No.

IN THE
Supreme Court of the United States

KENNATH ARTEZ HENDERSON,
Petitioner,

v.

TONY MAYS,
Respondent.

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Nos. 12-5028/14-5911

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENNATH ARTEZ HENDERSON,

Petitioner-Appellant,

v.

TONY MAYS, WARDEN,

Respondent-Appellee.

O R D E R

BEFORE: CLAY, McKEAGUE, and WHITE, Circuit Judges.

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

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

NOT RECOMMENDED FOR PUBLICATION
File Name: 23a0221n.06

Nos. 12-5028/14-5911

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 10, 2023
DEBORAH S. HUNT, Clerk

KENNATH ARTEZ HENDERSON, Petitioner-Appellant, v. TONY MAYS, Warden, Respondent-Appellee.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE OPINION

Before: CLAY, McKEAGUE, and WHITE, Circuit Judges.

WHITE, J., delivered the opinion of the court in which CLAY and McKEAGUE, JJ., joined. WHITE, J. (pp. 35–37), also delivered a separate concurring opinion.

HELENE N. WHITE, Circuit Judge. In 1998, Petitioner-Appellant Kennath Henderson pleaded guilty of first-degree murder in a Tennessee state court and was sentenced to death by a judge. After unsuccessful state post-conviction proceedings, he filed a habeas petition under 28 U.S.C. § 2254. He now appeals the denial of that petition. Certified for review are Henderson's claims that (1) trial counsel was ineffective in advising Henderson to plead guilty and waive jury sentencing; (2) Henderson was not competent to take either of those actions; (3) trial counsel was ineffective at sentencing; and (4) trial counsel was ineffective in using expert services. We AFFIRM.

I. BACKGROUND

A. Henderson Kills Deputy Tommy Bishop

On May 2, 1997, Henderson—an inmate at the Fayette County Jail—shot and killed Deputy Tommy Bishop during an escape. *State v. Henderson*, 24 S.W.3d 307, 310 (Tenn. 2000). Henderson was serving a sentence for aggravated burglary and felony escape. About a week before the shooting, Henderson's girlfriend smuggled a pistol into the jail, and a few days later, Henderson requested dental work on a tooth he needed to have pulled. The appointment was made with Dr. John Cima, and on May 2, Deputy Bishop took Henderson and another inmate to Dr. Cima's office.

At the office, Henderson was placed in a treatment room while Deputy Bishop remained in the reception area and spoke with the receptionist. As Dr. Cima and his assistant began the tooth-extraction process, Henderson pulled out his pistol. Dr. Cima reached for the gun and a struggle ensued. Dr. Cima called out for Deputy Bishop, who rushed into the treatment room. As Deputy Bishop arrived, Henderson regained control of the pistol and fired a shot that grazed Deputy Bishop's neck. The shot caused Deputy Bishop to fall backwards and hit his head on the doorframe or wall and fall face-down on the floor, "presumably unconscious." *Id.* Henderson left the room and came back with the receptionist in his custody. He took Deputy Bishop's gun and Dr. Cima's money, credit cards, and truck keys. He then ordered Dr. Cima and the receptionist to accompany him out of the building. But just before leaving the building, Henderson went back to the treatment room and fatally shot Deputy Bishop in the back of the head at point-blank range. Deputy Bishop had not moved since hitting his head and was still lying face-down when Henderson shot him.

Dr. Cima and the receptionist managed to escape when Henderson was startled by another patient; Henderson drove off in Dr. Cima's truck. After a police car began following him,

Henderson sped away. He eventually drove off the road and into a ditch, and was taken into custody. When police searched the truck, they found the murder weapon, personal items taken from Dr. Cima's office, and Deputy Bishop's gun.

B. State-Court Direct Proceedings

1. Henderson Pleads Guilty and Waives Jury Sentencing

A grand jury indicted Henderson on one count of premeditated murder; three counts of felony-murder; two counts of especially aggravated kidnaping; and one count each of attempted especially aggravated kidnaping, aggravated robbery, aggravated assault, and felonious escape. Henderson was indigent, so Judge Jon Kerry Blackwood appointed two lawyers to represent him: Andrew Johnston and Jerry Michael Mosier. Mosier was lead counsel; Johnston was a relatively new lawyer who had never defended a capital case.

From December 1997 through February 1998, Henderson wrote at least four letters to Mosier and Johnston either asking about the consequences of pleading guilty or expressly stating his desire to plead guilty to avoid the death penalty. For example, in a December 21, 1997 letter, he asked if it would help his case to "not go[] before the jury and plead[] guilty before the judge" in the hope that the judge would "grant a form of mercy and exclude the death penalty." R. 23-13, PID 3351. The letter also asked counsel to find out if Deputy Bishop's family were opposed to the death penalty, willing to say so to the judge, and "if so, [whether] that [would] be a help in my case along with pleading guilty and not going before a . . . jury." *Id.* In a January 11, 1998 letter, he stated: "[t]o be honest, I personally do not want to appear before a jury during trial. I wish so much to be able to only appear before the judge with a plea of guilt and . . . a plea of

mercy and justice." *Id.* PID 3357. Two subsequent letters reiterated Henderson's desire to plead guilty to avoid the death penalty.[1]

These letters also raised concerns about the impending trial, then set for March 9, 1998. Henderson repeatedly voiced his desire that his lawyers request a change of venue, a change of judge, and an extension of the trial date. R. 23-1, PID 3357-58, 3361, 3370, 3373.[2] Trial counsel moved (unsuccessfully) for a change of venue. But on February 11, counsel successfully obtained a continuance, and trial was rescheduled for July 6, 1998.[3] Mosier advised Henderson against requesting Judge Blackwood's recusal, explaining that he had no reason to ask for the judge's recusal and that there was no "better judge to hear a death penalty case," given that Judge Blackwood had stated "on the record that he was morally and philosophically opposed to the death penalty." R. 23-2, PID 2566-67.

[1] *See id.* PID 3359-61 (January 14, 1998 letter) ("By pleading guilty to such a charge [of first-degree murder] *with* the guarantee to the victim's family that I would *never* be eligible for parole (life without parole), is it possible to eliminate the other charges? Even if my punishment was several consecutive life sentences without the possibility of parole, I would still feel that a great deal was accomplished. . . . By bringing to the table a plea of guilty to the m[urder] charge . . . and asking to be given as many consecutive life sentences as the courts see fit, I am hoping that the d[eath] penalty would be lifted off my head and that the other nine charges can be dropped[.]"); *id.* PID 3373 (February 5, 1998 letter) ("As I told you, I feel very strongly about all of the following: (1) Entering a guilty plea[;] . . . (5) [v]arious charges eliminated in reference to my guilty plea[;] [lists several additional considerations].").

[2] Some of Henderson's letters mentioned his desire to plead guilty in conjunction with these other requests. For example, a fuller excerpt of his January 11, 1998 letter reads: "[b]y having to rush things before March 9th, there is much to miss out on because of the short time span, and after the trial, we would wish we would have thought of those pieces of reasoning. To be honest, I personally do not want to appear before a jury during trial. I wish so much to be able to only appear before the judge with a plea of guilt and of a plea for mercy and justice. But if you are able to move my trial to a different county, then I might have a change of opinion about certain things." R. 23-13, PID 3357. And Henderson's February 5, 1998 letter, along with including his "strong[]" feelings about entering a guilty plea and seeing "charges eliminated in reference to my guilty plea," also noted his strong desire to obtain a "change of judge and county" and a "much, much later court date (as far away from today as possible)." R. 23-13, PID 3373.

[3] Mosier's basis for the continuance motion, as discussed below, was that the mitigation specialist appointed by the court, Julie Fenyes, was "overwhelmed by the case load that she has" and "simply just hadn't been able to [properly prepare]"; he noted that "without a complete mitigation investigation, it's my opinion that I can't effectively give Mr. Henderson the sentencing hearing that is his right in this case." R. 20-2, PID 478-79. When the court asked Mosier what tasks Ms. Fenyes was planning on doing, which ones she completed, and which she had not completed, Mosier responded: "my answer to you would be, 'I don't know.' That's why Ms. Fenyes is appointed to do it. I don't know what they do." R. 20-2, PID 483. The court "reluctantly" granted the motion. *Id.* PID 484-85.

On the day of trial, July 6, 1998, Henderson submitted a written plea of guilty to all charges except the felony-murder charges, as well as written waivers of his right to trial by jury and his right to appeal his guilt, and the prosecution moved to dismiss the felony-murder charges. R. 20-2, PID 496-98. During a plea colloquy, Henderson acknowledged the penalties he could face for the crimes of which he admitted guilt, acknowledged that he understood the rights he was waiving, and stated that he was voluntarily waiving those rights. R. 20-2, PID 532-38. Judge Blackwell set the sentencing hearing for the following week, July 13, 1998, and Henderson waived his right to have a jury empaneled for sentencing. *Henderson*, 24 S.W.3d at 311.

C. The Mitigation Investigation Leading Up to Sentencing

In the months leading up to July 1998, Mosier took a hands-off approach to the mitigation investigation, later testifying that he "relied upon the expert that the Court appointed to make . . . connections and tell me why" any leads were significant. R. 23-2, PID 2576-77. The defense team included a mental-health expert, psychologist Lynne Zager, a mitigation specialist, Julie Fenyes, and an investigator, Tammy Askew.

Dr. Zager conducted a three-hour forensic evaluation of Henderson in November 1997, during which she asked Henderson about his "social history"; and on January 7, 1998, she reviewed medical records from LeBonheur Children's Hospital, where Henderson was treated after being struck by a car while riding a bicycle when he was eleven or twelve years old. R. 23-3, PID 2318, 2321-22, 2330. On January 8, she advised trial counsel that Henderson was competent to stand trial and that she had no information to support an insanity defense or to diagnose a major mental illness. R. 23-3, PID 2332-33. She did no further work until July 8, the week before sentencing, when she administered the Minnesota Multi-Phasic Inventory, second edition (MMPI-2), a diagnostic test. R. 23-3, PID 2337; R. 20-5, PID 312-13. During this process,

Henderson described going into a dissociative state, lasting twenty-four hours, after firing the first shot. R. 20-5, PID 315. She ultimately diagnosed Henderson with a personality disorder with narcissistic and antisocial traits, but no other mental disorders, and determined that Henderson was not "substantially impaired" during the shooting. R. 20-5, PID 322-24, 333.

Fenyes's role was to compile a social background of Henderson and identify mitigating evidence. She joined the defense team in June 1997. Between June 1997 and March 1998, she did minimal work on Henderson's case, causing Mosier to request the continuance of the March 6, 1998, trial date. Then, before the rescheduled trial was set to start on July 6, Fenyes told Mosier that "all the mitigation evidence that she had chased down was not helpful, and she may have felt that perhaps she needed to do some more." R. 23-2, PID 2554. As a result, on the morning of the July 6 trial date—before Henderson pleaded guilty—Mosier requested a continuance, telling the court that: "Ms. Fenyes advises us that she is not satisfied with the stage at which her mitigation investigation is at" and had "chased down every lead that's been furnished" but "there hasn't been enough time." R. 20-3, PID 926.

Judge Blackwood then held an in-camera conference with Fenyes. Fenyes explained that she had interviewed "most family members that knew" Henderson but that they were "not as cooperative as I had hoped they would be," and that otherwise, she had not uncovered any mitigating evidence. R. 20-3, PID 942-43, 948. She also said that, as of July 6, "I have not yet met" the "minimum standard that I set for my own work." R. 20-3, PID 953. Judge Blackwood noted that Henderson's case may be one where there simply is no mitigating evidence:

> [Judge Blackwood]. Well, what concerns me: There are some people in the world, that regardless of what you do, you can't find anything that will mitigate what they've done.
>
> [Fenyes]. Certainly.

> [Judge Blackwood]. And this may be one of the cases that there's absolutely nothing that anyone can do[.]

R. 20-3, PID 953. In light of Fenyes's statement that she had not yet performed an adequate mitigation investigation, Judge Blackwood granted a continuance of trial and suggested a new date in August. R. 20-3, PID 956. Later that afternoon, however, Henderson pleaded guilty, accepted a sentencing date of July 13, 1998, and waived a jury at sentencing. R. 20-3, PID 1012.

D. Sentencing Hearing

At the sentencing hearing, the state presented a number of witnesses to support its argument that the aggravating circumstances warranted imposition of the death penalty.[4] Defense counsel presented only four witnesses in support of the mitigating factors: Henderson, Dr. Zager, Henderson's mother, and Henderson's high-school principal.

Henderson testified that he had received various scholastic awards in elementary school and was a varsity athlete and skilled artist in high school. R. 20-5, PID 253-59, 260-63. He expressed remorse and apologized to Deputy Bishop's family, *id.* PID 264, and stated that he was "still living in this dream. I mean, it still seems like it's a dream to me," *id.* PID 269. Henderson also testified that while he was incarcerated in 1996, he asked his mother to get him psychological help, but nothing came of it. *Id.* PID 267-68. On cross-examination, he acknowledged that he had several prior convictions, stated that he was raised in a loving family environment, and, when

[4] *See Henderson*, 24 S.W.3d at 311 ("Several witnesses testified for the State at the sentencing hearing, including Deloice Guy, the inmate taken with the appellant to the dentist by Deputy Bishop; Dr. John Cima; Donna Feathers, Dr. Cima's dental assistant; and Peggy Riles, Dr. Cima's receptionist. In addition, Dr. O.C. Smith, a forensic pathologist, testified regarding his investigation of the crime scene and of his autopsy of Deputy Bishop. Dr. Smith stated that based on his examination of Deputy Bishop's wounds, along with witness testimony, it was likely that the first shot fired by the appellant hit the deputy in the neck, and caused the deputy to hit his head against the doorframe of the examination room. Dr. Smith opined that this blow to the deputy's head could have rendered him unconscious. Moreover, Dr. Smith testified that the second shot entered at the back of the deputy's head and exited near the left eye. This second shot caused "significant and severe brain damage," and the blood from this wound seeped from the skull fractures into the deputy's sinuses, and ultimately, was breathed into his windpipe. Finally, Dr. Smith testified that the bullets used by the appellant could have "easily" penetrated the thin walls of the dentist's office.").

asked if he ever "had any mental problems" requiring therapy or medication, answered: "I wouldn't say that." *Id.* PID 272-73, 281.

The next mitigation witness was Henderson's high-school principal, who generally described Henderson's high-school activities—playing basketball, being elected president of the student body, escorting the homecoming queen—and added that Henderson had mostly positive interactions with students but also had two undescribed "incidents"—which seemed to be fights—requiring the principal's involvement. R. 20-5, PID 287-90. Henderson's mother testified that Henderson "never" had problems with other students, and she never saw behavior from him during high school that suggested a need for intervention. R. 20-5, PID 292-93, 296. She recalled Henderson asking for psychological help while incarcerated in 1996 but never followed up on the request. *Id.* at PID 296. She testified that Henderson was raised in a "two-parent household" by "attentive parents, caring parents." R. 20-5, PID 298. When asked if she recognized any psychological problems with Henderson before Deputy Bishop's murder, she responded: "I wouldn't say that." *Id.* PID 299-300. But she added that he did a "couple things that didn't seem right . . . a couple of odd things," without specifying what they were. *Id.* She also testified that Henderson told her he did not remember the shooting. *Id.* PID 300-01.

The last mitigation witness was Dr. Zager. She testified that when she evaluated Henderson, he described being in a "dissociative state" for "about 24 hours after" the shooting, explaining that a dissociative state is "some sort of significant incident or trauma where an individual had difficulty integrating their overall functioning." R. 20-5, PID 314. She explained that she had diagnosed Henderson as having a "personality disorder, not otherwise specified, with" narcissistic and antisocial traits. *Id.* PID 317-18. As to Henderson's mental state at the time of the shooting, she opined that he was "under duress" and that "his judgment was not adequate," but

added that he was "not substantially impaired" and that she "would not offer an opinion to the Court that he be considered insane at the time." R. 20-5, PID 321-22. On cross-examination, she agreed that her diagnosis was a "basic catchall for something you can't otherwise explain." *Id.* PID 323-24. When asked, she agreed that Henderson did "not have a prior mental health history[,] [t]hat's absolutely correct." *Id.* PID 328.

At a few points, Dr. Zager mentioned that she reviewed records of the head injury Henderson suffered as a child, but offered sparse elaboration on what significance, if any, that information had. *See, e.g.*, R. 20-5, PID 311 ("I recall, also [when meeting with Henderson], he reported having had a significant head injury, where he had to be hospitalized, and I knew that it was very important to get those and other medical records, school records, et cetera, to do a comprehensive evaluation. At that time my initial impression was I would recommend he be considered competent to stand trial. And in terms of the mental condition at the time, I didn't have information at that time that I would have offered an opinion that he had a defense."); *id.* PID 329 (Dr. Zager noting that she "reviewed the records from his head injury and other records," without otherwise discussing the head injury). In discussing Henderson's social background, Dr. Zager noted that Henderson:

> had a lot going for him . . . he had a good family; he had a two-parent family; he had a loving family. He describes hi[s] family as being the most wonderful family in the world. Given all of that, though, there were problems and they weren't recognized and they weren't dealt with. And even in the most loving families and in the best circumstances, we all know there can be problems and they're not dealt with, and that's one of the areas that is of concern for me.

R. 20-5, PID 332. She added—without specificity—that it would be "significant" that Henderson "may have had problems in his life," but that it would not be significant to her evaluation of whether he was competent to stand trial. R. 20-5, PID 333. On that question, she stated that her

view was that Henderson was competent and that there was "no question" that he was sane at the time of the murder. R. 20-5, PID 333. After Dr. Zager's testimony, the defense rested.

The state argued that five aggravating factors called for the death penalty: (1) Henderson created a great risk of death to two or more persons during the act of murder, Tenn. Code Ann. § 39-13-204(i)(3); (2) the murder was committed for the purpose of avoiding an arrest, *id.* § 39-13-204(i)(6); (3) the murder was committed while fleeing after committing robbery and kidnapping, *id.* § 39-13-204(i)(7); (4) the murder was committed during an escape from lawful custody, *id.* § 39-13-204(i)(8); and (5) the murder was committed against a law-enforcement officer engaged in the performance of official duties, *id.* at § 39-13-204(i)(9). R. 20-5, PID 338-40. The state also highlighted the lack of evidence from the defense team supporting mitigation. R. 20-5, PID 341.

Defense counsel argued for five mitigating factors: that Henderson (1) had no significant history of prior criminal activity, Tenn. Code. Ann. § 39-13-204(j)(1); (2) committed the murder under extreme mental or emotional disturbance, *id.* § 39-13-204(j)(2); (3) acted under extreme duress, *id.* § 39-13-204(j)(6); (4) committed the murder while his mental capacity, while not deficient to the point of raising a defense, was substantially impaired, *id.* § 39-13-204(j)(8); and (5) was of a youthful age when committing the offense, *id.* § 39-13-204(j)(7). R. 20-5, PID 341-44. Counsel also argued for a non-statutory mitigating factor: that Henderson was a "young man who had a lot going for him" but "something happened and brought us where we are today," and the "lack of any intervention" to identify Henderson's "disorders" should be considered. R. 20-5, PID 344-46. Counsel offered almost no specifics in support of this argument, instead concluding with: "[y]ou know, some things speak for themselves, and sometimes things that a person does

are so terrible, so horrible, and so inhumane that they can't have been committed by somebody who didn't have a mental defect. And I think that this is a classic example." *Id.* PID 346.

Judge Blackwood determined that the aggravating factors outweighed the mitigating factors, and sentenced Henderson to death. R. 20-5, PID 356. Henderson appealed, arguing that the death penalty was excessive and disproportionate, and the Tennessee Court of Criminal Appeals affirmed. *Henderson*, 24 S.W.3d at 213. Upon automatic review, the Tennessee Supreme Court affirmed as well. *Id.* at 310-19.

E. State-Court Post-Conviction Proceedings

1. Lead-Up to Post-Conviction Hearing

Henderson filed a pro se petition for post-conviction relief in February 2001 and an amended, counseled petition in November 2001. The amended petition asserted ineffective assistance of counsel at trial and sentencing, along with several other challenges. Among other things, the petition alleged that trial counsel ineffectively advised Henderson to plead guilty and conducted an inadequate mitigation investigation, including the investigation into Henderson's mental illness. The petition did not mention anything about brain damage or failure to investigate Henderson's head injury.

Henderson's post-conviction counsel were Donald Dawson and Catherine Brockenborough from the Tennessee Office of the Post-Conviction Defender. Between November 2001 and January 2003, Dawson and Brockenborough requested several continuances of the post-conviction hearing. This eventually caused Judge Blackwood to remove them from the case for

failure to diligently prepare, before later rescinding his order.[5] The hearing was eventually set for April 28, 2003.

2. The Post-Conviction Hearing

At the post-conviction hearing, counsel focused largely on establishing that trial counsel performed an ineffective mitigation investigation and that an effective investigation would have led to evidence showing that Henderson had a mental illness. Specifically, post-conviction counsel

[5] After the state answered Henderson's amended petition, an evidentiary hearing was set for April 4, 2002. Defense counsel filed a motion to continue in March 2002, explaining that the mitigation was complicated, that the defense experts had not yet completed their work, and that Brockenborough was in the midst of an "acute" relapse for an unspecified "chronic condition," was under doctor's orders to reduce stressful situations in her life, and was thus unable to work on Henderson's case. R. 21-15, PID 1198-99, 1207-08. Judge Blackwood granted the continuance and set the hearing for August 12, 2002. R. 21-15, PID 1212. On July 5, 2002, counsel moved to continue this date.. They stated that their investigator, Kathryn Pryce, was undergoing dental surgery in July and that Dawson—lead counsel—had suffered a severe lower-back injury requiring surgery in late June, and was dealing with debilitating sciatica, preventing him from doing almost any work other than for extremely limited periods. R. 21-15, PID 1215. Counsel also noted that another of Dawson's cases had received an execution date, creating unexpected major additional work. *Id.* PID 1215-18. Judge Blackwood denied the motion, R. 21-15, PID 1238, but after counsel filed a motion to reconsider—pointing out that the chief judge had not yet approved expenditure of approved funds for Henderson's experts—Judge Blackwood "[r]eluctantly" granted a continuance until December 16, 2002, warning that "[t]here will be no further continuance." R. 22-1, PID 1528. On November 2, 2002, defense counsel requested continuance of the December hearing, stating that their psychiatric expert, Dr. William Kenner, believed that Henderson suffered from Bipolar II disorder but needed to place Henderson on mood-stabilizing medication for three to four months to determine his diagnosis. R. 22-1, PID 1542-43. On December 6, 2002, Judge Blackwood issued an order granting the continuance and removing Dawson and Brockenborough from representing Henderson:

> [A] pattern has emerged by Petitioner's counsel to apply for continuances shortly before each evidentiary hearing is scheduled. Included among the numerous reasons given for counsel's inability to be prepared for the hearing were the limited resources of their office, other workload, inability to investigate, conflicts with other cases, health problems and inability of their experts to complete their work. The Court finds that counsel has not been diligent in preparing this case for trial and has no expectation that counsel will be ready for a hearing at the next scheduled date. For the foregoing . . ., the Court hereby relieves the Office of the Post-Conviction Defender of any further responsibilities in this matter[.]"

R. 22-1, PID 1546. Dawson and Brockenborough filed a motion to reconsider on December 30, attaching an affidavit from Henderson stating that he believed that they had been "diligently working on my case," that their team "interviews me on a regular basis attempting to gather additional information," and has "interviewed the members of my family and others. . . . I am fully satisfied with their work[.]" R. 22-3, PID 1603-04. On January 2, 2003, Judge Blackwood granted the motion and reinstated counsel. *See* R. 22-6, PID 1605 ("The Court anticipates any further hearing and ruling [on the motion to reconsider] will only delay the disposition of this matter. Secondly, the Court is not eager to hear why there have been so many delays in this case and the excuses for them. Consequently, the Court will reverse its last ruling.").

emphasized that trial counsel failed to discover (1) a series of "red-flag" crimes and bizarre criminal behavior after high school and (2) a family history of mental illness.

Examples of the red-flag crimes included that Henderson burglarized the home of his high-school art teacher and family friend, cutting her phone line and holding a towel over her face while she slept, stealing her checkbook, and later getting caught trying to write checks in her name; Henderson abducted the fifteen-year-old sister of an ex-girlfriend and held her for two days; starting in February 1995, Henderson abducted and raped S.C., the mother of his then-girlfriend, on several occasions and after one occasion put out a false public announcement in a newspaper that he and the daughter had gotten married.[6] Mosier testified that at the time of sentencing, he was unaware of the abductions of S.C., despite the fact that the state had sent him and co-counsel information about the abductions in discovery. When asked if it would have meant something to him, Mosier responded: "[i]t wouldn't have suggested anything to me." R. 23-2, PID 2580.

Post-conviction counsel also sought to establish that members on both sides of Henderson's family had a history of mental illness (information that mitigation trial counsel had not uncovered). They introduced medical records for several of Henderson's maternal cousins, aunts, and uncles who had been treated at mental-health facilities, as well as psychiatric records of Henderson's paternal grandmother, who was institutionalized at Methodist Hospital in Memphis. Family

[6] During one of the abductions of S.C., in February 1996, Henderson took S.C. from her home at gunpoint and drove around with her for a day and a half in his car, forcing her to use the backseat as a bathroom. According to a police report read into the record, S.C. described Henderson's decision to release her, in part, as follows: "When he decided to let me go, he said, 'Don't tell anyone.' He said he'd seen a person who got killed and that it messed up his mind. He must have thought that I was crazy that I wouldn't tell anyone. Then he said he was thinking about driving the car off in the river with him and me in it, and he'd drive to the river and shoot himself in the head or that he would drive to the river and shoot myself in the head. Then he told me to take the thing off my head. He was trying to figure out what he'd do. He thought that if he let me see him that I wouldn't tell anyone what he'd done. I could tell he didn't know what he was going to do. I think that he was really scared before he let me go. We went to McDonald's, and kidnapping someone with them on the floorboard, that's crazy. I was in the floor of his car in the front seat." R. 23-4, PID 3257. Henderson eventually let S.C. go.

members from Henderson's maternal and paternal sides testified about the history of mental illness in his family.

Dr. William Kenner, a psychiatrist, testified that based on the information discussed above and his own in-person evaluations, he had diagnosed Henderson with Bipolar II disorder. R. 23-4, PID 3233-34. Another mental-health expert—psychologist Dr. Pamela Auble—gave Henderson a battery of psychological tests and reached the same conclusions as Dr. Zager, i.e., that Henderson "does not have what I would call global or general deficits, but does have some specific problems in his mental abilities." R. 23-4, PID 3210. Dr. Frank Einstein, a mitigation specialist, analyzed Julie Fenyes's mitigation work and testified that it fell far below the standards for an adequate investigation. He reviewed her billing sheets and determined that she did "almost all [her] work" within "the three weeks preceding the [sentencing] hearing itself," and that "very little work" was done before then. R. 23-2, PID 2626-27.

Several witnesses—Drs. Einstein, Zager, and Auble—made brief references to their awareness of records from Henderson's stay at a children's hospital after being struck by a car as a child, R. 23-2, PID 2658 (Dr. Einstein); R. 23-3, PID 2330, 2353 (Dr. Zager); R. 23-4, PID 3209, 3223 (Dr. Auble), but none elaborated on what those records showed.[7]

[7] Dr. Einstein explained that "one of the very first things a mitigation specialist looks at is whether there was some sort of trauma to the defendant," and when asked if he was able to "determine any significant physical trauma that may have had any impact on this case," he responded that "[t]here were two medical incidents. In one case I think he was hit by a car and had a possible head injury which was diagnosed as a possible concussion. The second was an incident, which I still don't completely understand, in which he lost – he fell down some stairs and lost control of his ability to move his legs for a period of time." R. 23-2, PID 2658-59. Dr. Zager testified that she reviewed the hospital records of the bike accident but was not qualified to make a determination whether the injury was significant because she was a psychologist, not a medical doctor. *See* R. 23-3, PID 2354 (Dr. Zager answering question whether Henderson had any significant medical conditions with: "Qualifying the answer to that question that I'm not a medical doctor, I'm a psychologist, there were some injuries in the past that he had sustained that I reviewed records, particularly since one had been a head injury. . . . But to the best of my knowledge, at the time I made the diagnosis he was healthy. . . . I believe he was on a bike and hit by a car."). Dr. Auble simply stated that in reviewing Dr. Zager's work, she also reviewed the hospital records. R. 23-4, PID 3209, 3223.

Additionally, Mosier addressed Henderson's decision to waive a jury for sentencing. He testified that he "didn't advise [Henderson], yes or no, to do it," but "advised him of the consequences" and "what the advantages were and the disadvantages were." R. 23-2, PID 2567. When asked what advice he gave, Mosier responded:

> this case was even more difficult [than some death-penalty cases] because it involved an apparently senseless killing of a law-enforcement officer. I didn't feel like Mr. Henderson's chances before a jury in any county were good at all. I felt like that allowing Judge Blackwood to sentence him in this case gave him the best chance that he had to avoid the death penalty.

R. 23-2, PID 2567–68. Mosier acknowledged that at the time he was advising Henderson on whether to plead guilty, Fenyes had not turned up anything that would be helpful to Henderson at the penalty phase of the proceeding, but he hoped that Henderson's acceptance of responsibility would "tip the scales" at sentencing:

> Every lead that Ms. Fenyes pursued turned up things that would not be helpful to Mr. Henderson. I felt like that all there was left for him was to try to demonstrate to the judge his acceptance of responsibility and by putting him on the stand, let him show remorse for what he did.

R. 23-2, PID 2570. Mosier also noted that as the trial date approached, Dr. Zager had only offered "pretty thin" mental-health mitigation evidence for sentencing. *Id.* PID 2571-72. Mosier added that at that point, he believed that Henderson was "very bright" and "wasn't lacking in mental capacity." *Id.*

3. State-Court Resolution of Post-Conviction Petition

Post-conviction counsel submitted a "closing argument" in the form of a written brief. Henderson's mental health as discussed above was one of its central arguments. *See, e.g.*, R. 22-8, PID 1920, 1930. Brain damage was not part of this argument. Judge Blackwood denied relief in a five-page written order. R. 22-8, PID 1943-47. He concluded that trial counsel was not ineffective despite being unaware of "all the history of mental illness in the Petitioner's family" or

"some of the violent events that the Petitioner engaged in shortly before this incident." R. 22-8, PID 1945. He also stated that the newly presented mitigation evidence was a "double-edged sword" and would not have changed Henderson's sentence, adding that "the Court, having been the trier of fact during the punishment phase, is in a unique position to be able to hear any additional mitigating evidence and weigh it against the evidence heard at trial":

> The Court can now look to the additional mitigation proof offered at this hearing in assessing whether the result would have been different. The additional mitigation proof can be summarized. The Petitioner was a normal student in grammar and high school. He was a talented basketball player and had a talent for art. About two years prior to this event, his behavior changed. He became violent. He viciously assaulted one girlfriend. He was convicted of some lesser felonies. Thereafter, he abducted the mother of his girlfriend on several occasions while masked. He also raped the mother. Petitioner's clinical psychologist opined that he had a personality disorder, but did not basically disagree with trial counsel's clinical psychologist, other than she administered more tests. Finally, Dr. Kenner diagnosed the Petitioner as bipolar. Significantly, Dr. Kenner opined that in order to fully explain the nature of Petitioner's bipolar diagnosis, the trier of fact would have to hear all the details of Petitioner's various assaults, abductions and rapes.
>
> At trial, the statutory aggravating circumstances . . . were simply overwhelming. The Court considered the mitigating testimony, especially the testimony regarding this personality disorder. This proffered new mitigating testimony regarding Dr. Kenner's bipolar diagnosis[] only reinforces the Court's opinion that the aggravating circumstances outweighed, in fact overwhelmed, any mitigating evidence. Two additional points need to be made. The Court is assuming, for arguments' purpose, that Dr. Kenner's diagnosis is correct. . . . Secondly, the evidence presented regarding the defendant's abduction of his girlfriend's mother, the rapes, the assaults, lead the Court to the conclusion that the Petitioner's acts were calculated, cold and deliberate. These are the same calculated and deliberate actions that led to the death of Tommy Bishop. Whether or not they are a result of a bipolar condition would not have changed the Court's decision to impose a sentence of death.

R. 22-8, PID 1944-47. Henderson appealed, and his appellate brief raised the same mental-health-related arguments, among others. *See, e.g.*, R. 23-15, PID 3163-68.

The Tennessee Court of Criminal Appeals (CCA) affirmed. *Henderson v. State*, 2005 WL 1541855 (Tenn. Crim. App. June 28, 2005). The CCA provided a detailed summary of the

testimony at the post-conviction hearing, including the new evidence of red-flag crimes and family history of mental illness, as well as Dr. Kenner's bipolar diagnosis. The CCA rejected Henderson's ineffective mitigation-investigation argument, reasoning that he could not establish prejudice given Judge Blackwood's accurate double-edged-sword observation and his statement that the newly discovered evidence and bipolar diagnosis would not have changed his sentence.[8] The CCA also rejected the argument that counsel was ineffective for advising Henderson to plead guilty and waive jury sentencing because

> [t]he evidence against the petitioner was overwhelming, as was the evidence of the statutory aggravating factors. Moreover, it is clear from the colloquy at the guilty plea hearing that the petitioner was informed that the trial court could impose a sentence of life, life without parole, or death. Thus, the petitioner made a conscious decision between two (2) viable options. Without more, the petitioner has failed to prove that counsel's advice was completely unreasonable. He is not entitled to relief on this issue.

Id. at *36-39. The Tennessee Supreme Court denied Henderson's application for permission to appeal.

[8] The CCA explained:

> It appears that the crux of the petitioner's complaint is the failure to introduce evidence regarding the alleged existence of a bipolar type 2 mental illness. The existence of such a mental illness would have been apparent, suggests the petitioner, had trial counsel discovered a family history of mental illness and evidence of the petitioner's erratic criminal behavior. . . . This "undiscovered" mitigation evidence raised by the petitioner was correctly characterized by the post-conviction court as being a "double-edged sword." Given the strength of the proof of the aggravating circumstances relied upon by the State, the mitigation evidence that was presented at sentencing and the possible negative impact of the "undiscovered" mitigation evidence, we conclude that had this information been presented to the court there is little reason to believe the trial judge would impose a sentence other than death. The petitioner is not entitled to relief on this basis. Indeed, in this case, unlike the situation where a jury imposes a death sentence, we are not left to speculate to some degree as to the effect this evidence might have had on the sentencer. The sentencer in this case, the trial judge himself, found this evidence would not have altered the result of the sentencing hearing.

See id. at *42-43.

F. Federal Habeas Proceedings

Henderson filed a timely pro se federal habeas petition under 28 U.S.C. § 2254, then filed an amended, counseled petition. The amended petition raised a large number of claims, set off in different paragraphs of the petition. Paragraph 13 alleges that Henderson was incompetent to enter a guilty plea and waive jury sentencing. R. 16, PID 126. Paragraph 8 consists of thirteen sub-claims (8(a) through 8(m)) asserting various theories of ineffective assistance of trial counsel, *id.* PID 86-94, including ineffective assistance in advising Henderson to plead guilty (Claim 8(h)), *id.* PID 92. Paragraph 9 consists of twenty sub-claims (9(a) through 9(t)) asserting various theories of ineffective assistance of counsel at sentencing. *Id.* PID 94-114. Claim 9(a) alleges ineffectiveness for advising Henderson to waive jury sentencing. Claim 9(d)(4) asserts that counsel was ineffective in failing to discover and present evidence that Henderson "suffers from brain damage." *Id.* PID 103. Finally, Claim 9(n) states: "[c]ounsel did not interview and adequately prepare defense witnesses, resulting in the failure to present to the Court a complete picture of Kennath Henderson." *Id.* PID 108. Claim 9(n) is phrased identically to a claim raised in the state-court post-conviction petition. *See* R. 21-14, PID 1146 (Ground 2.9).

The warden moved for summary judgment, and Henderson filed a response brief that attached an expert report from Dr. Ruben C. Gur—a Professor of Neuropsychology at the University of Pennsylvania—who reviewed imaging of Henderson's brain and determined that Henderson suffered from brain damage that likely stemmed in part from his childhood bike accident. (Gur Report) R. 68-1, PID 3991-94. Dr. Gur concluded that Henderson's "cranial volume is more than 2 standard deviations . . . below normal, a condition that occurs in less tha[n] 2.5% of the population," and that Henderson had "abnormally low brain volume" overall, a "sign of neurodevelopmental abnormalities." *Id.* PID 3993. Dr. Gur noted that Henderson's cranial

volume reduction was more significant in the left-top area of his head—the same spot where, as a child, he complained of soreness after his bicycle accident—and noted that the scans showed reductions consistent with "atrophy . . . often seen following head injury." *Id.* Based on a clinical interview and computerized testing—conducted in conjunction with a review of the brain scans—Dr. Gur concluded "to a reasonable degree of scientific certainty" that Henderson "suffers from brain dysfunction" and "abnormalities in brain function in regions relevant to behavior, especially related to executive functions (frontal), attention and comprehension of complex information (parietal), and the integration of self (right parietal)."[9] *Id.* PID 3993-94. He concluded that these abnormalities were "most likely related to anoxia or traumatic brain injury," and indicate that Henderson "suffers from brain dysfunction that impairs his ability to modulate his behavior in accordance with context and may specifically lead to dissociative states, such as the state he was in when he committed the offenses." *Id.* PID 3994.

Henderson also attached a report from Dr. George Woods, a psychiatrist, who diagnosed Henderson with Bipolar I disorder. (Woods Report) R. 55; R. 68-2, PID 3995-4007. After explaining how he reached a Bipolar I diagnosis, Dr. Woods noted:

> Importantly, Mr. Henderson's cognitive deficits are not only a function of his Mixed Phase Bipolar disorder. Dr. Ruben Gur, PhD., also documented structural damage in Mr. Henderson's brain. Specifically, Mr. Henderson shows impairments in the parts of his brain that control the ability to effectively weigh and deliberate and to control the understanding of social cues and recognize social responses. . . .
>
> The synergy between an impaired brain and a genetically-derived mood disorder creates for Mr. Henderson an increased vulnerability to atypical and more severe

[9] Dr. Gur elaborated that the frontal lobes "involve the ability to control and regulate behavior in accordance with its context, especially the ability to weigh and deliberate in making decisions." *Id.* The parietal lobes "are directly related to spatial processing and sensory integration and comprehension," including "integration of personality." *Id.* Damage to these areas of the brain "thus contributes to a poor recognition of social consequences and social cues, and is often related to dissociation." *Id.* According to Dr. Gur, other regions of Henderson's brain—like the temporal and occipital lobes—"[had] normal and even high relative volumes." *Id.*

> symptoms than would be expected from either the impaired brain or the Bipolar I Disorder individually.

R. 68-2, PID 4004. Dr. Woods concluded:

> These mental disorders, synergistic in their effects, including Mr. Henderson's depression, social decompensation, impaired ability to effectively weigh and deliberate due to his brain deficits, and impaired judgment, precluded Mr. Henderson from conforming his behavior to the law and also from making a rational and voluntary, intelligent, and knowing waiver of his rights to a jury trial and waiver of his right to be sentenced by a jury.

Id. PID 4007-08.

The district court denied Henderson's habeas petition in two orders. It held that Henderson's claims of ineffective assistance for advising him to plead guilty and waive jury sentencing were decided in state court on the merits and the decisions were neither "contrary to or an unreasonable application of clearly established federal law or based on an unreasonable determination of facts." R. 72, PID 4144, 4091; R. 91, PID 4422. It reached the same conclusion regarding Henderson's brain-damage claim, Claim 9(d)(4), reasoning that since it was decided on the merits, consideration of the Gur Report was barred under *Cullen v. Pinholster*, 563 U.S. 170 (2011). R. 72, PID 4127; R. 91, PID 4445-48.[10] The district court concluded that Claim 9(n) was procedurally defaulted and that Henderson could not establish "cause" to excuse the default. R. 72, PID 4129-30. It held the same for Henderson's incompetency claim (Claim 13). R. 72, PID 4181-82.

[10] In deciding that Claim 9(d)(4) was decided on the merits, the district court failed to cite any page of any state-court decision purporting to decide a claim relating to failure to present brain-damage evidence. The court concluded—without clear explanation—that Henderson "exhausted" claim 9(d)(4) despite also recognizing that "Henderson did not specifically assert that he suffered brain damage in the post-conviction proceedings." R. 72, PID 4126; *see also* R. 91, PID 4446-47 (concluding that the "Tennessee Court of Criminal Appeals' decision that Henderson was not prejudiced by counsel's failure to further investigate the accident and possible brain damage is not unreasonable," but failing to cite any page of the CCA's opinion purporting to reach that conclusion). It appears that the court may have distinguished between raising the claim and providing evidence in support of the claim, and possibly concluded that because there was some testimony that mentioned the bicycle accident, although no mention of brain damage, the brain-damage claim was exhausted.

Henderson appealed, but we remanded for reconsideration in light of *Martinez v. Ryan*, 566 U.S. 1 (2012), which recognized that under certain circumstances, ineffectiveness of post-conviction counsel may excuse procedurally defaulted "substantial" claims of ineffective assistance of trial counsel. The district court ordered Henderson to identify any defaulted "substantial" claims to which *Martinez* might apply. R. 123, PID 4621-22. Henderson responded, identifying numerous claims, including Claim 9(d)(4) and Claim 9(n). R. 129, PID 4668, 4660-67.[11] The brief focused on Claim 9(n), largely raising the same types of arguments in support of the claim—failure to identify red-flag crimes and mental illness—that were raised in the state-court post-conviction proceedings.[12] The district court held, once more, that claim 9(d)(4) was decided on the merits, and that *Martinez* would not allow Henderson to "circumvent *Pinholster*" and present the Gur Report in support of the claim. R. 134, PID 5019. It also denied relief on Claim 9(n), reasoning that although the claim—in the district court's view—was procedurally defaulted, it was not "substantial" under *Martinez*.

The district court issued a certificate of appealability (COA) on Henderson's claim that trial counsel was ineffective at sentencing (Claim 9) and his claim that he was incompetent to enter a guilty plea and waive jury sentencing (Claim 13). Henderson appealed, and we expanded the

[11] During the first round of summary-judgment briefing, before *Martinez*, Henderson had submitted declarations from post-conviction counsel Dawson, and several members of Dawson's office, stating that post-conviction counsel Brockenborough was suffering from severe mental illness during her representation of Henderson and was unable to function professionally or personally. *See* R. 74-1, 74-2, 74-3. In his post-remand briefing, Henderson signaled that he would rely on this type of information to show that post-conviction counsel was ineffective, and sought an evidentiary hearing to do so. R. 129, PID 4647.

[12] Henderson's brief on remand attached several new declarations relating to the fact that Henderson's father, Elton Henderson, suffered from mental illness. *See* R. 129-6 to 129-13. It also included a 2011 declaration from Judge Blackwood stating that he believed that trial and post-conviction counsel were ineffective, but also stating that he had reviewed the Gur and Woods reports and, after "several days [of] reflection on this matter," concluded he would still have imposed the death penalty even if he knew of those reports at the time. R. 129-2, PID 4690. Earlier in the federal habeas litigation, in 2008, Judge Blackwood had provided a declaration to federal habeas counsel—before seeing any new brain-damage evidence—stating that during sentencing, he would have been open to considering brain-damage evidence or evidence of mental illness, but not expressing any conclusions on whether it would have changed Henderson's sentence. R. 68-3, PID 4010-12.

COA to also include Henderson's claims that trial counsel was ineffective during the guilt phase for advising Henderson to plead guilty (Claim 8(h)) and for failing to use expert services effectively (Claim 8(k)).

II. STANDARD OF REVIEW

On appeal from a § 2254 proceeding, we review a district court's legal conclusions de novo. *Moss v. Hofbauer*, 286 F.3d 851, 858 (6th Cir. 2002). The Antiterrorism and Effective Death Penalty Act (AEDPA) provides that for claims "adjudicated on the merits in State court proceedings," we may only grant relief if the decision "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

A determination is "contrary to" clearly established federal law if the "state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts." *Van Tran v. Colson*, 764 F.3d 594, 604 (6th Cir. 2014). A determination involves an "unreasonable application" of federal law if the "state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the petitioner's case." *Henley v. Bell*, 487 F.3d 379, 384 (6th Cir. 2007). "[R]eview under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Pinholster*, 563 U.S. at 181.

III. DISCUSSION

The claims before us present four issues: (1) whether trial counsel were ineffective in advising Henderson to plead guilty and waive jury sentencing (Claims 8(h) & 9(a)); (2) whether Henderson was competent to plead guilty and waive jury sentencing (Claim 13); (3) whether trial counsel were ineffective at sentencing (Claim 9); and (4) whether trial counsel were ineffective in their use of expert services in preparing for the guilt phase (Claim 8(k)). Henderson does not brief the fourth issue on appeal, so we deem it forfeited. *Landrum v. Mitchell*, 625 F.3d 905, 913 (6th Cir. 2010).

A. Guilty Plea and Jury Waiver (Claims 8(h), 9(a))

Henderson first argues that trial counsel were constitutionally ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984) for advising him to plead guilty and to waive jury sentencing. It is undisputed that the state court rejected these claims on the merits, so Henderson must satisfy § 2254(d)'s standards by showing that the state court's ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103 (2011).

1. The Guilty-Plea Claim

Under *Strickland*, a petitioner must show that (1) counsel's performance was ineffective and (2) he suffered prejudice as a result. 466 U.S. at 692. Counsel's performance is ineffective when it falls below "an objective standard of reasonableness." *Id.* at 687-88. In general, *Strickland*'s prejudice standard requires "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. But in the context of guilty pleas, the question is whether "there is a reasonable probability that, but for counsel's errors, [petitioner] would not have pleaded guilty and would have insisted on going to

trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). "When analyzing a *Strickland* claim under § 2254(d), our review is 'doubly deferential.'" *Campbell v. Bradshaw*, 674 F.3d 578, 587 (6th Cir. 2012) (quoting *Pinholster*, 563 U.S. at 190)).

Henderson first argues that the state court applied a standard "contrary to" *Strickland* and *Lockhart* when assessing counsel's effectiveness. Specifically, Henderson takes issue with the CCA's reliance on a Tenth Circuit decision, *Hatch*, in articulating the applicable standard for the "performance" prong of *Strickland*. The CCA stated:

> An attorney's advice to his client to waive the client's right to a trial by jury is a classic example of a strategic trial judgment, "the type of act for which *Strickland* requires that judicial scrutiny be highly deferential." *Hatch v. Oklahoma*, 58 F.3d 1447, 1459 (10th Cir. 1995) (quoting *Green v. Lynaugh*, 868 F.2d 176, 178 (5th Cir.), *cert. denied*, 493 U.S. 831, 110 S. Ct. 102, 107 L.Ed.2d 66 (1989) (per curiam). It constitutes a conscious, tactical choice between two viable alternatives. *Hatch*, 58 F.3d at 1459 (citing *Carter v. Holt*, 817 F.2d 699, 701 (11th Cir. 1987)); *United States v. Ortiz Oliveras*, 717 F.2d 1, 3 (1st Cir. 1983) (holding that tactical decisions, whether wise or unwise, successful or unsuccessful, cannot ordinarily form the basis of a claim of ineffective assistance of counsel). Thus, for counsel's advice to rise to the level of constitutional ineffectiveness, the decision to waive a jury must have been "completely unreasonable, not merely wrong, so that it bears no relationship to a possible defense strategy." *Hatch*, 58 F.3d at 1459.

Henderson, 2005 WL 1541855, at *36. Henderson argues that the CCA "[v]itiat[ed]" the standard set by the Supreme Court by relying on *Hatch* and asking whether counsel's advice was "completely unreasonable" and "bears no relationship to a possible defense strategy." Appellant. Br. at 56-57.

As the warden points out, however, we have favorably cited an almost-identical articulation of the *Strickland* standard—albeit in a decision post-dating the state-court decision here. *See Moore v. Mitchell*, 708 F.3d 760, 786 (6th Cir. 2013) (describing the performance prong as requiring that counsel's action "must have been completely unreasonable, not merely wrong, so that it bears no relationship to a possible defense strategy" (quoting *Hoxsie v. Kerby*, 108 F.3d

1239, 1246 (10th Cir. 1997)). At the very least, this statement in *Moore* shows that the CCA's articulation of the *Strickland* standard was not necessarily a misstatement of the law, and certainly was not clearly "contrary to" *Strickland* as required by § 2254(d)(1).

Next, Henderson argues that the CCA violated § 2254(d)(1)'s "contrary to" clause in discussing prejudice. According to Henderson, the CCA incorrectly applied "an outcome determinative test" to determine prejudice. Henderson reasons, based on the CCA's observation that the evidence of Henderson's guilt was overwhelming, that it applied a "prejudice test [that] would require Mr. Henderson to prove he would have prevailed had he gone to trial"—a test contrary to *Lockhart*, which only requires a reasonable probability that the defendant would not have pleaded guilty. Appellant Br. at 58-59. This is an inaccurate characterization. The CCA did not require proof that Henderson would have won at trial but for the advice to plead guilty. Rather, it correctly articulated the *Lockhart* prejudice standard. *See Henderson*, 2005 WL 1541855 at *31 ("[I]n the context of a guilty plea, to satisfy the second prong of *Strickland*, the petitioner must show that 'there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" (quoting *Lockhart*, 474 U.S. at 59)); *id.* at *36 (same). The CCA correctly applied this standard as well. *See id.* at *37 (noting that Henderson sent several letters stating his desire to plead guilty and submit his case to a judge rather than a jury, and that Henderson "did not testify at the post-conviction evidentiary hearing, so there is no direct evidence in this record that but for counsel's alleged deficiencies he would not have pled guilty or submitted his case to the trial judge for sentencing"). Further, the CCA's recognition of the overwhelming evidence of guilt—which Henderson quotes out of context—was made when discussing effectiveness, not prejudice. The CCA cited the overwhelming evidence of guilt as a reason why it may have been reasonable to recommend a guilty plea. *Id.* at *37-39.

Finally, Henderson argues that the CCA's decision was based on an unreasonable determination of the facts. Under § 2254(d)(2), "state-court factual determinations must stand unless they are objectively unreasonable in light of the evidence presented in state court." *Allen v. Mitchell*, 953 F.3d 858, 864 (6th Cir. 2020). Henderson challenges the following portion of the CCA opinion:

> The record indicates that trial counsel made no guarantee to the petitioner that the trial court would not impose a death sentence. The evidence against the petitioner was overwhelming, as was the evidence of the statutory aggravating factors. Moreover, it is clear from the colloquy at the guilty plea hearing that the petitioner was informed that the trial court could impose a sentence of life, life without parole, or death. Thus, the petitioner made a conscious decision between two (2) viable options. Without more, the petitioner has failed to prove that counsel's advice was completely unreasonable.

Henderson, 2005 WL 1541855 at *39. Henderson argues that it was an "unreasonable determination of the facts for the CCA to conclude that Mr. Henderson made a conscious decision between two 'viable' options" because, in light of the absence of mitigation evidence when Henderson pleaded guilty, Tennessee law would have required Judge Blackwood to impose a death sentence. Appellant Br. at 62. But the same situation would have existed had Henderson not pleaded guilty—the same overwhelming evidence of guilt and aggravating factors would have been present, as would the same lack of mitigating evidence. Henderson argues that the law *required* the judge to impose a death penalty based on the absence of mitigating evidence, but if so, he fails to explain why it would not have also directed a jury to do the same. Tennessee law is the same whether a jury or judge imposes the sentence.

More fundamentally, Henderson fails to identify a faulty *factual determination* in this portion of the CCA's reasoning, let alone one that was the basis of the CCA's decision. But that is what § 2254(d)(2) requires. *See Rice v. White*, 660 F.3d 242, 250 (6th Cir. 2011) ("With regard to [§ 2254(d)(2)], it is not enough for the petitioner to show some unreasonable determination of

fact; rather, the petitioner must show that the resulting state court decision was 'based on' that unreasonable determination."). Henderson does not dispute the CCA's factual determinations that (i) the record showed that trial counsel made no guarantees regarding the death penalty; (ii) the evidence of guilt and statutory aggravating factors was overwhelming; and (iii) the plea colloquy informed Henderson of the risks of pleading guilty. All these determinations are supported by the record.

2. The Jury-Waiver Claim

Henderson makes no specific argument regarding the jury-waiver claim; indeed, he combines the two claims and raises the same set of arguments for both.[13] We note that to the extent there is a question whether *Strickland* or *Lockhart* governs the prejudice inquiry in claims of ineffective advice to waive jury sentencing, it does not matter because Henderson's challenge fails under either standard for the reasons discussed above.

B. The Competency Claim

Henderson next argues that he was not competent to plead guilty or waive jury sentencing. The warden responds that Henderson procedurally defaulted this claim by failing to present it in state court and cannot show "cause" for this default. The warden is correct.

"[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *Hodges v. Colson*, 727 F.3d 517, 529 (6th Cir. 2013) (quoting *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999)). "When a petitioner has failed to present the grounds to the state courts and no state remedy remains available, his grounds are procedurally defaulted." *Id.* Thus, in

[13] He does not argue, for example, that although it may have been reasonable to advise Henderson to plead guilty, it was not reasonable to waive the jury for sentencing.

general, a petitioner who fails to present a claim in the state courts may not present that claim in federal court "unless he can show cause to excuse his failure to present the claims and actual prejudice to his defense at trial or on appeal." *Id.* (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)). Henderson never raised a competency claim in state court, so he must show cause and prejudice to excuse his procedural default.[14]

Henderson argues that trial counsel's ineffectiveness in developing mitigation evidence constitutes cause excusing his default of the competency claim. "[C]ounsel's [unconstitutional] ineffectiveness in failing properly to preserve [a] claim for review in state court will suffice" as "cause" to excuse a procedural default of the unpreserved claim. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) (citing *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986)). But "an ineffective-assistance-of-counsel claim asserted as cause for the procedural default of another claim can itself be procedurally defaulted." *Id.* at 453. As the warden points out in his brief, Henderson never attempted to present an ineffective-assistance-of-counsel claim as cause to excuse his failure to raise a competency claim in state court. And while this procedural default is itself subject to the cause and prejudice analysis, *id.*, Henderson has not made such an argument here. Because Henderson never presented an argument in state court that his counsel was ineffective in failing to raise a competency claim, and does not show cause and prejudice justifying his failure to do so, he cannot use ineffectiveness of counsel as "cause" to excuse his default. *See Hodges*, 727 F.3d at 530 (holding that petitioner could not use ineffectiveness-of-counsel as "cause" for defaulted juror-misconduct claim because petitioner never raised this "cause" argument in state-court

[14] The Supreme Court's exception to the procedural-default rule recognized in *Martinez*, 566 U.S. at 17, is inapplicable here; *Martinez* applies only to defaulted claims of ineffective assistance of counsel and does not apply to other defaulted claims. *See Hodges*, 727 F.3d at 540 (holding that *Martinez* applies only to defaulted ineffective-assistance-of-counsel claims and thus could not apply to excuse a defaulted competency claim). Further, a petitioner advancing a claim under *Martinez* must show that the claim is "substantial," and Henderson's claim that he was not competent to plead guilty and waive jury sentencing is not substantial based on the record.

proceedings); *Zagorski v. Mays*, 907 F.3d 901, 904-05 (6th Cir. 2018) (similar conclusion). Thus, Henderson fails to show cause to excuse his default.

C. Ineffectiveness of Counsel at Sentencing (Claim 9)

Henderson's final, and most substantial, argument is that counsel was ineffective at sentencing for failing to perform an adequate mitigation investigation. Had counsel properly investigated his criminal background and personal and family history, Henderson argues, they would have discovered the red-flag crimes he committed, as well as a history of mental illness in his family, and these pieces of information, together with his bicycle accident, would have led to a diagnosis of bipolar disorder and the discovery of brain damage. To support this claim, he relies heavily on evidence introduced for the first time during federal habeas proceedings, including the Gur and Woods reports.

1.

A threshold question in analyzing this claim is whether it was decided on the merits or defaulted. In district court, Henderson asserted twenty different sub-claims under Claim 9. But on appeal, he only presses one—Claim 9(n)—which alleges that trial counsel were ineffective in failing to "interview and adequately prepare defense witnesses, resulting in the failure to present to the Court a complete picture of Kennath Henderson." R. 16, PID 108. Henderson's briefs in this court spend almost no time on the threshold question whether this claim was defaulted or decided on the merits. The district court found it to be procedurally defaulted, and Henderson's brief on appeal simply concedes that "there is no question that [Claim 9(n)] was defaulted" due to the ineffectiveness of post-conviction counsel. Appellant Br. at 84.[15]

[15] The warden offers no helpful discussion of this issue either. His brief spends only three pages in total on this claim, and consists solely of an assertion that Claim 9(n) was defaulted by "post-conviction appellate counsel's

A close review of the record, however, suggests otherwise. On appeal here, Henderson bases Claim 9(n) on the same theory that was centrally litigated in the state-court post-conviction proceedings: that counsel failed to adequately investigate Henderson's criminal background and family history, and that inadequate investigation meant counsel failed to discover red-flag crimes and familial-mental-illness evidence, and thus failed to present a full picture of Henderson at sentencing.[16] *E.g.*, Appellant Br. at 67-70. The crucial, and only, difference is that in state court, Henderson argued that an adequate investigation would have turned up (i) red-flag behavior, (ii) family history of mental illness, and (iii) a bipolar diagnosis; and in federal court, he says the same but adds that it would also have led to the discovery of brain damage. Briefing in the district court framed Claim 9(n) the same way. R. 129, PID 4660-67.

Apart from the brain damage claim, which we address separately, Henderson's central allegation—that counsel overlooked crucial pieces of mitigation evidence due to a constitutionally deficient background investigation—was clearly presented to and decided by the state courts. The CCA concluded:

> It appears that the crux of the petitioner's complaint is the failure to introduce evidence regarding the alleged existence of a bipolar type 2 mental illness. The existence of such a mental illness would have been apparent, suggests the petitioner, had trial counsel discovered a family history of mental illness and

failure to carry the claim forward on appeal," without citing anything in the record to support this position. Appellee Br. at 53.

[16] The post-conviction petition in state court contains a claim using phrasing identical to that used in Claim 9(n). *See* R. 21-14, PID 1146 ("Counsel did not interview and adequately prepare defense witnesses, resulting in the failure to present to the Court a complete picture of Kennath Henderson."). Henderson's post-conviction counsel extensively litigated the same theories raised here in support of Claim 9(n), including on appeal to the CCA. *See, e.g.*, R. 23-15, PID 3163-68. And the CCA's opinion framed these arguments in terms similar to the "failure to present a complete picture" language used in Claim 9(n) and the post-conviction petition, using "complete mitigation profile" instead of "complete picture." *See Henderson*, 2005 WL 1541855 at *41 ("[P]etitioner now alleges that trial counsel was ineffective for failing to present a complete mitigation profile. His complaints include counsel's: (1) failure to interview extended family members to reveal a family history of mental illness; (2) failure to seek additional psychological evaluation to reveal a diagnosis of bipolar disorder; and (3) failure to complete investigation to sufficiently indicate marked changed in behavior, including (a) change in sleep patterns, (b) the fact that his victims were people that he knew, (c) exhibitions of depression, and (d) indication of religious ideation.").

> evidence of the petitioner's erratic criminal behavior. Dr. Zager failed to diagnosis [sic] the petitioner with anything more severe than a personality disorder. The petitioner blames this diagnosis on trial counsel's failure to gather sufficient information. . . . [T]he necessary introduction of the petitioner's violent criminal behavior could have undermined this mitigating factor and outweighed any beneficial mitigating impact of the mental illness evidence. This "undiscovered" mitigation evidence raised by the petitioner was correctly characterized by the post-conviction court as being a "double-edged sword."
>
> Given the strength of the proof of aggravating circumstances relied upon by the State, the mitigation evidence that was presented at sentencing and the possible negative impact of the "undiscovered" mitigation evidence, we conclude that had this information been presented to the court there is little reason to believe the trial judge would impose a sentence other than death. The petitioner is not entitled to relief on this basis. *Indeed, in this case, unlike the situation where a jury imposes a death sentence, we are not left to speculate to some degree as to the effect this evidence might have had on the sentencer. The sentencer in this case, the trial judge himself, found this evidence would not have altered the result of the sentencing hearing.*

Henderson, 2005 WL 1541855 at *42-*43 (emphasis added). Henderson fails to make any argument in support of his position that the entirety of Claim 9(n) was defaulted, other than noting that the district court found it to be defaulted.[17]

2.

Because Claim 9(n) was adjudicated on the merits, § 2254(d)(1) and *Pinholster* apply. Accordingly, our review is limited to the record that existed when the state court adjudicated this claim. The CCA concluded that Henderson could not show prejudice based on the mitigation evidence presented in the post-conviction hearing because Judge Blackwood—the same judge who

[17] The district court offered almost no analysis or discussion of how the claim was presented in state court, aside from a sentence asserting that "Henderson asserts that he exhausted this claim when he alleged" trial counsel's failure to develop a relationship with his mother, and that "[a]lthough Henderson addressed his counsel's relationship with his mother, he failed to allege that counsel failed to prepare his mother or any other witness to testify. The claim in [9(n)] was not exhausted and is procedurally defaulted." R. 72, PID 4129-30. Failure to develop a relationship with Henderson's mother, however, was asserted as a distinct claim in both the post-conviction petition, R. 21-14, PID 1142, and federal habeas petition, R. 16, PID 89 (Claim 8(e)). The district court apparently failed to recognize that Henderson's state post-conviction petition included a "complete picture" claim identical to the one in Claim 9(n), and never explained why a claim focused on failure to present an entire mitigation picture of Henderson was somehow limited to the "failure to prepare his mother or any other witness to testify." R. 72, PID 4129-30.

imposed the death penalty—specifically stated that he would have imposed the same sentence even if the newly discovered mitigation evidence and bipolar diagnosis had been presented at sentencing. Henderson makes no argument that the CCA's prejudice determination ran afoul of § 2254(d)(1) on the record before it. It would be difficult to do so. The state court did not reach an objectively unreasonable prejudice determination based on that record. Accordingly, Henderson fails to show entitlement to relief under § 2254 based on his undefaulted Claim 9(n) arguments.

3.

Henderson argues that the subclaim involving the failure to uncover and present brain-damage evidence is a separate defaulted claim that he can pursue under *Martinez*. The brain-damage claim was never presented to the state court and is based entirely on the Woods and Gur Reports.

Henderson claims that "[Judge Blackwood did not] know how Mr. Henderson's serious mental illness and significant brain damage compounded each other and contributed to Deputy Bishop's death." *See, e.g.*, Appellant Br. at 74-75; *see also id.* at 75-76 ("Mosier failed to present that Mr. Henderson's brain functioning and behavior is compromised by rapid-cycling bipolar I disorder and frontal lobe damage. As a result of his mental illness, Mr. Henderson suffers from simultaneous mania and depression, which distort his perception of reality. At the same time, Mr. Henderson also has limited ability to control his impulses because of the atrophy of his temporal lobe."); *id.* at 76.

Accepting that the brain-damage claim is separate from the remainder of the mitigation claim, a habeas court's authority under *Martinez* to consider ineffective-assistance-of-counsel evidence first presented in federal court on habeas was significantly limited by the Supreme

Court's recent decision in *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022). *Ramirez* prevents Henderson from introducing evidence of brain damage for the first time in federal court. *Id.* at 1734-35 (holding that "a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on ineffective assistance of state postconviction counsel"). Henderson contends that *Ramirez* is inapplicable because he is not "at fault" for the failure to present evidence of his brain damage in state court. He claims that his post-conviction counsel was suffering from such severe mental illness that she effectively "abandoned" him, therefore her conduct cannot be attributed to him for AEDPA purposes. Petitioner Supplemental Briefing at 1, 6-9. Though Dawson and Brockenborough's representation was problematic, we cannot agree that their arguing at the post-conviction hearing that an effective mitigation investigation would have revealed Henderson's bipolar mental illness, and presenting additional evidence of mental-health evaluations, red-flag crimes, and family history in support of that theory—but failing to investigate whether he also suffered brain damage—was so extreme as to constitute abandonment.

Ramirez further holds that "under AEDPA and our precedents, state postconviction counsel's ineffective assistance in developing the state-court record is attributed to the prisoner." *Id.* at 1734. "In such a case, a federal court may order an evidentiary hearing or otherwise expand the state-court record only if the prisoner can satisfy § 2254(e)(2)'s stringent requirements."[18] *Id.*

[18] Section 2254(e)(2) provides that when a prisoner has "failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim" unless the applicant shows that:

> (A) the claim relies on
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

Henderson has not satisfied these requirements. Therefore, any evidence of brain damage developed outside the state-court record cannot be considered by this court in this habeas appeal, regardless whether the issue was adjudicated on the merits or procedurally defaulted, and regardless whether the evidence was previously thought to be appropriate for consideration under *Martinez*.

IV. CONCLUSION

For the foregoing reasons, we affirm the district court's denial of Henderson's ineffective-assistance-of-counsel claims concerning his guilty plea, his jury waiver, and his competence to take either of those actions. As for the effectiveness of his counsel at sentencing, the CCA's decision that Henderson was not prejudiced by the failure to develop the bipolar disorder, family mental illness, and bizarre behavior argument was not unreasonable since the trial judge stated that the evidence would not have changed Henderson's sentence. And although the brain damage evidence is different in kind, federal courts may not expand the state-court record. We are thus bound to deny habeas corpus relief.

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

HELENE N. WHITE, Circuit Judge, concurring. I write separately to address some additional observations. This case is disturbing for a number of reasons. First, of course, is the inexplicable and senseless murder of Deputy Tommy Bishop, who was unconscious when shot in the head.

Also disturbing is that Henderson received ineffective penalty-phase assistance from trial counsel and then again from post-conviction counsel. The medical records from the bicycle/car collision described an injury sufficiently serious that competent death-penalty counsel (and investigators) would have explored the effects of the accident with an expert qualified to make an assessment and offer an opinion. Penalty-phase counsel failed to do so, and post-conviction counsel compounded the error, although by that time additional indicators had become apparent.

The brain-damage claim was completely defaulted in state court, contrary to the district court's determination. And evidence from Dr. Gur and Dr. Woods would have been admissible under *Martinez* because the additional evidence established a substantial claim.

Martinez, however, has been nearly gutted as a vehicle for presenting defaulted ineffective-assistance-of-counsel claims. *Shinn v. Ramirez*, 142 S. Ct. 1718 (2022). True, if post-conviction counsel establishes a factual record and simply neglects to make the obvious legal arguments that flow from that evidence, a habeas petitioner may have a successful *Martinez* claim. But it seems to me that counsel will rarely adequately establish the facts only to default the legal argument. Further, a petitioner pursuing a viable claim under *Martinez* has, by definition, been denied the effective assistance of counsel in at his first opportunity to contest trial counsel's effectiveness, and this is so without regard to the adequacy of the factual record made in the state post-conviction court. *See Ramirez*, 142 S. Ct. at 1740 (Sotomayor, J., dissenting).

To avoid *Ramirez*'s bar on expanding the state-court record, Henderson points to counsel's mental illness and her supervisor's indifference and argues that counsel effectively abandoned him by failing to raise the brain-damage argument in the state post-conviction proceeding, and, therefore, he cannot be at fault. But a fair reading of the majority's opinion in *Ramirez* does not allow for such a conclusion.

Notwithstanding a death-penalty prisoner's heinous crime, the Court's death-penalty jurisprudence contemplates that a jury or judge will make this most consequential decision with full knowledge of the prisoner's history. *See, e.g.*, *Williams v. Taylor*, 529 U.S. 362, 393 (2000) (finding an ineffective assistance of counsel claim meritorious and holding that a capital defendant had a constitutionally protected right "to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer," including readily available evidence of childhood abuse, mental impairment, and repeated head injuries); *Wiggins v. Smith*, 539 U.S. 510, 534-35 (2003) (granting habeas relief and finding that counsel's mitigation investigation was constitutionally deficient where counsel failed to uncover or present at sentencing evidence of the capital defendant's severe childhood abuse); *Rompilla v. Beard*, 545 U.S. 374, 378-79 (2005) (finding the defendant entitled to habeas relief based on trial counsel's inadequate mitigation investigation, which failed to uncover easily accessible records of the defendant's "troubled childhood," mental illness, and alcoholism).

To be sure, we do not require a perfect presentation of the evidence pertinent to mitigation, only a reasonable one. And we require that an unreasonably inadequate presentation also cause prejudice to the defendant. But here the sentencing judge had no information at all regarding Henderson's significant structural brain damage or its likely effect on his behavior. And, although Judge Blackwood stated in a district-court filing (not considered by the district court judge based

on *Pinholster*) that the new evidence would not have changed his sentence, that opinion would have been subject to cross-examination at a *Martinez* hearing in light of Judge Blackwood's long involvement in the case. But as the case now stands, Henderson's death sentence was imposed, and will be carried out, without Henderson's having had an adequate opportunity to have his brain-damage considered in mitigation.

I reluctantly concur.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 12-5028/14-5911

KENNATH ARTEZ HENDERSON,

Petitioner - Appellant,

v.

TONY MAYS, Warden,

Respondent - Appellee.

FILED
May 10, 2023
DEBORAH S. HUNT, Clerk

Before: CLAY, MCKEAGUE, and WHITE, Circuit Judges.

JUDGMENT

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

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

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

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Case No. 12-5028/14-5911

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

KENNATH ARTEZ HENDERSON

Petitioner - Appellant

v.

WAYNE CARPENTER, Warden

Respondent - Appellee

Upon consideration of the appellant's motion for an expansion of certificate of appealability and the response of the appellee in opposition thereto,

It is **ORDERED** that the motion is hereby **GRANTED.** A certificate of appealability is granted as to **ISSUES 1 and 2.**

ENTERED BY ORDER OF THE COURT
Deborah S. Hunt, Clerk

Issued: April 01, 2015

Nos. 12-5028/14-5911

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENNATH ARTEZ HENDERSON,)
)
Petitioner-Appellant,)
)
v.) O R D E R
)
WAYNE CARPENTER, Warden,)
)
Respondent-Appellee.)

BEFORE: CLAY, McKEAGUE, and WHITE, Circuit Judges.

Kennath Henderson, a Tennessee death row inmate represented by counsel, appeals a federal district court's order denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. The district court granted a certificate of appealability ("COA") for two claims. Henderson now seeks to expand the COA. The warden has filed a response in opposition.

In May 1997, a Fayette County, Tennessee grand jury indicted Henderson for the following offenses: one count of premeditated murder; three counts of felony murder; two counts of especially aggravated kidnaping; and one count each of attempted especially aggravated kidnaping, aggravated robbery, aggravated assault, and felonious escape. Henderson pleaded guilty to all but the three counts of felony murder and waived his right to sentencing by a jury. Following a sentencing hearing, the trial court sentenced Henderson to death.

On direct appeal, Henderson challenged only whether his death sentence was comparatively disproportionate. The Tennessee Court of Criminal Appeals determined that the sentence was proper, and the Tennessee Supreme Court agreed. *State v. Henderson*, No. 02C01-9808-CC-00243, 1999 WL 410421, at *5 (Tenn. Crim. App. June 15, 1999), *aff'd*, 24 S.W.3d 307, 319 (Tenn. 2000).

In February 2001, Henderson, acting pro se, filed a petition for post-conviction relief in the state trial court. Counsel was appointed to represent Henderson, and an amended post-conviction petition was filed in November 2001. The trial court conducted an evidentiary hearing and subsequently denied relief. The Tennessee Court of Criminal Appeals affirmed the decision. *Henderson v. State*, No. W2003-01545-CCA-R3-PD, 2005 WL 1541855, at *47 (Tenn. Crim. App. June 28, 2005).

In January 2006, Henderson, acting pro se, filed a habeas corpus petition in federal district court. Following the appointment of counsel, Henderson filed an amended petition in July 2006. The court granted the warden's motion for summary judgment for a certain claims. The court subsequently denied Henderson's motion for an evidentiary hearing and the habeas corpus petition. The court granted a COA for two claims. Henderson's motion to alter or amend judgment was unsuccessful.

In July 2012, this court granted Henderson's motion to remand his case for consideration of *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). Upon motion by both parties, the district court held the case in abeyance pending the outcome of *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). Following the publication of *Trevino*, the court removed the case from abeyance, reviewed briefs from both parties, and denied relief. The court did not expand the COA. Henderson's motion to alter or amend judgment was unsuccessful. Henderson now seeks to expand his COA.

"A COA may not issue unless 'the applicant has made a substantial showing of the denial of a constitutional right.'" *Treesh v. Bagley*, 612 F.3d 424, 439 (6th Cir. 2010) (citing 28 U.S.C. § 2253(c)(2)). A substantial showing is made where the applicant demonstrates that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)). "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003).

However, the "threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it." *Id.* at 336.

This court "may also reject an issue for appeal if the procedural default doctrine applies." *Cooey v. Coyle*, 289 F.3d 882, 887 (6th Cir. 2002) (citing *Slack*, 529 U.S. at 483). If the district court denies a petition on procedural grounds only, however, "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

Upon review, we expand the COA. The Clerk's Office shall therefore issue a briefing schedule for the following claims: (1) trial counsel was ineffective at sentencing (amended petition ¶ 9); (2) Henderson was not competent to enter a guilty plea and waive jury sentencing (amended petition ¶ 13); (3) trial counsel was ineffective for failing to fully represent Henderson when they advised him to enter guilty pleas to the charges against him (amended petition ¶ 8h); and (4) trial counsel was ineffective for failing to use expert services effectively (amended petition ¶ 8k).

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

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

KENNATH ARTEZ HENDERSON, Petitioner, vs. WAYNE CARPENTER, Warden, Riverbend Maximum Security Institution, Respondent.	)	No. 06-2050-STA-tmp

ORDER ON REMAND REGARDING MARTINEZ ISSUES
ORDER DENYING PETITION PURSUANT TO 28 U.S.C. § 2254
ORDER GRANTING LIMITED CERTIFICATE OF APPEALABILITY
AND
ORDER CERTIFYING LIMITED APPEAL WOULD BE TAKEN IN GOOD FAITH

On July 11, 2012, this case was remanded for consideration of Martinez v. Ryan, ___ U.S. ___, ___, 132 S. Ct. 1309, (2012). (Electronic Case Filing ("ECF") No. 97.) The case was stayed awaiting the Supreme Court's holding in Trevino v. Thaler, ___ U.S. ___, 133 S. Ct. 1911 (2013). (ECF No. 114.) On July 25, 2013, Petitioner Kennath Henderson, through counsel, filed a brief about the applicability of Martinez. (ECF No. 116.) On September 10, 2013, Respondent filed a brief concerning procedural default and Trevino. (ECF No. 119.) On September 17, 2013, Petitioner filed his reply. (ECF No. 121.) On October 31, 2013, the Court directed the parties to further brief the Martinez issues. (ECF No. 123.) On

December 20, 2013, Petitioner filed a brief identifying his substantial claims under Martinez with multiple exhibits. (ECF No. 129-131.) On January 23, 2014, Respondent filed a notice regarding his brief concerning procedural default and Trevino. (ECF No. 132.)[1] On March 25, 2014, Petitioner filed a notice of supplemental authority. (ECF No. 133.)

