argues that the evidence preponderates against the post-conviction court's conclusion that he failed to present mental health evidence and evidence from a court-authorized psychological evaluation. In support of his claim, he asserts that Dr. Woods, a neuropsychiatrist, testified regarding mental health issues. Apparently, this issue was presented to the post-conviction court at the evidentiary hearing as a claim of ineffective counsel, which the court described as the "[p]etitioner next complains about trial counsel's failure to present ballistics, tool mark and pathology experts. Further petitioner alleges a failure to present proof of petitioner's mental health and functioning."

In its findings of fact, the post-conviction court found that the petitioner had not presented at the evidentiary hearing, *inter alia,* a psychologist and, thus, had failed to show trial counsel were ineffective in not calling such a witness at the trial:

> Petitioner was approved funds by this court to employ and utilize a Firearm

> examiner, Forensic Pathologist and a Pyschologist[.] No proof was presented from any such expert at the evidentiary hearing. The burden of proof is on the petitioner to show that trial counsel's failure to utilize such witnesses affected the verdict of the jury in the trial of this cause. Petitioner put on no proof regarding such experts[,] therefore this issue has no merit.

To the petitioner's argument that these findings are not supported by the evidence at the post-conviction hearing, the State responds that the post-conviction court is "technically correct," because neither Dr. Auble nor Dr. Kertay testified at the post-conviction hearing and, further, the court's findings do not show that the court did not consider the reports of Drs. Auble and Kertay in reviewing the proof. In his testimony at the hearing, Dr. Woods said that he worked with Dr. Auble, a neuropsychologist, and Dr. Kertay, a clinical psychologist, and relied on their reports and evaluations. Accordingly, we conclude that the evidence does not support the post-conviction court's findings that the petitioner presented no proof as to psychological experts. Dr. Woods, "a physician specializing in psychiatry," testified at the hearing and said he had utilized a team approach, which included Dr. Norton, a mitigation specialist, and Drs. Kertay and Auble. Thus, as to the petitioner's challenge to the finding of the post-conviction court that he did not present psychological proof at the hearing, we conclude that the court erred in this determination. The petitioner ties this issue to his claim that trial counsel was ineffective, and we will apply our determination on this issue to that question.

B. Finding that Trial Counsel Filed Numerous Pretrial Motions

***33** On appeal, the petitioner argues that "[t]he evidence preponderates against the finding that trial counsel had filed numerous pretrial motions." Apparently, at the post-conviction hearing, a part of the claim of ineffective of counsel was that trial counsel had made errors in the motions that were filed and that the motions, considered together, were inadequate for a capital case.

The post-conviction court found to be without merit the ineffective counsel claims based upon the alleged inadequacy of these pretrial motions, concluding both that the petitioner had failed to identify any specific motion which should have been filed as well as show that the alleged inadequate motions affected the outcome of the trial:

> The next area presented by petitioner is the issue of pre-trial motions. He alleges counsel failed to file any motions pretrial. Trial counsel testified that previous counsel had filed numerous motions, which were adopted by them. No proof was presented at this hearing about any specific motion, which should have been filed or litigated, and how it would have changed the verdict. Trial counsel testified they had the entire police file and had open file discovery from the State. This issue has [no] merit.
>
> The [p]etitioner alleges failure to file a motion to dismiss for failure to maintain the integrity of forensic evidence. However, post conviction counsel presented no proof that in fact there was a failure to maintain the integrity of forensic evidence or that it impacted or affected the verdict rendered. It does not appear that the forensic evidence played a role in the verdict of the jury in this court's opinion. This issue has no merit.
>
> ....
>
> Petitioner alleges failure of trial counsel to file a motion for Bill of Particulars. Petitioner has failed to show what if any information the State had which was unknown to the defense. Trial counsel testified they had the entire State's file including the statements of all witnesses. No proof has been presented that this failure affected the verdict of the jury. This issue has no merit.

In the "Argument" section of his appellate brief setting out this issue, the petitioner makes no references to the transcript of the post-conviction hearing showing that trial counsel, or any other witnesses, were questioned about the adequacy of the pretrial motions filed on behalf of the petitioner. Instead, as we understand the argument, the petitioner asks this court to find that his trial counsel filed "a number of form motions but no serious challenge to the death penalty," that "key motions were abandoned," and that "[t]he motion for expert services was not pursued and the denial of the motion for individual voir dire was not appealed." The petitioner does not suggest what standard we use in ascertaining whether the motions filed were, in fact, "numerous," or what further

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action, if any, is to be considered if we conclude the pretrial motions were other than numerous.

***34** The post-conviction court reviewed the pretrial motions, which are contained within the record on appeal, and found them to be "numerous." The record supports this finding. We note that the post-conviction court further found that "[n]o proof was presented at this hearing about any specific motion, which should have been filed or litigated, and how it would have changed the verdict." The petitioner does not respond to this determination, and we conclude that the record supports as well this conclusion of the post-conviction court.

The petitioner concludes this section by asking this court to find, apparently as the result of the alleged insufficient motions, that trial counsel were ineffective:

> No court can take seriously a finding that trial counsel's motion practice was adequate in a capital case in which the only challenge to the constitutionality of the death penalty is adopting a form motion challenging a repealed statute. Yet that is precisely the finding of the court below.

In sum, what the petitioner appears to seek on appeal is our determination that the motions filed were not "numerous," without providing guidance as to what this constitutes and, then, to find that counsel were ineffective for not filing "numerous" and "particularized" motions. The petitioner cites no references to the testimony of trial counsel at the evidentiary hearing that they were questioned about the motions or any legal authorities supporting his claim that we can make findings of ineffective assistance of counsel solely on an examination of the motions themselves or what standards are to be applied in making such a determination. Accordingly, we conclude that this issue is without merit.

C. Inadequate Cross-Examination of Eric Thomas

The petitioner's brief explains this claim:

> The evidence concerning the failure to effectively cross-examine Eric Thomas consisted of trial counsel's failure to use the transcript of Thomas' testimony in Derrick Garrin's trial. The effectiveness of such cross-examination speaks for itself. Trial counsel did use Thomas' statement to the police which named Carlito Adams as the person who shot him. However, by failing to also show that in a separate trial he identified Derrick Garrin as the shooter and person who took his money, counsel bypassed an opportunity which would have demonstrated a pattern to show that Thomas would simply identify whomever he wanted to get convicted at the moment.

As to this issue, the post-conviction court concluded that the petitioner failed to show that he was prejudiced by the alleged ineffective cross-examination of Eric Thomas:

> Petitioner ... attacks the ineffective cross-examination of Eric Thomas. Since there were some apparent in[ ]consistencies in the testimony of Mr. Thomas, this Court would have liked to have heard from Mr. Thomas. However, [there] was no proof presented as to Mr. Thomas and what his testimony would have been if he had been thoroughly cross-examined. Therefore, this Court is left to speculate. Apparently, he had previously picked the petitioner out of a line-up as one of the people who shot him. In the Garrin trial he described Garrin as one of the people who shot him. He testified he was shot twice by this person and then someone else came up and shot him again. In petitioner's trial he testified that he identified the

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> petitioner's photograph in a line-up and that petitioner took his money and shot him. He was not questioned by the State during petitioner's trial about Garrin, his description or if he shot him too. Mr. Thomas picked out petitioner's photograph two days after the shooting. Although the line up photograph was not presented to this Court ... the Court will assume that petitioner's hair was shorter in the photograph than it was during the trial, and still the witness picked out petitioner. Again this Court is left t[o] speculate as to an explanation for Mr. Thomas's identification and testimony about petitioner's role.... Although this court can see some areas where Mr. Thomas could have been cross-examined, there has been an explanation given by trial counsel with regard to those areas and petitioner has failed to present any proof to the contrary. Without a showing as to what Mr. Thomas's testimony would have been under more thorough cross-examination[,] this court cannot conclude that such cross-examination would have changed the outcome of the trial.

***35** As to this claim, the post-conviction court determined that, without seeing the petitioner's theories of effective cross-examination tested on Mr. Thomas, the court could not conclude that questioning him in the fashion the petitioner argues should have occurred would have changed the outcome of the trial. We agree with this conclusion. Likewise, as to the claim that the State proceeded on different theories in the prosecution, we conclude, as did the post-conviction court, that the petitioner has failed to establish that this occurred.

D. Finding that There was no Proof Presented that Kevin Shaw had a Jheri Curl or that the Petitioner was not Wearing the Black Trench Coat

The petitioner argues that "[t]he post-conviction court's findings that no proof was presented that Kevin Shaw had a jheri curt or that [the petitioner] was not wearing the black trench coat is not supported by the evidence." The petitioner does not make a reference to where precisely in the twenty-six-page post-conviction order these findings were made, and we will set out the two closest rulings we can locate to the petitioner's depiction. First, the post-conviction court found the petitioner failed to show that trial counsel were ineffective in their dealing with the petitioner's hairstyle, especially in view of his refusal to cooperate with trial counsel:

> The Petitioner complains that counsel did not explore the issue about his hair length. Although there was proof presented during this hearing about the length of the [petitioner's] hair, there was no proof presented that the petitioner gave any of those names to defense counsel during pre-trial preparation. Apparently, the only photograph available looked like the petitioner's mug shot.... Further the petitioner had at the time of trial a jheri curl hairstyle that matched the description given by some witnesses. The petitioner refused to cooperate with his attorney's advice to cut his hair resulting in the bolstered in court identification of an eyewitness. This court feels that the petitioner chose to ignore the advice of his attorneys and failed to cooperate with them in preparing the case by failing to give them names of people who could testify ab[o]ut his hair. This court does not feel that the attorneys should be held ineffective because the petitioner failed to follow their advice or cooperate with them.

Additionally, the court recounted the substantial proof against the petitioner as well as the lack of proof that Kevin Shaw had a jheri curl and noted that the petitioner had insisted on wearing his hair in the jheri curl style at the time of trial:

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> Petitioner again raises the issue about the length of his hair. This court has reviewed the trial transcript, the portions of other trial transcripts, witness and codefendant statements. The petitioner was present on the scene and he was described as wearing a long black trench coat. No one else on the scene, to the best of this court's recollection, was so dressed. Mr. Thomas picked out the petitioner's photograph even with short hair. Ms. Jones identified the petitioner by face and by the long black trench coat he was wearing. She also described his hair as a[j]heri curl. Trial counsel knew pre-trial that Thomas had identified Petitioner's picture and they testified that their picture of [the petitioner] looked very similar to the one in the line-up. It appears to the court that Ms. Jones, who testified later, had not made identification prior to trial. At trial she made an in court identification on cross-examination of the petitioner which appears to have been fully unexpected by the State or the defense. The petitioner had admitted being present on the scene, with a gun, and firing some. Thomas had identified him even with short hair. Up until that point this court is not sure that there was an issue about the length of petitioner's hair. Only when Ms. Jones described petitioner as the person with the black trench coat and jheri curl and the person she identified in court with a jheri curl, did his hair length become an issue. Again, this court is asked to speculate as to who else on the scene had a jheri curl. Petitioner implies Kevin Shaw but offered no proof by witness, photograph or otherwise that Shaw was the person with a jheri curl. This court can only speculate as to what might have occurred during this testimony if petitioner had cut his hair as requested by his attorneys prior to trial. However, this court is not allowed to speculate as to what impact any of this would have had on the jury. No proof has been offered by petitioner other than that he had short hair at the time of the crime. No proof has been presented that he was not the person in the black trench coat. Petitioner has failed to carry his burden of proof as to this issue and it therefore has no merits.

***36** As to this issue, the petitioner asserts:

> Rodney Weatherspoon testified that Kevin Shaw commonly wore baggy pants and sometimes wore a trench coat. He stated that such dress was typical of the Memphis rap band members. To the contrary, he stated that [the petitioner] and the West Memphis group wore t-shirts, Levi's and tennis shoes.... Kevin Whitaker testified that Kevin Shaw often wore a trench coat.... In addition, there was ample proof that demonstrated that Kevin Shaw approached the car with Carlito Adams and proof that connects that individual with the descriptions of wearing a trench coat and having a jheri curl. (*See* Statement of the Facts, *supra,* pp. 4-13).

Although the basis for this argument appears to be the petitioner's claims, otherwise presented in his brief, that he was wearing his hair short and not wearing a black trench coat at the time of the offenses, we are not certain that this is the case. Because of these deficiencies, as well as the fact that the petitioner has failed to direct us to the exact findings he is contesting so that we can review them, we conclude, pursuant to Tennessee Rule of Appellate Procedure 27(a)(7), that this claim is waived.

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II. Denial of Due Process at Post-Conviction Hearing

The petitioner contends that he was not afforded a full and fair hearing on his petition for post-conviction relief, saying that the denial of sufficient funds for expert witnesses and the alleged bias of the post-conviction court prevented his effectively presenting his claims and denied him the opportunity of presenting such evidence to a neutral and detached court, thus violating his right to due process of law. We will address the petitioner's claims.

A. Denial of Funds to Complete Social History

As to this issue, the petitioner argues that he was not provided with sufficient funds to obtain necessary services of expert witnesses:

> Given the burdens placed on a post-conviction petitioner pursuant to Tenn.Code Ann. § 40-30-201, *et. seq.* and Tenn. Sup.Ct. R. 28, this denial of the basic services necessary to demonstrate the prejudice that resulted from trial counsel's failure to conduct an investigation into mitigation issues or utilize expert services to develop mitigation themes functionally denied [the petitioner] the "opportunity to present proof and argument."

We will set out the background of this claim. After the filing of his petition for post-conviction relief, the petitioner, through counsel, requested the services of Dr. Lee Norton, a mitigation specialist with specific expertise in working with trauma victims. Upon the initial request, the post-conviction court authorized payment for fifty hours of work by Dr. Norton. A second request was made and the post-conviction court granted the petitioner a total of $5,000 for fifty hours of work at $100 per hour performed by Dr. Norton. The post-conviction court also granted travel expenses in the amount of $595. Although the Chief Justice approved the $5,000 for fifty hours of work, he denied the request for travel expenses. A third request for funds was made several months later for an additional 150 hours of services to be performed by Dr. Norton. The post-conviction court granted funds in the amount of $15,000 for 150 hours of work and granted $2,524, plus reasonable and necessary expenses, for the travel expenses of Dr. Norton. Upon review, the Chief Justice denied this payment, authorizing, instead, $4,875 for seventy-five hours of work at an hourly rate of $65 per hour for Dr. Norton's services plus reasonable expenses not to include out-of-state travel. The petitioner then sought review of the Chief Justice's denial pursuant to Tennessee Supreme Court Rule 13, § 6(b), and the court, with the Chief Justice not participating, found the petition without merit. Dr. Norton then refused to work for the $65 per hour fee allowed by the Chief Justice.

***37** During the post-conviction evidentiary hearing, Dr. Norton testified that she did not complete her work. Dr. Woods stated that he was unable to complete his evaluation due to the "incompleteness" of the investigation. The petitioner contends that the denial of funds resulted in his inability to present proof to establish he was prejudiced by counsel's failure to conduct an investigation into mitigation issues or utilize expert services to develop mitigation themes. Thus, he argues that he was denied his right to a full and fair hearing.

We disagree with the petitioner's claim that he was denied sufficient funds for the preparation of proof at the evidentiary hearing. He was granted $5,000 for fifty hours of Dr. Norton's services, at $100 per hour. The post-conviction court then granted an additional $15,000 for 150 hours of Dr. Norton's services at $100 per hour. However, the Chief Justice reduced the amount of these additional funds to $4,875 for seventy-five hours, at $65 per hour, a rate which Dr. Norton found unacceptable. Thus, the "court" did not deny the petitioner funds for expert services. Rather, Dr. Norton refused to work for the hourly rate which had been authorized. The petitioner has failed to establish that he could not employ another mitigation specialist at the $65 hourly rate. We will not assign constitutional error to a "court" when funds were provided but rejected by the one expert selected. Thus, the petitioner has failed to establish that the "court's" denial of funds for Dr. Norton denied him a full and fair hearing.

Moreover, Dr. Norton testified that the scope of her contract with the petitioner's counsel was limited to her assistance in conducting interviews, although she did perform some functions of the traditional mitigation specialist. She considered herself a "consultant" in this case. Dr. Norton acknowledged she was surprised at being subpoenaed to testify as an expert and, had she been aware this would occur, she would have prepared differently. With regard to Dr. Woods's evaluation, he clarified that when he referred to the investigation as "incomplete," he meant it was incomplete with regard to the way that "these things unfold" rather than incomplete due to a "lack of thoroughness." As such, there is no evidence to support a conclusion that Dr. Woods's opinion

would have been different had Dr. Norton completed her interviewing process. This issue is without merit.

B. Post-Conviction Court Exhibited Bias Toward the Petitioner

The petitioner complains that rulings and statements made by the post-conviction court demonstrated the bias of the court and its inability to consider and give effect to mitigation evidence, arguing that the court's actions and comments during the evidentiary hearing exhibited hostility to the concept of mitigation. Thus, according to this argument, the post-conviction court denied him a "full and fair hearing." We will examine the petitioner's specific claims in this regard.

1. Evidence that Obra Carter was Mentally Ill

***38** In his brief, the petitioner explains this claim:

> During the post-conviction hearing, evidence was presented from several witnesses regarding [the petitioner's] father and his erratic mood swings and his agitated and violent demeanor. During Louise Carter's testimony, post-conviction counsel attempted to introduce testimony regarding Mr. Carter's sleep habits, specifically that he required very little sleep, as a means of demonstrating that Mr. Carter had symptoms of mental illness. The state objected, and the court sustained the objection.

Because of the nature of these claims, we will set out this entire interchange as to Obra Carter's alleged mental illness. Louise Carter was questioned as to Mr. Carter's going out at night:

Q. And did this ever stop or did this continue on?

A. It would stop, you know, for a minute and then he'd go back out there. You know, he might stay at home, ... maybe two nights or three nights and then he'd go back out on the weekend or whatever.

Q. And when he would be out how long would he stay out?

[THE STATE]: Your Honor, I'm going to object to this. It seems like it's getting not really relevant. We're not dealing with caregivers of the [petitioner].

THE COURT: I'll have to agree. I'm going to sustain the objection.

[POST-CONVICTION COUNSEL]: Well, Your Honor, if I may be heard. This goes to show-I'm getting ready to develop a pattern of Mr. Carter staying out late and not sleeping very often. My mental health experts have advised me that Mr. Carter's sleeping habits is [sic] very relevant to their determination of possible symptomatic problems of mental illness in Mr. Carter. And I believe that they will discuss that when they testify. Sleeping patterns are symptoms-

THE COURT: Well-

[POST-CONVICTION COUNSEL]: Mr. Carter did not require a lot of sleep.

THE COURT: Okay. Neither do I. And I don't know that I have any mental health problems, but that's another question all together. Mr. Carter's mental health issues, what impact is that going to have on [the petitioner]?

[POST-CONVICTION COUNSEL]: Well, Your Honor, obviously the experts are the ones who need to address this. It is my understanding that a lot of mental illnesses have a genetic component.

THE COURT: Is there any proof? Do your experts have any proof? Because up to this point I have heard nothing nor have I seen anything in the record that indicates [the petitioner] has any mental health problems.

[POST-CONVICTION COUNSEL]: Well, Your Honor, I do not have any indication that [the petitioner] suffers from the same mental illness if Mr. Carter does indeed suffer and I do not think that they will be able to go as far as to diagnose Mr. Carter with a mental illness. They will be able to discuss behavioral symptoms that Mr. Carter exhibits and a lot of those deal with the way that Mr. Carter treated [the petitioner] on occasion. And

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we are going to be exploring that in depth today during testimony.

***39** [THE STATE]: Your Honor, I object. I think this is getting absolutely ridiculous. Here's a person who by all accounts says he doesn't have a mental illness. Nobody says that [the petitioner] has a mental illness. The testimony yesterday was that Mr. Carter had very little impact with [the petitioner]. And apparently Mr. Carter has never been diagnosed with a mental illness and we're going to extrapolate behavior based on whether or not he sleeps a lot at night and somehow put that on to [the petitioner]. I mean this is the kind of stuff that just gets absolutely beyond the pale of reason. I mean we're at the point now where we're just kind of grasping at straws. And I think the Court has to look at it from the standpoint of reason and is this reasonable testimony, is it relevant testimony, and what we're trying to do now is bootstrap a bunch of stuff without really any proof.

THE COURT: Well, that's my concern to be honest with you because that was one of the things I was really interested in yesterday. And we paid particular attention to and I think we inquired of Mrs. Burns the lack of contact between Obra Carter and [the petitioner], the very minimal contact between the two. And I can see some relevance if you were going to show from a genetic standpoint that Obra Carter has some mental illness and we can show that [the petitioner] has a mental illness and you can connect the two and as a result his actions were such. But to this point from what I've read in the file and what I've seen and heard [the petitioner] has no mental illness. So whether Obra Carter has a mental illness or not I don't see the relevance of that. And frankly, you know, his sleeping patterns-that may be a new one that I haven't heard yet from a mental health expert.

[POST-CONVICTION COUNSEL]: Well, Your Honor, if I may. First of all, I believe the testimony yesterday indicated that Mr. Carter had very little contact with [the petitioner] as compared to a father who lived in the home. However, that does not mean that Mr. Carter had very little impact on [the petitioner]. And I think you will see through the rest of the testimony from his siblings and some of Mrs. Carter's children that [the petitioner] in his later teenage years developed relationships with some of Mrs. Carter's children with Mr. Carter and spent some time over in their home, number one. Number two, the way that Mr. Carter did interact with [the petitioner] when he was available to [the petitioner] and the manner in which that contact occurred is very relevant because the impact was very great. And I believe that the mental health experts who will testify later will explain that in more detail. Number three, I said that-I just want to clarify this for the record. I said that it is not our contention that [the petitioner] suffers from the same mental illness as Mr. Carter if Mr. Carter suffers from any. He doesn't exhibit the same symptoms as Mr. Carter. However, only the mental health experts will be able to diagnose [the petitioner], whether or not he has a mental illness. I wouldn't want to go there at this point.

***40** THE COURT: Well, I'm not convinced that this is relevant. And I haven't heard anything in your argument that convinces me that it's relevant. And so I'm going to sustain the objection.

The admission of evidence generally lies within the sound discretion of the trial court and will not be reversed on appeal absent a showing of an abuse of discretion. *See* *State v. Edison,* 9 S.W.3d 75, 77 (Tenn.1999); *State v. Cauthern,* 967 S.W.2d 726, 743 (Tenn.1998). Here, the post-conviction court disallowed testimony as to the sleeping habits of Obra Carter, concluding there was no evidence either that Carter or the petitioner had a mental disease. The court further found that Obra Carter had little influence upon the petitioner's life as the proof introduced at the hearing strongly indicated that Carter had limited contact with the Burns children. However, the post-conviction court permitted counsel to make an offer of proof as to this issue. In this regard, Louise Carter testified that Obra Carter would "[s]ometimes ... stay out all night long. Sometimes he would come in at a reasonable hour." She explained that, if Carter came home at a "reasonable hour," he "might watch a little television" before going to bed. She said that Carter sometimes went to work without getting any sleep at all. The petitioner asserts that "a decreased need for sleep" is "[o]ne of the criteria for a manic episode ... necessary for a diagnosis of bipolar disorder." (citing *American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders,* at 362 (4th ed.2000). While that may be, the fact remains that the petitioner tries to tie together a series of tenuous arguments to construct this claim. We agree with the post-conviction court that this testimony was not relevant.

Furthermore, as noted by the State, the post-conviction court allowed evidence of Obra Carter's nocturnal behavior through the testimony of Dr. Norton. She interviewed Zettie Thomas,

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Obra Carter's first wife, who said that he often stayed out until 2:00 or 3:00 a.m. Accordingly, we conclude that the petitioner failed to establish that the post-conviction court was biased against him or refused to consider mitigation evidence.

2. Obra Carter's Violence Toward the Petitioner's Siblings

At the post-conviction hearing, the petitioner's sister, Robin Burns, testified that their father, Obra Carter, "whip[ped]" them for leaving the house or playing with the neighbors. She defined the "whippings" as Carter striking the children's legs or arms with a switch or, sometimes, a belt. The following exchange then occurred:

Q. And where on the body would he strike you when he used a belt?

A. The same. Legs or arms.

Q. Did he ever strike you on the back?

A. Not that I can recall.

Q. Would you please describe for the Court the worst time that you remember your father whipping you?

[THE STATE]: Your Honor, I'm going to object to relevance.

***41** THE COURT: Sustained.

[POST-CONVICTION COUNSEL]: Your Honor, [the petitioner] was living in the household. This is his father's method of disciplining his children. I think that that directly goes to his background.

[THE STATE]: First of all, Your Honor, she's asking her the worst spanking she ever got. And I don't see the relevance of that to [the petitioner]. And if the extent of the spankings were a switch on the legs I really am having a difficult time seeing the significance or the relevance of that. So I don't really see the relevance of the worst spanking that she ever got unless you can tell me what impact that had on [the petitioner] and why that's relevant.

[POST-CONVICTION COUNSEL]: May I have just a moment, Your Honor?

THE COURT: Sure.

[POST-CONVICTION COUNSEL]: Your Honor, if I may the incident that I'm referring to and asking Ms. Burns to describe is one in which Ms. Burns was so afraid of her father in anticipation of the whipping that she wet her pants when she was 13 years old. I think that that definitely goes to the degree of the whippings that Mr. Carter inflicted upon his children and the fear that that invoked.

THE COURT: Well, again, ... I'm not questioning what was in this child's mind under those circumstances. But from what I have heard and you've presented me nothing so far that I have heard that these are severe beatings. These are spankings with a switch. Not, you know, my definition of a spanking with a switch and your definition of a spanking with a switch may be two different things. So far I've heard these children testify that Mr. Obra Carter spanked them with a switch. The reasons for the discipline and the degree of discipline and the severity of the beatings, I haven't heard any testimony of abuse. I heard testimony of spankings with a switch. I don't know of too many children in anticipation of getting a spanking with a switch that look forward to it. I don't know too many children that I've heard of that would eagerly await that if they're told you're going to get a spanking when your father gets home or you're going to get a spanking when your father gets here. That's not an indication of a beating. I haven't heard that. And I really am struggling with the significance or where we're going with this. And again you know I don't see the relevance of that.

[POST-CONVICTION COUNSEL]: Well, Your Honor, if I may. The relevance is that these children only have this father's whippings to put anything into context. The experts will testify that [sic] the reaction of the children to their father's beatings.

THE COURT: Beatings? Where do you get the term beating?

[POST-CONVICTION COUNSEL]: They were whipped with a switch to the point that they were so afraid that a 13 year old wet her pants, Your Honor. I think that that indicates the severity and I believe that the experts will tie that in and will be able to address the

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trauma that goes into a 13 year old's loss of control of her bladder.

***42** [THE STATE]: Your Honor, the only problem-that's compounding the problem. The other witnesses['] testimony doesn't go to establish that this was a violent household. In fact if I remember some of the testimony when asked about Obra Carter one of the kids-I forget which one. They didn't say he was violent. And I didn't get the impression from Ms. Leslie Burns he was violent.

THE COURT: I hadn't heard any testimony that he was violent. I heard testimony that he spanked his children with a switch. Not on the back, not on the head. On the backs of the legs. Again I mean we may be living in a different world but I'll be honest with you with all due respect in the world that I grew up with a spanking with a switch on the back of the legs was not abnormal. It was not considered child abuse. It was not considered a beating. It's not a tree limb. It was a switch. They've all described it as a switch. They've all described it as switches on the legs. Which I'm really struggling with that as a severe beating or something that is traumatizing. And to be honest with you I'm kind of curious to listen to these experts that are going to tell me that that is a traumatizing thing other than a normal trauma type thing for a child anticipating a spanking or getting a spanking.

[POST-CONVICTION COUNSEL]: Well, I believe the experts will explain that in great detail about what those kinds of reactions indicate in children.

THE COURT: Well, again, and this is no disrespect to this young lady. I don't mean in any way to disrespect her. Her reaction and her fear of her father anticipating a spanking, I don't see the relevance of that as it applies to [the petitioner]. Her thought processes with regard to Obra Carter, I don't see how that impacts [the petitioner]. I don't know. It would be another thing if I were listening to proof of Obra Carter being this person who was around all the time and abusive and doing things that traumatized [the petitioner]. Or [the petitioner] was aware and saw that. I haven't heard any of that. And so to the extent of where we are right now I don't see the relevance of this. Of a particular incident where this young lady had an embarrassing moment as a result of that. You know, so I'm going to sustain the objection. I just fail to see the relevance of it.

As noted by the State, the post-conviction court heard evidence of the "whippings" by Obra Carter, for Renita Burns, Robin Burns, Phillip Carter, and Steve Carter all testified about his "whipping" them. Relying on *Eddings v. Oklahoma,* 455 U.S. 104, 115, 102 S.Ct. 869, 878, 71 L.Ed.2d 1 (1982), the petitioner contends on appeal that "[e]vidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation." In our view, the post-conviction court admitted such testimony, doing so through other witnesses. The petitioner has failed to establish that the post-conviction court's ruling with regard to Robin Burns wetting her pants or describing her "worst" whipping was relevant. We conclude that the post-conviction court did not abuse its discretion in this evidentiary ruling.

3. Bias Against Dr. Norton

***43** The petitioner argues that "[t]he post-conviction court's colloquies during Dr. Norton's testimony further demonstrate its hostility to mitigation." Additionally, he asserts that "[t]he post-conviction court ... grilled Dr. Norton on what she meant by an environment of fear and demanded her to break down the atmosphere between the Burns household and the Carter household." We will set out how this matter developed at the hearing.

Dr. Norton testified that, in her opinion, Obra Carter abused Zettie Thomas, Louise Carter, and Leslie Burns, saying that "the climates in both households primarily toward the father was that of trepidation, anxiety and fear." She continued that a child's witnessing of abuse of his or her mother "can cause tremendous traumatic reactions in children," adding that for children to "live in an environment of fear would be a very detrimental factor that can cause serious consequences to their development." The post-conviction court questioned Dr. Norton as to her definition of "environment of fear," asking that she differentiate between the Burns and the Carter children in her responses. She responded there was no difference between the Carter children, with whom Obra Carter resided, and the Burns children, with whom Obra Carter visited intermittently.

During the arguments on this matter, which precipitated a request from post-conviction counsel for a continuance of the hearing so that the transcripts of testimony of certain witnesses could be prepared and then reviewed by Drs. Norton and Woods to respond to questions from the post-

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conviction court, the court denied the request, clarifying the information the court was seeking from Dr. Norton:

> I'm going to deny the request. And I think your experts can still testify. The only thing I'm asking [Dr. Norton], and you know, maybe she can't tell me the answer. I don't know. There is a difference to this observer in the Carter family and the Burns family. I feel completely different. Two separate households. I've got maybe one gentleman who[ ]se called the head of the household, but I've got two separate families. And one family lives with [Obra Carter] 24 hours a day 7 days a week. One family sees him for 30 to 45 minutes twice a month. There's a totally different-there's got to be a totally different atmosphere and environment to me. Dr. Norton may tell me that's not true. That's just not true. Based on the testimony that I've heard in the courtroom from the Burns family and from the Carter family there's a totally different environment. The Carter family lived with this daily. And if they didn't make the bed or if they thought or if they were out of the yard or whatever, these were the rules and they were going to get a spanking. And it may have been on a daily basis or once a week or five times a month or whatever. The Burns family on the other side said the only thing I've heard that they got a whipping for was being out of the yard when Obra came by. And Obra didn't come by very often, but when he came by he expected all the kids there. And if they weren't the[re] they got a whipping. And there's a difference there to me when she uses the term "the children" grouping them all together. The Burns children and the Carter children saying they lived in a climate of fear because of the type of person Obra Carter was. I have a problem with that. And I'm trying to get her to tell me if there's a distinction between the Carter kids and the Burns kids.

***44** The petitioner concludes his argument as to this issue by asserting that "[t]he assumption that Obra Carter can be considered the head of a house in which he does not now and has never resided is contrary to both law and logic. *Cf.* 26 U.S.C. § 2(b) (a head of a household must reside therein)." We do not understand the relevance of the petitioner's reference to the Internal Revenue Code. The proof was, as we have set out, that Obra Carter spent the large majority of time with the children he had with his wife and saw only intermittently those, including the petitioner, he had with Leslie Burns. Rather than an exhibition of bias, it would appear logical for the post-conviction court, in assessing Dr. Norton's testimony, to determine whether Carter's treatment of his children, including the petitioner, had the same effect on those with whom he spent very little time. As to this issue, the petitioner has presented only argument, but no authorities, supporting his view that a court's seeking clarification can be an exhibition of hostility toward a witness.

We conclude that this issue is without merit.

III. Denial of Due Process at the Petitioner's Trial

The petitioner contends his right to a fair trial was violated by jury misconduct because the jury foreman recited a Bible verse during deliberations and the jury considered the potential sentencing during the guilt/innocence phase of deliberations. We will review these claims.

The petitioner alleges "the jurors in his case consulted extra-judicial materials-a Bible," explaining that the jury foreman brought a Bible into deliberations and "used" a Bible verse to ease "another juror's concern that if she voted to convict [the petitioner], and thereby sentence him to death, God would never forgive her." The State responds that this issue is waived because the petitioner did not present it on the direct appeal of his convictions; and, if considered on its merits, the claim fails because there is insufficient evidence that the jury consulted extraneous materials during deliberations. The waiver argument cannot be presented by the State for the first time on appeal for, as explained in *Walsh v. State,* 166 S.W.3d 641, 645 (Tenn.2005), "the State's waiver argument

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has itself been waived. Issues not addressed in the post-conviction court will generally not be addressed on appeal."

In our review, we first will set out the post-conviction hearing testimony of jury foreman Lloyd Davis. He said that at the trial he had a Bible with him and during deliberations "recited" a verse to another juror:

> Q [Did] you have that Bible with you in the jury room during the jury deliberations?
>
> A Every day.
>
> Q And at some point during the jury deliberations did you have occasion to cite certain Bible verses to the jury?
>
> A Yes, I did.
>
> Q Do you recall what Bible verses were cited, Mr. Davis?
>
> A I don't believe I recited but one.... That was in Isaiah.... I wouldn't know the verse, the chapter or the verse. I just know what it says.
>
> ***45** Q Do you remember the contents of the verse?
>
> A Yes, it was about God was telling that his thoughts were not our thoughts, and his ways were not our ways. Something like that.

Davis then explained that he recited the verse to the juror because she had expressed religious concerns about deciding guilt or innocence: "[S]he just stated something about God wouldn't want her to ... make a certain decision ... [and] wouldn't allow her to make her decision to give somebody the death penalty...." The State then objected to further testimony about the jurors' "internal communications," asserting that "the rules of evidence are very clear that jurors cannot testify about what they do in the jury room...." The court sustained the objection but allowed the petitioner's counsel to continue questioning to preserve the issue for appeal. It is the testimony of Mr. Davis during this proffer upon which the petitioner bases his claim that the jury improperly considered punishment during the guilt/innocence phase.