In Petitioner's Martinez brief filed on July 25, 2013, he argues that Martinez was applicable to claims in Amended Petition ¶¶ 8(b, c, f, g, h, j, l); 9(c, d, e, f, k, l, m, n, o, p, q, r); 10(a, b(4, 5, 11)); 11(a(in part), b, c, e, f); 13; and "unexhausted assertions of 'ineffective assistance of counsel as cause' for the default of other [unnamed] substantive constitutional claims." (ECF No. 116 at 13-14.) In the Court's October 31, 2013 order, the Court stated, "Petitioner has not specifically identified the claims he contends are subject to Martinez or argued whether those claims are substantial under Martinez." (ECF No. 123 at 1.) Petitioner was directed to file a brief "identifying the claims he contends are subject to Martinez and presenting any argument about the substantial nature of those claims." (Id. at 2.) Petitioner identified the claims that he contends are substantial in his brief filed on December 20, 2013. (ECF No. 129.) Petitioner has waived his Martinez argument as to

[1] Respondent relied on his prior briefing. (ECF No. 132 at 2.)

any claim not identified in the December 20, 2013 brief as a "substantial" claim.

I. BACKGROUND

Petitioner was incarcerated in the Fayette County Jail serving sentences for felony escape and aggravated burglary. Henderson v. State, No. W2003-01545-CCAR3-PD, 2005 WL 1541855, at *1 (June 28, 2005), *perm. app. denied* (Tenn. Dec. 5, 2005). On May 2, 1997, after Petitioner's girlfriend smuggled a .380 semi-automatic pistol into the jail, Deputy Tommy Bishop took Petitioner and another inmate Deloice Guy to dentist appointments at the office of Dr. John Cima. Id. Petitioner pulled the gun on Dr. Cima, and when Deputy Bishop responded to a call from Cima, Petitioner shot at Bishop grazing him and causing him to fall to the floor presumably unconscious. Id. at *2. Petitioner left the room and returned with the receptionist in his custody. Id. He took Bishop's pistol, money, credit cards, and Cima's truck keys; he then went back where Bishop was laying and shot him through the back of the head at point-blank range. Id. Petitioner attempted to take Cima and the receptionist as hostages, but they managed to escape when outside the building. Id. Petitioner was apprehended shortly afterward in Cima's truck. Id.

On July 6, 1998, after a continuance of the trial was granted, Petitioner pleaded guilty to first degree premeditated murder, two (2) counts of especially aggravated kidnapping, aggravated robbery, attempted especially aggravated kidnapping, aggravated assault, and

felonious escape. (*See* ECF No. 20-1 at PageID 714, 718, 722-727.)[2] *See* Henderson, 2005 WL 1541855, at *8. Petitioner waived his right to jury sentencing. (Id. at PageID 717.) After a capital sentencing hearing on July 13, 1998, the trial court imposed the death sentence for the murder count and an effective sentence of twenty-three (23) years in prison for the noncapital offenses. *See* Henderson v. State, No. W2003-01545-CCAR3-PD, 2005 WL 1541855, at *1 (June 28, 2005), *perm. app. denied* (Tenn. Dec. 5, 2005). After a state court appeal and post-conviction proceedings, Petitioner filed a habeas petition in this Court.

On February 15, 2008, Respondent filed a motion for summary judgment in which he sought the dismissal of multiple claims based solely on procedural default. (ECF No. 55-1 at 6-38; *see also* ECF No. 68 at 5-6.) Petitioner filed a response to the motion on July 31, 2008. (ECF No. 68.) On March 2, 2011, the Court entered an order directing the parties to file "briefs on the merits of all issues for which Respondent only argued procedural default" no later than May 2, 2011. (ECF No. 70 at 1.) On March 30, 2011, the Court entered an order granting in part and denying in part Respondent's motion for summary judgment and denying the petition in part. (ECF No. 72.)

On April 18, 2011, Petitioner filed a motion to reconsider the Court's March 30, 2011 order in light of the "grant of certiorari

[2] Citations to the state court record and exhibits are made using "PageID" numbers for ease of reference.

in *Maples v. Allen*, 586 F.3d 879 (11th Cir. 2009), *cert. granted sub nom. Maples v. Thomas*, 562 U.S. __ (2011)(U.S. No. 10-63); the granting of a stay of execution and leave to file an out-of-time rehearing petition in *Foster v. Texas*, U.S. No. 10-8317 (April 5, 2011); and the granting of a stay of execution in *Cook v. Arizona*, U.S. No. 10A955 (April 4, 2011)." (ECF No. 73 at 1.) Petitioner asserted that ineffective assistance of post-conviction counsel was the cause for the default of certain ineffective assistance of trial and appellate counsel claims and Petitioner's claim that his guilty plea and the waiver of a jury for sentencing was not made knowingly, intelligently, or voluntarily. (Id. at 1-5.) On May 4, 2011, the Court denied Petitioner's motion to reconsider. (ECF No. 78.)

On April 26, 2011, while the motion to reconsider was pending, Respondent filed his brief on the merits in support of summary judgment. (ECF No. 75.) On May 2, 2011, Petitioner filed a second response to the motion for summary judgment. (ECF No. 77.) At Petitioner's request, the Court allowed the parties to brief Petitioner's entitlement to an evidentiary hearing. (*See* ECF No. 80.) On October 11, 2011, the Court entered an order denying the motion for evidentiary hearing, denying the petition, and denying Petitioner's request for a stay of final judgment. (ECF No. 91.) The Court granted a limited certificate of appealability on the issues of ineffective assistance of counsel at sentencing (Amended

Petition ¶ 9) and Petitioner's incompetence to enter a guilty plea and waive jury sentencing (Amended Petition ¶ 13) and certified that a limited appeal would be taken in good faith. (ECF No. 91 at 95-96.)

Petitioner subsequently filed a motion to alter or amend judgment and to expand the certificate of appealability. (ECF No. 93.) The Court denied the motion on December 19, 2011. (ECF No. 95.)

II. MARTINEZ

In 2012, the Supreme Court issued its decision in Martinez, ___ U.S. at ___, 132 S. Ct. at 1320, which recognized a narrow exception to the rule stated in Coleman[3], "[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding . . . ." In such cases, "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance of counsel if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." Martinez, ___ U.S. at ___, 132 S. Ct. at 1320. The Supreme Court emphasized that "[t]he rule of Coleman governs in all but the limited circumstances recognized here. . . . It does not extend to attorney errors in other proceedings beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance

[3] Coleman v. Thompson, 501 U.S. 722 (1991).

at trial . . . .” Id. The requirements that must be satisfied to excuse a procedural default under Martinez are as follows:

> (1) the claim of “ineffective assistance of trial counsel” was a “substantial” claim; (2) the “cause” consisted of there being “no counsel” or only “ineffective” counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the “initial” review proceeding in respect to the “ineffective-assistance-of-trial-counsel claim”; and (4) state law requires that an “ineffective assistance of trial counsel [claim] ... be raised in an initial-review collateral proceeding.”

Trevino, ___ U.S. at ___, 133 S. Ct. at 1918 (2013) (emphasis and revisions in the original).

Martinez arose under an Arizona law that did not permit ineffective assistance claims to be raised on direct appeal. In the Supreme Court’s subsequent decision in Trevino, ___ U.S. at ___, 133 S. Ct. at 1921, the Supreme Court extended its holding in Martinez to states in which a “state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal . . . .” Thus, the decision in Trevino modified the fourth requirement stated for overcoming a procedural default.

Recently, the Sixth Circuit in Sutton v. Carpenter, 745 F.3d 787 (6th Cir. 2014), held that ineffective assistance of state post-conviction counsel can establish cause to excuse a Tennessee prisoner’s procedural default of a substantial federal habeas claim that his trial counsel was constitutionally ineffective.

III. ANALYSIS

Petitioner seeks Martinez relief for four categories of claims: (1) ineffective assistance of trial counsel claims previously found to be defaulted (Amended Petition ¶¶ 9(f)(1)(v) & 9(n)); (2) ineffective assistance of trial counsel claims for which the proof was defaulted (Amended Petition ¶¶ 8(h), 9(b, d(4), & h)); (3) ineffective assistance of appellate counsel claims (Amended Petition ¶ 10(b)(11)); and (4) substantive claims for which ineffective assistance of trial and appellate counsel are the cause for default (Amended Petition ¶¶ 8(a), 11(b), 12(a), 13, & 20). (*See* ECF No. 129 at 5, 22, 23-27.) The Court will first address those claims on which there is question about whether they are in the scope of *Martinez*.

A. Claims For Which The Proof Was Defaulted (Amended Petition ¶¶ 8(h), 9(b, d(4), & h))

Petitioner argues that Martinez applies to the ineffective assistance of trial counsel claims for which the proof was defaulted. (ECF No. 129 at 22.) Petitioner argues that the Court, prior to Martinez, found itself constrained from consideration of Petitioner's proof by the dictates of Cullen v. Pinholster, ___ U.S. at ___, 131 S. Ct. 1388 (2011). (Id.) Petitioner argues that Martinez applies where post-conviction counsel failed to develop the evidentiary basis for a claim of ineffective assistance during the initial review proceedings. (Id.) Petitioner contends that it is "irrational" to distinguish failing to properly assert a federal

claim and failing to properly develop the claim in state court. (Id.) Petitioner asserts that counsel failed to develop the proof now presented and incorporates by reference the proof in support of those claims as briefed in Petitioner's Second Response to the Respondent's Motion for Summary Judgment (ECF No. 77) for the ineffective assistance of trial counsel claims in Amended Petition ¶¶ 8(h), 9(b), 9(d)(4), and 9(h). (ECF No. 129 at 22-23.)

Petitioner attempts to develop facts that were not previously presented in the state court proceedings. "*Pinholster* plainly bans an attempt to obtain review of the merits of claims presented in state court in light of facts that were not presented in state court", and "*Martinez* does not alter that conclusion." Moore v. Mitchell, 708 F.3d 760, 785 (6th Cir. 2013); *see* Dixon v. Houk, 737 F.3d 1003, 1012 n.2 (6th Cir. 2013) (Martinez does not allow the petitioner to circumvent the proper standard of review under Pinholster where the claims adjudicated on the merits before the state courts), *reh'g & reh'g en banc denied* (Jan. 29, 2014).

Petitioner's claims in Amended Petition ¶¶ 8(h) and 9(b, d(4), & h) were adjudicated on the merits in the state courts and in this Court. (*See* ECF No. 91 at 19-73, 94.) Martinez does not allow Petitioner to circumvent Pinholster and allow consideration of evidence that was not developed and presented in the state courts. Petitioner is denied relief pursuant to Martinez on the claims in Amended Petition ¶¶ 8(h) and 9(b, d(4), & h).

B. Ineffective Assistance of Appellate Counsel Claims (Amended Petition ¶¶ 10(b)(11))

Petitioner argues that the equitable principles in Martinez apply to appellate counsel's failure to challenge all issues raised in Petitioner's habeas petition (Amended Petition ¶ 10(b)(11)). (ECF No. 129 at 23-27; *see* ECF No. 16 at 32-33, 35.) Specifically, Petitioner asserts:

> appellate counsel was ineffective for failing to raise the claims Mr. Henderson has raised regarding trial counsel's ineffectiveness in failing to investigate Mr. Henderson's paternal family history of serious mental illness, failing to investigate the traumatic brain injury Mr. Henderson suffered at age eleven, failing to review the discovery provided to them by the State and investigate the red flags signaling Mr. Henderson's serious mental illness contained therein, and then failing to present information regarding mental illness and brain injury to their experts.
>
> Appellate counsel was ineffective for failing to raise the issue that trial counsel's ineffectiveness led trial counsel to fail to properly advise Mr. Henderson regarding entry of a guilty plea and waiver of jury sentencing and, ultimately, to present the trial court with a false and misleading picture of Mr. Henderson. Appellate counsel was ineffective for failing to proffer the proof in support of those claims that Mr. Henderson has developed.

(ECF No. 129 at 24-25.) Petitioner asserts that his appellate counsel were ineffective for failing to raise claims regarding trial counsel's lack of qualifications (Claim 12); Petitioner's request for new counsel (Claim 12(c)); that the trial court erred in triple counting the aggravating facts surrounding the crime (Claim 15(c); and that Petitioner was not competent to enter a plea and waive jury sentencing (Claim 13). (Id. at 25-26.)

The holding in Martinez does not encompass claims that appellate counsel were ineffective. *See* Martinez, ___ U.S. at ___, 132 S. Ct. at 1319 ("Coleman held that an attorney's negligence in a postconviction proceeding does not establish cause, and this remains true except as to initial-review collateral proceedings for claims of ineffective assistance at trial."). The Sixth Circuit in Hodges v. Colson, 727 F.3d 517, 531 (6th Cir. 2013), stated "[u]nder Martinez's unambiguous holding our previous understanding of Coleman in this regard is still the law - ineffective assistance of post-conviction counsel cannot supply cause for procedural default of a claim of ineffective assistance of appellate counsel." Petitioner is denied relief under Martinez for his ineffective assistance of appellate counsel claims.

C. Other Substantive Claims (Amended Petition ¶¶ 8(a), 11(b), 12(a), 13, & 20)

Petitioner argues that the equitable principles of Martinez apply to substantive claims related to the appointment of qualified counsel, the grand jury, Petitioner's competence, and the guilty plea (*see* Amended Petition ¶¶ 8(a), 11(b), 12(a), 13, & 20), for which ineffective assistance of trial and appellate counsel are the cause for procedural default. (ECF No. 129 at 27-38.) Martinez is limited to ineffective assistance of trial counsel claims, *see* supra pp. 6-7. The Sixth Circuit in Hodges v. Colson, 727 F.3d 517, 531 (6th Cir. 2013), denied relief from the procedural default of a juror misconduct claim based on Martinez, stating

> The Court in *Martinez* purported to craft a narrow exception to *Coleman.* We will assume that the Supreme Court meant exactly what it wrote: "*Coleman* held that an attorney's negligence in a post-conviction proceeding does not establish cause, and this remains true *except* as to initial-review collateral proceedings for claims of ineffective assistance of counsel *at trial.*"

Id. (quoting Martinez, 132 S. Ct. at 1316 (internal citations omitted)). The Court in Hodges also denied Martinez relief for the procedural default of a substantive competency claim. Id. at 540.

In Olmos v. Ryan, No. CV-11-00344-PHX-GMS, 2013 WL 3199831, at *9 (D. Ariz. June 24, 2013), the petitioner argued that he "received ineffective assistance of counsel at the first post-conviction relief proceeding when counsel there failed to argue that trial/appellate counsel was ineffective for failing to argue that the prosecution's peremptory strikes were unconstitutional." The petitioner argued that the ineffective assistance of post-conviction counsel "then serves as cause to excuse the default of the claim that trial/appellate counsel was ineffective, which then serves as cause to excuse Olmos' default of the underlying claim." Id. The Court stated that "Olmos attempts to derive support for the viability of this labyrinthine causal chain from *Martinez v. Ryan,* but that reliance is misplaced." Id. at *10. The court stated that this is not a claim of ineffective assistance of counsel, but a substantive claim of a constitutional violation that was defaulted when the petitioner failed to raise it on direct review. Id. The court rejected Olmos' attempt "to extend *Martinez* to situations

where the ineffective assistance claim is merely the excuse for a procedural default - not the base claim itself" and cited his argument as a "dizzying chain of excuses" for his failure to exhaust his substantive claims. Id.

Similarly, this Court finds no reason to extend the limited holding in Martinez to claims other than ineffective assistance of trial counsel claims.[4] Petitioner is denied relief under Martinez for procedurally defaulted substantive claims other than ineffective assistance of trial counsel claims.

D. Procedurally Defaulted Ineffective Assistance of Trial Counsel Claims (Amended Petition ¶¶ 9(f)(1)(v) & 9(n))

As stated supra pp. 6-7, Martinez provides petitioners relief from the procedural default of ineffective assistance of trial counsel claims where there was either no post-conviction counsel or post-conviction counsel were ineffective. There is no dispute that the claims in Amended Petition ¶¶ 9(f)(1)(v) and 9(n) were determined to be procedurally defaulted.[5] The Court will now determine whether these claims are "substantial" under Martinez.

To be "substantial" under Martinez, a claim must have "some merit" based on the controlling standard for ineffective assistance of counsel stated in Strickland v. Washington, 466 U.S. 668 (1984).

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[4] Petitioner's allegations in Amended Petition ¶ 8(a) were denied on the merits, not on the basis of procedural default. (ECF No. 72 at 35-47, 63, 114.) Therefore, Martinez is inapplicable and would not provide Petitioner with relief.

[5] These claims were not raised in any of the state post-conviction proceedings. (*See* ECF No. 55-1 at 10.) The Court held that the claims were not exhausted and procedural defaulted. (*See* ECF No. 72 at 69-71.)

Martinez, ___ U.S. at ___, 132 S. Ct. at 1318-1319. To demonstrate deficient performance by counsel, a petitioner must demonstrate that "counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 687-88. "A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." Harrington v. Richter, ___ U.S. ___, ___, 131 S. Ct. 770, 787 (2011) (citing Strickland, 466 U.S. at 689). "The challenger's burden is to show 'that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" Id. (quoting Strickland, 466 U.S. at 687).

To demonstrate prejudice, a prisoner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.[6] "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.'" Richter, ___ U.S. at ___, 131 S. Ct. at 787-88 (quoting Strickland, 466 U.S. at 693). "Counsel's errors must be 'so serious as to deprive the defendant

[6] "[A] court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant." Strickland, 466 U.S. at 697. If a reviewing court finds a lack of prejudice, it need not determine whether, in fact, counsel's performance was deficient. Id.

of a fair trial, a trial whose result is reliable.'" Id. (quoting Strickland, 466 U.S. at 687).

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010).

> An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U.S., at 689-690, 104 S. Ct. 2052. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id., at 689, 104 S. Ct. 2052; see also Bell v. Cone, 535 U.S. 685, 702, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002); Lockhart v. Fretwell, 506 U.S. 364, 372, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland, 466 U.S., at 690, 104 S. Ct. 2052.

Richter, ___ U.S. at ___, 131 S. Ct. at 788.

Petitioner argues that trial counsel's failures resulted in his plea and waiver of a jury for sentencing. (ECF No. 129 at 6.) He asserts that his trial counsel did not: (1) know the prevailing professional norms in the field of capital representation; (2) hire qualified experts to complete a thorough "biopsychosocial" evaluation; (3) complete a "biopsychosocial" evaluation or social history; (4) give the experts needed information for a correct diagnosis; (5) prepare experts to testify about Petitioner's

serious mental illness and brain dysfunction; and (6) as a result, did not have a case to present at trial or sentencing. (Id.) Petitioner asserts that, had counsel performed adequately and developed proof of his "familially linked" serious mental illness and brain damage, there is a reasonable probability that counsel would have recognized that Petitioner was not competent, adjudicated his incompetency, and not have urged Petitioner to plead guilty. (Id.)

Petitioner contends that trial counsel presented such "fundamentally incomplete" information at sentencing that the resulting picture of Petitioner weighed by the trial court was false. (Id.) Petitioner asserts that the "false picture" was the result of counsel's failure to conduct a rudimentary investigation, including failure to identify and interview Petitioner's father Elton Henderson, investigate and prepare appropriate witnesses, review discovery materials including evidence of Petitioner's mental decompensation and criminal history, and interview any witnesses related to Petitioner's criminal history. (Id. at 6-7.)

Petitioner argues that the "false picture" that emerged was that Petitioner participated in the spelling bee and won the "Good Helper Award" in elementary school, was a basketball player, and a product of an intact family. (Id. at 7.) His trial counsel argued that he was "a young man who had a lot going for him", but some unspecified occurrence happened in Petitioner's life that brought

Petitioner to "where we are today." (Id. at 8.) Petitioner's trial counsel argued that he was under extreme duress and could not appreciate the wrongfulness of his conduct without proof or even speculation about what caused Petitioner's behavior. (Id.)

Petitioner asserts that the State seized on his counsel's depiction of him as smart and well-adjusted to argue for the death penalty:

> He says, my client is a smart fellow; he had above-average grades; he had the highest scores in his class in spelling and geography and math; he comes from a loving, two-parent family; he had all the best opportunities. But they say that because Ms. Johnson did not at some point intervene to some unspecified problems, which never even came out in the proof that was brought out in school, that somehow he was not afforded the treatment, which at any early stage would have kept him from the murder of Tommy Bishop. I don't believe that is a mitigating circumstance, if it please the court --- the lack of intervention by a loving and attentive mother, to what has not even been described as being any kind of problem; certainly nothing that manifested itself in any kind of prior mental history of Mr. Henderson.

(ECF No. 129 at 9; ECF No. 20-5 at PageID 352.)

Petitioner argues that the true picture of his life was very different. (ECF No. 129 at 9.) The truth is that Petitioner had never met his biological father who impregnated his mother at 14 and whose family had a history of serious mental illness. (Id. at 7-9.) Petitioner contends that his mental illness stemmed from genetically inherited rapid-cycling Bipolar I Disorder and from a head injury when he was hit by a car while riding a bike as a child. (Id. at 9.) Petitioner asserts that his brain, already compromised by low brain

volume, atrophied in the frontal and parietal lobes as a result of the injury. (Id.) Petitioner states that his mental illness did not begin to progress until his late teen years when he "began to lose control of his impulses and was increasingly overcome by mania and altered perception of reality." (Id. at 9-10.) Petitioner asserts that the true picture of his life is one "of a less morally culpable man with a genetically-transmitted, severe mental illness (rapid-cycling Biploar I Disorder) that 'combines the most disruptive symptoms of the depressed and manic phase' and results in the 'simultaneous expression of cognitive deficits, impaired judgment, and behavior disruption'; a traumatic brain injury that left his brain atrophied, and also affecting his cognition, ability to control his impulses, and impairing his judgment; and generation after generation of relatives who suffer from the same severe mental illness." (Id. at 10 (citation omitted); *see* ECF No. 68-2 at PageID 4002; *see also* ECF No. 68-1.) Petitioner asserts that this "powerful mitigation" shows his "pitiable state" and "explains the truly senseless nature of his crime, thereby lessening the power of the aggravating circumstances." (ECF No. 129 at 10.)

1. Failure to Educate Themselves (Amended Petition ¶ 9(f)(1)(v))

In Amended Petition ¶ 9(f)(1)(v), Petitioner alleges:

> Counsel failed to educate themselves concerning developments in the field of capital case defense work and were unaware of prevailing professional norms, and thus failed to identify and procure the experts necessary to develop, discover, explain, and present available

> mitigation themes or evidence, [s]ee Guideline 8.1 and commentary, ABA Guidelines for Death Penalty Cases:
>
> 1) Such evidence and experts include, but are not limited to: . . .
>
> v) expert assistance to develop family and community deficits affecting the psychological development of Mr. Henderson.

(ECF No. 16 at 21-22.) Petitioner did not develop the facts surrounding this claim in the Amended Petition or in addressing summary judgment and did not define which experts were needed and which family and community deficits should have been developed. (*See* ECF No. 16 at 21-22; *see* ECF No. 68 at 120-129.) Petitioner argued that his claim was exhausted under Vasquez v. Hillery, 474 U.S. 254, 258, 106 S. Ct. 617, 620, 88 L. Ed 2d 598 (1986), because the emphasis of different facts in his federal claims did not result in procedural default and that Respondent engaged in "hyper-technical hairsplitting." (ECF No. 68 at 119-120.)

Now, Petitioner argues that neither of his court-appointed counsel attended training on capital defense despite the availability of continuing legal education seminars, journal articles, books on capital sentencing preparation, and a practice guide. (ECF No. 129 at 11-12.) Petitioner asserts that counsel thought they could just hire an "expert" - Julie Fenyes, the mitigation specialist/jury consultant, to do the job. (Id. at 11-12.) He argues that counsel abdicated their duty to Fenyes, offered

her no guidance, and showed no familiarity with the range of mitigation evidence to be explored. (Id. at 12-13.)

Petitioner argues that Fenyes was not an adequate expert. (Id. at 13.) He contends that her work was "completely deficient"; that she failed to identify and interview Petitioner's father Elton Henderson; and that, as a result, she completely missed a "wealth of mitigating information" about Elton Henderson's family mental health history. (Id.) Petitioner contends that Fenyes' failures deprived him of a competent psychological evaluation because "[h]ad counsel hired an appropriate mitigation expert and learned of Henderson's paternal family mental health history, counsel would have realized the necessity of hiring a psychiatrist." (Id. at 14.)

Petitioner asserts that a competent mitigation expert would have been able to provide complete and correct information related to Petitioner's head trauma to Lynn Zager, a forensic psychologist who testified at sentencing, who would have then recommended further neurological testing. (Id.) Petitioner asserts that counsel's failure to identify and hire a competent social historian eviscerated his chance to present accurate, mitigating evidence at sentencing. (Id.) He argues that "[b]ut for the ineffectiveness of counsel – that is to say, had counsel discovered the wealth of mitigating evidence of Mr. Henderson's serious mental illness and brain disorder . . . there is a reasonable probability that Mr.

Henderson would not have pled guilty and would have insisted on going to trial, including a sentencing trial by jury." (Id.)

The themes of counsel's failure to educate themselves, abdication of their duties related to the mitigation phase to Fenyes, Fenyes' inadequate mitigation investigation, the failure to identify and investigate Elton Henderson, and the resulting failure of not having adequate information to provide mental health experts that Petitioner now asserts as part of his claim in ¶ 9(f)(1)(v) were addressed in the state court and/or this Court's prior rulings on the merits.

a. Failure to Educate

The Court addressed a similar guilt phase claim asserted in Amended Petition ¶ 8(c) that trial counsel failed to educate themselves about issues that might be presented as a defense. (*See* ECF No. 91 at 15-17.) The Court stated:

> a. Counsel's Education and Qualifications
>
> In ¶ 8(c) of the amended petition, Henderson alleged that his trial counsel failed to educate themselves about issues that might be presented as a defense and failed to investigate and develop available information and locate appropriate expert and lay witnesses to present a defense. (ECF No. 16 at 6.) The Tennessee Court of Criminal Appeals stated:
>
> > The petitioner next asserts that trial counsel were deficient by their failure to stay abreast of developments in capital representation. The petitioner argues that trial counsel's failures impaired their ability to work with experts properly and ensure that the experts were performing the necessary tasks. In support of his position, the petitioner asserts that both

> Mr. Mosier and Mr. Johnston admitted their deficiency regarding working with experts. The petitioner asserts that this deficiency resulted in the loss of vital mitigation evidence. As stated earlier, issues addressing the failure to present mitigation evidence will be addressed as such. Our review as to this claim is merely as to whether Mr. Mosier's and Mr. Johnston's failure to inform themselves of developments in capital litigation constituted deficient performance. The record reflects that Mr. Mosier had previous experience in capital litigation. Additionally, his testimony established that he was familiar with the use of experts and that the experts in this matter were hand-selected by him. The petitioner has failed to make specific allegations referencing the developments in the area of capital litigation of which trial counsel was unaware. Rather, the petitioner relies upon alleged deficiencies in the area of mitigation proof. We refuse to adopt a per se finding of deficiency based upon an allegation of counsel's lack of knowledge regarding recent developments in the law, especially in light of the absence of any reference by the petitioner of what legal developments counsel was allegedly unaware. The petitioner is not entitled to relief as to this claim.
>
> Henderson v. State, No. W2003-01545-CCA-R3-PD, 2005 WL 1541855, at *40 (Tenn. Crim. App. June 25, 2005). The court also rejected Henderson's assertions that Johnston and Mosier were unqualified to represent Henderson based on their lack of experience and the fact that their qualifications did not comply with Tennessee Supreme Court Rule 13. Id. at **32-33. This Court previously rejected Henderson's habeas claims that his counsel failed to satisfy the standards for capital representation. (ECF No. 72 at 39-47.)

(ECF No. 91 at 15-17.) Petitioner failed to argue the merits of his claim. (Id. at 18.) The Court found that Henderson could not demonstrate prejudice because of the overwhelming evidence of his guilt and that Petitioner was not entitled to habeas relief related

to the Tennessee Court of Criminal Appeals' determination of the claim in Amended Petition ¶ 8(c). (Id. at 18-19.)

Counsel's performance is the measure upon which the Court determines whether there was ineffective assistance, not counsel's lack of education. *See* United States v. Cronic, 466 U.S. 648, 665 (1984) ("The character of a particular lawyer's experience may shed light in an evaluation of his actual performance, but it does not justify a presumption of ineffectiveness in the absence of such an evaluation.") Counsel's failure to educate themselves must be accompanied by unreasonable performance and prejudice to make out a claim of ineffective assistance of counsel.

b. Fenyes' Mitigation Investigation

Petitioner presented claims of ineffective assistance of counsel at sentencing in the post-conviction proceedings, asserting that his trial counsel failed to develop and introduce mitigation evidence. Henderson, 2005 WL 1541855, at *39-43. Frank Einstein, a self-employed sentencing consultant and mitigation specialist, testified about the purpose of mitigation and the deficiencies he saw in Fenyes' investigation. Id. at *9-11. The post-conviction court did not find ineffective assistance of counsel, but clearly acknowledged that counsel was not fully aware of much of the social history information presented in the post-conviction proceedings:

> Counsel allowed the investigative and mitigation expert to conduct their investigation and report to counsel their findings. It is true that trial counsel was not aware of all the history of mental illness in the Petitioner's family. Also true was that counsel was not

> completely aware of some of the violent events that the Petitioner engaged in shortly before this incident. It is true that counsel was aware from the expert clinical psychologist that Petitioner was diagnosed with a personality disorder, not otherwise specified, with narcissistic traits. However, their expert did not see any bipolar tendency, and counsel, under the circumstances, acted in a competent manner in presenting this psychological proof to the Court. It is true that counsel's mitigation expert did not make as an extensive mitigation investigation as Post-conviction mitigation expert opined was necessary.

Id. at *21.

The post-conviction court determined that counsel was "not ineffective" because: (1) a mitigation investigation was conducted and witnesses testified on Petitioner's behalf[7]; (2) the post-conviction court "placed little weight on the testimony of Petitioner's mitigation expert, especially when he opined that it would take two to three years to do a proper mitigation investigation"; and (3) mitigation was difficult in this case and the findings presented "a double-edged sword." Id. The post-conviction court noted the change in Petitioner's behavior about two years before the murder, the vicious assault on Petitioner's girlfriend, Petitioner's felony conviction, the abduction of Petitioner's girlfriend's mother on several occasions, and the rape of her mother. Id. The post-conviction court noted the differences in diagnosis of mental illness, and the fact that psychiatrist William Kenner stated that "the details of Petitioner's various

[7] In the penalty phase, the defense witnesses presented at trial were Petitioner, Petitioner's high school principal Miles Wilson, his mother Sally Johnson, and psychologist Lynn Zager. (*See* ECF No. 20-4 at PageID 764.)

assaults, abductions and rapes" would have to be fully explained to understand the nature of Petitioner's bipolar diagnosis. Id. The post-conviction court also found the statutory aggravating circumstances to be "simply overwhelming" and found that the proffered new mitigating testimony about Kenner's bipolar diagnosis only reinforced the Court's opinion that the aggravating circumstance outweighed the mitigation evidence. Id. The post-conviction court stated,

> the evidence presented regarding the defendant's abduction of his girlfriend's mother, the rapes, the assaults, lead the Court to the conclusion that the Petitioner's acts were calculated, cold and deliberate. These are the same calculated and deliberate actions that led to the death of Tommy Bishop. Whether or not they were the result of a bipolar condition would not have changed the Court's decision to impose a sentence of death.

Id.

This Court addressed that claim as it relates to Petitioner's habeas allegations that counsel failed to properly investigate and prepare for the sentencing hearing (¶ 9(b)); talk with Petitioner about his social history or background (¶ 9(c)); investigate and develop evidence about Petitioner's brain damage (¶ 9(d)(4)); educate themselves about Zager's diagnosis of Petitioner as having narcissistic personality disorder (¶ 9(e)); identify and procure a psychiatrist and experts for neurological testing and neuropsychological testing (¶ 9(f)(1)); object to the trial court's request to confer with Fenyes (¶ 9(h)); and develop a theory of

mitigation (¶ 9(k)). (*See* ECF No. 16 at 12-32; *see* ECF No. 91 at 36-72.) The Court stated "[t]here were obvious deficiencies in the social history gathered by the defense team, regardless of whether that information was gathered by counsel or by Fenyes and [investigator Tammy] Askew." (ECF No. 91 at 54-55, 58-59.) The Court stated,

> The majority of the mitigation investigation in this case was conducted within the one week time period between the guilty plea and the sentencing hearing. Counsel clearly failed to develop a complete social history on Henderson, present this information to the experts, and use it to develop an appropriate mitigation theme. Counsel's performance was deficient at the sentencing phase.
>
> This Court must determine whether there is a reasonable probability that there would have been a different outcome at sentencing if a more complete picture of Henderson's behavior, bipolar disorder, and mental deficits had been presented to the trial court. In determining that Henderson was not prejudiced by counsel's performance, the Tennessee Court of Criminal Appeals placed great emphasis on the fact that the trial judge found that the evidence of Henderson's family history of mental illness and his own diagnosis of bipolar disorder 2 would not have changed the results of the sentencing hearing. Henderson, 2005 WL 1541[8]55, at *43.
>
> During the post-conviction proceedings, Judge Blackwood was made aware of undiscovered mitigating evidence. Blackwood acknowledged that counsel was not aware of Henderson's family's history of mental illness or the violent events that Henderson engaged in shortly before this incident. (ECF No. 22-8 at 77.) Blackwood stated that this case was one where finding mitigation was difficult and presenting mitigation evidence was "a double-edged sword." (Id.) Judge Blackwood determined that the additional mitigation evidence would not have changed his sentencing determination: . . . .

(ECF No. 91 at 65-66 (footnote omitted)). The Court noted that "more limited investigation into a defendant's behavior" was justified where the evidence presented would have a "double edge" and found that when "presented with the overwhelming evidence of the aggravating factors and the potential detrimental effect of introducing additional evidence about Henderson's criminal behavior in an attempt to mitigate his sentence. The double-edged nature of the new mitigation evidence does not establish a reasonable probability that the outcome at sentencing would change." (Id. at 70.)

c. Elton Henderson

Information related to Petitioner's biological father Elton Henderson was not developed until the latter stages of Petitioner's litigation.

(1) Trial

At trial, Petitioner's mother Sally Johnson testified that she was 15 years old when Petitioner was born. (ECF No. 20-5 at PageID 293.) There was no testimony at trial identifying Elton Henderson as Petitioner's biological father or about his family.

(2) Post-Conviction Proceedings

Elton Henderson's half-sister Margaret Henderson Simmons testified about Petitioner's father and his family in the post-conviction proceedings. Henderson, 2005 WL 1541855, at *14. (ECF No. 23-4 at PageID 3225-27, 3314-21.) Simmons testified that she and

Elton Henderson have the same mother Vester Hill[8] and that she and her mother were separated when she was a child. (Id. at PageID 3314-15.) Hill began to live with Simmons after Hill was diagnosed in 1990 or 1991 as "manic depressed." (Id. at PageID 3315.) Simmons takes cares of her mother "because she doesn't do anything but just sit all day in one place, and go from the bathroom to the kitchen, and that's it." (Id. at PageID 3316.) Simmons authorized access to Hill's mental health records, which were included as an exhibit to the post-conviction record. (Id.)[9]

Simmons testified about her maternal grandmother Novella Henderson who lived into her 90s but never went anywhere or did anything, just "sit in her chair all day in one place." (Id. at PageID 3316, 3319-20.) Novella never left the house. (Id. at PageID 3318.) Novella was "a strange lady. She wouldn't get in the bathtub, she wouldn't talk on the telephone, just different things. She didn't want to go near a gas stove and that type thing." (Id.) Simmons "was left" with Novella until she was about six or seven years old, and then Novella moved to Memphis with them when she was 85 and had broken her hip. (Id.)

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[8] The name is spelled "Veaster" in the post-conviction transcript. (ECF No. 23-4 at PageID 3315.)

[9] Initially, Simmons' testimony was made as a proffer because of questions about the familial relation, but the court moved the testimony into proof after she testified that Elton Henderson told her that Petitioner was his son and that they had been communicating while Petitioner was in prison in Nashville. (ECF No. 23-4 at PageID 3320-21.)

The post-conviction trial court denied counsel's request for a recess to allow Elton Henderson to testify. (*See* id. at PageID 3313.) There appears to be no evidence presented related to Elton Henderson's behaviors or mental illness in the post-conviction proceedings.

(3) Federal Habeas Proceedings

In the federal habeas proceedings, Petitioner argues that his father appears to suffer from a mood disorder although he has not officially been diagnosed. (ECF No. 68 at 13.) Petitioner notes that neuropsychiatrist George Woods interviewed Petitioner's father and found "multiple signs of mood disorder, including 'grandiosity with a flight of ideas, pressured speech, mood lability, hypersexuality, and impaired judgment.'" (Id.; *see* ECF No. 68-2 at PageID 3996-3997.)

Petitioner argued, as part of his allegations in Amended Petition ¶¶ 9(d)(1-3) and 9(j) that counsel failed to investigate and develop evidence about Petitioner's mental illness, that counsel did not investigate and develop evidence related to the history of mental illness in Petitioner's family, especially on the paternal side where Petitioner's great-grandmother, grandmother, and "likely his father" suffered manic depression and his paternal uncles suffered chronic depression. (ECF No. 68 at 29.) The Court denied relief based on the merits of these claims. (ECF No. 72 at 85-98.)

Petitioner presented information about his father and other family members on the paternal side to support the motion for reconsideration of the Court's March 30, 2011 order granting in part and denying in part Respondent's motion for summary judgment. (*See* ECF No. 74.) Petitioner presented the declaration of Ann Walker-King, an investigator in the Capital Habeas Unit at the Office of the Federal Public Defender for the Middle District of Tennessee who interviewed Elton Henderson in April 2008. (ECF No. 74-4.)[10]

Walker-King stated that Elton Henderson expressed worry for Petitioner "because of his talent" and stated that he believes life is harder for a person the more talented they are. (Id. at PageID 4226.) Elton claimed that there was a conspiracy against Petitioner and commented "that when you are in the sports arena, like Kennath is, people know how to dig ditches for you." (Id. at PageID 4226-4227.) Elton had heard that Petitioner was as good as Kobe Bryant and would have been the next Michael Jordan. (Id. at PageID 4226.)

Elton was about 22 when he met Petitioner's mother Sally Johnson, who was then 14. (Id. at PageID 4227.) He said that Johnson's stepmother did not want him around. (Id.) First, he stated that he and Sally were "in love", but then stated that she really loved him. (Id.) Elton said that he did not care about Johnson's pregnancy and took no responsibility when Petitioner was born. (Id.)

[10] Walker-King presented a declaration dated July 24, 2008, in response to the motion for summary judgment, but it did not mention Elton Henderson or issues related to mental illness in Petitioner's family although this information was available from the April 2008 interview. (*See* ECF No. 68-7.)

Elton claims that he had two other sons born at almost the same time as Petitioner, and the girls were jealous of each other until one day he saw them walking together. (Id.) He moved to Memphis after his three sons (Kennath, Chris, and Charles) were born. (Id.; *see* ECF No. 74-5 at PageID 4232.)

Elton and Charles' mother Lillian Rhodes were cousins, and Charles was born with deformities and had difficulty in school. (ECF No. 74-4 at PageID 4227.) Elton said they continued the relationship after learning that they were cousins. (Id. at PageID 4228.) Elton and Rhodes had a second child Tameka[11], who unlike Charles, was sharp. (Id.)

Walker-King said that Elton Henderson continuously talked about his sexual history and preferences and assumed that all the women he had been with would want to continue a relationship with him. (Id.) Elton admitted to having a preference for young girls, about fifteen years old, but "not necessarily as young as the twelve year old he was convicted of raping in 1988." (Id.) Elton explained "that he really hadn't meant to have sex with the twelve year old girl, because, at the time he 'had his eye on' his girlfriend's fifteen year old daughter. The twelve year old 'just happened to be there.'" (Id.) Elton said that it is common that men with a woman and her daughter and that the daughter may give the mother's boyfriend "a signal." (Id.) Walker-King described Elton's conversations bout

[11] The name is also spelled "Tomeka" in some documents, but the correct spelling appears to be "Tameka." (*See* ECF No. 74-8 & 129-9.)

sexual assault and molestation as "matter of fact" with "no emotion or empathy." (Id.)

Elton Henderson never saw his own father Herman Greer. (Id.) He was told that Greer carried two or three pistols. (Id.) Elton believes that Greer was "frightened" out of town because he was a witness to something done by a notorious person. (Id.)

Elton's mother Vester Hill had nine children. (Id. at PageID 4229.) Hill, Elton, and three older children lived in the country about eleven miles from Somerville, Tennessee and were sharecroppers. (Id.) He moved to Memphis in about 1974. (Id.) When asked about mental illness in his family, Elton said that his mother "lost equilibrium" and was given medicine that made her more depressed. (Id. at PageID 4230.)

Elton claimed that he was a talented singer and artist. (Id. at PageID 4227.) He has not held any job for long because he is talented. (Id. at PageID 4229.) He says that he is happiest when singing and rehearsing and has almost reached "CD status". (Id.) He expects to be "an overnight success." (Id.) He sings solo at church sometimes and sang the 23rd Psalm, which was later aired on the Montell Williams Show. (Id.) He claims to have performed once at the Memphis in May Music Festival and to have won a talent performance there. (Id.)

Elton Henderson described himself as a "leader" and says that he "goes in at the bottom and moves to the top." (Id.) He says that he was "considered like staff" when he was incarcerated. (Id.)

Walker-King stated that, although they were in a public place, Elton became more overtly sexual as the interview progressed, and his manner was "disconcerting" and "increasingly uncomfortable." (Id. at PageID 4228.) She described him as "profoundly lacking in boundaries and self-awareness" with "no appreciation for the reprehensible nature of his expressed opinions nor for the inappropriateness of sharing them with a female investigator whom he had just met." (Id.) Walker-King stated that Elton called her on her work cell phone at about midnight, and she told him that it was inappropriate to call her that time of night. (Id. at PageID 4230.) She thought that he was under the influence. (Id.)

Petitioner presented the declaration of Raymond Henderson, Elton Henderson's half-brother. (ECF No. 74-5.) Elton and Raymond have the same mother, but Elton was the only child of Herman Greer. (Id. at PageID 4231.) Raymond states, "[e]veryone agrees Mr. Greer was crazy." (Id.) Greer lived in Memphis and was known to drink a lot and get into fights. (Id.)

Raymond, Elton, their brother William, and their sister Margaret Henderson [Simmons] grew up in Somerville, Tennessee at their grandparents' home on the Fowler Plantation. (Id.) Their mother lived with them until Raymond was nine, and then she moved to Memphis. (Id.) The boys stayed on the plantation to work with their grandparents as sharecroppers, but later Margaret moved to

Memphis with their mother. (Id.) Elton is about seven years younger than Raymond. (Id.)

Raymond believes that Elton's mental illness began around age fifteen. (Id. at 1.) Raymond moved to Memphis after he graduated from high school and remembers his grandmother calling him upset because Elton was drinking heavily, had no memory of his actions when he was drunk, and "behaved really inappropriately by having sex with young girls." (Id.) Raymond stated that Elton "raped our mother's sister, Aunt Channie Trotter, who was about sixty years old at the time" while Elton was still in high school and living with their grandparents. (Id.) The rape was never reported to the authorities. (Id. at PageID 4231-4232.)

Elton has lived with Raymond at various times in his adult life. (Id. at PageID 4232.) Raymond describes Elton's behavior as "very weird." (Id.) Elton hid all of the towels and silverware in the house under his bed in a sack. (Id.) He kept a stool by his bedroom window and spent long hours staring out the window. (Id.) He used his food stamps, like a child, to buy candy, cookies, and ice cream that he ate for breakfast. (Id.)

Raymond became concerned when Elton started "seeing visions of Jesus by the fireplace." (Id.) Raymond stated that the visions were real to Elton. (Id.) Raymond said "that Elton thought he was a famous singer and asked people to go on tour with him." (Id.) He concluded, "Elton is just messed up in the mind." (Id.)

Raymond talked about Elton's "wild and loose" sexual behavior and the children he fathered. (Id. at PageID 4232.) Raymond stated that Elton was convicted of rape of a twelve year old girl in 1988, which was very troubling to the rest of the family. (Id.) Raymond said that "not too long ago, Elton called our sister Carolyn and asked her 'What do you think about having sex with your brother?'" (Id.) Carolyn called Raymond to tell him what Elton said and talk about "how crazy he is." (Id.)

Elton drag-raced and engaged in a lot of risky behaviors. (Id.) He drove off the road in a cotton field, and they took him to the hospital "because he seemed so crazy." (Id.)

Raymond took Elton for a mental evaluation because his behavior was "so bad." (Id.) Elton sneaked out of the house when they were getting ready, and Raymond found him a few blocks away and put him in the car. (Id.) Raymond waited for him while the counselor interviewed him, but Elton left out of the meeting "and told the counselor both she and I were crazy, not him." (Id.)

Raymond says that Elton has four children, and he's heard that they are all crazy. (Id.) Raymond believes that Elton and his daughter Tameka Rhodes had a sexual relationship and described incidents at a motel and where Tameka and Elton were locked in a bedroom together. (Id. at PageID 4232-33.) Raymond states, "[f]rom what I've heard about Elton's son Kennath, who is on death row, he sounds a lot like Elton. I'm not a doctor, but it seems to me that

craziness runs in this family - from Herman to Elton and now to Kennath and Elton's other children." (Id. at PageID 4233.) Raymond stated that he and his siblings "recognize how seriously mentally ill [Elton] is." (Id.)

Margaret Henderson Simmons, Elton Henderson's half-brother, provided a declaration in the habeas proceedings in addition to her post-conviction testimony, *see* supra pp. 28-29. (ECF No. 74-6.) Simmons agreed with Raymond's belief that Elton's father "Herman Greer is crazy, just like Elton." (Id. at PageID 4234-35.) She again spoke of her mother Vester Hill's manic depression stating,

> [b]efore my mother was on medication, she talked out of her head. She was mean to other people and she was paranoid too. On one occasion, my mother was watching television and the television went off. She blamed my friend who was there with her and pulled a butcher knife on him.

(Id. at PageID 4234.)

Simmons again discussed her maternal grandmother Novella Henderson's behavior and concluded that she was mentally ill:

> She never went outside if she could avoid it because she was so paranoid. She also would not use a telephone, a gas stove, or any new technology. In fact, I never saw my grandmother's hair until she was about eighty years old because she always kept it hidden in a turban and wouldn't wash her hair or bathe. She later got wigs, but wore them over the turban. Our grandmother was never put on medication for mental illness, but we believed based on her paranoid behavior that she also suffered from severe mental illness.

(Id. at PageID 4234-35.)

Simmons also expressed concern about Elton's sexual behavior. She confirmed Raymond's accounts about the rape of an elderly aunt. (Id. at PageID 4235.) She had heard that Elton had forced himself sexually on different girls. (Id.) She said that Lillian Rhodes told her "that Elton had taken their ten year old daughter, T[a]meka, to a motel and had tried to penetrate her." (Id.)

Simmons described Elton as having "two different personalities." (Id.) She states the incident with Tameka "along with other things" made her believe he needed help, and she talked to her siblings about getting mental health treatment. (Id.)

She stated that Elton couldn't keep a job and could not stay focused to even do tasks around the house. (Id.) Elton would do well at jobs for awhile, "then he would break off and run away and hide in the house for two to three weeks. Elton then would go back to the job and act like nothing happened." (Id.)

Carolyn Acey, Elton Henderson's half-sister, provided a declaration in the habeas proceedings. (ECF No. 74-7.) She said that she lived in Memphis with her parents and full siblings when she was young, but she visited Somerville where she saw Elton. (Id. at PageID 4236.) Elton began trying to have sex with her when she was nine years old. (Id.) Elton told her that it was alright for them to have sex since they did not live in the same house and were not really relatives. (Id.) Carolyn said that Elton made sexual advances toward her friends, and while in college, two of her friends said

that Elton sexually attached them when they were younger. (Id.) Carolyn stated,

> According to what I was told, Elton often gave girls rides home, and then would act like his car had broken down as an excuse to stop in a deserted place. He would then try to rape the girl. Elton didn't see anything wrong with trying to have sex or forcing himself sexually on my friends. Elton seemed to think his behavior was normal.

(Id.)

Carolyn Acey recounted the story that Elton had raped their aunt. (Id.) Acey said she asked him directly if he had raped their aunt. (Id.) He told her he believed he had but "blamed that behavior on being drunk at the time." (Id.)

Acey states that after he moved to Memphis she "tried for us to have a normal family relationship, but he is incapable of that, due to his mental illness." (Id. at PageID 4237.) She states that Elton "has always had – and still does have – sexual feelings for me." (Id.) She states,

> Elton texts me at work at night. He asks me what I am doing and sends me sexual messages, telling me his desires. When I tell him that it is wrong for him to send me such messages, he says that sending these messages is part of his healing process.

(Id.)

Acey states that Elton used to excuse his behavior by saying it was caused by drinking. (Id.) She states that, although he drank heavily in his twenties, he no longer does, but he is "still very

mentally ill." (Id.) Elton "sees nothing wrong with his sexual fixation on minor children." (Id.)

Acey compares Elton's depressions to her mother's and grandmother's depressions. (Id.) She says that he "sits in a very dark room alone for hours with the blinds closed." (Id.) If you ask him why he is sitting there, he says there is nothing else to do. (Id.)

Around April 2011, Acey said that she took him to get psychiatric help. (Id.) He told the mental health professional that he doesn't need help, and there is nothing wrong with him. (Id.) Acey states that she is "very concerned" about Elton and believes that he has never been on medication. (Id.)

Tameka Rhodes, Elton Henderson's daughter and Petitioner's half-sister, at age 34, provided a declaration for the habeas proceedings. (ECF No. 74-8.) Rhodes' declaration described an incident where Elton Henderson sexually assaulted her when she was ten years old. (Id. at PageID 4238-39.) She told her mother, but her mother did not file a police report. (Id. at PageID 4239.) Her mother called the lady that Elton was dating and told her about the rape. (Id.) Her mother then found out that the police were looking for Elton because he had raped a girl who was visiting. (Id.)

Rhodes states that Elton sent her a letter while he was in prison and asked for "pictures of various parts of my body." (Id.)

He told her "before another man can try you, your dad is supposed to try you first." (Id.)

After Elton's release from prison, Rhodes tried to help him obtain insurance, but instead of discussing insurance, he sent her "a crude and disgusting text message" asking for sex. (Id.) She stated that she does not want him to know where she is or to be around her children and states that she is "still very afraid" of her father. (Id. at PageID 4239-4240.) She states, "Elton is evil. He may be able to sing and quote the Bible, but he is absolutely not to be trusted." (Id. at PageID 4240.)

Lillian Rhodes, the mother of two of Elton's children Charles and Tameka, provided a declaration in the habeas proceedings. (ECF No. 74-9.) She states that about the same time she gave birth to Charles, Sally Henderson (Johnson) gave birth to Petitioner Kennath Henderson, and Teresa Holloway gave to birth to Chris. (Id. at PageID 4241.) Lillian Rhodes described how she learned of the sexual assaults on her daughter Tameka. (Id. at 4241-4242.) Rhodes said that Elton told her that a father is supposed to "try" his daughter, meaning have sex with her, but she did not believe he would do something like that until he attacked Tameka. (Id. at PageID 4242.)

Augustus Neal, Elton Henderson's half-brother on his father's side, provided a declaration for the habeas proceedings. (ECF No.

74-10.)[12] He met Elton in prison, and they figured out they had the same father Herman Greer. (Id. at PageID 4242.) Greer came around about twice a year to check on Neal, gave him a $50 bill, and took him out to eat. (Id.) Greer had a new model Gran Torino each year, and Neal remembers thinking that if Greer could get a new car each year, he could give him more money. (Id.) Neal states that Greer was married and had five children with his wife. (Id.) The wife and children were "snooty and acted like they were better than his other children." (Id.)

Greer never wanted to be old. (Id.) He was a truck driver and a mechanic. (Id. at PageID 4243.) He would tell Neal, "You know I'm a pimp." (Id.) Greer thought he was important to a lot of women and considered it an accomplishment. (Id.) Greer dated a lot of women and had a lot of kids. (Id.)

Greer was happy around a lot of people, but he got depressed when he was alone. (Id.) He drank too much and would do risky things. (Id.) Greer stated that he believes "depression ran on my dad's side of the family." (Id.)

In conjunction with Amended Petition ¶ 9(b), the Court addressed the investigation into Petitioner's biological father Elton Henderson and the discovery of a family history of mental illness. (ECF No. 91 at 55-56.) The Court stated that,

[12] Neal has been incarcerated since August 1993, according to his declaration. (ECF No. 74-10 at PageID 4242.)

> [Margaret Henderson Simmons'] testimony demonstrates that there was mitigation evidence available about a history of mental illness on Henderson's paternal side of the family relevant to the determination of ineffective assistance of counsel. Although counsel experienced difficulties with Henderson's mother, there is no evidence that Henderson's trial counsel attempted to develop mitigation evidence from his father's side of the family. Counsel, contrary to the goal of mitigation, ignored the fact that Henderson was born when his mother was fifteen (15) years old and made every attempt to present Henderson's family with his stepfather as a normal nuclear family. Further, Einstein noted the fact that trial counsel failed to discover that family members on both sides of Henderson's family suffered mental illness, and the Tennessee Court of Criminal Appeals found that counsel was unaware of the history of mental illness in Henderson's family. Henderson, 2005 WL 1541855, at **10, 21.

(ECF No. 91 at 56 (footnotes omitted)).

Petitioner has recharacterized claims that have been considered on the merits in an attempt to allow additional evidence not presented in the state courts to be considered as part of a new claim under Martinez, *see* supra pp. 8-10. Petitioner is asking this Court to determine whether his trial counsel were ineffective for failure to investigate and present evidence related to his father Elton Henderson and the history of mental illness on the paternal side of his family including expert testimony about Petitioner's most recent diagnosis of rapid-cycling Bipolar I disorder and the familial relationship or "high genetic transmission" of and "incidence of inheriting" this particular mood disorder.[13] (*See* ECF

[13] Petitioner has not defined what "community deficits" at are at issue in Amended Petition ¶ 9(f)(1)(v), and the Court will not address this aspect of Petitioner's claim.

No. 68-2 at PageID 3996.) William Kenner, even without the additional information related to Elton Henderson and the paternal side of Petitioner's family, determined that Petitioner suffered from a major mental illness based in part on evidence of Petitioner's family history of mental illness. Henderson, 2005 WL 1541855, at *20. The additional information provided about Elton Henderson and Petitioner's paternal family history of mental illness involves substantial unchecked, reprehensible, criminal behavior - the same type of criminal behavior that creates the double-edged sword the post-conviction court saw with the diagnosis of Bipolar II disorder and also presented with the rapid-cycling bipolar I disorder which, as defined by Woods, is "the most destructive of the Bipolar subsets" combining "the most disruptive symptoms of the depressed and manic phase, creating atypical symptomatology that often destroys lives" and may result in "uncharacteristic violence." (*See* ECF No. 91 at 70; *see* ECF No. 68-2 at PageID 4002.)[14]

There was a guilty plea and overwhelming evidence of the four statutory aggravating factors that: (1) the defendant created a

[14] Although there was limited evidence through the testimony of Margaret Henderson Simmons in the post-conviction record about Petitioner's paternal family history of mental illness, there was evidence of a family history of mental history on the maternal side including evidence of psychotic and schizophrenic disorders and mental health records of Glenn Johnson, Cora Lee Johnson, Hubert Henderson, and Herbert Henderson. (*See* ECF No. 23-3 at PageID 2216; *see also* ECF No. 23-6 at PageID 3494, 3498, 3523, 3532.) This information raises the question of whether post-conviction counsel's performance constituted ineffective assistance where there was some substantial investigation of Petitioner's family history of mental illness. Even without Elton Henderson's testimony and the additional declarations provided in the habeas proceedings, Kenner determined that Petitioner suffered from a major mental illness based in part on evidence of Petitioner's family history of mental illness. Henderson, 2005 WL 1541855, at *20.

great risk of death to two or more persons during the act of murder; (2) the murder was committed for the purpose of avoiding an arrest; (3) the murder was committed during the defendant's escape from lawful custody; and (4) the murder was committed against a law enforcement officer who was engaged in the performance of official duties. *See* State v. Henderson, 24 S.W.3d 307, 312-314 (Tenn. 2000). There was evidence available in the state court that Petitioner had an "unspecified personality disorder which exhibited some narcissistic and anti-social traits" or Bipolar II, depending on whether you believe Zager and clinical psychologist Pamela Auble or Kenner, and that Petitioner suffered neuropsychological deficits. *See* Henderson, 2005 WL 1541855, at *3, 16-20.[15] The criminal behaviors and family history associated with and leading to a diagnosis of Petitioner's mental disorder create a double edged sword for Petitioner, even with the diagnosis of rapid-cycling Bipolar I disorder from Woods and neuropsychiatrist Ruben Gur's conclusion that Petitioner suffered abnormalities in brain function in regions relevant to behavior. (*See* ECF No. 68-1 at 4.) In fact, the diagnosis of rapid-cycling Bipolar I disorder along with

[15] The Court notes that Kenner distinguished Bipolar I and Bipolar II in his testimony, stating that "[i]ndividuals who have the Type 1,in which they are floridly manic, can have quite a number of symptoms that indicate that they have - their perception of reality is different from that of other people's. They will hear things that aren't there, see things that aren't there, believe that folks are after them. They will believe themselves to be, you know, the long-lost son of George Bush, Sr., or somebody equally important, ... And they'll build a whole sort of delusion around that idea." (ECF No. 23-4 at PageID 3284-3285.) He described Bipolar II as possibly having "devastating effects" but being "more subtle." (Id. at PageID 3285-86.) He further stated "there are lots of folks who don't rape, murder, kill who have Bipolar 2." (Id. at PageID 3286.)

Petitioner's history of escape from incarceration, assaults, abductions, rapes, and the shooting of Bishop at point-blank range while he was unconscious makes Petitioner seem even more dangerous than the previous diagnoses. Petitioner can not demonstrate prejudice and has not demonstrated that his claim related to trial counsel's failure to educate themselves about family and community deficits is substantial under Martinez.

2. Failure to Interview and Prepare Defense Witnesses (Amended Petition ¶ 9(n))

Petitioner alleged:

> Counsel did not interview and adequately prepare defense witnesses, resulting in the failure to present to the Court a complete picture of Kennath Henderson. See Guideline 10.11 and commentary, ABA Guidelines for Death Penalty Cases.

(ECF No. 16 at 26.) The Court found the claim to be unexhausted and procedurally defaulted:

> The claim in ¶ 9(n) that counsel did not interview and adequately prepare defense witnesses which resulted in the failure to present to the Court a complete picture of him (ECF No. 16 at 26) was not exhausted in state court. Henderson, his mother Sally Johnson, Miles Wilson, and Zager testified on his behalf at the sentencing hearing. (See D.E. 20-5 at 6.) Henderson asserts that he exhausted this claim when he alleged in the post-conviction appellate brief that his counsel failed to develop a relationship with his mother Sally Johnson which "denied them critical information concerning the family dynamics" and his mental illness. (D.E. 68 at 118-19; see D.E. 23-15 at 74.) Although Henderson addressed his counsel's relationship with his mother, he failed to allege that counsel failed to prepare his mother or any other witness to testify. The claim in ¶ 9(n) was not exhausted and is procedurally defaulted.

(ECF No. 72 at 70-71 (footnote omitted).)

In relation to Amended Petition ¶ 9(n), Petitioner argues that counsel failed to: (a) interview or adequately prepare Elton Henderson or any witness to Elton Henderson's mental illness; (b) interview or prepare witnesses of Petitioner's aberrant behavior; and (c) adequately prepare Zager. (ECF No. 129 at 15-22.) Petitioner asserts that counsel's failure to identify, prepare, and present these witnesses undermines the reliability of the sentencing determination. (Id. at 21.) He contends that with the appropriate proof, at least one juror would have declined to impose the death sentence. (Id. at 22.)

a. Elton Henderson

Petitioner argues that counsel would have uncovered critical information necessary for the diagnosis of Petitioner's severe mental illness had they identified and interviewed Petitioner's family including his father Elton Henderson. (ECF No. 129 at 15.) Petitioner points out that Woods' report states that Petitioner's rapid-cycling Bipolar I Disorder was genetically inherited from his paternal family. (Id.) Petitioner asserts that although he is the only one in his family with this particular diagnosis, it is clear that the illness was genetically inherited because: (1) Elton Henderson's symptomatology is consistent with rapid-cycling Bipolar I Disorder[16] although he refuses mental health treatment; and (2)

[16] Elton Henderson's symptoms were described as "manic hypersexuality, reckless behavior, paranoid ideations, and altered perception of reality." (ECF (continued...)

Elton's mother Vester Hill was diagnosed with "manic depression", also with symptoms consistent with rapid-cycling Bipolar I Disorder. (Id. at 15-16.) Petitioner asserts that, instead of interviewing Petitioner's biological father or paternal relatives, counsel failed to find out who Petitioner's biological father was and told the court that Petitioner "did not come from a broken home." (Id. at 16.) Petitioner argues that the facts were that his mother was fourteen years old when he was born and that his parents never married or lived together. (Id.) Petitioner had not met his biological father. (Id.)

In Amended Petition ¶ 9(b)(1), Petitioner alleged that counsel failed to interview any witnesses apart from Petitioner's immediate family members and a few teachers. (ECF No. 16 at 12.) Petitioner alleged that important witnesses who counsel failed to interview included "[r]elatives of Mr. Henderson, who were aware of the history of mental illness in his extended family, which includes bipolar disorder, manic depression, and paranoid schizophrenia . . . ." (Id. at 13.) The Court addressed these allegations as it relates to the investigation of Elton Henderson, and noted that "the Tennessee Court of Criminal Appeals found that counsel was unaware of the history of mental illness in Henderson's family", *see* supra p. 43. (ECF No. 91 at 55-56; *see* id. at 47.) *See* Henderson, 2005 WL

[16] (...continued)
No. 129 at 16; ECF No. 129-4 at PageID 4695-97.)

1541855, at *7, 10-11, 14, 20-21. This Court has determined that the allegations related to counsel's failures associated with the investigation of Elton Henderson and Petitioner's paternal family are not substantial, *see* supra pp. 28-46, are not substantial and not entitled to merits review under Martinez.

b. Witnesses of Aberrant Behavior

Petitioner argues that counsel failed to conduct a cursory investigation and neglected to read the discovery that the State provided. (ECF No. 129 at 17.) Petitioner asserts that, had counsel reviewed the interview with Petitioner's former girlfriend Natonya Cobb from the Bureau of Alcohol, Tobacco and Firearms, counsel would have discovered that she was questioned extensively about her knowledge of Petitioner's repeated abduction and rape of her mother Shirley Cobb. (Id.) Petitioner contends that "[h]ad counsel performed this most basic task, *simply reading the discovery provided to him by the State*, counsel would have known, as everyone in the Fayetteville courthouse – except counsel – knew, that Mr. Henderson was accused of crimes which raised very obvious red flags about Kennath Henderson's mental health." (Id.) Petitioner further asserts that counsel would have had eyewitness proof of Petitioner's symptomatic behaviors upon which Zager could have relied in making an Axis I serious mental illness diagnosis if counsel had

interviewed and prepared Shirley Cobb, Ethel Shaw[17], Shirley Shelby, Tonya Whitmore, Tina Whitmore[18], and Michelle Sullivan[19] as witnesses. (Id.)

This Court addressed whether Petitioner's trial counsel read the discovery related to Petitioner's repeated abductions and rapes of Shirley Cobb or reviewed the offense report, documents, and videotape of Natonya Cobb in its analysis of Amended Petition ¶ 9(b). (ECF No. 91 at 57-58.) The Court stated that the defense team was "unaware of Henderson's criminal history, the bizarre nature of some of the incidents, and the fact that many of his victims were people he knew." (Id. at 58.) The Court stated "it is clear that

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[17] Miles Wilson, the principal at Petitioner's high school, stated that Ethel (also spelled "Ethyl") Shaw, the school secretary, was attacked by a man wearing a mask who she believed to be Petitioner. (ECF No. 23-13 at PageID 3418.) However, Wilson did not testify at trial about this incident.

Petitioner's high school basketball coach Larry Ransom stated that Petitioner had a "crush" on Shaw (also referred to as "Ethyl Pearl" or "Pearl"), but Ransom "and everyone else doubted" Shaw's accusation. (Id.) Ransom testified in the post-conviction proceedings that Petitioner placed something in the driveway of the school secretary. Henderson, 2005 WL 1541855, at *12.

Shaw reported to the post-conviction investigators that Petitioner attacked her in December 1991 after a basketball game, that Sally Johnson was saying "stuff" about her after the attack, and that T.L. Johnson (Petitioner's stepfather) told her he was sorry it happened. (Id. at PageID 3419.)

Dr. Woods' report states that Henderson attacked Ethel Shaw, the school secretary. (ECF No. 68-2 at PageID 3999.)

[18] In Petitioner's December 2013 brief, he spells the name "Whitamore".

[19] Sullivan was described as Petitioner's girlfriend by post-conviction investigators. (ECF No. 23-13 at PageID 3420.) She met Petitioner while working at Target in Memphis, and he lived with her at her mother's house in Memphis for about a month in April 1994. (Id.) Petitioner borrowed her car, took her check book from her house, cashed $900 worth of checks from her account, and left the state in her car. (Id.) Dr. Woods' report states that Petitioner had a sexual relationship with Michelle Sullivan. (ECF No. 129-4 at 6.)

crucial aspects of Henderson's criminal background were not conveyed to Zager prior to trial." (Id.) The Court noted that "[t]here were obvious deficiencies in the social history gathered by the defense team, regardless of whether that information was gathered by counsel or by Fenyes and Askew." (Id. at 59.)

This Court, after review and consideration of the testimony presented in the post-conviction proceedings, determined that counsel's performance was deficient at the sentencing stage and noted that the post-conviction trial court determined that additional mitigation evidence would not have changed the sentencing determination. (ECF No. 91 at 65-66.) This Court ultimately found no merit to Petitioner's claim after being "presented with the overwhelming evidence of the aggravating factors and the potential detrimental effect of introducing additional evidence about Henderson's criminal behavior in an attempt to mitigate his sentence." (ECF No. 91 at 70.) The Court stated,

> The double-edged nature of the new mitigation evidence does not establish a reasonable probability that the outcome at sentencing would change."

(Id.)

The "complete picture" that Petitioner seeks to present is not favorable or otherwise likely to have changed the outcome of his sentencing. Petitioner can not demonstrate that he was prejudiced by counsel's failure to interview and prepare Petitioner's victims

as witnesses to testify in the sentencing hearing. Petitioner's claim is not substantial under Martinez.

Further, the Court notes that it would be difficult to find ineffective assistance of post-conviction counsel as cause for the procedural default. Petitioner's post-conviction counsel presented Shirley Shelby and Tonya and Tempie Whitmore as witnesses and used their testimony, along with information related to Shirley Cobb, and observations of their experiences with Petitioner to obtain a psychiatric diagnosis from Kenner. (*See* ECF No. 23-2 at PageID 2519.) *See* Henderson, 2005 WL 1541855, at *13-14, 18-19. The state post-conviction court was well aware of Petitioner's criminal acts involving these victims, how those facts tied into Kenner's diagnosis, and the necessity of presenting details of Petitioner's crimes "to fully explain the nature of Petitioner's "various assaults, abductions and rapes" to fully explain the diagnosis, *see* supra pp. 25-26. *See* Henderson, 2005 WL 1541855, at *21. Given post-conviction counsel's actions in presenting this mitigating testimony and the use of that testimony in relation to obtaining an expert opinion, the Court can not determine that post-conviction counsel's performance was either deficient or prejudicial to Petitioner, and therefore, Petitioner can not establish cause for procedural default by asserting ineffective assistance of post-conviction counsel.

c. Lynn Zager

Petitioner argues that trial counsel failed to interview and prepare psychologist Lynn Zager for the penalty phase of trial. (ECF No. 129 at 17-18.) Petitioner asserts that counsel had not conducted any mitigation investigation when Zager did her assessment, did not meet with or otherwise prepare Zager between November 1997 and July 1998, and in July 1998, informed Zager to be ready to testify at the sentencing hearing just one week later. (Id.) Petitioner argues that counsel's failure to provide Zager with relevant social history led her to mis-diagnose Petitioner and testify inaccurately at sentencing. (Id. at 18.) Petitioner notes that neither his counsel nor Zager were aware of Petitioner's prior crimes and family history of mental illness; with that information, Zager would have likely reached the correct diagnosis of rapid-cycling Bipolar I disorder. (Id. at 18-20.)

Petitioner further asserts that counsel failed to provide information necessary to contextualize Petitioner's traumatic brain injury which he suffered when he was hit by a car at age 11. (Id. at 20.) He contends that proof of his brain damage would have significantly mitigated his moral culpability for the crime. (Id. at 20.) Petitioner refers to Gur's report indicating that Petitioner's brain damage "impairs his ability to modulate his behavior in accordance with context and may specifically lead to dissociative states, such as the state he was in when he committed

the offenses." (ECF No. 129 at 20-21; ECF No. 129-5 at PageID 4711.) Petitioner further notes that Zager would have had Petitioner tested for brain injury if she had known of his history of increasingly erratic behavior. (ECF No. 129 at 21; ECF No. 129-14 at PageID 4737.)

Zager was employed to perform a forensic evaluation on Petitioner prior to trial. (ECF No. 20-5 at PageID 310.) She determined that Petitioner was competent to stand trial. (Id. at PageID 311.) Petitioner reported that he had a significant head injury where he had to be hospitalized, and Zager knew that medical and school records would be important to a comprehensive evaluation. (Id.) She next saw Petitioner on July 9, 1998, when she performed a current mental status evaluation to determine if there was significant change in his mental status and a brief clinical interview. (Id. at PageID 312.) Zager diagnosed Petitioner with a dissociative state and a personality disorder, not otherwise specified, with narcissistic traits and antisocial traits. Henderson, 2005 WL 1548155, at *18. (ECF No. 20-5 at PageID 317.) Zager testified that Petitioner acted "under duress, and that his judgment was not adequate." (Id. at PageID 321.) Still, Zager's opinion as to Petitioner's mental state was that he was not "substantially impaired" to the point of insanity, but his judgment was impaired:

> My opinion in this case would be that he was not substantially impaired. I would not offer an opinion to the Court that he be considered insane at the time. However, I think his judgment was -- It would not reach where I could support insanity, but I think he was impaired at the time.

(Id. at PageID 322.)

This Court has acknowledged that Zager and Petitioner's trial counsel had not investigated and were not aware of many relevant facts about Petitioner's criminal background and family history, *see* supra pp. 50-51. (*See* ECF No. 91 at 58.) The Court also addressed Zager's representations in a declaration after she had reviewed additional information related to Petitioner and noted that she did not offer a different diagnosis. (ECF No. 91 at 60.) As late as May 2011, after Zager had been provided additional information about Petitioner, Zager states that, "based on the social history information and family history of mental illness provided to me by habeas counsel, the diagnosis of Dr. George Woods appears to be more accurate than the diagnosis I was able to provide in 1998." (ECF No. 77-3 at PageID 4323; ECF No. 129-14 at PageID 4737.) However, she did not change her diagnosis, but states "[h]ad I an opportunity to reevaluate Mr. Henderson, I would be able to determine whether it is appropriate to rule in the diagnosis of Bipolar Disorder." (ECF No. 77-3 at PageID 4323; ECF No. 129-14 at PageID 4737.)[20]

[20] In the instant claim, Petitioner asserts that counsel failed to interview and prepare psychologist Lynn Zager for the penalty phase of trial. However, in a similar claim in Amended Petition ¶ 9(d)(4), Petitioner argues that counsel (continued...)

Clearly, Zager was aware of the head injury and was able to determine, much like Woods, that Petitioner was in an altered "dissociative" state with impaired judgment at the time of the incident. Still, because Zager has not offered a different diagnosis, the Court finds no prejudice in Petitioner's claim that trial counsel failed to interview and prepare Zager for the penalty phase of trial.

The Court further notes that, in the post-conviction proceedings, Auble agreed with Zager's diagnosis as to Petitioner's narcissistic traits and antisocial personality. Id. Auble was unable to diagnosis Petitioner with an Axis I diagnosis of a major mental disorder. Id. Auble also performed a battery of tests on Petitioner and determined that Petitioner had neuropsychological deficits:

> To be exact, he has some difficulties learning information that he's told. That's a problem for him. He also had some problem in a test of manual dexterity, and he had some variable problems on tests which measure his ability to go back and forth between different ideas, to form hypotheses and test them, and to abstract reasoning.
>
> From the personality testing, [the petitioner] has a desire to present himself as a very normal, even maybe supernormal individual. He is likely to minimize or even be unaware of his own problems. He likes people and wants interaction with people.

Id. at *17. Auble determined that the neuropsychological deficits were significant because they affect his functioning, specifically

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[20] (...continued)
failed to investigate his traumatic brain injury. (ECF No. 77 at 10-11.) In response to the claim, the Court notes that Zager did not provide a different diagnosis. (ECF No. 91 at 60-61.)

"his portrayal of himself and his family is inconsistent with reality" and he was not "aware of his own emotional dynamics." Id. Auble did not diagnose Petitioner with a bipolar disorder.

In the post-conviction proceedings, Kenner diagnosed Petitioner with Bipolar II. Id. at *42. Zager stated that Bipolar II is not inconsistent with the MMPI[21] administered to Petitioner. Id. at *16.

Woods, a neuropsychiatrist hired in relation to the habeas proceedings, diagnosed Petitioner with Bipolar I Disorder, which was in a rapid-cycling, mixed phase at the time of the offense and at the entry of his guilty plea and waiver of jury sentencing; Cognitive Disorder Not Otherwise Specified; a traumatic brain injury; and "uncharacteristically low brain volume." (ECF No. 68-2 at PageID 4007-4008; ECF No. 129-4 at PageID 4706-4707.) Woods described Petitioner as being in an altered mental state with impaired judgment during the incident. (ECF No. 68-2 at PageID 4006-4007.) Woods determined that these mental disorders "impaired ability to effectively weigh and deliberate due to [Petitioner's] brain deficits, and impaired judgment, precluded Mr. Henderson from conforming his behavior to the law and also from making a rational and voluntary, intelligent, and knowing waiver of his rights to a jury trial and waiver of his right to be sentenced by a jury." (ECF No. 129-4 at PageID 4707; ECF No. 68-2 at PageID 4008.) This Court previously found evidence from Woods' evaluations and reports to be

[21] The "MMPI" is the Minnesota Multiphasic Personality Inventory.

barred by Pinholster. (ECF No. 91 at 36 n.14; id. at 56 n. 19; id. at 64-65 n. 24; id. at 76 n. 30.)

Gur concluded that:

> Neuropsychological testing suggested dysfunction in behavioral domains related to frontal-parietal systems, worse on the left for frontal and worse on the right for parietal. MRI data indicated reduced volume in the frontal and parietal regions, with similar laterality to that suggested by the neuropsychological testing.
>
> These results indicate abnormalities in brain function in regions relevant to behavior, especially related to executive functions (frontal), attention and comprehension of complex information (parietal), and the integration of self (right parietal). These abnormalities are of unclear etiology, but most likely related to anoxia or traumatic brain injury. By history, the blunt trauma and concussion sustained when Mr. Henderson was eleven could help explain his developmental deficits. Specifically, his complaint of a sore spot on the top left portion of his head is consistent with the behavioral image. The relevance of these abnormalities to his behavior during and subsequent to the crime was confirmed in a clinical interview. The combined information indicates that Mr. Henderson suffers from brain dysfunction that impairs his ability to modulate his behavior in accordance with context and may specifically lead to dissociative states, such as the state he was in when he committed the offenses.

(ECF No. 129-5 at PageID 4711.) The Court previously determined that consideration of Gur's report was barred by Pinholster. (ECF No. 91 at 59, 64-65 n.24.)