In issuing its order denying relief, the post-conviction court found that the "reciting" of a Bible verse was not prejudicial to the petitioner:

> This court does not believe that asking for divine intervention and comfort from God during the deliberation process is what was meant or intended as outside influence. We ask jurors to make life and death decisions and many jurors look to God for guidance in their everyday life and the daily decisions, which they face. This Court fails to see how asking God to help a juror make the right decision violates [the petitioner's] right to a fair trial. Frankly, this Court takes great comfort in the fact that before a jury would make such a monumental decision that they would seek guidance from God.

Tennessee Rule of Evidence 606(b) limits the circumstances under which jurors may be questioned about their deliberations:

> (b) Inquiry Into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon any juror's mind or emotions as influencing that juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes, except that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention, whether any outside influence was improperly brought to bear upon any juror, or whether the jurors agreed in advance to be bound by a quotient or gambling verdict without further discussion; nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror

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> would be precluded from testifying be received for these purposes.

The commentary to this rule sets out the circumstances to which this subsection is applicable:

> After verdict, part (b) would come into play. A juror may testify or submit an affidavit in connection with a motion for new trial, but only in the limited circumstances of:
>
> ***46** (1) "extraneous prejudicial information" finding its way into the jury room,
>
> (2) improper outside pressure on a juror, or
>
> (3) a quotient or gambling verdict.

In sum, the pertinent part of Tennessee Rule of Evidence 606(b) provides that a juror may not testify "to the effect of anything upon any juror's mind or emotions as influencing that juror to assent to or dissent from the verdict," but is allowed to testify "whether extraneous prejudicial information was improperly brought to the jury's attention, whether any outside influence was improperly brought to bear upon any juror...." Tenn. R. Evid. 606(b). In *Walsh,* 166 S.W.3d at 646-47, the Tennessee Supreme Court addressed the application of Rule 606 in a case where a juror testified about the mental and emotional effects of a deputy's statement to the juror during deliberations that she "had to" make a decision. The court concluded that Rule "606(b) permits juror testimony to establish the fact of extraneous information or improper influence on the juror; however, juror testimony concerning the effect of such information or influence on the juror's deliberative processes is inadmissible." *Id.* at 649.

Additionally, according to *Walsh,* once the petitioner proves "a juror was exposed to extraneous prejudicial information or subjected to improper influence, a rebuttable presumption of prejudice arises, and the burden shifts to the State to explain the conduct or demonstrate that it was harmless." *Id.* at 647 (citing *State v. Blackwell,* 664 S.W.2d 686, 689 (Tenn.1984)).

As we will explain, we conclude, as did the post-conviction court, that the petitioner failed to establish that the jury at his trial was exposed to extraneous prejudicial information. While Davis responded "[e]very day," when asked if he had a Bible with him in the jury room during deliberations, he was not asked if he displayed the Bible to the other jurors or whether they even were aware that he possessed it. Likewise, although he said that he "believe [d] [he] recited" only one Bible verse, he described it as "[t]hat was in Isaiah ... I wouldn't know the verse, chapter or the verse. I just know what it says," and was not asked if his knowledge of the verse was more precise at the time of the jury deliberations. Additionally, although saying that he "recited" the verse, he was not asked whether he had read the verse from his Bible, quoted it verbatim, paraphrased it, simply gave the gist of it, or whether he even had identified the verse as being from the Bible. [1] Thus, we conclude that the petitioner has failed to make an initial showing that, in the language of Rule 606(b), "extraneous prejudicial information was improperly brought to the jury's attention" so as to create a rebuttable presumption of prejudice and shift the burden to the State "to explain the conduct or demonstrate that it was harmless." *See* *Walsh,* 166 S.W.3d at 647. Accordingly, the additional questions asked Davis, which the petitioner claims show that the jury improperly considered the verdict during the guilt phase of the trial, were properly disallowed by the court as not being permitted by Rule 606(b).

IV. State's Use of Conflicting Theories at Codefendant's Trial and Perjured Testimony Violated the Petitioner's Rights to Due Process and a Fair Trial

***47** The petitioner argues that the State denied him a fair trial by "the use of conflicting theories between the [petitioner's trial and codefendant Garrin's trial] and the knowing use of perjured testimony." To support this claim, he inserted in his appellate brief charts containing excerpts from the testimony of Eric Thomas in the trials of the petitioner and of Derrick Garrin, asking that we "review" this testimony and conclude that it proves his claim.

In our consideration, we first note that the petitioner was convicted of two counts of felony murder for the shooting deaths of Damond Dawson and Tracey Johnson, but his convictions for the attempted murders of Eric Thomas and Tommie Blackman were reversed, this court finding that attempted felony murder is not a criminal offense. Thus, it is unclear as to how the issue of inconsistent theories as to who shot Eric Thomas is relevant to the petitioner's convictions for the first degree murders of Damond Dawson and Tracey

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Johnson. The petitioner attempts to make this connection by arguing that "[t]he State wanted to show that the person on trial was the most culpable, and, therefore, the most deserving of the death penalty." However, he makes no references to the record to support this theory.

In codefendant Garrin's trial, according to the petitioner's chart, Eric Thomas testified that he was shot by "[t]he big fellow with the glasses," the petitioner asserting that "[t]he record in the case is clear that [sic] big fellow with glasses is Derrick Garrin." However, he does not identify where in the appellate record, which consists of transcripts of testimony in two boxes, the information establishing this clarity can be located. Further, he asserts that "[t]he record is clear, including from the statements of Adams and Shaw to the police, PC Exhibits 7 and 8, that Kevin Shaw was with Adams when Adams first approached the car." He does not explain how we can make this determination solely from the confusing statements of these witnesses. He makes no references to the record as to questioning trial counsel or any other witnesses as to why Eric Thomas was not cross-examined in the way he believes should have occurred.

Additionally, the petitioner claims on appeal that the Shelby County District Attorney's Office suborned the perjured testimony of Eric Thomas:

> This is the intentional use of perjured testimony. There can be no question that Eric Thomas' alternative descriptions of the person who shot him involved perjury. Nor can there be any question that the State's attorneys were aware of the perjury.

We disagree with the petitioner's claims that he has shown the State suborned perjury by Eric Thomas or even established that Thomas perjured himself. Again, we note that it is difficult for this court to review issues where, as here, we are referred broadly to documents and not to the specific portion which, he claims, supports his accusations of subornation of perjury. The statement of Kevin Shaw consists of six pages and, by our reading, does not support the petitioner's claims. As we understand the statement, Shaw said that, upon hearing two shots, without identifying who fired them, he turned and ran, as "Kevin and Derrick" apparently ran up to the car. Shaw said, "I ran down the street. I heard a whole lot of shots after that as I was running down the street." In his statement, Carlito Adams said that he and Shaw approached the driver's side of the vehicle occupied by the victims and both began running as shots were fired, the first shot being fired by the man wearing "the big black nylon 3/4 jacket."

***48** The post-conviction court found that no proof had been presented as to the petitioner's conflicting theories claim and, thus, it was without merit:

> The next allegation by Petitioner is that the State's action denied him a fair trial and appeal. He first argues that the State had alternative theories of prosecution in the three separate trials. No proof has been presented as to contradictory theories by the [S]tate in the trial of the co-defendants. The petitioner admitted he was present on the scene armed with a gun and that he fired his gun. The testimony presented was that 5 or 6 people participated in this killing. At least 4 or 5 of them were armed. Several were identified as firing shots into the car containing the victims. The petitioner was identified by several witnesses as being "a shooter." No alternative theories were offered by the State as to Petitioner's role based upon what proof was presented to this Court. Since no proof has been presented regarding alternative theories [,] this issue has no merit.

In his appellate brief, the petitioner has neither acknowledged nor addressed this specific finding, nor has he made any references to the transcript of the evidentiary hearing as to whether his trial counsel, or any other witnesses, agreed with his claim that the State pursued differing theories in the two prosecutions. We conclude that the record supports the findings of the post-conviction court.

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V. Ineffective Assistance of Counsel

On appeal, the petitioner claims that trial counsel failed to function as effective counsel, arguing that they:

> A. Failed to thoroughly investigate and present evidence regarding the lesser culpability of the petitioner;
>
> B. Failed to competently select a jury;
>
> C. Failed to object to the presentation of victim impact evidence;
>
> D. Failed to utilize the services of various experts exacerbating deficiencies in the mitigation investigation;
>
> E. Failed to thoroughly investigate and present sufficient mitigation evidence; and
>
> F. Failed to prepare defense witnesses to testify.

We will examine these claims.

The Sixth Amendment provides, in pertinent part, that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. This right to counsel is " 'so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment.' " *Gideon v. Wainwright,* 372 U.S. 335, 340, 83 S.Ct. 792, 794, 9 L.Ed.2d 799 (1963) (quoting *Betts v. Brady,* 316 U.S. 455, 465, 62 S.Ct. 1252, 1257, 86 L.Ed. 1595 (1942)). Inherent in the right to counsel is the right to effective assistance of counsel. *Cuyler v. Sullivan,* 446 U.S. 335, 344, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); *McMann v. Richardson,* 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 1449 n. 14, 25 L.Ed.2d 763 (1970); *see also Strickland v. Washington,* 466 U.S. 668, 686, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984).

***49** "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland,* 466 U.S. at 686, 104 S.Ct. at 2064; *Combs v. Coyle,* 205 F.3d 269, 277 (6th Cir.2000). A two-prong test directs a court's evaluation of a claim of ineffectiveness:

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

Strickland, 466 U.S. at 687, 104 S.Ct. at 2064; *see also Combs,* 205 F.3d at 277.

The performance prong of the *Strickland* test requires a petitioner raising a claim of ineffectiveness to show that the counsel's representation fell below an objective standard of reasonableness, or "outside the wide range of professionally competent assistance." 466 U.S. at 690, 104 S.Ct. at 2066. "Judicial scrutiny of performance is highly deferential, and '[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.' " *Combs,* 205 F.3d at 278 (quoting *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2055). Upon reviewing claims of ineffective assistance of counsel, the court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Strickland,* 466 U .S. at 689,

104 S.Ct. at 2065. Additionally, courts should defer to trial strategy or tactical choices if they are informed ones based upon adequate preparation. *Hellard v. State,* 629 S.W.2d 4, 9 (Tenn.1982). Finally, we note that criminal defendants are not entitled to perfect representation, only constitutionally adequate representation. *Denton v. State,* 945 S.W.2d 793, 796 (Tenn.Crim.App.1996). In other words, "in considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.' " *Burger v. Kemp,* 483 U.S. 776, 794, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987) (quoting *United States v. Cronic,* 466 U.S. 648, 655 n. 38, 104 S.Ct. 2039, 2050 n. 38, 80 L.Ed.2d 657 (1984)). Notwithstanding, we recognize that "[o]ur duty to search for constitutional [deficiencies] with painstaking care is never more exacting than it is in a capital case ." *Id.* at 785, 107 S.Ct. at 3121.

***50** If the petitioner shows that counsel's representation fell below a reasonable standard, then he must satisfy the prejudice prong of the *Strickland* test by demonstrating "there is 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, 104 S.Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* In evaluating whether a petitioner satisfies the prejudice prong, a court must ask "whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell,* 506 U.S. 364, 372, 113 S.Ct. 838, 844, 122 L.Ed.2d 180 (1993) (citing *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064). In other words, a petitioner must establish that the deficiency of counsel was of such a degree that it deprived the defendant of a fair trial and called into question the reliability of the outcome. *Nichols,* 90 S.W.3d at 587. That is, the evidence stemming from the failure to prepare a sound defense or to present witnesses must be significant, but it does not necessarily follow that the trial would have otherwise resulted in an acquittal. *Nealy v. Cabana,* 764 F.2d 1173, 1178-79 (5th Cir.1985). "A reasonable probability of being found guilty of a lesser charge, or a shorter sentence, satisfies the second prong in *Strickland.*" *State v. Zimmerman,* 823 S.W.2d 220, 225 (Tenn.Crim.App.1991). Moreover, when challenging a death sentence, the petitioner must show that " 'there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death.' " *Henley,* 960 S.W.2d at 579-80 (quoting *Strickland,* 466 U.S. at 695, 104 S.Ct. at 2069).

We will examine the petitioner's specific claims as to ineffective assistance of counsel.

A. Failure to Investigate

1. Guilt Phase

The petitioner does not direct this court to the specific portions of the post-conviction court's findings of fact and conclusions of law which he challenges by this claim. As to this issue, he argues that trial counsel failed "to establish [the] relative culpability of the participants." He says that this issue "was made more acute by the fact that two of the participants, including Kevin Shaw [and] Benny Buckner ... were never charged at all." Additionally, the petitioner argues that counsel erred in deciding to "simply rely on [the petitioner]" to present his defense that "although [the petitioner] was present that day and had fired his gun, he never approached the victims' car and never fired into the car." He argues that "[f]rom a simple review of those transcripts and the other records, [trial] counsel could have, as post-conviction counsel has done, determined that [the petitioner] was not the Kevin who approached the victims' car initially with Carlito Adams. Rather [,] it was Kevin Shaw." To establish the certitude of this claim, the petitioner directs this court to review pages four through ten of his "Statement of the Facts."

***51** Additionally, the petitioner argues that although trial "[c]ounsel acknowledged that [the petitioner] had insisted that he had short hair at the time ... [trial counsel] ignored this insistence[,] choosing to believe that [the petitioner] had always had a jheri curl." He continues this argument by saying that counsel "never investigated and never interviewed friends or family about his hair style [sic] nor did they interview Mary Jones, the woman who lived across the street from the Dawsons and claimed to have seen the shooting, about the specific descriptions of individuals she had seen." The petitioner recounts testimony presented at the post-conviction hearing as to his hair length, asserting that "[b]y failing to take more seriously [the petitioner's] insistence that his hair had been short at the time of the incident and that

witness Mary Jones had mistaken him in the courtroom for Kevin Shaw at the scene and investigate accordingly, trial counsel's representation was both below the required standard of performance and was prejudicial to [the petitioner].”

As to the claim that trial counsel did not investigate and attempt to garner proof of the petitioner's hair length at the time of the offenses, the post-conviction court found:

> Petitioner again raises the issue about the length of his hair. This court has reviewed the trial transcript, the portions of other trial transcripts, witness and codefendant statements. The petitioner was present on the scene and he was described as wearing a long black trench coat. No one else on the scene, to the best of this court's recollection, was so dressed. Mr. Thomas picked out the petitioner's photograph even with short hair. Ms. Jones identified the petitioner by face and by the long black trench coat he was wearing. She also described his hair as a[j]heri curl. Trial counsel knew pre-trial that Thomas had identified Petitioner's picture and they testified that their picture of [the petitioner] looked very similar to the one in the line-up. It appears to the court that Ms. Jones, who testified later, had not made identification prior to trial. At trial she made an in court identification on cross-examination of the petitioner which appears to have been fully unexpected by the State or the defense. The petitioner had admitted being present on the scene, with a gun, and firing some. Thomas had identified him even with short hair. Up until that point this court is not sure that there was an issue about the length of petitioner's hair. Only when Ms. Jones described petitioner as the person with the black trench coat and jheri curl and the person she identified in court with a jheri curl, did his hair length become an issue. Again, this court is asked to speculate as to who else on the scene had a jheri curl. Petitioner implies Kevin Shaw but offered no proof by witness, photograph or otherwise that Shaw was the person with a jheri curl. This court can only speculate as to what might have occurred during this testimony if petitioner had cut his hair as requested by his attorneys prior to trial. However, this court is not allowed to speculate as to what impact any of this would have had on the jury. No proof has been offered by petitioner other than that he had short hair at the time of the crime.... No proof was presented that he was not the person in the black trench coat. Petitioner has failed to carry his burden of proof as to this issue and it therefore has no merits.

***52** We agree with the post-conviction court that the testimony at the hearing does not support the petitioner's assertions that trial counsel did not attempt to show he had a shorter hairstyle at the time of the incident. Senior trial counsel explained that the petitioner was unable to name any witnesses who would say that he did not have a jheri curl at the time:

> Q And do you recall whether he asked you to find witnesses that could describe his hair length?
>
> A I do and I think we-he couldn't give us anybody who could say that they saw him with a normal haircut at the time that this incident occurred or we would have called them, but what he did do was he gave us a photograph depicting him with short hair or a nonjheri curl hair, but that photograph appeared to be of a much younger Kevin Burns and not Kevin Burns at the time of this incident.
>
> And as matter of fact, to us it looked almost identical to the photograph they used for the witnesses in the photo lineup to be identified that they did in fact pick out. So we thought if we tried to use that photograph, it would only strengthen the case's I.D., since that photograph was similar to the photograph that was in evidence. But ... my recollection was he could not give us a name of anybody who could

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say that he did not have that jheri curl at the time of this incident.

Counsel told of his efforts to persuade the petitioner not to wear his hair in a jheri curl at the time of trial:

Q And in terms of the time of the trial when you met before-when you met [the petitioner], what was his hair length at that time?

A It was a jheri curl style hair, and it was long, and it aggravated me. We had words about it, and it was my preference that he change his hairstyle for trial and it didn't have anything to do with identification and that. I thought that his appearance was not conducive for something this serious, and I tried to get him to change his hairstyle, and he refused to do so.

Q Do you recall him advising you why he refused to change his hairstyle?

A He just simply said I like it, and I won't change it, and that is what he said the entire time. I even got his parents involved in that process trying to talk to him about that hair.

Junior trial counsel described their attempts to convince the petitioner he should not wear his hair in a jheri curl at the time of trial:

Q Do you remember why he refused to cut his hair?

A He just wouldn't cut it. We begged and pleaded with him to cut it because that was one of the issues in the trial that Ms. Jones was talking about this fellow had a jheri curl.