Although the diagnoses differ at trial, in the post-conviction proceedings, and as presented in the habeas proceedings, it is clear that there was agreement from the time of trial that Petitioner suffered a dissociative state with impaired judgment at the time of

the incident. The information uncovered about Petitioner's family and social history and incorporated and analyzed by experts to form what may be considered a more complete diagnosis of Petitioner's mental health still did not create a reasonable probability that the sentencing outcome would have been different. Petitioner suffered no prejudice, and his claim in Amended Petition ¶ 9(n) is not substantial under Martinez.

IV. CONCLUSION

Petitioner is not entitled to relief under Martinez either because his claims do not fall within the scope of Martinez or are not substantial under Martinez. As such, no further proceedings are required. The petition is DENIED.

V. APPEAL RIGHTS

There is no absolute entitlement to appeal a district court's denial of a § 2254 petition. Miller-El v. Cockrell, 537 U.S. 322, 335 (2003). The Court must issue or deny a certificate of appealability ("COA") when it enters a final order adverse to a § 2254 petitioner. Habeas Rule 11(a). A petitioner may not take an appeal unless a circuit or district judge issues a COA. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b)(1).

A COA may issue only if the petitioner has made a substantial showing of the denial of a constitutional right, and the COA must indicate the specific issue or issues that satisfy the required

showing. 28 U.S.C. §§ 2253(c)(2)-(3). A "substantial showing" is made when the petitioner demonstrates that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El, 537 U.S. at 336 (internal quotation marks omitted). A COA does not require a showing that the appeal will succeed. Id. at 337. Courts should not issue a COA as a matter of course. Id.

The Court previously granted Petitioner a limited certificate of appealability and certified that a limited appeal would be taken in good faith with regard to the following issues:

> Ineffective Assistance of Counsel at Sentencing (Amended Petition ¶ 9)
>
> Incompetence to Enter a Guilty Plea and Waive Jury Sentencing (Amended Petition ¶ 13)

(ECF No. 91 at 94-96.) The previous grant still stands.

Reasonable jurists could not disagree about the remaining issues. The Court DENIES a certificate of appealability on the remaining issues in the petition.

Federal Rule of Appellate Procedure 24(a)(3) provides that a party who was permitted to proceed in forma pauperis in the district court may proceed on appeal in forma pauperis unless the district court certifies that an appeal would not be taken in good faith or otherwise denies leave to appeal in forma pauperis. 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 above-referenced issues for which the Court grants a certificate of appealability. An appeal that does not address these issues is not certified as taken in good faith, and Petitioner should follow the procedures of Fed. R. App. P. 24(a)(5) to obtain in forma pauperis status.

IT IS SO ORDERED this 8th day of May, 2014.

s/ S. Thomas Anderson
S. THOMAS ANDERSON
UNITED STATES DISTRICT JUDGE

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

KENNATH ARTEZ HENDERSON, Petitioner, vs. RICKY BELL, Warden, Riverbend Maximum Security Institution, Respondent.	)	No. 06-2050-STA-tmp

ORDER DIRECTING CLERK TO CHANGE RESPONDENT
ORDER DENYING MOTION FOR EVIDENTIARY HEARING
ORDER DENYING PETITION PURSUANT TO 28 U.S.C. § 2254
ORDER DENYING REQUEST FOR STAY OF FINAL JUDGMENT
ORDER GRANTING LIMITED CERTIFICATE OF APPEALABILITY
AND
ORDER CERTIFYING LIMITED APPEAL WOULD BE TAKEN IN GOOD FAITH

On July 28, 2006, Petitioner Kennath Henderson, a death-sentenced inmate incarcerated at the Riverbend Maximum Security Institution ("RMSI"), filed, through counsel, an amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (ECF No. 16.) On March 30, 2011, the Court entered an order granting in part and denying in part Respondent Ricky Bell's[1] motion for summary judgment. (ECF No. 72.) On April 18, 2011, Henderson filed a motion to reconsider (ECF No. 73) which the Court denied on May 4, 2011

[1] The proper respondent to a habeas petition is the petitioner's custodian. See Rumsfeld v. Padilla, 542 U.S. 426, 435 (2004). Roland Colson is currently the warden of RMSI. See Tennessee Government, Department of Correction, http://www.tn.gov/correction/institutions/rmsi.html (last visited August 10, 2011). The Clerk shall record the respondent as RMSI Warden Roland Colson. The Clerk shall terminate all references to Ricky Bell as the respondent.

(ECF No. 78).

The remaining issues to be resolved in Henderson's amended habeas petition are the allegations in ¶¶ 8(c, g, h & l), 9(b-c, d(4), e, h, k & f(1) for failure to use a psychiatrist and develop neurological and neuropsychological evidence), 11 (d & g), 14 to the extent Henderson has alleged sufficiency of the evidence and Eighth Amendment vagueness claims, 15 to the extent Henderson has alleged sufficiency of the evidence, and 18. On April 29, 2011, Respondent filed a brief on the merits in support of judgment as a matter of law to address the remaining issues in the habeas petition. (ECF NO. 75.) On May 2, 2011, Henderson filed his second response to Respondent's motion for summary judgment. (ECF No. 77.)

On May 25, 2011, Henderson filed a motion for evidentiary hearing to develop the factual basis of the claims raised in ¶¶ 8(h), 9(b), 9(d)(4), and 9(h) of the amended petition. (ECF No. 87.) On June 10, 2011, Respondent filed a response in opposition to the motion. (ECF No. 88.) On June 16, 2011, Henderson filed a reply to the response. (ECF No. 90.)

A recitation of the proof, as found by the Tennessee Supreme Court, is set forth in the Court's March 30, 2011 order. (ECF No. 72 at 4-8.)

I. Evidentiary Hearing

Henderson requests an evidentiary hearing on his ineffective assistance of counsel claims that counsel failed to fully represent

Henderson when they: (1) advised him to enter guilty pleas (ECF No. 16 at 9, ¶ 8(h)); (2) failed to properly investigate and prepare for the sentencing hearing (id. at 12, ¶ 9(b)); (3) failed to investigate and develop evidence that Henderson suffered from brain damage (id. at 21, ¶ 9(d)(4)); and failed to object to the trial court's request to confer with mitigation specialist Julie Fenyes in an in-chambers examination (id. at 23-24, ¶ 9(h)). (ECF No. 87 at 1.)

Henderson asserts that at an evidentiary hearing, he would prove, through his own testimony and the testimony of trial counsel Mike Mosier, co-counsel Andrew Johnston, forensic psychologist Dr. Lynn Zager, Henderson's paternal relatives, Dr. George Woods, Dr. Ruben Gur, and Judge Jon Kerry Blackwood, that:

1. Counsel failed to perform a constitutionally adequate mitigation investigation - failing to identify or interview Mr. Henderson's paternal family and failing to read the discovery provided by the State, thereby missing obvious red-flags of severe mental illness (id. at 19-20);

2. Zager would have diagnosed Henderson differently had she been provided information about his erratic behavior, his attacks on Shirley Cobb, Shirley Shelby, and Mrs. Shaw[2], and the mental illness in his paternal family (id. at 20-21)[3];

3. Fenyes, having failed to conduct a thorough mitigation investigation, told the trial court in the in camera

[2] Henderson has not indicated who Mrs. Shaw is or the relevance of her testimony.

[3] Henderson wants to introduce Zager's testimony at a hearing to clarify her post-conviction testimony about the diagnosis. (Id. at 8-9 n.3.)

hearing that she had not completed her mitigation investigation, and the trial court responded by reprimanding her for her inadequate performance and sharing the judge's knowledge of mental illness in Henderson's family (id. at 21);

4. Fenyes, despite knowing that the trial court had deemed her performance inadequate, failed to investigate leads provided to her about mental illness in Henderson's family (id. at 21-22);

5. Counsel, just after the in camera hearing, advised Henderson to plead guilty and waive jury sentencing, despite having failed to conduct an adequate mitigation investigation, including failing to read the discovery provided by the State or to interview Henderson's family members (id. at 22);

6. Counsel advised Henderson to plead guilty and waive jury sentencing despite knowing that, given the inadequacies of the mitigation investigation and the resulting dearth of proof available for the sentencing hearing, Tennessee law mandated the death sentence (id. at 22);

7. Counsel advised Henderson to plead guilty and waive jury sentencing without knowing that earlier that day Fenyes had informed the trial court that the defense team had no mitigation evidence and that the trial court expressed contempt for Fenyes' inadequate work performance (id. at 22-23);

8. Counsel failed to inform Henderson of Fenyes' failure to investigate his mitigation case, of her indiscrete admission to the trial court that that the defense had no mitigation evidence, or that the trial court had expressed that her work was inadequate, but instead counsel only informed Henderson that his only chance to avoid the death penalty was to plead guilty and have the court sentence him (id. at 23);

9. Counsel's advice was predicated on a completely unreasonable belief that the trial court would not follow the law in sentencing Henderson (id. at 23);

10. Counsel failed to inform Henderson that his advice was based on wishful thinking rather than legal strategy (id. at 23-24);

11. Counsel would not have advised Henderson to plead guilty and waive jury sentencing if he had known the nature of the in camera conversation between Fenyes and Judge Blackwood (id. at 24); and

12. Henderson would have not pled guilty and waived jury sentencing had he been properly advised that the defense had conducted a thorough mitigation, that the trial court expressed contempt for Fenyes' inadequate work, and that Tennessee law provides that death shall be the sentence if the aggravating circumstances outweigh the mitigating circumstances (id. at 24).

Henderson asserts that he seeks to present proof about the trial court's in camera discussion with Fenyes. (Id. at 3-4.) He contends that the trial judge's multiple roles as a fact finder, potential witness, and post-conviction judge prevented him from developing the facts in support of his ineffective assistance claim and deprived him of a "meaningful opportunity" to litigate the merits of this claim. (Id. at 4-5.)

The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, Title I, § 102, 110 Stat. 1220 (Apr. 24, 1996) (codified, inter alia, at 28 U.S.C. § 2244 et seq.) ("AEDPA"), limits the ability of federal courts to grant an evidentiary hearing. Cornelison v. Motley, 395 F. App'x 268, 272 (6th Cir. 2010); Starcher v. Wingard, 16 F. App'x 383, 387 (6th Cir. 2001) (supplementation of the record in a habeas proceeding through an evidentiary hearing is allowed under limited circumstances). Habeas review under 28 U.S.C. § 2254(d)(1), for claims adjudicated in the state courts on the merits, is limited to the state court record,

and no evidentiary hearing is required. Cullen v. Pinholster, 131 S. Ct. 1388, 1399 (2011). Section 2254(e)(2) applies when the claim was not adjudicated on the merits in state court. Id. at 1401. Section 2254(e)(2) provides:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that-
>
> (A) the claim relies on-
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

The United States Supreme Court held that the threshold determination under § 2254(e)(2) is whether the petitioner "failed to develop the factual basis" of his claim in the state court proceedings. Williams v. Taylor, 529 U.S. 420, 432-35 (2000); see Starcher, 16 F. App'x at 387 (same). In Williams, the Court reasoned:

> For state courts to have their rightful opportunity to adjudicate federal rights, the prisoner must be diligent in developing the record and presenting, if possible, all claims of constitutional error. If the prisoner fails to do so, himself or herself contributing to the absence of a full and fair adjudication in state court, § 2254(e)(2) prohibits an evidentiary hearing to develop the relevant

> claims in federal court, unless the statute's other stringent requirements are met. Federal courts sitting in habeas are not an alternative forum for trying facts and issues which a prisoner made insufficient effort to pursue in state proceedings.

529 U.S. at 437; see Keeney v. Tamayo-Reyes, 504 U.S. 1, 9 (1992) ("The state court is the most appropriate forum for resolution of factual issues in the first instance, and creating incentives for the deferral of factfinding to later federal-court proceedings can only degrade the accuracy and efficiency of judicial proceedings.")

The failure to develop a claim refers to "lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." Id. at 432. The Supreme Court states:

> The question is not whether the facts could have been discovered but instead whether the prisoner was diligent in his efforts. The purpose of the fault component of "failed" is to ensure the prisoner undertakes his own diligent search for evidence. Diligence for purposes of the opening clause depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court.

Id. at 435.

Lack of diligence will not bar an evidentiary hearing if efforts to discover the facts would have been in vain. Id. A petitioner who fails to meet the diligence requirement of § 2254(e)(2) is channeled to the strict requirement of subparts (A) and (B) which permit an evidentiary hearing if the claim rests on (1) a new rule of constitutional law, or (2) on a factual predicate "that could not have been previously discovered through the

exercise of due diligence." Hutchison v. Bell, 303 F.3d 720, 729 (6th Cir. 2002); Cornelison, 395 F. App'x at 272. The petitioner must also establish that the facts underlying his claim provide clear and convincing evidence that absent constitutional error, no reasonable factfinder would have found him guilty of the underlying offense. 28 U.S.C. § 2254(e)(2)(B).[4]

Henderson contends, based on Townsend v. Sain, 372 U.S. 293, 313-14 (1963), that an evidentiary hearing is required. (ECF No. 87 at 3-4, 25.) He asserts that his claims are meritorious and that § 2254(d) does not preclude a hearing where the state court's decision relied on an unreasonable factual determination and standards that were contrary to and an unreasonable application of clearly established law. (Id. at 7.) Henderson asserts that the Court is not "constrained to the state court record" in determining his entitlement to relief. (Id.)

Respondent relies on his previous merits brief requesting judgment as a matter of law (see ECF No. 75) for these claims. (ECF No. 88 at 1.) Respondent notes that the Court has previously held that each of these claims was properly exhausted in state court, and therefore, Henderson is barred from presenting new evidence under Pinholster. (Id. at 1-2.) He asserts that the Supreme Court limited evidentiary hearings to claims that had not been

[4] If the petitioner was diligent in developing the factual basis of a claim in state court, the federal court may hold a hearing if the petitioner's factual allegations, if proved, would entitle him to relief. Vroman v. Brigano, 346 F.3d 598, 606 (6th Cir. 2003).

adjudicated in the state courts. (Id. at 2.) He states that Henderson does not explain how an evidentiary hearing presenting new evidence, from many of the same individuals who testified in the state proceedings, informs the Court's determination of whether the state court's decision was unreasonable based on the evidence presented. (Id. at 2-3.) He contends that there is no exception to Pinholster which allows Henderson to present the same claim in more detail and that Henderson has either already presented or could have presented all the evidence he specifies during his state court proceedings. (Id. at 3-4.) Simply, Respondent contends that Henderson is not entitled to relitigate his trial in this habeas proceeding, despite Henderson's contentions that he was not afforded a full and fair hearing in the state courts. (Id. at 3.)

Henderson replies that Respondent misapprehends Pinholster and asserts that § 2254(e) continues to have force where § 2254(d)(1) does not bar habeas relief. (ECF No. 90 at 1-2.) Henderson asserts that Pinholster is limited to cases where the state court process has not prevented or impeded the petitioner's efforts to develop facts. (Id. at 2.) Henderson argues that he is not at fault for any inadequacies in the state court record because he was prevented from developing facts in state court by the trial judge's repeated refusal to recuse himself from the post-conviction proceedings. (Id.) Henderson contends that because he was diligent, his claims lie outside the dictates of Pinholster. (Id. at 3.)

The claims that Henderson seeks to develop in an evidentiary hearing were exhausted in the state courts and are subject to § 2254(d) review. (See ECF No. 72 at 30-31, 66-67, 70.) Henderson must overcome the limitations of § 2254(d)(1), allowing habeas relief only if the decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," based solely on the state court record and is not entitled to an evidentiary hearing. Bray v. Andrews, 640 F.3d 731, 737 (6th Cir. 2011). Similarly, § 2254(d)(2) review allowing the grant of the writ based on an unreasonable determination of facts is by definition limited to "the evidence presented in the State court proceeding." Pinholster, 131 S. Ct. at 1401 n.7.

There is case law suggesting that where a federal court determines "independent of the new evidence and based solely on the evidence before the state court, that the state courts' decisions contravened or unreasonably applied clearly established federal law or involved an unreasonable determination of the facts," the court may consider additional evidence to determine whether habeas corpus relief could issue. Conway v. Houk, No. 2:07-cv-947, 2011 WL 2119373, at *3 (S.D. Ohio May 26, 2011); see Johnson v. Cullen, No. 3-98-cv-4043-SI, 2011 WL 2149313, at *2 (N.D. Cal. June 1, 2011) (staying evidentiary hearing until the court ruled on whether petitioner's claims survive § 2254(d)(1) review); see also Carter

v. Martel, No. 06cv1343-BEN(CAB), 2011 WL 3568344, at *2 (S.D. Cal. Aug. 12, 2011) ("it does not serve the interests of judicial economy to hold an evidentiary hearing, or decide whether an evidentiary hearing is warranted, prior to conducting review under section 2254(d)"). As the issues presented have been briefed on the merits, the Court will first address whether Petitioner's claims survive § 2254(d) review before determining whether an evidentiary hearing is warranted.

II. MERITS

A. Legal Standard for Merits Review

The statutory authority of federal courts to issue habeas corpus relief for persons in state custody is provided by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). A federal court may grant habeas relief to a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

Section 2254(d) provides the standard for addressing claims that have been adjudicated in the state courts on the merits:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1-2). The petitioner carries the burden of proof for this "difficult to meet" and "highly deferential [AEDPA] standard" which "demands that state-court decisions be given the benefit of the doubt." Pinholster, 131 S. Ct. at 1398 (quoting Harrington v. Richter, 131 S. Ct. 770, 786 (2011), and Woodford v. Viscotti, 537 U.S. 19, 24 (2002) (per curiam)) (citations omitted).[5]

Review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Pinholster, 131 S. Ct. at 1399. A state court's decision is "contrary" to federal law when it "arrives at a conclusion opposite to that reached" by the Supreme Court on a question of law or "decides a case differently than" the Supreme Court has "on a set of materially indistinguishable facts." Williams, 529 U.S. at 412-13.[6] An "unreasonable application" of federal law occurs when the state court "identifies the correct governing legal principle from" the Supreme Court's decisions "but unreasonably applies that

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[5] The AEDPA standard creates "a substantially higher threshold" for obtaining relief than a de novo review of whether the state court's determination was incorrect. Schriro v. Landrigan, 550 U.S. 465, 473 (2007) (citing Williams v. Taylor, 529 U.S. 362, 410 (2000)).

[6] The "contrary to" standard does not require citation of Supreme Court 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); see Mitchell v. Esparza, 540 U.S. 12, 16 (2003) (same); see Treesh v. Bagley, 612 F.3d 424, 429 (6th Cir. 2010) (same).

principle to the facts of the prisoner's case." Williams, 529 U.S. at 412-13. The state court's application of clearly established federal law must be "objectively unreasonable." Williams, 529 U.S. at 409. The writ may not issue merely because the habeas court, in its independent judgment, determines that the state court decision applied clearly established federal law erroneously or incorrectly. Renico v. Lett, 130 S. Ct. 1855, 1862 (2010) (citing Williams, 529 U.S. at 411).

There is little case law addressing the standard in § 2254(d)(2) that a decision was based on "an unreasonable determination of facts." However, the Supreme Court in Wood v. Allen, 130 S. Ct. 841, 849 (2010)[7], stated that a state-court factual determination is not "unreasonable" merely because the federal habeas court would have reached a different conclusion. In Rice, the Court explained that "[r]easonable minds reviewing the record might disagree" about the factual finding in question, "but on habeas review that does not suffice to supersede the trial court's . . . determination." 546 U.S. at 341-42.

[7] In Wood, 120 S. Ct. at 845, the Supreme Court granted certiorari to resolve the question of whether to satisfy § 2254(d)(2), a petitioner must establish only that the state-court factual determination on which the decision was based was "unreasonable," or whether § 2254(e)(1) additionally requires a petitioner to rebut a presumption that the determination was correct with clear and convincing evidence. Id. at 848. However, the Court once again found it unnecessary to reach the question, and left it open "for another day." Id. at 849, 851 (citing Rice v. Collins, 546 U.S. 333, 339 (2006) (recognizing that it is unsettled whether there are some factual disputes where § 2254(e)(1) is inapplicable)).

"Notwithstanding the presumption of correctness, the Supreme Court has explained that the standard of § 2254(d)(2) is 'demanding but not insatiable.' [Miller-El v.] Dretke, 545 U.S. [231, 240 (2005)] (quoting Miller-El v. Cockrell, 537 U.S. 322, 340 (2003) (internal quotations omitted)). Accordingly, '[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review.' Cockrell, 537 U.S. at 324, 123 S. Ct. 1029." Harris v. Haeberlin, 526 F.3d 903, 910 (6th Cir. 2008). A state court adjudication will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state court proceeding. Ayers v. Hudson, 623 F.3d 301, 308 (6th Cir. 2010); see Hudson v. Lafler, 421 F. App'x 619, 624 (6th Cir. 2011) (same).

There is no AEDPA deference and the standards of § 2254(d) do not apply if a habeas claim is fairly presented in the state courts but not adjudicated on the merits. Montes v. Trombley, 599 F.3d 490, 494 (6th Cir. 2010); see Thompson v. Warden, Belmont Corr. Inst., 598 F.3d 281, 285 (6th Cir. 2010) (a claim that is fairly presented in the state court but not addressed is subject to de novo review by the habeas court). The pre-AEDPA de novo review standard applies for questions of law and mixed questions of law and fact, and the clear error standard applies to factual findings. Montes, 599 F.3d at 494.

B. Ineffective Assistance of Counsel

The remaining ineffective assistance of counsel claims are that counsel failed to: (1) educate themselves about issues that might be presented as a defense (¶ 8(c)); (2) investigate or develop guilt phase defenses (¶ 8(g)); (3) fully represent Henderson when they advised him to enter guilty pleas (¶ 8(h)); (4) consider and develop a theory of defense to intentional murder or the associated felonies (¶ 8(l)); (5) properly investigate and prepare for Henderson's sentencing hearing (¶ 9(b)); (6) talk with Henderson about his social history or background (¶ 9(c)); (7) investigate and develop evidence about Henderson's brain damage (¶ 9(d)(4)); educate themselves about Zager's diagnosis of Henderson as suffering from a narcissistic personality disorder (¶ 9(e)); (8) use a psychiatrist and develop neurological and neuropsychological evidence (¶ 9(f)(1)); (9) object to the trial court's request to confer with mitigation specialist Julie Fenyes in an in-chambers examination (¶ 9(h)); and (10) develop a theory of mitigation (¶ 9(k)). (See ECF No. 16 at 6-32.)

1. Ineffective Assistance of Counsel in Preparation for Trial and Guilty Pleas (¶¶ 8(c, g, h & l)

a. Counsel's Education and Qualifications

In ¶ 8(c) of the amended petition, Henderson alleged that his trial counsel failed to educate themselves about issues that might be presented as a defense and failed to investigate and develop available information and locate appropriate expert and lay

witnesses to present a defense. (ECF No. 16 at 6.) The Tennessee Court of Criminal Appeals stated:

> The petitioner next asserts that trial counsel were deficient by their failure to stay abreast of developments in capital representation. The petitioner argues that trial counsel's failures impaired their ability to work with experts properly and ensure that the experts were performing the necessary tasks. In support of his position, the petitioner asserts that both Mr. Mosier and Mr. Johnston admitted their deficiency regarding working with experts. The petitioner asserts that this deficiency resulted in the loss of vital mitigation evidence. As stated earlier, issues addressing the failure to present mitigation evidence will be addressed as such. Our review as to this claim is merely as to whether Mr. Mosier's and Mr. Johnston's failure to inform themselves of developments in capital litigation constituted deficient performance.
>
> The record reflects that Mr. Mosier had previous experience in capital litigation. Additionally, his testimony established that he was familiar with the use of experts and that the experts in this matter were hand-selected by him. The petitioner has failed to make specific allegations referencing the developments in the area of capital litigation of which trial counsel was unaware. Rather, the petitioner relies upon alleged deficiencies in the area of mitigation proof. We refuse to adopt a *per se* finding of deficiency based upon an allegation of counsel's lack of knowledge regarding recent developments in the law, especially in light of the absence of any reference by the petitioner of what legal developments counsel was allegedly unaware. The petitioner is not entitled to relief as to this claim.

Henderson v. State, No. W2003-01545-CCA-R3-PD, 2005 WL 1541855, at *40 (Tenn. Crim. App. June 25, 2005). The court also rejected Henderson's assertions that Johnston and Mosier were unqualified to represent Henderson based on their lack of experience and the fact that their qualifications did not comply with Tennessee Supreme Court Rule 13. Id. at **32-33. This Court previously rejected

Henderson's habeas claims that his counsel failed to satisfy the standards for capital representation. (ECF No. 72 at 39-47.)

b. Counsel's Guilt Phase Investigation

Henderson alleges that counsel's performance was deficient for failing to investigate and develop available information and defenses (¶¶ 8(c, g & l)). (See ECF No. 16 at 6, 8-9, 11.) He asserts that the defense investigator Tammy Askew spent a total of only 25.5 hours investigating his case and that she conducted no records searches until after his guilty plea was entered. (Id. at 8.) Henderson contends that had counsel conducted the requisite investigation, they would have been in a position to advise him whether to plead guilty. (Id. at 8-9.)

On appeal of the post-conviction proceedings, Henderson argued that his counsel should have put on a guilt phase defense consistent with the penalty phase case, even if guilt was presumed, because it would have allowed an opportunity to present mitigation themes and for the jury to hear all of the facts. (ECF No. 23-15 at 75-76.) The Tennessee Court of Criminal Appeals summarized Askew's testimony at the post-conviction hearing (see ECF No. 23-3 at 82-102):

> Tammy Askew was retained as the investigator by the trial team in this case. She specifically recalled being contacted by Mr. Mosier prior to August 1997. She was instructed by both Mr. Mosier and Mr. Johnston to interview witnesses. Her understanding was that her investigation was limited to solely the guilt phase of the trial. Ms. Askew's records of her investigation reveal that on August 27, 1997, she interviewed Ms. Guy, Mr. Holmes, and Sally and TL Johnson. Her records also

> reveal that she attempted to interview Dr. Cima, Peggy Wilde and Donna Feathers; these witnesses refused to be interviewed. As advised by Mr. Mosier, Ms. Askew again attempted to interview these witnesses; they again declined.
>
> Ms. Askew testified that she interviewed the petitioner's parents Sally and TL Johnson at their home. The couple were interviewed separately. An interview of the petitioner was then conducted. This was Ms. Askew's only interview with the petitioner. Ms. Askew conducted no additional investigative activities in this matter until June 1998. She explained that she had interviewed all of the persons that defense counsel had asked her to interview, with the exception of those individuals that declined. She stated that defense counsel never asked her to interview anyone from the Sheriff's Department. Ms. Askew explained that after a defense team meeting on July 8, 1998, she researched criminal records of the petitioner and picked up some medical records on the petitioner.

Henderson, 2005 WL 1541855, at *14.

The Tennessee Court of Criminal Appeals focused on the prejudice aspect of this claim and noted that the evidence of Henderson's guilt was "overwhelming" and that Henderson "failed to establish that trial counsel's advice regarding entry of a guilty plea was unreasonable." Henderson, 2005 WL 1541855, at **7, 37-39.

Henderson failed to argue the merits of the claims in ¶¶ 8(c, g, & l) of the amended petition. The Tennessee Court of Criminal Appeals cited the appropriate Supreme Court precedent for ineffective assistance of counsel as stated in Strickland v. Washington, 466 U.S. 668 (1984), and Hill v. Lockhart, 474 U.S. 52

(1985).[8] See Henderson, 2005 WL 1541855, at **30-31, 33, 36. Henderson has not demonstrated what additional knowledge counsel could have obtained that would have created a reasonable probability that Henderson would not have plead guilty. Further, even if counsel's performance in investigating and developing guilt phase defenses was deficient, Henderson can not demonstrate prejudice because his conviction "resulted not from any deficiency in his legal presentation, but from the overwhelming evidence of his guilt." Fugate v. Head, 261 F.3d 1206, 1214 (11th Cir. 2001); see Manley v. Ross Corr. Inst., 314 F. App'x 776, 786 (6th Cir. 2008) (overwhelming evidence of guilt precluded petitioner from demonstrating prejudice); see also Woodward v. Epps, 580 F.3d 318, 328 (5th Cir. 2009) (when counsel conceded guilt without obtaining the defendant's consent, there is no ineffective assistance where the evidence is overwhelming and the crime heinous).

The Tennessee Court of Criminal Appeals' determination of the allegations in ¶¶ 8(c, g & l) was not contrary to or an unreasonable application of clearly established federal law and was based on a reasonable determination of the facts in light of the evidence presented. Henderson's allegations in ¶¶ 8(c, g & l) are DENIED.

c. Guilty Plea

[8] See ECF No. 72 at 36-39 (for a detailed ineffective assistance of counsel analysis).

In ¶ 8(h), Henderson alleges that his trial counsel failed to fully represent him when they advised him to enter guilty pleas. (ECF No. 16 at 9.) He alleges that his counsel failed in their duties to fully represent him when they advised him to plea: (1) shortly after the court granted a motion to continue[9] the trial; (2) prior to a psychological evaluation being completed; (3) without a plea bargain; and (4) without advising him that pleading guilty to escape and premeditated murder of a law enforcement officer would constitute proof of three of the prosecutor's four aggravating circumstances. (ECF No. 16 at 9.)

The Tennessee Court of Criminal Appeals stated:

> **4. Trial counsel's advice to the petitioner to enter guilty plea and waive jury sentencing.**
>
> The petitioner's trial was scheduled to commence on July 6, 1998. That morning, trial counsel moved for and was granted a continuance until August 17, 1998. Later that afternoon, the petitioner entered a guilty plea to first degree murder and waived jury sentencing in this matter. On appeal, the petitioner asserts that this action was permitted absent "serious evaluation by his counsel, thus, violating counsel's duty to investigate the case and intelligently advise [his] client." In support of his claim, the petitioner makes several assertions, including: (1) the petitioner received "absolutely nothing" in return for his pleading guilty; (2) trial counsel was misinformed in his belief that Judge Blackwood was "philosophically opposed to the death penalty;" (3) trial counsel acquiesced to the trial court's in camera proceeding with its mitigation expert, during which Ms. Fenyes informed the trial court that there was no significant mitigation evidence; and (4)

[9] Mosier stated that the continuance was requested because counsel was not prepared for the sentencing phase of the trial. (ECF No. 23-2 at 45; ECF No. 20-1 at 107-110; ECF No. 20-3 at 12.)

trial counsel failed to attempt to obtain a change of venue.

As noted *supra*, under Strickland, 466 U.S. at 687, the petitioner must establish deficient representation and prejudice resulting from the deficiency. However, in the context of a guilty plea, to satisfy the second prong of *Strickland*, the petitioner must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59; *see also* Walton, 966 S.W.2d at 55. Under the first prong of the *Strickland* test, a defendant must show that his attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. Moreover, in evaluating an ineffectiveness claim, this Court must presume that the "challenged action 'might be considered sound trial strategy.'" Id. at 689 (quoting *Michel*, 350 U.S. at 101). The petitioner bears the burden of overcoming this presumption. Id.

An attorney's advice to his client to waive the client's right to a trial by jury is a classic example of a strategic trial judgment, "the type of act for which *Strickland* requires that judicial scrutiny be highly deferential." Hatch v. Oklahoma, 58 F.3d 1447, 1459 (10th Cir. 1995) (quoting Green v. Lynaugh, 868 F.2d 176, 178 (5th Cir.), *cert. denied*, 493 U.S. 831, 110 S. Ct. 102, 107 L. Ed. 2d 66 (1989) (per curiam). It constitutes a conscious, tactical choice between two viable alternatives. Hatch, 58 F.3d at 1459 (citing Carter v. Holt, 817 F.2d 699, 701 (11th Cir. 1987)); United States v. Ortiz Oliveras, 717 F.2d 1, 3 (1st Cir. 1983) (holding that tactical decisions, whether wise or unwise, successful or unsuccessful, cannot ordinarily form the basis of a claim of ineffective assistance of counsel). Thus, for counsel's advice to rise to the level of constitutional ineffectiveness, the decision to waive a jury must have been "completely unreasonable, not merely wrong, so that it bears no relationship to a possible defense strategy." Hatch, 58 F.3d at 1459.

Regarding the decision to enter the guilty plea, it is beyond question that the evidence establishing the petitioner's guilt was overwhelming. Thus, Mr. Johnston recalled that they believed that the petitioner's guilty plea would be considered as a mitigating factor by the

trial court. In relation to waiving jury sentencing, Mr. Johnston testified that "we thought it would be in Mr. Henderson's best interest to have the court do the sentencing." The opinion of the defense team was that Judge Blackwood was personally opposed to the death penalty, and this opinion was influential in guiding their advice to the petitioner. In hindsight, Mr. Johnston conceded that he "wish[ed] that a jury would have been empaneled and that they would have fought the case on the merits."

Mr. Mosier testified that the petitioner made inquiry as to the possibility of entering a guilty plea in December 1997. The petitioner penned at least three (3) or four (4) more letters discussing the advantages of entering a guilty plea. Mr. Mosier verified Mr. Johnston's opinion that Judge Blackwood was opposed to the death penalty. However, he testified that the decision of whether to waive a jury trial was left entirely to the petitioner. Trial counsel advised him of the advantages and disadvantages of waiving a jury in a capital sentencing trial. These factors included weighing the circumstances of this particular case, which included the senseless killing of a law enforcement officer. . . . Again is (sic) should be noted that the petitioner did not testify at the post-conviction evidentiary hearing, so there is no direct evidence in this record that but for counsel's alleged deficiencies he would not have pled guilty or submitted his case to the trial judge for sentencing.

Prior to entry of the plea, the trial court extensively questioned the petitioner regarding his decision to enter a guilty plea and to waive jury sentencing. This colloquy, which covers nearly twenty (20) full pages of transcript, reveals that the trial court made every attempt to discern that: (1) the petitioner was fully aware of and understood the nature of the charges and potential sentences against him; (2) the petitioner understood that he had the right to plead not guilty as to all of the charges and have a jury determine his guilt or innocence, explaining that a jury could find the petitioner guilty of some, all, or none of the charges; (3) the petitioner understood that he could be convicted of a lesser-included offense of the charged offense; . . . (7) the petitioner understood that, as part of the plea, the State would dismiss three counts of the indictment charging the petitioner with felony murder; (8) the petitioner had discussed the decision to enter a

> guilty plea and waive jury sentencing with his attorneys, (9) the petitioner was satisfied with the representation provided him by appointed counsel and by the appointed experts; and (10) the petitioner was not suffering from any mental illness or disorder. On at least five (5) separate occasions, the trial court asked the petitioner whether his decision to waive his right to a jury trial as to guilt and to waive his right to a jury trial as to capital sentencing were entered freely and voluntarily. The record preponderates against any conclusion that the petitioner had no knowledge as to the impact of his decision to enter guilty pleas and waive jury sentencing.
>
> A defendant asserting that his counsel was ineffective must show more than that counsel's advice was merely wrong. He must also show that it was completely unreasonable so that it bears no relationship to a possible defense strategy. *See* Hatch, 58 F.3d at 1459. Further, the petitioner must show that but for trial counsel's advice, he would not have pled guilty and would have insisted on going to trial. There is no dispute that the evidence establishing the petitioner's guilt as to the first degree murder of Deputy Bishop was overwhelming. Also, the petitioner has failed to establish that trial counsel's advice regarding entry of a guilty plea was unreasonable.

Henderson, 2005 WL 1541855, at **36-38.[10]

The two-part test articulated in Strickland applies to challenges to guilty pleas based on ineffective assistance of counsel. Hill, 474 U.S. at 57-58. When a "defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" Id. at 56 (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)); see Tollett v. Henderson,

[10] (See ECF No. 72 at 72-85 (ineffective assistance analysis related to waiver of jury sentencing.)

411 U.S. 258, 267-68 (1973) (a voluntary and intelligent guilty plea may not be vacated because counsel did not advise of every conceivable constitutional issue; the interests of the accused "are not advanced by challenges that would only delay the inevitable date of prosecution").

Moreover, "in order to satisfy [Strickland's] 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59. The Supreme Court stated:

> [i]n many guilty plea cases, the "prejudice" inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than going to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.

Id.

At the post-conviction hearing, Mosier testified about Henderson's inquiries related to a guilty plea:

> On July 6, 1998, Ms. Fenyes informed Mr. Mosier that the mitigation evidence that she had gathered was not helpful and that she would need more time. Mr. Mosier "felt like that all that there was left for him was to try to demonstrate to the judge his acceptance of responsibility, and by putting him on the stand, let him show remorse for what he did." This information formed

> part of the basis for counsel's motion for continuance submitted on July 6. After the continuance was granted on July 6, Mr. Mosier, at the petitioner's request, approached the prosecution in an attempt to seek a life sentence in exchange for a guilty plea. Mr. Mosier stated, however, that the possibility of entering a guilty plea was discussed in December 1997. Indeed, the petitioner wrote counsel a letter asking about the benefits of entering a guilty plea. Specifically, he inquired as to whether his showing of remorse would persuade the judge to spare him the death penalty and get him a life sentence. Counsel received three (3) or four (4) letters of this nature. The first letter dated December 21, 1997, made inquiry as to pleading guilty and hoping for mercy. The next letter dated January 11, 1998, evidenced an apology to Deputy Bishop and his family, but noting that the death penalty should not be imposed. On January 14, 1998, a third letter was written by the petitioner asking what would happen to the other charges if he pled guilty to first degree murder. The petitioner added that the victim's family would be assured that he would never be eligible for parole. The letter further asked that the trial be moved to another county at a later date from the scheduled March 9, 1998, trial. The petitioner penned a fourth letter on January 23, 1998. In this letter, he again indicated a desire for a change of venue and recusal of the trial judge. . . . Investigator Pugh and Sheriff Kelly wrote a letter recommending that the death penalty not be imposed. The District Attorney's Office was informed on numerous occasions about the petitioner's willingness to accept a life sentence. In other words, Mr. Mosier "acted on what was valid, and what had no basis in law or fact, I took no action on."

Henderson, 2005 WL 1541855, at *8.

Henderson argues that counsel was ineffective for advising him to plead guilty when the plea would prove two of the four aggravating circumstances. (ECF No. 77 at 12.)[11] He asserts that the

[11] Previously Henderson's counsel argued that trial counsel were ineffective because three of four aggravating circumstances would be proven through the plea, see supra p. 20. This Court determined that the overwhelming evidence of the aggravating factors and that the detrimental effect of new evidence about Henderson's criminal behavior prevented him from demonstrating (continued...)

plea was an admission that he was in custody at the time of the murder and that Bishop was a law enforcement officer. (Id. at 12 n.7.) Further, Henderson asserts that Mosier admitted that the advice to plead guilty was based on hope that the trial court would give him a life sentence, not strategy. (Id. at 12.)[12] Henderson argues that counsel's advice was "antithetical to the laws of the State of Tennessee," and therefore, counsel abdicated his role as legal counsel. (Id. at 13.) He asserts that had counsel properly investigated and read the discovery provided by the State, he would not have advised Henderson to plead guilty, and Henderson would not have agreed to plead guilty. (Id. at 13.)

Henderson compares the advice his counsel gave on the plea and waiver of jury sentencing to the advice found to constitute deficient performance in Padilla v. Kentucky, 130 S. Ct. 1473, 1483-84 (2010). In Padilla, the defendant pled guilty to a drug charge based on his attorney's representation that the plea would not affect his immigration status. Id. at 1477-78. Henderson contends that if trial counsel had read the statute, he would have known that the death sentence was "mandated." (ECF No. 77 at 14.)

Henderson argues that § 2254(d) does not bar habeas relief because (1) the Tennessee Court of Criminal Appeals' finding that

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[11] (...continued)
prejudice. (See ECF No. 72 at 94-95.)

[12] Henderson relies on Mosier's April 12, 2012 affidavit (ECF No. 77-1) which can not be considered based on Pinholster.

counsel's advice was a "a conscious decision between two (2) viable options"[13] was an unreasonable determination of facts (ECF No. 77 at 15-16, 21-22; see ECF No. 68 at 69-70); (2) the court unreasonably applied Strickland and Hill by using a "completely unreasonable" standard which is contrary to Supreme Court precedent (ECF No. 77 at 16-19; see ECF No. 68 at 67-69); and (3) the court applied an outcome determinative test contrary to Supreme Court precedent (ECF No. 77 at 19-20; see ECF No. 68 at 65-67).

1. Unreasonable Determination of Fact

Henderson argues that the Tennessee Court of Criminal Appeals' conclusion that he had "two viable options" is "patently unreasonable" in light of counsel's failure to investigate and develop a mitigation theory, particularly when counsel knew at the time that they did not have mitigation proof to outweigh the aggravating factors. (ECF No. 77 at 15; see ECF No. 68 at 69-70.) Henderson contends that his counsel advised him that he had "no other viable option than to plead guilty and have the court sentence him." (ECF No. 77 at 15.)

Johnston recalled that he and Mosier believed Henderson's guilty plea would be considered a mitigating factor by the trial court. Henderson, 2005 WL 1541855, at *37. Mosier testified that "all that there was left for him (Henderson) was to try to demonstrate to the judge his acceptance of responsibility and by

[13] Henderson, 2005 WL 1541855, at *39.

putting him on the stand, let him show remorse for what he did. And I was hoping that would tip the scales." (ECF No. 23-2 at 57.)

The Tennessee Court of Criminal Appeals' reference to the plea colloquy was not to demonstrate that because there was a colloquy, counsel was excused from any duty to reasonably advise Henderson about the plea. Henderson, through the colloquy, indicated that he understood the nature of the charges and his sentence exposure, that he had the right to plead not guilty and the right for a jury to determine his innocence, and that if he went to trial, a jury might find him guilty of an offense less than first degree murder. (ECF No. 20-2 at 78-83.) Henderson stated that he had discussed this matter with his attorney and that his decision was being made in accordance with counsel's advice. (Id. at 87.) The court noted that Henderson was made aware that if he entered a plea, his sentencing options were limited to life, life without parole, or death and that counsel made no guarantee that a plea would prevent imposition of the death penalty. Henderson, 2005 WL 1541855, at **37, 39. (See id. at 85.) The plea colloquy demonstrated that Henderson was aware of and understood the charges and potential sentence he faced, that he had a right not to plead guilty and have a jury determine his guilt or innocence and that he could be convicted of a lesser-included offense. Henderson, 2005 WL 1541855, at *37.

Henderson had the option to plead guilty and hope that the trier of fact would view the plea as an acceptance of responsibility for the crime or to go to trial and be faced with overwhelming evidence of his guilt. The predicted outcome of either a guilty plea or trial was basically the same - that Henderson would be convicted. Even considering the affect of a guilty plea on the penalty phase, neither option presented a particularly favorable outcome or guaranteed that Henderson would receive a life sentence instead of death. Henderson was aware of the likelihood of a conviction regardless of whether a trial was conducted and of the sentencing options. The state court's factual determination is presumed to be correct, and Henderson has not presented clear and convincing evidence to rebut the presumption of correctness. See 28 U.S.C. § 2254(e)(1).

2. Contrary to and an Unreasonable Application of Strickland and Hill

Henderson argues that the Tennessee Court of Criminal Appeals' analysis of counsel's performance in relation to the guilty plea was an unreasonable application of Strickland and Hill. (ECF No. 77 at 16.) The court stated:

> The evidence against the petitioner was overwhelming, as was the evidence of the statutory aggravating factors. Moreover, it is clear from the colloquy at the guilty plea hearing that the petitioner was informed that the trial court could impose a sentence of life, life without parole, or death. Thus, the petitioner made a conscious decision between two (2) viable options. Without more, the petitioner has failed to prove that counsel's advice

> was completely unreasonable. He is not entitled to relief on this issue.

Henderson, 2005 WL 1541855, at *39. Henderson contends that the court failed to contemplate that counsel's advice was predicated entirely on counsel's trust that the judge would "follow his conscience rather than the law." (ECF No. 77 at 17.) He argues that contrary to the petitioner's counsel in Fields v. Gibson, 277 F.3d 1203, 1217 (10th Cir. 2002), Henderson's lawyers did not take all the information they learned and use it to advise him of his best course of action. (Id. at 18.) He asserts that counsel's advice on the plea was based on two factors: (1) the failure to conduct a mitigation investigation; and (2) counsel's personal belief that the trial court would base his decision on something other than Tennessee law. (Id.)

The Court addressed Henderson's argument that the Tennessee Court of Criminal Appeals' decision was contrary to Supreme Court precedent because it applied a "completely unreasonable" standard in its decision on the motion for summary judgment. (See ECF No. 72 at 81-82.) For the reasons previously stated, the Court finds that the Tennessee Court of Criminal Appeals' use of the term "completely unreasonable" in its analysis of the ineffective assistance of counsel issues is not contrary to Supreme Court precedent. See Byrd v. Workman, 645 F.3d 1159, 1167-68 (10th Cir. 2011) (applying the "highly deferential" first prong of the Strickland analysis by determining deficient performance based on

whether counsel's performance was "completely unreasonable"); see also Parker v. Jones, 423 F. App'x 824, 828 (10th Cir. 2011) ("strategic decisions are constitutionally ineffective only if they are "completely unreasonable"). The Court now turns to whether the Tennessee Court of Criminal Appeals' unreasonably applied Supreme Court precedent in its analysis of the guilty plea.

In Florida v. Nixon, 543 U.S. 175, 191-92 (2004), the Supreme Court recognized the difficult challenges related to developing trial strategies in a capital case:

> Attorneys representing capital defendants face daunting challenges in developing trial strategies, not least because the defendant's guilt is often clear. Prosecutors are more likely to seek the death penalty, and to refuse to accept a plea to a life sentence, when the evidence is overwhelming and the crime heinous. In such cases, "avoiding execution [may be] the best and only realistic result possible."

Id. at 191 (citations omitted). The Court found it reasonable for counsel to focus on the penalty stage and stated, "In this light, counsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in 'a useless charade'" by pleading not guilty in the face of overwhelming evidence to the contrary. Id. at 192.

In Post v. Bradshaw, 621 F.3d 406, 415-18 (6th Cir. 2010), cert. denied, 131 S. Ct. 2902 (2011), the Sixth Circuit considered whether counsel was ineffective in advising a capital defendant to plead no contest when no benefit had been secured in return for the plea. The Ohio Supreme Court held that Post's counsel's strategy

was reasonable because of the hopelessness of Post preceding to trial, the overwhelming evidence of his guilt, and the benefit of preserving an evidentiary issue for appellate review. Id. at 416. The Sixth Circuit held that the Ohio Supreme Court unreasonably applied Strickland in determining that there was no ineffective assistance because Post was "virtually certain to be found guilty." Id. The Sixth Circuit noted that a no-contest plea and a trial are not equivalent and that the Ohio Supreme Court's decision ignored the loss of Post's constitutional right to a trial by jury. Id. However, on de novo review, the Sixth Circuit determined that counsel's strategy of using the plea as a mitigating factor was professionally reasonable given the overwhelming evidence of guilt and Post's weak mitigation case. Id. at 417-18.

The Tennessee Court of Criminal Appeals appropriately relied on Strickland and Hill. Counsel's performance was reasonable in advising Henderson to plea, given the overwhelming evidence of Henderson's guilt, the limited mitigation evidence available, and counsel's belief that the judge was morally and philosophically opposed to the death penalty. (See ECF No. 23-2 at 53-54.) In Hill, 474 U.S. at 59, the Court noted that the assessment of prejudice with a guilty plea relies, in part, on whether new evidence discovered by counsel would have changed the outcome of the trial, see supra p. 24. Even if Henderson had been tried before a jury, the overwhelming evidence of his guilt and of the statutory

aggravating factors would not have altered the outcome. Henderson can not demonstrate prejudice from the guilty plea. See Goodwin v. Johnson, 632 F.3d 301, 309-11 (6th Cir. 2011) (strategy to concede guilt on associated felony to avoid guilty verdict on death specifications is not deficient performance); see Wright v. Lafler, 247 F. App'x 701, 708 (6th Cir. 2007) (finding no ineffective assistance where defendant has "no alternative other than proceeding to trial where, in light of the overwhelming evidence against him, he almost certainly would have been found guilty"); see also Hodges v. Bell, 548 F. Supp. 2d 485, 518 (M.D. Tenn. 2008) (finding no ineffective assistance where counsel sought to demonstrate defendant's remorse through a guilty plea and limit the State's proof because of the overwhelming evidence of guilt).

3. Outcome Determinative Test

Henderson argues that the Tennessee Court of Criminal Appeals' decision is contrary to and an unreasonable application of clearly established federal law. (ECF No. 77 at 19-20; see ECF No. 87 at 9-11.) Henderson asserts that the outcome determinative test used by the court -"that counsel were not ineffective because the evidence of Henderson's guilt was overwhelming, as were the aggravating factors" - is contrary to the mandate of Strickland and Hill, because it required Henderson to prove that he would have prevailed had the case gone to trial. (Id. at 9-10.) Henderson emphasizes that his burden under Hill was to show that there is a reasonable

probability that, but for counsel's errors, he would not have pleaded guilty and waived jury sentencing, but not that he would have been acquitted. (Id. at 10.) He argues that trial counsel would not have advised Henderson to plead guilty if counsel had conducted an adequate mitigation investigation and read discovery. (Id. at 11.)

Henderson's argument about the outcome determinative test fails. The prejudice prong of the Strickland analysis includes an assessment of whether evidence or information not known to counsel would have changed the outcome of the trial, see supra p. 24. The Tennessee Court of Criminal Appeals did not err in considering the overwhelming evidence that proved both Henderson's guilt and established the statutory aggravating factors. Further, Henderson did not testify in the post-conviction evidentiary hearing and presented "no direct evidence in this record that but for counsel's alleged deficiencies he would not have pled guilty. . . ." Henderson, 2005 WL 1541855, at *37; see supra p. 22.

4. Other Claims Related to the Guilty Plea

The Court finds no merit to Henderson's ineffective assistance of counsel claims about the timing of the plea, that there was no plea bargain, and that a mental evaluation had not been conducted. The timing of Henderson's guilty plea is irrelevant to a determination of ineffective assistance of counsel so long as Henderson understood and voluntarily entered into the plea. United

States v. Lundy, 484 F.3d 480, 484 (7th Cir. 2007) (connecting the prejudice aspect of an ineffective assistance claim to a determination of the voluntariness of the plea). The continuance granted the morning prior to Henderson's plea would have alleviated much of the pressure on Henderson to plead guilty. Henderson has not presented proof that he was under duress or that he would not have pled guilty based merely on the fact that the plea occurred on the same day that the trial had been scheduled. Further, the fact that Henderson did not enter into a plea bargain is not relevant to the court's finding because given the overwhelming evidence against Henderson, counsel was reasonable in advising him to plead guilty, see supra pp. 32-33.

Henderson also contends that counsel should not have advised him to plea because they thought he was mentally ill. (ECF No. 16 at 9, ¶ 8(h)(3).) Henderson's assertion that counsel thought he was mentally ill is contradictory to Mosier's testimony at the post-conviction hearing. Mosier testified:

> Well, at the time that Mr. Henderson entered his plea, what I was really concerned about was the insanity issue, which, from my meetings with him, it never crossed my mind, and Dr. Zager early on told me that that would not be a defense. He wasn't lacking in mental capacity. Mr. Henderson was very bright, he was very cooperative, he was very well mannered, very polite, easy to work with. There was nothing that Dr. Zager had found up to the point of July 6 that would operate as any kind of affirmative defense, only for possible use as mitigation in a sentencing hearing. And what she found after she completed her tests, it was pretty thin, but it's all we had to go on.

(ECF No. 23-2 at 58-59.) There was no evidence at trial, sentencing, or at post-conviction that indicated that Henderson was incompetent to make the plea. (See ECF No. 72 at 122-23.) Counsel's performance in relying on the mental health information available to him pre-trial and at the plea was not unreasonable and does not constitute deficient performance.[14]

The Tennessee Court of Criminal Appeals' decision was not contrary to or an unreasonable application of clearly established federal law or based on an unreasonable determination of facts. Counsel's strategy in advising Henderson to enter a guilty plea was not deficient performance. Further, Henderson has not demonstrated prejudice. The claim of ineffective assistance of counsel as it relates to the guilty plea in ¶8(h) of the Amended Petition is without merit and DENIED.

2. Ineffective Assistance of Counsel at Sentencing (¶¶ 9(b-c, d(4), e, h, k & f(1))

Henderson alleged in his habeas petition that counsel failed to: properly investigate and prepare for the sentencing hearing (¶ 9(b)); talk with Henderson about his social history or background (¶ 9(c)); investigate and develop evidence about Henderson's brain damage (¶ 9(d)(4)); educate themselves about Zager's diagnosis of Henderson as having narcissistic personality disorder (¶ 9(e));

[14] In 2008, more than ten years after the plea, Woods concluded that Henderson could not make a voluntary, intelligent, and knowing waiver of his rights to a jury trial and to be sentenced by a jury. (ECF No. 68-2 at 13-14.) However, consideration of this evidence is barred by Pinholster.

identify and procure a psychiatrist and experts for neurological testing and neuropsychological testing (¶ 9(f)(1)); object to the trial court's request to confer with Fenyes (¶ 9(h)); and develop a theory of mitigation (¶ 9(k)). (See ECF No. 16 at 12-32.) These allegations were addressed in Henderson's post-conviction claim of ineffective assistance of counsel. (See ECF No. 72 at 65-71.)

The Tennessee Court of Criminal Appeals opined:

> **7. Trial counsel failed to develop and introduce mitigation evidence.**
>
> The petitioner asserts that trial counsel failed to adequately utilize the services of a mitigation specialist to prepare a social history and timeline relating to the petitioner's life. In support of his allegations, the petitioner relies upon the testimony of his expert, Dr. Frank Einstein, who testified that Ms. Fenyes, the mitigation specialist, spent less than 38.5 hours working on mitigation from the time of her appointment until June 30, 1998. Dr. Einstein calculated that Ms. Fenyes spent an additional 28.9 hours on the case from June 30, 1998, until July 6, 1998, the date of the petitioner's guilty plea. Dr. Einstein testified that Ms. Fenyes worked an additional 43.5 hours between the date of the guilty plea on July 6 and the sentencing hearing held on July 13.
>
> The petitioner contends that he has established his assertion through the testimony of lay witnesses and the introduction of medical records. He argues that evidence existed that would have raised serious issues about the existence of a mental disease or defect and would have provided significant mitigation. Specifically, the petitioner asserts that the need for further psychiatric evaluation would have been triggered had the defense team secured information relating to the history of mental illness in his extended family members and the petitioner's behavior during the two (2) years prior to the murder of Deputy Bishop. In this regard, the petitioner relies upon the diagnosis of Dr. Kenner that the petitioner suffers from bipolar disorder 2.

At the sentencing hearing, the defense team presented the testimony of four (4) witnesses. The petitioner testified that he was a twenty-four-year-old high school graduate and that he was the eldest of five (5) sons. Trial counsel introduced evidence of the petitioner's achievements in both elementary and high school, including fourteen (14) achievement awards from Central Elementary School during the period between 1985 and 1988 and two (2) awards related to the petitioner's participation in the Fayette County Athletic League. The petitioner also testified to being very involved in extracurricular activities during high school, including the following: basketball team, 4-H Club president, student body president, track and baseball. Miles Wilson, the principal of Fayette-Ware High School, further testified that the petitioner was an officer in the library club and a member of the Esquire club. He participated both as an athlete and a coach in the Fayette County Athletic League. The petitioner's talent as an artist was also explored, emphasizing that he had won a contest naming Sonic Restaurant's newspaper and drawing the cover for the paper and winning first place in an art contest with his drawing of the Fayette County Courthouse. The petitioner also testified that he drew the logo and designed the window for Somerville Electronics.

When testifying, the petitioner expressed his remorse and apologies to Deputy Bishop's family and to the Fayette County Sheriff's Department. He stated that, while incarcerated in Arkansas, he asked his mother to inquire as to obtaining him psychological help because "things that I was going through mentally wasn't normal." He stated that his mother contacted the sheriff but that nothing was done.

The petitioner's high school principal, Miles Wilson, stated that the petitioner was respectful to faculty members and that he had positive interaction with the other students, with the exception of two incidents. Mr. Wilson stated that the petitioner's mother was in denial that the petitioner could do anything wrong.

The petitioner's mother, Sally Johnson, testified that she was fifteen (15) years old when the petitioner was born. She did not marry the petitioner's father. She did not recall the petitioner having any problem with other students during high school, although she remembered one

incident when the petitioner left the campus with his girlfriend. She also vaguely recalled the petitioner requesting psychological treatment. She could not recall what happened. Mrs. Johnson blamed the petitioner's girlfriend, Natonya Cobb, for his behavior.

Dr. Lynn Zager, a clinical psychologist, testified regarding her meetings and evaluations of the petitioner. She diagnosed the petitioner with a dissociative state, narcissistic traits and antisocial traits.

Trial counsel testified at the post-conviction hearing that they presented all of the mitigating evidence that they had collected. The petitioner now alleges that trial counsel was ineffective for failing to present a complete mitigation profile. His complaints include counsel's: (1) failure to interview extended family members to reveal a family history of mental illness; (2) failure to seek additional psychological evaluation to reveal a diagnosis of bipolar disorder; and (3) failure to complete investigation to sufficiently indicate marked change in behavior, including (a) a change in sleep patterns, (b) the fact that his victims were people that he knew, (c) exhibitions of depression, and (d) indication of religious ideation.

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, 93 L. Ed. 2d 934 (1987); *see* Eddings v. Oklahoma, 455 U.S. 104, 113-15, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 604-05, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) (plurality opinion); Zagorski v. State, 983 S.W.2d 654, 657-58 (Tenn. 1998); *Goad*, 938 S.W.2d at 369. The right that capital defendants have to present a vast array of personal information in mitigation at the sentencing phase, however, is constitutionally distinct from the question whether counsel's choice of what information to present to the jury was professionally reasonable.

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

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

It appears that the crux of the petitioner's complaint is the failure to introduce evidence regarding the alleged existence of a bipolar type 2 mental illness. The existence of such a mental illness would have been apparent, suggests the petitioner, had trial counsel discovered a family history of mental illness and evidence of the petitioner's erratic criminal behavior. Dr. Zager failed to diagnosis the petitioner with anything more severe than a personality disorder. The petitioner blames this diagnosis on trial counsel's

> failure to gather sufficient information. The petitioner ignores the fact that Dr. Zager's diagnosis remained the same even after reviewing the additional information. Moreover, the petitioner's own post-conviction witness, Dr. Auble, arrived at essentially the same diagnosis as Dr. Zager. While Dr. Kenner eventually diagnosed the petitioner as Bipolar Type 2, his diagnosis would have necessitated the introduction of evidence regarding the petitioner's escalating history of violent crime, which is a tactic with considerable risk. The petitioner's claim, at best, amounts to an assertion that counsel should have obtained an expert who would have diagnosed the petitioner as Bipolar Type 2. The Constitution does not require attorneys to "shop around" for more favorable expert testimony. Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992). Additionally, the necessary introduction of the petitioner's violent criminal behavior could have undermined this mitigating factor and outweighed any beneficial mitigating impact of the mental illness evidence. This "undiscovered" mitigation evidence raised by the petitioner was correctly characterized by the post-conviction court as being a "double-edged sword."
>
> Given the strength of the proof of the aggravating circumstances relied upon by the State, the mitigation evidence that was presented at sentencing and the possible negative impact of the "undiscovered" mitigation evidence, we conclude that had this information been presented to the court there is little reason to believe the trial judge would impose a sentence other than death. The petitioner is not entitled to relief on this basis. Indeed, in this case, unlike the situation where a jury imposes a death sentence, we are not left to speculate to some degree as to the effect this evidence might have had on the sentencer. The sentencer in this case, the trial judge himself, found this evidence would not have altered the result of the sentencing hearing.

Henderson, 2005 WL 1541855, at **39-43 (footnote omitted).

The Strickland analysis applies to Henderson's claim that counsel failed to investigate and present sufficient mitigating evidence. Wong v. Belmontes, 130 S. Ct. 383, 384-85 (2009). Counsel has an obligation to conduct a thorough investigation into the

defendant's background. Williams, 529 U.S. at 396. Counsel has at a minimum a duty to take the first step of interviewing witnesses and requesting records. Porter v. McCollum, 130 S. Ct. 447, 453 (2009). Counsel falls short of meeting reasonable professional standards when they fail to expand their investigation of the defendant's life history based on the initial information obtained. Wiggins v. Smith, 539 U.S. 510, 524 (2003) (ineffective assistance found when counsel abandons their investigation after having acquired only rudimentary knowledge of the defendant's history from a narrow set of sources). The Supreme Court held that defendants have "a right - indeed, a constitutionally protected right - to provide the jury with the mitigating evidence that their trial counsel either failed to discover or failed to offer." Williams, 529 U.S. at 393.

a. The mitigation investigation

Askew's investigation of the case was limited to interviewing a few witnesses for the guilt phase and obtaining some criminal and medical records, supra p. 18. Fenyes was much more involved in the investigation related to the mitigation phase. Fenyes' four-page mitigation report was made an exhibit at the post-conviction

hearing. (ECF No. 23-12 at 9-12.) Fenyes interviewed[15] the following persons (either in person or by phone):

1. Kenneth A. Henderson
2. Sally Johnson
3. T.L. Johnson
4. Darrell Johnson
5. T. L. Johnson, Jr.
6. Lorenzo Henderson
7. Leroy Henderson
8. Myles Wilson[16]
9. Hortense Carpenter
10. Rose Cross
11. Bennie Perry
12. Walter Perry
13. Charles Brewer
14. Rev. George Hester

(ECF No. 23-13 at 59.) The trial team obtained school, medical, employment, corrections, and Department of Human Services records. (Id. at 60.) Askew wrote two reports of interviews with Sally Johnson (Id. at 119-20) and T.L. Johnson (ECF No. 23-14 at 2-3). Otherwise, there are no memos or reports summarizing or analyzing the information from Fenyes' interviews or the records collected. (See ECF No. 23-13 at 59-60.) Zager created a "social history" with background information on Henderson including Henderson's report of two head injuries, one from a car accident in 1985 and one while working at Buds' Warehouse in 1993. (Id. at 51-56.) At trial,

[15] Fenyes did not testify in the post-conviction proceedings. Einstein's testimony and report outlined the work Fenyes performed on the case. (See ECF No. 23-13 at 57-66.) Fenyes also noted what work she had completed as of the scheduled trial date in the *in camera* hearing with Judge Blackwood. (See ECF No. 20-3 at 28-45.)

[16] The Tennessee Court of Criminal Appeals referred to the testimony of "Miles" Wilson in the mitigation phase. Henderson, 2005 WL 1541855, at *41.

counsel presented mitigation proof from Henderson, Miles Wilson[17], Sally Johnson, and Zager, see supra pp. 37-38. (See ECF No. 20-4 at 7.)

b. The post-conviction mitigation proof

David Chearis, Tonya Whitmore, Tempie Whitmore, Willie Mae Henderson Armour, Barbara Weddle, Margaret Henderson Simmons, Coach Larry Ransom, and Shirley Shelby testified as lay witnesses on Henderson's behalf. Henderson, 2005 WL 1541855, at **11-14. The Tennessee Court of Criminal Appeals summarized their testimony as follows:

> David Louis Chearis testified that in late 1996 and early 1997 he was confined in the Fayette County Jail. Mr. Chearis served six (6) months in the jail, leaving the jail about a month and a half before the murder of Deputy Bishop. During his confinement, he had the opportunity to observe the petitioner. Chearis knew the petitioner prior to incarceration, however, as the two men were "supposed to be some kin" and, generally, from "being on the streets." He also recalled publicity the petitioner received from playing basketball in high school.
>
> Mr. Chearis noted that the petitioner was "like laid back and didn't really associate . . . with other inmates . . . and mostly stayed to himself, drawing . . . listening to his music. . . ." He observed that the petitioner slept most of the time, not rising until time to "get his 12 o'clock sandwich." This behavior of staying to himself persisted for about five-and-one-half (5 ½) months. He then changed. The petitioner started playing games, card games, arm wrestling, and other things. He starting getting out of bed earlier. He began associating with the other inmates. Mr. Chearis described the petitioner's changed behavior as "risky," explaining that when you started playing games you ran the risk of being in a fight. He further observed that the petitioner stopped

[17] Wilson was Henderson's high school principal. (ECF No. 20-5 at 46.)

"draw[ing] as much." Previously, he would draw pictures of his girlfriend, his mother and Michael Jordan, all people that he liked. After his behavioral change, he "got into a lot of tattoos."

On cross-examination, Mr. Chearis conceded that it was possible that the fact that the the (sic) petitioner was in possession of a handgun and was planning a murder was the reason behind his change in behavior.

Barbara Weddle, a retired school teacher, testified that she first encountered the petitioner in elementary school. Ms. Weddle was the fourth and fifth grade teacher at Central Elementary. Although the petitioner was not a student of hers, she knew of him because he "had a real good personality." In 1981, Ms. Weddle transferred to Fayette-Ware High School. At the high school, the petitioner was in Ms. Weddle's art class. Ms. Weddle recognized the petitioner's talent for drawing. She encouraged him to enter a contest about drawing the courthouse. The petitioner won the contest and won a dinner at a restaurant. Ms. Weddle always thought of the petitioner as "another Eddie Murphy. . . . He just liked to say funny things and make the kids laugh." She described him as playful, not disruptive. Ms. Weddle could not recall the petitioner's character other than that displayed in her classroom. Ms. Weddle could not recall being contacted by any person on the petitioner's trial team.

Larry Ransom, a teacher and the basketball coach at Fayette-Ware High School, testified that the petitioner played basketball under him at the high school. At the time, Coach Ransom was the assistant coach. He related that the petitioner was a very talented athlete and played hard. The petitioner was present at all practices and got along well with the other players. Coach Ransom could not recall any complaints about the petitioner from any of the teachers. He did state that, during his senior year, the petitioner concentrated more on his art work than on basketball. Despite the petitioner's passion for artwork, Coach Ransom was of the opinion that the petitioner could succeed at basketball at the college level.

On cross-examination, Coach Ransom recalled an incident where the petitioner placed something on the driveway of

the school secretary. He also recalled an incident where the petitioner was involved in a fight on a school bus.

Although Tonya Whitmore went to high school with the petitioner, she did not actually meet him until after graduation when he was working at Sonic. Ms. Whitmore began dating the petitioner in 1993. She stated that, during the time they dated, she spent time with the petitioner and his family. She described the family as "pretty close," "pretty normal," and "[n]othing seemed out of the ordinary. . . ." During the first few months of their relationship, the couple would go places, have fun together, and the petitioner would paint pictures of Ms. Whitmore. At some point, the petitioner changed. He became very violent with her. Ms. Whitmore described one incident in January 1995 where the petitioner had come to her place of employment, broken into her vehicle, and waited for her. When Ms. Whitmore got into her car, [h]e drove around beating [her]." Ms. Whitmore ended up in the emergency room as a result of this incident. Ms. Whitmore initially did not tell anyone that the petitioner was the person that had inflicted the injuries upon her. Later that evening, Ms. Whitmore returned to the hospital and informed them that the petitioner beat her up and that he would kill her. Ms. Whitmore was placed in a room at the hospital until law enforcement officers arrived and made the petitioner leave. Ms. Whitmore later sought a protection order against the petitioner. Ms. Whitmore did have contact with the petitioner via telephone calls. She described these conversations as "[t]wisted, very twisted." She described the petitioner as being like two (2) different people. A few weeks later, the petitioner kidnapped Ms. Whitmore's younger sister, Tina. Ms. Whitmore testified that she broke up with the petitioner after the January 1995 beating, but later reconciled with the petitioner. She stated that she stayed with the petitioner after he started abusing her because he was a "good manipulator and a good conner. . . ."

Tempie Whitmore, Tina and Tonya Whitmore's mother, testified that her initial impression of the petitioner was that he was "odd, strange." She explained, "he just would stare at you and look at you right hard. . . . Looked like he was a little bit withdrawn. . . ." After the incident where Tonya was taken to the hospital, the petitioner telephoned Mrs. Whitmore at her place of employment, stating that he was sorry that he "beat Tonya up like that."

Willie Mae Henderson Armour, the petitioner's "great auntie," testified that her daughter, Cora Johnson, and two (2) of Cora's sons lived with her. Mrs. Armour stated that Cora was at Western State due to a nervous breakdown at the time of the birth of her twins, Penn and Glenn. Glenn Johnson, one of Cora's sons, was currently confined in the Somerville jail. Glenn had previously been hospitalized for mental problems. Mrs. Armour explained that Glenn had "been in and out of different places, and he got hurt in Cookeville, Tennessee, and that could be some of his problem." She stated that Glenn had been raped and it did something to his spine. Mrs. Armour was in the process of trying to get Glenn back into a mental hospital. She described particular incidents of Glenn's behavior, including an incident where he tore her front door off and stabbed his sister in the head.

In addition to Cora and her children's known mental illnesses, Mrs. Armour stated that another aunt, Amelia Winfrey, had "nerve-mental trouble," and her son, Arthur Peter Winfrey "died in Western State Hospital from mental illness." She added that her "great great auntie, Aunt Liza Winfrey, "lost her mind." Aunt Liza's son, Albert Springfield also "lost his mind, and he died in New York." She explained that "they'd just go wild." The mental illness apparently ran on both the maternal and paternal sides of the family.

Margaret Simmons is the sister of Elton Henderson. Ms. Simmons has never met the petitioner and only knows of him through articles relating the murder of Deputy Bishop.[18]

Shirley Shelby testified that she had known the petitioner since he was eight or ten years old. The petitioner was friends with Ms. Shelby's sons. Ms. Shelby was also the petitioner's art teacher. She described him as an "exceptionally talented student." She added that he was also a talented athlete, specifically basketball.

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[18] Simmons is Elton Henderson's half-sister. (ECF No. 23-4 at 41, 130.) A proffer was initially made because there was some question about whether Elton Henderson had been established as Henderson's father. (Id. at 42-43.) Ms. Simmons' mother Veaster Hill, presumably Henderson's paternal grandmother, was diagnosed with manic depression in 1990 or 1991. (Id. at 131.) Simmons' grandmother Novella (Veaster's mother) never left the house and sat in a chair all day. (Id. at 132-33.) Simmons testified that Elton told her that Henderson was his son and that he had been communicating with him in prison. (Id. at 136.) The evidence was then moved into proof. (Id. at 137.)

> Ms. Shelby related an incident where someone broke into her home and held a towel over her face. The person was wearing a ski mask and the house was dark as it was two o'clock in the morning. After chasing the intruder out of the house, Ms. Shelby and her daughters realized that their telephone lines had been cut. They decided to leave in her vehicle. The intruder chased the family away. The intruder then returned to Ms. Shelby's home and took "whatever purse he could find." Ms. Shelby then learned of checks having been written on her account. At some point, someone was able to identify the person who was writing the checks on Ms. Shelby's bank account. The person was identified as the petitioner. Ms. Shelby confirmed that in her recommendations for sentencing of the petitioner in this crime against her she recommended that he be provided psychological counseling.

Henderson, 2005 WL 1541855, at **11-14.

In addition to the testimony of family members and acquaintances, former teachers, Henderson's trial counsel, and victims of crimes perpetrated by Henderson, there was substantial expert testimony presented at the post-conviction hearing. Dr. Pamela Auble, a clinical psychologist, and Dr. William Kenner, a psychiatrist, testified as experts on Henderson's behalf at the post-conviction hearing. The Tennessee Court of Criminal Appeals summarized Auble's testimony as follows:

> Dr. Pamela Auble, a clinical psychologist, explained that the role of an expert is to evaluate the client, sometimes recommending further experts. A major part of the function is to consult with the attorneys and the mitigation specialist. She described the role as an "ongoing process," because the evaluation may lead to new questions, additional records, additional consultations with the team, new information, and so on.
>
> Dr. Auble stated that the MMPI is a personality test consisting of 567 true or false questions. Mainly, the questions are about various aspects of human experience. The test has some mental ability limitations, that is,

you have to be able to read and understand the questions. Additionally, the test is only a "snapshot" of how the person taking the test is at that moment. She stated that the MMPI, on its own, is not a sufficient tool for providing a full picture of a person's psychology because; (1) it does not measure a person's abilities, thinking, reasoning or memory; (2) it is dependent upon the person's ability to describe themselves; and (3) no single test is the answer for everything. Dr. Auble confirmed the importance of the evaluator personally interviewing the client.

Dr. Auble testified that she was involved in the petitioner's case. She interviewed the petitioner, performed a battery of tests, and reviewed some records about his history. She further attested that she had consulted with post-conviction counsel and talked with various persons about the case, their findings, and other aspects of the petitioner's history. Specifically, Dr. Auble administered the Wechsler Memory Scale Third Edition, the Weschler Adult Intelligence Scale Third Edition, the Test of Memory Malingering, the Wisconsin Card Sort, Trailmaking, the Speech Perception Test, the Seashore Rhythm Test, the Tactual Performance Test, the California Verbal Learning Test, the Rey-Osterrieth Complex Figure, the Delis-Kaplan Executive Functioning System, the Finger Oscillation Test, the Grooved Pegboard Test, the Rorschach, the Personality Assessment Inventory, and the Incomplete Sentences Blank. Dr. Auble further reviewed the testimony and notes of Dr. Zager, the records from LeBonheur Children's Medical Center, the report of Dr. Einstein, and a transcript of the sentencing hearing. The review of these materials was completed after Dr. Auble's report was prepared but had no affect on her conclusions. Dr. Auble provided the following test results:

> The testing of the mental abilities told me that [the petitioner] does not have what I would call global or general deficits, but does have some specific problems in his mental abilities.
>
> To be exact, he has some difficulties learning information that he's told. That's a problem for him. He also had some problem in a test of manual dexterity, and he had some variable problems on tests which measure his ability to

> go back and forth between different ideas, to form hypotheses and test them, and to abstract reasoning.
>
> From the personality testing, [the petitioner] has a desire to present himself as a very normal, even maybe supernormal individual. He is likely to minimize or even be unaware of his own problems. He likes people and wants interaction with people. He - in my testing he was less distressed than he was when Dr. Zager saw him. I guess that's sort of a quick summary.

Dr. Auble explained that her findings of neuropsychological deficits was significant because they affect his functioning. She stated that:

> [F]rom the personality testing it was hard for me to draw a lot of conclusions because of his tendency to shut down and to minimize problems, to . . . I don't know that he really has much insight into what his real problems are. So from the personality testing I'm not sure I got underneath, underneath his sort of mask of normalcy that he wants to portray to everyone. . . . I don't think he was as depressed at the time I saw him [as he was when Dr. Zager saw him].

There were indications however that his functioning was not right and his portrayal of himself and his family is inconsistent with reality. Dr. Auble believes that the petitioner is not "aware of his own emotional dynamics."

In comparing her results with those reached by Dr. Zager, Dr. Auble noted that Dr. Zager did not perform some of the testing of mental ability and, therefore, she did not talk about the problems with the petitioner's memory and his rigidity. She did concede that the personality style identified by Dr. Zager was similar to the personality style observed in her evaluation. Dr. Auble further agreed with Dr. Zager's diagnosis as to the petitioner's narcissistic traits and antisocial personality. She conceded that she was unable to diagnosis (sic) the petitioner with an Axis I diagnosis of a major mental disorder.

Henderson, 2005 WL 1541855, at **16-18.