During cross-examination, junior counsel further detailed their dealings with the petitioner and his hairstyle:

Q He had a jheri curl in the courtroom at trial?

A Right.

Q And you and [senior counsel] tried to get him not to have a jheri curl at trial?

A Yes, very much so.

Q And the reason you did that was because the description of him involved a jheri curl?

***53** A Exactly.

Q From Ms. Jones?

A Yes.

Q Did he tell you that he had a jheri curl on the day of the crime?

A No, not that I remember.

Q Did he give you the name of anybody that could prove he didn't have a jheri curl at the trial?

A No.

Q Okay. Explain that to me. What exactly happened? What was the interaction between you and [the petitioner] about this hairstyle?

A This hairstyle when I first met him I believe that he had already had the start of a jheri curl, and I say start, but it was pretty long. He'd already doing [sic] the process or whatever it takes. I don't know what all it takes to keep a jheri curl, but he already had it, but one of the issues that came up during our investigation was, like I say, Ms. Jones says the person that done the shooting had a jheri curl.

And out of all the guys, Derrick Garrin, nobody else had a jheri curl except [the petitioner]. Because I remember making a comment to him back when he had this nobody else was wearing jheri curls in this community. I mean the jheri curl was like the afro. It had died and gone away, but he was sitting in the jail with a jheri curl with all the grease on his shoulders and stuff. It was shining and glistening and stuff, and we kept saying cut your hair, Kevin, get your hair cut. No, I'm not going to cut my hair, and he didn't cut his hair.

So I mean that was one of the things-we didn't have anybody from him that says he was bald headed at the time of the commission of the offense.

Q And you-all attempted to find somebody?

A We didn't find anybody.

Q You couldn't find anybody?

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A No.

Q He couldn't give you anybody?

A No, he always had hair from what I seen. He had hair. I mean he can come back now and say he was bald headed, but he had hair. I think-we even had a picture that was so closely related to the way he actually was during trial, that we couldn't even use that. I think that picture came from an arrest around about that same time. He had hair.

Q He never really gave you a reason why he wouldn't cut his hair?

A No, he didn't, and I thought that was one of the most-it was a bad thing. As simple as cutting your hair, which may or may not be able to help you in the course of saving your life, and he wouldn't do it.

Q Did you ask his mom to maybe talk to him about it?

A I think we talked to everybody about that. It was out of style. It was out of character. It wasn't what we needed as far as trying to save his life for him to be sitting there behind us with a jheri curl.

On appeal, the petitioner fails to acknowledge the difficult position in which he forced trial counsel by requiring they contend that, while he had a jheri curl at the time of trial, he had not worn his hair in that style at the time of the offenses. In fact, if the petitioner's claims as to his changes in hairstyle are true, this would appear to be the very unique situation in which a person charged with an offense changed his hairstyle by the time of trial to more closely match the description of the offender, rather than vice versa, which is the norm. We conclude that the record supports the findings of the post-conviction court.

***54** Although he concedes that trial counsel recognized the importance of establishing whether he was in fact the shooter who killed one of the victims or merely was present, the petitioner asserts that counsel failed to utilize the testimony of Eric Thomas from Garrin's trial to rebut evidence establishing the petitioner as the shooter. He argues that evidence of his lesser culpability and the fact that his codefendants received lesser sentences were an essential part of the circumstances of the crimes. Additionally, he argues that counsel's failure to investigate this issue led to a series of missed opportunities to cross-examine the State's witnesses and raise doubt as to whether the petitioner shot at the victims inside the vehicle.

At the petitioner's trial, the proof, as recounted by our supreme court, established that the petitioner and Carlito Adams walked up to the passenger side of a car in which four young men, Dawson, Johnson, Thomas, and Blackman, were sitting. *Burns,* 979 S.W.2d at 278. Adams pulled out a handgun and told Blackman to get out of the car. *Id.* When he refused, the petitioner pulled out a gun and went around to the driver's side of the car. *Id.* Blackman exited the car and fled. *Id.* Adams said, “Get him,” evoking the emergence of three or four men from behind hedges. *Id.* These men fired at the fleeing Blackman. *Id.*

Mary Jones testified that she saw Carlito Adams shoot Johnson in the chest and identified the petitioner as the person who shot Dawson several times. *Id.* She unequivocally identified the petitioner, explaining that she got “a real good look in his face” as he ran toward her after the shootings. *Id.* Eric Thomas, a surviving victim of the gunfire, made a photographic identification of the petitioner two days after the incident. *Id.* Although acknowledging that he had initially identified Adams as his shooter, Thomas explained that he thought he was going to die and Adams was the only name he knew. *Id.*

In the direct appeal of this matter, our supreme court described the petitioner's statement to FBI agents regarding the crimes:

> On June 23, 1992, Burns was found in Chicago and arrested. After being advised of his rights and signing a waiver, the defendant gave a statement in which he admitted his role in the killings. He said that he had received a telephone call from Kevin Shaw, who told him that four men had “jumped” Shaw's cousin. Burns, Shaw, and four others intended to fight the four men, and Shaw gave Burns a .32 caliber handgun. As the others approached a car with four men sitting in it, Burns stayed behind. He heard a shot, saw a man running across the yard, and fired three shots. He then left the scene with the other men.

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Id.

At the post-conviction hearing, Mary Jones said the shooter of Damond Dawson was the person with a shoulder-length jheri curl and wearing a long black trench coat. She described Tracey Johnson's shooter as "a brown-skinned guy, tall, ... about six-two, six-three, weighed about 250 pounds," and identified the petitioner as the assailant sporting the jheri curl.

***55** Trial counsel testified that the petitioner had severely limited his options by providing a statement to FBI agents in Chicago where he was arrested, admitting to them that he was present at the scene, had a weapon, and fired shots. Junior counsel said the theory of defense rested upon the petitioner's assertions that he had fired into the ground or air, did not know the victims, and was not culpable. Although a main focus of the defense was to challenge the eyewitnesses' identification, senior counsel recalled that "nine out of ten people said [the petitioner] was the trigger person." Further, Investigator Mull talked with one of the codefendants who specifically implicated the petitioner as the trigger person. In this regard, senior counsel noted that the best proof to establish his defense that the petitioner was not the shooter was going to come from the testimony of the petitioner himself. However, on the day the petitioner was to testify, he refused to take the stand, which greatly impacted the defense strategy.

Senior counsel acknowledged that Eric Thomas identified Derrick Garrin as his shooter and described the other perpetrator as "five-eight, slim build, dark complexion, curl-like fade." Senior counsel said this description matched the petitioner. Eric Thomas' identification of his shooter changed at the petitioner's trial, and both senior and junior counsel recounted that they attempted to impeach his testimony. Senior counsel said that, while there was not "one hundred percent consistency among the witnesses and victims," there was a consistency in that the petitioner was not one of the first people to arrive at the car. Senior counsel further found the information that Carlito Adams did not know the petitioner by name not particularly useful because Adams had also implicated two individuals he did not know as the shooters. Counsel added that all of the codefendants, with the exception of Derrick Garrin, identified the petitioner as the trigger person.

At the post-conviction hearing, the petitioner presented the testimony of various witnesses who said that he did not have a jheri curl at the time of the offenses. Kevin Whitaker testified that, in 1992, Kevin Shaw wore his hair "kind of like a high top, kind of like a high-top fade type of deal" and often wore a trench coat. Whitaker said that the petitioner wore his hair "low on the scalp." Samuel G. Brooks testified that he could not recall the petitioner wearing a "jheri curl," but the last time he saw the petitioner was in March 1992. Rodney Weatherspoon testified that Kevin Shaw "sometimes" wore a trench coat, adding that the people from West Memphis wore their hair in fades, while those from Memphis had "chemical processes" in their hair. He described Kevin Shaw as having "bushy hair," "longer hair" with "the little curl." Weatherspoon stated that he never saw the petitioner with long hair or a jheri curl. The petitioner's mother, Leslie Burns, who testified at the petitioner's trial, said that the petitioner wore his hair short at the time of the incident and did not start growing his hair long until after his arrest. She said she saw no reason for her son to change his hairstyle for trial. Renita Burns said that the petitioner never wore his hair long or used chemicals in his hair. Steve Carter said that the petitioner "always kept short hair." George Michael Hissong said that the petitioner wore his hair short.

***56** The post-conviction court found that trial counsel had not been ineffective in their preparation for the guilt phase of the trial:

> Petitioner alleges that counsel failed t[o] interview witnesses to the crime. Both attorneys testified that their investigator attempted to locate and talked to witnesses. Tomm[ie] Blackm[a]n refused to talk to them. He was successful on some and not on others. [Senior counsel] also testified that he and the investigator canvassed the neighborhood door to door for witnesses but to no avail. However, he testified that his investigator had secured the entire police department file and copies of all of the witnesses' statements pre-trial. Further, they were able to convince the State to try [the petitioner] after defendants Garrin and Adams so that they would have the testimony of the witnesses as well. The Court feels the attorneys were not ineffective for failing to interview witnesses. It appears they were well prepared for trial. This issue has no[ ] merit.
>
> Petitioner alleges that counsel failed to talk to codefendants, Garrin and Adams.... The testimony at the evidentiary hearing was that one co-defendant, name unknown, refused to talk to the investigator and another named the Petitioner as the "Trigger man".... There has been no proof presented that ... [Garrin and/or Adams] wanted to testify [for the petitioner at trial] or that the[ir]

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testimony would have been helpful to the Petitioner and they were available to testify at this hearing. This Court therefore concludes that this issue is without merit.

Petitioner alleges ineffectiveness for not interviewing all of the co-defendants. The attorneys testified that they had each co-defendant's statement, as well as the statements of those present but not charged.... [C]ounsel had reviewed the testimony of those who had been tried and those who had testified in the earlier trials. Adams described the Petitioner as a shooter and described him as wearing a 3/4 length black coat. Shaw gave the same description, Buckner, who was arrested and charged as a participant by order of the court after his testimony, said the [petitioner] was present when the proceeds of the robbery were divided, Garrin said the petitioner fired shots and may have been the one to take the jewelry. This court has not seen any testimony or a statement from Richard Morris other than a small portion of his testimony placing the Petitioner on the scene with a gun. This Court has not heard testimony from any of these co-participants or co-defendants, which would have been beneficial to Petitioner or would have affected the verdict of the jury. This Court sees nothing beneficial that would have been offered by any of those present and nothing has been presented to the Court to indicate that due to the failure of defense counsel to interview these parties the outcome of the trial would have been different. This issue has no merit.

As found by the post-conviction court, the testimony showed that trial counsel and their investigator attempted to interview witnesses to the crimes. Tommie Blackman refused to talk to them. Counsel also had the entire file of the prosecution and had the transcripts of the trials of Carlito Adams and Derrick Garrin. One codefendant specifically identified the petitioner as the "trigger man." Both Carlito Adams and Kevin Shaw described the shooter as wearing a black trench coat. Buckner and Garrin both stated that the petitioner shared in the proceeds of the robbery, and Garrin stated that the petitioner fired shots. There is no proof that the petitioner provided trial counsel with the names of any of the numerous witnesses who could have testified that he had short hair. One witness identified the petitioner two days after the incident by photographic lineup in which the petitioner had a short hairstyle. Another witness described the petitioner as having a jheri curl. The petitioner refused to cooperate with counsel by changing his hairstyle or providing counsel with witnesses regarding his hairstyle or manner of dress. Further, he hampered any attempt to establish his lesser culpability by suddenly refusing to testify on his own behalf.

***57** There was no proof presented that any of the participants other than the petitioner was wearing a trench coat during the shootings. The petitioner asserts that Kevin Shaw had a jheri curl at the time of the offenses. In support thereof, defense witness Rodney Weatherspoon identified Kevin Shaw as wearing longer hair with "the little curl." Notwithstanding, defense witness Kevin Whitaker testified that Kevin Shaw wore his hair in a "high-top fade." This conflicting evidence fails to identify Kevin Shaw as wearing a black trench coat or wearing a long jheri curl at the time of the offenses. The post-conviction court properly concluded that the petitioner failed to present evidence establishing that he was mistakenly identified as the shooter.

The conflicting testimony of the codefendants, the petitioner's refusal to cooperate with counsel, his statement to FBI agents, and his decision not to testify at trial hindered trial counsel's efforts to pursue a theory of lesser culpability. Even if, as the petitioner claims, trial counsel were deficient in not presenting witnesses to testify regarding the length of his hairstyle, it is clear that the identification of him as the shooter does not rest solely upon his hairstyle. The proof, including the petitioner's statement to the FBI, established, beyond a reasonable doubt, that he was guilty of the felony murders of the victims, Johnson and Dawson. Thus, he has failed to show that he was prejudiced by counsel's alleged failure to further investigate his lesser culpability and the alleged failure to present evidence of his lesser culpability.

2. Penalty Phase

On appeal, the petitioner asserts that "[f]ailure to conduct even a rudimentary investigation in this case denied [the petitioner] his right to the effective assistance of counsel." According to the petitioner, "much of the problem in this case was related to the total lack of understanding of mitigation by defense counsel." To bolster this allegation, he points to his claims that "Obra Carter abused the women in his life and his children," and "Leslie Burns ... had significant deficiencies as a parent." Pointing to the findings of Drs. Norton, Woods, Kertay, and Auble, we are directed to "various symptomologies" of the petitioner, including "traumatic stress, genetic vulnerabilities and environmental issues."

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The post-conviction court found this claim to be without merit:

> [O]n trial preparation, petitioner alleges failure to prepare proper mitigation. The defense strategy in this case was that the petitioner was a good person and this activity was out of character for him.... [T]rial counsel testified that a large part of their case was based upon the petitioner testifying. He had indicated throughout pretrial that he would testify. Yet at trial he decided not to. Although this is petitioner's right, it is also another example of his failure to cooperate with his attorneys by advising them of this decisions [sic] in advance. This court heard a full week's worth of testimony from mitigation witnesses; family, friends, teachers, a sociologist/mitigation expert and a neuro-psychiatrist.... [T]he proof presented showed that this was a well-adjusted young man who committed a crime that was out of character for him. After listening to all of the mitigation proof ... this court heard nothing about the petitioner that offered any better insight into why this crime occurred or why the petitioner chose to act the way he did on the day in question. The bulk of the mitigation proof dealt with the petitioner's father. There was no proof offered ... that his upbringing played any role in the commission of this offense. If anything it showed that the petitioner had overcome adversity and survived, leading to a conclusion that this crime was out of character.... [T]his Court does not feel that the petitioner has carried his burden of proof that the mitigation presented during this hearing would have changed the verdict rendered by the jury....

***58** Regarding the penalty phase, the proof established, under the testimony of Thomas and Jones, that the petitioner shot into a vehicle, creating a great risk of death. According to the petitioner's FBI statement, he shot at Blackman, admitting that three children were in his line of fire. This statement also supports application of the factor of creating a great risk of death to two or more persons other than the victim. Under either theory, the aggravating circumstance is still established. The petitioner cannot establish that his sentence would have been different. The record supports the determination of the post-conviction court that this claim is without merit.

B. Failure to Competently Select a Jury

The petitioner argues trial counsel did not adequately voir dire prospective jurors on their respective attitudes about the death penalty, alleging that counsel were completely inadequate with regard to the jury selection process in a capital case. In support of this allegation, he asserts that trial counsel failed to adequately voir dire potential jurors by not asking questions necessary to reveal their personal biases. Additionally, he faults them for failing, in his view, to zealously pursue the motion for individual voir dire. The petitioner asserts that, as evidenced by these alleged facts, “trial counsel surrendered in this case by not questioning jurors about their ability to consider a life sentence.”

The post-conviction court found that trial counsel were not ineffective in selecting the jury:

> Petitioner next complains about Errors at Trial. The first complaint deals with Voir Dire. The first three allegations deal with the extent or lack thereof, in which jurors were questioned about the death penalty, mitigation and the full range of punishment. The depth and complexity of voir dire is an individual decision made by each trial attorney. The purpose is to obtain a fair and impartial jury. Both trial counsels have long and distinguished trial records. They both have extensive experience in selecting juries and death qualified juries. Their testimony was that they were satisfied with the manner in which they selected the

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> jury and they were satisfied that they had a fair jury. There has been no proof offered that this was not true.... Petitioner has failed to offer any proof that any particular juror was unfair or unqualified.

At the post-conviction hearing, trial counsel testified that Archibald had filed a motion, which was denied, for individual voir dire. Senior counsel acknowledged that "the standard policy ... in Shelby County is that it's denied unless you begin to pick the jury and find that because of some pretrial publicity, individual voir dire may be warranted." As for the voir dire, counsel explained that he utilized standard questions for capital cases and said that a jury list was sought to get an idea of who the potential jurors were, where they worked, and their backgrounds. Junior counsel confirmed that a motion for individual voir dire was filed in hopes that "one day some judge will allow you to have individual voir dire ... [to prevent] the domino theory," but he had never had such a motion granted. He said that the potential jurors were asked questions to learn about their views of the death penalty and, while the law did not permit a person who was unable to impose the death penalty to be a juror, there was no way to gauge the strength of one's conviction to impose the death penalty. While he acknowledged that no questions were asked as to whether prospective jurors would automatically impose the death penalty, he believed that such questions might inform the jury a defendant was guilty.

***59** In the capital murder context, where the jury in the punishment phase must choose between life and death, several courts have said that not questioning as to whether a prospective juror can fairly consider a life sentence does not necessarily constitute deficient performance. *Stanford v. Parker,* 266 F.3d 442, 453-454 (6th Cir .2001); *Commonwealth v. Morris,* 546 Pa. 296, 684 A.2d 1037, 1042-43 (Pa.1996); *Hartman v. State,* 896 S.W.2d 94, 105 (Tenn.1995). The Tennessee Supreme Court has held that the decision of whether to voir dire prospective jurors on their ability to consider a life sentence, or to what degree, is a strategic one. *See Hartman,* 896 S.W.2d at 105. Valid tactical reasons exist to refrain from asking detailed questions on the death penalty. *Id.* According to the Sixth Circuit, counsel may have validly refrained from asking such questions, not wanting prospective jurors to hear each other's answers. *Stanford,* 266 F.3d at 454. Junior counsel explained that, in his opinion, an inquiry in this regard may be perceived by potential jurors as a concession that credible evidence of guilt exists. *Id.*

The petitioner relies upon the holding in *Morgan v. Illinois,* 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992), to support his claim that counsel's not asking life-qualifying questions prevented the proper exercise of challenges. *Morgan* holds that a defendant has the right to life-qualify the jury upon request but does not mandate that life-qualifying questions be asked of potential jurors in every case. By premising a defendant's right to life-qualify upon defense counsel's making a request to life-qualify, *Morgan* suggests that there are instances where defense counsel might choose not to ask life-qualifying questions as a matter of strategy.

The petitioner presents no evidence to counteract our conclusion that his counsel's failure to ask life-qualifying questions during general voir dire constituted trial strategy. Junior counsel explained his view that such questions risked suggesting to the jury that a defendant was guilty. The post-conviction court concluded that the decision not to ask "life-qualifying" questions of prospective jurors was a strategic determination by experienced counsel. The record supports this conclusion. Further, the petitioner has failed to establish that the trial outcome would have been different if these questions had been asked during voir dire.

The petitioner additionally argues that counsel should have pursued more zealously the motion for individual voir dire, including failing to pursue the issue on direct appeal. As our supreme court has noted, the prevailing practice is to examine jurors collectively. *See State v. Austin,* 87 S.W.3d 447, 471 (Tenn.2002) (citing *State v. Jefferson,* 529 S.W.2d 674, 681 (Tenn.1975)). Even in a capital case, there is no requirement that death qualification of a capital jury must be conducted by individual, sequestered voir dire. *Id.* Moreover, individual voir dire of prospective jurors is a matter within the trial court's discretion. *Id.* (citations omitted). "Individual voir dire is mandated only when there is a 'significant possibility' that a juror has been exposed to potentially prejudicial material." *Id.* at 471-72. The record does not reflect that the petitioner's trial was a high profile case, and we conclude that he did not establish the need for individual voir dire.

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***60** The ultimate goal of voir dire is to insure that jurors are competent, unbiased, and impartial. *State v. Cazes,* 875 S.W.2d 253, 262 (Tenn.1994). The petitioner has not established that any juror was unqualified to serve, biased, or partial. In fact, junior counsel testified that his requests in previous cases for individual voir dire had been unsuccessful. The petitioner has failed to establish that trial counsel's request for individual voir dire would have been successful if pursued more zealously or that the outcome would have been different if the request had been granted. Accordingly, the record supports the determination of the post-conviction court that the petitioner did not establish that trial counsel were ineffective in selection of the jury.

C. Failure to Object to Victim Impact Evidence

The petitioner argues that trial counsel were ineffective in failing to object to certain victim impact testimony. Again, he makes no references to having questioned trial counsel about this claim during the post-conviction hearing. The post-conviction court found this claim to be without merit:

> Petitioner alleges trial counsel should have objected to the victim impact testimony. No proof has been offered as to how said testimony was improper or how that testimony impacted the Jury Verdict. This Court has reviewed the testimony and finds that it was appropriate testimony and further finds that based upon all of the proof in the case the victim impact testimony in this Court's opinion played little role in the jury's verdict....

During the guilt phase, the State presented the testimony of Jonnie Dawson, mother of victim Damond Dawson, who testified that he was the youngest of her three children and was seventeen years old at the time of his murder. *Burns,* 979 S.W.2d at 279. She described her son as "very good at athletics." *Id.* She said that "[t]he neighborhood had changed after the killings; people locked their doors and were afraid." *Id.* Brenda Hudson, the mother of victim Tracey Johnson, testified that he was twenty years old at the time of his murder and was the oldest of her three children. *Id.* She said Johnson had a four-month-old daughter who he supported and described the effect of his death on her two other children, his grandfather, and his daughter. *Id.*

On direct appeal, counsel challenged the admission of the testimony of both Jonnie Dawson and Brenda Hudson. *Id.* at 281. Our supreme court described the victim impact testimony:

> Here, the victims' mothers testified during the penalty phase. Each related a few details about their deceased sons. Ms. Dawson testified that the shootings had a negative effect on her own life: she had divorced, moved to another house, and no longer knew what it was like to feel happy. Johnson's mother, Ms. Hudson, testified that "it had been hard to let go" of the killings, and she cried every day. She also testified that the killing affected her other two children, her father, and the victim's young daughter.

***61** *Id.* at 282.

In reviewing the admissibility of this evidence, the supreme court concluded that the trial court had not erred in allowing it:

> Although evidence regarding the emotional impact of the murder "should be most closely scrutinized," *[State v.] Nesbit,* 978 S.W.2d 872,] 891 [(Tenn.1998)], nearly all of this evidence was limited in scope to a glimpse into the lives of Dawson and Johnson and the effects of the killings on their immediate families. This testimony was reserved in nature and not inflammatory, and its admission was not barred by the capital sentencing statutes or the Constitutions of the United States and Tennessee. Moreover, the prosecutor did not extensively discuss or emphasize this evidence in summation. Accordingly, neither the admission of this evidence nor the prosecution's argument was improper.

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Id. The supreme court noted the additional testimony of Ms. Dawson as to the effects of the killings on the entire community, *e.g.,* people were afraid and kept their doors locked, *id.,* noting that the prosecutor emphasized this claim during closing argument, *e.g.,* "They didn't just kill a couple of more Memphis teenagers.... They killed an entire village. They killed an entire neighborhood." *Id.* at 283. The supreme court concluded that this testimony and the mention of it during closing argument went beyond being " 'information designed to show those unique characteristics which provide a glimpse into the life of the individual who has been killed, the contemporaneous and prospective circumstances surrounding the individual's death, and how those circumstances financially, emotionally, psychologically or physically impacted upon *members of the victim's family.*' " *Id.* (quoting *Nesbit,* 978 S.W.2d at 891). However, the court further determined that the testimony and argument "did not render the proceedings fundamentally unfair or unduly prejudicial to the defendant." *Id.* (citing *Darden v. Wainwright,* 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986)).

The petitioner argues on appeal that trial counsel's not objecting to the admission of Ms. Dawson's testimony constituted ineffective assistance, denied him a fair trial, and resulted in the failure to preserve an important issue for appeal. However, whether trial counsel were deficient in not objecting to the victim impact testimony of Jonnie Dawson and related argument of the prosecutor need not be decided since the petitioner is unable to show prejudice. In this regard, on direct appeal, our supreme court determined that any error in admitting the statements and argument was harmless in view of the fact that neither the testimony nor the argument was inflammatory. *Burns,* 979 S.W.2d at 283. The court further found that the admission of this victim impact testimony and argument did not render the proceedings fundamentally unfair or unduly prejudicial. *Id.* In order for the petitioner to succeed on an ineffective assistance of counsel claim, there must be a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068. This issue was resolved on direct appeal adversely to the petitioner. Additionally, we note that an issue raised on direct appeal cannot form the basis of a claim of ineffective assistance of counsel on collateral review. *See Pruett v. Thompson,* 996 F.2d 1560, 1576 (4th Cir.1993).

D. Trial Counsel's Pretrial Investigator and Presentation of Mitigation Evidence and E. Use of Expert Services

***62** The petitioner asserts that trial counsel "failed to present significant mitigation evidence." This mitigation proof included testimony that he was a decent person; that his father, Obra Carter, abused the women in his life and his children; and that his mother, Leslie Burns, had significant deficiencies as a parent due to the number of children in her household, the presence of a severely handicapped child, and the sum of problems she had leading to bouts with depression. He further argues that no evidence was presented regarding the nature of the neighborhood in which the petitioner was raised. In addition to lay testimony, he asserts, further, that trial counsel failed to adequately utilize the services of experts in investigating and presenting a mitigation defense, specifically, that not employing a mitigation specialist and a neuropsychologist resulted in counsel's performance falling below the expected standards for counsel in a capital proceeding.

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); *Zagorski v. State,* 983 S.W.2d 654, 657-58 (Tenn.1998). 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 of whether counsel's choice of what information to present to the jury was professionally reasonable.

There is no constitutional imperative, however, that counsel must offer mitigation evidence at the penalty phase of a 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 v. State,* 938 S.W.2d 363, 369-70 (Tenn.1996).

To ascertain whether trial counsel was ineffective by not presenting mitigating evidence, the reviewing court must consider several factors. First, the 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); *Adkins v. State,* 911 S.W.2d 334 (Tenn.Crim.App.1994)). 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); *State v. Melson,* 722 S.W.2d 417, 421 (Tenn.1989)). Third, the court must consider whether there was such strong evidence of applicable aggravating factor(s) 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)). Thus, to determine whether the petitioner has carried his burden of showing that there is a reasonable probability that at least one juror would have declined to impose a sentence of death if presented with certain mitigation evidence, we must "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins v. Smith,* 539 U.S. 510, 534, 123 S.Ct. 2527, 2542, 156 L.Ed.2d 471 (2003).

***63** In support of his allegations, the petitioner points to the testimony of Dr. Norton, a mitigation specialist, and Dr. Woods, a neuropsychologist, arguing both concluded that Obra Carter was abusive to Zettie Thomas, Louise Carter, and Leslie Burns. Dr. Norton testified that the Burns family lived in a physically and emotionally abusive environment due to the conduct of Obra Carter, saying that the physical abuse of a child's mother can cause traumatic reactions in children. Dr. Woods believed that the petitioner had difficulty in certain coping skills, including the ability to weigh and deliberate, and related these problems to various symptomologies existing in his environment. He further found evidence of impaired judgment, saying the petitioner's inability to weigh and deliberate was a result of mental inflexibility which was indicated on the psychological testing. He found that these deficits played a part both in the poor decision-making of the petitioner at the time of the offenses as well as in his refusal to cut his hair prior to trial.

During the sentencing portion of the petitioner's trial, counsel presented the testimony of six witnesses. *See* *Burns,* 979 S.W.2d at 279. Leslie Burns, the petitioner's mother, testified that he was twenty-six years of age, had twelve brothers and sisters, had graduated from high school, and had presented no disciplinary problems while in school. *Id.* His father, Obra Carter, testified that his son had always been obedient and well-mannered. *Id.* Phillip Carter, the petitioner's half-brother, testified that the petitioner had been active in church and had always tried to avoid trouble. *Id.* Norman McDonald, the petitioner's Sunday School teacher, testified that the petitioner was a "faithful" young man who attended church regularly. *Id.* Mary Wilson, a captain with the Shelby County Sheriff's Department, and Bennett Dean, a volunteer chaplain, both testified that the petitioner had actively participated in religious services while in custody for these offenses. *Id.* The petitioner complains that this evidence "failed to say much, if anything, about Kevin Burns."

At the post-conviction hearing, senior counsel testified that he instructed the investigator to contact approximately twelve friends, neighbors, teachers, and co-workers of the petitioner. An attempt was made to interview the petitioner's siblings. The witnesses that counsel selected to testify were those who could relate the most positive things about the petitioner. A limit was placed on the number of witnesses, however, to prevent cross-examination as to the petitioner's prior criminal record. Senior counsel said that the petitioner's mother had instructed certain witnesses not to come to trial. He acknowledged that no investigation was made into the culture of West Memphis or the nature of the petitioner's neighborhood and said he had not been told of instances where gunshots had been fired at the petitioner's house. Senior counsel explained that neither of the petitioner's parents provided any indication that the petitioner had anything but a normal childhood. Counsel also could not see any mitigation value in testimony that the petitioner's house was located near a housing project.

***64** Regarding the use of mental health experts, senior counsel said there was no indication from either the mental evaluation performed by Midtown Mental Health, the petitioner's family, or his school records that the petitioner had any mental problem or mental illness. Counsel said that, had anything been discovered that would have questioned the petitioner's mental condition, counsel would have sought additional assistance from the court. In counsel's opinion, the petitioner understood the nature and consequences of his defense but refused to follow counsel's recommendations.

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Senior counsel said that he understood the presentation of mitigation evidence as "those factors that are enumerated in the statute in terms of presenting them and the defendant's case whether it be his age, his-any kind of mental problems, his role as a leader, or amount of participation in the crime involved, and thus his family history, society history." He said he had never used the services of a mitigation specialist.

Junior counsel described the penalty phase defense, that the petitioner "was in fact a good person," as "[v]ery weak." He reiterated senior counsel's testimony that certain mitigation witnesses were not used because their testimony was cumulative and counsel did not want to open the door as to questioning about the petitioner's prior criminal record. He said their proof was intended to show that the petitioner did not have a bad childhood and there was no reason for him to be involved in the crimes. Counsel said that, in preparing for mitigation, counsel were hindered by the actions of the petitioner's mother who prevented certain evidence from being introduced, recounting that she "basically controlled this case as far as whether or not people would talk to us, and during the negotiations and talking to her and talking to his dad at one point it got to the point that she didn't want anybody, any family members or anybody from West Memphis to [have] anything to do with us at all period." Her actions blocked trial counsel from presenting witnesses from the petitioner's community. Other potential witnesses refused to testify because they did not want to be bothered or did not remember the petitioner as well as he thought they did, and junior counsel opined that it was a bad practice to compel mitigation witnesses to testify.

Junior counsel acknowledged that he and senior counsel did not investigate the culture of West Memphis, Arkansas. He said that, in his opinion, the culture of West Memphis was not that different from that of Memphis and, while there were minor differences, he did not believe that these rose to the level of mitigation. As to testimony about the petitioner's family, counsel stated that he was aware the petitioner's father was relatively strict but knew that the father had a separate family with whom he resided. Counsel observed that this situation was peculiar but not sufficient to rise to the level of mitigation. Additionally, he explained that the petitioner was more influenced by his mother than his father and that the petitioner's neighborhood was not particularly violent. While he acknowledged that information that gunshots had been fired at the petitioner's house might have been useful in mitigation, no such information was ever passed along to counsel.

***65** Junior counsel said that their preparation of a defense theory at both the guilt and penalty phases was hindered by the lack of cooperation by the petitioner's family. For example, the petitioner's mother refused to believe that her son had committed any crime. Counsel related that he and co-counsel had learned through their investigation that the petitioner's mother had actually "assisted him in that little trip to Chicago evading arrest." Counsel included the petitioner in creating a mitigation strategy and providing them with the names of witnesses.

Corroborating senior counsel's statements, junior counsel testified that there was no indication whatsoever that the petitioner suffered from any mental or personality defects. All information was consistent in that it revealed that the petitioner had a decent childhood, knew both of his parents, attended school, and had food and clothing.

The post-conviction court found that the defense strategy was, in fact, that the petitioner was a good person and that the criminal acts were out of character for him:

> Finally, on trial preparation, petitioner alleges failure to prepare proper mitigation. The defense strategy in this case was that the petitioner was a good person and this activity was out of character for him. Further, trial counsel testified that a large part of their case was based upon the petitioner testifying. He had indicated throughout pretrial that he would testify. Yet at trial he decided not to. Although this is petitioner's right, it is also another example of his failure to cooperate with his attorneys by advising them of this decision[ ] in advance. This court heard a full week's worth of testimony from mitigation witnesses; family, friends, teachers, a sociologist/mitigation expert and a neuro-psychiatrist. In this court's opinion the proof presented showed that this was a well-adjusted young man who committed a crime that was out of character for him. After

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> listening to all of the mitigation proof presented this court heard nothing about the petitioner that offered any better insight into why this crime occurred or why the petitioner chose to act the way he did on the day in question. The bulk of the mitigation proof dealt with the petitioner's father. There was no proof offered, including testimony from the petitioner, that his upbringing played any role in the commission of this offense. If anything it showed that the petitioner had overcome adversity and survived, leading to a conclusion that this crime was out of character. Based upon the proof presented, this Court does not feel that the petitioner has carried his burden of proof that the mitigation presented during this hearing would have changed the verdict rendered by the jury. Therefore, the Court finds this issue has no merit.

This proof supported the conclusion that the petitioner was a well-adjusted young man who committed a crime that was out of character for him. The post-conviction court concluded that the petitioner failed to offer any better insight at the evidentiary hearing into why this crime occurred or why the petitioner chose to act the way he did on the day of the double homicide.

***66** "While '[i]t should be beyond cavil that an attorney who fails altogether to make any preparations for the penalty phase of a capital murder trial deprives his client of reasonably effective assistance of counsel by any objective standard of reasonableness' it is unclear how detailed an investigation is necessary" under *Strickland* to ensure effective counsel. *White v. Singletary,* 972 F.2d 1218, 1224 (11th Cir.1992) (internal citation omitted). The right to present and have a sentencer consider any and all mitigating evidence means little if defense counsel fails to look for mitigating evidence or fails to present a case in mitigation at the capital sentencing hearing. Thus, although "no absolute duty exists to investigate particular facts or a certain line of defense," *see* *Chandler v. United States,* 218 F.3d 1305, 1317 (11th Cir.2000), counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland,* 466 U.S. at 691, 104 S.Ct. 2052, 80 L.Ed.2d 674. In determining whether counsel breached this duty, "we must conduct an objective review of [counsel's] performance, measured for reasonableness under prevailing professional norms, which includes a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time." *Wiggins,* 539 U.S. at 523, 123 S.Ct. at 2536 (internal citation and quotation marks omitted). It is also necessary to be mindful that defense counsel is not required to "investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing" or "to present mitigating evidence at sentencing in every case." *Id.* at 533, 123 S.Ct. at 2540. Moreover, counsel does not have the duty to interview every conceivable witness. *Hendricks v. Calderon,* 70 F.3d 1032, 1040 (9th Cir.1995). In sum, counsel's investigation will not be found deficient for failing to unveil all mitigating evidence, if, after a reasonable investigation, nothing has put counsel on notice of the existence of that evidence. *See* *Babbitt v. Calderon,* 151 F.3d 1170, 1174 (9th Cir.1998).