The Tennessee Court of Criminal Appeals summarized Kenner's testimony as follows:

> Dr. William Kenner, a psychiatrist engaged by post-conviction counsel in this case, testified that in formulating his opinion he reviewed:
>
> [Q]uite a stack of material . . . which involved the interviews that had been done with his [Henderson's] family members. I also - and other individuals who had known him over the years. I also had a chance to talk with Shirley Cobb and Tina Whitmore and Tina's mother, Tempie Whitmore, to get their views and experiences with [the petitioner].
>
> In Dr. Kenner's opinion, the petitioner suffered from a bipolar type 2 disorder at the time of Deputy Bishop's murder. He continued to describe bipolar disorder:
>
> > One way to think about bipolar disorder is in terms of the cruise control on a car. The human brain has its own cruise control that sets the pace of our lives, the pace at which we think, act, and so forth. And, you know, some of us have cruise controls that are set quite differently. Some people are slow talking, and others talk very quickly and move on to things and so forth.
> >
> > But when that cruise control becomes defective, some interesting changes take place in an individual. They begin to feel too good. Their thinking can race ahead, oblivious to any warning signs that they would otherwise have heeded when they were in their normal state. They don't need as much sleep as others. And the more manic they get, the less sleep they will need. What often goes with the fast thinking is extremes in the manic's opinion of himself, that it will become grandiose, his thinking will become expansive, and he will feel wonderful in circumstances that most folks would feel pretty just the opposite.
> >
> > The manic patients have the normal human appetites, but they go overboard in terms of pleasure seeking, in terms of having a good

> time, and they will do this heedless of any consequences. . . . The manic will be unable to use good judgment to slow down and reflect on a particular course of action. . . . He may break the law in ways that he would not have done when he was on a more even keel.

Dr. Kenner related the traits of a manic to those of one with a narcissistic personality disorder, stating that a "manic is like a narcissist on methamphetamines." He stated, however, that a narcissist is one who puts himself out as being a rather special person, while a manic, when the mania is over, will resume their normal personality. Regarding the diagnosis of antisocial personality disorder, Dr. Kenner stated that symptoms of this trait begin at age fifteen (15). These traits were not evident in the petitioner. The petitioner was very conscientious and hard working in school.

Dr. Kenner stated that the marked change in the petitioner's personality in early adulthood suggests several things including the use of drugs or the start of a mental illness. There was no indication that the petitioner abused drugs. Dr. Kenner based his diagnosis primarily upon the petitioner's behavior during childhood and high school compared to his behavior in his early adulthood years. Dr. Kenner considered the petitioner's extracurricular activities, noting that he played basketball all four (4) years, he ran track, he was president of the 4-H and the student body at high school, he participated in the art club, he coached and played in the Fayette County Athletic League. Based upon his performance to this point, the petitioner showed great promise, that is, before his bipolar symptoms came into play. There were some signs in high school, specifically sleep disorder systems. His criminal career began with the forging of a Tennessee Department of Employment Security check. The check was made for $104, and the petitioner added a five (5) in front of the amount, making it $5,104. In February 1995, he raped Shirley Cobb, the mother of his girlfriend. The petitioner described his girlfriend Natonya as his wife. In March 1995, he broke into Shirley Shelby's home and stole some purses. In May 1995, he abducted the younger sister of a former girlfriend.

Other events proved insightful in making a diagnosis. In October 1995, the petitioner placed a wedding

announcement in the local paper stating he and Natonya were to be married and giving her last name as Boyland. The announcement further provided that the wedding was to take place on October 14, 1995, at the Adams Mark Hotel with an elegant reception afterwards. Information in the announcement also indicated that the couple were soon to be parents of a baby boy, that Natonya was going to sign a contract with a modeling agency, and that the petitioner was pursuing his art career at the Naegele Outdoor Advertising Company. There was absolutely no truth in the announcement. They were not getting married; she was not pregnant; he was working at Target; he was not pursuing an art career; and Natonya was not signing a modeling contract.

On December 27, 1995, the petitioner was released from jail at 1:17 p.m. By 4:00 pm, he had again abducted Shirley Cobb and raped her. The abduction was in daylight in front of somebody's house. The petitioner began to serve a sentence for aggravated burglary in January 1996. He was on work release in February 7, 1996, when he again abducted Shirley Cobb. On February 9, he released her. Two (2) months later, the petitioner was arrested in Conway, Arkansas, with Natonya Cobb.

Dr. Kenner opined that these events are significantly different from behavior earlier in his life. His family history is heavily loaded for bipolar disorder. The murder of Deputy Bishop occurred during a period of difficulty in sleeping. Moreover, like the other crimes committed by the petitioner, this offense did not make any sense, shooting a deputy and escaping through the middle of town. He stated that Mr. Chearis' description of the petitioner's behavior while at the Fayette County Jail was consistent with a diagnosis of bipolar disorder 2.

Dr. Kenner concluded that, in his opinion, the petitioner was suffering from a major medical illness that affected his abilities to control his behavior in this case. He added that someone suffering from a bipolar disorder would have more difficulty in avoiding this type of criminal behavior than a person without a mental illness. Dr. Kenner stated that the most convincing evidence as to the diagnosis that the petitioner was suffering from bipolar disorder at the time of the murder is the presence of the sleep disorder. However, he placed equal importance on the family history of mental illness and

> the petitioner's presentation that he had a perfect family. He stated that the illness could be supported without the two (2) year history of criminal behavior, but it is much more convincing with the history.
>
> On cross-examination, Dr. Kenner conceded that his information of the petitioner's sleep history was based on the self-report of the petitioner. He related, however, that bipolar disorder was not a mental illness easily or readily "faked" by persons. Dr. Kenner further admitted that none of the petitioner's first-degree biological relatives had bipolar disorder. He stated, however, that there is relevance of a second cousin suffering from a mental illness, but he conceded, this relevance is not recognized in the DSM4.

Henderson, 2005 WL 1541855, at **18-20.

Einstein testified as an expert in the field of mitigation. (ECF No. 23-2 at 75.) He stated that the following categories of information were available and would have been useful to the trial team but not discovered:

> Information regarding the petitioner consisted of the following: (1) changes in the petitioner's behavior during high school years; (2) radical changes in the petitioner's behavior during the two (2) years preceding the murder including but not limited to the alleged rape and kidnapping of his girlfriend's mother; (3) exhibitions of signs of depression and suicidal thoughts; and (4) indication of a strange sort of religious ideation, consisting of spirits that affect his behavior. Information about the petitioner's extended family included: a significant history of mental illness and instability, where at least nine (9) extended family members on both his maternal and paternal side suffered from mental illness.

Id. at *10.

The Tennessee Court of Criminal Appeals summarized the mitigation proof offered during the post-conviction hearing but not submitted at trial as follows:

> The Petitioner was a normal student in grammar and high school. He was a talented basketball player and had a talent for art. About two years prior to this event, his behavior changed. He became violent. He viciously assaulted one girlfriend. He was convicted of some lesser felonies. Thereafter, he abducted the mother of his girlfriend on several occasions while masked. He also raped the mother. Petitioner's clinical psychologist opined that he had a personality disorder, but did not . . . disagree with trial counsel's clinical psychologist, other than she administered more tests. Finally, Dr. Kenner diagnosed the Petitioner as bipolar. . . . Dr. Kenner opined that in order to fully explain the nature of Petitioner's bipolar diagnosis, the trier of fact would have to hear all the details of Petitioner's various assaults, abductions and rapes.

Id. at *21. The court acknowledged that Fenyes did not conduct as extensive a mitigation investigation as Einstein found necessary. Henderson, 2005 WL 1541855, at *21. However, Judge Blackwood placed "little weight" on Einstein's testimony because he opined that it would take two to three years to do a proper mitigation investigation. Id.

With regard to the allegations in ¶ 9(b) related to the investigation of Elton Henderson, Henderson argues that if counsel had conducted the most basic task of a mitigation investigation - interviewing the defendant's family - they would have uncovered critical information "necessary for the diagnosis of Mr. Henderson's severe mental illness." (ECF No. 77 at 6.) Henderson contends that although he was the first in his family to have been formally diagnosed with rapid-cycling Bipolar I disorder, it is clear that his mental illness is genetically inherited. (Id. at 7-8.)

Margaret Henderson Simmons, Elton Henderson's half-sister, testified at the post-conviction hearing, see supra p. 47 n.16. Henderson, 2005 WL 1541855, at *14. (ECF No. 23-4 at 41-43, 130-37.) Her testimony demonstrates that there was mitigation evidence available about a history of mental illness on Henderson's paternal side of the family relevant to the determination of ineffective assistance of counsel.[19] Although counsel experienced difficulties with Henderson's mother, there is no evidence that Henderson's trial counsel attempted to develop mitigation evidence from his father's side of the family. Counsel, contrary to the goal of mitigation, ignored the fact that Henderson was born when his mother was fifteen (15) years old and made every attempt to present Henderson's family with his stepfather as a normal nuclear family. Further, Einstein noted the fact that trial counsel failed to discover that family members on both sides of Henderson's family suffered mental illness, and the Tennessee Court of Criminal Appeals found that counsel was unaware of the history of mental illness in Henderson's family. Henderson, 2005 WL 1541855,at **10, 21.[20]

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[19] Henderson also relies on the declarations of Henderson's paternal uncles Raymond Henderson (ECF No. 74-5) and Augustus Neal (ECF No. 74-10), paternal aunts Margaret Simmons (ECF No. 74-6) and Carolyn Acey (ECF No. 74-7), half-sister Tameka Rhodes (ECF No. 74-8) and her mother Lillian Rhodes (ECF No. 74-9), and Zager (ECF No. 77-3) and the addendum to Dr. George Woods, Jr.'s evaluation (ECF No. 77-2), which were first presented in the habeas proceedings and are barred from consideration under Pinholster. (ECF No. 77 at 7.)

[20] Judge Blackwood was aware from his time working as a district attorney of a history of mental illness and mental retardation in Henderson's (continued...)

In ¶ 9(b), Henderson also asserts that counsel failed to review the discovery provided by the state. (ECF No. 77 at 8.) The Court can only presume that this allegation stems from the general assertion that counsel failed to properly investigate and prepare for the sentencing hearing. (ECF No. 16 at 12.) Henderson contends that the State provided counsel with a copy of the Bureau of Alcohol, Tobacco and Firearms interview with Natonya Cobb, Henderson's former girlfriend and the woman who brought him the gun in jail, which had information about Henderson's repeated abductions and rapes of her mother Shirley Cobb. (ECF No. 77 at 8.) He argues that if counsel had read the discovery, they would have been alerted to the "very obvious red flags" about Henderson's mental health and provided that crucial information to Zager. (Id. at 8-9.)

The record is not clear as to whether counsel read the discovery about Henderson's repeated abductions and rapes of Shirley Cobb. Johnston testified that he had been provided documents or discovery responses from the State, and he believes that he received "the offense report and accompanying documents," including a videotape of Natonya Cobb's statement to federal authorities and a transcript of that statement. (ECF No. 23-1 at

[20] (...continued)
family. (ECF No. 68-3 at 2-3.) Still, Judge Blackwood's July 2008 declaration, even though it appears to present evidence of his knowledge at the time of trial and the post-conviction proceedings, can not be considered because it is barred by Pinholster.

83, 94-97.) Johnston testified that he saw the videotape. (Id. at 97.) He stated that he was unaware of charges from 1996 against Henderson for aggravated kidnapping and aggravated rape. (Id. at 99-100.) Johnston also testified that he was sure that the ATF statements were provided based on a June 29, 1998 letter. (Id. at 104.)

The defense team was unaware of Henderson's criminal history, the bizarre nature of some of the incidents, and the fact that many of his victims were people he knew. In fact, trial counsel argued that the lack of significant criminal history was a statutory mitigating factor that should be considered by the court. Id. at *4. Mosier was not aware of the circumstances surrounding the burglary of Ms. Shelby's home or that she was his art teacher and his friend's mother. (ECF No. 23-2 at 62-63.) He was not aware that Henderson was charged in Shelby County with three attacks on Shirley Cobb, his girlfriend's mother, including kidnapping and rape, until he met with Henderson's post-conviction counsel. (ECF No. 23-2 at 65.) Henderson, 2005 WL 1541855, at *9. Mosier did not recall knowing about the statement Natonya Cobb made to the ATF. (Id. at 67.) However, Judge Blackwood was apparently aware of Henderson's criminal history to some degree. (See ECF No. 20-3 at 34.) Further, it is clear that crucial aspects of Henderson's criminal background were not conveyed to Zager prior to trial. Id. at *16.

In ¶ 9(c), Henderson alleges that counsel failed to talk with him about his social history or background, relying completely on his mitigation specialist and investigator to have these discussions. (ECF No. 16 at 15.) The Tennessee Court of Criminal Appeals addressed aspects of this claim through its evaluation of the relationship between Henderson and his counsel and found that Henderson did not establish that he did not have a working relationship with counsel or what information he could have communicated to counsel that would have aided in his defense. Henderson, 2005 WL 1541855, at *35.[21] There were obvious deficiencies in the social history gathered by the defense team, regardless of whether that information was gathered by counsel or by Fenyes and Askew, see supra p. 58.

With regard to ¶ 9(d)(4), Henderson argues that counsel failed to investigate his traumatic brain injury. (ECF No. 77 at 10-11.) He asserts that because counsel failed to inform Zager of his increasingly erratic behavior, she did not recognize the significance of the traumatic head injury he suffered as a child. (Id. at 11.) He relies on Gur's report (ECF No. 68-1) and Zager's declaration (ECF No. 77-3) which are barred by Pinholster for purposes of § 2254(d)(1) review. (Id.)

[21] This claim is closely related to the allegations in ¶ 8(d) of the amended habeas petition about counsel's failure to develop an adequate attorney-client relationship. (See id. at 6-8; see also ECF No. 72 at 66-67.) The Court addressed the allegations in ¶¶ 8(d) and found that Henderson's relationship with counsel including concerns about his level of communication did not provide a basis for an ineffective assistance of counsel claim. (See ECF No. 72 at 47-55.)

Still, in the post-conviction proceedings, Zager testified that she was aware of Henderson's accident and knew that Henderson had been rendered unconscious. Henderson, 2005 WL 1541855, at *15. (See ECF No. 23-3 at 122, 146.) Prior to the post-conviction proceedings, Zager was provided information about the details of the crimes for which Henderson had been charged and the victim's point of view of those incidents. Id. at *16. After becoming aware of Henderson's criminal behavior, Zager did not offer a different diagnosis in the post-conviction proceedings or relate that behavior to Henderson's accident and possible brain injury. She only stated that it would be prudent to continue to look and see if there was reason to change her diagnosis. Id.[22] Further, the Tennessee Court of Criminal Appeals had the benefit of Auble's testimony about Henderson's neuropsychlogical deficits and functioning and Kenner's conclusions that the changes in behavior were due to the use of drugs or the start of mental illness (namely a bipolar type 2 disorder), see id. at **18-19, with neither of these experts concluding that Henderson's behavior was a result of brain injury. The Tennessee Court of Criminal Appeals' decision that Henderson was not prejudiced by counsel's failure to further

[22] Zager's recent declaration, although barred from consideration by Pinholster, similarly states, "Had I known at the time that Mr. Henderson had a history of increasingly erratic behavior, I would have recognized the importance of Mr. Henderson's head injury and requested further evaluation to assess his neurological functioning." (ECF No. 77-3 at 3.)

investigate the accident and possible brain damage is not unreasonable.

Henderson does not directly address the allegations in ¶ 9(e) about counsel's failure to educate themselves about narcissistic personality disorder. Henderson alleged that had counsel known that someone who is narcissistic would not be perceived as remorseful, but as self-absorbed, they would not have put Henderson on the stand at sentencing. (ECF No. 16 at 21.) Zager concluded that Henderson had "an unspecified personality disorder which exhibited some narcissistic and anti-social traits." Henderson, 2005 WL 1541855, at *3. She testified that the personality disorder was discussed during the defense meeting. Id. at **15-16. Auble agreed with Zager's diagnosis as it related to the narcissistic traits, and Kenner related the traits of a manic (one end of the bipolar spectrum) to those of one with narcissistic personality disorder. Id. at *18.

Henderson's trial counsel hoped that the trial court would consider Henderson's guilty plea as taking responsibility for his actions. Id. at *8. During Henderson's testimony at the sentencing hearing, he expressed sorrow and remorse over his actions and admitted that there was "no reason" for Tommy Bishop's murder. Id. at **3, 41. The state court record states little about whether the trial court considered Henderson to be remorseful for his actions or the effect of Henderson's testimony on the court's decision.

Henderson has not demonstrated that if his counsel had educated himself more about narcissistic personality disorder or had prevented him from testifying at sentence that there was a reasonable probability that the outcome would have been different. The Tennessee Court of Criminal Appeal's "focus was on the 'strength of the proof of the aggravating circumstances' and the negative impact of the 'undiscovered' mitigating evidence." Id. at *43. Henderson's show of remorse did not have enough weight to counter the balance.

With regard to the allegation in ¶ 9(f)(1) about counsel's failure to use a psychiatrist and develop neurological and neuropsychological evidence in mitigation (see ECF No. 16 at 21-22), Henderson asserts that had counsel effectively used experts in the sentencing phase there is a reasonable probability that he would not have been sentenced to death. (ECF No. 68 at 128.) The evidence presented by Zager, Kenner, and Auble, including the previously undeveloped evidence about Henderson's erratic criminal behavior, when balanced against the aggravating factors was not sufficient mitigation to establish prejudice.

With regard to the allegations in ¶ 9(k) that counsel failed to develop a mitigation theory (ECF No. 16 at 26), Henderson asserts that counsel admits that "he knew at the time that 'we did not have mitigation proof sufficient to legally outweigh the aggravating circumstances.'" (ECF No. 77 at 15.) He asserts that

counsel's advice was based on "pure desperation, not legal theory or strategy" and "was borne of inaction and ignorance," and as a result, counsel had nothing of worth to present on Henderson's behalf. (Id. at 15-16.) Henderson relies on Sears v. Upton, 130 S. Ct. 3259 (2010), for the proposition that the Court should not presume that a mitigation theory is reasonable where there has not been a reasonable mitigation investigation, and further that the petitioner is prejudiced as a result of a "false picture" being presented at trial.[23] (ECF No. 77 at 31-33.)

Henderson contends that the drastic changes in his personality and his manic behavior would have been discovered had counsel properly investigated and relayed this information to Zager and that Zager would have recognized that Henderson suffered major mental illness. (ECF No. 16 at 15-17.) He contends that he was born with neurological deficiencies, that he suffers from mixed phase bipolar disorder, and that his counsel failed to investigate, discover, and present this information as mitigation evidence to

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[23] In Sears, 130 S. Ct. at 3265, the Court found that "a more probing prejudice inquiry" should have called into question the reasonableness of counsel's mitigation theory:

> And, more to the point, that a theory might be reasonable, in the abstract, does not obviate the need to analyze whether counsel's failure to conduct an adequate mitigation investigation before arriving at this particular theory prejudiced Sears. The "reasonableness" of counsel's theory was, at this stage in the inquiry, beside the point: Sears might be prejudiced by his counsel's failures, whether his haphazard choice was reasonable or not.

The Court further noted that it has found prejudice where counsel presented "a superficially reasonable mitigation theory during the penalty phase." Id. at 3266.

Judge Blackwood. (ECF No. 68 at 6-7.) He argues that because his counsel had no knowledge of his neurological and psychiatric deficiencies and the impact of these deficiencies on his ability to conform his behavior, the trial court did not hear any of this evidence "though it was the very sort of evidence that would have caused the trial judge to give Kennath Henderson a life sentence." (ECF No. 68 at 19-20.) Henderson presented Judge Blackwood's declaration which stated that he was "aware that Mr. Henderson had family members who had a prior histories (sic) of mental illness and mental retardation" and that he "would have given great weight to any mitigating evidence, especially any evidence of organic brain damage or serious mental illness (other than a personality disorder) or mental retardation." (ECF No. 68-3 at 2-3.) Judge Blackwood stated that he "would have weighed that evidence, along with the aggravating factors". (Id. at 3.) This declaration does not represent information before the state court at the time of its determination, but only Judge Blackwood's hindsight recollections. The state court record, including the trial transcript, Judge Blackwood's post-conviction testimony, and his opinions, are the evidence that must be considered pursuant to a § 2254(d) analysis. The July 16, 2008 declaration is barred from consideration under Pinholster.[24]

[24] Henderson also relies on the post-conviction evaluations of Dr. Ruben C. Gur and Dr. George Woods, Jr. (ECF No. 68-1, 68-2, & 77-2), the declarations of Henderson's paternal uncles Raymond Henderson (ECF No. 74-5) and Augustus Neal (continued...)

The majority of the mitigation investigation in this case was conducted within the one week time period between the guilty plea and the sentencing hearing.[25] Counsel clearly failed to develop a complete social history on Henderson, present this information to the experts, and use it to develop an appropriate mitigation theme. Counsel's performance was deficient at the sentencing phase.

This Court must determine whether there is a reasonable probability that there would have been a different outcome at sentencing if a more complete picture of Henderson's behavior, bipolar disorder, and mental deficits had been presented to the trial court. In determining that Henderson was not prejudiced by counsel's performance, the Tennessee Court of Criminal Appeals placed great emphasis on the fact that the trial judge found that the evidence of Henderson's family history of mental illness and his own diagnosis of bipolar disorder 2 would not have changed the results of the sentencing hearing. Henderson, 2005 WL 154155, at *43.

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[24] (...continued)
(ECF No. 74-10), paternal aunts Margaret Simmons (ECF No. 74-6) and Carolyn Acey (ECF No. 74-7), half-sister Tameka Rhodes (ECF No. 74-8) and her mother Lillian Rhodes (ECF No. 74-9), Mosier (ECF No. 77-1), and Zager (77-3), which were first presented in the habeas proceedings and are barred from consideration under Pinholster.

[25] Trial was set for July 6, 1998, but a continuance was granted. Henderson, 2005 WL 1541855, at *20. The sentencing hearing was conducted one week later on July 13, 1998. Id. A defense team meeting was held on July 10, 1998, three days prior to the sentencing hearing, to formulate a plan about what evidence would be presented. Id. at *16.

During the post-conviction proceedings, Judge Blackwood was made aware of undiscovered mitigating evidence. Blackwood acknowledged that counsel was not aware of Henderson's family's history of mental illness or the violent events that Henderson engaged in shortly before this incident. (ECF No. 22-8 at 77.) Blackwood stated that this case was one where finding mitigation was difficult and presenting mitigation evidence was "a double-edged sword." (Id.) Judge Blackwood determined that the additional mitigation evidence would not have changed his sentencing determination:

> At trial, the statutory aggravating circumstances proven beyond a reasonable doubt by the State were simply overwhelming. The Court considered the mitigating testimony, especially the testimony regarding this personality disorder. This proffered new mitigating testimony regarding Dr. Kenner's bipolar diagnosis, only reinforces the Court's opinion that the aggravating circumstances outweighed, in fact overwhelmed, any mitigating evidence. Two additional points need to be made. The Court is assuming, for argument's purpose that Dr. Kenner's diagnosis is correct. Had this testimony been offered at the trial, the State, of course, would have had an opportunity to rebut same. Then a question of weight would have to be assigned. Secondly, the evidence presented regarding the defendant's abduction of his girlfriend's mother, the rapes, the assaults, lead the Court to the conclusion that the Petitioner's acts were calculated, cold and deliberate. These are the same calculated and deliberate actions that led to the death of Tommy Bishop. Whether or not they were the result of a bipolar condition would not have changed the Court's decision to impose a sentence of death.

(Id. at 78-79.)

c. Rompilla[26], Wiggins, and Strickland

Henderson argues that the Tennessee Court of Criminal Appeals' decision is contrary to and an unreasonable application of Rompilla, Wiggins, and Strickland because the court found that his counsel was not ineffective for failing to investigate Henderson's mental health where the introduction of "evidence regarding the petitioner's escalating history of violent crime" presents "a tactic with considerable risk" and could have "outweighed any beneficial mitigating impact of the mental illness evidence." (ECF No. 87 at 13-14; see ECF No. 77 at 25-39.) See Henderson, 2005 WL 1541855, at *42. Henderson focuses on counsel's duty to investigate Henderson's life, including his criminal and mental health histories, and asserts that the fact that this information presents "a risky strategy does not erase the prejudice Mr. Henderson suffered by counsels' failure to engage in effective representation." (ECF No. 87 at 14.)

In Rompilla, 545 U.S. at 390-91, the Supreme Court held that counsel's failure to look at the file on the defendant's prior conviction and discover information about the defendant being raised in a slum, having prior incarcerations of an assaultive nature related to alcohol use, test results pointing to schizophrenia and other mental disorders, and a third grade level of cognition constituted ineffective assistance. On the issue of

[26] Rompilla v. Beard, 545 U.S. 374 (2005)

prejudice, the Court found that the "accumulated entries would have destroyed the benign conception of Rompilla's upbringing and mental capacity." The Court stated:

> although we suppose it is possible that a jury could have heard it all and still have decided on the death penalty, that is not the test. It goes without saying 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 if the evidence had gone in is "sufficient to undermine confidence in the outcome" actually reached at sentencing.

Id. at 393 (citations omitted).

More recently in Belmontes, 130 S. Ct. at 385, the Supreme Court determined that a petitioner was not prejudiced by counsel's failure to present expert testimony, in mitigation, that would open the door to evidence about a prior murder committed by the petitioner. In Belmontes, trial counsel, as part of his strategy, structured his mitigation arguments and evidence to limit the possibility that evidence of a prior murder was introduced. Id. at 385-86. The Court bypassed the issue of deficient performance because it found that the defendant could not establish prejudice. Id. at 386. In the penalty phase, counsel put on evidence about the defendant's terrible childhood, alcoholic and abusive father, lack of success at school, the deaths of his younger sister and grandmother, and also of his strong family relationships and religious conversion while in state custody. Id. at 387. The Court determined that additional humanizing evidence would have been

cumulative and offered no significant benefit. Id. at 388. The Court further found that the expert testimony that the Ninth Circuit indicated should have been presented would have exposed the defendant to evidence about the prior murder. Id. at 388-89. The Court stated, "Here, the worst kind of bad evidence would have come in with the good." Id. at 390. The Court stated, "*Strickland* does not require the State to "rule out" a sentence of life in prison to prevail. Rather, *Strickland* places the burden on the defendant, . . . , to show a 'reasonable probability' that the result would have been different." Id. at 390-91. The Court stated,

> [i]t is hard to imagine expert testimony and *additional* facts about Belmontes' difficult childhood outweighing the facts of McConnell's murder. It becomes even harder to envision such a result when the evidence that Belmontes had committed another murder - "the most powerful imaginable aggravating evidence" . . . is added to the mix.

Id. at 391.

In Pinholster, 131 S. Ct. at 1410, the Court noted that the proposed new evidence, including the testimony of Dr. Woods, would have been opened to rebuttal by a state expert, and evidence of more serious substance abuse, mental illness, and criminal problems "is also by no means clearly mitigating, as the jury might have concluded that Pinholster was simply beyond rehabilitation." The Court found that that the new material was "not so significant" that the state court's finding of no prejudice was "necessarily unreasonable." Id. The Court found that it was not an unreasonable

application of Supreme Court precedent to conclude that Pinholster did not establish prejudice. Id. at 1411.[27]

The Sixth Circuit has also found that "more limited investigations into a defendant's background" were justified where the evidence presented would have a "double edge." Morales v. Mitchell, 507 F.3d 916, 949 (6th Cir. 2007); see Burdette v. United States, 410 F. App'x 940, 942-43 (6th Cir. 2011) (no prejudice where the psychologist's testimony would have been a double-edged sword).

The Court is presented with the overwhelming evidence of the aggravating factors and the potential detrimental effect of introducing additional evidence about Henderson's criminal behavior in an attempt to mitigate his sentence. The double-edged nature of the new mitigation evidence does not establish a reasonable probability that the outcome at sentencing would change. The Tennessee Court of Criminal Appeals' decision was not contrary to or an unreasonable application of clearly established federal law.

d. Unreasonable Determination of Facts

Henderson argues that the Tennessee Court of Criminal Appeals made an unreasonable determination of fact when it claimed that Zager testified that the new social and criminal history evidence

[27] However, in Porter, 130 S. Ct at 454-56, the Supreme Court found that a petitioner was prejudiced by trial counsel's failure to investigate and present mitigation evidence of the petitioner's heroic military service in the Korean War, his struggles to regain normalcy, his childhood history of physical abuse, and his brain abnormality, cognitive deficits, and limited schooling.

presented during the post-conviction proceedings would not have changed her diagnosis. (ECF No. 77 at 38; ECF No. 87 at 8.) He asserts that the state court denied relief based on misinterpretations of the testimony at the post-conviction hearing. (ECF No. 87 at 8.) He argues that the Tennessee Court of Criminal Appeals unreasonably found that Dr. Pam Auble "arrived at essentially the same diagnosis as Dr. Zager" when in fact Auble uncovered neuropsychological deficits which affect Henderson's functioning and mental flexibility that Zager did not find, and Auble's conclusions were not completely in agreement with Zager. (Id. at 9.)

The Court addressed the claim that the state court misrepresented Zager's testimony about whether she changed her diagnosis after reviewing the new evidence and determined that the Tennessee Court of Criminal Appeals' decision was not based on an unreasonable determination of fact. (ECF No. 72 at 95-96.) The Court addressed Henderson's concerns about whether Zager and Auble made the same diagnosis and held that the Tennessee Court of Criminal Appeals' determination that Auble's diagnosis was "essentially the same" was not an unreasonable determination of fact. (Id. at 96-98.) Further, this Court found that the state court's "focus was on the 'strength of the proof of the aggravating circumstance' and the negative impact of the 'undiscovered' mitigating evidence." (Id. at 97-98.)

The Tennessee Court of Criminal Appeals' decision was not contrary to or an unreasonable application of clearly established federal law and was based on a reasonable determination of the facts in light of the evidence presented. Henderson's claims in ¶¶ 9(b, c, d(4), e, f(1), and k) are without merit and DENIED.

e. Counsel failed to object to the trial court's request to confer with Fenyes in an in-chambers examination (Amended Petition ¶ 9(h).)

Henderson asserts that the trial court's in-chambers discussion with Fenyes was highly improper, violated his attorney-client privilege, and his constitutional rights to due process and to present a defense. (ECF No. 16 at 24.) Henderson asserts that in the *in camera* hearing with Judge Blackwood, Fenyes revealed prejudicial information about Henderson, his family, his mental health, and her belief that none of the information was mitigating. (ECF No. 68 at 49-51, 83, 126-27.)[28] Henderson's trial counsel were not present to hear what information was presented to the judge or make objections. (ECF No. 23-2 at 42.) The purpose of the hearing was to protect counsel's work product and prevent the prosecutor from learning the defense's mitigation theory. (See ECF No. 20-3 at 24.) When Judge Blackwood advised the parties that he was going to question Fenyes about the mitigation investigation, Mosier stated, "we'd prefer that that be done in camera with just you and Ms.

[28] (See ECF No. 20-3 at 25-41 (transcript of the *in camera* hearing).)

Fenyes." (Id. at 24-25.) There is no explanation on the record of why counsel did not attend the hearing.

Fenyes' testimony indicated that there was additional work to be done. (ECF No. 20-3 at 29-33, 38, 40-41.)[29] The trial court granted the time requested to perform the necessary mitigation work. (Id. at 42.) Despite Henderson's arguments that the information Fenyes conveyed to the trial court was prejudicial, this Court has examined the effect of the in-chambers examination on the outcome of the case. (ECF No. 72 at 76-79.) There is no indication that the court relied on Fenyes' representations in-chambers instead of the actual evidence presented at the mitigation hearing. Even if counsel's performance was deficient for failing to object to or attend the hearing, Henderson has not demonstrated that he was prejudiced. The allegations in ¶ 9(h) are without merit and are DENIED.

Henderson has not surpassed the § 2254(d) bar to relief on his ineffective assistance of counsel claims and is not entitled to an evidentiary hearing. Henderson's motion for an evidentiary hearing is DENIED.

C. Guilty Plea and Waiver of Jury Sentencing (¶¶ 11(d & g))

Henderson alleged that his guilty plea and waiver of jury sentencing are constitutionally infirm because he was suffering

[29] Henderson relies in part on Judge Blackwood's declaration (ECF No. 68-3 at 3) and Mosier's declaration (ECF No. 77-1). (ECF No.77 at 23-24 n.8.) However, these declarations are barred from consideration under Pinholster.

from major mental illness and brain damage at the time (¶ 11(d)) and because the trial court failed to properly inform him that he has a constitutional right to be sentenced by a jury during the guilty plea and waiver colloquy (¶ 11(g)). (ECF No. 16 at 37-38.) The Tennessee Court of Criminal Appeals examining the plea colloquy to determine whether the plea and waiver of jury sentencing were knowing and voluntary, see supra pp. 22-23. See Henderson, 2005 WL 1541855, at **36-37. Henderson argues that the trial court's finding that it "made every attempt to discern" whether Henderson was suffering from a mental illness at the time of his guilty plea is an unreasonable determination of fact. (ECF No. 77 at 41.) Henderson contends that the trial court asked just two questions related to his mental health. (Id. at 42.) Those questions were:

> Q. Mr. Henderson, have you ever been hospitalized at a local mental health center?
>
> A. No, sir.
>
> Q. Or have you ever been seen by any doctor for any mental health disorders?
>
> A. No, sir.

(Id.; ECF No. 20-2 at 144.) Henderson asserts that in light of the limited two-question inquiry about his mental health, the conclusion that the trial court made "every attempt to discern" whether he suffered from mental illness is completely unreasonable. (ECF No. 77 at 42.) He asserts that he is entitled to *de novo* review because the Tennessee Court of Criminal Appeals'

determination that his plea and waiver were knowing was based on an unreasonable determination of fact. (Id.)

The Court first notes that Henderson does not give a full picture of the colloquy. The trial court went over each charge and the potential sentence. (ECF No. 20-2 at 130-32.) The court addressed the right to plead not guilty and have a jury determine guilt or innocence and the possibility with the murder charge that if a jury heard the case, they could either find him guilty of first degree murder, guilty of a lesser included offense, or not guilty. (Id. at 132-34.) The court also addressed how sentencing would be conducted under each of these scenarios. (Id. at 133-36, 138-40.) The court explained that at a trial, Henderson would have the right to call witnesses, to confront and cross-examine the state's witnesses, and the right against self-incrimination. (Id. at 137.) Henderson responded that he understood the process, had consulted with counsel, and expressed no concerns with counsel's representation. (See id. at 129-49.)

Zager testified that Henderson was competent to stand trial; she did not diagnose him with a major mental illness. Henderson, 2005 WL 1541855, at *15. Kenner diagnosed Henderson with bipolar disorder after being engaged by Henderson's counsel in the post-conviction proceedings and stated that the bipolar disorder affected Henderson's ability to control his behavior. Id. at ** 18, 20. There is no indication on the state court record that anyone at

the time of trial considered Henderson to have a major mental illness. No mental health professional either at trial or during the post-conviction proceedings determined that the plea and waiver of jury sentencing were not knowing and voluntary.[30]

A defendant must not only be competent to stand trial, but prior to accepting a guilty plea, a district court must also 'satisfy itself that the waiver of his constitutional rights is knowing and voluntary.'" Godinez v. Moran, 509 U.S. 389, 400-401 (1993); United States v. Shepherd, 408 F. App'x 945, 947 (6th Cir. 2011). A state court's factual finding that a guilty plea was valid is a factual finding entitled to a presumption of correctness rebuttable only by clear and convincing evidence, on federal habeas review. Stewart v. Morgan, 232 F. App'x 482, 490 (6th Cir. 2007); see 28 U.S.C. § 2254(e)(1). Henderson's assertion that mental illness negated his competence to enter a knowing and voluntary guilty plea is not supported by clear and convincing evidence. See Fautenberry v. Mitchell, 515 F.3d 614, 637 (6th Cir. 2008) (denying habeas relief where none of the psychological evidence indicated that the defendant was mentally incapable of understanding, appreciating, and waiving his constitutional rights); see also

[30] Woods made a determination that Henderson's "mental disorders, . . ., including Mr. Henderson's depression, social decompensation, impaired ability to effectively weigh and deliberate due to his brain deficits, and impaired judgment, precluded Mr. Henderson from conforming his behavior to the law and also from making a rational and voluntary, intelligent, and knowing waiver of his rights to a jury trial and waiver of his right to be sentenced by a jury." (ECF No. 68-2.) However, his declaration was not presented in the state courts and is barred from consideration by Pinholster.

Stewart v. Morgan, 232 F. App'x 482, 490-91 (6th Cir. 2007) (defendant's past psychiatric problems and purported marijuana use prior to the plea were not clear and convincing evidence necessary to rebut the state trial court's finding of a voluntary, intelligent and knowing plea where trial court engaged in a full plea colloquy and defendant stated that he understood the consequences of the plea).

Henderson also argues that the trial court failed to properly inform him that he had a constitutional right to be sentenced by a jury during the guilty plea and waiver colloquy and that the court tied his waiver of a jury for trial to the waiver of a jury for sentencing. (ECF No. 77 at 44-45.) Henderson asserts that he did not know that he had a right to be sentenced by a jury despite his guilty plea. (Id. at 45.) He argues that the Tennessee Court of Criminal Appeal's factual determinations about the "extensive colloquy," the ten different facts that were covered, and the five separate occasions where Henderson was asked whether his decisions to waive his right to a jury trial and to a jury trial for capital sentencing were free and voluntary are unreasonable determinations of fact. (Id. at 46.) He contends that the trial court confused the issues and failed to correctly apprise him of his rights. (Id. at 46-47.)

In the plea colloquy, the trial court first addressed the right to plead not guilty and the right to have a jury determine guilt or innocence:

> Q. Now, do you understand that with regard to all of these charges that are contained in this Indictment, that you have a right to plead not guilty to those charges; you have a right for a jury to determine whether you are guilty or innocent of these charges?
>
> A. Yes.
>
> Q. All right, sir. Now, do you understand that if you had a trial in this case regarding your guilt or innocence of these charges, that the jury could find you not guilty of these charges; could find you guilty of some of the charges, and not guilty of the other charges; or could find you guilty of all the charges, or none of the charges: Do you understand that?
>
> A. Yes, sir.
>
> Q. And do you understand that if the jury found you not guilty of all of the charges, that you'd simply be freed of this charge; do you understand that?
>
> A. Yes, sir.

(ECF No. 20-2 at 132.)

The Court then addressed the nature of sentencing in the event that a jury found Henderson guilty on any of the charges other than the murder charge:

> Q. But if the jury found you guilty of these charges — I'm not talking to you about Murder; I'm talking about the other charges; just disregard the Murder charges this time — but the other charges: Do you understand that if the jury found you guilty of those charges, that it would be up to the court at a separate sentencing hearing to sentence you on those charges: Do you understand that?
>
> A. Yes, sir.

(Id. at 132-33.) The court then asked Henderson whether he waived his rights to a jury trial on the charges other than the murder charge:

> Q. Having explained those rights to you with regard to the other charges, other than Murder, do you hereby voluntarily waive or give up your right to a jury trial on those charges?
>
> A. Yes, sir.

(Id. at 133.) At this point, Henderson has waived his right to a jury trial on all charges other than the murder charge.

The court then addressed the murder charge:

> Q. Now, I want to speak with you with regard to the charge of Murder, that's contained in the first, second, third, and fourth count of the Indictment. Do you understand that the jury could find you not guilty of the Murder charges; do you understand that?
>
> A. Yes, sir.
>
> Q. Or that the jury might find you guilty of a lesser included offense of Murder; do you understand that?
>
> A. Yes, sir.
>
> Q. Do you understand if the jury found you not guilty of First Degree Murder or any of its lesser included offenses, that you'd be freed of the charges; do you understand that?
>
> A. Yes, sir.
>
> Q. Do you understand that if the jury found you guilty of one of the lesser included offenses, which is Second Degree Murder, Voluntary Manslaughter, Reckless Homicide, or Criminally Negligent Homicide, that then the Court would conduct a sentencing hearing and determine an appropriate sentence on one of those lesser included offenses; do you understand that?
>
> A. Yes, sir.

(Id. at 133-34.) At this point, Henderson has been completely informed of the possibility that: (1) a jury could find him not guilty of first degree murder and the lesser included offenses, and he would be free; or (2) a jury could find him guilty of a lesser included offense, and he would be sentenced by the trial court at a sentencing hearing.

The trial court addressed the sentencing procedure and potential sentences related to a conviction for first degree murder:

> Q. Now, do you understand that you have a right to have a jury to determine your sentence if you are convicted of First Degree Murder; do you understand that?
>
> A. Yes, sir.
>
> Q. Do you understand if you had a trial in this case with regard to your guilt or innocence, if the jury found you guilty of First Degree Murder, that the same jury would then retire and have a sentencing hearing for determining the appropriate sentence in this case, being either Death, Life Without the Possibility of Parole, or Life Imprisonment: Do you understand that?
>
> A. Yes, sir.

(Id. at 134.) The trial court addressed the presentation of proof of aggravating factors and mitigation evidence, and the fact that the jury would determine the sentence. (Id. at 134-35.) Henderson was then asked about the waiver of his rights on the murder charge:

> Q. Now, I'm going to ask you, sir, having explained those rights to you: First of all, do you hereby voluntarily waive or give up your right for a jury to determine whether or not you are guilty or innocent of the charge of First Degree Murder?

A. Yes, sir.

Q. All right, sir. By giving up the right to determine – for the jury to determine your guilt or innocence of that First Degree Murder, now do you hereby give your right to have a jury trial to determine the appropriate sentence in this case?

Do you understand what I'm talking about?

A. Could you read that again – restate it?

Q. I've already asked you about whether or not you'd give up your right or waive your right for a jury to determine whether or not you are guilty or innocent of First Degree Murder; do you understand that?

A. Yes, sir.

Q. Now, by doing that, do you understand that now this Court will determine whether or not – will determine at a sentencing hearing the punishment in this case, do you understand that?

A. Yes, sir.

Q. Your attorneys have explained that to you; is that right?

A. Yes, sir.

Q. So I'm going to ask you now; Do you give up or waive your right to have the jury determine your sentence with regard to the punishment for First Degree Murder?

A. Yes, sir.

Q. Do you understand that by voluntarily entering a plea of guilty to First Degree Murder in this case, that after a sentencing conducted by the Court, that the Court will have three options and that is punishment of Death, Life Without the Possibility of Parole, or Life Imprisonment: Do you understand that?

A. Yes, sir.

(Id. at 135-36.) The trial court affirmed that Henderson was waiving his right to a jury trial at the guilt phase and that he was waiving his right to have a jury sentence him. (Id. at 136-37.) Henderson also indicated that he was not forced or threatened to waive his rights for the jury trial and that he was not promised any specific sentence or decision. (Id. at 145.) He stated that his decision was made freely and voluntarily with the advice of his attorneys. (Id. at 146.) Petitioner then pled guilty. (Id. at 148.)

Henderson focuses on the language, "[b]y giving up that right" and "[n]ow by doing that" to give the impression that Henderson was not aware that the right to a jury trial and the right to waive jury sentencing were two separate and distinct rights. (ECF No. 77 at 45-46.) After the trial court used the language contested by Henderson, it affirmed that Henderson understood that he was waiving his right to have a jury determine his sentence:

> Q. So I'm going to ask you now; Do you give up or waive your right to have the jury determine your sentence with regard to the punishment for First Degree Murder?
>
> A. Yes, sir.

(ECF No. 20-2 at 136.) When the colloquy is read in its totality, the trial court treated the right to jury trial at the guilt phase and at the capital sentencing phase as two separate rights and two separate waivers, not dependent or conditioned on the other. Although Henderson asserts that the Tennessee Court of Criminal Appeal's decision is based on an unreasonable determination of

fact, he has not presented clear and convincing evidence to rebut the presumption of correctness. The record supports the Tennessee Court of Criminal Appeals' finding that the "records preponderates against any conclusion that the petitioner had no knowledge as to the impact of his decision to enter guilty pleas and waive jury sentencing." Henderson is not entitled to habeas relief for the allegations in ¶¶ 11(d &g).

D. Sufficiency of the Evidence (¶¶ 14, 15, & 18)

Henderson alleges that the "knowingly created a great risk of death to two or more persons" and the "avoiding arrest" aggravating circumstances were not supported by sufficient evidence. (ECF No. 16 at 46-48, ¶¶ 14 & 15.) Henderson argues that if the facts of this case establish the "knowingly created a great risk of death" aggravating circumstance, then the aggravating circumstance is unconstitutionally vague and overbroad because it fails to narrow the class of persons eligible for the death penalty. (Id. at 46-47.)[31] He alleges that the evidence presented at the sentencing hearing was not sufficient to support the trial court's finding that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. (Id. at 49, ¶ 18.)[32]

1. "Great Risk of Death" Aggravating Circumstance (¶ 14)

[31] The Court granted summary judgment to the Respondent for the other constitutional claims in ¶¶ 14 & 15. (ECF No. 72 at 125.)

[32] The Court denied summary judgment based on procedural default. (ECF No. 72 at 127-28.)

One of the aggravating circumstances that the state proved was that the defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder. See State v. Henderson, 24 S.W.3d 307, 312 (Tenn. 2000); see Tenn. Code Ann. § 39-13-204(i)(3). Henderson asserts that the evidence is that there were two shorts fired, a single shot into the hallway that grazed Bishop's neck and a single shot to the back of Bishop's head, and that this evidence is not sufficient to sustain a finding that there was a great risk of death to two or more persons other than the victim. (Id. at 46.)

The Tennessee Supreme Court addressed the sufficiency of the evidence aspect of this claim:

> The record shows that the appellant's actions in firing the weapon caused a great risk of death to two or more persons during the act of murder. This factor "'contemplates either multiple murders or threats to several persons at or shortly prior to or shortly after an act of murder upon which the prosecution is based.'" State v. Burns, 979 S.W.2d 276, 280 (Tenn. 1998) (quoting State v. Cone, 665 S.W.2d 87, 95 (Tenn. 1984)). This factor "most often has been applied where a defendant fires multiple gunshots in the course of a robbery or other incident at which persons other than the victim are present." Id.
>
> The record in this case reveals that the appellant threatened the dentist and dental assistant by pointing a loaded weapon at them, that the dentist and the appellant struggled over the loaded weapon, and that when the appellant fired the first shot at the victim, the receptionist was very close nearby. The State also introduced expert testimony that the bullets fired by the appellant could easily have penetrated the thin walls of the office and continued into adjoining rooms. We conclude that a rational trier of fact could have

> concluded that this aggravated circumstance was proven beyond a reasonable doubt.

Henderson, 24 S.W.3d at 313-14.

The Supreme Court, in Jackson v. Virginia, 443 U.S. 307, 324 (1979), sets forth the standard that a petitioner must satisfy to prevail on a sufficiency of the evidence claim:

> We hold 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 of guilt beyond a reasonable doubt.

In making this assessment, the evidence presented at trial must be viewed in the light most favorable to the prosecution. Id. at 319.[33]

Henderson argues that the Tennessee Court relied on inapposite facts in State v. Burns, 979 S.W.2d. 276, 280 (Tenn. 1998). (ECF No. 77 at 49.) He contends that in Burns and other cases where this aggravating circumstance has been applied, multiple people were shot at or killed or sustained life-threatening injuries. (Id. at 49-50.) He asserts that the three shots fired were fired directly at Bishop and at close range, with the first shot being fired into Bishop's shoulder and the second and third shots being fired into the floor where Bishop already lay wounded. (Id. at 50.)[34] He

[33] The Supreme Court emphasized that a habeas court is not to substitute its own views for those of the jury. Jackson, 443 U.S. at 318-19.

[34] One shot was fired into the back of Bishop's head at point-blank range. Henderson, 24 S.W.3d at 310.

contends that no one except Bishop was at risk of death during the act of murder. (Id.)

The Tennessee Supreme Court held that this aggravating circumstance "contemplates either multiple murders or threats to several persons at or shortly prior to or shortly after an act of murder upon which the prosecution is based." State v. Jordan, 325 S.W.3d 1, 67 (Tenn. 2010) (quoting State v. Cone, 665 S.W.2d 87, 95 (Tenn. 1984)). "Most commonly, this aggravating circumstance 'has been applied where a defendant fires multiple gunshots in the course of a robbery or other incident at which persons other than the victim are present.'" State v. Jordan, No. W2007-012720CCA-R3-DD, 2009 WL 1607902, at *42 (Tenn. Crim. App. June 9, 2009) (quoting State v. Henderson, 24 S.W.3d 307, 314 (Tenn. 2000)). However, "[i]n many of the cases upholding application of the (i)(3) aggravator, the defendant fired random shots with others present or nearby, the defendant engaged in a shootout with other parties, or the defendant actually shot people in addition to the murder victim." Johnson v. State, 38 S.W.3d 52, 60-61 (Tenn. 2001) (footnotes omitted). In King v. State, 992 S.W.2d 946, 950-51 (Tenn. 1999), the Tennessee Supreme Court affirmed the application of this aggravating circumstance where the defendants fired two shots, one into the ceiling and another into the victim, held others at gun point, and the surrounding circumstances of the offense indicated that "the threat to their lives were real." In

State v. Fitch, No. W2004-028330CCA-R3-DD, 2006 WL 3147057, at *30 (Tenn. Crim. App. Nov. 2, 2006), the court found sufficient evidence to support application of this aggravating circumstance where the uncontested proof was that the defendant fired multiple gun shots inside a nursing home where the victim and other employees and patients were present and took cover behind the nurse's station once the gunfire began.

In the instant case, Deloice Guy, another inmate receiving treatment at Dr. John Cima's dental office, testified that she heard gun shots in the other room, that she could see Henderson with Deputy Bishop in the hallway right outside the room where she was, and that Henderson was asking about her. (ECF No. 20-4 at 27-28.) Guy felt that she was in danger. (Id. at 28.)

Peggy Riles, the receptionist, testified that Henderson called for them to come to the room, and he took the gun and shot Deputy Bishop in the head in front of her. (Id. at 50.) Henderson was in the doorway of the treatment room, and Riles was in the hall next to Bishop. (Id. at 50-51.) Riles managed to get back down the hall to her office, and Henderson came, jerked her from under the desk, and took her down the hall and out the back door. (Id. at 52-53.) Henderson was armed with two guns. (Id. at 54.) Riles testified that she felt her life was in danger and that she was at risk of death. (Id. at 55.)

Donna Feathers, Cima's dental assistant, testified that when she and Cima went into the room, Henderson pulled a gun on them and jumped up knocking over the dental cart. (Id. at 32, 35.) Feathers was standing on the left side of the dental chair facing Henderson when he pulled the gun and pointed it toward her. (Id. at 35-36.) She testified that she was in fear for her life and that the gun was pointed in the direction of the room where Guy was waiting. (Id. at 36-37.) Feathers was about three feet away from Deputy Bishop when he was shot. (Id. at 37.) Feathers testified that Henderson attempted to take Riles and Cima against their will. (Id. at 37.)

Cima testified that he grabbed for Henderson's pistol and tried to push it away, but the pistol was pointing at Feathers. (Id. at 65.) Henderson held the pistol on Cima and Feathers. (Id. at 65-66.) Henderson had Riles by the hand. (Id.) Henderson, armed with two pistols, walked Cima and Riles down the hall to the parking lot. (Id. at 70, 72.) Cima was frightened after Henderson shot the deputy. (Id. at 72.) Cima was eight feet from Bishop the first time he was shot and about two feet away the second time. (Id. at 73.) Cima testified that the interior walls were made of two pieces of plaster board and that one of the bullets went through the plaster board and was imbedded in a two-by-four; another bullet went through the floor. (Id. at 73-74.)

The Tennessee Supreme Court correctly applied the principles from Jackson, in determining that the evidence was sufficient to support the determination that the great risk of death aggravating circumstance was proven beyond a reasonable doubt. Henderson, 24 S.W.3d at **313-14. Regardless of whether Henderson knew that the dentist office walls were made of plaster, there was substantial evidence that Henderson created a great risk of death to two or more persons sufficient for a rational trier of fact to find proof beyond a reasonable doubt. 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.

With regard to Henderson's allegations of Eighth Amendment vagueness, the United States Supreme Court in Gregg v. Georgia, 428 U.S. 153, 202-03 (1976), upheld the constitutionality of a similar "great risk of death" aggravating circumstance in the Georgia death penalty statute because the Georgia Supreme Court had not construed it to allow an overly broad interpretation. See McElmurry v. State, 60 P.3d 4, 27 (Okl. Crim. App. 2002) (the "knowingly created a great risk of death to more than one person" aggravator had been analyzed thoroughly and found to withstand constitutional challenge). Henderson has not demonstrated that Tennessee's great risk of death aggravating circumstance is unconstitutionally vague.

The claims in ¶ 14 of the Amended Petition are DENIED.

2. Avoiding Arrest Aggravating Circumstance (¶ 15)

The avoiding arrest aggravating circumstance states that the "murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another." See Tenn. Code Ann. § 39-2-203(i)(6) (1982). Henderson contends that the "avoiding arrest" aggravating circumstance was not supported by sufficient evidence because the circumstance is directed to the killing of a witness to another current crime or some previous crime. (ECF No. 16 at 47, ¶ 15.) He argues that where Bishop was unconscious at the time and other eyewitnesses were present and unharmed, he could "hardly have committed the murder" in order to "avoid arrest." (ECF No. 77 at 51.) He contends that the cases applying this aggravating circumstance involve the murder of the only remaining eyewitness other than co-defendants. (Id.)

The Tennessee Supreme Court held:

> The record also demonstrates that the murder was committed to avoid arrest or prosecution. As our cases make clear, the desire to avoid arrest or prosecution need not be the sole motive, so long as it is one of the motives in the killing. State v. Carter, 714 S.W.2d 241, 250 (Tenn. 1986); *see also* State v. Smith, 868 S.W.2d 561, 581 (Tenn. 1993) (stating that prevention of arrest and prosecution need not be the "dominant" motive for the killing). The evidence in this case is that the appellant returned to the treatment room after looking for money throughout the office only to put a bullet into the head of an unconscious, non-resisting law-enforcement officer lying face-down on the floor. Viewed in a light most favorable to the State, we conclude that a rational trier of fact could have found the existence of this aggravating circumstance beyond a reasonable doubt.

Henderson, 24 S.W.3d at 314. Under Tennessee law, this aggravating circumstance focuses on a defendant's motives in killing the victim. State v. Young, 196 S.W.3d 85, 116 (Tenn. 2006). In Young, the Tennessee Supreme Court upheld application of the aggravating circumstance where proof was sufficient to establish that the defendant killed the victim "at least in part to prevent his apprehension." Id. at 116. Although there must be some "particular proof" supporting this aggravating circumstance, the State need not prove that the defendant's desire to avoid prosecution was his sole motive in murdering the victim. Id.

In the instant case, Henderson, to aid in his escape, went back and shot Bishop, the lone law enforcement officer in the building, even though Bishop was unconscious. The Tennessee Supreme Court correctly applied the principles in Jackson. See Henderson, S.W.3d at 314. The 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.

The claim in ¶ 15 of the amended petition is DENIED.

3. Aggravating Circumstances Outweigh Mitigating Circumstances (¶ 18)

The Tennessee Supreme Court held,

> We also hold that the evidence supports the trial court's findings concerning the applicable aggravating circumstances and that these aggravating circumstances

> outweigh any mitigating circumstances beyond a reasonable doubt.
>
> . . .
>
> After a careful review of the testimony and evidence presented at the sentencing hearing, we conclude that the evidence fully supports the findings of the trial court and that the aggravating circumstances outweigh any mitigating circumstances beyond a reasonable doubt.

Henderson, 24 S.W.3d at 313.[35]

There is no constitutionally-mandated burden of proof governing the weighing of aggravating and mitigating circumstances. Zant v. Stephens, 462 U.S. 862, 890 (1983) (specific standards for balancing aggravating against mitigating circumstances are not constitutionally required in narrowing the categories of murders for which a death sentence may be imposed); see Kansas v. Marsh, 548 U.S. 163, 174-75 (2006) (the Supreme Court indicated that, as long as the State is required to prove aggravating circumstances beyond a reasonable doubt before a defendant is considered death-eligible, the "State enjoys a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are to be weighed"). The United States Supreme Court has consistently held that a sentencer must consider any relevant evidence offered by a capital defendant in support of a sentence less than death. Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982); Lockett v. Ohio, 438 U.S. 586, 604 (1978); see also

[35] Henderson has not presented a merits argument directly addressing this issue.

Boyde v. California, 494 U.S. 370, 377- 78 (1990). The sentencer is not, however, required to find the proffered evidence mitigating, nor must the sentencer accord the evidence the weight a defendant believes is appropriate. Eddings, 455 U.S. at 114-15, 117. Because a rational fact finder could determine that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt, Henderson's claim in ¶ 18 is without merit and DENIED.

III. CONCLUSION

The allegations in ¶¶ 8(c, g, h & l), 9(b-c, d(4), e, h, k & f(1) for failure to use a psychiatrist and develop neurological and neuropsychological evidence), 11 (d & g), 14 to the extent Henderson has alleged sufficiency of the evidence and Eighth Amendment vagueness claims, 15 to the extent Henderson has alleged sufficiency of the evidence, and 18 of the amended petition are without merit and DENIED. Because Henderson's claims are either noncognizable, devoid of substantive merit, or procedurally barred (see ECF No. 72), disposition of this petition without an evidentiary hearing is proper. See Rule 8(a) of the Rules Governing Section 2254 Cases in the United States District Courts. The petition filed pursuant to 28 U.S.C. § 2254 is DENIED in its entirety and DISMISSED. Henderson's motion for an evidentiary hearing is DENIED, supra p. 73.[36]

IV. APPEAL ISSUES

There is no absolute entitlement to appeal a district court's denial of a § 2254 petition. Miller-El v. Cockrell, 537 U.S. 322, 335 (2003); Bradley v. Birkett, 156 F. App'x 771, 772 (6th Cir. 2005). The Court must issue or deny a certificate of appealability

[36] The Court notes that Henderson, in his reply to the motion for evidentiary hearing, requests a stay of the entry of any final judgment based on a recent grant of certiorari in Martinez v. Ryan, 131 S. Ct. 2960 (2011), which addresses ineffective assistance of post-conviction counsel. (ECF No. 90 at 5-7.) For the reasons previously stated in the Court's May 4, 2011 order denying Petitioner's motion to reconsider (ECF No. 78), Henderson's request for a stay of the final judgment in this case is DENIED.

("COA") when it enters a final order adverse to a § 2254 petitioner. Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts. The petitioner may not take an appeal unless a circuit or district judge issues a COA. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22(b)(1).

A COA may issue only if the petitioner has made a substantial showing of the denial of a constitutional right, and the COA must indicate the specific issue(s) which satisfy the required showing. 28 U.S.C. §§ 2253(c)(2) & (3). A "substantial showing" is made when the petitioner demonstrates that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Miller-El, 537 U.S. at 336 (citing Slack v. McDaniel, 529 U.S. 473, 84 (2000)); Henley v. Bell, 308 F. App'x 989 (6th Cir. 2009) (same). A COA does not require a showing that the appeal will succeed. Miller, 537 U.S. at 337; Caldwell v. Lewis, Nos. 08-516 & 08-5157, 2011 WL 915764, *5 (6th Cir. Mar. 16, 2011) (same). Courts should not issue a COA as a matter of course. Bradley, 156 F. App'x at 773 (quoting Slack, 537 U.S. at 337).

In this case, reasonable jurists could differ about the following issue(s):

Ineffective Assistance of Counsel at Sentencing (¶ 9)

Incompetence to Enter a Guilty Plea and Waive Jury Sentencing (¶ 13)

The Court GRANTS a limited certificate of appealability on these issues.

Reasonable jurists could not disagree about the remaining issues. The Court DENIES a certificate of appealability on the remaining issues in the petition.

Federal Rule of Appellate Procedure 24(a)(3) provides that a party who was permitted to proceed in forma pauperis in the district court may proceed on appeal in forma pauperis unless the district court certifies that an appeal would not be taken in good faith or otherwise denies leave to appeal in forma pauperis. 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 above-referenced issues for which the Court grants a certificate of appealability. An appeal that does not address these issues is not certified as taken in good faith, and Petitioner should follow the procedures of Fed. R. App. P. 24(a)(5) to obtain in forma pauperis status.

IT IS SO ORDERED this 8th day of October, 2011.

s/ S. Thomas Anderson
S. THOMAS ANDERSON
UNITED STATES DISTRICT JUDGE

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

KENNATH ARTEZ HENDERSON, Petitioner, vs. RICKY BELL, Warden, Riverbend Maximum Security Institution, Respondent.	§	No. 06-2050-STA-tmp

ORDER GRANTING IN PART AND DENYING IN PART
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT
AND
ORDER DENYING IN PART PETITION PURSUANT TO 28 U.S.C. § 2254

On January 24, 2006, Petitioner Kennath Artez Henderson, Tennessee Department of Corrections ("TDOC") prisoner number 250126, a death-sentenced inmate confined at the Riverbend Maximum Security Institution ("RMSI") in Nashville, Tennessee, filed a pro se habeas corpus petition under 28 U.S.C. § 2254, a motion for leave to proceed in forma pauperis, and a motion for appointment of counsel. (Docket Entries ("D.E.") 1-3.) On January 27, 2006, the Court entered an order granting in forma pauperis status and appointing counsel. (D.E. 4.) On July 28, 2006, Henderson filed an amended petition. (D.E. 16.) On October 12, 2006, Respondent filed his answer to the amended petition. (D.E. 18.) On October 20, 2006, Respondent filed the state court record. (D.E. 20-23.) On February 15, 2008, Respondent filed a motion for summary judgment. (D.E. 55.) Henderson filed his response to the motion on July 31, 2008.

(D.E. 68.) On March 2, 2011, the Court entered an order directing the parties to file briefs on the merits and to report the status of state court proceedings related to this case. (D.E. 70.) On March 3, 2011, Henderson filed a notice regarding the status of state court proceedings. (D.E. 71.)

I. STATE COURT PROCEDURAL HISTORY

On July 6, 1998, Henderson pleaded guilty to first degree premeditated murder, two (2) counts of especially aggravated kidnapping, aggravated robbery, attempted especially aggravated kidnapping, aggravated assault, and felonious escape. (D.E. 20-1 at 116, 120, 124-29.) Henderson waived his right to jury sentencing. (Id. at 119.) After a capital sentencing hearing on July 13, 1998, the trial court imposed the death sentence for the murder count and an effective sentence of twenty-three (23) years in prison for the noncapital offenses. See Henderson v. State, No. W2003-01545-CCA-R3-PD, 2005 WL 1541855, at *1 (June 28, 2005), perm. app. denied (Tenn. Dec. 5, 2005). On August 7, 1998, Henderson filed a notice of appeal. (D.E. 20-1 at 132.) On June 15, 1999, the Tennessee Court of Criminal Appeals affirmed. State v. Henderson, No. 02C01-9808-CC-00243, 1999 WL 410421 (Tenn. Crim. App. June 15, 1999) (D.E. 21-7 at 2-10). On July 10, 2000, the Tennessee Supreme Court affirmed. Tennessee v. Henderson, 24 S.W.3d 307 (Tenn. 2000) (D.E. 21-10). On October 10, 2000, the United States Supreme Court denied certiorari. Henderson v. Tennessee, 531 U.S. 934 (2000) (D.E. 21-13 at 2).

On February 12, 2001, Henderson filed a pro se petition pursuant to the Tennessee Post-Conviction Procedure Act, Tenn. Code Ann. §§ 40-30-101 to -122, in the Circuit Court of Fayette County, Tennessee. (D.E. 21-14 at 6-12.) Counsel was appointed to represent Henderson (id. at 14), and the first amended post-conviction petition was filed (id. at 47-74; D.E. 21-15 at 2-5). The post-conviction court conducted a hearing on April 28-29, 2003, and on May 21, 2003, Judge Jon Kerry Blackwood of the Circuit Court of Fayette County issued an order dismissing the petition. (D.E. 22-8 at 75-79.) On June 19, 2003, Henderson filed a notice of appeal. (Id. at 80.) The Tennessee Court of Criminal Appeals affirmed. Henderson v. State, No. W2003-01545-CCA-R3-PD, 2005 WL 1541855 (Tenn. Crim. App. June 28, 2005) (D.E. 23-18), perm. app. denied (Tenn. Dec. 5, 2005) (D.E. 23-19).

On December 28, 2007, Henderson filed a motion to reopen the post-conviction proceedings in the Fayette County Circuit Court. (See D.E. 49 at 1-2; see also D.E. 71 at 1.) On January 24, 2008, the Fayette County Circuit Court denied Henderson's motion. (Id.)[1] The court re-entered the order on August 21, 2008, because it was never served on counsel. (Id.) Henderson applied for permission to appeal. However, on December 9, 2008, the Tennessee Court of Criminal Appeals denied the application. (Id.) The Tennessee Supreme Court denied Henderson's application for permission to

[1] The motion to reopen addressed discrimination in the selection of the grand jury foreperson. (Id. at 1.) On January 31, 2008, Henderson moved for a stay of the federal habeas proceedings to exhaust his state court remedies related to this claim. (D.E. 49.) The motion to stay the federal proceedings was denied without prejudice. (D.E. 56.)

appeal on April 27, 2009. (Id. at 1-2.) The court issued a mandate on May 13, 2009. (Id. at 2.)

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

> At the time of the events giving rise to this case, the appellant, Kennath Henderson, was incarcerated at the Fayette County Jail serving consecutive sentences for felony escape and aggravated burglary. On April 26, 1997, as the appellant was planning an escape from jail, he had a .380 semi-automatic pistol smuggled into the jail through his girlfriend. A couple of days later, the appellant requested dental work on a tooth that needed to be pulled, and an appointment was made for May 2 with Dr. John Cima, a dentist practicing in Somerville. Dr. Cima had practiced dentistry in Somerville for more than thirty years, and he had often seen inmate patients. In fact, this was not the appellant's first visit to see Dr. Cima.
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> On May 2, 1997, Deputy Tommy Bishop, who was serving in his official capacity as a transport officer for the Fayette County Sheriff's office, took the appellant and another inmate, Ms. Deloice Guy, to Dr. Cima's Office in a marked police car. Upon their arrival at the dentist's office, Dr. Cima placed the appellant and Ms. Guy in separate treatment rooms, and each patient was numbed for tooth extraction. Deputy Bishop remained in the reception area and talked with the receptionist during this time.
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> When Dr. Cima and his assistant returned to the appellant's treating room to begin the tooth extraction, the appellant pulled out his .380 pistol. Dr. Cima immediately reached for the pistol, and he and the appellant struggled over the weapon. During this brief struggle, Dr. Cima called out for Deputy Bishop, and the deputy hurried back to the treatment room. Just as the deputy arrived at the door, the appellant regained control of the pistol and fired a shot at Deputy Bishop, which grazed him on the neck. Although not fatal, this shot caused the deputy to fall backwards, hit his head against the doorframe or the wall, and then fall to the floor face down, presumably unconscious.
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> The appellant then left the treating room and came back with the receptionist in his custody. The appellant

reached down and took Deputy Bishop's pistol, and he took money, credit cards, and truck keys from Dr. Cima. The appellant then ordered Dr. Cima and the receptionist to accompany him out of the building, but just before he turned to leave the building, the appellant went back to the treatment room, leaned over Deputy Bishop, and shot him through the back of the head at point-blank range. The deputy had not moved since first being shot in the neck moments earlier and was still lying face-down on the floor by the door to the treatment room when the appellant fatally shot him.

Once outside of the office, the appellant was startled by another patient, and Dr. Cima and his receptionist were able to escape back into the office. Once inside, Dr. Cima locked the door and called the police. The appellant, in the meantime, stole Dr. Cima's truck and drove away at a slow speed so as not to attract any attention to himself. When police officers began to follow him, the appellant sped away, and eventually drove off the road and into a ditch. The officers took the appellant into custody, and upon searching the truck, they found the murder weapon, Deputy Bishop's gun, and personal items taken from Dr. Cima's office.

On May 13, 1997, the appellant was indicted by a Fayette County Grand Jury in a ten-count indictment, which alleged one count of premeditated murder, three counts of felony murder, two counts of especially aggravated kidnaping, and one count of attempted especially aggravated kidnaping, aggravated robbery, aggravated assault, and felonious escape. After three continuances, the appellant pled guilty on the day of trial to all of the charges except for the three counts of felony murder.

On July 13, 1998, the circuit court held the sentencing hearing, and the appellant waived his right to have a jury empaneled for purposes of determining his sentence. Several witnesses testified for the State at the sentencing hearing, including Deloice Guy, the inmate taken with the appellant to the dentist by Deputy Bishop; Dr. John Cima; Donna Feathers, Dr. Cima's dental assistant; and Peggy Riles, Dr. Cima's receptionist. In addition, Dr. O.C. Smith, a forensic pathologist, testified as to his investigation of the crime scene and of his autopsy of Deputy Bishop. Dr. Smith stated that based on his examination of Deputy Bishop's wounds, along with witness testimony, it was likely that the first shot fired by the appellant hit the deputy in the neck, and caused the deputy to hit his head against the door-frame of the examination room. Dr. Smith opined that this blow

to the deputy's head could have rendered him unconscious. Moreover, Dr. Smith testified that the second shot fired by the appellant entered at the back of the deputy's head and exited near the left eye. This second shot caused "significant and severe brain damage," and the blood from this wound seeped from the skull fractures into the deputy's sinuses, and ultimately, was breathed into his windpipe. Finally, Dr. Smith testified that the bullets used by the appellant could have "easily" penetrated the thin walls of the dentist's office.

In mitigation, the appellant testified on his own behalf. According to his testimony, he was 24 years old at the time of the offense. He was a high-school graduate and has four younger brothers. While in elementary school, the appellant received numerous academic awards and certificates, and he was heavily involved in extracurricular activities and sports while in high school. Although the appellant expressed sorrow and remorse over his actions, he admitted that "[t]here's no reason" for the murder of Tommy Bishop. While he acknowledged that he extensively planned his escape from prison, including procuring the .380 pistol, his only excuse for the shooting was that he "wasn't thinking clearly that day."

The appellant also testified that he had some "problems" in high school, and although he was never cited to the juvenile court, he stated that he felt like his problems were never addressed. He also testified that while in jail in 1996, he requested counseling because he "felt like [he] needed help psychologically." His mother testified, however, that she did not believe that the appellant needed any help or intervention of any kind during his high school years. In addition, the appellant's mother testified that though she remembered that the appellant requested help while in jail in 1996, she never pursued the matter because he "seemed to be doing fine when [she] talked to him."

Finally, Dr. Lynne Zager, a forensic psychologist, testified as to her findings and conclusions based on two interviews with the appellant, a personality test administered to the appellant, and other information supplied by the defense. From this pool of information, Dr. Zager concluded that the appellant was suffering from dissociative disorder at the time of the murder, and that the appellant possessed an unspecified personality disorder which exhibited some narcissistic and anti-social traits. She also testified that based upon her testing, she believed that the appellant's

dissociative state began after the first shot was fired and lasted at least 24 hours following. While in this state, Dr. Zager stated that it was not uncommon for individuals to feel as though they are in a dream-like state and are not "an integral part of what the person is [really] doing." Although she refused to give an opinion as to whether the appellant was aware of his actions at the time of the murder, the appellant, in her opinion, "was [acting] under duress, and that his judgment was not adequate." In addition, while Dr. Zager considered him to be "impaired at the time," she testified that the appellant's condition at the time of the murder would not support a legal finding of insanity.

The State argued that four aggravating factors applied to warrant imposing the death sentence: (1) that the defendant created a great risk of death to two or more persons during the act of murder, Tenn. Code Ann. § 39-13-204(i)(3); (2) that the murder was committed for the purpose of avoiding an arrest, Tenn. Code Ann. § 39-13-204(i)(6); (3) that the murder was committed during the defendant's escape from lawful custody, Tenn. Code Ann. § 39-13-204(i)(7); and (4) that the murder was committed against a law enforcement officer, who was engaged in the performance of official duties, Tenn. Code Ann. § 39-13-204(i)(9).

The appellant argued that four statutory mitigating factors should be considered by the court: (1) the lack of significant criminal history by the defendant; Tenn. Code Ann. § 39-13-204(j)(1); that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, Tenn. Code Ann. § 39-13-204(j)(2); (3) that the defendant acted under extreme duress; Tenn. Code Ann. § 39-13-204(j)(6); and (4) that the murder was committed while the defendant's mental capacity, while not deficient to the point of raising a defense, was substantially impaired, Tenn. Code Ann. § 39-13-204(j)(8). In addition, the defense argued for application of an additional non-statutory mitigating circumstance, i.e., that the failure to recognize and treat the mental health disorders of the defendant allowed such to remain untreated by any form of intervention.

At the conclusion of the hearing, the circuit court found that all four of the aggravating circumstances were proven beyond a reasonable doubt by the State. Although the circuit court did not make a specific finding as to which mitigating circumstances were supported by the evidence, the court found that the aggravating

> circumstances had been proven beyond a reasonable doubt to "outweigh the mitigating circumstances." The circuit court then imposed the sentence of death for the premeditated murder of Deputy Tommy Bishop.
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> All of the prison terms, except the term imposed for felonious escape, were ordered to run concurrently with each other, but to run consecutively with the sentences then being currently served by the appellant. The prison term for felonious escape was ordered to run consecutively to all of the non-capital offenses. Accordingly, the effective sentence ordered by the court in this case is death and a prison term totaling 23 years, which is to run consecutively to the current prison sentence.

Henderson, 2005 WL 1541855, at **1-4.

II. PETITIONER'S FEDERAL HABEAS CLAIMS

Henderson raises the following issues:

1. Counsel was ineffective in preparation for trial and at the resulting guilty pleas (D.E. 16 at 4-12);

2. Counsel was ineffective at sentencing (id. at 12-32);

3. Counsel was ineffective on appeal (id. at 32-35);

4. The guilty plea and subsequent waiver of a jury for sentencing was not made knowingly, intelligently, or voluntarily (id. at 35-38);

5. The trial court committed errors that violated Henderson's constitutional rights (id. at 38-44);

6. The conviction and death sentence violated the Sixth, Eighth, and Fourteenth Amendments because Henderson suffers major mental illness and was incompetent to enter a guilty plea and waive jury sentencing (id. at 44-46);

7. The "knowingly created a great risk of death to two or more persons" aggravating circumstance was inapplicable, not supported by sufficient evidence, unconstitutional, and invalid (id. at 46-47);

8. The "avoiding arrest" aggravating circumstance was inapplicable, not supported by sufficient evidence, unconstitutional, and invalid (id. at 47-48);

9. The prosecution failed to disclose exculpatory evidence prior to the entry of a guilty plea (id. at 48);

10. The aggravating factors which made Henderson eligible for a death sentence were not charged in the indictment, properly submitted to the grand jury, nor ultimately found by a sentencing jury, in violation of Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002) (id. at 48-49);

11. The evidence presented at Henderson's sentencing hearing was insufficient to support the trial court's finding that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt (id. at 49);

12. Henderson's death sentence is unconstitutional because there were no standards for the decision to choose to seek (or impose) the death sentence, nor were there any consistent and objective standards for proportionality review (id.);

13. The grand jury was improperly constituted in violation of the Sixth, Eighth, and Fourteenth Amendments (id. at 49-50);

14. The cumulative effect of the errors at the guilty plea and sentencing denied Henderson due process under the Sixth, Eighth, and Fourteenth Amendments (id. at 50);

15. Henderson was denied a full and fair state post-conviction proceeding (id. at 50-51);

16. Henderson was denied a full and fair state post-conviction proceeding because post-conviction counsel was ineffective (id. at 51-52);

17. The Tennessee capital sentencing scheme facially violates the Sixth, Eighth, and Fourteenth Amendments (id. at 52-54);

18. The procedure employed by Tennessee appellate courts for proportionality review is not structurally sound (id. at 54-55);

19. Henderson's death sentence is comparatively disproportionate to the offense (id. at 55);

20. The Tennessee system of judicial appointment of counsel violates the Sixth, Eighth, and Fourteenth Amendments (id. at 55-56);

21. The Tennessee death penalty statute violated the Eighth and Fourteenth Amendment and the requirements of Furman v. Georgia, 408 U.S. 238 (1972), that the discretion to impose death must be closely confined to avoid arbitrariness; the requirements of Lockett v. Ohio, 438 U.S. 586 (1978), that the sentencer must have unlimited discretion not to impose death; and the requirements of Eddings v. Oklahoma, 455 U.S. 104 (1982), that the death penalty must be imposed "fairly, and with reasonable consistency or not at all . . ." (id. at 56);

22. The Tennessee death penalty statute impinges on Henderson's fundamental right to life (id.);

23. Electrocution constitutes cruel and unusual punishment (id. at 56-57);

24. Lethal injection constitutes cruel and unusual punishment (id. at 57-63);

25. Henderson's rights under treaties to which the United States is bound and customary international law were disregarded at trial (id. at 63);

26. Henderson's death sentence is unconstitutional, as a result of the length of time he has been incarcerated under sentence of death following his conviction (id.); and

27. Henderson is not competent to be executed (id. at 63-64).

III. ANALYSIS OF THE MERITS

A. Waiver and Procedural Default

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

(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that–

> (A) the applicant has exhausted the remedies available in the courts of the State; or
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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); O'Sullivan v. Boerckel, 526 U.S. 837, 847-48 (1999); Carey v. Saffold, 536 U.S. 214, 220 (2002).

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. Boerckel, 526 U.S. at 845 (1999); Pillette v. Foltz, 824 F.2d 494, 496 (6th Cir. 1987). A petitioner has not exhausted his state remedies if he has merely presented a particular legal theory to the courts without presenting each factual claim. Pillette, 824 F.2d at 497-98. Each claim must be presented to the state courts as a matter of federal law. "It is not enough that all the facts necessary to support the federal claim were before the state courts, or that a somewhat similar state-law claim was made." Anderson v. Harless, 459 U.S. 4, 6 (1982); see also Duncan v. Henry, 513 U.S. 364, 366 (1995) (per curiam) ("If a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court.").

The state court decision must rest primarily on federal law. Coleman v. Thompson, 501 U.S. 722, 734-35 (1991). If the state court decides a claim on an independent and adequate state ground,

such as a procedural rule prohibiting the state court from reaching the merits of the constitutional claim, a petitioner ordinarily is barred by this procedural default from seeking federal habeas review. Wainwright v. Sykes, 433 U.S. 72, 87-88 (1977). However, the state-court decision need not explicitly address the federal claims; instead, it is enough that the petitioner's brief squarely presents the issue. Smith v. Digmon, 434 U.S. 332 (1978) (per curiam).

When a petitioner's claims have never been actually presented to the state courts, but a state procedural rule prohibits the state court from extending further consideration to them, the claims are deemed exhausted, but procedurally barred. Coleman, 501 U.S. at 752-53; Teague v. Lane, 489 U.S. 288, 297-99 (1989); Wainwright, 433 U.S. at 87-88; Rust, 17 F.3d at 160.

A petitioner confronted with either variety of procedural default must show cause for the default and prejudice to obtain federal court review of his claim. Teague, 489 U.S. at 297-99; Wainwright, 433 U.S. at 87-88. Cause for a procedural default depends on some "objective factor external to the defense" that interfered with the petitioner's efforts to comply with the procedural rule. Coleman, 501 U.S. at 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 Carrier, 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 Henderson's post-conviction 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. Id. at § 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.

Id. at § 40-30-106(f).[2]

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[2] Tenn. Code Ann. § 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

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 post-conviction relief. Hannah v. Conley, 49 F.3d 1193, 1196-97 (6th Cir. 1995) (construing pre-1995 statute and stating "the language of Tenn. Code Ann. § 40-30-102 is mandatory"). In this case, Henderson's right to file any further state post-conviction petition is barred by the one-year statute of limitations and, therefore, he does not have the option of returning to state court to exhaust any claim presented in this § 2254 petition.

B. Legal Standard for Merits Review

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

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly

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> right not recognized as existing at the time of trial if either the federal or state constitution requires retroactive application of that right; or
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> (2) The failure to present the ground was the result of state action in violation of the federal or state constitution.
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> (h) A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing. A full and fair hearing has occurred where the petitioner is afforded the opportunity to call witnesses and otherwise present evidence, regardless of whether the petitioner actually introduced any evidence.

> 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.

This Court must determine whether the state court adjudications of the claims that were decided on the merits were "contrary to" or an "unreasonable application of" "clearly established" federal law as determined by the United States Supreme Court. This Court must also determine whether the state court decision on each issue was based on an unreasonable determination of the facts in light of the evidence presented in the state proceeding.

The Supreme Court has issued a series of decisions setting forth the standards for applying § 2254(d)(1)[3]. In (Terry) Williams v. Taylor, 529 U.S. 362, 404 (2000), the Supreme Court emphasized that the "contrary to" and "unreasonable application" 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.

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

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 (2003) (same); Bell v. Cone, 535 U.S. 685, 694 (2002) (same).[4] The Supreme Court has emphasized the narrow scope of the "contrary to" clause, explaining that "a run-of-the-mill state-court decision applying the correct legal rule from our cases to the facts of a prisoner's case would not fit comfortably within § 2254(d)(1)'s 'contrary to' clause." Williams, 529 U.S. at 406; see also id. at 407 ("If a federal habeas court can, under the 'contrary to' clause, issue the writ whenever it concludes that the state court's application of clearly established federal law was incorrect, the 'unreasonable application' test becomes a nullity.") (emphasis in original).

A federal court may grant the writ under the "unreasonable application" clause "if the state court correctly identifies the governing legal principle from [the Supreme Court's] decisions but unreasonably applies it to the facts of the particular case." Cone, 535 U.S. at 694; see also Andrade, 538 U.S. at 75; Williams, 529 U.S. at 409 (same).[5] "[A]n unreasonable application of federal law

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[4] The Supreme Court has 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).

[5] Although the Supreme Court in Williams recognized, in dicta, the possibility that a state-court decision could be found to violate the "unreasonable application" clause when "the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply," 529 U.S. at 407, the Supreme Court expressed a concern that "the classification does have some problems of precision," id. at 408. The Williams Court concluded that it was not necessary "to decide how such 'extension of legal

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

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

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principle' cases should be treated under § 2254(d)(1)," id. at 408-09. In Yarbrough v. Alvarado, 541 U.S. 652, 666 (2004), the Supreme Court further 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.

[6] 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.").

[7] See 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).

by the United States Supreme Court." Harris v. Stovall, 212 F.3d 940, 943-44 (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. 1998) (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 this [the Supreme] Court's decisions as of the time of the relevant state-court decision." Williams, 529 U.S. at 412.

There is almost no case law about the standards for applying § 2254(d)(2), which permits federal courts to grant writs of habeas corpus where the state court's adjudication of a petitioner's claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." In a decision applying this standard, the Supreme Court observed that § 2254(d)(2) must be read in conjunction with 28 U.S.C. § 2254(e)(1), which provides that a state court's factual determinations are presumed to be correct unless rebutted by clear and convincing evidence. Miller-El v.

Dretke, 545 U.S. 231, 240 (2005).[8] It appears that the Supreme Court has, in effect, incorporated the standards applicable to the "unreasonable application" prong of § 2254(d)(1). Rice, 546 U.S. at 341-42 ("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, 237 (6th Cir. 2002) (citing 28 U.S.C. § 2254(e)(1)); see Sumner v. Mata, 449 U.S. 539, 546-47 (1981) (applying presumption of correctness to factual determinations of state appellate courts); see also Matthews v. Ishee, 486 F.3d 883, 889 (6th Cir. 2007); see also Stanley v. Lazaroff, 82 F. App'x 407, 416-17 (6th Cir. 2003).

C. Summary Judgment Standard

The Court shall grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P.

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

56(a)[9]; see Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Asbury v. Teodosio, No. 09-4471, 2011 WL 589228, at *2 (6th Cir. Feb. 22, 2011). "The district court must construe the evidence and draw all reasonable inferences in favor of the nonmoving party." American Civil Liberties Union of Ky. v. Grayson County, Ky., 591 F.3d 837, 843 (6th Cir. 2010), reh'g denied, 605 F.3d 426 (6th Cir. 2010) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)). However, to successfully oppose a summary judgment motion, "there must be evidence on which the jury could reasonably find for the plaintiff." Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 800 (6th Cir. 1994) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. at 252 (1986)).

"When the moving party has carried its burden under Rule 56, its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., 475 U.S. at 586 (citation & internal footnote omitted). "In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" Id. at 587. "A fact is 'material' and precludes grant of summary judgment if proof of that fact would have [the] effect of establishing or refuting one of essential elements of a cause of action or defense asserted by the parties, and would necessarily affect application of appropriate principle of law to the rights

[9] Pursuant to the December 1, 2010 amendments to Rule 56, former subdivision (c)(2), which contained the summary judgment standard, has been designated as subdivision (a).

and obligations of the parties." Midwest Media Prop. L.L.C. v. Symmes Twp., Ohio, 503 F.3d 456, 469 (6th Cir. 2007), reh'g en banc denied (Jan. 10, 2008) (quoting Kendall v. Hoover Co., 751 F.2d 171, 174 (6th Cir. 1984)). "Entry of summary judgment is appropriate '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 re Morris, 260 F.3d 654, 665 (6th Cir. 2001) (quoting Celotex Corp., 477 U.S. at 322).

IV. ANALYSIS OF HENDERSON'S CLAIMS

A. Post-Conviction Issues

1. Ineffective Assistance of Post-Conviction Counsel (Amended Petition ¶ 23)

Henderson contends that he was denied a full and fair state post-conviction proceeding because post-conviction counsel was ineffective. (D.E. 16 at 51-52.) Respondent argues that Henderson has failed to sufficiently plead the issue as required by Rule 2 of the Rules Governing Habeas Corpus Cases Under Section 2254 ("Habeas Rule 2"), has not alleged a specific constitutional violation, and the claim is procedurally defaulted and without merit. (D.E. 55-1 at 26-27.) Henderson argues that he pleaded the violation of his right to the effective assistance of post-conviction counsel with specificity and asserts that there is no procedural default because he was denied due process and his claims were not fully presented in the post-conviction proceedings. (D.E. 68 at 143-45.)

Henderson's claim is without merit. There is no constitutional right to the assistance of counsel during state post-conviction proceedings. Coleman v. Thompson, 501 U.S. 722, 752-53 (1991) (citations omitted); Abdus-Samad v. Bell, 420 F.3d 614, 631 (6th Cir. 2005) (no constitutional right to an attorney in collateral proceedings). "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. The claim in ¶ 23 of the Amended Petition is DENIED.

2. Full and Fair State Post-conviction Proceeding (Amended Petition, ¶ 22)

Henderson asserts that he was denied a full and fair state post-conviction proceeding based on seven enumerated[10] grounds. (D.E. 16 at 50-51.) Respondent asserts procedural default and merits arguments for the claim in ¶ 22. (See D.E. 55-1 at 19-26, 61-64.) The Court finds that this claim is not cognizable in a petition pursuant to 28 U.S.C. § 2254.

A federal court may entertain an application for a writ of habeas corpus on behalf of a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The amended petition raises issues concerning the conduct of state-court

[10] Henderson indicates that there may be additional grounds which support his claim by using the language "including but not limited to the following errors of the post-conviction court". (D.E. 16 at 50.) Habeas Rule 2 states that a petition must "specify all the grounds for relief available to the petitioner" and "state the facts supporting each ground." The Court will not consider grounds for relief not specifically set forth in the Amended Petition.

collateral challenges to Henderson's convictions and sentences. Those matters are not cognizable in a petition pursuant to 28 U.S.C. § 2254. See Kirby v. Dutton, 794 F.2d 245, 247 (6th Cir. 1986) ("[T]he writ [of habeas corpus] is not the proper means by which prisoners should challenge errors or deficiencies in state post-conviction proceedings such as [petitioner's] claims here because the claims address collateral matters and not the underlying state conviction giving rise to the prisoner's incarceration."); Cress v. Palmer, 484 F.3d 844, 853 (6th Cir. 2007) (same); Roe v. Baker, 316 F.3d 557, 571 (6th Cir. 2002), cert. denied, 540 U.S. 853 (2003) (same); see Alley v. Bell, 307 F.3d 380, 387 (6th Cir. 2002) ("error committed during state post-conviction proceedings can not provide a basis for federal habeas relief"). The claim in ¶ 22 of the Amended Petition is DENIED.

B. Ineffective Assistance of Counsel Pretrial and Guilty Plea Proceedings (Amended Petition ¶ 8)

Henderson alleges that his Sixth, Eighth, and Fourteenth Amendment Rights were violated because his counsel were ineffective in preparation for trial and at the guilty plea proceedings, for the following reasons[11]:

a. Counsel failed to satisfy the standards for capital representation set forth by the American Bar Association (ABA) and the Tennessee Supreme Court (D.E. 16 at 5);

b. Counsel failed to maintain caseloads consistent with professional standards governing defense representation in capital cases (id. at 6);

[11] Henderson asserts that these are "non-exclusive reasons." (D.E. 16 at 5.) For the reasons stated, supra p. 23 n.10, the Court will not consider grounds for relief not specifically set forth in the Amended Petition.

c. Counsel failed to educate themselves regarding issues that might be presented as a defense (id.);

d. Counsel failed to develop an adequate attorney-client relationship with Henderson (id. at 6-7);

e. Counsel failed to establish a relationship of trust with Henderson's family (id. at 7-8);

f. Counsel failed to involve experts who may have been able to engage Henderson's family, especially his mother, and involve them in the defense process (id. at 8);

g. Counsel failed to investigate or develop any guilt phase defenses (id. at 8-9);

h. Counsel failed to fully represent Henderson when they advised him to enter guilty pleas (id. at 9);

i. Counsel failed to fully develop the venue issue (id. at 9-10);

j. Counsel failed to request that the trial court recuse itself (id. at 10);

k. Counsel failed to use experts' services effectively (id. at 10-11); and

l. Counsel failed to consider and develop a defense theory (id. at 11).[12]

1. Procedural Default

Respondent contends that the ineffective assistance of counsel claims asserted in ¶¶ 8(b-c), 8(f-h), 8(j), 8(k)(1-5, 7-8), and 8(l-m) of the Amended Petition were never raised in the state courts, are procedurally defaulted, and should be summarily dismissed. (D.E. 55-1 at 7-8). Henderson argues that Respondent's allegations of procedural default are incorrect, and summary judgment is not appropriate. (D.E. 68 at 108-109.) He asserts that the claims in ¶¶ 8(b-c), 8(f), and 8(k) were raised in the state

[12] Paragraph 8(m) alleges the prejudicial consequences from trial counsel's deficient performance.

court. (Id. at 109-110.) He asserts that Respondent engaged in "inappropriate, technical hairsplitting" for the claims in ¶¶ 8(b-c), 8(f-h), 8(j), and 8(l). (Id. at 111.) He argues that these claims are "not unexhausted because he emphasized different facts in his federal claim." (Id.) He relies on Vasquez v. Hillery, 454 U.S. 254, 258 (1986), for the proposition that "the presentation of additional facts to the district court . . . evades the exhaustion requirement when the prisoner has presented the substance of his claim to the state courts . . . ." (Id.) He contends that there can be no procedural default when the facts are in the state court record and do not fundamentally alter the legal claim already considered by the state court. (Id.) He asserts ineffective assistance of post-conviction counsel as cause and that prejudice overcomes the procedural default of the claims in ¶¶ 8(b-c), 8(f-h), 8(j), and 8(l). (Id. at 113-116.)

On appeal of the denial of post-conviction relief, Henderson argued ineffective assistance of counsel for the pre-trial and guilty plea proceedings as follows:

1. Defense Co-Counsel Was Unqualified to Represent Mr. Henderson in This Capital Case

2. Defense Counsel's Performance was Deficient in that Counsel Failed to Provide Timely and Sufficient Funding for the Mitigation Specialist to Carry Out the Necessary Investigation and Counsel Failed to Monitor and Direct the Mitigation Investigation

3. Counsel Failed to Develop the Necessary Relationship with Mr. Henderson and Failed to Consult Him and Involve Him in the Preparation of His Defense

4. Trial Counsel Were Ineffective in Allowing Mr. Henderson to Enter a Plea of Guilty and Waive Sentencing by a Jury

5. Counsel Failed to Provide Assistance as Required by the State and Federal Constitutions by Their Failure to Continue to Pursue the Change of Venue

6. Counsel's Performance was Deficient by Failing to Inform Themselves of Developments in Capital Litigation

7. Counsel's Failure to Provide Constitutionally Effective Representation in Developing and Making Use of Mitigation Evidence is Without Question

(D.E. 23-15 at 10, 65-84.) See Henderson, 2005 WL 1541855, at **31-32.

The claim in ¶ 8(b), that counsel failed to maintain their caseloads consistent with professional standards, was asserted in Henderson's first amended post-conviction petition. (See D.E. 21-14 at 53, ¶ 8.) This claim was not preserved on appeal and not exhausted in the state courts.

The claim in ¶ 8(c), that counsel failed to educate themselves regarding issues that might be presented as a defense, investigate and develop available information, and locate appropriate expert and lay witnesses to present a defense (see D.E. 16 at 6) was asserted in the first amended post-conviction petition. (See D.E. 21-14 at 53, ¶ 9.) Henderson argues that the claim was included in the facts on appeal. (D.E. 68 at 109-110.) He points to language in the appellate brief stating,

> counsel must have a working familiarity with many fields, particularly the area of mental health. Mr. Henderson's counsel did none of this. They completely abdicated their duty.

(Id. at 110; see D.E. 23-15 at 59.)

The Court further notes that, in the post-conviction appellate brief, as part of Henderson's claim that his co-counsel Andrew Johnston was unqualified to represent a defendant in a capital case, Henderson alleged that his counsel lacked the ability to seek the appropriate experts and guide them in their work:

> As noted by Professor Goodpaster and by Ms. Miller, the defense of capital cases requires the ability to work in many different fields. Defense counsel must have an understanding of working with experts . . . . Here, neither lead nor co-counsel was sufficiently versed in working with experts to guide the process of the investigation. . . . Counsel's duty is not only to seek the necessary expert services but also to coordinate and guide the work of the experts.

(D.E. 23-15 at 69.) He made similar relevant assertions related to his claim that counsel's performance was deficient because they failed to inform themselves of developments in capital litigation.

> Counsel's intentional lapse in staying abreast with developments in capital representation cobbled their ability to work with their experts properly and to make sure the experts were doing what was required and needed in this case. They were also unable to identify and obtain necessary additional experts. This failing affected both phases of the trial. . . . Mr. Mosier's admitted lack of knowledge concerning the work of his experts was below the requirements for performance by defense counsel in a capital case. Equally, since Mr. Johnston also lacked this essential knowledge, neither was aware of the deficiencies in the performance of the experts and vital mitigation evidence was missed.

(Id. at 78.) Henderson raised the issue of counsel's lack of knowledge, failure to develop evidence, and how that affected the use of experts in the post-conviction proceedings. The claim in ¶ 8(c) was exhausted.

Henderson argues that the claim in ¶ 8(f), that counsel failed to involve experts who may have been able to engage his family and consider the role that race played in the interaction with the defense team (D.E. 16 at 8), was raised in the first amended post-conviction petition and the facts were included on appeal. (D.E. 68 at 110.) Henderson focuses on language in the appellate brief about the lack of contact that Tammy Askew and Julie Fenyes had with his mother. (Id.) The Tennessee Court of Criminal Appeals addressed the issue of counsel's relationship with Henderson's mother and the defense team's visits to see her. Henderson, 2005 WL 1541855, at *35. However, there was no assertion of ineffective assistance based on the failure to engage experts to develop the relationship with Henderson's family and no mention of the effect of race on the relationship between Henderson's family and the defense team. Review of this claim would change the nature of the ineffective assistance of counsel claim and require the Court to make legal determinations not addressed in the state courts. See Hines v. Kelly, No. 1:09CV379, 2009 WL 2705884, at *16 (N.D. Ohio Aug. 26, 2009) (not sufficient to say that new allegations of ineffective assistance of counsel are exhausted when they are legally distinct). The claim in ¶ 8(f) of the Amended Petition was not exhausted in the state court.

In ¶ 8(g) of the Amended Petition, Henderson alleged that counsel failed to investigate or develop guilt phase defenses. (D.E. 16 at 8.) Specifically, he complained about the limited investigation conducted by Askew and that counsel would have been

able to advise him in his guilty plea had the requisite investigation been conducted. (Id. at 8-9.) He argues that Respondent has subjected the claim to inappropriate, technical hairsplitting. (D.E. 68 at 111.) In the post-conviction appellate brief, Henderson asserted that "neither lead nor co-counsel was sufficiently versed in working with experts to guide the process of the investigation." (D.E. 23-15 at 69.) He argued that when the post-conviction court denied relief because counsel "allowed the investigation and mitigation expert to conduct their investigation and report to counsel," it lacked an understanding of the role of capital defense counsel to guide the investigation. (Id.) He asserted that he was permitted to plead guilty and waive jury sentencing without serious evaluation by his counsel in violation of the duty to investigate the case and intelligently advise the client. (Id. at 75.) Askew testified at the post-conviction hearing about her investigation. See Henderson, 2005 WL 1541855, at *14. Johnston testified that he had "few interactions" with Askew. Id. at *6. Mosier testified that she was to make contact with persons having factual knowledge of the offense and with Henderson's family. Id. at *14. The investigation and Henderson's assertions that counsel did not properly guide the investigation were addressed in the state courts. The claim in ¶ 8(g) is exhausted.

With regard to the claim in ¶ 8(h) of the Amended Petition, Respondent asserts that although Henderson raised a claim in his post-conviction appellate brief (see D.E. 23-15 at 75-77) that counsel failed in their duties to fully represent him when they

advised him to take guilty pleas, the factual basis for the claim raised in state court was different than that asserted in the habeas petition. (D.E. 55-1 at 7 n.2.) Before the Tennessee Court of Criminal Appeals, Henderson asserted that his counsel was unprepared for trial and failed to spend the necessary time to develop any mitigation evidence or theory. (D.E. 23-15 at 75.) He noted that he received nothing in exchange for his plea and that he relinquished the opportunity to challenge the aggravating factors by pleading guilty to all of the felonies. (Id. at 76.) He asserted that he was permitted to plea without serious evaluation by his counsel in violation of counsel's duty to investigate the case and to intelligently advise their client. (Id. at 75.)

In his habeas petition, Henderson alleged that counsel advised him shortly after the motion to continue was granted that it was in his best interest to enter a guilty plea even though the prosecution refused to provide a plea bargain, counsel suspected Henderson was mentally ill, and the psychologist had not completed the mental evaluation. (D.E. 16 at 9.) Henderson further alleged that counsel did not advise him that entering a plea to the escape and premeditated murder charges would constitute proof of three of the four aggravating factors. (Id.)

In both proceedings, Henderson addressed the lack of a plea bargain, the effect of the plea on the aggravating factors, and counsel's lack of preparation and development of mitigation evidence. In the habeas petition, Henderson further asserts that counsel suspected he was mentally ill and that the psychologist had

not completed her mental evaluation. These allegations correspond with his assertion in the post-conviction proceedings that counsel failed to spend the necessary time to develop mitigation evidence and that he was permitted to plea without serious investigation and evaluation. The allegations raised in the habeas petition do not fundamentally alter the legal claim presented to the state court. The claim in ¶ 8(h) is exhausted.

Henderson has not associated the claim in ¶ 8(j), that counsel failed to request that the trial court recuse itself (D.E. 16 at 10), with any claim presented in the state court. In Henderson's post-conviction appellate brief, he asserts that was denied the right to a full and fair sentencing and post-conviction rehearing because the trial court failed to recuse itself. (D.E. 23-15 at 39-51.) However, the recusal issue was never raised as an ineffective assistance of counsel claim.[13] The claim in ¶ 8(j) was not exhausted in the state courts.

Henderson argues that the claim in ¶ 8(k), that counsel failed to use the expert services of Fenyes and Dr. Lynn Zager effectively (D.E. 16 at 10-11), was raised in his amended post-conviction petition (see D.E. 21-14 at 53, ¶ 10) and included in the facts on appeal. (D.E. 68 at 110-111.) Henderson's post-conviction appellate brief states,

> The role of defense counsel in a capital trial is not to "allow" defense team experts to do their work. Rather it is to direct the development of evidence and information

[13] Mosier testified that he did not seek recusal of Judge Blackwood because Blackwood was morally and philosophically opposed to the death penalty. Henderson, 2005 WL 1541855, at *8.

> that supports counsel's theory of defense. It is the attorney's duty to guide the experts, provide them with all the supporting materials they need to fulfill their work in the case, maintain regular contact as the preparation phase unfolds, and integrate the various components into a cohesive defense case . . . Mr. Henderson's trial counsel did none of this. They completely abdicated their duty.

(Id.; see D.E. 23-15 at 59.) Henderson also cites language in the brief about counsel's duty to seek the necessary experts, lack of knowledge concerning the work of his experts, and failure to adequately use the clinical psychologist that was secured in the case. (See D.E. 68 at 111.) In the post-conviction appellate proceedings, Henderson argued that counsel failed to provide timely and sufficient funding for Fenyes, the mitigation specialist, and to monitor and direct the mitigation investigation. (D.E. 23-15 at 71-73.) See Henderson, 2005 WL 1541855, at *32-34. He argued that had "defense counsel understood the development of mitigation and directed their experts they would have been able to supply information critical to reaching a reliable diagnosis of serious bi-polar illness." (Id. at 73.) He claimed that counsel failed to adequately use Fenyes' and Zager's services. (Id. at 79-80). Further, the Tennessee Court of Criminal Appeals thoroughly reviewed the funding issues, and Fenyes' and Zager's work. Id. at **9-10, 15-16, 34, 40-42. The claim in ¶ 8(k) was exhausted in the state court.

In ¶ 8(l), Henderson complained that counsel failed to develop a defense theory to the intentional murder and associated felonies. (D.E. 16 at 11.) As part of Henderson's post-conviction claim that

his counsel were ineffective for allowing him to enter a plea, he asserted,

> Because neither counsel had studied or understood the nature of a death penalty case, they ignored a general principal of always putting forth a guilt phase case that is consistent with the planned penalty phase case. The need to conduct a guilt phase even in those cases where a finding of guilt is presumed was articulated as long ago as 1983. . . . This issue and the benefits of proceeding to trial in the guilt-innocence phase, even in an overwhelming evidence case, were fully developed by Goodpaster. . . . These reasons include an opportunity to begin to present mitigation themes in the guilt-innocence phase and the opportunity for the jury to hear all of the facts and act on them by returning a guilty verdict before turning to the serious decision concerning sentence.

(D.E. 23-15 at 75-76 (citations omitted)). He asserted that counsel were deficient in their investigation of the case at the guilt stage, were not prepared, failed to appropriately advise him related to the plea, and failed to put on a guilt phase defense. (Id. at 75.) The claim in ¶ 8(l) is exhausted.

Henderson asserts that ineffective assistance of counsel during the post-conviction proceedings demonstrates cause for the failure to exhaust any of these claims. (D.E. 68 at 113-14.) Henderson has no constitutional right to the effective assistance of post-conviction counsel and cannot establish cause to prevent the procedural default of his unexhausted claims on that basis. Coleman, 501 U.S. at 752-55 (ineffective assistance of counsel during state post-conviction proceedings cannot serve as cause to excuse factual or procedural default); Clark v. Waller, 490 F.3d 551, 556 (6th Cir. 2007) (rejecting ineffective assistance of post-conviction counsel as cause for procedural default); Abdus-Samad,

420 F.3d 614, 631 (6th Cir. 2005); see Wilson v. Hurley, 382 F. App'x 471, 478-79 (6th Cir. 2010) (ineffective assistance of counsel does not establish cause for procedural default where there was no right to counsel in the collateral proceeding at issue). Henderson has not established that a fundamental miscarriage of justice would result from the failure of the Court to review his unexhausted claims.

The claims in ¶¶ 8(b), 8(f), and 8(j) were not exhausted and are procedurally defaulted. Summary judgment is GRANTED as to the claims in ¶¶ 8(b), 8(f), and 8(j), and these claims are DENIED.

The claims in ¶¶ 8(c), 8(g), 8(h), 8(k), and 8(l) are exhausted. Summary judgment, based on procedural default, is DENIED as to the claims in ¶¶ 8(c), 8(g), 8(h), 8(k), and 8(l).

2. Merits Review

Respondent asserts that only five of the thirteen grounds of ineffective assistance of counsel at the pre-trial and guilty plea proceedings alleged in Henderson's habeas petition were presented in the state court. (D.E. 55-1 at 40-41.) Those grounds are purportedly stated in ¶¶ 8(a)(1-3), (d-e), (i), and (k). (See id. At 40.) Respondent contends that the state court correctly recognized Strickland as the controlling authority on the issue of ineffective assistance of counsel, and after a thorough discussion of Strickland, determined that Henderson was not entitled to relief. (Id. at 41.) He asserts that the state court's decisions were reasonable and that he is entitled to summary judgment. (Id.)

A claim of ineffective assistance of counsel under the Sixth Amendment is controlled by the standards enunciated 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 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 v. Bell, 161 F.3d 320, 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'") (citations omitted).

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. at 697.

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.

a. Counsel failed to satisfy the standards for capital representation set forth by the ABA and the Tennessee Supreme Court (Amended Petition ¶ 8(a)(1-3)).[14]

Henderson alleged that despite the fact that his lead counsel Mike Mosier had handled several capital cases prior to his case, Mosier never attended a training seminar addressing capital defense representation and failed to stay current with developments in capital litigation, including changes in case law, social sciences, and mitigation development. (D.E. 16 at 5, ¶ 8(a)(1).) He alleged that his co-counsel Andrew Johnston had practiced law for less than three years, had no prior experience using experts, was appointed to act as a "housekeeper", had no experience with capital cases, and participated substantively only in the motion for change of venue. (Id. at 5-6, ¶ 8(a)(2).) He asserted that contrary to prevailing professional norms in capital litigation, Mosier handled the case on his own and failed to utilize co-counsel effectively. (Id. at 6, ¶ 8(a)(3).) He alleged that Johnston lacked the experience and initiative to become more involved in the case. (Id.)

The Tennessee Court of Criminal Appeals addressed counsel's qualifications and performance:

[14] Henderson's response to the motion for summary judgment combines his claim that his counsel's representation did not satisfy the ABA and Tennessee standards for capital representation (D.E. 16 at 12, ¶ 8(a)) with his claims that counsel was ineffective when they advised Henderson to plead guilty and to waive jury sentencing (D.E. 16 at 12, ¶¶ 8(h) & 9(a)). (See D.E. 68 at 48-58.) The Court will address these claims separately on the merits.

The petitioner asserts that Andrew Johnston, second chair counsel, was not qualified to represent him in a capital proceeding. While the petitioner acknowledges that appointment in this case was made prior to the effective date of the standards for appointment of counsel contained in the current version of Rule 13, Rules of the Tennessee Supreme Court, he asserts that the necessary qualifications of counsel in capital cases was standard. *See ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (February 1989). The petitioner asserts that Mr. Johnston "did not come close to meeting these standards." In support of this position, the petitioner relies upon a letter from the trial court to lead counsel dated June 3, 1997, in which the court states, "I'm going to attempt to appoint a local lawyer this week, who can do most of your housekeeping, babysitting, and logistical work." The petitioner interprets this statement as inferring that the trial court was more interested in appointing someone to file documents and keep up with the docket, rather than appointing an attorney capable of assisting in the difficult and complex representation of an individual facing the death penalty.

The petitioner recognizes that the core question is whether Mr. Johnston's performance was deficient to the prejudice of the petitioner. He responds that the fact that he was only provided one qualified attorney to his capital defense amounted to *per se* deficient performance.

"[T]he Sixth Amendment does not grant a defendant, who does have the absolute and unqualified right to appointed counsel, the additional right to counsel of his own choosing." However, since Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), it has become apparent that special skills are necessary to assure adequate representation of defendants in death penalty cases. *See ABA, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* at 5.1. However, there is no presumption that counsel is ineffective because of lack of experience in trying a particular kind of case. See Russell v. State, 849 So.2d 85, 122 (Miss. 2003).

At the time of appointment in the present case, there was no specific criteria required of an attorney prior to receiving appointment in a capital case. Indeed, prior to July 1, 1997, the rule merely provided, "[i]n a capital case two attorneys may be appointed for one defendant." Tenn. Sup. Ct. R. 13, § 1 (prior to amendment in 1997) (emphasis added); see also Brimmer v. State, 29 S.W.3d

> 497, 503 (Tenn. Crim. App. 1998). Thus, under the applicable rule, the petitioner was not entitled to second chair counsel as of right. Moreover, no qualifying criteria was specified as to lead counsel. While we recognize that ABA standards as to capital representation were in place at the time of the appointment and while it must be conceded that Mr. Johnston failed to satisfy all of the suggested criteria established by the ABA, these guidelines are not binding upon the trial courts of this state. The trial court appointed Mr. Johnston as second-chair counsel, noting that the court had been impressed with Mr. Johnston's "legal acumen." Accordingly, the petitioner's argument that Mr. Johnston's lack of experience results in *per se* deficient performance is not supported in law.
>
> In addition to Mr. Johnston's failure to satisfy any criteria relating to the appointment of capital counsel, the petitioner cites to numerous other factors indicating that his lack of experience constituted deficient performance, for example: (1) counsel did not have any experience in working with experts; (2) counsel failed to timely secure sufficient funds for the mitigation specialist; and (3) lead counsel was not qualified to handle a capital case under Rule 13, Rules of the Tennessee Supreme Court. Again, we refuse to conclude that these allegations automatically result in a finding of deficient performance. A successful claim of ineffectiveness requires more than just a showing that trial counsel was inexperienced. Rather, the petitioner must demonstrate with specificity that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687. Even if a defendant meets this threshold, he or she must also prove that such error prejudiced the defense. Id. Furthermore, in the context of a guilty plea, the petitioner must show that there is a reasonable probability he would have not pleaded guilty if not for trial counsel's error. Hill, 474 U.S. at 59. We proceed therefore to examine the petitioner's specific allegations of deficient performance.

Henderson, 2005 WL 1541855, at **32-33.

The Tennessee Court of Criminal Appeals noted that Mosier had been a licensed attorney for twenty-seven years and had experience with capital cases and the use of experts. Id. at **8, 20, 40. The

court summarized Johnston's testimony about his experience and involvement in the case, as follows:

> Andrew Johnston, second chair counsel at the petitioner's trial, testified that he was appointed to represent the petitioner in June 1997. Lead counsel, Michael Mosier, had already been appointed at this time. Mr. Johnston stated that he was to serve as "local counsel." In other words, he was to file documents prepared by Mr. Mosier and he would meet with the petitioner's family if necessary. In this regard, Mr. Johnston testified that he met with the petitioner's family about three (3) or four (4) times. He added that he met with the petitioner on numerous occasions prior to trial.
>
> At the time of his appointment, Mr. Johnston had been licensed as an attorney for two (2) years and eight (8) months. Mr. Johnston stated that this was his first capital case. Prior to this appointment, the most serious case handled by Mr. Johnston was either an aggravated robbery or aggravated burglary. His practice was forty percent (40%) criminal, mostly handled in General Sessions Court. Post-conviction counsel informed Mr. Johnston that the standards for capital representation went into effect July 1, 1997, after Mr. Johnston's appointment in this matter. These standards express requirements for capital counsel in regards to the number of trials in which they have to participate, among other things. Mr. Johnston conceded that, at the time of his appointment, his experience did not satisfy the requirements of Tennessee Supreme Court Rule 13. Mr. Johnston admitted that, prior to his appointment, he had never met Mr. Mosier.

Id. at **5-6.

The Tennessee Court of Criminal Appeals held:

> **6. Trial counsel failed to inform themselves of developments in capital litigation.**
>
> The petitioner next asserts that trial counsel were deficient by their failure to stay abreast of developments in capital representation. The petitioner argues that trial counsel's failures impaired their ability to work with experts properly and ensure that the experts were performing the necessary tasks. In support of his position, the petitioner asserts that both Mr. Mosier and Mr. Johnston admitted their deficiency regarding working with experts. The petitioner asserts that this deficiency resulted in the loss of vital

> mitigation evidence. As stated earlier, issues addressing the failure to present mitigation evidence will be addressed as such. Our review as to this claim is merely as to whether Mr. Mosier's and Mr. Johnston's failure to inform themselves of developments in capital litigation constituted deficient performance.
>
> The record reflects that Mr. Mosier had previous experience in capital litigation. Additionally, his testimony established that he was familiar with the use of experts and that the experts in this matter were hand-selected by him. The petitioner has failed to make specific allegations referencing the developments in the area of capital litigation of which trial counsel was unaware. Rather, the petitioner relies upon alleged deficiencies in the area of mitigation proof. We refuse to adopt a per se finding of deficiency based upon an allegation of counsel's lack of knowledge regarding recent developments in the law, especially in light of the absence of any reference by the petitioner of what legal developments counsel was allegedly unaware. The petitioner is not entitled to relief as to this claim.

Id. at *40.

Henderson argues that he was prejudiced because he accepted his counsel's advice without knowing that counsel did not satisfy the standards for capital representation set forth by Tennessee Supreme Court Rule 13. (D.E. 68 at 48, 55.)[15] He argues that Rule 13 was designed to prevent the types of attorney error that occurred in his case. (Id. at 55, 57.) He asserts that Mosier and Johnston both failed to satisfy the Rule 13 standard. (Id. at 56.) He argues about the timing of the appointments, whether Rule 13 applies, and asserts that the trial court erred in not appointing

[15] Henderson also argues prejudice based on the fact that counsel permitted Fenyes to reveal prejudicial information about him and his case to the sentencing judge and Tennessee law required a sentencer to impose the death sentence if aggravating circumstances outweighed mitigating circumstances. (D.E. 68 at 48-49, 53.) These facts are best addressed in the context of Henderson's assertion of ineffective assistance of counsel related to the guilty plea. (See D.E. 16 at 9, ¶ 8(h)).

Rule 13 qualified counsel to replace Johnston. (Id. at 57-58.) He asserts that the trial court's failure to appoint qualified counsel resulted in counsel's failure to properly investigate and present serious mental health issues, to prevent Fenyes from misleading the trial court that there was "a dearth of mitigating evidence," and to appropriately advise him about the court's discretion with regard to imposition of the death penalty. (Id. at 58.)

Henderson argues that the Tennessee Court of Criminal Appeals unreasonably determined that Rule 13 did not govern the appointment of counsel in this case and applied "erroneous standards contrary to and in unreasonable application of Supreme Court precedent." (D.E. 68 at 62.) He argues that the court made an unreasonable determination of fact when it adopted the trial court's finding that Johnston was appointed in June 1997, relied on the pre-July 1, 1997 version of Rule 13, and determined that Henderson was not entitled to a second chair counsel as of right. (Id. at 63-64.) He asserts that Johnston was appointed on August 6, 1997, thirty-six days after Rule 13 went into effect and that he was entitled to Rule 13 qualified counsel based on Hicks v. Oklahoma, 447 U.S. 343 (1980). (Id. at 64.)

Johnston's name appeared on a series of motions filed June 25, 1997 (see D.E. 20 at 19-35, 38-87), demonstrating that he worked on the case prior to the effective date of the July 1, 1997 version of Rule 13. Henderson also admits that Johnston performed and billed for work prior to the passage of Rule 13. (D.E. 68 at 57.) The Tennessee Court of Criminal Appeals' determination that the July 1, 1997 version to Rule 13 did not apply was not unreasonable. Further

that determination has little bearing on this case as the Strickland standard, not Rule 13, applies.

Deficient performance, not qualifications, establish the Sixth Amendment right. See Bell v. State, 879 So.2d 423, 432 (Miss. 2004) ("Inexperience does not as a matter of law make counsel ineffective"); see also United States v. Lewis, 786 F.2d 1278, 1281-82 (5th Cir. 1986) (claims of inexperience have little merit); see also Ortiz v. Stewart, 149 F.3d 923, 933 (9th Cir. 1998) (an ineffective assistance claim cannot be based solely on counsel's inexperience). "Prevailing norms of practice as reflected in American Bar Association standards and the like, . . . , are guides to determining what is reasonable, but they are only guides." Strickland, at 466 U.S. at 688; Bobby v. Van Hook, 130 S. Ct. 13, 16-18 (2009); Eley v. Bagley, 604 F.3d 958, 972 (6th Cir. 2010. "While the ABA Guidelines provide noble standards for legal representation in capital cases and are intended to improve that representation, they nevertheless can only be considered as a part of the overall calculus of whether counsel's representation falls below an objective standard of reasonableness . . . ." Yarbrough v. Johnson, 520 F.3d 329, 339 (4th Cir. 2008). Similarly, in Roe v. Flores-Ortega, 528 U.S. 470, 479 (2000), the Supreme Court noted that state rules for representation of criminal defendants are not equivalent to the constitutional requirements for representation.

> W]hile States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices.

Id.; see Jamison v. Collins, 100 F. Supp. 2d 647, 740 (S.D. Ohio 2000) (a Strickland analysis is required to determine whether lack of training or education about capital cases constitutes ineffective assistance of counsel when specialized training and education for capital cases was not required by the state court at the time of the representation). The Tennessee Court of Criminal Appeals' refusal to presume that counsel was deficient based on the lack of compliance with an ABA standard or a state court rule without a demonstration of how counsel's failure to satisfy these standards resulted in making objectively unreasonable choices was not contrary to or an unreasonable application of Supreme Court precedent.[16]

Henderson's argument that he was denied a second attorney because of Johnston's lack of experience and Mosier's failure to utilize Johnston as co-counsel (see D.E. 16 at 6, ¶ 8(a)(3)) is without merit. There is no constitutional right to the appointment of co-counsel in a capital case. Riley v. Taylor, 277 F.3d 261, 306 (3d Cir. 2001); see Rachal v. Quarterman, 265 F. App'x 371, 378 (5th Cir. 2008).

> The Constitution does not specify the number of lawyers who must be appointed. If a single attorney provides reasonably effective assistance, the Constitution is satisfied, and if a whole team of lawyers fails to provide such assistance, the Constitution is violated.

Riley, 277 F.3d at 306.

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[16] Henderson did not tie his assertions related to counsel's lack of knowledge and experience to claims of deficient performance in the state courts. See Henderson, 2005 WL 1541855, at *40. He attempts to make those connections in his habeas brief. (See D.E. 68 at 55-61.) The Court will address these assertions of deficient performance independently.

The Tennessee 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. The claim in ¶ 8(a) is DENIED.

b. Counsel failed to develop an adequate attorney-client relationship and a relationship of trust with Henderson's family (Amended Petition ¶¶ 8(d) and (e)).

Henderson alleges that his trial counsel failed to develop an adequate relationship with him and his family, particularly with his mother Sally Johnson. (D.E. 16 at 6-8.) He alleges that Mosier visited him less than six times, that Johnston visited him four times, and that counsel did not respond to his letters and questions. (Id. at 6-7.) He asserts that although counsel knew that his mother was a "considerable factor in the preparation and presentation" of his defense, they failed to establish a relationship with his mother and other family members. (Id. at 7.) He alleges that counsel rarely met with his mother, that Askew met with her once, and that Fenyes met with her no more than twice and then reported to lead counsel that she had problems communicating with and obtaining information from her. (Id. at 7-8.)

On appeal in the post-conviction proceedings, the Tennessee Court of Criminal Appeals held:

3. Counsel failed to develop a relationship with the petitioner, failed to consult with the petitioner and failed to involve the petitioner in the preparation of a defense.

The petitioner contends that trial counsel failed to consult and involve the petitioner in the defense of his

own life. He states that the limited visits between himself and his counsel prohibited either attorney from developing any type of relationship with the petitioner. Thus, the petitioner argues that he was precluded from developing a trusting relationship with the very people entrusted with his life. He adds that counsels' failure to consult with the petitioner prohibited them from monitoring the petitioner's mental health and prohibited the petitioner from being involved in his defense. This lack of contact with the petitioner also impacted counsels' relationship with the petitioner's mother, Sally Johnson. The fact that counsel failed to develop a relationship with Mrs. Johnson denied counsel critical information regarding the family dynamics and the existence of the petitioner's mental illness.

The United States Supreme Court has stated that the right to counsel as guaranteed by the Sixth Amendment to the United States Constitution does not include "the right to a meaningful attorney-client relationship." See Morris v. Slappy, 461 U.S. 1, 13, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983). Indeed, the Court stated that "no court could possibly guarantee that a defendant will develop this kind of rapport with his attorney." Id.

According to the petitioner, Mr. Mosier met with him on at least six (6) occasions and Mr. Johnston met with the petitioner on at least four (4) occasions. The record reveals a large amount of correspondence between the petitioner and counsel. A large portion of this correspondence involved the petitioner's questions regarding the possibility of entering a guilty plea and the consequences of having the jury impose the sentence compared to having the judge impose the sentence. Mr. Mosier acknowledged that, on one occasion, it was brought to his attention that the petitioner was dissatisfied with their representation. Within several days of receiving this information, Mr. Mosier visited the petitioner at Riverbend. The petitioner expressed no further dissatisfaction with counsel until after a sentence of death was imposed by the trial court. Trial counsel cited no other occasions where they had difficulty with the petitioner. Rather, both trial counsel found the petitioner respectful and pleasant. At his guilty plea proceeding, the petitioner informed the trial court that Mr. Mosier and Mr. Johnston had met with him and that he was satisfied with their representation. Finally, the petitioner failed to testify at the post-conviction evidentiary hearing. The petitioner has failed to demonstrate what he could have communicated to his attorney that would have aided in his defense had counsel established a greater level of communication. See

> Lloyd v. State, 669 N.E.2d 980 (Ind. 1996); *cf.* State v. Creech, 132 Idaho 1, 966 P.2d 1, 19-20 (Idaho 1998), cert. denied, 526 U.S. 1147, 119 S.Ct. 2025, 143 L.Ed.2d 1036 (1999) (determining that it was not ineffective assistance of counsel where counsel did not spend a lot of time with a client who was unwilling to listen to counsel's advice). Moreover, there is nothing demonstrating that the petitioner was prohibited from effective communication with trial counsel. See Washington v. Meachum, 238 Conn. 692, 680 A.2d 262, 282 (Conn. 1996) (holding that the right to assistance of counsel includes the right to communicate effectively with counsel in preparation of one's defense). Accordingly, he has failed to satisfy his burden of establishing that he did not have a working relationship with counsel. Further, the petitioner has not shown that he was prejudiced by his relationship with counsel or that had counsel spent more time with him, he would not have pled guilty and insisted on going to trial.
>
> The petitioner also faults counsel for failing to develop a relationship with the petitioner's mother. The record indicates, as does the trial transcript, that the petitioner's mother was interviewed by the defense team. Her testimony, as well as that of other witnesses, indicates that Sally Johnson was defensive regarding claims against the petitioner and maintained his innocence, faulting others for mistakes that he had made. Additionally, the petitioner has failed to assert that his mother would have been more forthcoming had counsel "actively wooed" her. The petitioner's own post-conviction expert, Dr. Frank Einstein, described Mrs. Johnson as "very, very guarded." The petitioner has also failed to produce any family member, extended or otherwise, who provided insight into his alleged mental illness. Accordingly, we conclude there is no evidence that counsel would have gained insight into the petitioner's alleged mental illness if they had more actively pursued a relationship with the petitioner's mother. Petitioner is not entitled to relief as to this claim.

Henderson, 2005 WL 1541855, at **34-35.

Henderson acknowledged that the Sixth Amendment does not include the right to a meaningful attorney client relationship. (D.E. 68 at 85.)[17] However, he contends that counsel's only access

[17] See Morris v. Slappy, 461 U.S. 1, 13-14 (1983).

to a complete social history, as required by the Supreme Court in Wiggins v. Smith, 539 U.S. 510, 524-25 (2003), was through communication with him and his family, particularly his mother. (Id. at 86.) He contends that the failure to develop these relationships prevented counsel from learning about his "downward spiral" during adolescence, his criminal activities in his late teens and early twenties, problems with anger and impulsive behavior, homelessness, pleas for assistance with his mental health, and the history of mental illness in his family. (Id.)

Henderson relies on Guideline 10.5 of the ABA Guidelines for Death Penalty Cases to establish that counsel was ineffective for his failures to consistently visit and correspond, to engage in a "continuing interactive dialogue," to establish a relationship of trust, and to maintain close contact. (D.E. 68 at 83-84.) He relies on Guideline 10.7 and the supplementary guidelines to impose a duty on counsel to establish a relationship with his family and to conduct multiple face-to-face interviews. (Id. at 83-85.)

He claims that he was prejudiced by counsel's deficient performance because there is a reasonable probability that a mental health professional would have determined, as Dr. George Woods did, that Henderson suffered from brain damage and bipolar disorder, was unable to conform his behavior at the time of the offense, and was unable to knowingly and intelligently enter a valid guilty plea. (Id. at 86-87.) He asserts that had counsel had this information, there is a reasonable probability that counsel would not have

advised him to plead guilty or waive his right to a jury trial. (Id. at 87.)

Henderson argues that the decision of the Tennessee Court of Criminal Appeals is contrary to and an unreasonable application of Strickland and Hill v. Lockhart, 474 U.S. 52 (1985). (D.E. 68 at 87-88.) He asserts that the state court in determining that counsel's performance was not deficient incorrectly relied on two premises: (1) that he failed to demonstrate what information could have been communicated to his attorney to aid in his defense; and (2) that "there is nothing demonstrating that the petitioner was prohibited from effective communication with trial counsel." (Id. at 87.) He contends that the state court then made a blanket statement that there was no prejudice. (Id. at 88.) He asserts that Strickland is "an evaluation of counsels' failures" - not the defendant's. (Id.) He asserts that counsel's failures do not meet professional standards and constitute deficient performance. (Id.)

Henderson asserts that the finding of no prejudice is objectively unreasonable given the large amount of information related to his brain injury and mental health that might have been ascertained but for counsel's deficient performance. (Id. at 88-89.) He argues that, had counsel known that he suffered symptoms of major mental illness, bi-polar disorder, and brain damage from a traumatic head injury, counsel could have informed the court that he could not make a knowing and intelligent plea. (Id.)

The Sixth Amendment does not guarantee Henderson a meaningful or a friendly attorney-client relationship. Morris, 461 U.S. at 13-

14; United States v. Harris, 308 F. App'x 932, 940 (6th Cir. 2009); Crawford v. Epps, 353 F. App'x 977, 990 (5th Cir. 2009) (a certificate of appealability will not issue on claim that counsel was ineffective for failing to develop a meaningful attorney-client relationship); see Jackson v. United States, 638 F. Supp. 2d 514, 538 (W.D.N.C. 2009) ("mutual admiration societies are not constitutional guaranties"). The focus is on whether the attorney was effective in the adversarial process, not the client's relationship with his attorney. Wheat v. United States, 486 U.S. 153, 159 (1988). Only in circumstances where the attorney-client relationship causes the attorney to perform in a deficient manner and the defendant is prejudiced by the attorney's performance is the Sixth Amendment violated. See Hill v. Mitchell, 400 F.3d 308, 324 (6th Cir. 2005) ("Even granting Hill the assumption that his relationship with his lawyers was not what it should have been, he has not shown how that failing affected the advocacy they provided him.").

Counsel paints a very different picture of the relationship with Henderson. Both counsel met with Henderson, and Henderson corresponded with them. (See D.E. 23-1 at 80-81, 90, 105-106; D.E. 23-2 at 23-25, 27-28, 30, 34, 46-47.) The trial court notified Mosier that Henderson had concerns about his representation, and Mosier went to visit him to address those concerns. (Id. at 30.) Mosier had no problems communicating with Henderson. (Id. at 61.) Johnston described Henderson as calm, respectful, and pleasant, stated that he liked Henderson, and was unaware of any friction

between Henderson and any member of the defense team. (D.E. 23-1 at 105-07.)

The Tennessee Court of Criminal Appeals correctly applied Morris for the proposition that Henderson was not entitled to a friendly or positive attorney-client relationship. With regard to Henderson's assertion that the ABA required counsel to establish a relationship of trust, the Supreme Court held that ABA standards are "guides to determining what is reasonable". Rompilla v. Beard, 545 U.S. 374, 387 (2005). There was no obvious and ongoing conflict between Henderson and his counsel that prevented communication. See Daniels v. Woodford, 428 F.3d 1181, 1196-98 (9th Cir. 2005). Even to the extent that Henderson had communication problems or disagreed with counsel's strategic decisions, he could not establish deficient performance based on the attorney-client relationship. See Larson v. Palmateer, 515 F.3d 1057, 1066-67 (9th Cir. 2008). The Sixth Amendment right to counsel extends to a client when the client's conduct prevents a meaningful relationship. Gore v. State, 24 So.3d 1, 7 (Fla. 2009) (citing Morris, 461 U.S. 1 (1983)).

The right to the effective assistance of counsel does not extend to require counsel to establish a relationship of trust with Henderson's family, and Henderson has provided no Supreme Court precedent to establish that right.

Henderson asserts that he was prejudiced because if counsel had a better relationship, it would become fairly obvious that he was mentally impaired. (See D.E. 68 at 88.) However, Zager

evaluated Henderson and found him competent to stand trial. Henderson, 2005 WL 1541855, at *15. She determined that the evidence did not support an insanity defense. Id. Zager's testimony indicates that bi-polar disorder does not necessarily prevent someone from being a functioning member of society. Id. at *16. Henderson was diagnosed with bi-polar disorder subsequent to trial. Counsel should be able to rely on Zager's evaluation with regard to Henderson's competence and mental status at trial.[18] Further, there is no evidence contemporaneous to trial that supports the conclusion that Henderson was unable to make a knowing, intelligent, and voluntary plea. Henderson has not established that the nature of his relationship with counsel prejudiced his case at the pretrial and guilt phases, especially considering the overwhelming evidence that Henderson was guilty of the crimes and the potential benefit of entering a plea in these circumstances.

The record evidence also indicates that Henderson's mother did not believe that he needed any help for his mental condition, never indicated that Henderson had a mental health issue, was in denial about his actions, was defensive, "very, very guarded," and maintained his innocence. Henderson, 2005 WL 1541855, at **3, 7, 9, 35, 41. The Sixth Amendment only requires the attorney's

[18] When Zager completed her evaluation in preparation for sentencing, she determined only that Henderson had a personality disorder with narcissistic and anti-social traits. Henderson, 2005 WL 1541855, at *16. During the post-conviction proceedings, Dr. Pamela Auble evaluated Henderson, found that he had neuropsychological deficits, and agreed with Zager's diagnosis of a personality disorder. Id. at **17-18. Auble was unable to diagnose Henderson with a major mental disorder. Id. at *18. During the post-conviction proceedings, Dr. William Kenner testified that Henderson suffered from bipolar type 2 disorder. Id. at *18. Kenner did not indicate to what extent, if any, the bipolar disorder would have affected Henderson's ability to enter a knowing and voluntary guilty plea.

performance to be objectively reasonable and not to prejudice the defendant. Henderson's claim about his counsel's relationship with his family is without merit.[19]

The Tennessee Court of Criminal Appeals' applied the appropriate Supreme Court precedent from Morris. See Henderson, 2005 WL 1541855, at *35. The 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. The claims in ¶¶ 8(d) and 8(e) are DENIED.

c. Trial counsel were ineffective for failing to fully develop the question of venue (Amended Petition ¶ 8(i)).

Henderson alleges that counsel's failure to pursue an interlocutory appeal for the denial of the motion to change venue or begin the voir dire process to challenge the assumption that an impartial jury could be impaneled constitutes ineffective assistance of counsel. (D.E. 16 at 9-10.)[20] He alleges that counsel's failures to pursue the venue issue precluded any attack on the denial of change of venue and limited his "knowingness in entering a guilty plea." (D.E. 16 at 10.)

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[19] The Court acknowledges that Henderson has asserted that additional information about his mental health may have been ascertained through more contact with his family. This issue may be bettered addressed in response to the allegations in ¶¶ 8(g), 8(h), 9(b-d), 9(g), and 9(j).

[20] In response to the motion for summary judgment, Henderson asserts that counsel could have supplemented the record with additional proof of unfair prejudice in the community (see D.E. 68 at 77), but he does not make this allegation in his habeas petition. The Court will not address counsel's failure to supplement the record as it was not plead pursuant to Habeas Rule 2.

Respondent argues that Henderson's claim that counsel was ineffective for failing to proceed with voir dire was not raised in the state court and is procedurally defaulted. (D.E. 55-1 at 47 n.5.) Henderson ignores the procedural default and addresses the entire claim on the merits. (See D.E. 68 at 75-79.) In the post-conviction appellate brief, Henderson specifically states that "the attempt to select a jury" would have raised a myriad of additional potential errors for appeal. (D.E. 23-15 at 77-78.) The Court finds that the claim is exhausted.

Respondent argues that the Tennessee Court of Criminal Appeals correctly determined that Henderson waived any objection related to venue when he entered the guilty plea. (D.E. 55-1 at 48.) He asserts that Henderson failed to demonstrate that the state court's decision was contrary to, or an involved an unreasonable application of established federal law. (Id.)

The Tennessee Court of Criminal Appeals stated:

> **5. Trial counsel failed to adequately pursue a motion for change of venue**
>
> Prior to trial, trial counsel filed a motion requesting a change of venue. At argument on the motion, trial counsel argued that:
>
> [D]ue to the extensive pretrial publicity; due to the nature of the case; the very fact that it's a death penalty case; due to the nature of Deputy Bishop ... being well-liked by everybody in this community.... We've attached copies of some newspaper articles in the Fayette County paper.... But the one headline that I think compels this Court to move this case from Fayette County is one attached, which is from the Wednesday, May 7, 1997 Edition, front page of the Fayette County Review, and the headlines show the photograph of Deputy Bishop. It shows a picture of a multitude of law enforcement vehicles, going ... to the funeral

> home.... And the headline says this: "County Mourns Loss of Deputy Bishop."...I just don't feel like that Mr. Henderson can get a fair trial in Fayette County.
>
> Mr. Mosier further related other media reports detailing the petitioner's history of escape attempts. The trial court denied the motion, reserving final ruling on the matter until the conclusion of the voir dire process. The trial court noted that, if at the conclusion of voir dire of the venire that it appeared that it would be difficult to get a jury in this case, the trial court would then move the case.
>
> Again, counsel sought a change of venue and the trial court reserved final determination until it was shown that it would be impossible to impanel an impartial jury. The petitioner entered an informed and counseled guilty plea prior to the trial court's ruling on the motion to change venue. The petitioner has waived any claim regarding change of venue by virtue of his voluntary guilty plea. *See* State v. McKinney, 74 S.W.3d 291, 306 (Tenn. 2002); State v. House, 44 S.W.3d 508, 513 (Tenn. 2001); *See also* Recor v. State, 489 S.W.2d 64, 69 (Tenn. Crim. App. 1972) (holding valid please (sic) of guilty waives issue of change of venue). The petitioner has failed to show that further efforts by counsel in seeking a change of venue would have created a situation where he would not have entered a guilty plea. Accordingly, the petitioner has failed to meet the standard for ineffective assistance of counsel in the guilty plea setting. Therefore, he is not entitled to relief as to this claim.

Henderson, 2005 WL 1541855, at *39.

Henderson claims that he would not have agreed to a guilty plea and the waiver of jury sentencing if the venue had been changed. (D.E. 68 at 78.) He asserts that his counsel presented “paltry evidence” of the overwhelming community prejudice against him and failed to notify the court that only one attorney in the community other than Henderson’s own attorney would agree to give an affidavit about unfair prejudice against Henderson. (Id. at 75.) He claims that his counsel failed to investigate community

sentiment, community support for Deputy Bishop and his family, or the obvious prejudice in the community against him. (Id. at 75-77.)

Henderson claims that his counsel's failures prejudiced him because he knew he would not receive a fair trial in Fayette County and had "no option but to accept counsels' advice to waive his rights and place his fate in the hands of Judge Blackwood." (Id. at 77.) Henderson wrote his attorneys asking whether the venue decision could be appealed and stated, "As you know, under absolutely no circumstances do I want to be tried by a jury from Fayette County or any county in Fayette's nearby surroundings. I also still feel the same way about a judge from Fayette County." (Id.)

Henderson asserts that the Tennessee Court of Criminal Appeals elevated the level of proof when it determined that he "failed to show that further efforts by counsel to seek a change of venue would have created a situation where he would not have entered a guilty plea." (Id. at 79.) He argues that under Hill, he was only required to show that there was a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (Id.) He contends that the court applied a legal standard that was contrary to and an unreasonable application of Supreme Court precedent when it required that he demonstrate that he would have gone to trial but for counsel's ineffectiveness. (Id.)

A voluntary and counseled guilty plea constitutes a waiver of all pre-plea, non-jurisdictional constitutional deprivations.

Tollett v. Henderson, 411 U.S. 258, 267 (1973); see Bradshaw v. Stumpf, 545 U.S. 175, 182-83 (2005) ("a guilty plea operates as a waiver of important rights"); see Haithcote v. Castillo, No. 4:09-CV-4, 2010 WL 1330011, at *8 (E.D. Tenn. Mar. 29, 2010). Venue is distinct from jurisdiction. United States v. Micciche, 165 F. App'x 379, 386 (6th Cir. 2006). Defendants automatically waive venue objections when they plead guilty. United States v. Mobley, No. 08-4641, 2010 WL 3340364, at *5 (6th Cir. Aug. 25, 2010). Since Henderson challenges the validity of his guilty plea (see D.E. 16 at 35-38), the Court will address counsel's performance related to the motion to change venue.

Counsel filed a motion for change of venue and argued that the major newspapers had published articles describing the crime and that the offenses had "evoked great passion and unfair prejudice" against Henderson. (D.E. 20-1 at 94-104.) Two attorneys presented affidavits about the extensive publicity surrounding the case, indicating that Henderson's criminal history was presented in the local newspapers, that the community expressed "great affection" for the victim and "great scorn/hatred" for Henderson, and that his right to a fair and impartial trial would be violated if Henderson were tried in Fayette County. (Id. at 96-98.) Local newspaper articles about Deputy Bishop, Henderson, and the crime were attached in support of the motion. (Id. at 99-104.) The motion was denied, but the trial court reserved a final ruling on the matter until the voir dire process. (D.E. 20-2 at 73.)

The merit of a change of venue motion is most likely to be revealed at voir dire. United States v. Goins, 146 F. App'x 41, 46 (6th Cir. 2005) . Because voir dire was not conducted in this case, the Court can not determine whether there was an impartial jury pool in Fayette County. See Puiatti v. Sect'y, Dept. of Corr., 651 F. Supp. 2d 1286, 1308 (M.D. Fla. 2009) ("Knowledge of the incident because of its notoriety is not, in and of itself, grounds for a change of venue. The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presented in the courtroom.") The evidence presented indicated that there was some pretrial publicity. However, there is no indication that a change of venue was required.

Henderson claims that he would not have pleaded guilty if venue had been changed. The determination to plead guilty and to waive sentencing involves consideration of the overwhelming evidence at both the guilt and sentencing phases, in addition to consideration of the venue. See Braun v. Ward, 190 F.3d 1181, 1188-89 (10th Cir. 1999) (plea of nolo contendere was voluntary where there were no misleading guarantees about the plea or the judge's view on the death penalty and there was not a reasonable probability that the outcome of the death penalty would be different in a different venue); see also State v. Moore, 678

N.E.2d 1258, 1263 (Ind. 1997) (no ineffective assistance of counsel where change of venue would not have altered ultimate decision because defendant indisputably killed three people and the "likelihood of a guilty plea irrespective of venue cannot be ignored"). Mosier testified, because of the nature of the crime, Henderson's chances before a jury in any county were not good. (See D.E. 23-2 at 54-55.) Henderson has not demonstrated that there is a reasonable probability that he would have gone to trial or that the outcome of his case would differed had his counsel further pursued a change of venue.

The Tennessee 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. The claim in ¶ 8(i) is DENIED.

d. Counsel failed to effectively utilize mitigation and mental health experts (Amended Petition ¶ 8(k))[21]

Henderson complains about the timing and lack of expert funding, the Fenyes' delays in starting and completing work, the limited time experts spent on the case, and that Zager did not conduct "a full evaluation" until after the guilty plea was entered. (D.E. 16 at 10-11.)[22]

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[21] The Court previously determined that the claims in ¶ 8(k) were exhausted, supra p. 33, 35. Henderson states that he has fully briefed the failures of counsel to properly and effectively use Fenyes' and Zager's services. (D.E. 68 at 89.) The Court, therefore, finds the issue ripe for merits review without further briefing.

[22] To the extent this claim includes an evaluation of the mitigation evidence that trial counsel and defense experts investigated and presented, the Court will consider these allegations in connection with Henderson's ineffective

The Tennessee Court of Criminal Appeals considered this issue:

2.Counsel's performance as it related to obtaining funding for and monitoring the mitigation investigation.

Trial counsel's motions for court-appointed expert assistance were granted. The petitioner complains, however, that "[a]sking for services does not absolve defense counsel of the duty to properly utilize those services." The petitioner asserts that trial counsel failed to adequately and timely move for additional funds for the mitigation specialist. Specifically, he refers to the motion for continuance conducted on July 6, 1998, the day trial was scheduled to begin.

At the motion for continuance, Ms. Fenyes testified that she had only spent forty (40) hours working on the case, noting specifically that she had only been granted funds to complete twenty (20) hours of work. She stated that it was not her policy to continue to work absent funding. As of July 6, 1998, Ms. Fenyes estimated that she needed to complete an additional thirty (30) to forty (40) hours of work to adequately prepare for this case. She added that funding for these services had not been approved until the week prior to the July 6 trial date.

Mr. Johnston informed the trial court that trial counsel "made application for additional funds on May, the 7th, in this case and Your Honor immediately signed those orders...." He explained that the request for funds was then forwarded to the Administrative Office of the Courts ("AOC") for the signature of the Chief Justice. Mr. Johnston later contacted the AOC to determine the status of the fund request, at which time, he was informed that the request had yet to be signed by the Chief Justice. From this point, Mr. Johnston spent the next "three weeks to four weeks ... calling up to the Chief Justice's office to determine where the orders were." He explained that his contact at the AOC was on vacation and that she was the only one that could assist him with funding requests. Mr. Johnston's office continued to make contact with the AOC regarding the status of the fund request. The Monday prior to July 6, the AOC contacted Ms. Fenyes, informing her that the requests "are going to be signed; go ahead; get it done."

The trial record does nothing to bolster the petitioner's assertion that counsel failed to timely file motions

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assistance claims related to the penalty phase asserted in ¶ 9 of the Amended Petition. (See D.E. 68 at 89-90.)

> requesting funds and failed to file motions requesting sufficient funds. Counsel cannot be found deficient for actions beyond their control. The request was made two (2) months prior to the scheduled commencement of the trial. It was unforeseeable that the request would not be granted until two (2) months after its submission. The petitioner is not entitled to relief as to this claim.

Henderson, 2005 WL 1541855, at **33-34.

The AOC caused the delay in obtaining additional funding for the mitigation specialist despite counsel's repeated efforts. (See D.E. 23-1 at 72-73.) Henderson has not demonstrated that counsel's efforts constitute deficient performance. The Tennessee Court of Criminal Appeals' decision is neither contrary to, nor an unreasonable application of Supreme Court precedent or based on an unreasonable determination of facts. The claim in ¶ 8(k) is DENIED.

Summary judgment is GRANTED for the claims in ¶¶ 8(a-b), 8(d-f), 8(i-k), and therefore, these claims are DENIED. Summary judgment is DENIED for the claims in ¶¶ 8(c), 8(g-h), and 8(l).

C. Ineffective Assistance of Counsel During Sentencing (Amended Petition ¶9)

Henderson alleges that his Sixth, Eighth, and Fourteenth Amendment Rights were violated because his counsel were ineffective at sentencing, for the following reasons[23]:

a. Counsel improperly advised Henderson to waive jury sentencing and to proceed to a sentencing hearing before the trial court (D.E. 16 at 12);

b. Counsel failed to properly investigate and prepare for the sentencing hearing (id. at 12-15);

[23] Henderson asserts that these are "non-exclusive reasons". (D.E. 16 at 12.) The Court will not consider any grounds for ineffective assistance of counsel that are not specifically set forth in the amended petition and pleaded in accordance with Habeas Rule 2.

c. Counsel failed to talk with Henderson about his social history or background, relying completely on the mitigation specialist and investigator to have those discussions (id. at 15);

d. Counsel failed to investigate and develop evidence regarding Henderson's mental illness (id. at 15-21);

e. Counsel failed to educate themselves about Zager's diagnosis of Henderson's narcissistic personality disorder (id. at 21);

f. Counsel failed to educate themselves concerning developments in the field of capital case defense work and were unaware of prevailing professional norms, and thus failed to identify and procure the experts necessary to develop, discover, explain and present available mitigation themes or evidence (id. at 21-22);

g. Counsel failed to develop and make use of mitigation proof by their failure to adequately utilize the services of a mitigation specialist to prepare a social history relating to Henderson's life (id. at 22-23);

h. Counsel failed to object to the trial court's request to confer with the mitigation specialist in-chambers, without counsel present (id. at 23-24);

i. Counsel failed to adequately use the clinical psychologist (id. at 24-25);

j. Counsel failed to obtain critical information related to Henderson's psychological profile and the psychological history of his family before determining that they had insufficient mitigation evidence to present to a jury and that Henderson should waive jury sentencing (id. at 25-26);

k. Counsel failed to develop a theory of mitigation (id. at 26);

l. Counsel failed to make a motion for judgment of acquittal at the close of the state's proof at sentencing (id.);

m. Counsel failed to challenge the fact that District Attorney Betsy Rice only sought the death penalty for African-Americans (id.);

n. Counsel failed to interview and adequately prepare witnesses (id.);

o. Counsel failed to maintain caseloads consistent with professional standards governing defense representation in capital cases (id.);

p. Counsel failed to assert that Tennessee's death penalty statute violates the Eighth and Fourteenth Amendments, the requirements of Furman v. Georgia, 408 U.S. 238 (1972), that the discretion to impose death must be closely confined to avoid arbitrariness; of Lockett v. Ohio, 438 U.S. 586 (1978), that the sentencer must have unlimited discretion not to impose death; and of Eddings v. Oklahoma, 455 U.S. 104 (1982), that the death penalty must be imposed fairly and with reasonable consistency or not at all (id. at 26-27);

q. Counsel failed to assert that the Tennessee death penalty statute violates the Fourth, Sixth, Ninth, and Fourteenth Amendments (id. at 27); and

r. Counsel failed to argue that the Tennessee death penalty statute violates international law (id. at 27-31).[24]

1. Procedural Default

Respondent contends that the claims in ¶¶ 9(b-c), 9(d)(4), 9(e), 9(f)(1), 9(h), and 9(k-r) are procedurally defaulted and should be dismissed. (D.E. 55-1 at 9-10.) Henderson responds that the claims in ¶¶ 9(b), 9(e), 9(f), 9(k), and 9(n) were raised in the state courts and that to the extent that these allegations are defaulted, he can demonstrate cause and prejudice to overcome the default. (Id. at 116-19.) He argues that Respondent engaged in inappropriate technical hairsplitting in asserting procedural default for the claims in ¶¶ 9(c), 9(d), 9(e), 9(f), 9(k), and 9(n). (Id. at 116-20.) He asserts the fundamental unfairness of the state post-conviction process and ineffective assistance of

[24] Paragraphs 9(s-t) allege that counsel's deficient performance at sentencing prejudiced him because if counsel had been effective, he would have received life imprisonment. (Id. at 31-32.) Despite Respondent's procedural arguments (D.E. 55-1 at 9), the Court will not address these paragraphs as separate issues.

post-conviction counsel as cause and prejudice for any alleged default of the claims in ¶¶ 9(c-f) and 9(k-r). (Id. at 120-28.)

Paragraph 9(b) alleges that counsel failed to properly investigate and prepare for the sentencing hearing. (D.E. 16 at 12-15.) Henderson argues that he raised this claim in his amended petition for post-conviction relief and included it on appeal. (D.E. 68 at 117.) In the post-conviction appellate brief, Henderson asserted, "counsel did not act in a competent manner in preparing a sentencing case." (D.E. 23-15 at 60.) He claimed that the investigation was "completely inadequate", there was a "total failure" to conduct an investigation into his background, and counsel failed to develop and make use of mitigation proof and prepare a social history and timeline relating to Henderson's life. (Id. at 60, 79, 81.) The Tennessee Court of Criminal Appeals addressed Henderson's assertions that the mitigation investigation was inadequate because of counsel's failure to interview witnesses and to investigate his prior convictions and charges and because of Fenyes' inadequate social history. Henderson, 2005 WL 1541855, at **10-14, 16, 21, 40, 42-43. The claim in ¶ 9(b) was exhausted in state court.

In ¶ 9(c), Henderson alleges that counsel failed to talk with him about his social history or background and relied completely on his mitigation specialist and investigator to have those discussions. (D.E. 16 at 15.) The Tennessee Court of Criminal Appeals addressed communication issues between Henderson and his counsel and Henderson's purported inability to be involved in his

defense as part of his claim about counsel's failure to develop a relationship with him. Henderson, 2005 WL 1541855, at *34. Henderson asserted that counsel failed to monitor and direct the mitigation investigation, and Mosier testified that Askew's function was to investigate the offense and contact Henderson's family and Fenyes' function was to conduct a social background investigation to prepare mitigation. Id. at *8, 32. The combination of assertions in the post-conviction proceedings that counsel lacked a relationship with Henderson, that Henderson was unable to assist in his defense because of their poor relationship, and that counsel relied on his experts to develop the social history demonstrate that the claim in ¶ 9(c) was exhausted in the state courts.

In ¶ 9(d)(4), Henderson asserted that counsel was ineffective for failing to present evidence that he suffered brain damage. (D.E. 16 at 21.) Henderson did not specifically assert that he suffered brain damage in the post-conviction proceedings, but he asserted that counsel failed to develop mitigation evidence about mental disease and defect. See Henderson, 2005 WL 1541855, at *40. Zager also testified about Henderson's head injury at the post-conviction hearing. (D.E. 23-3 at 122, 146.) The claim in ¶ 9(d)(4) only differs from the state court claim to the extent that Henderson specifically addresses brain damage instead of the more general term "mental defect." The claim in ¶ 9(d)(4) was exhausted in the state courts.

Henderson argues that his claim in ¶ 9(e) that counsel failed to educate themselves about Zager's diagnosis of having a narcissistic trait was raised in the post-conviction appellate brief. (D.E. 68 at 117.) He asserts that this claim was presented in his statements about the "attorney's duty to guide experts" and to have a "working familiarity with many fields, particularly the area of mental health" and that counsel failed to adequately use Zager's services. (Id.; see D.E. 23-15 at 59, 80.) The Court further notes Henderson's similar post-conviction claims about counsel's lack of knowledge concerning the work of his experts, failure to work with experts, and failure to develop evidence about his mental condition. (See D.E. 23-15 at 69, 78-81.) At the post-conviction hearing, Zager testified about how a person with a narcissistic trait behaves (D.E. 23-3 at 137-38), and Mosier testified that he had no discussion about how his narcissistic trait would affect Henderson's ability to show remorse. (D.E. 23-2 at 59.) The claim in ¶ 9(e) was exhausted in the state courts.