The petitioner presented witnesses at the post-conviction evidentiary hearing who arguably could have provided mitigation evidence had they been called to testify. However, the fact that additional witnesses such as these might have been available or that other testimony might have been elicited from those who testified does not establish ineffective assistance of counsel. *Waters v. Thomas,* 46 F.3d 1506, 1513-14 (11th Cir.1995).

The post-conviction court found that the mitigation evidence presented by trial counsel "showed that this was a well-adjusted young man who committed a crime that was out of character for him." Additionally, the court concluded that "[t]he bulk of the mitigation proof dealt with the petitioner's father" but "offered [no] better insight into why this crime occurred or why the petitioner chose to act the way he did on the day in question." Thus, the post-conviction court found that, although the petitioner established that additional witnesses were available, the "bulk" of them testified about his father and did not offer any explanation as to why he had committed the crimes. Thus, the court concluded that the petitioner failed to show that he was prejudiced by the

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fact these witnesses had not testified at the trial. The record supports these conclusions.

***67** Additionally, the petitioner argues that trial counsel were ineffective in not retaining the services of a mitigation specialist and/or a mental health expert. As to this claim, we note there is no *per se* rule requiring defense counsel to retain experts in every capital case. While the United States Supreme Court has adopted standards such as those set forth by the American Bar Association as guidelines for what is reasonable, the Court repeatedly has declined to adopt a rigid checklist of tasks that defense counsel must perform in all cases because "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland,* 466 U.S. at 688-89, 104 S.Ct. at 2065. This fact, coupled with the "constitutionally protected independence of counsel," has resulted in trial counsel being granted broad discretion as to whether the retention of an expert will serve the interests of their clients. *See Wiggins,* 539 U.S. at 533, 123 S.Ct. at 2541; *see also Kandies v. Polk,* 385 F.3d 457, 470 (4th Cir.2004).

As for counsel's not retaining a mitigating specialist, it is clear that such a witness is not exclusive means through which defense counsel can thoroughly investigate a defendant's background. *See Kandies,* 385 F.3d at 470. Defense counsel has numerous tools available by which to conduct a background investigation, including lay persons such as family, friends, and coworkers, the defendant, and defense counsel's own experience. *Id.* In the present case, counsel conducted an investigation and developed a mitigation theory to which they adhered. The testimony of the witnesses at the sentencing hearing supported counsel's investigation and development of this theory. Although additional information regarding the petitioner's family history was presented at the post-conviction hearing, much of that evidence dealt with the life experiences of Leslie Burns and Obra Carter but did not show how they affected the petitioner. We disagree with the argument that trial counsel's duty to investigate was not "governed" by the petitioner's own cooperation or lack thereof. The United States Supreme Court has unequivocally stated that "what investigation decisions are reasonable depends critically" on "information supplied by the defendant." *Strickland,* 466 U.S. at 691, 104 S.Ct. 2066; *cf. Barnes v. Thompson,* 58 F.3d 971, 979-80 (4th Cir.1995) (stating that counsel "may rely on the truthfulness of his client and those whom he interviews in deciding how to pursue his investigation"). Thus, counsel cannot be faulted for relying upon the assertions of the petitioner and/or his family members.

In sum, we note that this is not a case in which counsel failed to conduct any inquiry into the accused's background and social history. *See Williams v. Taylor,* 529 U.S. 362, 396, 120 S.Ct. 1495, 1514, 146 L.Ed.2d 389 (2000). Rather, based on their investigation, trial counsel determined that the best mitigation defense was to show that the petitioner was "a good guy" and that this crime was out of character for him, this theory based upon the information provided by the petitioner and his family. There was no indication, by either the petitioner or his parents, that further investigation into the family history was necessary or would have been fruitful. Although much information specific to the petitioner's mother and father and not directly related to him was presented at the post-conviction hearing, that proof shadowed the mitigation theme of the defense at trial, *i.e.,* that the petitioner was "a good guy." Regardless what a different investigation might have uncovered, the petitioner must first demonstrate that counsel's deciding not to investigate further was objectively unreasonable performance. *Cauthern v. State,* 145 S.W.3d 571, 604 (Tenn.Crim.App.), *perm. to appeal denied* (Tenn.2004). The petitioner has failed to do so. Counsel's decision not to further investigate into the petitioner's background by hiring a mitigation specialist was reasonable based upon the information they had.

***68** The petitioner also criticizes trial counsel's decision not to retain a mental health expert. As before, we must determine whether counsel's decision in this regard constituted ineffective assistance. The evidence at the post-conviction hearing revealed that trial counsel, upon their initial appointment in this matter, filed motions requesting the assistance of several experts, including a psychologist. The petitioner's first senior counsel appointed explained that the motions were filed in anticipation of presenting proof at the penalty phase, saying that he interviewed the petitioner regarding his medical history, school activities, drug or alcohol use, and prior criminal history. The petitioner never spoke of a drug or alcohol problem. The first junior counsel appointed testified that a mental evaluation of the petitioner was requested out of an abundance of caution, and the evaluation concluded that he was competent and that an insanity plea could not be supported. This information was provided to successor counsel who actually represented the

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petitioner at trial. After reviewing the petitioner's background, childhood problems, and school and family history, senior counsel concluded that nothing indicated that a further check into the petitioner's mental status was necessary and nothing caused them to believe that the petitioner did not understand the various plea offers. Senior counsel said that had anything been discovered to question the petitioner's mental condition, counsel would have made further inquiry. Junior counsel confirmed that there was no indication that the petitioner suffered from any mental or personality defects.

Trial counsel's being unfamiliar with much of the information presented at the evidentiary hearing as to the petitioner's alleged family history of mental illness and the petitioner's "impaired judgment" was not unreasonable. Counsel and their investigator spoke with the petitioner, his family members, and others who might have had such information, and none of them suggested there was any history of mental illness in the petitioner's family or that he suffered from any mental defect. Other courts have held that "counsel is not deficient for failing to find mitigating evidence if, after a reasonable investigation, nothing has put the counsel on notice of the existence of that evidence." *Matthews v. Evatt,* 105 F.3d 907, 920 (4th Cir.1997). This comports with the principle that a lawyer may make reasonable decisions that render particular investigations unnecessary. The absence of any information from the petitioner, his family members, or others indicating any mental defect/illness in conjunction with a mental evaluation of the petitioner which did not provide any indication of a potential mental illness supports counsel's decision that further investigation with a mental health expert was not necessary. *See Babbitt,* 151 F.3d at 1174.

A review of the record indicates that trial counsel's decisions not to employ either a mitigation specialist or a mental health expert were reasonable considering the information amassed by counsel through their investigation. Accordingly, counsel were not deficient in their investigation in this matter. Moreover, the proof at trial was overwhelming with regard to the aggravating circumstance. In the direct appeal of this matter, our supreme court concluded that "the evidence ... overwhelmingly supports the prosecutor's argument and the jury's finding that the [petitioner] knowingly created a great risk of death to two or more persons other than the victims murdered." *See Burns,* 979 S.W.2d at 281. "The [petitioner] fired his weapon inside the car where Dawson, Johnson, and Thomas were seated, killing Dawson and wounding Thomas. He admitted firing shots at the fleeing Blackman, which ... directly imperiled Eric Jones and the three individuals who were playing basketball in the Dawson's driveway." *Id.* The post-conviction court properly found that the potential mitigation evidence disclosed at the post-conviction hearing was cumulative and corroborative of the mitigation evidence presented at the penalty phase. While information was revealed relating to the life of the petitioner's mother, the disciplinary tactics of the petitioner's father, and the petitioner's alleged "impaired judgment," we cannot conclude that this evidence would have persuaded the jury not to impose the death penalty. The petitioner is not entitled to relief on this issue.

F. Failure to Prepare Defense Witnesses

***69** The petitioner argues that trial counsel failed to prepare defense witnesses to testify. In support of this allegation, he relies upon the testimony of Leslie Burns and Phillip Carter. Leslie Burns, the petitioner's mother, related that she first learned that she was to testify at the penalty phase on the day that she was called to testify, saying that trial counsel never explained the goal of her testimony or what she was expected to say. Phillip Carter, the petitioner's half-brother, testified that he only spoke with the petitioner's attorneys for about five to seven minutes prior to his taking the stand. He said that he was not advised as to the nature or scope of his testimony, nor was he questioned regarding his relationship with the petitioner. The petitioner contends that, had trial counsel prepared these witnesses to testify, counsel's examination would have been more far reaching. This failure, he contends, constituted ineffective assistance of counsel.

During the penalty phase of the trial, Leslie Burns testified that the petitioner was twenty-six years old and had twelve brothers and sisters. *Burns,* 979 S.W.2d at 279. She said that the petitioner had graduated from high school and had presented no disciplinary problems while in school. *Id.* Phillip Carter testified that the petitioner was active in his church and always tried to avoid trouble. *Id.*

At the post-conviction evidentiary hearing, Leslie Burns testified extensively as to the circumstances of her own life, describing the living conditions for herself and her children, as well as the amount of contact Obra Carter had with his children. She reaffirmed her testimony at the penalty phase by agreeing that the petitioner was "a good son, never caused any trouble," and said that he had graduated from high school. Phillip Carter recalled that his testimony at the penalty phase

was limited to what schools he attended and what kind of person the petitioner was. He said the petitioner had a good work ethic and recounted the petitioner's career with Shoney's restaurant. He also provided testimony regarding his first meeting with the Burns children and the "house rules" established and enforced by Obra Carter. Throughout his testimony, Phillip Carter reaffirmed the principle that the petitioner was never in trouble and that he and the petitioner were raised to know the difference between right and wrong.

Senior counsel explained that mitigation witnesses were limited in order to prevent cross-examination by the State into the petitioner's prior criminal record. He stated that the witnesses were chosen based upon who could say the most positive things about the petitioner. He further stated that the petitioner's parents provided no indication that the petitioner had anything but a normal childhood. He explained that all of their evidence established that the petitioner "was in fact a good person." In this regard, their presentation of witnesses was limited because the testimony would have been cumulative. Junior counsel explained that the plan was to present "good guy mitigation" evidence and to paint a picture that the petitioner did not deserve a sentence of death.

***70** The post-conviction court correctly concluded that the proof presented at the evidentiary hearing showed that the petitioner was a well-adjusted young man who committed a crime that was out of character for him. In other words, the proof at the post-conviction hearing was consistent with what Leslie Burns and Phillip Carter testified to during the penalty phase. The strategy of the defense was to present testimony that the petitioner was a "good guy," and this is exactly the type of testimony that was provided by the mitigation witnesses. The petitioner has failed to offer any proof establishing how additional preparation of these witnesses by trial counsel would have altered the result of the penalty phase. In this regard, the petitioner has failed to carry his burden.

VI. Constitutional Errors with the Imposition of the Death Penalty

The petitioner raised numerous challenges to the constitutionality of the imposition of the death penalty. In essence, he asserts that his sentence of death must be vacated because the trial and appellate proceedings were rife with constitutional error. We agree with the State that these claims should have been raised in prior proceedings. Accordingly, the petitioner's claims are waived. *See* Tenn.Code Ann. § 40-30-106(g). Notwithstanding, inasmuch as the petitioner related these claims to his allegation of ineffective counsel, we proceed to address each claim on its merits.

A. Death Sentence Infringes upon the Petitioner's Fundamental Right to Life

The petitioner contends that his sentence of death should be set aside because it infringes upon his fundamental right to life. In support of this position, he asserts that the punishment of death is not necessary to promote any compelling state interest in punishing him and that the State has not shown there are no less restrictive means of punishing him. The petitioner's complaint that his death sentence must be reversed because it violates his "fundamental right to life" is contrary to settled precedent as reflected in *Cauthern,* 145 S.W.3d at 629 (citing *Nichols,* 90 S.W.3d at 604; *State v. Mann,* 959 S.W.2d 503, 536 (Tenn.1997) (Appendix); *State v. Bush,* 942 S.W.2d 489, 523 (Tenn.1997)). Accordingly, this argument is without merit.

B. Failure to Charge Aggravating Circumstance in Indictment Violates Due Process

The petitioner next asserts that his being sentenced to death violates the Due Process Clause, Article I, § 8 of the Tennessee Constitution and the Fourteenth Amendment to the United States Constitution. Relying upon *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), he argues that his indictment was flawed because the aggravating circumstances which made him eligible for the death penalty were not submitted to the grand jury nor returned in the indictment.

The petitioner's argument is based upon the premise that first degree murder is not a capital offense unless accompanied by aggravating factors. Thus, he alleges that to satisfy the requirements of *Apprendi,* the indictment must include language of the statutory aggravating circumstances to elevate the offense to capital murder. This argument has recently been rejected by our supreme court in *State v. Holton,* 126 S.W.3d 845 (Tenn.2004); *see also* *State v. Berry,* 141 S.W.3d 549, 558-562 (Tenn.2004) (concluding also that the Supreme Court's decision in *Blakely v. Washington,* 542

U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), does not alter the court's analysis on whether statutory aggravating circumstances must be pled in the indictment). The petitioner is not entitled to relief on this issue.

C. Death Penalty Violates *Bush v. Gore*

***71** The petitioner contends that the imposition of the death penalty violates both the state and federal constitutions because the statute grants absolute discretion to each individual district attorney general to indiscriminately seek the death penalty. The petitioner concedes that this issue was raised and rejected on direct appeal as part of a general challenge to the Tennessee death penalty statute. *See* *Burns,* 979 S.W.2d at 297. Our supreme court has not altered its opinion and has continued to reject this claim since the petitioner's direct appeal. *See, e.g.,* *State v. Thomas,* 158 S.W.3d 361, 407 (Tenn.2005). Notwithstanding, the petitioner asserts that the issue should be reconsidered in light of the principles set forth in *Bush v. Gore,* 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). The petitioner asserts that the prosecutorial function is analogous to a state court's issuance of a remedy and implies a duty to ensure that prosecution of crimes is implemented fairly.

The petitioner's claim fails for numerous reasons. First, the opinion in *Bush* was not released until 2000, two years after our supreme court's affirmance of the petitioner's convictions and death sentence. Thus, *Bush* is inapplicable to the petitioner's case unless the holding established a new rule of law which is to be applied retroactively.

In *Bush,* the United States Supreme Court held that when a state court orders a remedy, such as a recount of votes, there must be some assurance the implementation of the remedy will comport with "the rudimentary requirements of equal treatment and fundamental fairness...." *Id.* at 109, 121 S.Ct. at 532. The potential sweep of the Supreme Court's holding is limited by the opinion's own words: "Our consideration is limited to the present circumstances...." *Id.* Thus, we decline the invitation to conclude that *Bush* established a new rule of constitutional criminal procedure. *Bush,* a voting rights case, does not apply to this criminal prosecution. *See generally Black v. Bell,* 181 F.Supp.2d 832, 879 (M.D.Tenn.2001). Moreover, the petitioner's claim, on its merits, has been rejected on numerous occasions. The United States Supreme Court has refused to strike down various death penalty statutes on the ground that those statutes grant prosecutors discretion in determining whether to the seek the death penalty. *Gregg v. Georgia,* 428 U.S. 153, 199, 96 S.Ct. 2909, 2937, 49 L.Ed.2d 859 (1976) (The 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 system is unconstitutional.); *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 2967, 49 L.Ed.2d 913 (1976) (same). Applying the United States Supreme Court decision in *Gregg,* 428 U.S. at 198-99, 96 S.Ct. at 2937, the Tennessee Supreme Court has held that:

> opportunities for discretionary action occurring during the processing of a murder case, including the authority of the state prosecutor to select those persons for whom he wishes to seek capital punishment do not render the death penalty unconstitutional on the theory that the opportunities for discretionary action render imposition of the death penalty arbitrary or freakish.

***72** *State v. Cazes,* 875 S.W.2d 253, 268 (Tenn.1994); *see also State v. Brimmer,* 876 S.W.2d 75, 86 (Tenn.1994); *State v. Hall,* 958 S.W.2d 679, 716 (Tenn.1997). Moreover, in *Hall,* our supreme court expressly rejected the assertion that prosecutorial discretion to seek the death penalty violated the separation of powers doctrine found in Article II, § 2 of the Tennessee Constitution. 958 S.W.2d at 716-17. Accordingly, we conclude that the decision in *Bush,* a case involving the method of counting ballots for a presidential election, does not invalidate the discretion of the prosecutor in determining whether to seek the death penalty. This claim is without merit.

D. Execution by Lethal Injection is Cruel and Unusual Punishment

The petitioner next submits that "the process of lethal injection ... violates his state and federal constitutional rights

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against cruel and unusual punishment." Our supreme court recently concluded that death by lethal injection is not constitutionally prohibited. *See* *State v. Robinson,* 146 S.W.3d 469 (Tenn.2004), *pet. for cert. filed* (Jan. 31, 2005).

E. Sentence of Death Violates International Law

The petitioner asserts that Tennessee's imposition of the death penalty violates United States treaties as well as the Supremacy Clause of the United States Constitution. It appears that he argues that the Supremacy Clause was violated when his rights under treaties and customary international law to which the United States is bound were disregarded. Arguments that the death penalty is unconstitutional under international laws and treaties have systematically been rejected by the courts. *See* *State v. Odom,* 137 S.W.3d 572, 600 (Tenn.2004). This claim is without merit.

CONCLUSION

After a thorough review of the record and the law applicable to the issues raised herein, we conclude that the petitioner has failed to prove the allegations contained in his post-conviction petition. The order of the post-conviction court is affirmed.

All Citations

Not Reported in S.W.3d, 2005 WL 3504990

Footnotes

1 Based upon this analysis, we distinguish the facts of this case from those in *State v. Harrington,* 627 S.W.2d 345, 350 (Tenn.1981), where our supreme court determined it was error for the jury foreman to read passages to other jurors during their deliberations to "buttress" his belief that the death penalty should be imposed.

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MAR 0 4 2004
POST CONVICTION
DEFENDERS OFFICE

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

KEVIN BURNS

Vs. P2-1820

STATE OF TENNESSEE

ORDER DENYING PETITION FOR
POST CONVICTION RELIEF

This cause came on to be heard on a Petition for Post Conviction Relief filed on August 19, 1999. Because the Petitioner was sentenced to Death for the underlying Petition, the Post-Conviction Defender's Office was appointed. The office was notified to appear in this Court on September 24, 1999, for an official appointment. On or about September 24, the Court was notified that Attorney Paul Morrow, who was to be appointed, was ill and could not be present. At his request the matter was delayed until November 4, 1999. The office was appointed on that date; Stephanie McCardle and Marjorie Bristol were assigned the case. The matter was set for the filing of an amendment on December 16, 1999. On November 24, 1999, defense counsel requested a 60-day continuance. On February 8, 2000, an amended Petition for Post Conviction Relief was filed and the matter was set for evidentiary hearing on June 19, 2000. On May 17, 2000, defense counsel requested a

continuance and the matter was reset for hearing to October 9, 2000. On September 21, 2000, a second amended Petition was filed. On September 27, 2000, defense counsel asked for another continuance and asked that the District Attorney General's office be recused. The request was denied. The State filed a motion to have the Post Conviction Defender's Office removed based on a conflict of interest. The motion was granted in October 2001. The ruling was appealed and reversed in October, 2001. The matter was set for a hearing in April, 2002. On February 25, 2002, defense counsel requested a continuance due to medical problems of Ms. Bristol. The hearing was set November 18, 2002. Both parties requested in October, 2002, to continue the case until March 31, 2003. On March 7, 2003, defense counsel requested another continuance. The request was denied and the hearing commenced on March 31, 2003. A week's worth of proof was received and at the request of defense counsel the remaining portion of the proof was continued until August 4, 2003, to allow the defense experts to complete their work and to testify. On July 25, 2003, defense counsel requested another continuance. In the interim they had requested more money for there expects and the Supreme Court denied the request. The hearing began on August 4, 2003, another full week of proof was presented and the matter was rescheduled for September 4, 2003, for one omitted short witness and closing arguments. On September 4, 2003, defense counsel filed a third amended Petition for Post Conviction Relief. The court refused to consider the third amendment as not timely filed. The hearing was concluded on September 4, 2003.

The Petitioner alleges that his conviction was based on use of a coerced confession. No proof was offered on this issue therefore the Court finds no merit.

The Petitioner alleges that his conviction was based on the unconstitutional failure of the prosecution to disclose to defendant evidence favorable to defendant. No proof was presented to prove this allegation. The testimony presented was that defense trial counsel had a copy of the entire State's file. Further, testimony revealed that defense counsel convinced the State to try the defendant last to allow defense counsel to have the transcripts of witnesses who had testified under oath in the co-defendant's trials. In the present hearing no proof was offered to show that any exculpatory evidence existed or that the State suppressed same or that it would have impacted or affected the verdict in the case. The court finds this issue has no merit.

The Petitioner alleges ineffective assistance of trial and appellate counsel. Mr. Burns was originally represented by appointed attorneys Harold Archibald and Clem Matlock from July, 1992 through February, 1993. Archibald and Matlock filed the majority of all pre-trial motions. They withdrew from the case after Mr. Matlock determined that he knew one of the victim's families. Mr. Glenn Wright and Mr. William Johnson were appointed to replace them in February, 1993. They continued on the case through trial and Appeal. The Petitioner was convicted of Murder in Perpetration of a Felony, 2 counts, and two counts of Attempted Felony Murder. He was sentenced to Death on the Murder convictions. Subsequently on Appeal, the Attempt Felony Murder charges were Dismissed and the Murder

Convictions and Death Penalty were upheld. The petitioner alleges Mr. Wright and Mr. Johnson were ineffective not only in the guilt and sentencing phase of the trial but also on appeal.

Petitioner alleges that counsel failed t interview witnesses to the crime. Both attorneys testified that their investigator attempted to locate and talked to witnesses. Tommy Blackmon refused to talk to them. He was successful on some and not on others. Mr. Wright also testified that he and the investigator canvassed the neighborhood door to door for witnesses but to no avail. However, he testified that his investigator had secured the entire police department file and copies of all of the witnesses' statements pre-trial. Further, they were able to convince the State to try Mr. Burns after defendants Garrin and Adams so that they would have the testimony of the witnesses as well. The Court feels the attorneys were not ineffective for failing to interview witnesses. It appears they were well prepared for trial. This issue has not merit.

Petitioner alleges that counsel failed to talk to co defendants, Garrin and Adams who wanted to testify for the Petitioner. The testimony at the evidentiary hearing was that one co-defendant, name unknown, refused to talk to the investigator and another named the Petitioner as the "Trigger man". The Petitioner alleges that both co defendants Garrin and Adams wanted to testify for the Petitioner at trial. These has been no proof presented that in fact they wanted to testify or that there testimony would have been helpful to the Petitioner and they were available to testify at this hearing. This Court therefore concludes that this issue is without merit.

Petitioner alleges ineffectiveness for not interviewing all of the co-defendants. The attorneys testified that they had each co-defendant's statement, as well as the statements of those present but not charged. Also, counsel had reviewed the testimony of those who had been tried and those who had testified in the earlier trials. Adams described the Petitioner as a shooter and described him as wearing a ¾ length black coat. Shaw gave the same description, Buckner, who was arrested and charged as a participant by order of the court after his testimony, said the defendant was present when the proceeds of the robbery were divided, Garrin said the petitioner fired shots and may have been the one to take the jewelry. This court has not seen any testimony or a statement from Richard Morris other than a small portion of his testimony placing the Petitioner on the scene with a gun. This Court has not heard testimony from any of these co-participants or co-defendants, which would have been beneficial to petitioner or would have affected the verdict of the jury. This court sees nothing beneficial that would have been offered by any of those present and nothing has been presented to the Court to indicate that due to the failure of defense counsel to interview these parties the outcome of the trial would have been different. This issue has no merit.

Petitioner alleges the failure to call Richard Morris, as a witness was ineffective. Morris testified for the State in the case against Derrick Garrin. In Exhibit #25F, a small portion of his testimony in trial, at page 139 line 8, there is an indication that the Petitioner was with "the other two" which would be Adams and Shaw at the car or near it. This Court did not hear from Morris and has seen or heard nothing that would lead the Court to believe that the verdict against

petitioner would have changed if counsel had interviewed and/or called Morris as a defense witness. Counsel had the benefit of reviewing Morris's testimony and determined that he would not aid their defense. Nothing has been presented to this court that such action was ineffective or affected the verdict rendered in this trial.

The Petitioner complains that counsel did not explore the issue about his hair length. Although there was proof presented during this hearing about the length of the defendant's hair, there was no proof presented that the petitioner gave any of those names to defense counsel during pre-trial preparation. Apparently, the only photograph available looked like the petitioner's mug shot, which was identified by the witnesses. Further the petitioner had at the time of trial a jheri curl hairstyle that matched the description given by some witnesses. The petitioner refused to cooperate with his attorney's advice to cut his hair resulting in the bolstered in court identification of an eyewitness. This court feels that the petitioner chose to ignore the advice of his attorneys and failed to cooperate with them in preparing the case by failing to give them names of people who could testify abut his hair. This court does not feel that the attorneys should be held ineffective because the petitioner failed to follow their advice or cooperate with them. This allegation therefore has not merit.

Petitioner next alleges that failure to explore the full confrontation between Carlito Adams and Tommy Blackmon affected the verdict. No proof was presented to prove this point. This court fails to see how a confrontation, which had occurred earlier, even if it occurred the way petitioner, alleges, would have justified 5 or 6-

armed men confronting, robbing and shooting the victims. The petitioner was convicted of Murder in Perpetration of a Robbery. This issue has no merit.

Petitioner alleges failure of the defense counsel to request experts in forensic matters impacted the verdict. Although, petitioner's post conviction counsel was authorized funds for a firearms expert and a forensic pathologist, this court heard no proof that either expert found anything to contradict the testimony at trial. No proof was presented on this point. This court can only conclude that since no proof was presented none exist. Therefore, the failure of trial counsel to seek such experts cannot have affected the outcome of the trial. This issue has not merit.

Petitioner next claims ineffective assistance of counsel due to their failure to explore other suspects, a woman at Carlito Adams house, Maliko Fields or an unknown male on the scene. Post conviction counsel failed to put on any proof about these issues or how that information would have affected the verdict, since the petitioner admitted being there, firing shots and receiving proceeds from the robbery. Therefore, this issue has no merit.

Finally, on trial preparation, petitioner alleges failure to prepare proper mitigation. The defense strategy in this case was that the petitioner was a good person and this activity was out of character for him. Further, trial counsel testified that a large part of their case was based upon the petitioner testifying. He had indicated throughout pretrial that he would testify. Yet at trial he decided not to. Although this is petitioner's right, it is also another example of his failure to cooperate with his attorneys by advising them of this decisions in advance. This court heard a full week's worth of testimony from mitigation witnesses; family,

friends, teachers, a sociologist/mitigation expert and a neuro-psychiatrist. In this court's opinion the proof presented showed that this was a well-adjusted young man who committed a crime that was out of character for him. After listening to all of the mitigation proof presented this court heard nothing about the petitioner that offered any better insight into why this crime occurred or why the petitioner chose to act the way he did on the day in question. The bulk of the mitigation proof dealt with the petitioner's father. There was no proof offered, including testimony from the petitioner, that his upbringing played any role in the commission of this offense. If anything it showed that the petitioner had overcome adversity and survived, leading to a conclusion that this crime was out of character. Based upon the proof presented, this Court does not feel that the petitioner has carried his burden of proof that the mitigation presented during this hearing would have changed the verdict rendered by the jury. Therefore, the Court finds this issue has no merit.

The next area presented by petitioner is the issue of pre-trial motions. He alleges counsel failed to file any motions pretrial. Trial counsel testified that previous counsel had filed numerous motions, which were adopted by them. No proof was presented at this hearing about any specific motion, which should have been filed or litigated, and how it would have changed the verdict. Trial counsel testified they had the entire police file and had open file discovery from the State. This issue has not merit.

The Petitioner alleges failure to file a motion to dismiss for failure to maintain the integrity of forensic evidence. However, post conviction counsel presented no proof that in fact there was a failure to maintain the integrity of

forensic evidence or that it impacted or affected the verdict rendered. It does not appear that the forensic evidence played a role in the verdict of the jury in this court's opinion. This issue has no merit.

Petitioner alleges ineffective counsel because they did not seek juvenile records of codefendants and non-indicted participants. Also alleging failure to seek Court ordered psychiatric evaluations of these same people affected his verdict. No proof has been presented as to any of these issues or how they would have impacted the trial. This issue has no merit.

Petitioner alleges failure of trial counsel to file a motion for Bill of Particulars. Petitioner has failed to show what if any information the State had which was unknown to the defense. Trial counsel testified they had the entire State's file including the statements of all witnesses. No proof has been presented that this failure affected the verdict of the jury. This issue has no merit.

The petitioner next alleges that the State should have been required to elect which theory they were pursuing. No proof has been presented that the State had any different theory as to the role of Kevin Burns in any of the trials. All trials indicated Kevin Burns was present and fired shots. This issue has no merit.

Petitioner alleges trial Counsel was ineffective for failing to issue a subpoena duces tecum or to seek an exparte order for the weapons returned to Kevin Shaw, alleging these weapons could have been used by Petitioner. No proof has been presented as to what possession of those weapons would have shown or how that would have impacted the verdict. This issue has no merit.

Petitioner alleges the trial counsel should have field a detailed pre-trial discovery motion. Since the petitioner had the entire file and since there has been no proof that the State withheld any such evidence, there is nothing before this Court that indicates this allegation has any merit.

Petitioner alleges trial counsel was ineffective for filing a Motion to charge Range of Punishment. Range of Punishment was not charged, therefore this Court fails to see how the mere filing of the Motion, which the jury never heard, affected the verdict of said jury. No proof has been offered on this issue. It has no merit.

Petitioner alleges trial counsel failed to move the Court to strike the aggravating circumstances charged in the case due to petitioner's limited role. The only aggravating circumstance was that the defendant created a great risk of death to two or more persons other than the victim. No proof has been presented to this Court that the petitioner played a minor role in commission of this offense or that there is a legal basis for such a request. This issue has no merit.

Finally, petitioner alleges ineffective assistance of counsel for failure to move to Strike the Death Penalty for Various reasons. No proof was presented on any of these issues. They have previously been determined to have no merit and this Court again finds no merit to them.

Petitioner next complains about Errors at Trial. The first complaint deals with Voir Dire. The first three allegations deal with the extent or lack thereof, in which jurors were questioned about the death penalty, mitigation and the full range of punishment. The depth and complexity of voir dire is an individual decision made by each trial attorney. The purpose is to obtain a fair and impartial jury.

Both trial counsels have long and distinguished trial records. They both have extensive experience in selecting juries and death qualified juries. Their testimony was that they were satisfied with the manner in which they selected the jury and they were satisfied that they had a fair jury. There has been no proof offered that this was not true. After reviewing the totality of the voir dire process this court fails to find any indication that this was not a fair and impartial jury of petitioner's peers. Petitioner has failed to offer any proof that any particular juror was unfair or unqualified. There issues have no merit.

The next issue deals with juror Sharlonda Winton. After being selected, she determined that she had some slight knowledge about the case. An ex-friend had mentioned to her that her baby's father had been shot. During voir dire only the last names of parties had been used. When the parties first names were used she recognized the names and brought it to the court's attention. She had no relationship with any of the parties. The court determined that she would still be a proper juror and yet trial counsel prevailed in having her removed. In light of the fact that the court determined that she would not have been challenged for cause, even if this information had come out during voir dire, petitioner would have had to use a peremptory challenge. Therefore, petitioner had her removed from the jury without using a peremptory challenge. How then was petitioner prejudiced? This issue has no merit.

Finally, it is alleged that trial counsel should have asked for a mistrial because it was likely that Ms. Winton told other jurors about his. There is no proof

for such an allegation. Also, there was no basis for a mistrial. There has been no prejudice shown to the petitioner. This issue has no merit.

The next area considered in the petition deals with cross examination of witnesses. Specifically, petitioner alleges that trial counsel should have called Richard Morris to testify based on his testimony in the Garrin trial. A portion of that testimony is found in Exhibit 25F, page 139. The witness has placed Kevin Shaw and Carlito Adams at the victim's car. When asked about the petitioner he state's "Kevin Burns is by the other two", the next question is "Derrick and Benny where are they? Coming up the sidewalk". So it is not clear but would or could appear that Petitioner was with the other two, Carlito Adams and Kevin Shaw. Later in that testimony he states that by the time the first shot was fired all parties converged on the car. It is not clear from this portion of the transcript what active role the petitioner played. Since there was no testimony presented in this evidentiary hearing by Morris, this court is still left with a question as to what Morris said or meant with regard to Petitioner's location and activity. Therefore this Court can reach no conclusion as to what if any affect this testimony would have had on the outcome of the trial. The petitioner has not carried his burden of proof that failure to call this witness was ineffective and as a result impacted the verdict. This issue has no merit.

Petitioner next alleges ineffectiveness for failing to cross-examine Tommy Blackmon more extensively about the altercation between Black and Carlito Adams. In reviewing the facts of the case; that 5 or 6 armed men approached the 4 victims seated in a car and began shooting into the car after forcing the victims to surrender

money and jewelry, killing two and seriously injuring a third, it does not appear to this court that the fact that one of the victims had previously pointed a gun at one of the defendants would have affected the verdict of the jury. This court cannot get around the fact that the defendant's robbed the victims and then shot them while they were in a confined space. It would not appear to the Court that whatever prior altercations had occurred would justify, explain or mitigate what occurred on the scene. The petitioner has failed to carry his burden of proof that such testimony would have affected the verdict of the jury and if it would not have affected the verdict of the jury how the role of trial counsel was ineffective for failing to bring it out. This issue has no merit.