The claim in ¶ 9(f)(1) is that counsel failed to educate themselves in the field of capital case defense work and failed to identify and procure experts for neurological and neuropsychological testing, a psychiatrist, an expert in socio-economic issues to explain the effects of racism on an African-American male growing up in the rural south, and an expert to assist in developing evidence about family and community deficits that may have affected Henderson's psychological development. (D.E. 16 at 21-22.) Respondent argues that this claim is

procedurally defaulted because Henderson did not allege any specifics or details about the evidence that could have been presented as part of a mitigation theme in the state courts. (D.E. 55-1 at 57 n.7.) Henderson contends that the claim was raised in the post-conviction appeal. (D.E. 68 at 118.) He relies on his arguments that his counsel failed in their duty to guide the experts and provide them with supporting material and that they lacked a working familiarity with many fields of expertise. (Id.; D.E. 23-15 at 59.) Henderson's claim that his counsel failed to procure a psychiatrist and work with experts to develop neurological and neuropsychological evidence related to a mental illness or mental defect is exhausted because it addresses counsel's failure to develop evidence related to mental disease or defect, see supra p. 67. See Henderson, 2005 WL 1541855, at *40.

The claim in ¶ 9(f)(1) related to experts in socio-economic issues and community and family deficits was not exhausted. His argument that the unfairness of the post-conviction proceedings and ineffective assistance of post-conviction counsel excuse the procedural default (see D.E. 116 at 120-28) fails, see supra pp. 22-24, 34-35. Henderson has not demonstrated that a fundamental miscarriage of justice will result from the Court's failure to address this claim. The claim in ¶ 9(f)(1) to the extent it relates to experts in socio-economic issues and community and family deficits is procedurally defaulted.

The claim in ¶ 9(h) that counsel failed to object to the trial court conferring with Fenyes in chambers was raised in Henderson's post-conviction appellate brief and by the Tennessee Court of Criminal Appeals. (See D.E. 23-15 at 72.) Henderson, 1541855, at *36. The claim in ¶ 9(h) was exhausted in the state courts.

The claim in ¶ 9(k) that counsel failed to develop a theory of mitigation coincides with his post-conviction claim that counsel failed to investigate and develop mitigation evidence. (See D.E. 23-15 at 79). The claim in ¶ 9(k) was exhausted in the state courts.

The claim in ¶ 9(n) that counsel did not interview and adequately prepare defense witnesses which resulted in the failure to present to the Court a complete picture of him (D.E. 16 at 26) was not exhausted in state court. Henderson, his mother Sally Johnson, Miles Wilson, and Zager testified on his behalf at the sentencing hearing. (See D.E. 20-5 at 6.) Henderson asserts that he exhausted this claim when he alleged in the post-conviction appellate brief that his counsel failed to develop a relationship with his mother Sally Johnson which "denied them critical information concerning the family dynamics" and his mental illness. (D.E. 68 at 118-19; see D.E. 23-15 at 74.) Although Henderson addressed his counsel's relationship with his mother, he failed to allege that counsel failed to prepare his mother or

any other witness to testify. The claim in ¶ 9(n) was not exhausted and is procedurally defaulted[25].

Henderson asserts that to the extent the court finds any aspect of the claims in ¶¶ 9(c-f) & 9(k-r) unexhausted, he can demonstrate cause and prejudice for the procedural default of these claims through the fundamental unfairness of the state post-conviction process and ineffective assistance of post-conviction counsel. (D.E. 68 at 120.) The Court has reviewed the record and determined that the claims in ¶¶ 9(l-m) and 9(o-r), in addition to those paragraphs addressed supra, were not exhausted in the state courts. For the reasons stated, supra p. 22-24, 34-35, Henderson has not demonstrated cause and prejudice to overcome the procedural default. He has not demonstrated that a fundamental miscarriage of justice would result from the failure of the Court to review these claims.

Summary judgment is GRANTED for the claims in ¶ 9(f)(1) to the extent it relates to experts in socio-economic issues and community and family deficits and ¶¶ 9(l-r), as these claims were not exhausted in the state courts and are procedurally defaulted. The claims in ¶ 9(f)(1) to the extent it relates to experts in socio-economic issues and community and family deficits and ¶¶ 9(l-r) are DENIED.

Summary judgment is DENIED for the claims in ¶¶ 9(b-c), 9(d)(4), 9(e), 9(f)(1) related to failure to use a psychiatrist

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[25] Henderson's arguments to overcome procedural default fail, see supra pp. 22-24, 34-35.

and develop neurological and neuropsychological evidence, 9(h), and 9(k).

2. Merits Review

Respondent acknowledges that ¶¶ 9(a), 9(d)(1-3), 9(f)(2), 9(g), 9(i), and 9(j) should be addressed on the merits as these claims were raised in the state post-conviction proceedings. (D.E. 55-1 at 50-51.)

a. Counsel improperly advised Henderson to waive jury sentencing (Amended Petition ¶ 9(a)).

Henderson alleges that his counsel improperly advised him to waive jury sentencing in spite of the fact that counsel allowed the judge to examine Fenyes in-chambers, without counsel being present, and to inform the court that there was no mitigation. (D.E. 16 at 12.) During the post-conviction proceedings, the Tennessee Court of Criminal Appeals addressed the waiver of jury sentencing, as follows:

> In relation to waiving jury sentencing, Mr. Johnston testified that "we thought it would be in Mr. Henderson's best interest to have the court do the sentencing." The opinion of the defense team was that Judge Blackwood was personally opposed to the death penalty, and this opinion was influential in guiding their advice to the petitioner. In hindsight, Mr. Johnston conceded that he "wish[ed] that a jury would have been empaneled and that they would have fought the case on the merits."
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> . . .
>
> Mr. Mosier verified Mr. Johnston's opinion that Judge Blackwood was opposed to the death penalty. However, he testified that the decision of whether to waive a jury trial was left entirely to the petitioner. Trial counsel advised him of the advantages and disadvantages of waiving a jury in a capital sentencing trial. These factors included weighing the circumstances of this particular case, which included the senseless killing

of a law enforcement officer. Mr. Mosier stated that the decision to waive jury sentencing and permit Judge Blackwood to impose the sentence was the best chance that the petitioner had to avoid the death penalty. Again is (sic) should be noted that the petitioner did not testify at the post-conviction evidentiary hearing, so there is no direct evidence in this record that but for counsel's alleged deficiencies he would not have pled guilty or submitted his case to the trial judge for sentencing.

Prior to entry of the plea, the trial court extensively questioned the petitioner regarding his decision to enter a guilty plea and to waive jury sentencing. This colloquy, which covers nearly twenty (20) full pages of transcript, reveals that the trial court made every attempt to discern that: (1) the petitioner was fully aware of and understood the nature of the charges and potential sentences against him; . . . (4) the petitioner understood that he had the right to have a jury determine his sentence if he was convicted of first degree murder; (5) the petitioner understood the nature and dynamics of a capital sentencing hearing; (6) the petitioner understood the impact of waiving his right to have a jury impose sentence in his first degree murder conviction; . . . (8) the petitioner had discussed the decision to enter a guilty plea and waive jury sentencing with his attorneys, (9) the petitioner was satisfied with the representation provided him by appointed counsel and by the appointed experts; and (10) the petitioner was not suffering from any mental illness or disorder. On at least five (5) separate occasions, the trial court asked the petitioner whether his decision to waive his right to a jury trial as to guilt and to waive his right to a jury trial as to capital sentencing were entered freely and voluntarily. The record preponderates against any conclusion that the petitioner had no knowledge as to the impact of his decision to enter guilty pleas and waive jury sentencing. . . .

We are left to address counsel's advice regarding the decision to waive jury sentencing as to the punishment of first degree murder. In People v. Montgomery, 192 Ill.2d 642, 249 Ill.Dec. 587, 736 N.E.2d 1025 (Ill. 2000), the Illinois Supreme Court addressed whether counsel's advice to a capital defendant to waive jury sentencing was deficient performance. In *Montgomery*, defense counsel advised the defendant to enter a guilty plea and waive jury sentencing in light of alleged assurances from the trial court that a sentence of death would not be imposed. Montgomery, 249 Ill.Dec.

587, 736 N.E.2d at 1033-34. The defendant entered guilty pleas to two (2) murders and, following a bench trial for sentencing, the trial court imposed a death sentence. Id. at 1035. At the post-conviction evidentiary hearing, the trial judge and his court reporter denied making any assurances that a sentence less than death would be imposed upon defendant's entry of guilty pleas. Id. at 1035-36. The post-conviction court rejected counsel's allegations that the trial judge had made *ex parte* assurances regarding a sentence less than death. Id. at 1036. Regardless, the defendant stated that trial counsel had only informed him that this particular judge had never before sentenced a defendant to death in a bench proceeding, and that counsel therefore encouraged him to waive a jury for the sentencing hearing. Id. at 1037. This assertion by trial counsel was later proven untrue. Id. at 1039. Notwithstanding the mistaken beliefs and assertions of trial counsel, the Illinois supreme court found that trial counsel were not deficient in their advice to the defendant. Id.; *see also* People v. Maxwell, 173 Ill.2d 102, 219 Ill.Dec. 1, 670 N.E.2d 679 (Ill. 1996) (determining that trial counsel's advice to waive jury for capital sentencing was not deficient). The Illinois Supreme Court acknowledged that counsel's belief that a judge was less likely than a jury to impose the death penalty is a legitimate ground on which to base jury waiver in a capital sentencing trial. Montgomery, 249 Ill.Dec. 587, 736 N.E.2d at 1038.

Similarly, in Fields v. Gibson, 277 F.3d 1203 (10th Cir. 2002), the Tenth Circuit addressed whether counsel's advice to waive jury sentencing constituted deficient performance. Trial counsel believed that if the defendant accepted a blind plea that he would be sentenced to less than death. Fields, 277 F.3d at 1209. Her belief was based upon several conversations with the trial judge. Id. at 1209-10. Notwithstanding, there was no guarantee that the trial court would not impose a sentence of death. Id. at 1210. Counsel then persuaded defendant, with the assistance of several of his family members, to enter a guilty plea. Id. The trial court accepted the plea and after a bench sentencing hearing imposed a sentence of death. Id. Defendant later attempted to withdraw his plea, but his attempt was rejected by the trial court and the court's decision was upheld on appeal. Id. at 1211. The Tenth Circuit determined that the defendant's plea was voluntarily entered and that trial counsel's advice regarding the decision to waive jury sentencing did not constitute deficient performance. Id. at 1214-15. In finding counsel's advice not deficient, the court acknowledged that "[t]he fact that the desired result

> was not reached in this case does not render defense counsel ineffective." Id. at 1216 (citing Fields v. State, 923 P.2d 624, 635 (Okla. Crim. App. 1996)).
>
> Lawyers are supposed to draw conclusions from all the evidence in a case and recommend what they think is in their clients' best interest. Fields, 277 F.3d at 1216. "The Supreme Court has recognized that because representation is an art and not a science, even the best criminal defense attorneys would not defend a particular client in the same way." Id. (quoting Waters v. Thomas, 46 F.3d 1506, 1522 (11th Cir. 1995) (en banc)). The record indicates that trial counsel made no guarantee to the petitioner that the trial court would not impose a death sentence. The evidence against the petitioner was overwhelming, as was the evidence of the statutory aggravating factors. Moreover, it is clear from the colloquy at the guilty plea hearing that the petitioner was informed that the trial court could impose a sentence of life, life without parole, or death. Thus, the petitioner made a conscious decision between two (2) viable options. Without more, the petitioner has failed to prove that counsel's advice was completely unreasonable. He is not entitled to relief on this issue.

Henderson, 2005 WL 1541855, at **37-39.

Henderson asserts that on July 6, 1998, when his lawyers advised him to waive jury sentencing, they failed to advise him of certain critical facts:

> 1) the mitigation expert on his case, Julie Fenyes, had just hours earlier in an *in camera* hearing without counsel present, informed the trial judge that the defense had no mitigation proof and did not expect to find any;[26] . . . 3) according to Tennessee statute, the trial judge had no discretion in sentencing and would indeed be required to sentence Kennath Henderson to

[26] Henderson also asserted that he should have been advised that Johnston was not qualified under Tennessee Supreme Court Rule 13 to be counsel on his case. (D.E. 68 at 48.) This allegations was not presented in the amended petition in relation to Henderson's claims of ineffective assistance of counsel for the guilty plea and waiver of jury sentencing. The Court will not address the claim as it has not been pleaded in accordance with Habeas Rule 2.

> death if the aggravating factors outweighed the mitigating proof.[27]

(D.E. 68 at 48.) Henderson claims that counsel's failure to advise him of this information constitutes deficient performance. (Id.) Henderson claims that he was prejudiced because if properly advised, he "certainly would not have waived jury sentencing in order to allow the trial court, who he already believed to be biased against him, to decide whether he would live or die." (Id.)

1. Effect of In Camera Hearing with Fenyes

Henderson contends that Fenyes revealed prejudicial information about his family, his mental health, and her belief that none of the information she had gathered was mitigating. (D.E. 68 at 49-50.) He claims that she did not explain why his family was reluctant to testify and that she implied inaccurately that his family did not want him to avoid the death penalty. (Id. at 50.) He claims that Fenyes misled the trial judge into thinking that a psychological evaluation had been completed, when at that time, Zager had only interviewed Henderson. (Id.)[28]

Henderson asserts that it was clear that the trial judge already had an opinion of his character. (D.E. 68 at 51.) He points out that Judge Blackwood exhibited his knowledge of Henderson's

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[27] The Tennessee Court of Criminal Appeals addressed the advice given to Henderson about the waiver of jury sentencing, counsel's preference that the judge sentence Henderson, and the reasons for that preference. See Henderson, 2005 WL 1541855, at *37. The court did not specifically address the "discretion" the trial court had in sentencing, as the issue was not raised in this manner in the state court.

[28] Zager testified that she questioned Henderson on November 4, 1997, for at least two hours and reviewed records from his head injury prior to trial; she saw him again on July 9, 1998. (D.E. 20-5 at 87-88.)

criminal record, stated that Henderson could not testify because of his record, and refuted Henderson's mother's opinion that he could "do no wrong". (Id. at 51.) He also notes that in an "off the record" conversation, Blackwood admonished Fenyes because her work was incomplete and her performance did not meet the standards necessary for a capital case. (Id.; see D.E. 68-3 at 3.) Henderson asserts that counsel should have advised him that the trial judge: (1) opined that he was antisocial; (2) remembered his criminal record; (3) indicated that he believed that Henderson's case was one where "there was absolutely nothing that anyone can do" to mitigate the circumstances; and (4) severely reprimanded Fenyes about her inadequate investigation. (D.E. 68 at 52-53.)

On July 6, 1998, the trial date, the trial court held a hearing on the motion to continue. (See D.E. 20-3 at 11.) Mosier indicated that they were ready to proceed in the guilt/innocence phase of the trial, but that they were not prepared for the mitigation phase. (Id. at 12.) Fenyes testified that she had spent just over 40 hours on Henderson's case when the funding ran out, and she needed about another 30 to 40 hours to complete the investigation. (Id. at 18.) Because of concerns about work product, the trial judge conducted an *in camera, ex parte* hearing to determine what work had been done and what needed to be done. (Id. at 24-25.) Fenyes stated that when she was told that she would receive additional funding in the prior week, she put in an additional 40 hours of work for a total of 80 hours. (Id. at 27-28.) She had been able to interview family members, but they were

not as cooperative as she had hoped. (Id. at 28-29.) She stated that Henderson's mother was reluctant to testify and was the only witness other than Henderson himself. (Id. at 29.) Fenyes was scared to have his mother testify "because of the approach she's been taking." (Id.)[29] Fenyes was "running into a lot of dead ends." (Id. at 30.) She told the judge that she had problems tracking down Henderson's former supervisors and was hoping to get work records to show that he was a productive member of society. (Id.) She tried to get in touch with a number of coaches and had some information that Henderson had coached junior basketball, won some awards, had "great leadership ability," and had been his high school's class president. (Id. at 31-32.) She told the judge that she was still waiting on medical records and that a psychological evaluation had been done, but she was not sure that the evaluation would help him in mitigation. (Id. at 34.) Fenyes testified that if they proceeded without a continuance and she were later asked whether she had conducted an adequate mitigation investigation, she would have to say "no." (Id. at 37-38.)

Judge Blackwood stated that Henderson's case may be one where there was absolutely no mitigation.

> Well, what concerns me: There are some people in the world, that regardless of what you do, you can't find anything that will mitigate what they've done. . . And

[29] Fenyes was concerned that Henderson's mother was "his biggest fan in the world; can do no wrong," but his mother's attitude did not reflect his behavior. (Id. at 35.) Fenyes described his mother as "a bit of a loose cannon" and very much in denial. (Id. at 35-36.) Fenyes and the trial judge both acknowledged that his mother did not trust the attorneys. (Id. at 36.)

> this may be one of the cases that there's absolutely nothing that anyone can do, ...[30]

(Id. at 52; see also D.E. 20-3 at 39.) He further commented,

> but the coach-aspect is what bothers me the most. I mean, if he was ever in a situation where he did coach little kids, and he won some outstanding leadership awards in sort of athletics, I mean, that certainly could strike some jurors as having something positive in his life.

(Id.) Blackwood stated that he did not know whether Henderson had a reputation as a hard worker. (Id.) The judge asked about Henderson's coaches and what investigation had been done. (Id. at 40-41.)

2. Tennessee Law and the Trial Court's Discretion in Sentencing

Henderson argues that Johnston, without consulting the death penalty statute, based his advice to waive jury sentencing on his personal knowledge of the judge's philosophical opposition to the death penalty without knowing that the statute mandated a death sentence if the trier of fact found that the statutory aggravating factors outweighed any mitigating circumstance. (D.E. 68 at 53-54.) He contends that the statute mandates "no discretion" in this circumstance and that Blackwood, if he followed the law, could only give him the death sentence. (Id. at 54.) He asserts that Mosier merely confirmed Johnston's opinion. (Id.) He argues that he had been adamant that he could not get a fair trial in front of Blackwood, and that he would have not agreed to have Blackwood, instead of a neutral jury, determine his fate. (Id. at 54-55.)

[30] Henderson's recitation of the judge's comments is incomplete and potentially misleading.

Counsel's testimony about their advice related to the waiver of jury sentencing is relevant to the determination of this issue. Johnston testified at the post-conviction hearing, as follows:

> In terms of waiving a jury for sentencing, I think it was a situation where we wanted based on the conversations among counsel, that we wanted a – at least we thought it would be in Mr. Henderson's best interest to have the Court do the sentencing.
>
> . . .
>
> From what I recall, we met with Mr. Henderson and we talked about where we were. And it was decided that we would want the judge to do the sentencing in the event we ended up in a sentencing hearing. And I think there would have been a conversation at that point that we felt that the facts were not in our favor and that it was going to be very difficult to avoid a sentencing hearing.

(D.E. 23-1 at 87-88.)

Mosier testified that the case was,

> in front of a judge who had stated before on the record that he was morally and philosophically opposed to the death penalty. And in short, I didn't feel like that I could have a better judge to hear a death penalty case. If I could have hand-selected a judge, it would have been the judge here.

(D.E. 23-2 at 53-54.) Mosier explained that he advised Henderson of the consequences, advantages, and disadvantages of waiving jury sentencing. (Id. at 54.)

> Well, you know, death penalty cases are always different. You know, the law recognizes that they are, in fact, different that any other case known to law. And this case was even more difficult because it involved an apparently senseless killing of a law-enforcement officer. I didn't feel like Mr. Henderson's chances before a jury in any county were good at all. I felt like that allowing Judge Blackwood to sentence him in this case gave him the best chance that he had to avoid the death penalty.

(Id. at 54-55.) Mosier testified that he thought that all that was left for Henderson was "to try to demonstrate to the judge his acceptance of responsibility . . . And I was hoping that would tip the scales." (Id. at 57.)

Henderson asserts that counsel should have known that the trial court found the mitigation evidence was lacking because the judge chastised the mitigation expert for not doing her job. (Id. at 59.) He argues that his counsel failed to provide the information necessary to make a reasonable decision with regard to the waiver. (Id. at 60.) He relies on Davis v. Greiner, 428 F.3d 81, 88 (2d Cir. 2005), for the proposition that his counsel had a duty to explain the matter to the extent reasonably necessary for the client to make an informed decision. (Id.) He contends that if he had the appropriate information, he would not have waived jury sentencing as evidenced by his letters indicating his distrust for any judge in Fayette County. (Id. at 61.)

Henderson argues that the Tennessee Court of Criminal Appeals denied relief based on an analysis that was contrary to and an unreasonable application of Supreme Court precedent. (D.E. 68 at 64.) He contends that the court erred because it: (1) applied an outcome determinative test, contrary to the standard articulated in Hill; and (2) used a "completely unreasonable" standard, instead of the "objectively unreasonable" standard set forth in Strickland. (Id. at 65.)

The Supreme Court in Strickland states that judicial scrutiny of counsel's performance must be highly deferential and that every

effort must be made to "eliminate the distorting effects of hindsight." 466 U.S. at 689. Courts must indulge a strong presumption that counsel's conduct falls within the "wide range of reasonable profession 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.

The Tennessee Court of Criminal Appeals cited Strickland, and relied on Hatch v. Oklahoma, 58 F.3d 1447 (10th Cir. 1995) (reversed on other grounds), for the proposition that advice to a client to waive the right to a jury trial is a classic example of a strategic trial judgment that under Strickland requires highly deferential judicial scrutiny. Henderson, 2005 WL 1541855, at *36. The court stated that when counsel makes an informed strategic choice, his performance is virtually unchallengeable unless it is "completely unreasonable, not merely wrong, so that it bears no relationship to a possible defense strategy." Id. at *36. See Sallahdin v. Mullin, 380 F.3d 1242, 1253-54 (10th Cir. 2004) (using the "completely reasonable" standard as a heightened presumption of objective reasonableness where a strategic choice was made). Instead of being contrary to Strickland, the "completely unreasonable" standard provides for the high deferential scrutiny of counsel's performance and the strong presumption that counsel's conduct falls within the "wide range of reasonable profession assistance" required when counsel has made a strategic choice in the litigation.

The Tennessee Court of Criminal Appeals analyzed several cases involving situations where counsel advised a defendant to waive jury sentencing based on a belief that the judge might be less likely than a jury to impose a capital sentence. See Henderson, 2005 WL 1541855, at **38-39. The court noted that in the instant case the evidence of the statutory aggravating factors was overwhelming, that no guarantees were made to Henderson that he would receive a life sentence if he waived jury sentencing, and that he made a "conscious decision between two (2) viable options." Id. at *39.

In Post v. Bradshaw, 621 F.3d 406, 415-18 (6th Cir. June 15, 2010), the Sixth Circuit rejected the defendant's contention that the ABA Guidelines indicate that it is *per se* ineffective assistance of counsel to plead no contest to a capital crime without a guarantee of a life sentence. By pleading no contest, the defendant would be sentenced by a three judge panel which would have to vote unanimously to impose a death sentence. Id. at 417. The defendant's counsel polled the three judge panel and determined that one of the judges had a moral struggle with the death penalty because of religious considerations. Id. The Sixth Circuit found that because co-counsel did not believe one of the judges would vote for death and Ohio required an unanimous vote to impose the death penalty, the decision to plead no contest was a professionally reasonable tactic. Id. at 418.

Henderson has argued that he felt he could not get a fair trial before Blackwood and that if he had been given the

appropriate information about his case that he would not have waived jury sentencing. (D.E. 68 at 54-55, 61.) However, it is unclear what information counsel should have given Henderson that would have changed his decision. The transcript for the plea proceedings indicates what information was available at the time of trial. Henderson understood that the case would be tried before Blackwood. Henderson was not guaranteed a life sentence in exchange for the waiver of jury sentencing. (D.E. 20-3 at 94.) He understood that he had the right to have a jury sentence him, that the State had the right to put on proof, that he had the right to present mitigating evidence, and that by waiving his right to a jury sentencing, the Court would determine his punishment. (Id. at 83-85, 88.) He stated that his attorneys explained his rights to him, that he discussed the decision with his attorneys, and the decision was being made with their advice. (Id. at 85, 87.) He had no complaints about his attorney's representation. (Id. at 90-93.) Blackwood specifically addressed the fact that although the felony murder charges had been dismissed, the state would attempt to introduce proof related to the crime as aggravation. (Id. at 96.) The record reveals that Henderson was aware that aspects of the crime could be used in aggravation, that the trial judge would be sentencing him, and that the judge could consider facts related to the crime as aggravating circumstances.

Counsel's advice to waive jury sentencing was not deficient performance. See Sowell v. Bradshaw, 372 F.3d 821, 838 (6th Cir. 2004) (counsel's performance was not deficient for recommending

that defendant take a calculated risk of allowing the judge to sentence him). Henderson's counsel noted that this was a "senseless killing of a law enforcement officer" and he believed that Henderson's "chances before a jury in any county were [not] good at all." Henderson, 2005 WL 1541855, at *9. Henderson admitted that there was no reason for Bishop's murder. Id. at *3. With the waiver of jury sentencing, Henderson was faced with the decision of Blackwood, who counsel believed had reservations about the death penalty and who had expressed concerns about the possibility of more mitigation in the case, versus twelve jurors faced with the facts of this senseless murder. Counsel's advice was reasonable.

The Tennessee Court of Criminal Appeals' decision that counsel was not ineffective for advising Henderson to waive jury sentencing 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. Henderson's claim in ¶ 9(a) of the Amended Petition is DENIED.

b. Counsel failed to investigate and develop evidence concerning Henderson's mental illness (Amended Petition ¶ 9(d)(1-3)).

Henderson alleges that the drastic changes in his personality and his manic behavior, which are characteristic of someone suffering major mental illness, would have been discovered had counsel properly investigated and relayed this information to Zager. (D.E. 16 at 15-17.) He alleges that Zager would have recognized that he suffered major mental illness instead of being completely unprepared to do a proper psychological evaluation. (Id.

at 17.) He asserts that since his sentencing hearing, he has been properly diagnosed with bipolar disorder. (Id. at 18-20.)

Respondent argues that the Tennessee Court of Criminal Appeals thoroughly reviewed this issue and remarked that even after Zager was provided with additional information comprising Henderson's social history, she did not change her diagnosis. (D.E. 55-1 at 54-55.) Respondent emphasizes the court's statement that certain evidence, especially Henderson's escalating history of violent crime, was a "double-edged sword" that would have undermined the mitigating evidence he was trying to present and argues that he is not entitled to habeas relief. (Id. at 55-57.)

The Tennessee Court of Criminal Appeals summarized the additional mitigation proof offered during the post-conviction hearing that was not offered at trial, as follows:

> The Petitioner was a normal student in grammar and high school. He was a talented basketball player and had a talent for art. About two years prior to this event, his behavior changed. He became violent. He viciously assaulted one girlfriend. He was convicted of some lesser felonies. Thereafter, he abducted the mother of his girlfriend on several occasions while masked. He also raped the mother. Petitioner's clinical psychologist opined that he had a personality disorder, but did not ... disagree with trial counsel's clinical psychologist, other than she administered more tests. Finally, Dr. Kenner diagnosed the Petitioner as bipolar.... Dr. Kenner opined that in order to fully explain the nature of Petitioner's bipolar diagnosis, the trier of fact would have to hear all the details of Petitioner's various assaults, abductions and rapes.

Id. at *21. During the post-conviction hearing, Zager testified about the additional information she learned about Henderson and the impact it had on her opinion.

> Since the initiation of post-conviction proceedings, Dr. Zager had been advised of additional information regarding the petitioner that she was not aware of at the time of her diagnosis. She stated that she learned "a whole lot of additional background information," including details of the different crimes for which the petitioner had been charged and convicted. Specifically, she was provided the victim's point of view of the incidents. Dr. Zager noted that the petitioner's art teacher was the victim of one of his prior crimes. She stated that any additional information would have been used in evaluating or refining her diagnosis.
>
> Dr. Zager testified that she was aware that the petitioner had been diagnosed with a Bipolar 2 disorder. She stated that this diagnosis was not inconsistent with the MMPI previously administered to the petitioner. On cross-examination, Dr. Zager explained that Bipolar 2 is a mood disorder and is not a psychosis. She added that a person can be diagnosed as Bipolar 2 and be a functioning member of society without antisocial or criminal traits.
>
> Although Dr. Zager stated that she had not made a new diagnosis in this case based on new information, she agreed that it would be prudent to continue to look and see if there was a reason to change her prior diagnosis.

Henderson, 2005 WL 1541855, at *16.

The Tennessee Court of Criminal Appeals addressed Henderson's claim that counsel failed to develop and introduce mitigation and as it related to Zager, determined the following:

> Dr. Lynn Zager, a clinical psychologist, testified regarding her meetings and evaluations of the petitioner. She diagnosed the petitioner with a dissociative state, narcissistic traits and antisocial traits.
>
> Trial counsel testified at the post-conviction hearing that they presented all of the mitigating evidence that they had collected. The petitioner now alleges that trial counsel was ineffective for failing to present a complete mitigation profile. His complaints include counsel's: (1) failure to interview extended family members to reveal a family history of mental illness; (2) failure to seek additional psychological evaluation to reveal a diagnosis of bipolar disorder; and (3) failure to complete investigation to sufficiently indicate marked change in behavior, including (a) a change in sleep patterns, (b) the fact that his victims were people that he knew, (c)

exhibitions of depression, and (d) indication of religious ideation.

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, 93 L.Ed.2d 934 (1987); see Eddings v. Oklahoma, 455 U.S. 104, 113-15, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 604-05, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion); Zagorski v. State, 983 S.W.2d 654, 657-58 (Tenn. 1998); Goad, 938 S.W.2d at 369. The right that capital defendants have to present a vast array of personal information in mitigation at the sentencing phase, however, is constitutionally distinct from the question whether counsel's choice of what information to present to the jury was professionally reasonable.

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

To determine whether or not trial counsel was ineffective for failing to present mitigating evidence, the reviewing court must consider several factors. First, the reviewing court must analyze the nature and extent of the mitigating evidence that was available but not presented. Goad, 938 S.W.2d at 371 (citing Deutscher v. Whitley, 946 F.2d 1443 (9th Cir. 1991); Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988); State v. Adkins, 911 S.W.2d 334 (Tenn. Crim. App. 1994); Cooper v. State, 847 S.W.2d 521, 532 (Tenn. Crim. App. 1992)). Second, the court must determine whether substantially similar mitigating evidence was presented to the jury in either the guilt or penalty phase of the proceedings. Id. (citing Atkins v. Singletary, 965 F.2d 952 (11th Cir. 1992), cert. denied, 515 U.S. 1165, 115 S.Ct. 2624, 132 L.Ed.2d 865 (1995); Clozza v. Murray, 913 F.2d 1092 (4th Cir. 990), cert. denied, 499 U.S. 913, 111 S.Ct. 1123, 113 L.Ed.2d 231(1991); Melson, 722 S.W.2d at 421). Third, the court

must consider whether there was such strong evidence of applicable aggravating 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), cert. denied, 502 U.S. 1112, 112 S.Ct. 1219, 117 L.Ed.2d 456 (1992)); Elledge v. Dugger, 823 F.2d 1439 (11th Cir.1987), cert. denied, 485 U.S. 1014, 108 S.Ct. 1487, 99 L.Ed.2d 715 (1988)).

It appears that the crux of the petitioner's complaint is the failure to introduce evidence regarding the alleged existence of a bipolar type 2 mental illness. The existence of such a mental illness would have been apparent, suggests the petitioner, had trial counsel discovered a family history of mental illness and evidence of the petitioner's erratic criminal behavior. Dr. Zager failed to diagnosis the petitioner with anything more severe than a personality disorder. The petitioner blames this diagnosis on trial counsel's failure to gather sufficient information. The petitioner ignores the fact that Dr. Zager's diagnosis remained the same even after reviewing the additional information. Moreover, the petitioner's own post-conviction witness, Dr. Auble, arrived at essentially the same diagnosis as Dr. Zager. While Dr. Kenner eventually diagnosed the petitioner as Bipolar Type 2, his diagnosis would have necessitated the introduction of evidence regarding the petitioner's escalating history of violent crime, which is a tactic with considerable risk. The petitioner's claim, at best, amounts to an assertion that counsel should have obtained an expert who would have diagnosed the petitioner as Bipolar Type 2. The Constitution does not require attorneys to "shop around" for more favorable expert testimony. Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992). Additionally, the necessary introduction of the petitioner's violent criminal behavior could have undermined this mitigating factor and outweighed any beneficial mitigating impact of the mental illness evidence. This "undiscovered" mitigation evidence raised by the petitioner was correctly characterized by the post-conviction court as being a "double-edged sword."

Given the strength of the proof of the aggravating circumstances relied upon by the State, the mitigation evidence that was presented at sentencing and the possible negative impact of the "undiscovered" mitigation evidence, we conclude that had this information been presented to the court there is little reason to believe the trial judge would impose a sentence other than death. The petitioner is not entitled to relief on this basis. Indeed, in this case, unlike the situation where a jury imposes a death sentence, we are not left to speculate to

> some degree as to the effect this evidence might have had on the sentencer. The sentencer in this case, the trial judge himself, found this evidence would not have altered the result of the sentencing hearing.

Henderson, 2005 WL 1541855, at **41-43.

Henderson contends that he was born with neurological deficiencies, he suffers from mixed phase bipolar disorder and brain damage, and his counsel failed to investigate, discover, and present this information as mitigation evidence to Judge Blackwood. (D.E. 68 at 6-7.) He argues that he has an unusual brain morphology, abnormally low brain volumes in the frontal and parietal lobes, is vulnerable to dissociative states, impaired in his ability to control and regulate behavior, and as a result of bipolar disorder, is unable to regulate his mood and recognize reality. (Id. at 8-11, 18.) He argues that he was "too impaired to conform his behavior at the time of the offense." (Id. at 19.) He contends that the trial court did not hear this evidence because his counsel had no knowledge of his neurological and psychiatric deficiencies and the impact of these deficiencies "though it was the very sort of evidence that would have caused the trial judge to give Kennath Henderson a life sentence." (D.E. 68 at 19-20; D.E. 68-4 at 4.) Relying on Wiggins, Henderson asserts that he is entitled to habeas corpus relief because counsel has a duty to conduct a reasonable social history investigation into the defendant's background, and there is a reasonable probability that if his counsel had done so, he would not have been sentenced to death. (D.E. 68 at 20-26.)

The Strickland analysis applies to Henderson's claim that counsel failed to investigate and present sufficient mitigating evidence. Wong v. Belmontes, 130 S.Ct. 383, 384-85 (2009) (per curiam). Counsel has an obligation to conduct a thorough investigation into the defendant's background. Williams v. Taylor, 529 U.S. 362, 396 (2000). Counsel has at minimum a duty to take the first step of interviewing witnesses and requesting records. Porter v. McCollum, 130 S.Ct. 447, 453 (2009) (per curiam). Counsel falls short of meeting reasonable professional standards when they fail to expand their investigation of the defendant's life history based on initial information obtained. Wiggins, 539 U.S. at 524 (ineffective assistance found when counsel abandons their investigation after having acquired only rudimentary knowledge of the defendant's history from a narrow set of sources). The Supreme Court held that defendants have "a right-indeed, a constitutionally protected right - to provide the jury with the mitigating evidence that their trial counsel either failed to discover or failed to offer." Williams, 529 U.S. at 393.

In determining that Henderson was not prejudiced by counsel's performance, the Tennessee Court of Criminal Appeals placed great emphasis on the fact that the trial judge found that the evidence of Henderson's family history of mental illness and his own diagnosis of bipolar disorder 2 would not have changed the results of the sentencing hearing. Henderson presented Judge Blackwood's declaration which stated that he was "aware that Mr. Henderson had family members who had a prior histories (sic) of mental illness

and mental retardation" and that he "would have given great weight to any mitigating evidence, especially any evidence of organic brain damage or serious mental illness (other than a personality disorder) or mental retardation." (D.E. 68-3 at 2-3.) Still, Blackwood stated that he "would have weighed that evidence, along with the aggravating factors." (Id. at 3.)

Subsequent to the post-conviction proceedings, Dr. Ruben C. Gur, Director of Neuropsychology for the University of Pennsylvania Health System, conducted a comprehensive neurofunctional evaluation of Henderson. (D.E. 68-1.) Gur indicated that magnetic resonance imaging (MRI) studies revealed abnormalities in Henderson's regional brain function relevant to behavior, executive functions, attention and comprehension of complex information, and the integration of self. (Id. at 4.) Gur was not clear as to the etiology of these abnormalities, but he related them to blunt trauma and concussion that Henderson reportedly sustained and stated that these abnormalities could help to explain his developmental deficits. (Id.) Ultimately, Gur determined that Henderson suffers from "brain dysfunction which impairs his ability to modulate his behavior in accordance with context and may specifically lead to dissociative states, such as the state he was in when he committed the offenses." (Id.)

Dr. George Woods, Jr. performed a neuropsychiatric evaluation on Henderson in 2007. (D.E. 68-2.) Dr. Woods stated,

> it is the interplay between the symptoms of Mr. Henderson's genetically derived Bipolar I Disorder, such as depression, irritability, and dissociative states, as

> well as his impaired decision-making and neurologically-derived problems with judgment and social functioning, including brain damage and low brain volume, that impaired Mr. Henderson's ability to conform his behavior to the law at the time of the offense.

(Id. at 13.) Woods stated,

> It is my professional opinion, which I hold to a reasonable degree of medical certainty, that Mr. Henderson was suffering from Bipolar I Disorder and in a rapid-cycling, mixed phase at the time of the offense for which he was charged and convicted and at the entry of his guilty plea and waiver of jury sentencing. It is also my professional opinion that Mr. Henderson was also suffering from Cognitive Disorder Not Otherwise Specified, a traumatic brain injury at age twelve, and an uncharacteristically low brain volume. These mental disorders, synergistic in their effects, including Mr. Henderson's depression, social decompensation, impaired ability to effectively weigh and deliberate due to his brain deficits, and impaired judgment, precluded Mr. Henderson from conforming his behavior to the law and also from making a rational and voluntary, intelligent, and knowing waiver of his rights to a jury trial and waiver of his right to be sentenced by a jury.

(Id. at 14.)

This Court must determine whether there is a reasonably probability that there would have been a different outcome at sentencing if a more complete picture of Henderson's behavior, bipolar disorder, and mental deficits had been presented to the trial court. During the post-conviction proceedings, Blackwood, the trier of fact, was made aware of the undiscovered evidence except the reports of Woods and Gur that were first presented in the habeas proceedings. Blackwood acknowledged that counsel was not aware of Henderson's family's history of mental illness or the violent events that Henderson engaged in shortly before this incident. (D.E. 22-8 at 77.) Blackwood stated that this case was

one where finding mitigation was difficult and presenting mitigation evidence was "a double-edged sword." (Id.) With all the additional mitigation evidence before him except Gur and Woods' opinions, Blackwood determined that the result of the sentencing would not have changed. (Id. at 78-79.) He stated:

> At trial, the statutory aggravating circumstances proven beyond a reasonable doubt by the State were simply overwhelming. The Court considered the mitigating testimony, especially the testimony regarding this personality disorder. This proffered new mitigating testimony regarding Dr. Kenner's bipolar diagnosis, only reinforces the Court's opinion that the aggravating circumstances outweighed, in fact overwhelmed, any mitigating evidence. Two additional points need to be made. The Court is assuming, for argument's purpose that Dr. Kenner's diagnosis is correct. Had this testimony been offered at the trial, the State, of course, would have had an opportunity to rebut same. Then a question of weight would have to be assigned. Secondly, the evidence presented regarding the defendant's abduction of his girlfriend's mother, the rapes, the assaults, lead the Court to the conclusion that the Petitioner's acts were calculated, cold and deliberate. These are the same calculated and deliberate actions that led to the death of Tommy Bishop. Whether or not they were the result of a bipolar condition would not have changed the Court's decision to impose a sentence of death.

(Id. at 78-79.)

Woods' and Gur's expert opinions have not been subjected to Respondent's expert's analysis and cross-examination. However, the knowledge of potential brain abnormalities provides little additional weight, if any, in mitigation. When considering the overwhelming evidence of the aggravating factors and the detrimental effect of additional evidence about Henderson's criminal behavior, Henderson was not prejudiced by his counsel's performance because there was no reasonable probability that

Henderson would have been given a different sentence. See Wong v. Belamontes, 130 S.Ct. 383, 391 (2009) (denying claim of ineffective assistance of counsel when it is "hard to imagine expert testimony and *additional* facts . . . outweighing the facts of the" victim's murder).

Henderson argues that the Tennessee Court of Criminal Appeals decision was based on an unreasonable determination of fact because the state court relied on a misrepresentation of Zager's testimony that the new social history information would not have changed her diagnosis. (D.E. 68 at 43.) The Tennessee Court of Criminal Appeals, in summarizing the evidence at the post-conviction hearing, noted that Zager "agreed it would be prudent to continue to look and see if there was a reason to change her prior diagnosis." Henderson, 2005 WL 1541855, at *16. At a later point in the opinion, the court stated, "The petitioner ignores the fact that Dr. Zager's diagnosis remained the same even after reviewing the additional information." Henderson, 2005 WL 1541855, at *42.) Zager's actual testimony states:

> Q. Dr. Zager, have you made a new diagnosis in this case based on new information?
>
> A. No, I have not.
>
> Q. Would you, based on new information, continue to look and see if there was a reason to change your diagnosis?
>
> A. Yes.

(D.E. 23-3 at 152.) That Zager had not made a new or different diagnosis is not the crux of the state court's determination that

trial counsel was ineffective for failing to investigate, develop, and present mitigating evidence. The Tennessee Court of Criminal Appeals noted the differences in opinions related to the diagnosis. Henderson, 2005 WL 1541855, at *42. However, the focus was on the "strength of the proof of the aggravating circumstances" and the negative impact of the "undiscovered" mitigating evidence. Id. at *43. The court's decision was not based on an unreasonable determination of fact.

Henderson contends that the state court relied on an unreasonable determination of fact in concluding that Dr. Pam Auble had essentially the same diagnosis as Zager. (D.E. 68 at 43-44.) See id. at *42. He argues that Auble testified that she had not been asked to reach a diagnosis, that she had uncovered neuropsychological deficits which affect Henderson's functioning and mental flexibility, and that she found Henderson to have both antisocial and narcissistic traits. (Id. at 44.) He asserts that Auble's conclusions were not completely in agreement with Zager, as the state court claimed. (Id.)

Auble noted that Henderson had some specific problems in his mental abilities, like learning information that he was told, manual dexterity, abstract reasoning, mental inflexibility, and with his ability to form hypotheses and test them. (D.E. 23-4 at 26-29.) She noted that it was hard for her to draw conclusions from the personality testing. (Id. at 29.) She testified,

> There were indications on the neuropsychological testing that his function wasn't right. And from the personality testing, the glowing picture– and from my interviews with

> him as well, the glowing picture that he portrays of himself and his family is really inconsistent with reality, as far as I could tell from what else I knew about him.
>
> . . .
>
> He's kind of rigid, and he doesn't have an understanding of himself like most people do. I think that he really, truly, genuinely is not aware of his own emotional dynamics.

(Id. at 29-31.) She stated, "I think that the personality style that she (Zager) identified in her testimony is similar to the personality style that I saw in Mr. Henderson." (Id. at 35.) She stated, "I think that Dr. Zager and I have arrived at the same conclusion, that Mr. Henderson tends to deny and minimize his problems and weaknesses to a pathological degree. . . . And that, I think, is, you know, what she's calling narcissistic." (Id. at 36.) Auble agreed that Henderson had narcissistic traits and an antisocial personality; she did not make a diagnosis of whether Henderson had a major mental illness. (Id. at 37, 40.)

Both Zager and Auble noted Henderson's personality issues and narcissism. The Tennessee Court of Criminal Appeals' determination that Auble's diagnosis was "essentially the same" is not an unreasonable determination of fact.

The Tennessee Court of Criminal Appeals' decision that Henderson was not prejudiced was based on "the strength of the proof of the aggravating circumstances . . . and the possible negative impact of the 'undiscovered' mitigation evidence." See Henderson, 2005 WL 1541855, at *43. The court noted the danger of introducing evidence regarding Henderson's escalating history of

violent crime associated with Dr. Kenner's bipolar diagnosis and the potential that the undiscovered mitigation evidence could outweigh any mental illness evidence. Id. The court's 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.

Summary judgment is GRANTED as to Henderson's claims in ¶¶ 9(d)(1-3), and these claims are DENIED.

> c. Counsel failed to educate themselves concerning developments in the field of capital case defense and were unaware of prevailing professional norms, and thus failed to identify and procure the experts necessary to develop, discover, explain, and present available mitigation themes or evidence. (Amended Petition ¶ 9(f)(2)).

Henderson alleges that had counsel educated themselves about developments in capital defense litigation and undertaken the requisite investigation, they would have been able to develop significant mental health and socio-economic mitigation evidence to present on Henderson's behalf. (D.E. 16 at 22.) He asserts, in conjunction with his arguments that counsel failed to investigate and present evidence of his brain damage and mental illness, that his counsel's performance was deficient for failing to educate themselves about mental health issues and hire appropriate experts. (D.E. 68 at 20.) However, he fails to address the merits of this specific claim in his response.

The Tennessee Court of Criminal Appeals found that Henderson failed to allege specific developments in the area of capital defense litigation of which counsel should have been aware,

"refused to adopt a *per se* finding of deficiency based upon an allegation of counsel's lack of knowledge . . . .," and determined that issues addressing the failure to present mitigation evidence will be addressed as such. Henderson, 2005 WL 1541855, at *40. Respondent argues that the Tennessee Court's of Criminal Appeals determination was not contrary to, or based on an unreasonable application of established federal law. (D.E. 55-1 at 58.)

The Tennessee Court of Criminal Appeals' opinion was based on allegations that counsel lacked knowledge of unspecified developments in capital case defense. With the habeas petition, Henderson attempts to correct the deficiencies related to these allegations in the post-conviction proceedings by asserting that counsel should have educated themselves about mental health issues. Although Henderson prefers Gur's and Woods' opinions of his mental health and abilities over Zager's, counsel has no duty to provide the "best" experts for defendant or the expert with a more favorable opinion. Reynolds v. Bagley, 498 F.3d 549, 557 (6th Cir. 2007). Counsel's performance is not unreasonable because he failed to rule out "every possible psychological mitigator" through specialized evaluations. Carter v. Mitchell, 443 F.3d 517, 527 (6th Cir. 2006). The fact that counsel did not "shop around for a psychiatrist willing to testify to the presence of more elaborate or grave psychological disorders" does not constitute ineffective assistance. Id. (quoting Poyner v. Murray, 964 F.3d 1404, 1419 (4th Cir. 1992)). Henderson was not prejudiced by counsel's failure to develop the undiscovered mental health mitigation evidence, supra

pp. 94-95. Similarly, the Court finds no prejudice from counsel's lack of investigation or failure to educate himself more about the mental health issues in this case.

Henderson's allegations about socio-economic mitigation evidence are procedurally defaulted for the reasons stated supra p. 71.

The Tennessee 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. Summary judgment is GRANTED as to ¶ 9(f)(2) of the Amended Petition. The claim in ¶ 9(f)(2) is DENIED.

d. Counsel failed to develop and make use of mitigation proof by their failure to adequately utilize the services of Julie Fenyes, a mitigation specialist, to prepare a social history of Henderson's life (Amended Petition ¶ 9(g)).

Henderson alleges that Fenyes spent only about 75 hours working on mitigation preparation, and over half of that time was spent during the week between July 6, 1998, and July 13, 1998, after Henderson pleaded guilty. (D.E. 16 at 22-23.) Henderson asserts that if trial counsel had insured that Fenyes completed her work in a timely fashion, they would have been armed with information to help them ascertain the need for additional experts and identified necessary lay witnesses. (Id. at 23.)

Henderson emphasizes that the trial court recognized that Fenyes had not done her job. (D.E. 68 at 30.) He noted that counsel had no idea how she divided her time between the roles of

mitigation specialist and jury consultant. (Id.) Henderson asserts that Mosier did not understand the role of a mitigation specialist or his role to guide the defense team and experts. (Id. at 31.) Mosier simply asked the experts to keep him apprised of their progress, and even as of the July 6 hearing, Mosier had no idea about what mitigation evidence had been collected. (Id. at 30-31.)

Fenyes did not testify at the post-conviction hearing. Her four-page mitigation report was made an exhibit. (D.E. 23-12 at 9-12.) Einstein's testimony and report outlined the work Fenyes performed on the case. (See D.E. 23-13 at 57-66.) Einstein testified about Fenyes' work as follows:

> In reviewing Ms. Fenyes' work, Dr. Einstein found it remarkable that almost all the work completed in her investigation was done two (2) weeks prior to the entry of the guilty plea. Dr. Einstein concluded that there was no mitigation work completed from June 1997 through December 1997. Ms. Fenyes only met with the petitioner four (4) times, and never alone. This is important because the ability to gain sensitive information is hindered when a third party is present. Ms. Fenyes did not meet with the petitioner until February 1998. There is no indication of any further meetings until June 1998. The petitioner entered a guilty plea on July 6, 1998. It is Dr. Einstein's opinion that the amount of time spent preparing a mitigation defense "would definitely not [have] been enough time in this case." Dr. Einstein acknowledged that Ms. Fenyes was not authorized to begin work until September 1997. Dr. Einstein further faulted Ms. Fenyes's practice of interviewing persons by telephone rather than in person. Basically, all of the mitigation work was completed in the week between entry of the plea and the sentencing hearing.

Henderson, 2005 WL 1541855, at *10. Einstein also noted the available information that the trial team did not discover:

> Dr. Einstein separated the "missing" information into two categories, (1) information about Petitioner Henderson and (2) information about the petitioner's extended family. Information regarding the petitioner consisted of

> the following: (1) changes in the petitioner's behavior during high school years; (2) radical changes in the petitioner's behavior during the two (2) years preceding the murder including but not limited to the alleged rape and kidnapping of his girlfriend's mother; (3) exhibitions of signs of depression and suicidal thoughts; and (4) indication of a strange sort of religious ideation, consisting of spirits that affect his behavior. Information about the petitioner's extended family included: a significant history of mental illness and instability, where at least nine (9) extended family members on both his maternal and paternal side suffered from mental illness. His report indicated that the petitioner should have been examined by a psychiatrist.

Id.

The Tennessee Court of Criminal Appeals outlined the time Fenyes spent working on the case.

> The petitioner asserts that trial counsel failed to adequately utilize the services of a mitigation specialist to prepare a social history and timeline relating to the petitioner's life. In support of his allegations, the petitioner relies upon the testimony of his expert, Dr. Frank Einstein, who testified that Ms. Fenyes, the mitigation specialist, spent less than 38.5 hours working on mitigation from the time of her appointment until June 30, 1998. Dr. Einstein calculated that Ms. Fenyes spent an additional 28.9 hours on the case from June 30, 1998, until July 6, 1998, the date of the petitioner's guilty plea. Dr. Einstein testified that Ms. Fenyes worked an additional 43.5 hours between the date of the guilty plea on July 6 and the sentencing hearing held on July 13.

Henderson, 2005 WL 1541855, at *40. The court addressed counsel's role in the delays in obtaining funding for Fenyes' work. Id. at *34. Further, the court addressed the reality that there was "undiscovered" mitigation evidence and the fact that the evidence was "correctly characterized as a being a "double-edged sword" which would not have altered the sentence. Id. at **42-43.

Even if counsel's performance were deficient with regard to the development and use of mitigation proof, the nature of the

mitigation proof uncovered in this case does not establish the prejudice needed to provide habeas relief, supra pp. 94-95. The Tennessee 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. Summary judgment is GRANTED as to ¶ 9(g) of the Amended Petition. The claim in ¶ 9(g) is DENIED.

e. Counsel were ineffective for failing to adequately use the clinical psychologist secured for the case. (Amended Petition ¶ 9(i)).

Henderson alleges that he first met with Zager on November 4, 1997, but she only spent a total of 1.5 hours working on the case between then and July 7, 1998. (D.E. 16 at 25.) He alleges that Zager was not given valuable information about his family, his or his family's psychiatric history, and his prior criminal record which resulted in an incomplete evaluation and an incorrect diagnosis. (Id.; see D.E. 68 at 34-39.)

These allegations are addressed in relation to the Court's analysis of ¶¶ 9(d)(1-3). For the reasons stated supra pp. 85-98, the claim in ¶ 9(i) is DENIED.

f. Counsel failed to obtain critical information related to Henderson's psychological profile and the psychological history of his family before determining they had insufficient mitigation evidence to present to a jury and determining that Henderson should waive jury sentencing. (Amended Petition ¶ 9(j)).

Henderson alleges that Fenyes and Zager had not completed their work prior to counsel advising him to waive a jury. (D.E. 16 at 25-26.) Henderson combines his arguments of ineffective

assistance of counsel related to Amended Petition ¶¶ 9(d)(1-3), 9(f), 9(g), 9(i), and 9(j), and contends that he is entitled to habeas corpus relief on the merits. (D.E. 68 at 6-48.) He focuses on the "hands off approach" that Mosier took with Zager. (Id. at 34.) Mosier did not know what facts Zager knew, how often she visited Henderson, or what test she used to evaluate him. (Id.) He noted that Zager never received a social history report from Fenyes. (Id. at 35.) He argues that counsel's failure to direct Zager and provide her with information about Henderson resulted in Zager taking the stand although she was surprised to be asked to testify about her limited findings. (Id. at 36.)

The Court addressed the lack of information developed in the mitigation investigation and provided to Zager in relation to the claims in ¶ 9(d)(1-3). For the reasons stated supra pp. 85-98,the claim in ¶ 9(j) is DENIED.

C. Ineffective Assistance of Appellate Counsel (Amended Petition ¶ 10)

Henderson alleges that his appellate counsel was ineffective, as follows:

a. Counsel failed to develop an effective attorney-client relationship (D.E. 16 at 32-33); and

b. Counsel failed to raise any issue beyond the question of whether Henderson's death sentence was proportional, despite the numerous issues raised in pretrial motions, including the following[31] challenges to:

[31] Henderson indicates that there may be additional grounds which support his claim of ineffective assistance of appellate counsel by using the language "including but not limited to the following." (D.E. 16 at 33.) The Court will not consider any grounds for ineffective assistance of appellate counsel that are not specifically set forth in the amended petition and pleaded in accordance with Habeas Rule 2.

(1) the constitutionality of the death penalty statute and the imposition of the death penalty in Tennessee;

(2) the trial court's denial of the Motion for Discovery of Dispositions of All First Degree Murder Prosecutions in the State of Tennessee;

(3) the trial court's denial of the motion for the State to declare publicly the standards for seeking the death penalty for an individual defendant;

(4) the trial court's denial of a change of venue;

(5) the trial court's denial of the Motion to Strike T.C.A. § 39-13-204(h) as Unconstitutional and to Allow the Jury to Know that if They are Unable to Reach a Verdict in the Sentencing Phase that the Judge will impose a Sentence of Life Imprisonment;

(6) the constitutionality of Tenn. Code Ann. § 39-13-204 because it improperly allows for a sentence enhancement not included in the indictment;

(7) Tenn. Code Ann. § 39-13-204, because it violates the Eighth and Fourteenth Amendments under Furman, Lockett, and Eddings;

(8) Tenn. Code Ann. § 39-13-204 because it impinges on Henderson's fundamental right to life;

(9) the constitutionality of the death penalty because it involves torture;

(10) the fact that Tennessee's death penalty scheme violates international law; and

(11) any and all issues raised in this petition on appeal.

(Id. at 33-35.)

1. Procedural default

Respondent asserts that Henderson's claims in ¶¶ 10(a), 10(b)(4)-(5), and 10(b)(11) were not exhausted in state court and

are procedurally defaulted. (D.E. 55-2 at 10-11.) Henderson asserts that the claim in ¶ 10(a), that appellate counsel failed to develop an effective attorney-client relationship, was raised in his First Amended Petition for Post-Conviction Relief. (D.E. 68 at 130; see D.E. 21-14 at 64.) Henderson failed to raise this issue on appeal in the post-conviction proceedings, and the issue presented in ¶ 10(a) was not exhausted in the state courts.

Henderson asserts that the claims in ¶ 10(b)(4), that appellate counsel failed to challenge the trial court's denial of a change of venue; ¶ 10(b)(5), that appellate counsel failed to challenge the trial court's denial of the Motion to Strike T.C.A. § 39-13-204(h) as Unconstitutional and to Allow the Jury to Know that if They are Unable to Reach a Verdict in the Sentencing Phase that the Judge will impose a Sentence of Life Imprisonment; and ¶ 10(b)(11), that appellate counsel should have raised any and all issues raised in the post-conviction amended petition on appeal, were raised in the first amended petition and addressed on appeal of the post-conviction court's determination by stating that counsel "raised only one issue on direct appeal-proportionality." (D.E. 68 at 131-32.) These claims were not specifically addressed in the post-conviction appellate brief (see D.E. 23-15 at 84-87) and not exhausted in the state courts.

Henderson's asserts that the claims in ¶¶ 10(a), 10(b)(4-5) & (11) are not procedurally defaulted because the ineffective assistance of post-conviction counsel demonstrates cause and prejudice for any alleged default of these claims. (D.E. 68 at 130-

32.) Ineffective assistance of post-conviction counsel does not establish cause for procedural default, supra pp. 22-23, 34-35. Henderson has not demonstrated that a miscarriage of justice would result from the Court's failure to review these claims. Summary judgment is GRANTED for the claims in ¶¶ 10(a) and 10(b)(4-5) & (11), as they are procedurally defaulted. The claims in ¶¶ 10(a) and 10(b)(4-5) & (11) are DENIED.

2. Merits Review

Respondent seeks summary judgment on the claims in ¶¶ 10(b)(1-3) & (6-10)[32] and asserts that Henderson has not established that the Tennessee Court of Criminal Appeals' decision was contrary to, or involved an unreasonable application of federal law. (D.E. 55-1 at 59-61.)

The Tennessee Court of Criminal Appeals addressed Henderson's claims that his appellate counsel Michael Robbins was ineffective, as follows :

> A petitioner alleging ineffective assistance of appellate counsel must prove both that (1) appellate counsel acted objectively unreasonably in failing to raise a particular issue on appeal, and (2) absent counsel's deficient performance, there was a reasonable probability that defendant's appeal would have been successful before the state's highest court. See e.g., Smith v. Robbins, 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000); Aparicio v. Artuz, 269 F.3d 78, 95 (2nd Cir. 2001); Mayo v. Henderson, 13 F.3d 528, 533-34 (2d Cir. 1994). To show that counsel was deficient for failing to raise an issue on direct appeal, the reviewing court must determine the merits of the issue. Carpenter v. State, 126 S.W.3d 879, 887 (Tenn. 2004) (citing Kimmelman v. Morrison, 477 U.S. 365, 375, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986)). Obviously, if an issue has no merit or is weak, then

[32] ¶ 10(c), the only remaining paragraph not addressed, merely asserts that Henderson was prejudiced by counsel's performance. (D.E. 16 at 35.)

appellate counsel's performance will not be deficient if counsel fails to raise it. Id. Likewise, unless the omitted issue has some merit, the petitioner suffers no prejudice from appellate counsel's failure to raise the issue on appeal. Id. When an omitted issue is without merit, the petitioner cannot prevail on an ineffective assistance of counsel claim. Carpenter, 126 S.W.3d at 888 (citing United States v. Dixon, 1 F.3d 1080, 1083 (10th Cir. 1993)). Additionally, ineffectiveness is very rarely found in cases where a defendant asserts that appellate counsel failed to raise an issue on direct appeal, primarily because the decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel.

Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986), established a test for determining whether counsel was deficient in *Strickland* terms for failing to raise particular claims on direct appeal, i.e, "significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective counsel be overcome." Id.

In *Carpenter v. State*, our supreme court refused to hold that the *Gray v. Greer* standard was the conclusive test of finding deficient performance. Carpenter, 126 S.W.3d at 888. Our supreme court noted that the relative strength of the omitted issue is only one among many factors to be considered. Indeed, the court noted the numerous factors relied upon the Sixth Circuit Court of Appeals in evaluating appellate counsel's failure to raise issues. Id. The non-exhaustive list includes:

1) Were the omitted issues "significant and obvious"?

2) Was there arguably contrary authority on the omitted issues?

3) Were the omitted issues clearly stronger than those presented?

4) Were the omitted issues objected to at trial?

5) Were the trial court's rulings subject to deference on appeal?

6) Did appellate counsel testify in a collateral proceeding as to his appeal strategy and, if so, were the justifications reasonable?

7) What was appellate counsel's level of experience and expertise?

8) Did Henderson and appellate counsel meet and go over possible issues?

9) Is there evidence that counsel reviewed all the facts?

10) Were the omitted issues dealt with in other assignments of error?

11) Was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt?

Carpenter, 126 S.W.3d at 888 (citing Mapes v. Coyle, 171 F.3d 408, 427-28 (6th Cir. 1999)).

Again, the petitioner complains that appellate counsel failed to raise issues concerning the constitutionality of the death penalty, for example: (1) the death penalty is arbitrarily imposed; (2) the sentencer does not have unlimited discretion not to impose death; (3) the death penalty is not imposed fairly; (4) the death penalty statute impinges upon the petitioner's fundamental right to life; and (5) the death penalty statute is unconstitutional because it imposes torture. These are essentially the same arguments that we have already determined that the petitioner waived for failure to assert them on direct appeal. These issues have been repeatedly rejected by the appellate courts of this state on numerous occasions. *See e.g.*, State v. Odom, 137 S.W.3d 572, 600 (Tenn. 2004) (determining that the death penalty is not unconstitutional under international law); State v. Holton, 126 S.W.3d 845 (Tenn. 2004) (holding that a sentence of death does not violate due process where the indictment fails to include language of the statutory aggravating circumstances that elevate the offense to capital murder); State v. Hines, 919 S.W.2d 573, 582 (Tenn. 1995), *cert. denied*, 519 U.S. 847, 117 S.Ct. 133, 136 L.Ed.2d 82 (1996) (concluding that unlimited discretion is vested in the prosecutor and that the death penalty was not imposed in a discriminatory manner). Further, the petitioner asserts no argument and cites no new authority requiring reversal of this precedent and does not show how he was prejudiced by counsel's failure to raise these issues. Mr. Robbins testified that he did not raise these issues on appeal because the law as to the claims was well-settled. Mr. Robbins was experienced in appellate matters and his decision to omit these issues and focus upon what he considered the single meritorious issue was reasonable.

> An appellate attorney is neither duty bound nor required to raise every possible issue on appeal. Carpenter, 126 S.W.3d at 887 (citing King v. State, 989 S.W.2d 319, 334 (Tenn. 1999)); *Campbell v. State*, 903 S.W.2d 594, 596-97 (Tenn. 1995). Mr. Robbins, an experienced appellate advocate, focused on the only issue he felt had merit. *See generally Cooper*, 849 S.W.2d at 757 (determining that it is standard practice for advocates to weed out weak arguments in order to focus on one central issue). An attorney's determination as to the viability of the issues should be given considerable deference. Carpenter, 126 S.W.3d at 887; *Campbell*, 903 S.W.3d at 597. Application of the *Carpenter* factors indicate that counsel's decision was not deficient. Accordingly, no prejudice resulted. The petitioner is not entitled to relief as to his claim that appellate counsel was ineffective.

Henderson, 2005 WL 1541855, at **45-46 (footnote omitted).

Henderson "is entitled to effective assistance of counsel in connection with [his] first appeal of right." Joshua v. DeWitt, 341 F.3d 430, 441 (6th Cir. 2003); see Evans v. Hudson, 575 F.3d 560, 564 (6th Cir. 2009). The two-pronged Strickland test is applied to evaluate appellate counsel's representation. Smith v. Robbins, 528 U.S. 259, 285-86 (2000) (applying Strickland to claim that appellate counsel rendered ineffective assistance by failing to file a merits brief); Smith v. Murray, 477 U.S. 527, 535-36 (1986) (applying Strickland for failure to raise issue on appeal); Benning v. Warden, Lebanon Corr. Inst., 345 F. App'x 149, 155 (6th Cir. 2009) (same). Appellate counsel is not ineffective for failing to raise every non-frivolous argument. Jones v. Barnes, 463 U.S. 745, 751-54 (1983).

To establish that appellate counsel was ineffective in failing to raise an issue, Henderson

> must first show that his counsel was objectively unreasonable . . . in failing to find arguable issues to

> appeal-that is, that counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them. If [the prisoner] succeeds in such a showing, he then has the burden of demonstrating prejudice. That is, he must show a reasonable probability that, but for his counsel's unreasonable failure to file a merits brief, he would have prevailed on his appeal.

Smith v. Robbins, 528 U.S. at 285 (citation omitted). Rather, "[i]f there is a reasonable probability that [the defendant] would have prevailed on appeal had the claim been raised, we can then consider whether the claim's merit was so compelling that appellate counsel's failure to raise it amounted to ineffective assistance of appellate counsel." Valentine v. United States, 488 F.3d 325, 338 (6th Cir. 2007) (quoting McFarland v. Yukins, 356 F.3d 688, 700 (6th Cir. 2004)).

Henderson argues that Robbins' performance on appeal violated his Sixth, Eighth, and Fourteenth Amendment rights because he only raised the issue of proportionality on appeal. (D.E. 68 at 90-91.)[33] He notes that Robbins was aware that issues which were not raised on appeal would be considered waived for federal habeas review. (Id. at 91.) He contends that while there is no constitutional right to have every non-frivolous issue raised on appeal, decisions respecting which issue to present on appeal must be based on an informed understanding of applicable procedural and substantive law. (Id. at 92.) He asserts that Robbins "misapprehended the law, believing that he could not raise issues that had not been litigated and ruled on by the trial court." (Id.) He disputes

[33] Henderson does not address the merits of the claim raised in ¶ 10(b)(10).

counsel's failure to raise issues addressed in the pre-trial motions for discovery, to declare public the standards which apply in seeking the death penalty, to change venue, and challenging the constitutionality of Tennessee's death penalty statute. (Id. at 92-93.) He asserts that had Robbins known and understood the law, he would have known that "he had no reason not to raise these claims." (Id. at 93.)

Henderson argues that Robbins' conclusions that the claims were not "viable" or "well-grounded" because the law was settled on issues related to the constitutionality of the death penalty were wrong. (Id. at 93-94.) He emphasizes that the Tennessee Supreme Court has held that a capital appellant is entitled to review of any claim raised on appeal, even if that claim was not raised at trial. (Id. at 93-94.) He argues that Robbins' decision about what issues to raise on appeal was not an "informed, tactical decision." (Id. at 94-95.) Henderson argues that there is a reasonable probability that he would have received a new sentencing hearing if counsel had properly raised these issues on appeal. (Id. at 95.)

Henderson asserts that his claim for relief based on Apprendi[34] and Ring[35] - the claim in ¶ 10(b)(6) for failure to challenge the constitutionality of Tenn. Code Ann. § 39-13-204 because it improperly allows for a sentence enhancement not included in the indictment - is meritorious. (Id. at 95-98.) The federal right to presentment or indictment by a grand jury does not extend to the

[34] Apprendi v. New Jersey, 530 U.S. 466 (2000).

[35] Ring v. Arizona, 526 U.S. 584 (2002).

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); see Hall v. Bell, No. 2:06-CV-56, 2010 WL 908933, at **42-43 (E.D. Tenn. Mar. 12, 2010) (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). Henderson can not demonstrate that his claim that the aggravating circumstances must be plead in the indictment is meritorious and can not demonstrate prejudice for the ineffective assistance of appellate counsel claim asserted in ¶ 10(b)(6).

Henderson has not demonstrated that his claims would have been meritorious if raised on appeal or that he was prejudiced. The Tennessee Court of Criminal Appeals applied the correct legal standard. The court's determination of Henderson's ineffective assistance of appellate counsel claims is neither contrary to nor an unreasonable application of clearly established Supreme Court precedent or based on an unreasonable determination of the facts.

Summary judgment is GRANTED for the claims in ¶¶ 10(b)(1-3) & (6-10); the claims in ¶¶ 10(b)(1-3) & (6-10) are DENIED.

D. Guilty Plea and Waiver of Jury Sentencing Were Not Knowingly, Intelligently, or Voluntarily Made (Amended Petition ¶ 11)

Henderson alleges that his conviction and sentence violate the Sixth, Eighth, and Fourteenth Amendments because his guilty plea and subsequent waiver of a jury for sentencing was not knowingly, intelligently, or voluntarily made. (D.E. 16 at 35-36.) He contends that his plea and waiver of sentencing were constitutionally infirm because of: (1) ineffective assistance of counsel, including the trial court's failure to properly adjudicate his request for new attorneys (¶ 11(a)); (2) the trial court's bias against him (¶ 11(b)); (3) the trial court's refusal to grant a change of venue prior to selecting a jury (¶ 11(c)); (4) his mental illness and brain damage at the time of the plea (¶ 11(d)); (5) the trial court's refusal to recuse itself (¶ 11(e)); (6) withheld exculpatory evidence (¶ 11(f)); and (7) the trial court's failure to properly inform him that he had a constitutional right to be sentenced by a jury during the guilty plea and waiver colloquy (¶ 11(g)). (Id. at 36-38.)

Respondent argues that Henderson never raised this claim in the state courts and it is procedurally defaulted. (D.E. 55-1 at 11.) Henderson asserts that the post-conviction court addressed the claim when it stated, "there is nothing in the record to suggest that Petitioner did not voluntarily, knowingly, and intelligently waive his right to a jury trial on the issue of punishment." (D.E.

68 at 133; see D.E. 22-8 at 76.) He asserts that the waiver of the right to jury sentencing was also addressed in his post-conviction appellate brief. (D.E. 68 at 134; see D.E. 23-15 at 58.) He claims that the Tennessee Court of Criminal Appeals' extensive discussion of the trial court's colloquy which addressed both the guilty plea and the waiver of jury sentencing and which ended with the court's statement that "The record preponderates against any conclusion that the petitioner had no knowledge as to the impact of his decision to enter guilty pleas and waive jury sentencing" demonstrates that these claims were exhausted in the state courts. (D.E. 68 at 134.) See Henderson, 2005 WL 1541855, at *37. He further asserts that on direct appeal, the Tennessee Supreme Court, in its review of the record for reversible error, considered the issues of whether the plea and waiver of jury for sentencing were valid. (Id. at 135.) He contends that if the Court finds that the claims were not exhausted, he can demonstrate cause and prejudice through ineffective assistance of appellate and post-conviction counsel. (Id.)

The Tennessee Court of Criminal Appeals addressed the claims of ineffective assistance of counsel related to the guilty plea and waiver of jury sentencing and determined that counsel's advice was reasonable. See Henderson, 2005 WL 1541855, at **35-39. The court stated that the record "preponderates against any conclusion that the petitioner had no knowledge" of the impact of his decision. Id. at *37. Further, the court noted that petitioner made a conscious decision between two viable options. Id. at *39. The claim in ¶

11(a) was exhausted to the extent the court addressed whether the plea and waiver was knowing as it relates to the advice given by counsel.

The Tennessee Court of Criminal Appeals, in its examination of the plea colloquy, noted that the trial court made every attempt to discern that Henderson was not suffering from mental illness or disorder (¶ 11(d)) and that he was aware of his right to be sentenced by a jury (¶ 11(g)). To that extent, Henderson's claims in ¶ 11(d) and ¶ 11(g) are exhausted.

The claims in ¶¶ 11(a) to the extent the court addressed whether the plea and waiver was knowing as it relates to the advice given by counsel, 11(d), and 11(g) are exhausted. Summary judgment is DENIED for the claims in ¶¶ 11(a) to the extent the court addressed whether the plea and waiver was knowing as it relates to the advice given by counsel, 11(d), and 11(g).

The Tennessee Court of Criminal Appeals did not specifically address whether the trial court's refusal to appoint new attorneys (¶ 11(a)), to grant a change of venue (¶ 11(c)[36]), and to recuse itself (¶ 11(e)); the trial court's alleged bias (¶ 11(b)); and withheld exculpatory evidence (¶ 11(f)) affected the plea and waiver. The claims in ¶ 11(a) about the trial court's refusal trial court's refusal to appoint new attorneys and ¶¶ 11(b, c, e & f)

[36] The court, as part of its Strickland analysis, noted that further efforts to seek a change of venue would not have created a situation where Henderson would not have entered a guilty plea. Id. at *39. The claim was not presented in the state court as an independent assertion that the plea and waiver were involuntary because of the trial court's refusal to change venue, as it is presented in the habeas petition.

were not exhausted. Henderson failed to exhaust ineffective assistance of appellate counsel claims related to these issues. See Henderson, 2005 WL 1541855, at *43. Henderson has not demonstrated cause and prejudice for the failure to exhaust his ineffective assistance of appellate counsel claims. See Edwards v. Carpenter, 529 U.S. 446, 451-52 (2000), quoting Murray v. Carrier, 477 U.S. at 489 ("'[A] claim of ineffective assistance,' . . . generally must 'be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default"). He does not demonstrate that a miscarriage of justice would result from the Court's failure to address these ineffective assistance claims. He can not rely on these procedurally defaulted ineffective assistance claims as cause for procedural default of his claims related to the guilty plea and waiver. Further, ineffective assistance of post-conviction counsel does not establish cause for procedural default, supra pp. 22-23, 34-35, and Henderson has not demonstrated that a fundamental miscarriage of justice will result from the Court's failure to address the claims related to his plea and waiver of jury sentencing. The claims in ¶ 11(a) about the trial court's refusal trial court's refusal to appoint new attorneys and ¶¶ 11(b, c, e & f) are procedurally defaulted. Summary judgment is GRANTED for the claims in ¶ 11(a) about the trial court's refusal trial court's refusal to appoint new attorneys and ¶¶ 11(b, c, e & f), and the claims are DENIED.

E. Trial Court Errors (Amended Petition ¶ 12)

Henderson alleges that the trial court, in violation of his Sixth Eighth, and Fourteenth Amendment rights, committed the following errors:

> a. failed to appoint qualified co-counsel (D.E. 16 at 38);
>
> b. picked a jury prior to ruling on the venue issue (id. at 39-40);
>
> c. improperly delegated judicial obligations to the judge's secretary (id. at 40-42);
>
> d. conducted an in chambers, *ex parte* examination of mitigation expert Julie Fenyes (id. at 42-43);
>
> e. failed to inform Henderson that he had a constitutional right to be sentenced by a jury (id. at 43-44); and
>
> f. participated in improper *ex parte* contact with sheriff's deputies during Henderson's sentencing (id. at 44).

Respondent argues that the claims in ¶ 12 were presented to the state courts but were deemed waived on adequate and independent state grounds because in Tennessee, a guilty plea results in a waiver of all claims arising before the entry of the guilty plea. (D.E. 55-1 at 12-13; see D.E. 18 at 45.) He asserts that under Tollett, Henderson's claims are waived because he plead guilty. (D.E. 55-1 at 12.)

In support of his assertion of procedural default, Respondent cites the Tennessee Court of Criminal Appeals' opinion, as follows:

> **1. Issues Waived by Guilty Plea and/or Failure to Raise Them on Direct Appeal**
>
> In this appeal, the petitioner raises a number of issues centering around both the trial court's refusal to recuse

> itself during both the guilt and the sentencing phase as well as constitutional error with the imposition of the death penalty. Specifically, with regard to the death penalty, the petitioner argues that: (1) his sentence of death violates international law; (2) his sentence of death violates due process; (3) his waiver of jury sentencing was invalid; (4) the death penalty itself is unconstitutional; and (5) the system of appointing capital defense counsel is unconstitutional. 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 it 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 the failure to present the ground "was the result of state action in violation of the federal or state constitution." Tenn. Code Ann. § 40-36-106(g). Neither of the exceptions is present herein. Further, the petitioner pled guilty. A guilty plea waives all non-jurisdictional constitutional inequalities. See State v. McKinney, 74 S.W.3d 291 (Tenn. 2002). Thus, these issues are waived. Accordingly, the only remaining issues properly before this Court involve the trial court's failure to recuse itself at the post-conviction proceeding, the effectiveness of trial and appellate counsel, and the post-conviction court's decision to exclude the testimony of Kelly Gleason.

(See D.E. 55-1 at 12.) Henderson, 2005 WL 1541855, at *22. Henderson asserts that Respondent is “completely incorrect” in finding that the claims in ¶ 12 were waived because he cites to a portion of the state court record that is “wholly different” from the claims raised in ¶ 12, and there is no finding of waiver. (D.E. 68 at 136-37.)

The Tennessee Court of Criminal Appeals referred to “a number of issues” centering around the trial court’s refusal to recuse itself and determinated that those issues were waived. Henderson, 2005 WL 1541855, at *22. Henderson’ s habeas claims that the trial court failed to appoint qualified co-counsel (¶ 12(a)); that the

trial court delegated its judicial obligations to his secretary (¶ 12(c)); and that the trial court's *ex parte* hearing with Fenyes was improper (¶ 12(d)) were addressed in the post-conviction appellate brief in the context of the recusal issue. (See D.E. 23-15 at 40-42, 48-49.) These issues were waived pursuant to Tenn. Code Ann. § 40-30-106(g) for failure to present them for determination, as they were not addressed as one of the remaining issues related to recusal addressed by the state court.[37] Id. at **22-23. The Sixth Circuit has found waiver pursuant to Tenn. Code Ann. § 40-30-106(g) to be an adequate and independent state procedural ground supporting dismissal of the claim at the state level and resulting in a procedural default of the claim when brought in a subsequent habeas corpus petition. Patterson v. Brandon, No. 3:07-0029, 2010 WL 1417772, at *7 (M.D. Tenn. Mar. 1, 2010); see Hutchison v. Bell, 303 F.3d 720, 738 (6th Cir. 2002); see also Cone v. Bell, 243 F.3d 961, 969 (6th Cir. 2001) (finding Brady claim procedurally barred by predecessor to T.C.A. § 40-30-206(g)), rev'd on other grounds, 535 U.S. 685 (2002); see also Alley v. Bell, 307 F.3d 380, 388-89 (6th Cir. 2002) (stating that claims are procedurally defaulted because of the state's post-conviction waiver rule in Tenn. Code Ann. § 40-30-106(g)).

Henderson argues that the claims in ¶ 12 are not waived based on the Tennessee Supreme Court's statutorily mandated direct review

[37] The Tennessee Court of Criminal Appeals, in addressing the recusal issue, focused on the following assertions: (1) that the judge predetermined post-conviction issues at the trial stage; (2) that the judge demonstrated bias toward Einstein; (3) that the judge refused to allow his secretary to testify as a witness; and (4) the disparate treatment of the witnesses. Id. at *23.

for reversible error. (D.E. 68 at 137.) The federal courts have rejected 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. Miller v. Bell, 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. The Court held that the record was examined for all issues raised, and those not presented remained defaulted. Id. 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 rejects the implicit review argument to demonstrate exhaustion of these claims.

Henderson does not attempt to demonstrate exhaustion of any of these claims. He asserts that to the extent the Court finds any of these claims procedurally defaulted, ineffective assistance of appellate counsel is cause for the procedural default. He has not

exhausted ineffective assistance claims related to the trial court errors alleged in this habeas petition or provided an excuse for the procedural default of such claims. See Edwards, 529 U.S. at 451-52, supra p. 117.

The claims in ¶ 12 are procedurally defaulted. Summary judgment is GRANTED; and the claims in ¶ 12 are DENIED.

F. Incompetence to Enter Guilty Plea and Waive Jury Sentencing (Amended Petition ¶ 13)

Henderson contends that his Sixth, Eighth, and Fourteenth Amendment rights were violated because he was incompetent to enter a guilty plea and to waive a jury for sentencing because he suffers from major mental illness, bi-polar disorder, and brain damage. (D.E. 16 at 44-45.) He argues that he was unable to properly understand the ramifications of entering a guilty plea to facts that established the aggravating circumstances which support a death sentence or the ramifications of being sentenced by a judge who was already biased against him. (Id. at 45-46.)

Respondent contends that this claim was never raised in the Tennessee courts and should be dismissed because it is procedurally defaulted. (D.E. 55-1 at 13). Henderson insists, based on opinions from the United States Courts of Appeals for the Tenth and Eleventh Circuits, that a substantive due process mental incompetency claim must be considered on the merits. (D.E. 68 at 139.) He asserts that trial counsel's failure to conduct an adequate mental health investigation and to effectively utilize the mitigation specialist and mental health professionals establishes cause for the

procedural default of this claim and the resulting prejudice. (D.E. 68 at 140.)

The Sixth Circuit has not established a *per se* rule that a substantive due process claim for mental incompetence is not subject to procedural default[38], as some circuits[39] have. There is no dispute that Henderson's claim was not exhausted in the state courts. Competency did not become an issue until Woods' and Gur's evaluation of Henderson's mental status. Henderson can not establish cause based on ineffective assistance of counsel because the record clearly demonstrates that Zager conducted a competency assessment and determined that Henderson was competent to stand trial. Henderson, 2005 WL 1541855, at *15. Henderson's claim of incompetence in ¶ 13 is procedurally defaulted and DENIED. Summary judgment is GRANTED for the claim in ¶ 13.

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[38] The Ninth Circuit rejected the argument that mental incompetency claims can never be procedurally defaulted. Lee v. Schiro, No. CV 04-039-PHX-MHM, 2006 WL 2827162, *7 (D. Ariz. Sept. 25, 2006). A claim alleging actual incompetence to stand trial is subject to the same state procedural default rules as other claims. See Martinez-Villareal v. Lewis, 80 F.3d 1301, 1306-07 (9th Cir. 1996) (rejecting the argument that mental incompetency claims can never be procedurally defaulted and upholding conclusion of the state court that petitioner's competency claim is procedurally defaulted); see also Lyons v. Luebbers, 403 F.3d 585, 593 (8th Cir. 2005) ("regardless of how incompetent Lyons . . . . was, Lyons was represented during the state court proceedings, and Lyon's incompetence did not prevent *his counsel* from raising the competency issue.)

[39] The Tenth Circuit in Sena v. New Mexico State Prison, 109 F.3d 652, 654 (10th Cir. 1997), held that the failure to appeal in the state court a substantive claim that the petitioner was mentally incompetent at the time that he entered his guilty plea does not bar federal habeas review. The Eighth Circuit in Vogt v. United States, held, "The procedural default rule . . .does not operate to preclude a defendant who failed to request a competency hearing at trial or pursue a claim of incompetency on direct appeal from contesting his [or her} competency to stand trial and be sentenced through post-conviction proceedings." Vogt, 88 F.3d 587, 590 (8th Cir. 1996)(quoting Adams v. Wainwright, 764 F.2d 1356, 1359 (11th Cir. 1985). See also Pate v. Robinson, 383 U.S. 375, 384 (1966)(noting that it is contradictory to argue that a defendant may be incompetent and yet knowingly or intelligently waive the right to have the court determine capacity to stand trial.)

G. Inapplicability and Unconstitutionality of the "Great Risk of Death" and the Avoiding Arrest" Aggravating Circumstances (Amended Petition ¶¶ 14 & 15)

Henderson alleges that the "knowingly created a great risk of death to two or more persons" and the "avoiding arrest" aggravating circumstances were inapplicable, not supported by sufficient evidence, and otherwise unconstitutional and invalid, in violation of the Sixth, Eighth, and Fourteenth Amendments. (D.E. 16 at 46-48.) Respondent contends that these claims were never raised in the state courts and are procedurally defaulted. (D.E. 55-1 at 13-14.) Henderson responds that Tennessee law, at the time of his direct appeal, required review of the sufficiency of the evidence used to support the conviction and the death sentence and the constitutionality and applicability of the aggravating circumstance. (D.E. 68 at 141-42.) He contends that because of this review, the claims are not procedurally barred. (Id. at 142.)

The Tennessee Supreme Court clearly addressed the issue of whether the evidence supported the trial court's finding of these two aggravating circumstances. Henderson, 24 S.W.3d 307, 313-15 (Tenn. 2000). Henderson's sufficiency of the evidence claims related to these two aggravating circumstances are exhausted.

Henderson's Eighth Amendment claim of vagueness asserted in ¶ 14 (see D.E. 16 at 46, ¶ 14(b)) was exhausted based on an implicit review theory that the Sixth Circuit accepted in Cone, supra p. 136 n.44. Henderson has not exhausted his other constitutional claims related to these aggravating circumstances, demonstrated cause and prejudice for the procedural default, or established that a

miscarriage of justice would result from the failure to present these constitutional claims.

Summary judgment is DENIED for the claims in ¶¶ 14 & 15 about sufficiency of the evidence and the Eighth Amendment vagueness claim in ¶ 14(b). Summary judgment is GRANTED as it relates to all constitutional claims that Henderson alleged in ¶¶ 14 & 15, except the Eighth Amendment vagueness claim asserted in ¶ 14(b). The constitutional claims in ¶¶ 14 and 15 except the Eighth Amendment vagueness claim in ¶ 14(b) are DENIED.

H. Brady Violation (Amended Petition ¶16)

Henderson alleges that the prosecution failed to disclose exculpatory evidence about his mental state before, during, and after the date of the offense; promises, deals, agreements, and understandings made by or on behalf of the state to any witness or potential witness; and evidence that Henderson should have been sentenced to life in prison. (D.E. 16 at 48.) Respondent argues that this claim was never raised in the state courts and is procedurally defaulted. (D.E. 55-1 at 14.) Henderson did not respond to this argument, and a review of the record does not demonstrate that the claim was exhausted in the state courts. Henderson has not demonstrated cause and prejudice or that a miscarriage of justice would result from the Court's failure to address this claim. Summary judgment is GRANTED as to the claim in ¶ 16 of the Amended Petition as it is procedurally defaulted. The claim in ¶ 16 is DENIED.

I. The Aggravating Factors Were Not Properly Submitted to the Grand Jury (Amended Petition ¶ 17)

Henderson asserts that his Sixth, Eighth, and Fourteenth Amendment rights were violated because the aggravating factors which made Henderson eligible for a death sentence were not submitted to the grand jury. (D.E. 16 at 48-49.) Respondent asserts that the claim was never presented in the state courts and is procedurally defaulted. (D.E. 55-1 at 15.) He also contends that the claims are without merit because the United States Supreme Court has never announced a federal constitutional requirement that states charge in an indictment the aggravating factors to be relied upon during sentencing in a first-degree murder prosecution. (Id. at 15).

Henderson asserts that he raised this claim in his petition for post-conviction relief and on appeal. (D.E. 68 at 100.) He asserted in his post-conviction appellate brief, that his sentence violated the Fourteenth Amendment because "the aggravating factors which made him eligible for a sentence of death were elements of the offense of capital murder which were not submitted to the grand jury nor returned in the indictment. (D.E. 23-15 at 94.) He relied on the Supreme Court's analysis in Apprendi to argue that his Fifth and Sixth Amendment rights were violated. (Id. at 95.) The Sixth and Fourteenth Amendment aspects of the claim in ¶ 17 were exhausted in the state courts.[40]

[40] Respondent also asserts that the claim was waived under Tollett. (D.E. 55-1 at 16-17.) Because issues related to the validity of the guilty plea have not been resolved on the merits, the Court will not address this issue.

Despite exhaustion of the claim, Henderson is not entitled to relief for this claim on the merits. 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); Hall v. Bell, No. 2:06-CV-56, 2010 WL 908933, at **42-43 (E.D. Tenn. Mar. 12, 2010) (a petitioner is not entitled to habeas relief for failure to allege aggravating factors in an indictment). Summary judgment is GRANTED, and the claim in ¶ 17 is DENIED.

J. The Evidence was Insufficient to Support a Finding that the Aggravating Circumstances Outweighed the Mitigating Circumstances Beyond a Reasonable Doubt (Amended Petition ¶ 18)

Henderson alleges that the evidence presented at his sentencing hearing was not sufficient to support the trial court's finding that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. (D.E. 16 at 49.) Respondent contends that Henderson never raised this claim in the state court, and the claim is procedurally defaulted. (D.E. 55-1 at 17.) The Tennessee Supreme Court specifically held, "We also hold that the evidence supports the trial court's findings

concerning the applicable aggravating circumstances and that these aggravating circumstances outweigh any mitigating circumstances beyond a reasonable doubt." Henderson, 24 S.W.3d at 313. Henderson's claim in ¶ 18 is not procedurally defaulted, and summary judgment is DENIED as to this claim.

K. Death Sentence Violates Equal Protection and Due Process Rights (Amended Petition ¶ 19)

Henderson asserts that his Eighth and Fourteenth Amendment rights were violated because there were no standards for the decision to impose the death sentence and no consistent and objective standards for proportionality review. (D.E. 16 at 49.) He alleges that throughout the 1990s, District Attorney Elizabeth Rice never sought the death penalty for a white person and that Fayette County is known to be racially segregated. (Id.)

Respondent asserts that Henderson never raised this claim in the state courts and it is procedurally defaulted. (D.E. 55-1 at 17.) Henderson argues that ineffective assistance of appellate counsel establishes cause and prejudice for the failure to exhaust this claim. (D.E. 68 at 142.) The Court found that Henderson's ineffective assistance of appellate counsel claims were not entitled to habeas relief, supra pp. 110-14. Henderson can not demonstrate cause for the failure to exhaust the claims in ¶ 19. Further, he has not demonstrated that a miscarriage of justice will result from the Court's failure to review this claim. The claims in ¶ 19 are procedurally defaulted. Summary judgment is GRANTED, and the claims in ¶ 19 are DENIED.

L. Improper Composition of Grand Jury (Amended Petition ¶ 20)

Henderson claims that his Sixth, Eighth, and Fourteenth Amendment rights were violated because women and Blacks were systematically excluded as grand jury forepersons and the grand jury was not selected from a fair cross-section of the community. (D.E. 16 at 49-50.) Respondent argues that this claim was never raised in the Tennessee courts and should be dismissed because it is procedurally defaulted. (D.E. 55-1 at 18.) He also contends that Henderson's claim is waived because he pleaded guilty. (Id.)

Henderson asserts that he "continues to attempt to exhaust" this claim in state court and that the Court should stay any ruling on the procedural posture of this claim until state court proceedings are completed. (D.E. 68 at 143.) In a recent filing, Henderson has indicated that his application for permission to appeal the denial of his motion reopen was denied. (D.E. 71.) This claims was not exhausted in the state courts and is procedurally barred. Henderson has not asserted and excuse for the procedural default of this claim. The claim in ¶ 20 is procedurally defaulted and DENIED. Summary judgment is GRANTED for the claim in ¶ 20.

M. Cumulative Error (Amended Petition ¶ 21)

Henderson contends that the cumulative effects of the errors at the guilty plea and sentencing proceedings denied him the due process of law. (D.E. 16 at 50.) Respondent contends that Henderson's claim was never raised "in its current form" in the Tennessee courts. (D.E. 55-1 at 18.) Respondent asserts that because the cumulative error claim relies on claims that were

procedurally defaulted and/or without merit, those claims cannot be considered. (Id. at 18-19.) He argues that Henderson is now "barred by the state post-conviction statute of limitations, the post-conviction waiver provision and restrictions on successive state petitions from presenting his claim to the state courts". (Id. at 19.) He argues that the claim is barred by the Supreme Court's ruling in Teague because the Supreme Court has never held that habeas relief is warranted on the basis of cumulative error. (Id.)

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)[41]. The claim in ¶ 21 is without merit. Summary judgment is GRANTED, and the claim in ¶ 21 is DENIED.

N. Challenges to Tennessee's Capital Sentencing Scheme (Amended Petition ¶ 24)

Henderson asserts that Tennessee's capital sentencing scheme is unconstitutional for the following reasons: (1) the statute fails to meaningfully narrow the class of death eligible defendants (¶ 24(a));(2) Tennessee death penalties are imposed in an arbitrary and capricious manner (¶ 24(b)); (3) the appellate review process in death penalty cases is constitutionally inadequate (¶ 24(c)); and (4) the method of execution constitutes cruel and unusual

[41] 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).

punishment (¶ 24(d)). (D.E. 16 at 52-54.) Respondent contends that Henderson's claims that the statute fails to meaningfully narrow the class of death eligible defendants (¶ 24(a)) and that death penalties are imposed in an arbitrary and capricious manner (¶ 24(b)) were never raised in the Tennessee courts and are "now barred from presentation to the state courts by the statute of limitations. (D.E. 55-1 at 27-28.) Respondent asserts that the claims are barred by Habeas Rule 2(c) for failure to allege facts in support of the allegations. (Id.)

Henderson contends that the claims in ¶ 24 are available for habeas review because the Tennessee Supreme Court, on direct appeal, made a finding that the sentence of death was not arbitrarily imposed and not disproportionate to the sentence imposed in similar cases. (D.E. 68 at 146.) He argues that the court's review "obviously included the constitutionality of the Tennessee capital sentencing scheme." (Id.) Alternatively, he argues that he can establish cause and prejudice for the failure to exhaust these claims through ineffective assistance of appellate counsel. (Id.)

The Tennessee Supreme Court addressed the specific application of Tennessee statute to this case and held that the "sentence of death in this case has not been arbitrarily imposed and that it is not disproportionate to the sentence imposed in similar cases." Henderson, 24 S.W.3d at 313. However, there is no indication that the court addressed the constitutionality of Tennessee's capital sentencing scheme.

The claims in ¶¶ 24(a-c) were raised in the post-conviction appellate brief. (D.E. 23-15 at 96.) Henderson also addressed the constitutionality of the death penalty statute in the context of appellate counsel's failure to raise these issues on appeal. (Id. at 23-15 at 85-87.)

The Tennessee Court of Criminal Appeals held that Henderson's claims that the death sentence violates due process and that the death sentence itself is unconstitutional are waived. Henderson, 2005 WL 1541855, at **22, 43 & 45.[42] Henderson's assertion of ineffective assistance of appellate counsel does not establish cause for the procedural default because this Court has already determined that the ineffective assistance of appellate counsel claims on which he relies are not entitled to habeas relief, supra p. 114.

The claim in ¶ 24 is procedurally defaulted. Summary judgment is GRANTED, and the claim in ¶ 24 is DENIED.

O. Tennessee Appellate Courts' Procedure to Conduct Proportionality Review is Not Structurally Sound (Amended Petition ¶ 25)

Henderson alleges that his Sixth, Eighth, and Fourteenth Amendment rights were violated because the procedure employed by the Tennessee appellate courts for proportionality review is not structurally sound. (D.E. 16 at 54-55.) Respondent contends that

[42] Respondent does not specifically address the claims in ¶¶ 24(c) and (d) in his motion for summary judgment but asserts that there are two general claims in this issues. (D.E. 55-1 at 27.) Petitioner addresses ¶ 24 as one issue and does not distinguish between the paragraphs. (D.E. 68 at 146.) Although there is no specific discussion of the claims in ¶ 24(c) & (d), the Court addresses the issue of procedural default in relation to these claims as part of the general issue of constitutional challenges to the Tennessee capital sentencing scheme.

the claim is procedurally defaulted and completely without merit. (D.E. 55-1 at 28-29.)

The Tennessee Supreme Court correctly distinguished its proportionality review from a traditional Eighth Amendment proportionality analysis:

> Comparative proportionality review is not required by either the state or federal constitutions and the review must be distinguished from 'traditional Eighth Amendment proportionality analysis, which is the 'abstract evaluation of the appropriateness of a sentence for a particular crime.

Henderson, 24 S.W.3d at 315. The United States Supreme Court has held that the Constitution does not require proportionality review, but only requires proportionality between the punishment and the crime, not between the punishment in this case and that exacted in other cases. Pulley v. Harris, 465 U.S. 37, 50 (1984). "[T]here is no federal constitutional requirement that a state appellate court conduct a comparative proportionality review." McQueen v. Scroggy, 99 F.3d 1302, 1333-34 (6th Cir. 1996); see Hall v. Bell, No. 06-CV-56, 2010 WL 908933, at **44-45 (E.D. Tenn. Mar. 12, 2010) (comparative proportionality review by state appeals courts is not dictated by the Constitution). The Supreme Court has generally rejected claims that a petitioner's death sentence is disproportionate to the sentences received by individuals convicted of similar crimes. See, e.g., Gregg v. Georgia, 428 U.S. 153, 199 (1976) (rejecting claim that discretionary decision making with respect to the imposition of capital punishment, including the fact that "the state prosecutor has unfettered authority to select those persons whom he wishes to prosecute for a capital offense and to

plea bargain with them," violates the Eighth Amendment); Proffitt v. Florida, 428 U.S. 242, 254 (1976) (same); McCleskey v. Kemp, 481 U.S. 279, 306 (1987) ("[W]here statutory procedures adequately channel a sentencer's discretion [in imposing the death penalty], proportionality review [of a death sentence to sentences imposed in similar cases] is not constitutionally required."). "Since proportionality review is not required by the Constitution, states have great latitude in defining the pool of cases used for comparison"; therefore "limiting proportionality review to other cases already decided by the reviewing court in which the death penalty has been imposed" falls within this wide latitude. Williams v. Bagley, 380 F.3d 932, 962-63 (6th Cir. 2004) (citing seven prior Sixth Circuit cases that have upheld Ohio's limited proportionality review against constitutional challenges); see also Smith v. Mitchell, 567 F.3d 246, 261 (6th Cir. 2009) (the Sixth Circuit has rejected habeas challenges to Ohio's system of proportionality review); see also Coe v. Bell, 161 F.3d 320, 351-352 (6th Cir. 1998) (the Tennessee mandatory death-penalty review statute did not create a liberty interest or a due process right in a proportionality review).[43]

[43] Henderson relies on Bush v. Gore, 531 U.S. 98 (2000), to make his equal protection argument. (D.E. 68 at 102.) The decision in Bush, a case involving the method of counting ballots for a presidential election, does not require a different result. Black v. Bell, 181 F. Supp. 2d 832, 879 (M.D. Tenn. 2001); 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"); 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").

In Getsy v. Mitchell, 495 F.3d 295, 306 (6th Cir. 2007), the Sixth Circuit indicated that "statutorily incorporating a form of comparative proportionality review that compares a defendant's death sentence to others who have also received a sentence," adds a safeguard beyond the requirements of the Eighth Amendment. See id. at 306. The Sixth Circuit opined that a criminal defendant "simply had no constitutional guarantee that his jury would reach the same results as prior or future juries dealing with similar facts, irrespective of the offense with which he was charged." Id. at 307.

The claim in ¶ 25 is without merit. Summary judgment is GRANTED, and the claim in ¶ 25 is DENIED.

P. Henderson's Death Sentence is Disproportionate to the Offense (Amended Petition ¶ 26)

Henderson asserts that his death sentence is comparatively disproportionate to the offense in this case and that Tennessee's proportionality review fails to meet the requirements of the Eighth and Fourteenth Amendments. (D.E. 16 at 55.) He relies on his direct appeal brief to support his claim on the merits. (D.E. 68 at 107-108.) Respondent contends that this issue is not one on which habeas corpus relief can be granted. (D.E. 55-1 at 29.)

Henderson's argument addresses a state appellate court's proportionality review, not the Eighth Amendment proportionality defined by the Supreme Court as "an abstract evaluation of the appropriateness of a sentence for a particular crime." See Pulley, 465 U.S. at 42-43. This is the same claim presented in ¶ 25 of the Amended Petition, and the claim is without merit for the same

reasons, see supra pp. 132-35. Summary judgment is GRANTED, and the claim in ¶ 26 is DENIED.

Q. Tennessee's System of Judicial Appointment of Counsel is Unconstitutional (Amended Petition ¶ 27)

Henderson contends that Tennessee's system of judicial appointment of counsel provides for appointment of defense counsel by the trial judge. (D.E. 16 at 55.) He asserts that there is no oversight mechanism to ensure fairness and constitutional compliance. (Id. at 55.) The judge's unlimited discretion in appointing counsel facilitates an arrangement in the local bar where judges favor certain attorneys. (Id.) Henderson contends that the appointment in this case resulted in him receiving unqualified counsel and a violation of right to the effective assistance of counsel. (Id. at 56.)

Respondent contends that the Tennessee Court of Criminal Appeals found this issue was waived on post-conviction appeal for failure to raise it on direct appeal and argues that under Coleman, "A habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance." (D.E. 55-1 at 31.) Henderson claims that the Tennessee courts do no regularly and consistently apply the waiver rule and this waiver can not serve as a bar to federal review of this claim. (D.E. 68 at 147.) He asserts that he can establish cause and prejudice based on the ineffective assistance of appellate counsel. (Id.)

The Tennessee Court of Criminal Appeals held that this claim was waived pursuant to Tenn. Code Ann. § 40-30-106(g) for failure to present it for determination. Id. at *22. The Sixth Circuit has found waiver pursuant to Tenn. Code Ann. § 40-30-106(g) to be an adequate and independent state procedural ground supporting dismissal of the claim at the state level and resulting in a procedural default of the claim when brought in a subsequent habeas corpus petition. Patterson, No. 3:07-0029, 2010 WL 1417772, at *7 (M.D. Tenn. Mar. 1, 2010). Further, Henderson did not exhaust his ineffective assistance claim related to appellate counsel's failure to challenge Tennessee's system of judicial appointment of counsel. Henderson has not demonstrated cause and prejudice or that a miscarriage of justice would result from the Court's failure to address this ineffective assistance claim. Henderson can not rely on a procedurally defaulted claim to excuse the default of this habeas claim. See Edwards v. Carpenter, 529 U.S. at 451-52, supra p. 117.

The claim in ¶ 27 is procedurally defaulted and DENIED. Summary judgment is GRANTED for the claim in ¶ 27.

R. Tennessee's Death Penalty Statute Violates the Eighth Amendment (Amended Petition ¶ 28)

Henderson asserts that the Tennessee death penalty statute violates the Eighth and Fourteenth Amendments, the requirements of Furman v. Georgia, 408 U.S. 238 (1972), that the discretion to impose death must be closely confined to avoid arbitrariness; of Lockett v. Ohio, 438 U.S. 586 (1978), that the sentencer must have

unlimited discretion not to impose death; and of Eddings v. Oklahoma, 455 U.S. 104 (1982), that the death penalty must be imposed fairly and with reasonable consistency or not at all. (D.E. 16 at 56.) Respondent asserts that the claim was waived and is procedurally defaulted. (D.E. 55-1 at 33.) Henderson argues that the Tennessee Supreme Court's review on direct appeal includes a review of the constitutionality of the Tennessee death penalty statute. (D.E. 68 at 148.)

There is no indication from the Supreme Court's opinion that an independent review of the constitutionality of Tennessee's death penalty statute was conducted. The Tennessee Court of Criminal Appeals held that these constitutional challenges were waived pursuant to Tenn. Code Ann. § 40-30-106(g) for failure to present them for determination. Id. at **22, 43, 45. Waiver for failure to present a claim under Tenn. Code Ann. § 40-30-206(g) has been held to be an adequate and independent state procedural ground for the procedural default of a claim. See Patterson, 2010 WL 1417772, at *7. Further, as stated supra p. 137, Henderson can not rely on procedurally defaulted ineffective assistance of appellate counsel claims to excuse procedural default.

The claim in ¶ 28 is procedurally defaulted. Summary judgment is GRANTED, and the claim in ¶ 28 is DENIED.

S. Tennessee's Death Penalty Statute Violates Henderson's Fundamental Right to Life (Amended Petition ¶ 29)

Henderson asserts that the Tennessee death penalty statute violates the Fourth, Sixth, Ninth, and Fourteenth Amendments

because it impinges on the fundamental right to life. (D.E. 16 at 56.) Respondent argues that the claim was never raised in the Tennessee courts and that Henderson can only present it for habeas review if he shows cause and prejudice or manifest injustice. (D.E. 55-1 at 34.) Henderson made the same arguments that he made in relation to the claim in ¶ 28. (D.E. 68 at 147-49.)

The claim that the Tennessee death penalty statute violates Henderson's fundamental right to life was argued during the post-conviction proceedings in the context of his ineffective assistance of appellate counsel claim. See Henderson, 2005 WL 1541855, at **43, 45. The Tennessee Court of Criminal Appeals determined that the issue was waived and that the claims had been rejected by state appellate courts on "numerous occasions." Id. at *45.

The waiver of this claim constitutes an independent and adequate procedural ground for the procedural default and to deny habeas relief, supra p. 137 . Further, Henderson's allegations of ineffective assistance of appellate counsel are without merit, supra p. 114, and do not establish cause and prejudice. He does not assert or demonstrate that a miscarriage of justice would result from the Court's failure to address this claim. The claim in ¶ 29 is procedurally defaulted and DENIED. Summary judgment is GRANTED for the claim in ¶ 29.

T. Death by Lethal Injections and/or Electrocution Violates the First, Eighth and Fourteenth Amendments (Amended Petition ¶¶ 30 & 31)

Henderson asserts that electrocution and lethal injection constitute cruel and unusual punishment and violate the Sixth,

Eighth, and Fourteenth Amendments. (D.E. 16 at 56-63.) Respondent argues that these claims were never raised in the Tennessee courts and are now barred from federal review due to procedural default. (D.E. 55-1 at 34.) Henderson argues that he raised the claim in his First Amended Petition by stating that "the death penalty is unconstitutional because it involves torture" without specifying electrocution or lethal injection as the torture. (D.E. 68 at 149.) He asserts that he can establish cause and prejudice for the default based on the ineffective assistance of appellate counsel. (Id. at 150.)

Henderson's claim that the death penalty involved torture was rejected by the Tennessee Court of Criminal Appeals as one of the arguments that were waived. See Henderson, 2005 WL 1541844, at ** 43, 45. The waiver of these claims constitutes an independent and adequate procedural ground for the procedural default and to deny habeas relief, supra p. 137. Further, Henderson's allegations of ineffective assistance of appellate counsel are without merit, supra p. 113, and do not establish cause and prejudice. He does not assert or demonstrate that a miscarriage of justice would result from the Court's failure to address this claim.

The claims in ¶¶ 30 & 31 are procedurally defaulted. Summary judgment is GRANTED on the claims in ¶¶ 30 & 31, and the claims in ¶¶ 30 & 31 are DENIED.[44]

[44] The Court finds it unnecessary to address Respondent's merits argument because of the procedural default.

U. Henderson's Conviction and Sentence Violate Art. 6, § 2 of the United States Constitution (Amended Petition ¶ 32)

Henderson contends that the Supremacy Clause was violated when his "rights under treaties to which the United States is bound and customary international law" were disregarded at trial. (D.E. 16 at 63.) Respondent contends that Henderson's claim was never properly raised in the Tennessee courts and is now barred from federal review due to procedural default. (D.E. 55-1 at 35.) As Henderson has failed to demonstrate cause and prejudice or a miscarriage of justice, Respondent contends that the claim is procedurally defaulted, and Henderson is not entitled to relief. (Id.)

Henderson's claim that the death penalty is unconstitutional because it violated certain rights he possesses under international law were waived. See Henderson, 2005 WL 1541855, at **22, 45. The waiver of this claim constitutes an independent and adequate procedural ground for the procedural default and to deny habeas relief, supra p. 137. Additionally, Henderson's allegations of ineffective assistance of appellate counsel are without merit, supra p. 113, and do not establish cause and prejudice. He does not assert or demonstrate that a miscarriage of justice would result from the Court's failure to address this claim. The claim in ¶ 32 is procedurally defaulted. Summary judgment is GRANTED for the claim in ¶ 32, and the claim in ¶ 32 is DENIED.

V. Henderson's Death Sentence is Unconstitutional because of the Length of Time of Incarceration following Conviction (Amended Petition ¶ 33)

Henderson asserts that his Eighth and Fourteenth Amendment rights have been violated because of the cruel and unusual nature of the death sentence and the length of time he has been incarcerated. (D.E. 16 at 63.) The parties dispute whether the claim was exhausted in state court. (D.E. 55-1 at 36; D.E. 68 at 151.) Respondent asserts that regardless of whether the claim has been procedurally defaulted, it is without merit, and Henderson is not entitled to habeas relief. (D.E. 55-1 at 36-38.) Respondent argues that in White v. Johnson, 79 F.3d 432, 439 (5th Cir. 1996), the Fifth Circuit Court of Appeals held that there are compelling justifications for the delay between conviction and the execution of a death sentence and that the state's interest in deterrence and swift punishment must compete with its interest in insuring that those who are executed receive fair trails with constitutionally mandated safeguards. (D.E. 55-1 at 36.) The Court in White noted that, "Throughout this process [petitioner] has had the choice of seeking further review of his conviction and sentence or avoiding further delay of his execution by not petitioning for further review or by moving for expedited consideration of his habeas petition". (Id.) Respondent further quotes Fourth Circuit Judge Luttig who states:

> It is a mockery of our system of justice, and an affront to lawabiding citizens who are already rightly disillusioned with that system, for a convicted murderer, who, through his own interminable efforts of delay and systemic abuse has secured the almost-indefinite

> postponement of his sentence, to then claim that the almost-indefinite postponement renders his sentence unconstitutional.

Turner v. Jabe, 58 F.3d 924, 933 (4th Cir. 1995). (Id. at 37-38.)

The Supreme Court has not held that lengthy incarceration prior to execution constitutes cruel and unusual punishment. See Lackey v. Texas, 514 U.S. 1045 (1995) (mem.) (Stevens, J. & Breyer, J., discussing denial of certiorari and noting the claim has not been addressed); Henry v. Ryan, No. CV 02-656-PHX-SRB, 2009 WL 692356, at *95 (D. Ariz. Mar. 17, 2009); Black v. Bell, 181 F. Supp. 2d 832, 882 (M.D. Tenn. 2001); see Booker v. McNeil, No. 1L08cv143/RS, 2010 WL 3942866, at *26 (N.D. Fla. Oct. 5, 2010) ("no federal or state court has accepted that argument that a prolonged stay on death row constitutes cruel and unusual punishment, especially where both parties bear responsibility for the long delay"). Circuit courts have held that prolonged incarceration under a sentence of death does not offend the Eighth Amendment. See McKenzie v. Day, 57 F.3d 1493, 1493-94 (9th Cir. 1995) (en banc); White v. Johnson, 79 F.3d 432, 438 (5th Cir. 1996); Stafford v. Ward, 59 F.3d 1025, 1028 (10th Cir. 1995). Accordingly, Henderson cannot establish a right to federal habeas relief. Summary judgment is GRANTED as to the claim in ¶ 33, and the claim is DENIED.

W. Henderson is Not Competent And Can Not Be Executed (Amended Petition, ¶ 34)

Henderson alleges that he is not competent to be executed in accordance with Ford v. Wainwright, 477 U.S. 399 (1986). (D.E. 16 at 63-64.) Henderson acknowledges that this claim is not ripe, but

he raises the claim in accordance with the United States Supreme Court's decision in Stewart v. Martinez-Villareal, 523 U.S. 637 (1998), which holds that it is proper to raise the claim in the initial habeas petition and then to litigate the claim if it ever becomes ripe. (Id. at 63-64.) Respondent contends that once an execution date is imminent, the state courts must be given the first opportunity to consider the claim, and the claim should be dismissed without prejudice. (D.E. 55-1 at 38.)

In Panetti v. Quarterman, 551 U.S. 930, 947 (2007), the Supreme Court held that a petitioner's Ford claim of incompetency to be executed because of his mental condition at the time of the scheduled execution is not one that is required to be brought in an initial habeas petition on pain of being treated as a second or successive petition. See Tompkins v. 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. Because Henderson's claim is not ripe for habeas relief, summary judgment is GRANTED for the claim in ¶ 24. The claim in ¶ 34 is DENIED.

V. CONCLUSION

Summary judgment is GRANTED for the claims in ¶¶ 8(a-b), 8(d-f), 8(i-k), 9(a), 9(d)(1-3), 9(f)(1) related to experts in socio-economic issues and community and family deficits, 9(f)(2), 9(g), 9(i-j), 9(l-r), 10, 11(a) related to the trial court's refusal to appoint new attorneys, 11(b-c), 11(e-f), 12-13, 14 related to constitutional claims other than the Eighth Amendment

vagueness the claim in 14(b), 15 related to the constitutional claims, 16, 17, and 19-34, and these claims are DENIED.

Summary judgment is DENIED for the claims in ¶¶ 8(c), 8(g-h), 8(l), 9(b-c), 9(d)(4), 9(e), 9(f)(1) related to failure to use a psychiatrist and develop neurological and neuropsychological evidence, 9(h), 9(k), 11(d), 11(g), 14 related to sufficiency of the evidence and Eighth Amendment vagueness, 15 related to sufficiency of the evidence, and 18.[45]

IT IS SO ORDERED this 30th day of March, 2011.

s/ S. Thomas Anderson
S. THOMAS ANDERSON
UNITED STATES DISTRICT JUDGE

[45] The parties have until May 2, 2011, to file any brief on the merits for the remaining issues in the petition. (See D.E. 70.)

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

KENNATH ARTEZ HENDERSON v. STATE OF TENNESSEE

Circuit Court for Fayette County

No. 4465

No. W2008-01927-CCA-R28-PD

ORDER

This matter is before the Court upon Petitioner Kenneth Artez Henderson's application for permission to appeal the trial court's denial of his motion to reopen his post-conviction petition. The State has filed a response in opposition thereto.

The Petitioner, Kenneth Artez Henderson, entered guilty pleas to first degree premeditated murder, two counts of especially aggravated kidnapping, aggravated robbery, attempted especially aggravated kidnapping, aggravated assault, and felonious escape. The Petitioner waived his right to jury sentencing. After a capital sentencing hearing, the trial court imposed the death sentence for the murder count and an effective sentence of twenty-three (23) years in prison for the noncapital offenses. The Petitioner's convictions and sentences, including the sentence of death, were affirmed on direct appeal by the Tennessee Supreme Court. *See State v. Henderson,* 24 S.W.3d 307 (Tenn.2000), *cert. denied,* 531 U.S. 934, 121 S.Ct. 320 (2000). A *pro se* petition for post-conviction relief was filed on February 12, 2001, which was followed by an amended petition on November 30, 2001. An evidentiary hearing was held on April 28-29, 2003, and, on May 21, 2003, the trial court denied relief and dismissed the petition. This Court affirmed the lower court's denial of post-conviction relief. *See Kennath Henderson v. State*, No. W2003-01545-CCA-R3-PD (Tenn. Crim. App., at Jackson, Jun. 28, 2005), *perm. to appeal denied*, (Tenn. Dec. 5, 2005).

On December 28, 2007, the Petitioner filed a motion to reopen his post-conviction petition in the Fayette County Circuit Court. As grounds for the motion, the Petitioner alleged that there was discrimination in the selection of the grand jury and grand jury foreperson in Fayette County. Specifically, the Petitioner alleged that "only White males have ever been selected as foremen from

1900 to today, and the grand jury which indicted Mr. Henderson systematically excluded Blacks." The lower court denied the motion to reopen.

The Petitioner timely filed an application for permission to appeal with this Court. In his application, the Petitioner alleges that Rule 6(g), Tennessee Rules of Criminal Procedure, gave unfettered discretion to a judge in the selection of the grand jury foreman. In this regard, he contends that the Rule resulted in the systematic exclusion and under-representation of women and African-Americans as the foreperson of the grand jury. The Petitioner claimed that the court should reopen proceedings under section 40-30-117, Tennessee Code Annotated, because this matter involves a request for the recognition of a new right in Tennessee and its retroactive application here. The Petitioner asserts that a motion to reopen is proper because the relief requested would establish new rules in Tennessee although based upon old, federal constitutional law which predates his sentence of death. Specifically, the Petitioner alleges that Tennessee courts have yet to apply the settled federal law governing his claims.

Section 40-30-117(c), Tennessee Code Annotated, *see also* Tenn. Sup. Ct. R. 28 § 10(b), governs motions to reopen a post-conviction petition. A motion to reopen a prior post-conviction petition may only be filed if the petitioner alleges that:

(1) a final ruling of an appellate court establishes a constitutional right that was not recognized as existing at the time of trial and retrospective application of the right is required; or

(2) new scientific evidence exists establishing that the petitioner is actually innocent of the convicted offense(s); or

(3) the petitioner's sentence was enhanced based upon a prior conviction which has subsequently been found invalid.

T.C.A. § 40-30-117(a)(1-3). If the claim is based upon a new constitutional rule of law, the claim must be brought within one year of the ruling establishing that right. T.C.A. § 40-30-117(a)(1). If the claim is based upon an invalid prior conviction, the claim must be brought within one year of the ruling holding the prior conviction invalid. T.C.A. § 40-30-117(a)(3).

In the present case, Petitioner Henderson contends that he is entitled to relief because there was discrimination against women and African-Americans in the selection of the grand jury foreperson, in violation of the due process clause of the Fourteenth Amendment, the equal protection clause of the Fourteenth Amendment, the Fifth and Sixth Amendment rights to a grand jury selected from a fair-cross section of the community, the Eighth and Ninth Amendments, and Article I §§ 6, 8, 9, 14, & 16 of the Tennessee Constitution. The Petitioner further argues that Rule 6(g), Tennessee Rules of Criminal Procedure, was susceptible to abuse because it lacked any standards for choosing

the foreperson. The Petitioner concludes that "the evidence establishes a clear *prima facie* case that women and Black persons were the victims of illegal discrimination in the selection of the grand jury foreperson." (citations omitted).

The Petitioner contends that Rule 6(g), Tennessee Rules of Criminal Procedure, gave unfettered discretion to the judge in the selection of the grand jury "foreman." The Petitioner asserts that the United States Supreme Court recognized in *Rose v. Mitchell*, 443 U.S. 545, 548, 99 S. Ct. 2993 n. 2 (1979), that, because the foreperson in Tennessee votes as a grand juror and also possesses additional, special powers, discrimination in the selection of the foreperson in Tennessee was unconstitutional in the present case given the undisputed proof about the exclusion of women and African-Americans as foreperson. The Petitioner asserts that the Tennessee courts have yet to acknowledge the holdings of *Rose v. Mitchell* and other cases in the context of discrimination in the selection of the grand jury foreperson. The Petitioner states that the Tennessee Supreme Court has rejected *Rose*, claiming that the foreperson has only ministerial duties. *See State v. Bondurant*, 4 S.W.3d 662 (1999). The Petitioner claims that the holding in *Bondurant* is directly contrary to Rule 6(g), Tennessee Rules of Criminal Procedure, and the precedent established by the United States Supreme Court in *Rose v. Mitchell* and *Hobby v. United States*, 468 U.S. 339, 104 S. Ct. 3093 (1984).

The Petitioner 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 his 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 recognize the fundamental federal rights at issue here." The Petitioner maintains that, "[b]ecause the rights here would be newly recognized in Tennessee - though they are (and were at the time of indictment and trial) well-settled under federal due process, equal protection, and fair-cross-section jurisprudence – this Court should grant the application for permission to appeal, grant the motion to reopen, and either grant relief on these claims . . . or else remand for further proceedings . . . ." The Petitioner states that "this Court is not at liberty to ignore the Supreme Court's holdings in *Rose* and *Hobby*, especially where Rule 6(g) on its face makes clear that the foreperson's duties are *not* ministerial." (Emphasis in original).

Our supreme court, in *State v. Bondurant*, 4 S.W.3d at 675, explaining the holdings in *Rose v. Mitchell*, 443 U.S. at 545, 99 S. Ct. at 2993, and *Hobby v. United States*, 468 U.S. at 339, 104 S. Ct. at 3093, said that the method of selecting the grand jury foreperson is relevant only as to reviewing the composition of the grand jury as a whole, the "role of the grand jury foreperson in Tennessee [being] ministerial and administrative." In Tennessee, the foreperson is the spokesperson and has the same voting power as any other grand jury member. *See Bondurant*, 4 S.W.3d at 674 (citing *Bolen v. State*, 544 S.W.2d 918, 920 (Tenn. Crim. App. 1976)). The Tennessee Supreme Court, in *Bondurant*, observed that, in *Hobby v. United States*, 468 U.S. at 339, 104 S. Ct. at 3093, the United States Supreme Court "greatly exaggerated" the powers of the Tennessee grand jury foreperson. Moreover, the *Bondurant* Court noted that "nowhere in the majority opinion does the

Court in *Rose* conclude that the Tennessee grand jury foreperson has virtual veto power over the indictment proceedings." *Id.* at 675.

The Petitioner essentially asks this Court to disregard the holding of our supreme court in *State v. Bondurant*; we decline to do so. As previously indicated, the grounds for reopening a post-conviction petition are very narrow: (1) a new constitutional right that is given retroactive application; (2) new scientific evidence of actual innocence; or (3) evidence of an improperly enhanced sentence. *See* T.C.A. § 40-30-117(a)(1-3). The Petitioner's claim of a new constitutional right fails to satisfy the requirements of section 40-30-117(a)(1). Section 40-30-117(a)(1) provides that "the motion must be based upon **a final ruling** of an appellate court establishing a **constitutional right that was not recognized** as existing at the time of trial." (Emphasis added). To circumvent the plain language and intent of the statute, the Petitioner asks this Court to disregard our supreme court's ruling in *Bondurant*. We decline to do so, noting that, even if this Court accepted the Petitioner's argument and rejected the holding in *Bondurant*, our ruling would not constitute a **"final ruling."**

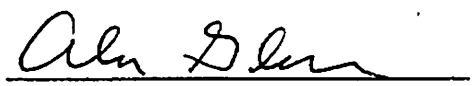
The case law relied upon by the Petitioner was established in 1979 and 1984, respectively. Our supreme court explained these holdings in *Bondurant* in 1999. The Petitioner could have raised a challenge under *Rose* and *Hobby* during his trial and direct appeal. The Petitioner could have also made a similar claim, including a challenge to the *Bondurant* holding, during his post-conviction petition. The Petitioner failed to raise the issue at these times. The claim regarding Rule 6(g), Tennessee Rules of Criminal Procedure, raised by the Petitioner is not "a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time of trial. . . ." T.C.A. § 40-30-117(a)(1). The Petitioner's claim fails to present a claim under which a motion to reopen may be granted.

Although uniquely presented by the Petitioner, a petitioner may not thwart the plain language and intent of section 40-30-117, Tennessee Code Annotated, by requesting that the court rule differently than the Tennessee Supreme Court. A motion to reopen is not an avenue in which a petitioner may raise claims and/or challenges that should have and could have been made in previous proceedings. The opportunity to raise said claims was available to the Petitioner; he failed to present such challenges at the appropriate time. He is precluded from doing so now in a motion to reopen. While the Petitioner's argument to the contrary is novel, it is not persuasive.

For the reasons contained herein, we conclude that the Petitioner has failed to allege a ground under which a petition for post-conviction relief may be reopened. The trial court did not abuse its discretion in summarily denying the motion to reopen. It is ORDERED that the Petitioner's application for permission to appeal is DENIED. The judgment of the lower court is affirmed. Since it appears that the Petitioner is indigent, costs are taxed to the State.

CAMILLE R. MCMULLEN, JUDGE

JOHN EVERETT WILLIAMS, JUDGE



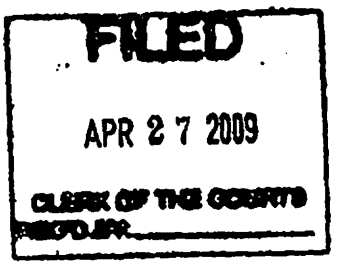
ALAN E. GLENN, JUDGE

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

KENNATH ARTEZ HENDERSON v. STATE OF TENNESSEE

Circuit Court for Fayette County
No. 4465

No. W2008-01927-SC-R11-PD



ORDER

Upon consideration of the Tenn. R. App. P. 11 application for permission to appeal of Kennath Henderson and the record before us, the application is denied.

PER CURIAM

IN THE CIRCUIT COURT OF FAYETTE COUNTY, TENNESSEE

KENNATH ARTEZ HENDERSON

Vs. Docket No. 4465

STATE OF TENNESSEE

ORDER DENYING MOTION TO RE-OPEN PETITION FOR POST-CONVICTION RELIEF

Upon review of the Motion to Re-open Petition for Post-Conviction Relief, it appears pursuant to T.C.A. § 40-30-117 that the Petitioner is not entitled to post-conviction relief. The Court finds that the trial court's final order on Petitioner's Post-Conviction Relief was entered on May 5, 2003. The Court of Criminal Appeals entered an order affirming the denial of the Post-Conviction Relief on June 28, 2005. The Tennessee Supreme Court denied Petitioner's Rule 11 application to appeal the Post-Conviction Relief on December 5, 2005.

Therefore, the motion should be denied.

ORDERED this 24th day of January, 2008.

J. Weber McCraw, Judge

CERTIFICATE OF SERVICE

I, Connie Doyle, Circuit Court Clerk, hereby certify that a true and correct copy of the foregoing order was forwarded to all parties or attorneys of record on this the 24 day of Jan, 2008.

Wendi Raines PC
Clerk

Entered Minute Book No. 701, Page(s) 104

IN THE CIRCUIT COURT OF FAYETTE COUNTY, TENNESSEE

KENNATH ARTEZ HENDERSON

Vs. Docket No. 4465

STATE OF TENNESSEE

SUPPLEMENTAL
ORDER DENYING MOTION TO RE-OPEN
PETITION FOR POST-CONVICTION RELIEF

A motion to re-enter the Order Denying Motion to Re-Open Petition for Post-Conviction Relief was filed on behalf of the petitioner, Kennath Henderson. The supporting affidavit of counsel indicates that the attorney for Kennath Henderson was not properly notified of the Court's prior order entered January 24, 2008 regarding this post-conviction issue. The Court agrees. Therefore, the Court restates its earlier order of January 24, 2008.

Upon review of the Motion to Re-open Petition for Post-Conviction Relief, it appears pursuant to T.C.A. § 40-30-117 that the Petitioner has not raised any new meritorious issues and is not entitled to post-conviction relief. The Court finds that the trial court's final order on Petitioner's Post-Conviction Relief was entered on May 5, 2003. The Court of Criminal Appeals entered an order affirming the denial of the Post-Conviction Relief on June 28, 2005. The Tennessee Supreme Court denied Petitioner's Rule 11 application to appeal the Post-Conviction Relief on December 5, 2005.

Therefore, the motion should be denied.

ORDERED this 20th day of August, 2008.

RECEIVED-ENTERED

AUG 21 2008

CLERK, DEPUTY CLERK

Judge J. Weber McCraw

Entered Minute
Book 106 Page 539

CERTIFICATE OF SERVICE

I, Connie Doyle, Circuit Court Clerk, hereby certify that a true and correct copy of the foregoing order was forwarded to all parties or attorneys of record on this the 21 day of August, 2008.

Wendi Banks
Clerk

Entered Minute
Book 106 Page 540

2005 WL 1541855
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.

Kennath HENDERSON
v.
STATE of Tennessee.

No. W2003-01545-CCA-R3-PD.
|
Nov.2004 Session.
|
June 28, 2005.
|
Application for Permission to Appeal
Denied by Supreme Court
Dec. 5, 2005.

Direct Appeal from the Circuit Court for Fayette County, No. 4465; Jon Kerry Blackwood, Judge.

Attorneys and Law Firms

Donald E. Dawson, Nashville, Tennessee, and Catherine Y. Brockenborough, Nashville, Tennessee, for the appellant, Kennath Henderson.

Paul G. Summers, Attorney General and Reporter; Alice B. Lustre, Assistant Attorney General; Elizabeth T. Rice, District Attorney General and Walt Freeland, Assistant District Attorney General, for the appellee, State of Tennessee.

JERRY L. SMITH, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER, and J.C. McLIN, JJ., joined.

OPINION

JERRY L. SMITH, J.

***1** The petitioner, Kennath Henderson, appeals as of right from the May 21, 2003 judgment of the Fayette County Circuit Court denying his petition for post-conviction relief. The petitioner entered guilty pleas to first degree premeditated murder, two (2) counts of especially aggravated kidnapping, aggravated robbery, attempted especially aggravated kidnapping, aggravated assault, and felonious escape. The petitioner waived his right to jury sentencing. After a capital sentencing hearing, the trial court imposed the death sentence for the murder count and an effective sentence of twenty-three (23) years in prison for the noncapital offenses. The petitioner's convictions and sentences, including the sentence of death, were affirmed on direct appeal by the Tennessee Supreme Court. *See State v. Henderson,* 24 S.W.3d 307 (Tenn.2000), *cert. denied,* 531 U.S. 934, 121 S.Ct. 320, 148 L.Ed.2d 257 (2000). A *pro se* petition for post-conviction relief was filed on February 12, 2001, which was followed by an amended petition on November 30, 2001. An evidentiary hearing was held on April 28-29, 2003, and, on May 21, 2003, the trial court denied relief and dismissed the petition. The petitioner appeals, presenting for our review the following claims: (1) the trial judge erred in failing to recuse himself at both the trial and the post-conviction hearings; (2) the post-conviction court's findings were clearly erroneous; (3) trial counsel was ineffective; (4) appellate counsel was ineffective; (5) the post-conviction court erred in prohibiting a witness from testifying; and (6) the imposition of the death penalty is unconstitutional. After a careful and laborious review of the record, this Court concludes that there is no error requiring reversal. Accordingly, the order of the post-conviction court denying post-conviction relief is affirmed.

Background

The proof, as set forth in our supreme court's decision, *State v. Henderson,* 24 S.W.3d at 210, established the following:

> At the time of the events giving rise to this case, the appellant, Kennath Henderson, was incarcerated at the Fayette County Jail serving consecutive sentences for felony escape and aggravated burglary. On April 26, 1997, as the appellant was planning an escape from jail, he had a .380 semi-automatic pistol smuggled into the jail through his girlfriend. A couple of days later, the appellant requested dental work on a tooth that needed to be pulled,

and an appointment was made for May 2 with Dr. John Cima, a dentist practicing in Somerville. Dr. Cima had practiced dentistry in Somerville for more than thirty years, and he had often seen inmate patients. In fact, this was not the appellant's first visit to see Dr. Cima.

On May 2, 1997, Deputy Tommy Bishop, who was serving in his official capacity as a transport officer for the Fayette County Sheriff's office, took the appellant and another inmate, Ms. Deloice Guy, to Dr. Cima's Office in a marked police car. Upon their arrival at the dentist's office, Dr. Cima placed the appellant and Ms. Guy in separate treatment rooms, and each patient was numbed for tooth extraction. Deputy Bishop remained in the reception area and talked with the receptionist during this time.

***2** When Dr. Cima and his assistant returned to the appellant's treating room to begin the tooth extraction, the appellant pulled out his .380 pistol. Dr. Cima immediately reached for the pistol, and he and the appellant struggled over the weapon. During this brief struggle, Dr. Cima called out for Deputy Bishop, and the deputy hurried back to the treatment room. Just as the deputy arrived at the door, the appellant regained control of the pistol and fired a shot at Deputy Bishop, which grazed him on the neck. Although not fatal, this shot caused the deputy to fall backwards, hit his head against the doorframe or the wall, and then fall to the floor face down, presumably unconscious.

The appellant then left the treating room and came back with the receptionist in his custody. The appellant reached down and took Deputy Bishop's pistol, and he took money, credit cards, and truck keys from Dr. Cima. The appellant then ordered Dr. Cima and the receptionist to accompany him out of the building, but just before he turned to leave the building, the appellant went back to the treatment room, leaned over Deputy Bishop, and shot him through the back of the head at point-blank range. The deputy had not moved since first being shot in the neck moments earlier and was still lying face-down on the floor by the door to the treatment room when the appellant fatally shot him.

Once outside of the office, the appellant was startled by another patient, and Dr. Cima and his receptionist were able to escape back into the office. Once inside, Dr. Cima locked the door and called the police. The appellant, in the meantime, stole Dr. Cima's truck and drove away at a slow speed so as not to attract any attention to himself. When police officers began to follow him, the appellant sped away, and eventually drove off the road and into a ditch. The officers took the appellant into custody, and upon searching the truck, they found the murder weapon, Deputy Bishop's gun, and personal items taken from Dr. Cima's office.

On May 13, 1997, the appellant was indicted by a Fayette County Grand Jury in a ten-count indictment, which alleged one count of premeditated murder, three counts of felony murder, two counts of especially aggravated kidnaping, and one count of attempted especially aggravated kidnaping, aggravated robbery, aggravated assault, and felonious escape. After three continuances, the appellant pled guilty on the day of trial to all of the charges except for the three counts of felony murder.

On July 13, 1998, the circuit court held the sentencing hearing, and the appellant waived his right to have a jury empaneled for purposes of determining his sentence. Several witnesses testified for the State at the sentencing hearing, including Deloice Guy, the inmate taken with the appellant to the dentist by Deputy Bishop; Dr. John Cima; Donna Feathers, Dr. Cima's dental assistant; and Peggy Riles, Dr. Cima's receptionist. In addition, Dr. O.C. Smith, a forensic pathologist, testified as to his investigation of the crime scene and of his autopsy of Deputy Bishop. Dr. Smith stated that based on his examination of Deputy Bishop's wounds, along with witness testimony, it was likely that the first shot fired by the appellant hit the deputy in the neck, and caused the deputy to hit his head against the doorframe of the examination room. Dr. Smith opined that this blow to the deputy's head could have rendered him unconscious. Moreover, Dr. Smith testified that the second shot fired by the appellant entered at the back of the deputy's head and exited near the left eye. This second shot caused "significant and severe brain damage," and the blood from this wound seeped from the skull fractures into the deputy's sinuses, and ultimately, was breathed into his windpipe. Finally, Dr. Smith testified that the bullets used by the appellant could have "easily" penetrated the thin walls of the dentist's office.

***3** In mitigation, the appellant testified on his own behalf. According to his testimony, he was 24 years old at the time of the offense. He was a high-school graduate and has four younger brothers. While in elementary school, the appellant received numerous academic awards and certificates, and he was heavily involved in extracurricular activities and sports while in high school. Although the appellant expressed sorrow and remorse over his actions, he admitted that "[t]here's no reason" for the

murder of Tommy Bishop. While he acknowledged that he extensively planned his escape from prison, including procuring the .380 pistol, his only excuse for the shooting was that he "wasn't thinking clearly that day."

The appellant also testified that he had some "problems" in high school, and although he was never cited to the juvenile court, he stated that he felt like his problems were never addressed. He also testified that while in jail in 1996, he requested counseling because he "felt like [he] needed help psychologically." His mother testified, however, that she did not believe that the appellant needed any help or intervention of any kind during his high school years. In addition, the appellant's mother testified that though she remembered that the appellant requested help while in jail in 1996, she never pursued the matter because he "seemed to be doing fine when [she] talked to him."

Finally, Dr. Lynne Zager, a forensic psychologist, testified as to her findings and conclusions based on two interviews with the appellant, a personality test administered to the appellant, and other information supplied by the defense. From this pool of information, Dr. Zager concluded that the appellant was suffering from dissociative disorder at the time of the murder, and that the appellant possessed an unspecified personality disorder which exhibited some narcissistic and anti-social traits. She also testified that based upon her testing, she believed that the appellant's dissociative state began after the first shot was fired and lasted at least 24 hours following. While in this state, Dr. Zager stated that it was not uncommon for individuals to feel as though they are in a dream-like state and are not "an integral part of what the person is [really] doing." Although she refused to give an opinion as to whether the appellant was aware of his actions at the time of the murder, the appellant, in her opinion, "was [acting] under duress, and that his judgment was not adequate." In addition, while Dr. Zager considered him to be "impaired at the time," she testified that the appellant's condition at the time of the murder would not support a legal finding of insanity.

The State argued that four aggravating factors applied to warrant imposing the death sentence: (1) that the defendant created a great risk of death to two or more persons during the act of murder, Tenn.Code Ann. § 39-13-204(i)(3); (2) that the murder was committed for the purpose of avoiding an arrest, Tenn.Code Ann. § 39-13-204(i)(6); (3) that the murder was committed during the defendant's escape from lawful custody, Tenn.Code Ann. § 39-13-204(i)(7); and (4) that the murder was committed against a law enforcement officer, who was engaged in the performance of official duties, Tenn.Code Ann. § 39-13-204(I)(9).

***4** The appellant argued that four statutory mitigating factors should be considered by the court: (1) the lack of significant criminal history by the defendant; Tenn.Code Ann. § 39-13-204(j)(1); that the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, Tenn.Code Ann. § 39-13-204(j)(2); (3) that the defendant acted under extreme duress; Tenn.Code Ann. § 39-13-204(j)(6); and (4) that the murder was committed while the defendant's mental capacity, while not deficient to the point of raising a defense, was substantially impaired, Tenn.Code Ann. § 39-13-204(j)(8). In addition, the defense argued for application of an additional non-statutory mitigating circumstance, i.e., that the failure to recognize and treat the mental health disorders of the defendant allowed such to remain untreated by any form of intervention.

At the conclusion of the hearing, the circuit court found that all four of the aggravating circumstances were proven beyond a reasonable doubt by the State. Although the circuit court did not make a specific finding as to which mitigating circumstances were supported by the evidence, the court found that the aggravating circumstances had been proven beyond a reasonable doubt to "outweigh the mitigating circumstances." The circuit court then imposed the sentence of death for the premeditated murder of Deputy Tommy Bishop.

All of the prison terms, except the term imposed for felonious escape, were ordered to run concurrently with each other, but to run consecutively with the sentences then being currently served by the appellant. The prison term for felonious escape was ordered to run consecutively to all of the non-capital offenses. Accordingly, the effective sentence ordered by the court in this case is death and a prison term totaling 23 years, which is to run consecutively to the current prison sentence.

Henderson, 24 S.W.3d at 310-12 (internal footnotes omitted).

Evidence Presented at Post-Conviction Hearing

Michael Robbins was appointed by the trial court to represent Petitioner Henderson on direct appeal. He stated that for the past twelve (12) or thirteen (13) years "forty percent or more" of his practice has been state and federal appeals. He added

that he annually attended the national habeas seminar "put on" by the federal defenders.

Mr. Robbins testified that only one issue was raised on direct appeal, i.e., the proportionality of the imposition of the death penalty in this case. The focus of his appellate argument relied upon the premise that the death penalty was reserved for the "worst of the worst," distinguishing the case herein from other such cases. He added that he spoke to both Mr. Mosier and Mr. Johnston, the petitioner's trial counsel, during the early stages of the appeal. Regarding his failure to raise appellate challenges to the denial of various pretrial motions, Mr. Robbins explained that "[t]here was no significant motion practice in that sense. Most of the motions were generalized objections to the death sentence or selection of the jury panel ... and there was argument on the motion...." No error as to the rulings on these motions was argued on direct appeal because Mr. Robbins "did not consider the motion[s] to be well grounded." He explained that the law in Tennessee and in the United States was well-settled as to these issues.

***5** On cross-examination, Mr. Robbins stated that he only raised the proportionality issue on direct appeal because "[i]t was [his] professional judgment that that was the only viable issue." He further acknowledged that he did "file a motion seeking a remand for the purpose of conducting an evidentiary hearing in the Court of Criminal Appeals" based upon what he perceived to be a "motion to withdraw [Henderson's] plea of guilty." Mr. Robbins asserted that his appellate experience was "[v]irtually entirely criminal." He testified that, during the course of his representation, he did consult with David Keefe and Jefferson Dorsey, whom he believed to be associated with the predecessor office to the Office of the Post-Conviction Defender. On re-direct, Mr. Robbins admitted that these individuals recommended raising issues relating to the constitutionality of the death penalty statutes. Mr. Robbins later opined that this case "was peculiar because never ... [had he] ever even heard of an attorney waiving a jury for sentencing in a capital case." He added that a decision to waive a jury and submit a capital sentencing case to a single person was "woefully uninformed."

Kathryn Pryce, an investigator and legal clerk with the Office of the Post-Conviction Defender, was assigned to work on Petitioner Henderson's case. Her duties as an investigator include locating and requesting a client's records. In the present case, Ms. Pryce requested the Petitioner's (1) institutional records, including school, medical, psychiatric, court records, attorneys' files, prosecution files, and law enforcement files, (2) medical and psychiatric records of family members, and (3) school records of family members. In this regard, Ms. Pryce acknowledged that she received records for Herbert Henderson, the petitioner's uncle; Cora Lee Johnson, the petitioner's aunt; Glenn Johnson, the petitioner's second cousin; and Veaster Hill, the petitioner's paternal grandmother. These records reference other family members that had been treated at Western Mental Health Institute, J.B. Summers Counseling Center, and Methodist Hospital. Ms. Pryce also possessed law enforcement records relating to Shelby County rapes involving the petitioner and relating to prior offenses occurring in Fayette County, specifically contributing to the delinquency of a minor. Ms. Pryce stated that she began collecting the various records in April 2001.

Andrew Johnston, second chair counsel at the petitioner's trial, testified that he was appointed to represent the petitioner in June 1997. Lead counsel, Michael Mosier, had already been appointed at this time. Mr. Johnston stated that he was to serve as "local counsel." In other words, he was to file documents prepared by Mr. Mosier and he would meet with the petitioner's family if necessary. In this regard, Mr. Johnston testified that he met with the petitioner's family about three (3) or four (4) times. He added that he met with the petitioner on numerous occasions prior to trial.

***6** At the time of his appointment, Mr. Johnston had been licensed as an attorney for two (2) years and eight (8) months. Mr. Johnston stated that this was his first capital case. Prior to this appointment, the most serious case handled by Mr. Johnston was either an aggravated robbery or aggravated burglary. His practice was forty percent (40%) criminal, mostly handled in General Sessions Court. Post-conviction counsel informed Mr. Johnston that the standards for capital representation went into effect July 1, 1997, after Mr. Johnston's appointment in this matter. These standards express requirements for capital counsel in regards to the number of trials in which they have to participate, among other things. Mr. Johnston conceded that, at the time of his appointment, his experience did not satisfy the requirements of Tennessee Supreme Court Rule 13. Mr. Johnston admitted that, prior to his appointment, he had never met Mr. Mosier.

Regarding his participation in the case, Mr. Johnston recalled being particularly involved in the motion for change of venue. Mr. Johnston collected various newspaper articles and attempted to procure affidavits from other attorneys verifying that it would be difficult to have a fair trial in Fayette County.

He stated that he also assisted in numerous ex parte motions at the beginning of the representation in order to get a defense team together, i.e., investigator, clinical psychologist, and jury/mitigation expert. He stated that he provided no input as to what experts would be sought. Ultimately, the defense team consisted of Tammy Askew, the investigator; Dr. Lynn Zager, the clinical psychologist; and Julie Fenyes, the mitigation/jury consultant.

Mr. Johnston testified that he had few interactions with Ms. Askew. He did not provide her with instructions as to what to do or who to interview. Mr. Johnston did not recall meeting Dr. Zager "until the very end." However, he did recall a time in July when he had to take an "MMPI test up [to Tipton County], so I would have been working ... with her at that time...." Regarding Ms. Fenyes, he testified that Ms. Fenyes prepared the juror questionnaire. Mr. Johnston could not recall any conclusions regarding the jury based on Ms. Fenyes' work. Mr. Johnston stated that he was not in a position where he was trying to provide the experts with direction. Rather, he was "trying to do what I was asked to do by Mr. Mosier...."

In May 1998, when a jury trial was still contemplated, Mr. Mosier asked Mr. Johnston whether he would be willing to present the closing argument. Mr. Johnston, however, informed Mr. Mosier that he would be more comfortable if Mr. Mosier presented closing argument. Mr. Johnston stated that he was involved regarding the decision of whether to enter a plea and whether jury sentencing should be waived.

Regarding the waiver of a jury trial and entrance of a guilty plea, Mr. Johnston stated that they:

> [W]ere in a position at the point where we were fairly certain as to in terms of the probability that we'd be in a sentencing hearing, and I know that at that point we wanted to have as much mitigation as we could. And entering a plea certainly would have been a mitigating factor to be considered by the Court. So I think it dealt with an analysis at that point of aggravating factors, mitigating factors, and the likelihood that we would ultimately be in a sentencing hearing, given the proof that had been developed at that point.

***7** In terms of waiving a jury for sentencing, I think it was a situation where we wanted ... at least we thought it would be in Mr. Henderson's best interest to have the Court do the sentencing.

It was the opinion of the defense team that Judge Blackwood was personally opposed to the death penalty and that was a point to consider regarding a plea. He added:

> From what I recall, we met with [the petitioner] and we talked about where we were. And it was decided that we would want the judge to do the sentencing in the event we ended up in a sentencing hearing. And I think there would have been a conversation at that point that we felt that the facts were not in our favor and that it was going to be very difficult to avoid a sentencing hearing.
>
> ....
>
> And there was a decision made at that point that if the State agreed to allow the Court to do the sentencing, that that would be the way to proceed. And one thing led to another thing, and we were in court that afternoon and we entered the plea.

Mr. Johnston acknowledged the fact that they were no more prepared for sentencing at the time the plea was entered than they were earlier that morning when they had asked for and received a continuance from the court. The sentencing phase was scheduled for the following week. A meeting was held in Jackson with the entire defense team. At the meeting, all members presented the information they had gathered. The information was assimilated and organized in order to present a defense.

With regard to the petitioner, Mr. Johnston recalled that, during their initial meeting, the petitioner was "calm, ... respectful, ... pleasant...." His opinion after this meeting was that the petitioner was going to be pleasant to work with during the case. Mr. Johnston stated that he was not satisfied with the results in this case. He expressed concern that the petitioner's family was not present at the time his plea was entered. In hindsight, he "wish [ed]" that a jury would have been empaneled and that they would have fought the case on the merits." Notwithstanding his belief, he could not state what else could have been done by the defense team related to sentencing.

On cross-examination, Mr. Johnston stated that the petitioner's mother never indicated that the petitioner had any sort of mental health issues or was mentally deficient. Mr. Johnston, through his interaction with the petitioner, was not able to discern any obvious indicators that the petitioner was unable to assist in his representation or suffered from any mental illness. Any information related to possible mental

illnesses or deficiencies were solely limited to the opinions of Dr. Zager. Mr. Johnston conceded that the evidence as to the petitioner's guilt was overwhelming. He added that the defense team presented all evidence that they considered to be of mitigation value at the sentencing hearing.

On re-direct, Mr. Johnston stated that information that four (4) second cousins of the petitioner had been diagnosed with mental illnesses would have been very relevant and this information would have been passed to the clinical psychologist. He further conceded that information that the mother of these four (4) second cousins had a mental illness would be not only relevant to defense counsel but also to the court as well.

***8** Mr. Johnston conceded that he had no prior knowledge or training as to what issues might raise flags to lead counsel when reviewing information on a capital defendant. He admitted that the fact that the petitioner stood accused of raping the mother of the woman he considered his girlfriend would certainly "raise a flag."

Lead counsel in this matter, Michael Mosier, testified that he had been a licensed attorney for twenty-seven (27) years. He explained that he was contacted by Judge Blackwood regarding appointment in this matter as there was no attorney in the district that could represent the petitioner due to potential conflicts. Mr. Mosier testified that the defense of a capital case is a "pretty awesome responsibility" and that he "considered Mr. Johnston's role to be more than just local liaison." He stated that he relied upon Mr. Johnston for the initial information about the case. Mr. Johnston was advised as to Mr. Mosier's normal procedure in a capital case, motions that would be filed, and expert assistance that would be sought. Mr. Mosier prepared all of the motions. Mr. Mosier selected the experts and investigators. He stated that he believed that expert services were granted in August 1997. He stated that Ms. Askew's function as the investigator was to make contact with persons having factual knowledge of the offense and to contact members of the petitioner's family. Ms. Fenyes' function as the jury/mitigation consultant was to conduct a social background investigation of the petitioner in order to prepare a mitigation investigation for possible use at a sentencing hearing. Ms. Fenyes also compiled jury questionnaires, reviewed the responses, and made recommendations as to which prospective venire members would be good jurors. Mr. Mosier stated that he visited the petitioner at Riverbend Maximum Security Institution approximately three (3) to four (4) times. He added that he visited the petitioner prior to his transfer to Riverbend.

Mr. Mosier recalled the petitioner informing the trial court by letter, dated June 24, 1998, that he was dissatisfied with Mr. Mosier's and Mr. Johnston's representation. Mr. Mosier visited the petitioner at Riverbend on June 30, 1998, in part, to discuss this letter with the petitioner.

On July 6, 1998, Ms. Fenyes informed Mr. Mosier that the mitigation evidence that she had gathered was not helpful and that she would need more time. Mr. Mosier "felt like that all that there was left for him was to try to demonstrate to the judge his acceptance of responsibility, and by putting him on the stand, let him show remorse for what he did." This information formed part of the basis for counsel's motion for continuance submitted on July 6. After the continuance was granted on July 6, Mr. Mosier, at the petitioner's request, approached the prosecution in an attempt to seek a life sentence in exchange for a guilty plea. Mr. Mosier stated, however, that the possibility of entering a guilty plea was discussed in December 1997. Indeed, the petitioner wrote counsel a letter asking about the benefits of entering a guilty plea. Specifically, he inquired as to whether his showing of remorse would persuade the judge to spare him the death penalty and get him a life sentence. Counsel received three (3) or four (4) letters of this nature. The first letter dated December 21, 1997, made inquiry as to pleading guilty and hoping for mercy. The next letter dated January 11, 1998, evidenced an apology to Deputy Bishop and his family, but noting that the death penalty should not be imposed. On January 14, 1998, a third letter was written by the petitioner asking what would happen to the other charges if he pled guilty to first degree murder. The petitioner added that the victim's family would be assured that he would never be eligible for parole. The letter further asked that the trial be moved to another county at a later date from the scheduled March 9, 1998, trial. The petitioner penned a fourth letter on January 23, 1998. In this letter, he again indicated a desire for a change of venue and recusal of the trial judge. Mr. Mosier stated that he discussed the trial judge's recusal with the petitioner and provided the petitioner with his strong recommendation that he not ask the trial judge to recuse himself. First, there was nothing in the record to warrant the request. Second, Judge Blackwood had previously stated on the record that he was morally and philosophically opposed to the death penalty. In other words, Mr. Mosier concluded that if he were able to hand-select a judge in a death penalty case, he would have selected Judge Blackwood. For these reasons, he

did not seek recusal of Judge Blackwood. Mr. Mosier stated that he did seek a change of venue in this matter. He stated that contact was made with Deputy Bishop's family. Investigator Pugh and Sheriff Kelly wrote a letter recommending that the death penalty not be imposed. The District Attorney's Office was informed on numerous occasions about the petitioner's willingness to accept a life sentence. In other words, Mr. Mosier "acted on what was valid, and what had no basis in law or fact, I took no action on."

***9** Mr. Mosier testified that Dr. Zager was provided with everything in Mr. Mosier's file. Mr. Mosier stated that there is some indication that as of July 6, 1998, Dr. Zager had not yet evaluated the petitioner. Mr. Mosier stated, however, that at the time the plea was entered, he was mainly concerned about the insanity issue. There was no indication at this time that insanity would be a viable defense. The petitioner was not lacking in mental capacity, he was cooperative, well-mannered, polite, and his attorney worked with him easily.

Mr. Mosier stated that it was the petitioner's decision to waive a jury for sentencing. Mr. Mosier merely advised the petitioner of the advantages and disadvantages of waiving a jury in a capital sentencing trial. He stated that this case involved the "senseless killing of a law-enforcement officer." Mr. Mosier believed that the petitioner's "chances before a jury in any county were [not] good at all." In his opinion allowing Judge Blackwood to impose the sentence was the best chance that the petitioner had to avoid the death penalty.