Petitioner next attacks the ineffective cross-examination of Eric Thomas. Since there were some apparent in consistencies in the testimony of Mr. Thomas, this Court would have liked to have heard from Mr. Thomas. However, was no proof presented as to Mr. Thomas and what his testimony would have been if he had been thoroughly cross-examined. Therefore, this Court is left to speculate. Apparently, he had previously picked the petitioner out of a line-up as one of the people who shot him. In the Garrin trial he described Garrin as one of the people who shot him. He testified he was shot twice by this person and then someone else came up and shot him again. In petitioner's trial he testified that he identified the petitioner's photograph in a line-up and that petitioner took his money and shot him. He was not questioned by the State during petitioner's trial about Garrin, his description or if he shot him too. Mr. Thomas picked out petitioner's photograph two days after the shooting. Although the line up photograph was not presented to

this Court during this hearing the Court will assume that petitioner's hair was shorter in the photograph than it was during the trial, and still the witness picked out petitioner. Again this Court is left t speculate as to an explanation for Mr. Thomas's identification and testimony about petitioner's role. The burden of proof is on the petitioner in a post conviction hearing to convince this court that but for the ineffective assistance of counsel the outcome of the trial would have been different. This Court is being asked to speculate as to what Mr. Thomas's testimony would have been had he been questioned about these details. Although, this court can see some areas where Mr. Thomas could have been cross-examined, there has been an explanation given by trial counsel with regard to those areas and petitioner has failed to present any proof to the contrary. Without a showing as to what Mr. Thomas's testimony would have been under more thorough cross examination this court cannot conclude that such cross examination would have changed the outcome of the trial. Petitioner has failed to carry his burden of proof as to this issue and it therefore has no merit.

Petitioner again raises the issue about the length of his hair. This court has reviewed the trial transcript, the portions of other trial transcripts, witness and co defendant statements. The petitioner was present on the scene and he was described as wearing a long black trench coat. No one else on the scene, to the best of this court's recollection, was so dressed. Mr. Thomas picked out the petitioner's photograph even with short hair. Ms. Jones identified the petitioner by face and by the long black trench coat he was wearing. She also described his hair as a gheri curl. Trial counsel knew pre-trial that Thomas had identified Petitioner's picture

and they testified that their picture of defendant looked very similar to the one in the line-up. It appears to the court that Ms. Jones, who testified later, had not made identification prior to trial. At trial she made an in court identification on cross-examination of the petitioner which appears to have been fully unexpected by the State or the defense. The petitioner had admitted being present on the scene, with a gun, and firing some. Thomas had identified him even with short hair. Up until that point this court is not sure that there was an issue about the length of petitioner's hair. Only when Ms. Jones described petitioner as the person with the black trench coat and jheri curl and the person she identified in court with a jheri curl, did his hair length become an issue. Again, this court is asked to speculate as to who else on the scene had a jheri curl. Petitioner implies Kevin Shaw but offered no proof by witness, photograph or otherwise that Shaw was the person with a jheri curl. This court can only speculate as to what might have occurred during this testimony if petitioner had cut his hair as requested by his attorneys prior to trial. However, this court is not allowed to speculate as to what impact any of this would have had on the jury. No proof has been offered by petitioner other than that he had short hair at the time of the crime. No proof has been offered by petitioner other than that he had short hair at the time of the crime. No proof was presented that he was not the person in the black trench coat. Petitioner has failed to carry his burden of proof as to this issue and it therefore has no merits.

Petitioner next complains about the cross examination of Ms. Jones. Petitioner alleges that Kevin Shaw had a jheri curl in his photo line-up but no proof was presented to this court. Petitioner alleges that trial counsel could have cross-

examined Ms. Jones about this line-up. However, during the evidentiary hearing, while Ms. Jones was testifying petitioner's counsel did not present said photo nor did they cross-examine or question Ms. Jones about her identification. Ms. Jones was not questioned about any issues, while she was testifying before this court, dealing with her identification of petitioner. The burden of proof is on the petitioner to show that with close and rigid cross-examination on these issues Ms. Jones's testimony would have changed or in some way been impeached and as a result the verdict would have been impacted. There has been no such proof. This issue has no merit.

Petitioner alleges trial counsel was ineffective for failing to subpoena Kevin Shaw or issue a subpoena duces tecum for 2 weapons. Petitioner has offered no proof as to what Kevin Shaw would have testified to or as to what significance the two weapons would have had on the jury verdict. Since no proof was offered this issue has no merit.

Petitioner next complains about trial counsel's failure to present ballistics, tool mark and pathology experts. Further petitioner alleges a failure to present proof of petitioner's mental health and functioning. Petitioner was approved funds by this court to employ and utilize a Firearm examiner, Forensic Pathologist and a Psychologist; No proof was presented from any such expert at the evidentiary hearing. The burden of proof is on the petitioner to show that trial counsel's failure to utilize such witnesses affected the verdict of the jury in the trial of this cause. Petitioner put on no proof regarding such experts therefore this issue has no merit.

The final allegation in this section deals with failure of trial counsel to prepare for the sentencing phase of the trial by no presenting evidence on the statutory mitigating factor of lesser participation. Trial counsel testified that they were relying on petitioner to testify as to his lesser participation. Surprisingly, petitioner decided not to testify. During the evidentiary hearing, again, petitioner failed to testify. No proof was offered to this Court as to the Petitioner's lesser participation in this crime. No offer of proof from any witness called during this hearing indicated that the petitioner played a lesser role in this crime. To quote petitioner, "while it has been said that quality is often preferred to sheer quantity or volume, petitioner contends that in the presentation of his capital penalty phase case there was neither quality nor quantity." This court would add that as to mitigation proof on "lesser participation" during two weeks of proof on the evidentiary hearing there was sheer quantity and volume but no quality. The petitioner has failed to carry his burden of proof as to what evidence could have and should have been presented in mitigation on the issue of "lesser participation." This issue has no merit.

The next area complained about deals with trial counsel's request to charge range of punishment. This issue has previously been discussed and found to have no merit.

Petitioner alleges trial counsel should have objected to the victim impact testimony. No proof has been offered as to how said testimony was improper or how that testimony impacted the Jury Verdict. This Court has reviewed the testimony and finds that it was appropriate testimony and further finds that based upon all of

the proof in the case the victim impact testimony in this Court's opinion played little role in the jury's verdict. This issue has no merit.

Petitioner next complains about improper closing argument by the State which went unobjected to by trial counsel. No proof has been offered as to what if any impact said argument had on the jury. Petitioner alleges the State "appealed to the jury to sentence Kevin Burns to death in order to keep the entire community of Orange Mound safe". The Court has reviewed the quote in question and finds no such appeal. Rather, it appears to the Court that the State was simply pointing out based on testimony, what impact this crime had on the community. Several witnesses have testified about moving and how the neighborhood had changed as a result of this shooting. The argument in this Court's opinion appears to be proper but if it is not it would appear to be harmless. This issue is without merit.

Finally, in this section of the petition, petitioner alleges ineffective assistance of counsel because "trial counsel failed to object to the trial Judge's failure to explain to the jurors... "Certain questions had been asked by the Jury and the trial Court instructed them to refer to the jury instructions or charge which had already been given to the jury. Petitioner points to a comment from the Supreme Court in State vs. Burns, 979 S. W. 2d at 295, in which the Court stated since defense counsel did not object at the time that issue is waived. However, petitioner fails to point out that the Supreme Court stated: "Even if the defendant had not waived this "error", however, this issue has no merit." The Supreme Court has ruled this issue had no merit so it would seem to this Court that failure to object to something that has no merit would not be ineffective representation. This issue has no merit.

The next section of this Petition alleges ineffective assistance of Counsel at Direct Appeal. Petitioner has failed to carry his burden of proof on this issue. No proof has been presented as to any constitutional claims, which have any merit which were not raised by trial counsel. Further, no proof has been presented as to trial errors which had any merit which were not included on appeal. This issue has not merit.

The next allegation by Petitioner is that the State's action denied him a fair trial and appeal. He first argues that the State had alternative theories of prosecution in the three separate trials. No proof has been presented as to contradictory theories by the state in the trial of the co-defendants. The petitioner admitted he was present on the scene armed with a gun and that he fired his gun. The testimony presented was that 5 or 6 people participated in this killing. At least 4 or 5 of them were armed. Several were identified as firing shots into the car containing the victims. The petitioner was identified by several witnesses as being "a shooter". No alternative theories were offered by the State as to Petitioner's role based upon what proof was presented to this Court. Since no proof has been presented regarding alternative theories this issue has no merit.

The petitioner next alleges a failure of the State to maintain the integrity of the evidence. There has been no proof presented that in fact there was a failure to maintain the integrity of the evidence. There has been no proof that any evidence relevant to the case, which was improperly handled, had any bearing on the outcome of the trial. Since there has been no proof at all on this issue it has no merit.

The next allegation is that the State violated its duty to do justice by failing to indict Kevin Shaw and Richard Morris. Petitioner has the burden of proving that the failure of the State to indict Shaw and Morris affected his trial and subsequent verdict. The Jury was charged with trying petitioner for his involvement. Since no proof has been presented as to how this affected petitioner's case this issue has no merit.

Petitioner next alleges the State engaged in arguments at the penalty phase of the case, which were designed to arouse and inflame the passions of the jury, in violation of petitioner's 8th and 14th Amendment rights. No proof was presented as to what if any statements petitioner is referring to. This court has no way of determining which statements are in question. Therefore, since there is no proof on this issue it has no merit.

Petitioner next alleges that the State denied him his right to prepare a defense by returning two weapons to Kevin Shaw. The Petitioner has put on no proof as to what defense he would have put on if he had those two weapons. He has failed to put on any proof as to the relevance of those two weapons. Since no proof has been presented this issue has no merit.

Finally, in this section, the Petitioner accuses the State of Violating the defendant's right to discover exculpatory and impeachment evidence at the time of trial and continuing to the point of the filing of this amended petition. There has been no proof presented of any failure by the State to grant full and proper discovery nor has there been any proof that there exist or that the State has failed to disclose exculpatory or impeachment evidence. This Court understands the role of

the Capital Defender's Office and the burden that it must bear. However, a blanket accusation of unethical and illegal actions by the State with absolutely no proof of to support such a statement is very disturbing to this Court. This Court considers it unethical to accuse another attorney of unethical behavior and then put an absolutely no proof to substantiate such a charge. The Petitioner again has failed to carry his burden of proof as to the allegation and it has no merit.

The final section of this Petition deals with the constitutionality of the Death Penalty. The first issue deals with the allegation that Tennessee's death Penalty statute fails to meaningfully narrow the class of death eligible defendants. This issue has previously been determined to have no merit and no proof has been offered to the contrary. The second allegation deals with the aggravating circumstance T.C.A. 39-13-204(I)(5). The Jury in this case did not find (I)(5) as an aggravating circumstance and this Court is not clear why this issue is being presented. There is no proof as to this allegation and it has no merit. The next allegation deals with the issue that the death penalty is imposed arbitrarily and capriciously. There has been no proof presented to this Court on these issues. This Court cannot rely on the unsubstantiated and unproven statistics and numbers cited in the Petition. Absolutely no proof was presented on these matters therefore there can be found no merit to this issue. The following 23 allegations are simply statements in the pleading. No proof has been offered as to their accuracy. No proof has been offered as to what if any impact they had on the trial. No proof has been offered as to any legal basis for any of these allegations. Most of these matters

have previously been determined to have no merit, however, in this case since there has been no proof presented the issues will not be considered and have o merit.

Petitioner also filed a Second Amended Petition. The first allegation is that petitioner's rights were violated because one of the jurors had a Bible in the Jury room. No proof has been offered that outside and extraneous information was used or introduced to the Jury during deliberation. The foreman of the Jury was allowed to testify that he had his Bible in the Jury room and that he quoted some scripture. There is also an allegation that the quoting of scripture and prayer by the jurors violated petitioners "right to a full and fair trial and due process of law and to be tried by an impartial jury". Case law is clear that what goes on in the jury room cannot be questioned unless there is a showing that some outside source of information affecting the evidence has been introduced into the deliberation process. This court does not believe that asking for divine intervention and comfort from God during the deliberation process is what was meant or intended as outside influence. We ask jurors to make life and death decisions and many jurors look to God for guidance in their everyday life and the daily decisions, which they face. This Court fails to see how asking God to help a juror make the right decision violates Mr. Burns's right to a fair trial. Frankly, this Court takes great comfort in the fact that before a jury would make such a monumental decision that they would seek guidance from God. Ironically, one of the issues raised by counsel in this case was that Mr. Burns must have a mental problem because he put his faith in God's hands and was able to rest comfortably with that thought. This issue has no merit. The next four allegations deal with the charge of Criminal Attempt; Felony Murder.

At the time of the trial of this case State vs. Kimbrough, 924 S.W.2d 888, had not been decided. By the time this matter was tried and ruled upon Kimbrough was the law. As a result the charges and convictions against Mr. Burns were dismissed. This Court fails to see how the fact, that trial counsel failed to object or argue an issue which had not yet been decided but which eventually resulted in charges against the petitioner being dismissed, constitutes ineffective assistance of counsel. Obviously, the petitioner cannot show prejudice since the charges were dismissed. This issue has no merit. The next two issues in the Petition deal with remarks made by the District Attorney in Closing Argument about the petitioner's statement to the FBI. The particular remarks in question have not been pointed out to the Court nor has there been any proof presented that the remarks were untrue, improper or violations of the petitioner's rights. No proof or argument has been presented on these issues therefore the Court finds that they have no merit. This Court cannot speculate as to what the statements were or how thy prejudiced the petitioner. The next issue alleges trial counsel was ineffective for failing to request funding for the services of an expert in eyewitness identification. During the time this petition has been pending there has been no request for funding for an identification expert, therefore this Court would be left to speculate as to what such an expert would have said. Petitioner has failed to put on any proof that eyewitness identification experts would have affected the Verdict of the jury. Because no proof has been presented, this Court cannot determine whether trial counsel was ineffective for failing to secure such services, since the burden of proof has not been carried this issue has no merit. The next two issues deal with the failure of the State to preserve Audiotapes

made by Memphis Police Department containing taped statements of witnesses. This Court has heard no proof regarding any audiotapes. Further this Court has heard no proof that said audiotapes would be different from the type written versions. This court has heard no proof as to which witnesses were on said tapes. This Court has hard no proof that said tapes were in fact destroyed. There has been no proof regarding this issue therefore the Court finds it has no merit.

Finally, the original filing on August 19, 1999 initiated this case, an amendment was filed February 8, 2000, and a second amendment was filed September 21, 2000. On September 4, 2003, after two full weeks of testimony over a five month period, on the day the case was being submitted for final Argument Petitioner filed a Third Amendment. This Court ruled that said Amendment was not timely filed, that counsel had four (4) years to perfect these issues, had two full weeks of evidentiary hearings and a full month from the last court sitting to file said Amendment. Petitioner filed and served this third Amendment on the State the very morning the case was to be submitted to the court for ruling. In this Court's opinion this was consistent with post conviction counsel's tactics of waiting until the last minute to seek delays and continuances. This Court therefore ruled that it would not consider the issues in the last Amendment filed. The Court in an effort to preserve the Petitioner's right to review allowed the matter to be filed and made a past of the record but the Court will not decide those issues.

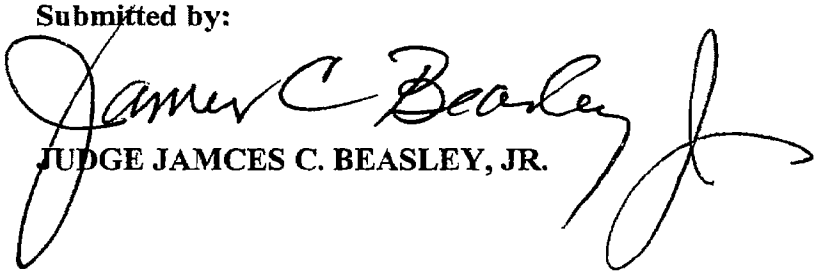
The burden of proof is on the petitioner to show that the standard of representation he received did not rise to the standard of representation he received did not rise to the standards required by law. If he can carry that burden of proof

he next must show that he was prejudiced by this ineffective representation and as a result he did not receive a fair trial. This Court has been observing the trial tactics and techniques of both trial counsels for nearly 20 years. Both have testified to the efforts and extent to which they prepared this case. Both testified as to their opinions and judgments on certain trial strategies. Both testified that petitioner and petitioner's mother refused to listen to their advice or to cooperate with them in trial preparation. This Court is charged with weighing the credibility of all witnesses. This Court is well aware of the credibility of Mr. Wright and Mr. Johnson not only as Criminal Defense lawyers but also as officers of the Court. This Court recognizes the inherent difficulties in trying a Death Penalty case and how easy it is to second-guess trial lawyers after the fact. In reviewing the trial transcript and the testimony presented at the evidentiary hearing this Court is not prepared to rule that the Petitioner has carried his burden of proof that trial counsels were ineffective. This Court rules that the petitioner did receive effective representation during his trial. Further, this Court finds that any omissions or deficiencies by trial counsel did not prejudice him to the extent of denying him a fair trial. Mr. Burns chose the manners in which he wanted to be represented when he refused to cooperate with counsel. He and he alone must be left to contemplate what might have happened if he had listened to his attorneys about cutting his hair, testifying, accepting a very reduced plea bargain, or having a Bench Trial.

This Court finds that the Petitioner has failed to carry his burden of proof as required under the Post Conviction statutes and has failed to state a colorable claim under which the relief sought could be granted.

It Is Therefore Ordered Adjudged and Decreed that the Petition For Post Conviction Relief filed in this cause should be DENIED.

Submitted by:



JUDGE JAMCES C. BEASLEY, JR.

Nos. 11-5214/14-6089

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 24, 2022
DEBORAH S. HUNT, Clerk

KEVIN B. BURNS,

Petitioner-Appellant,

v.

TONY MAYS, WARDEN,

Respondent-Appellee.

ORDER

BEFORE: BATCHELDER, COOK,* and STRANCH, 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. Judge Stranch would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

*In March 2019, Judge Cook retired from regular active service while retaining her office. *See* 28 U.S.C. § 371(b). Although she transitioned to inactive status on September 30, 2021, she remains a senior judge who has been designated by the chief circuit judge "to perform such judicial duties within the circuit as [s]he is willing and able to undertake." *Id.* §§ 294(b)-(c). Judge Cook accepted the chief judge's assignment in this case.