Mr. Mosier stated that there were many difficulties with this case, primarily the status of the victim as a law enforcement officer and communication with the petitioner's family. The petitioner's mother, for example, refused to believe that her son could commit any criminal acts. Mr. Mosier was not aware of the incident alleging that the petitioner had kidnapped and raped his girlfriend's mother. He further conceded that the mitigation report failed to indicate that one of the petitioner's victims in a prior incident was his art teacher and the mother of his friends. Notwithstanding, Mr. Mosier could not say that knowledge of these factors would have been indicators for the need of further psychological or psychiatric testing.

Dr. Frank Einstein, a self-employed sentencing consultant and mitigation specialist, stated that there are two purposes of mitigation in capital cases. "One is to be able to present a picture of the client as a full human being to the sentencer. The second related part is to-the purpose of mitigation is to reduce the moral culpability of the defendant for the crime of murder for which he or she has been found guilty." In satisfying the second purpose, the person's entire life must be examined to determine whether there is anything biological, physiological or medical that may have interfered with a rational, constructive decision-making process.

In completing a mitigation investigation, Dr. Einstein testified that he begins two ways. One is to interview the client and the second involves reviewing life history records collected by the attorney. Under either method, a chronological history of the defendant's life is formulated. Any records from schools, medical facilities, etcetera, are then collected to support the chronology. A picture of the family is then drawn. A list of names is created of people to interview. Where immediate family members fail to cooperate, extended family members should be interviewed. Moreover, records provide valuable information about the client. Finally, the investigator should continue an attempt to establish a rapport with immediate family members. Records of family members are also sought to establish certain familial patterns, for example of mental illness, abuse or molestation.

***10** Dr. Einstein testified that once this information is gathered the mitigation specialist pieces the information into a chronological time line. The information is then synthesized to show patterns. This presents the mitigation specialist with a likely theme in the case or in the client's life. A social history is then compiled of the collected data to show the sequential development of the client's life. Dr. Einstein distinguished between the social history compiled by a mitigation specialist and that contained in medical records. He stated that social histories contained in medical records are based upon information provided by the patient and one or two family members. This type of social history is "totally uncorroborated." Thus, reliance upon this type of social history alone leads to the high possibility that one would miss serious clues that would trigger the need for further evaluation. Dr. Einstein stated that the compilation of an accurate social history could be completed in as short a time as one (1) year or could take as long as two (2) to three (3) years. It is highly unlikely that it could be completed in less than one (1) year.

Post-conviction counsel asked Dr. Einstein to review the work completed at the trial level in the petitioner's case and the adequacy thereof and compare that work with the investigation completed by the post-conviction team. In reviewing Ms. Fenyes' work, Dr. Einstein found it remarkable

that almost all the work completed in her investigation was done two (2) weeks prior to the entry of the guilty plea. Dr. Einstein concluded that there was no mitigation work completed from June 1997 through December 1997. Ms. Fenyes only met with the petitioner four (4) times, and never alone. This is important because the ability to gain sensitive information is hindered when a third party is present. Ms. Fenyes did not meet with the petitioner until February 1998. There is no indication of any further meetings until June 1998. The petitioner entered a guilty plea on July 6, 1998. It is Dr. Einstein's opinion that the amount of time spent preparing a mitigation defense "would definitely not [have] been enough time in this case." Dr. Einstein acknowledged that Ms. Fenyes was not authorized to begin work until September 1997. Dr. Einstein further faulted Ms. Fenyes's practice of interviewing persons by telephone rather than in person. Basically, all of the mitigation work was completed in the week between entry of the plea and the sentencing hearing.

In comparing the mitigation investigation completed by the trial team and the mitigation investigation completed by the post-conviction team, Dr. Einstein observed information not discovered by the trial team that was available and useful in preparing a mitigation defense. Dr. Einstein separated the "missing" information into two categories, (1) information about Petitioner Henderson and (2) information about the petitioner's extended family. Information regarding the petitioner consisted of the following: (1) changes in the petitioner's behavior during high school years; (2) radical changes in the petitioner's behavior during the two (2) years preceding the murder including but not limited to the alleged rape and kidnapping of his girlfriend's mother; (3) exhibitions of signs of depression and suicidal thoughts; and (4) indication of a strange sort of religious ideation, consisting of spirits that affect his behavior. Information about the petitioner's extended family included: a significant history of mental illness and instability, where at least nine (9) extended family members on both his maternal and paternal side suffered from mental illness. His report indicated that the petitioner should have been examined by a psychiatrist.

***11** On cross-examination, Dr. Einstein conceded that his fee in this case would amount to $30,000 or $40,000. He stated that the fact that the petitioner has been diagnosed with a mental illness and the fact that this information was omitted at the trial level was prejudicial to the petitioner. He added that information regarding the family history of mental illness should have been presented. Dr. Einstein explained that this case was difficult for two (2) reasons. First, the petitioner was not honest regarding his family history, because he presented a picture of having a perfect family. Second, his family was very guarded and closed to outsiders.

Dr. Einstein conceded that the petitioner did not have an abusive childhood. Although the petitioner did have two (2) incidents of significant physical trauma, this information was procured by the trial team. There is no indication of childhood malnutrition. He further conceded that, at the time of trial, there was no mental health history of the petitioner and there was no evidence that he was mentally retarded. There is no evidence of fetal alcohol syndrome or effects. There is no evaluation completed by an addictionologist nor is there any indication that the petitioner had any kind of addiction. He agreed that there is no indication as to whether the petitioner had been exposed to lead, agricultural chemicals, or environmental toxins. Although these initial questions were answered negatively, Dr. Einstein stated that mitigation investigation does not end. Dr. Einstein conceded that, in any given case, there may exist several arguable issues that should be eliminated for the purpose of focusing on one (1) or two (2) stronger issues.

The trial judge himself made inquiry as to Dr. Einstein's qualifications. Dr. Einstein affirmed under questioning by the trial judge that his Ph.D. was in English. He further stated that he went from teaching English at Fisk University to being a specializing consultant and mitigation specialist. The trial court further questioned Dr. Einstein as to the manner of action taken when after interviewing four (4) or five (5) people there is nothing unusual discovered about the client. In response to questioning by the trial court, Dr. Einstein stated that he would continue to work for free in some cases, acknowledging that a court would refuse to grant more funds when there is no reason to support further investigation. The trial court also inquired as to the financial reasons motivating an investigator to continue seeking mitigation evidence if initial efforts prove unproductive.

David Louis Chearis testified that in late 1996 and early 1997 he was confined in the Fayette County Jail. Mr. Chearis served six (6) months in the jail, leaving the jail about a month and a half before the murder of Deputy Bishop. During his confinement, he had the opportunity to observe the petitioner. Chearis knew the petitioner prior to incarceration, however, as the two men were "supposed to be some kin" and, generally, from "being on the streets." He also recalled publicity the petitioner received from playing basketball in high school.

***12** Mr. Chearis noted that the petitioner was "like laid back and didn't really associate ... with other inmates ... and mostly stayed to himself, drawing ... listening to his music...." He observed that the petitioner slept most of the time, not rising until time to "get his 12 o'clock sandwich." This behavior of staying to himself persisted for about five-and-one-half (5 ½) months. He then changed. The petitioner started playing games, card games, arm wrestling, and other things. He starting getting out of bed earlier. He began associating with the other inmates. Mr. Chearis described the petitioner's changed behavior as "risky," explaining that when you started playing games you ran the risk of being in a fight. He further observed that the petitioner stopped "draw[ing] as much." Previously, he would draw pictures of his girlfriend, his mother and Michael Jordan, all people that he liked. After his behavioral change, he "got into a lot of tattoos."

On cross-examination, Mr. Chearis conceded that it was possible that the fact that the the petitioner was in possession of a handgun and was planning a murder was the reason behind his change in behavior.

Barbara Weddle, a retired school teacher, testified that she first encountered the petitioner in elementary school. Ms. Weddle was the fourth and fifth grade teacher at Central Elementary. Although the petitioner was not a student of hers, she knew of him because he "had a real good personality." In 1981, Ms. Weddle transferred to Fayette-Ware High School. At the high school, the petitioner was in Ms. Weddle's art class. Ms. Weddle recognized the petitioner's talent for drawing. She encouraged him to enter a contest about drawing the courthouse. The petitioner won the contest and won a dinner at a restaurant. Ms. Weddle always thought of the petitioner as "another Eddie Murphy.... He just liked to say funny things and make the kids laugh." She described him as playful, not disruptive. Ms. Weddle could not recall the petitioner's character other than that displayed in her classroom. Ms. Weddle could not recall being contacted by any person on the petitioner's trial team.

Larry Ransom, a teacher and the basketball coach at Fayette-Ware High School, testified that the petitioner played basketball under him at the high school. At the time, Coach Ransom was the assistant coach. He related that the petitioner was a very talented athlete and played hard. The petitioner was present at all practices and got along well with the other players. Coach Ransom could not recall any complaints about the petitioner from any of the teachers. He did state that, during his senior year, the petitioner concentrated more on his art work than on basketball. Despite the petitioner's passion for artwork, Coach Ransom was of the opinion that the petitioner could succeed at basketball at the college level.

On cross-examination, Coach Ransom recalled an incident where the petitioner placed something on the driveway of the school secretary. He also recalled an incident where the petitioner was involved in a fight on a school bus.

***13** Although Tonya Whitmore went to high school with the petitioner, she did not actually meet him until after graduation when he was working at Sonic. Ms. Whitmore began dating the petitioner in 1993. She stated that, during the time they dated, she spent time with the petitioner and his family. She described the family as "pretty close," "pretty normal," and "[n]othing seemed out of the ordinary...." During the first few months of their relationship, the couple would go places, have fun together, and the petitioner would paint pictures of Ms. Whitmore. At some point, the petitioner changed. He became very violent with her. Ms. Whitmore described one incident in January 1995 where the petitioner had come to her place of employment, broken into her vehicle, and waited for her. When Ms. Whitmore got into her car, [h]e drove around beating [her]." Ms. Whitmore ended up in the emergency room as a result of this incident. Ms. Whitmore initially did not tell anyone that the petitioner was the person that had inflicted the injuries upon her. Later that evening, Ms. Whitmore returned to the hospital and informed them that the petitioner beat her up and that he would kill her. Ms. Whitmore was placed in a room at the hospital until law enforcement officers arrived and made the petitioner leave. Ms. Whitmore later sought a protection order against the petitioner. Ms. Whitmore did have contact with the petitioner via telephone calls. She described these conversations as "[t]wisted, very twisted." She described the petitioner as being like two (2) different people. A few weeks later, the petitioner kidnapped Ms. Whitmore's younger sister, Tina. Ms. Whitmore testified that she broke up with the petitioner after the January 1995 beating, but later reconciled with the petitioner. She stated that she stayed with the petitioner after he started abusing her because he was a "good manipulator and a good conner...."

Tempie Whitmore, Tina and Tonya Whitmore's mother, testified that her initial impression of the petitioner was that he was "odd, strange." She explained, "he just would stare at you and look at you right hard.... Looked like he was a little bit withdrawn...." After the incident where Tonya was taken to the hospital, the petitioner telephoned Mrs. Whitmore at her

place of employment, stating that he was sorry that he "beat Tonya up like that."

Willie Mae Henderson Armour, the petitioner's "great auntie," testified that her daughter, Cora Johnson, and two (2) of Cora's sons lived with her. Mrs. Armour stated that Cora was at Western State due to a nervous breakdown at the time of the birth of her twins, Penn and Glenn. Glenn Johnson, one of Cora's sons, was currently confined in the Somerville jail. Glenn had previously been hospitalized for mental problems. Mrs. Armour explained that Glenn had "been in and out of different places, and he got hurt in Cookeville, Tennessee, and that could be some of his problem." She stated that Glenn had been raped and it did something to his spine. Mrs. Armour was in the process of trying to get Glenn back into a mental hospital. She described particular incidents of Glenn's behavior, including an incident where he tore her front door off and stabbed his sister in the head.

***14** In addition to Cora and her children's known mental illnesses, Mrs. Armour stated that another aunt, Amelia Winfrey, had "nerve-mental trouble," and her son, Arthur Peter Winfrey "died in Western State Hospital from mental illness." She added that her "great great auntie, Aunt Liza Winfrey, "lost her mind." Aunt Liza's son, Albert Springfield also "lost his mind, and he died in New York." She explained that "they'd just go wild." The mental illness apparently ran on both the maternal and paternal sides of the family.

Margaret Simmons is the sister of Elton Henderson. Ms. Simmons has never met the petitioner and only knows of him through articles relating the murder of Deputy Bishop.

Shirley Shelby testified that she had known the petitioner since he was eight or ten years old. The petitioner was friends with Ms. Shelby's sons. Ms. Shelby was also the petitioner's art teacher. She described him as an "exceptionally talented student." She added that he was also a talented athlete, specifically basketball.

Ms. Shelby related an incident where someone broke into her home and held a towel over her face. The person was wearing a ski mask and the house was dark as it was two o'clock in the morning. After chasing the intruder out of the house, Ms. Shelby and her daughters realized that their telephone lines had been cut. They decided to leave in her vehicle. The intruder chased the family away. The intruder then returned to Ms. Shelby's home and took "whatever purse he could find." Ms. Shelby then learned of checks having been written on her account. At some point, someone was able to identify the person who was writing the checks on Ms. Shelby's bank account. The person was identified as the petitioner. Ms. Shelby confirmed that in her recommendations for sentencing of the petitioner in this crime against her she recommended that he be provided psychological counseling.

Tammy Askew was retained as the investigator by the trial team in this case. She specifically recalled being contacted by Mr. Mosier prior to August 1997. She was instructed by both Mr. Mosier and Mr. Johnston to interview witnesses. Her understanding was that her investigation was limited to solely the guilt phase of the trial. Ms. Askew's records of her investigation reveal that on August 27, 1997, she interviewed Ms. Guy, Mr. Holmes, and Sally and TL Johnson. Her records also reveal that she attempted to interview Dr. Cima, Peggy Wilde and Donna Feathers; these witnesses refused to be interviewed. As advised by Mr. Mosier, Ms. Askew again attempted to interview these witnesses; they again declined.

Ms. Askew testified that she interviewed the petitioner's parents Sally and TL Johnson at their home. The couple were interviewed separately. An interview of the petitioner was then conducted. This was Ms. Askew's only interview with the petitioner. Ms. Askew conducted no additional investigative activities in this matter until June 1998. She explained that she had interviewed all of the persons that defense counsel had asked her to interview, with the exception of those individuals that declined. She stated that defense counsel never asked her to interview anyone from the Sheriff's Department. Ms. Askew explained that after a defense team meeting on July 8, 1998, she researched criminal records of the petitioner and picked up some medical records on the petitioner.

***15** Judge Blackwood was then called as a witness by post-conviction counsel. Judge Blackwood testified that from 1974 to 1976 he was in private practice in Fayette County. In 1975, he became a part-time assistant district attorney, going full-time in 1976. Judge Blackwood remained in this position until November 1985 at which time he was appointed to the bench. Judge Blackwood acknowledged that he had applied for the position of District Attorney General while employed with the District Attorney's Office.

Regarding an in camera conference between Judge Blackwood and Ms. Fenyes during the July 6, 1998, motion for continuance, Judge Blackwood stated that he questioned Ms. Fenyes as to how much more time she needed with regard

to preparation of a mitigation defense. Trial counsel did not object to the conference.

Dr. Lynn Zager, a clinical psychologist, was retained by trial counsel to evaluate the petitioner. Dr. Zager testified that her evaluation of the petitioner began on November 4, 1997. Actually, Dr. Zager had previously traveled to Mark Luttrell in Shelby County to interview the petitioner, but he had already been transferred to another institution. On November 4, Dr. Zager spent three (3) hours at Riverbend completing a forensic evaluation of the petitioner. The purpose of this evaluation involved informing the petitioner of the purpose of the evaluation and the limits of confidentiality. She explained that her evaluation consisted of a social history, a competency assessment, and a "mental condition at the time the offense is said to have happened" assessment. Throughout this process, Dr. Zager is looking for signs and symptoms of a mental illness, personality disorder or other mental issues. Dr. Zager testified that, on this date, she did not complete any social history information.

On January 7, 1998, Dr. Zager reviewed the petitioner's medical records from LeBonheur Children's Hospital. Dr. Zager recalled the petitioner being involved in a bicycle accident when he was twelve (12) years old. The Petitioner had been hit by a car and was rendered unconscious. At this point, Dr. Zager provided her opinion to defense counsel that the petitioner was competent to stand trial and there was insufficient evidence to support a defense of insanity. She added that she did not have information to diagnose a major mental illness.

Dr. Zager testified that after the entry of the petitioner's guilty plea, the defense held a team meeting. During this meeting, there was discussion about the possibility of a personality disorder existing, specifically with narcissistic and antisocial traits. Dr. Zager decided to further pursue these disorders. Prior to July 8, 1997, Dr. Zager did not conduct any formal psychological testing. After this meeting, Dr. Zager administered the MMPI to the Petitioner and evaluated the results. Between the team meeting and the administration of the MMPI, Dr. Zager had not been provided any more social history information on the petitioner. Dr. Zager had not been provided letters written to trial counsel by the petitioner. Notwithstanding, Dr. Zager testified that she felt comfortable with the amount of social history she had been provided. She did concede, however, that in other cases, the mitigation specialist had provided her with information as to the client's social history. Dr. Zager stated that information as to extended family histories involving alcoholism, mental health, and other issues are helpful and valuable tools. She added that, depending on the case, information gained from interviews with extended family members and people in the client's community could be significant in looking at a person's mental health.

***16** A team meeting held on July 10 consisted of Dr. Zager, Mr. Mosier, Mr. Johnston, and Ms. Fenyes. The petitioner's mother attended this meeting and brought with her a box of things thought to be helpful or valuable in terms of preparing for the sentencing hearing. Dr. Zager could recall items of artwork most vividly. She recalled that a plan was formulated as to what would be presented at the hearing. Dr. Zager had determined that the petitioner suffered from a personality disorder with narcissistic and antisocial traits. This information was discussed at the meeting. Her evaluations, however, did not meet the specific diagnosis for these disorders. Dr. Zager testified that she was surprised that she was asked to testify at the sentencing hearing because her diagnosis of the petitioner did not constitute a major mental illness, in other words, her diagnosis was not very valuable in asserting a defense.

Since the initiation of post-conviction proceedings, Dr. Zager had been advised of additional information regarding the petitioner that she was not aware of at the time of her diagnosis. She stated that she learned "a whole lot of additional background information," including details of the different crimes for which the petitioner had been charged and convicted. Specifically, she was provided the victim's point of view of the incidents. Dr. Zager noted that the petitioner's art teacher was the victim of one of his prior crimes. She stated that any additional information would have been used in evaluating or refining her diagnosis

Dr. Zager testified that she was aware that the petitioner had been diagnosed with a Bipolar 2 disorder. She stated that this diagnosis was not inconsistent with the MMPI previously administered to the petitioner. On cross-examination, Dr. Zager explained that Bipolar 2 is a mood disorder and is not a psychosis. She added that a person can be diagnosed as Bipolar 2 and be a functioning member of society without antisocial or criminal traits.

Although Dr. Zager stated that she had not made a new diagnosis in this case based on new information, she agreed that it would be prudent to continue to look and see if there was a reason to change her prior diagnosis.

Dr. Pamela Auble, a clinical psychologist, explained that the role of an expert is to evaluate the client, sometimes recommending further experts. A major part of the function is to consult with the attorneys and the mitigation specialist. She described the role as an "ongoing process," because the evaluation may lead to new questions, additional records, additional consultations with the team, new information, and so on.

Dr. Auble stated that the MMPI is a personality test consisting of 567 true or false questions. Mainly, the questions are about various aspects of human experience. The test has some mental ability limitations, that is, you have to be able to read and understand the questions. Additionally, the test is only a "snapshot" of how the person taking the test is at that moment. She stated that the MMPI, on its own, is not a sufficient tool for providing a full picture of a person's psychology because; (1) it does not measure a person's abilities, thinking, reasoning or memory; (2) it is dependent upon the person's ability to describe themselves; and (3) no single test is the answer for everything. Dr. Auble confirmed the importance of the evaluator personally interviewing the client.

***17** Dr. Auble testified that she was involved in the petitioner's case. She interviewed the petitioner, performed a battery of tests, and reviewed some records about his history. She further attested that she had consulted with post-conviction counsel and talked with various persons about the case, their findings, and other aspects of the petitioner's history. Specifically, Dr. Auble administered the Wechsler Memory Scale Third Edition, the Weschler Adult Intelligence Scale Third Edition, the Test of Memory Malingering, the Wisconsin Card Sort, Trailmaking, the Speech Perception Test, the Seashore Rhythm Test, the Tactual Performance Test, the California Verbal Learning Test, the Rey-Osterrieth Complex Figure, the Delis-Kaplan Executive Functioning System, the Finger Oscillation Test, the Grooved Pegboard Test, the Rorschach, the Personality Assessment Inventory, and the Incomplete Sentences Blank. Dr. Auble further reviewed the testimony and notes of Dr. Zager, the records from LeBonheur Children's Medical Center, the report of Dr. Einstein, and a transcript of the sentencing hearing. The review of these materials was completed after Dr. Auble's report was prepared but had no affect on her conclusions. Dr. Auble provided the following test results:

> The testing of the mental abilities told me that [the petitioner] does not have what I would call global or general deficits, but does have some specific problems in his mental abilities.
>
> To be exact, he has some difficulties learning information that he's told. That's a problem for him. He also had some problem in a test of manual dexterity, and he had some variable problems on tests which measure his ability to go back and forth between different ideas, to form hypotheses and test them, and to abstract reasoning.
>
> From the personality testing, [the petitioner] has a desire to present himself as a very normal, even maybe supernormal individual. He is likely to minimize or even be unaware of his own problems. He likes people and wants interaction with people. He-in my testing he was less distressed than he was when Dr. Zager saw him. I guess that's sort of a quick summary.

Dr. Auble explained that her findings of neuropsychological deficits was significant because they affect his functioning. She stated that:

> [F]rom the personality testing it was hard for me to draw a lot of conclusions because of his tendency to shut down and to minimize problems, to ... I don't know that he really has much insight into what his real problems are. So from the personality testing I'm not sure I got underneath, underneath his sort of mask of normalcy that he wants to portray to everyone.... I don't think he was as depressed at the time I saw him [as he was when Dr. Zager saw him].

There were indications however that his functioning was not right and his portrayal of himself and his family is inconsistent with reality. Dr. Auble believes that the petitioner is not "aware of his own emotional dynamics."

***18** In comparing her results with those reached by Dr. Zager, Dr. Auble noted that Dr. Zager did not perform some of the testing of mental ability and, therefore, she did not talk about the problems with the petitioner's memory and his rigidity. She did concede that the personality style identified by Dr. Zager was similar to the personality style observed in her evaluation. Dr. Auble further agreed with Dr. Zager's

diagnosis as to the petitioner's narcissistic traits and antisocial personality. She conceded that she was unable to diagnosis the petitioner with an Axis I diagnosis of a major mental disorder.

Dr. William Kenner, a psychiatrist engaged by post-conviction counsel in this case, testified that in formulating his opinion he reviewed:

> [Q]uite a stack of material ... which involved the interviews that had been done with his family members. I also- and other individuals who had known him over the years. I also had a chance to talk with Shirley Cobb and Tina Whitmore and Tina's mother, Tempie Whitmore, to get their views and experiences with [the petitioner].

In Dr. Kenner's opinion, the petitioner suffered from a bipolar type 2 disorder at the time of Deputy Bishop's murder. He continued to describe bipolar disorder:

> One way to think about bipolar disorder is in terms of the cruise control on a car. The human brain has its own cruise control that sets the pace of our lives, the pace at which we think, act, and so forth. And, you know, some of us have cruise controls that are set quite differently. Some people are slow talking, and others talk very quickly and move on to things and so forth.
>
> But when that cruise control becomes defective, some interesting changes take place in an individual. They begin to feel too good. Their thinking can race ahead, oblivious to any warning signs that they would otherwise have heeded when they were in their normal state. They don't need as much sleep as others. And the more manic they get, the less sleep they will need. What often goes with the fast thinking is extremes in the manic's opinion of himself, that it will become grandiose, his thinking will become expansive, and he will feel wonderful in circumstances that most folks would feel pretty just the opposite.
>
> The manic patients have the normal human appetites, but they go overboard in terms of pleasure seeking, in terms of having a good time, and they will do this heedless of any consequences.... The manic will be unable to use good judgment to slow down and reflect on a particular course of action.... He may break the law in ways that he would not have done when he was on a more even keel.

Dr. Kenner related the traits of a manic to those of one with a narcissistic personality disorder, stating that a "manic is like a narcissist on methamphetamines." He stated, however, that a narcissist is one who puts himself out as being a rather special person, while a manic, when the mania is over, will resume their normal personality. Regarding the diagnosis of antisocial personality disorder, Dr. Kenner stated that symptoms of this trait begin at age fifteen (15). These traits were not evident in the petitioner. The petitioner was very conscientious and hard working in school.

***19** Dr. Kenner stated that the marked change in the petitioner's personality in early adulthood suggests several things including the use of drugs or the start of a mental illness. There was no indication that the petitioner abused drugs. Dr. Kenner based his diagnosis primarily upon the petitioner's behavior during childhood and high school compared to his behavior in his early adulthood years. Dr. Kenner considered the petitioner's extracurricular activities, noting that he played basketball all four (4) years, he ran track, he was president of the 4-H and the student body at high school, he participated in the art club, he coached and played in the Fayette County Athletic League. Based upon his performance to this point, the petitioner showed great promise, that is, before his bipolar symptoms came into play. There were some signs in high school, specifically sleep disorder systems. His criminal career began with the forging of a Tennessee Department of Employment Security check. The check was made for $104, and the petitioner added a five (5) in front of the amount, making it $5,104. In February 1995, he raped Shirley Cobb, the mother of his girlfriend. The petitioner described his girlfriend Natonya as his wife. In March 1995, he broke into Shirley Shelby's home and stole some purses. In May 1995, he abducted the younger sister of a former girlfriend.

Other events proved insightful in making a diagnosis. In October 1995, the petitioner placed a wedding announcement in the local paper stating he and Natonya were to be married and giving her last name as Boyland. The announcement further provided that the wedding was to take place on October 14, 1995, at the Adams Mark Hotel with an elegant reception afterwards. Information in the announcement also indicated that the couple were soon to be parents of a baby boy, that Natonya was going to sign a contract with a modeling agency, and that the petitioner was pursuing his art career at the Naegele Outdoor Advertising Company. There

was absolutely no truth in the announcement. They were not getting married; she was not pregnant; he was working at Target; he was not pursuing an art career; and Natonya was not signing a modeling contract.

On December 27, 1995, the petitioner was released from jail at 1:17 p.m. By 4:00 pm, he had again abducted Shirley Cobb and raped her. The abduction was in daylight in front of somebody's house. The petitioner began to serve a sentence for aggravated burglary in January 1996. He was on work release in February 7, 1996, when he again abducted Shirley Cobb. On February 9, he released her. Two (2) months later, the petitioner was arrested in Conway, Arkansas, with Natonya Cobb.

Dr. Kenner opined that these events are significantly different from behavior earlier in his life. His family history is heavily loaded for bipolar disorder. The murder of Deputy Bishop occurred during a period of difficulty in sleeping. Moreover, like the other crimes committed by the petitioner, this offense did not make any sense, shooting a deputy and escaping through the middle of town. He stated that Mr. Chearis' description of the petitioner's behavior while at the Fayette County Jail was consistent with a diagnosis of bipolar disorder 2.

***20** Dr. Kenner concluded that, in his opinion, the petitioner was suffering from a major medical illness that affected his abilities to control his behavior in this case. He added that someone suffering from a bipolar disorder would have more difficulty in avoiding this type of criminal behavior than a person without a mental illness. Dr. Kenner stated that the most convincing evidence as to the diagnosis that the petitioner was suffering from bipolar disorder at the time of the murder is the presence of the sleep disorder. However, he placed equal importance on the family history of mental illness and the petitioner's presentation that he had a perfect family. He stated that the illness could be supported without the two (2) year history of criminal behavior, but it is much more convincing with the history.

On cross-examination, Dr. Kenner conceded that his information of the petitioner's sleep history was based on the self-report of the petitioner. He related, however, that bipolar disorder was not a mental illness easily or readily "faked" by persons. Dr. Kenner further admitted that none of the petitioner's first-degree biological relatives had bipolar disorder. He stated, however, that there is relevance of a second cousin suffering from a mental illness, but he conceded, this relevance is not recognized in the DSM4.

Findings of the Post-Conviction Court

In its order denying post-conviction relief, the post-conviction court summarized the facts supporting the petitioner's conviction for the first degree murder of Deputy Bishop. The post-conviction court noted that numerous pre-trial motions were filed by defense counsel, including motions for ex parte services. These motions were granted by the trial court. The post-conviction court further acknowledged that the trial was originally scheduled for July 6, 1998, but, immediately prior to the commencement of the trial, defense counsel sought and was granted a continuance. Later that day, after an extensive hearing, the petitioner entered a plea of guilty to first degree murder. After further questioning, the petitioner waived his right to have a jury impose punishment. A capital sentencing hearing was conducted one (1) week later. At the conclusion of which, the trial court imposed a sentence of death.

The post-conviction court acknowledged the petitioner's claims regarding the ineffective assistance of trial and appellate counsel. In this regard, the post-conviction court made the following findings of fact and conclusions of law:

> First, this case occurred before Rule 13 of the Supreme Court became applicable. Nevertheless, Mr. Mosier had experience in capital cases, and Mr. Johnston had impressed the Court with his legal acumen, despite his lack of experience. Secondly, there is nothing in the record to suggest that the Petitioner did not voluntarily, knowingly, and intelligently waive his right to a jury trial on the issue of punishment. The record indicates that he initially suggested to trial counsel that he plead guilty. Thirdly, there are very few factual issues of importance that are disputed. Lastly, the Court, having been the trier of fact during the punishment phase, is in a unique position to be able to hear any additional mitigating evidence and weight [sic] it against the evidence at trial. This is important in determining whether any additional mitigating evidence would have changed the Court's sentence.
>
> ***21** [T]he Court finds that Petitioner was not denied effective assistance of counsel. Counsel filed all the appropriate motions. Counsel was provided with expert services. Counsel allowed the investigative and mitigation expert to conduct their investigation and report to counsel their findings. It is true that trial counsel was not aware

of all the history of mental illness in the Petitioner's family. Also true was that counsel was not completely aware of some of the violent events that the Petitioner engaged in shortly before this incident. It is true that counsel was aware from the expert clinical psychologist that Petitioner was diagnosed with a personality disorder, not otherwise specified, with narcissistic traits. However, their expert did not see any bipolar tendency, and counsel, under the circumstances, acted in a competent manner in presenting this psychological proof to the Court. It is true that counsel's mitigation expert did not make as an extensive mitigation investigation as Post-conviction mitigation expert opined was necessary. However, two points need to be addressed. One, there was a mitigation investigation and a review of the trial transcript revealed that various witnesses testified on Petitioner's behalf in an effort to produce mitigation. Secondly, the Court places little weight on the testimony of Petitioner's mitigation expert, especially when he opined that it would take two to three years to do a proper mitigation investigation. Lastly, as trial counsel stated, this was a case where finding mitigation was difficult, and as explained hereinafter, also a double-edged sword. Therefore, the Court concludes that counsel was not ineffective.

....

The Court can now look to the additional mitigation proof offered at this hearing in assessing whether the result would have been different.... The Petitioner was a normal student in grammar and high school. He was a talented basketball player and had a talent for art. About two years prior to this event, his behavior changed. He became violent. He viciously assaulted one girlfriend. He was convicted of some lesser felonies. Thereafter, he abducted the mother of his girlfriend on several occasions while masked. He also raped the mother. Petitioner's clinical psychologist opined that he had a personality disorder, but did not ... disagree with trial counsel's clinical psychologist, other than she administered more tests. Finally, Dr. Kenner diagnosed the Petitioner as bipolar.... Dr. Kenner opined that in order to fully explain the nature of Petitioner's bipolar diagnosis, the trier of fact would have to hear all the details of Petitioner's various assaults, abductions and rapes.

....

[T]he statutory aggravating circumstances ... by the State were simply overwhelming. The Court considered the mitigating testimony, especially the testimony regarding this personality disorder. This proffered new mitigating testimony regarding Dr. Kenner's bipolar diagnosis, only reinforces the Court's opinion that the aggravating circumstances outweighed, in fact overwhelmed, any mitigating evidence.... The Court is assuming ... that Dr. Kenner's diagnosis is correct. Had this testimony been offered at the trial, the State, of course, would have had the opportunity to rebut same.... Secondly, the evidence presented regarding the defendant's abduction of his girlfriend's mother, the rapes, the assaults, lead the Court to the conclusion that the Petitioner's acts were calculated, cold and deliberate. These are the same calculated and deliberate actions that led to the death of Tommy Bishop. Whether or not they were the result of a bipolar condition would not have changed the Court's decision to impose a sentence of death.

***22** Lastly, Appellate counsel was not ineffective given the history of the case. The only viable issue to appeal was pre [sic] portionality.

Post-Conviction Standard of Review

Post-conviction relief is only warranted when a petitioner establishes that his or her conviction is void or voidable because of an abridgement of a constitutional right. Tenn.Code Ann. § 40-30-103. The petition challenging the conviction for first-degree murder herein is governed by the 1995 Post-Conviction Act, which requires that allegations be proven by clear and convincing evidence. *See* Tenn.Code Ann. § 40-30-110(f). Evidence is clear and convincing when 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).

Once the post-conviction court has ruled upon a petition, its findings of fact are conclusive on appeal unless the evidence in the record preponderates against them. *Wallace v. State,* 121 S.W.3d 652, 656 (Tenn.2003); *State v. Nichols,* 90 S.W.3d 576, 586 (Tenn.2002) (citing *State v. Burns,* 6 S.W.3d 453, 461 (Tenn.1999)). This Court may not reweigh or reevaluate the evidence or substitute its inferences for those drawn by the post-conviction court. *Nichols,* 90 S.W.3d at 586. Questions concerning the credibility of witnesses and the weight to be given their testimony are for resolution by the post-conviction court. *Id.* (citing *Henley v. State,* 960 S.W.2d 572, 579 (Tenn.1997)). Notwithstanding, determinations of whether counsel provided a defendant constitutionally

deficient assistance present mixed questions of law and fact. *Wallace,* 121 S.W.3d at 656; *Nichols,* 90 S.W.3d at 586. As such, our review is *de novo,* and we accord the conclusions reached below no presumption of correctness. *Wallace,* 121 S.W.3d at 656, *Nichols,* 90 S.W.3d at 586.

I. Issues Waived by Guilty Plea and/or Failure to Raise Them on Direct Appeal

In this appeal, the petitioner raises a number of issues centering around both the trial court's refusal to recuse itself during both the guilt and the sentencing phase as well as constitutional error with the imposition of the death penalty. Specifically, with regard to the death penalty, the petitioner argues that: (1) his sentence of death violates international law; (2) his sentence of death violates due process; (3) his waiver of jury sentencing was invalid; (4) the death penalty itself is unconstitutional; and (5) the system of appointing capital defense counsel is unconstitutional. 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 it 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 the failure to present the ground "was the result of state action in violation of the federal or state constitution." Tenn.Code Ann. § 40-36-106(g). Neither of the exceptions is present herein. Further, the petitioner pled guilty. A guilty plea waives all non-jurisdictional constitutional inequalities. See *State v. McKinney,* 74 S.W.3d 291 (Tenn.2002). Thus, these issues are waived. Accordingly, the only remaining issues properly before this Court involve the trial court's failure to recuse itself at the post-conviction proceeding, the effectiveness of trial and appellate counsel, and the post-conviction court's decision to exclude the testimony of Kelly Gleason.

II. Recusal of the Court at the Post-conviction Level

***23** The petitioner complains that the post-conviction judge erred in failing to recuse himself from the post-conviction proceedings. As basis for recusal, the petitioner asserts that: (1) the judge predetermined post-conviction issues at the petitioner's original trial; (2) the post-conviction judge demonstrated bias by its attitude and behavior regarding defense witness Dr. Einstein; (3) the post-conviction judge refused to permit the defense to call his secretary as a witness so as to not disrupt its office, although defense counsel had properly subpoenaed her; and (4) the judge's disparate treatment of witnesses.

In support of these claims, the petitioner offers the following. The petitioner alleges that the judge began predetermining post-conviction issues during the original trial of this matter. Specifically, the petitioner cites to the trial judge's questioning of Ms. Fenyes with hypothetical questions regarding whether there was sufficient mitigation investigation to support a finding that trial counsel was effective. The petitioner further asserts that the judge's pre-determination of counsel's effectiveness is evidenced by the post-conviction judge's conduct during the testimony of Dr. Frank Einstein, the post-conviction defense mitigation specialist. The petitioner claims that the trial judge took notes during Dr. Einstein's testimony and contemporaneously "smiled" at the prosecutors. The petitioner also cites to the post-conviction judge's questioning of Dr. Einstein concerning his change of careers from a teacher to the more lucrative career of a sentencing mitigation specialist. The following is an excerpt from the post-conviction judge's questioning of Dr. Einstein:

> THE COURT: I wonder why you left the position [teaching] at Fisk to go into the criminal justice system.
>
> DR. EINSTEIN: Well, there were very many reasons. I made a career change at that time. To continue teaching, I would have had to have moved around, you know, out of Nashville. And by that time my wife and I had two small children. And this, an opportunity came up which I decided to take advantage of.
>
> THE COURT: Would it also be fair to say that about that time that the criminal justice system's compensation became more lucrative?
>
> DR. EINSTEIN: I don't know about that.
>
> THE COURT: Would it be fair to say that since 1997, when Tennessee has adopted the federal rules which have all these funds for mitigation experts and so forth, that your income has greatly increased since 1997?
>
> DR. EINSTEIN: I don't think it has greatly increased.
>
> THE COURT: If you go and you interview four or five witnesses and you find no mitigation or nothing to help you, one of the reasons that you would continue to try to find

mitigation experts is if you're being paid, the cash register will continue to run, won't it?

DR. EINSTEIN: That wouldn't be the reason. The reason would be that I would have taken on the commitment to do a task and there being four or five people in that task.

***24** The petitioner also challenges the post-conviction judge's refusal to allow post-conviction counsel to call Becky Pitts, the judge's secretary, as a witness. Ms. Pitts had been properly subpoenaed by post-conviction counsel. Ms. Pitts' testimony was allegedly necessary in regards to a letter sent by the petitioner to the trial judge requesting new attorneys. Despite the petitioner's protest to the contrary, the post-conviction judge stated that anything relating to the petitioner's letter was already contained in the record and there was no need for more evidence about that issue. The post-conviction judge further stated that "it is disrupting my office for her to be over here." When post-conviction counsel argued that the petitioner had a right to confront and to present testimony in his behalf, the post-conviction judge responded that "I rule that Ms. Pitts' testimony is not relevant."

Additionally, although not specifically challenged by the petitioner, the record indicates that the post-conviction judge was a witness in this case. Post-conviction counsel announced their intent to call the post-conviction judge as a witness. The following colloquy occurred:

MR. DAWSON: Your Honor, we do have some questions that we intended to ask the Court ... that we indicated that we needed the Court as a witness. We do have questions for the Court, if the Court would allow that.

THE COURT: It's never happened before, I suppose. All right, sir.

Swear me, Mr. German.

GENERAL FREELAND: Your Honor, I think I'm going to object unless there's some waiver on the part of the petitioner that this will not be in itself a basis for recusal of Your Honor. It seems to me that this is all part of the process that's been renewed today from yesterday to have Your Honor recuse himself. And if you're called by him as a witness and he says-

THE COURT: I think I have to recuse myself.

GENERAL FREELAND: Yes, sir. Your Honor, I understand his basis, ... for Your Honor to recuse yourself, in which Your Honor has already ruled. But if a further basis is going to be that Your Honor is a witness, I'm going to object to his calling you as a witness.

THE COURT: All right, sir.

MR. DAWSON: Your Honor, that was, of course, what we had indicated prehearing or at the beginning of the hearing, is that we would need to call the Court as a witness, and that was, of course, one of the grounds that we gave for recusal. The Court denied that motion, and we still need the Court as a witness.

GENERAL FREELAND: I take that as a waiver, Your Honor.

MR. DAWSON: Your Honor, I don't think that's a waiver. We made the motion. We had indicated the Court needed to recuse itself for that reason. The Court refused to. I think [the petitioner] still needs the Court as a witness, and if that means the Court cannot then do the opinion in this case, then that's where we are in this matter.

GENERAL FREELAND: Yes, sir. And, Your Honor, rather than this just be[ing] a fishing expedition, since this is unprecedented as far as I know, I'd like to have some sort of offer of proof as to what Mr. Dawson is going to ask.

***25** THE COURT: Yes, sir.

The judge was sworn and testified regarding his legal career and political aspirations. Post-conviction counsel questioned the judge regarding the in-chambers conference with Ms. Fenyes. In this regard, the judge responded that there had been no objection to this procedure by trial counsel. He related that the in-chambers conference was limited to a discussion regarding how much more time Ms. Fenyes would need to procure mitigation evidence. At the conclusion of this testimony, post-conviction counsel unsuccessfully renewed the motion for the court's recusal.

A fair trial in a fair tribunal is a basic requirement of due process. The principles of impartiality, disinterestedness and fairness are fundamental concepts in our jurisprudence. *See State v. Bondurant,* 4 S.W.3d 662, 668 (Tenn.1999) (quoting *State v. Lynn,* 924 S.W.2d 892, 898 (Tenn.1996)). Article I, Section 17 of the Tennessee Constitution and the Fourteenth Amendment to the United States Constitution guarantee all litigants a hearing before an impartial decision-maker. *In re Cameron,* 126 Tenn. 614, 151 S.W. 64, 76 (1912); *see also Tumey v. Ohio,* 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed.

749 (1927) (stating that "every procedure which would offer a possible temptation to the average man as a judge [to forget the burden of proof required to convict the defendant, or which might lead him] not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law"). Article VI, Section 11 of the Tennessee Constitution states that judges cannot participate in cases in which they might have even the slightest interest. *Neely v. State,* 63 Tenn. 174, 182 (1874). A similar restriction appears in Tennessee Code Annotated section 17-2-101(1). The purpose of these provisions is to guard against the prejudgment of a litigant's rights and to avoid situations in which the litigants might believe that the court reached a prejudiced conclusion because of interest, partiality or favor. *Chumbley v. Peoples Bank & Trust Co.,* 165 Tenn. 655, 57 S.W.2d 787, 788 (Tenn.1933). A trial before a biased or prejudiced judge is a denial of due process. *Wilson v. Wilson,* 987 S.W.2d 555, 562 (Tenn.Ct.App.1998).

Judges must not only be impartial, but also appear impartial because judicial fairness is violated when the appearance of fairness is ignored. *See State ex rel. McFerran v. Justice Court of Evangeline Starr,* 32 Wash.2d 544, 202 P.2d 927 (Wash.1949). This is not merely an idealistic sentiment. Deference to the judgments and rulings of the courts depends upon public confidence in the integrity and independence of the judges that make them. As our supreme court has acknowledged:

> It is of lasting importance that the body of the public should have confidence in the fairness and uprightness of the judges created to serve as dispensers of justice. The continuance of this belief, so long entertained by the people of this country, and so well warranted by the history of the judiciary as a body, is largely essential to the future existence of our institutions in their integrity.

***26** *In re Cameron,* 151 S.W. at 76. Since what the public perceives may be substantially different from what actually exists, it is the appearance of impartiality that will often undermine or resurrect society's faith in the judicial system. *See Bondurant,* 4 S.W.3d at 668 (quoting *State v. Lynn,* 924 S.W.2d 892, 898 (Tenn.1993) (citing *Offutt v. United States,* 348 U.S. 11, 14, 75 S.Ct. 11, 99 L.Ed. 11 (1954))). Thus, "justice must satisfy the appearance of justice." *Id.*

Canon 2A, Tennessee Supreme Court Rule 10, requires judges to conduct themselves "at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Similarly, Canon 3(E)(1), Tennessee Supreme Court Rule 10, requires judges to disqualify themselves in cases where their "impartiality might reasonably be questioned." The strict application of Canon 3(E)(1) may result in the disqualification of a judge who has no actual bias and who believes that he or she can try a case fairly. *See In re Murchison,* 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955). The test is not whether the judge believes he or she can be impartial but rather whether others might reasonably question the judge's impartiality. *Lackey v. State,* 578 S.W.2d 101, 104 (Tenn.Crim.App.1978). Thus, even where a just result is achieved, the appearance of justice is lost when the judge appears biased or partial to one party. *See generally Offutt,* 348 U.S. at 14 (stating that "justice must satisfy the appearance of justice").

A trial judge should recuse himself or herself whenever the judge has any doubt as to his or her ability to preside impartially or whenever his or her impartiality can reasonably be questioned. *Pannell v. State,* 71 S.W.3d 720, 725 (Tenn.Crim.App.2001). This is an objective standard. *Alley v. State,* 882 S.W.2d 810, 820 (Tenn.Crim.App.1994). The appearance of impropriety is conceptually distinct from the subjective approach of a judge facing a possible disqualification challenge and does not depend on the judge's belief that he or she is acting properly. *See Liteky v. United States,* 510 U.S. 540, 553, n. 2, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994) (determining that "[t]he judge does not have to be subjectively biased or prejudiced, so long as he appears to be so"). "Thus, while a trial judge should grant a recusal whenever the judge has any doubts about his or her ability to preside impartially, recusal is also warranted when a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality." *Alley,* 882 S.W.2d at 820. The trial judge retains discretion over his or her recusal. *State v. Smith,* 906 S.W.2d 6, 11 (Tenn.Crim.App.1995). Unless the evidence in the record indicates that the failure to recuse was an abuse of discretion, this Court will not interfere with that decision. *State v. Hines,* 919 S.W.2d 573, 578 (Tenn.1995).

It is difficult, if not impossible, for an appellate court to conduct a meaningful review of a trial court's discretionary decision without knowing the basis for the trial court's action. In no circumstance is this more true than when the impartiality of a judge is in question. In these cases, it is simply not sufficient for an appellate court to presume that there exists adequate support for the trial court's decision. The integrity of our judicial system demands actual reviewability in these matters. Thus, an appellate court must view the facts and circumstances through the eyes of the average man on the street.

***27** The issue of a post-conviction judge's partiality or the appearance of it when the judge himself testifies was addressed previously by this Court in *Harris v. State,* 947 S.W.2d 156 (Tenn.Crim.App.1996). In *Harris,* the petitioner sought the recusal of the post-conviction judge because: (1) the judge was seeking the office of the United States Senator; (2) the judge was a material witness with respect to the issues raised in the post-conviction proceeding; and (3) the impartiality of the judge could reasonably be questioned. *Harris,* 947 S.W.2d at 171. Specifically, the petitioner argued that the post-conviction judge had personal knowledge of disputed facts because he served as the trial judge. *Id.* Although not contained in this Court's opinion, it appears that the post-conviction judge made comments during the post-conviction proceedings that led the petitioner to believe that he was biased in favor of the State. While acknowledging that a trial judge cannot both preside at a post-conviction proceeding and serve as a witness in that proceeding, this Court concluded that "the judge was not a significant source of information at the hearing, nor was the judge's decision ultimately influenced by that information." *Id.* at 173. This Court also noted that adverse rulings are usually an insufficient basis upon which to find bias. *Id.* While not condoning the judge's actions and remarks at the post-conviction hearing, this Court concluded that the judge's conduct did not "diminish the overall fairness of the proceeding, even applying the heightened standards of due process applicable in a capital case." *Id.* (internal citations and footnote omitted).

In the present case, the petitioner asserts that the post-conviction court advocated the State's interests by openly attacking the credibility of Dr. Einstein and by refusing to permit the petitioner to call the judge's secretary as a witness. He contends that these actions are exacerbated by the trial court's apparent pre-determination of post-conviction issues during the trial proceedings and the post-conviction judge's disparate treatment of witnesses.

At the conclusion of Dr. Einstein's testimony, the post-conviction judge questioned Dr. Einstein about his motives for changing careers from teaching at a university to becoming a mitigation specialist and sentencing consultant. The petitioner argues that, by questioning the witness at length, taking notes during his testimony and "smiling" at the prosecutor during the testimony, the post-conviction judge created the appearance that he was taking sides.

A trial judge ordinarily has a duty to question a witness to clarify any issues for the jury. *See State ex rel. Com'r Dept. of Trans. v. Williams,* 828 S.W.2d 397, 403 (Tenn.Ct.App.1991). In the case herein, however, there was no jury. In *Bowling v. Commonwealth,* 80 S.W.3d 405 (Ky.2002), the Kentucky Supreme Court upheld the trial court's refusal to recuse itself after the trial court questioned certain witnesses at length. The defendant in *Bowling* posited an argument similar to the petitioner herein, that, by questioning the witnesses, the trial court became a material witness at the hearing and should have recused itself. *Id.* at 420. The supreme court of Kentucky disagreed with the argument, determining that in most cases, the judge's actions could have had a negative impact on a jury, but that, in the absence of a jury, there were no jury impact concerns. *Id.* Further, the court determined that the trial court did not "exceed its authorization to interrogate witnesses." *Id.* We agree. The trial judge presided over the post-conviction hearing, without a jury, and even though he questioned the witness at length without a jury there can be no argument that the trial judge's actions prejudiced the petitioner. Unquestionably trial judges as human beings may often find themselves forming opinions as to the credibility of witnesses. While expressing those sentiments before a jury may give rise to concern that the trial judge's statements or actions have prejudiced the finder of fact, this concern is not present where the trial judge is the trier of fact. We conclude that it was not error for the post-conviction judge to fail to recuse himself for questioning Dr. Einstein.

***28** The petitioner also argues that the post-conviction judge at trial predetermined post-conviction issues concerning the effectiveness of counsel, specifically by sending a letter to defense counsel to acknowledge his participation in such a "thankless task" and by noting on the form for first degree murder cases required to be completed by the trial court pursuant to Tennessee Supreme Court Rule 12, that trial counsel's representation had been "[v]ery capable." While the

statements about trial counsel were clearly complimentary, the statements were made well before any claim of ineffective assistance of counsel had been presented. This Court will not infer from those comments alone that the trial court could not be impartial in a subsequent post-conviction claim. *See Thomas E. Montooth v. State,* No. 01C01-9604-CC-00126, 1997 WL 381907, at *2 (Tenn.Crim.App., at Nashville, Jul. 11, 1997), *perm. app. denied* (Tenn.1998) (determining that trial judge who had been complimentary of trial counsel's performance did not abuse its discretion in failing to recuse himself from a post-conviction claim alleging ineffective assistance of counsel).

On the whole, we find the facts before this Court similar to those presented in *Harris*. While we do not sanction the conduct of the post-conviction judge, specifically his participation as a witness, we conclude that the judge's conduct did not diminish the overall fairness of the proceeding. Nevertheless, while not requiring a reversal in this case, a judge's continued role as presiding over a proceeding in which he or she is or is likely to become a witness is a course fraught with peril and should be avoided whenever possible. *See* Tenn. R. Evid. 605 (providing that a judge may not testify in a trial over which the judge is presiding).

III. Challenges to the Post-Conviction Court's Findings

A. Standard of Review

The petitioner contends that a contradiction exists in the current status of the law governing review of ineffective assistance of counsel claims. In *State v. Burns,* 16 S.W.3d 453 (Tenn.1999), our supreme court held that a claim of ineffective assistance of counsel is a mixed question of law and fact. *See Burns,* 6 S.W.3d at 461. In *Fields v. State,* 40 S.W.3d 450 (Tenn.2001), our supreme court explained the standard of review in cases of ineffective assistance of counsel:

> [A post-conviction] court's findings of fact underlying a claim of ineffective assistance of counsel are reviewed on appeal under a *de novo* standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. However, a [post-conviction] court's conclusions of law-such as whether counsel's performance was deficient or whether that deficiency was prejudicial-are reviewed under a purely *de novo* standard, with no presumption of correctness given to the [post-conviction] court's conclusions.

Id. at 458 (citations omitted).

***29** In clarifying the standard, our supreme court noted that the standard for reviewing the factual findings of a trial court has always been in accordance with the requirements of the Rules of Appellate Procedure. *See Id.* at 456.

Petitioner asserts that the standard utilized in *Henley v. State,* 960 S.W.2d 572, 578 (Tenn.1997), which states the post-conviction court's findings are given the "weight of a jury verdict," cannot be reconciled with the Rule 13(d) standard "*de novo* upon the record of the trial court, accompanied by a presumption of correctness." The petitioner then contends that this Court must apply the more relaxed *de novo* standard of review espoused in *Fields.* First, we note that the *Henley* standard invoked the Rules of Appellate Procedure regarding standards to be applied upon review. *Henley,* 960 S.W.2d at 578-79. Additionally, both the *Henley* and the *Fields* standards of review presume the trial court's findings are correct unless the evidence preponderates otherwise. *See Fields,* 40 S.W.3d at 458; *Henley,* 960 S.W.2d at 578. Finally, this Court is perplexed by the petitioner's complaint because the standard he seeks imposed *is* the standard employed by the appellate courts of this state.

B. Findings of Post-Conviction Court Not Supported by a Preponderance of the Evidence

The petitioner next asserts that the post-conviction court's findings are not entitled to the presumption of correctness because its findings are not supported by a preponderance of the evidence. In support of his argument, the petitioner relies upon several statements in the trial court's order to support his allegation:

(1) Post-conviction court's recitation of the underlying facts of the murder, specifically the court's characterization of the actions of Dr. Cima as "quick thinking." Petitioner asserts that this characterization demonstrates the fact that the court's concern was on the death of Deputy Bishop and not on the claims for relief from an unconstitutional conviction and sentence;

(2) Post-conviction court's description of the sentencing hearing as "long." Petitioner asserts that the sentencing hearing was conducted in one day and consists of 214 pages of trial transcript.

(3) Post-conviction court summarily concluded that the post-conviction petition revolves around trial counsel's deficiencies in the mitigation stages of the proceeding. Petitioner asserts that the court ignored other issues raised. Petitioner further asserts that the post-conviction court applied an erroneous standard and incorrectly stated that Petitioner's argument was that bipolar disorder would have been a mitigating factor.

(4) Post-conviction court erroneously concluded that Petitioner voluntarily waived his right to a jury trial on the issue of punishment.

(5) Post-conviction court erroneously concluded that "[c]ounsel filed all appropriate motions;" "[c]ounsel allowed the investigative and mitigation expert to conduct their investigation and report to counsel their findings;" counsel "acted in a competent manner in presenting the psychological proof to the Court."

***30** (6) Post-conviction court disregarded testimony of Dr. Frank Einstein, the Petitioner's expert as to mitigation investigation.

(7) Post-conviction court mischaracterized Dr. Auble's testimony.

(8) Post-conviction court's treatment of Dr. Kenner's diagnosis and testimony is "frankly astonishing."

The statements relied upon by the petitioner to support his assertion that the evidence preponderates against the post-conviction court's findings do not constitute viable challenges to the veracity of the lower court's findings of fact. Specifically, Petitioner's first three (3) claims are attacks against the court's choice of words. The terminology employed by the lower court does not affect the accuracy of the court's factual findings. In this regard, this challenge to the presumption of the lower court's findings fails. Similarly, the petitioner's allegations that the post-conviction judge improperly characterized all ineffective claims as claims attacking counsel's failure to prepare for mitigation, that the court mischaracterized Dr. Auble's testimony, and that the court discredited Dr. Kenner's testimony fail to impact the propriety of the court's factual findings. The petitioner has merely challenged the trial court's characterization of the evidence; he has failed to assert that the actual evidence preponderates against the factual findings. Finally, we conclude that the remainder of the petitioner's challenges to the "presumption of correctness" are actually challenges to the post-conviction court's "conclusions of law" concerning trial counsel's effectiveness and/or the voluntariness of the petitioner's plea and the submission of the punishment issue to the trial court. This Court reviews these issues *de novo* with no presumption of correctness and will do so as such issues are raised *infra.*

IV. Ineffective Assistance of Counsel

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 defense." 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, 350, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (quoting *Betts v. Brady,* 316 U.S. 455, 465, 62 S.Ct. 1252, 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, 25 L.Ed.2d 763 (1970); *see also Strickland v. Washington,* 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, the petitioner bears the burden of showing that (a) the services rendered by trial counsel were deficient and (b) that the deficient performance was prejudicial. *See Powers v. State,* 942 S.W.2d 551,558 (Tenn.Crim.App.1996). In order to demonstrate deficient performance, the petitioner must show that the services rendered or the advice given was below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose,* 523 S.W.2d 930, 936 (Tenn.1975). In order to demonstrate prejudice, the petitioner must show that there

is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *See Strickland,* 466 U.S. at 694. "Because a petitioner must establish both prongs of the test to prevail on a claim of ineffective assistance of counsel, failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim." *Henley,* 960 S.W.2d at 580.

***31** As noted above, this Court will afford the post-conviction court's factual findings a presumption of correctness, rendering them conclusive on appeal unless the record preponderates against the court's findings. *See id.* at 578. However, as stated above, our supreme court has "determined that issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact ...; thus, [appellate] review of [these issues] is *de novo* " with no presumption of correctness. *Burns,* 6 S.W.3d at 461.

Furthermore, on claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight. *See Adkins v. State,* 911 S.W.2d 334, 347 (Tenn.1994). This Court may not second-guess a reasonably-based trial strategy, and we cannot grant relief based on a sound, but unsuccessful, tactical decision made during the course of the proceedings. *See id.* However, such deference to the tactical decisions of counsel applies only if counsel makes those decisions after adequate preparation for the case. *See Cooper v. State,* 847 S.W.2d 521, 528 (Tenn.Crim.App.1992).

Once a guilty plea has been entered, effectiveness of counsel is relevant only to the extent that it affects the voluntariness of the plea. In this respect, such claims of ineffective assistance necessarily implicate the principle that guilty pleas be voluntarily and intelligently made. *See Hill v. Lockhart,* 474 U.S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) (citing *North Carolina v. Alford,* 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)). As stated above, in order to successfully challenge the effectiveness of counsel, the petitioner must demonstrate that counsel's representation fell below the range of competence demanded of attorneys in criminal cases. *See Baxter,* 523 S.W.2d at 936. Under *Strickland,* 466 U.S. at 687, the petitioner must establish deficient representation and prejudice resulting from the deficiency. However, in the context of a guilty plea, to satisfy the second prong of *Strickland,* the petitioner must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill,* 474 U.S. at 59; *see also Walton v. State,* 966 S.W.2d 54, 55 (Tenn.Crim.App.1997). 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 (Tenn.1997) (citing *Strickland,* 466 U.S. at 695).

A. Claims Before this Court

On appeal, the petitioner claims that trial counsel, Michael Mosier and Andrew Johnston, failed to function as effective counsel as guaranteed by both the Tennessee and United States Constitutions. In this regard, the petitioner asserts that Mr. Mosier and Mr. Johnston denied him effective assistance of counsel by breaching acceptable standards for capital representation in that:

***32** (1) Mr. Johnston was not qualified to represent Petitioner in a capital proceeding;

(2) Trial counsel failed to provide timely and sufficient funding for a mitigation specialist and failed to monitor and direct the mitigation investigation;

(3) Trial counsel failed to develop a relationship with the Petitioner, failed to consult with the Petitioner and failed to involve Petitioner in the preparation of the defense;

(4) Trial counsel was ineffective in permitting Petitioner to enter a guilty plea and waive jury sentencing;

(5) Trial counsel failed to pursue a change of venue;

(6) Trial counsel failed to inform themselves of developments in capital litigation; and

(7) Trial counsel failed to develop and make use of mitigation evidence. Trial counsel failed to present evidence that Petitioner was a good father and for failing to present other good acts of the Petitioner.

We proceed to review each of the petitioner's arguments and analyze them in light of trial counsel's conduct and performance.

1. Mr. Johnston was not qualified to represent the petitioner in a capital proceeding.

The petitioner asserts that Andrew Johnston, second chair counsel, was not qualified to represent him in a capital proceeding. While the petitioner acknowledges that appointment in this case was made prior to the effective date of the standards for appointment of counsel contained in the current version of Rule 13, Rules of the Tennessee Supreme Court, he asserts that the necessary qualifications of counsel in capital cases was standard. *See* ABA *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (February 1989). The petitioner asserts that Mr. Johnston "did not come close to meeting these standards." In support of this position, the petitioner relies upon a letter from the trial court to lead counsel dated June 3, 1997, in which the court states, "I'm going to attempt to appoint a local lawyer this week, who can do most of your housekeeping, babysitting, and logistical work." The petitioner interprets this statement as inferring that the trial court was more interested in appointing someone to file documents and keep up with the docket, rather than appointing an attorney capable of assisting in the difficult and complex representation of an individual facing the death penalty.

The petitioner recognizes that the core question is whether Mr. Johnston's performance was deficient to the prejudice of the petitioner. He responds that the fact that he was only provided one qualified attorney to his capital defense amounted to *per se* deficient performance.

"[T]he Sixth Amendment does not grant a defendant, who does have the absolute and unqualified right to appointed counsel, the additional right to counsel of his own choosing." However, since *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), it has become apparent that special skills are necessary to assure adequate representation of defendants in death penalty cases. *See* ABA, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* at 5.1. However, there is no presumption that counsel is ineffective because of lack of experience in trying a particular kind of case. *See Russell v. State,* 849 So.2d 85, 122 (Miss.2003).

***33** At the time of appointment in the present case, there was no specific criteria required of an attorney prior to receiving appointment in a capital case. Indeed, prior to July 1, 1997, the rule merely provided, "[i]n a capital case two attorneys *may* be appointed for one defendant." Tenn. Sup.Ct. R. 13, § 1 (prior to amendment in 1997) (emphasis added); *see also Brimmer v. State,* 29 S.W.3d 497, 503 (Tenn.Crim.App.1998). Thus, under the applicable rule, the petitioner was not entitled to second chair counsel as of right. Moreover, no qualifying criteria was specified as to lead counsel. While we recognize that ABA standards as to capital representation were in place at the time of the appointment and while it must be conceded that Mr. Johnston failed to satisfy all of the suggested criteria established by the ABA, these guidelines are not binding upon the trial courts of this state. The trial court appointed Mr. Johnston as second-chair counsel, noting that the court had been impressed with Mr. Johnston's "legal acumen." Accordingly, the petitioner's argument that Mr. Johnston's lack of experience results in *per se* deficient performance is not supported in law.

In addition to Mr. Johnston's failure to satisfy any criteria relating to the appointment of capital counsel, the petitioner cites to numerous other factors indicating that his lack of experience constituted deficient performance, for example: (1) counsel did not have any experience in working with experts; (2) counsel failed to timely secure sufficient funds for the mitigation specialist; and (3) lead counsel was not qualified to handle a capital case under Rule 13, Rules of the Tennessee Supreme Court. Again, we refuse to conclude that these allegations automatically result in a finding of deficient performance. A successful claim of ineffectiveness requires more than just a showing that trial counsel was inexperienced. Rather, the petitioner must demonstrate with specificity that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland,* 466 U.S. at 687. Even if a defendant meets this threshold, he or she must also prove that such error prejudiced the defense. *Id.* Furthermore, in the context of a guilty plea, the petitioner must show that there is a reasonable probability he would have not pleaded guilty if not for trial counsel's error. *Hill,* 474 U.S. at 59. We proceed therefore to examine the petitioner's specific allegations of deficient performance.

2. Counsel's performance as it related to obtaining funding for and monitoring the mitigation investigation.

Trial counsel's motions for court-appointed expert assistance were granted. The petitioner complains, however, that "[a]sking for services does not absolve defense counsel of the duty to properly utilize those services." The petitioner asserts that trial counsel failed to adequately and timely move for additional funds for the mitigation specialist. Specifically, he refers to the motion for continuance conducted on July 6, 1998, the day trial was scheduled to begin.

***34** At the motion for continuance, Ms. Fenyes testified that she had only spent forty (40) hours working on the case, noting specifically that she had only been granted funds to complete twenty (20) hours of work. She stated that it was not her policy to continue to work absent funding. As of July 6, 1998, Ms. Fenyes estimated that she needed to complete an additional thirty (30) to forty (40) hours of work to adequately prepare for this case. She added that funding for these services had not been approved until the week prior to the July 6 trial date.

Mr. Johnston informed the trial court that trial counsel "made application for additional funds on May, the 7th, in this case and Your Honor immediately signed those orders...." He explained that the request for funds was then forwarded to the Administrative Office of the Courts ("AOC") for the signature of the Chief Justice. Mr. Johnston later contacted the AOC to determine the status of the fund request, at which time, he was informed that the request had yet to be signed by the Chief Justice. From this point, Mr. Johnston spent the next "three weeks to four weeks ... calling up to the Chief Justice's office to determine where the orders were." He explained that his contact at the AOC was on vacation and that she was the only one that could assist him with funding requests. Mr. Johnston's office continued to make contact with the AOC regarding the status of the fund request. The Monday prior to July 6, the AOC contacted Ms. Fenyes, informing her that the requests "are going to be signed; go ahead; get it done."

The trial record does nothing to bolster the petitioner's assertion that counsel failed to timely file motions requesting funds and failed to file motions requesting sufficient funds. Counsel cannot be found deficient for actions beyond their control. The request was made two (2) months prior to the scheduled commencement of the trial. It was unforeseeable that the request would not be granted until two (2) months after its submission. The petitioner is not entitled to relief as to this claim. We also find without merit petitioner's two-sentence argument that "[h]ad defense counsel understood the development of mitigation and directed their experts they would have been able to supply information critical to reaching a reliable diagnosis of a serious bi-polar illness." The substance of this argument, regarding the lack of mitigation evidence, will be addressed *infra.*

3. Counsel failed to develop a relationship with the petitioner, failed to consult with the petitioner and failed to involve the petitioner in the preparation of a defense.

The petitioner contends that trial counsel failed to consult and involve the petitioner in the defense of his own life. He states that the limited visits between himself and his counsel prohibited either attorney from developing any type of relationship with the petitioner. Thus, the petitioner argues that he was precluded from developing a trusting relationship with the very people entrusted with his life. He adds that counsels' failure to consult with the petitioner prohibited them from monitoring the petitioner's mental health and prohibited the petitioner from being involved in his defense. This lack of contact with the petitioner also impacted counsels' relationship with the petitioner's mother, Sally Johnson. The fact that counsel failed to develop a relationship with Mrs. Johnson denied counsel critical information regarding the family dynamics and the existence of the petitioner's mental illness.

***35** The United States Supreme Court has stated that the right to counsel as guaranteed by the Sixth Amendment to the United States Constitution does not include "the right to a meaningful attorney-client relationship." *See Morris v. Slappy,* 461 U.S. 1, 13, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983). Indeed, the Court stated that "no court could possibly guarantee that a defendant will develop this kind of rapport with his attorney." *Id.*

According to the petitioner, Mr. Mosier met with him on at least six (6) occasions and Mr. Johnston met with the petitioner on at least four (4) occasions. The record reveals a large amount of correspondence between the petitioner and counsel. A large portion of this correspondence involved the petitioner's questions regarding the possibility of entering a guilty plea and the consequences of having the jury impose the sentence compared to having the judge impose the sentence. Mr. Mosier acknowledged that, on one occasion, it was brought to his attention that the petitioner was dissatisfied with their representation. Within several days of receiving this information, Mr. Mosier visited the petitioner at Riverbend. The petitioner expressed no further dissatisfaction with counsel until after a sentence of death was imposed by the trial court. Trial counsel cited no other occasions where they had difficulty with the petitioner. Rather, both trial counsel found the petitioner respectful and pleasant. At his guilty plea proceeding, the petitioner informed the

trial court that Mr. Mosier and Mr. Johnston had met with him and that he was satisfied with their representation. Finally, the petitioner failed to testify at the post-conviction evidentiary hearing. The petitioner has failed to demonstrate what he could have communicated to his attorney that would have aided in his defense had counsel established a greater level of communication. *See Lloyd v. State,* 669 N.E.2d 980 (Ind.1996); *cf. State v. Creech,* 132 Idaho 1, 966 P.2d 1, 19-20 (Idaho 1998), *cert. denied,* 526 U.S. 1147, 119 S.Ct. 2025, 143 L.Ed.2d 1036 (1999) (determining that it was not ineffective assistance of counsel where counsel did not spend a lot of time with a client who was unwilling to listen to counsel's advice). Moreover, there is nothing demonstrating that the petitioner was prohibited from effective communication with trial counsel. *See Washington v. Meachum,* 238 Conn. 692, 680 A.2d 262, 282 (Conn.1996) (holding that the right to assistance of counsel includes the right to communicate effectively with counsel in preparation of one's defense). Accordingly, he has failed to satisfy his burden of establishing that he did not have a working relationship with counsel. Further, the petitioner has not shown that he was prejudiced by his relationship with counsel or that had counsel spent more time with him, he would not have pled guilty and insisted on going to trial.

The petitioner also faults counsel for failing to develop a relationship with the petitioner's mother. The record indicates, as does the trial transcript, that the petitioner's mother was interviewed by the defense team. Her testimony, as well as that of other witnesses, indicates that Sally Johnson was defensive regarding claims against the petitioner and maintained his innocence, faulting others for mistakes that he had made. Additionally, the petitioner has failed to assert that his mother would have been more forthcoming had counsel "actively wooed" her. The petitioner's own post-conviction expert, Dr. Frank Einstein, described Mrs. Johnson as "very, very guarded." The petitioner has also failed to produce any family member, extended or otherwise, who provided insight into his alleged mental illness. Accordingly, we conclude there is no evidence that counsel would have gained insight into the petitioner's alleged mental illness if they had more actively pursued a relationship with the petitioner's mother. Petitioner is not entitled to relief as to this claim.

4. Trial counsel's advice to the petitioner to enter guilty plea and waive jury sentencing.

***36** The petitioner's trial was scheduled to commence on July 6, 1998. That morning, trial counsel moved for and was granted a continuance until August 17, 1998. Later that afternoon, the petitioner entered a guilty plea to first degree murder and waived jury sentencing in this matter. On appeal, the petitioner asserts that this action was permitted absent "serious evaluation by his counsel, thus, violating counsel's duty to investigate the case and intelligently advise [his] client." In support of his claim, the petitioner makes several assertions, including: (1) the petitioner received "absolutely nothing" in return for his pleading guilty; (2) trial counsel was misinformed in his belief that Judge Blackwood was "philosophically opposed to the death penalty;" (3) trial counsel acquiesced to the trial court's in camera proceeding with its mitigation expert, during which Ms. Fenyes informed the trial court that there was no significant mitigation evidence; and (4) trial counsel failed to attempt to obtain a change of venue.

As noted *supra,* under *Strickland,* 466 U.S. at 687, the petitioner must establish deficient representation and prejudice resulting from the deficiency. However, in the context of a guilty plea, to satisfy the second prong of *Strickland,* the petitioner must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill,* 474 U.S. at 59; *see also Walton,* 966 S.W.2d at 55. Under the first prong of the *Strickland* test, a defendant must show that his attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland,* 466 U.S. at 687. Moreover, in evaluating an ineffectiveness claim, this Court must presume that the "challenged action 'might be considered sound trial strategy.' " *Id.* at 689 (quoting *Michel,* 350 U.S. at 101). The petitioner bears the burden of overcoming this presumption. *Id.*

An attorney's advice to his client to waive the client's right to a trial by jury is a classic example of a strategic trial judgment, "the type of act for which *Strickland* requires that judicial scrutiny be highly deferential." *Hatch v. Oklahoma,* 58 F.3d 1447, 1459 (10th Cir.1995) (quoting *Green v. Lynaugh,* 868 F.2d 176, 178 (5th Cir.), *cert. denied,* 493 U.S. 831, 110 S.Ct. 102, 107 L.Ed.2d 66 (1989) (per curiam). It constitutes a conscious, tactical choice between two viable alternatives. *Hatch,* 58 F.3d at 1459 (citing *Carter v. Holt,* 817 F.2d 699, 701 (11th Cir.1987)); *United States v. Ortiz Oliveras,* 717 F.2d 1, 3 (1st Cir.1983) (holding that tactical decisions, whether wise or unwise, successful or unsuccessful, cannot ordinarily

form the basis of a claim of ineffective assistance of counsel). Thus, for counsel's advice to rise to the level of constitutional ineffectiveness, the decision to waive a jury must have been "completely unreasonable, not merely wrong, so that it bears no relationship to a possible defense strategy." *Hatch,* 58 F.3d at 1459.

***37** Regarding the decision to enter the guilty plea, it is beyond question that the evidence establishing the petitioner's guilt was overwhelming. Thus, Mr. Johnston recalled that they believed that the petitioner's guilty plea would be considered as a mitigating factor by the trial court. In relation to waiving jury sentencing, Mr. Johnston testified that "we thought it would be in Mr. Henderson's best interest to have the court do the sentencing." The opinion of the defense team was that Judge Blackwood was personally opposed to the death penalty, and this opinion was influential in guiding their advice to the petitioner. In hindsight, Mr. Johnston conceded that he "wish[ed] that a jury would have been empaneled and that they would have fought the case on the merits."

Mr. Mosier testified that the petitioner made inquiry as to the possibility of entering a guilty plea in December 1997. The petitioner penned at least three (3) or four (4) more letters discussing the advantages of entering a guilty plea. Mr. Mosier verified Mr. Johnston's opinion that Judge Blackwood was opposed to the death penalty. However, he testified that the decision of whether to waive a jury trial was left entirely to the petitioner. Trial counsel advised him of the advantages and disadvantages of waiving a jury in a capital sentencing trial. These factors included weighing the circumstances of this particular case, which included the senseless killing of a law enforcement officer. Mr. Mosier stated that the decision to waive jury sentencing and permit Judge Blackwood to impose the sentence was the best chance that the petitioner had to avoid the death penalty. Again is should be noted that the petitioner did not testify at the post-conviction evidentiary hearing, so there is no direct evidence in this record that but for counsel's alleged deficiencies he would not have pled guilty or submitted his case to the trial judge for sentencing.

Prior to entry of the plea, the trial court extensively questioned the petitioner regarding his decision to enter a guilty plea and to waive jury sentencing. This colloquy, which covers nearly twenty (20) full pages of transcript, reveals that the trial court made every attempt to discern that: (1) the petitioner was fully aware of and understood the nature of the charges and potential sentences against him; (2) the petitioner understood that he had the right to plead not guilty as to all of the charges and have a jury determine his guilt or innocence, explaining that a jury could find the petitioner guilty of some, all, or none of the charges; (3) the petitioner understood that he could be convicted of a lesser-included offense of the charged offense; (4) the petitioner understood that he had the right to have a jury determine his sentence if he was convicted of first degree murder; (5) the petitioner understood the nature and dynamics of a capital sentencing hearing; (6) the petitioner understood the impact of waiving his right to have a jury impose sentence in his first degree murder conviction; (7) the petitioner understood that, as part of the plea, the State would dismiss three counts of the indictment charging the petitioner with felony murder; (8) the petitioner had discussed the decision to enter a guilty plea and waive jury sentencing with his attorneys, (9) the petitioner was satisfied with the representation provided him by appointed counsel and by the appointed experts; and (10) the petitioner was not suffering from any mental illness or disorder. On at least five (5) separate occasions, the trial court asked the petitioner whether his decision to waive his right to a jury trial as to guilt and to waive his right to a jury trial as to capital sentencing were entered freely and voluntarily. The record preponderates against any conclusion that the petitioner had no knowledge as to the impact of his decision to enter guilty pleas and waive jury sentencing.

***38** A defendant asserting that his counsel was ineffective must show more than that counsel's advice was merely wrong. He must also show that it was completely unreasonable so that it bears no relationship to a possible defense strategy. *See Hatch,* 58 F.3d at 1459. Further, the petitioner must show that but for trial counsel's advice, he would not have pled guilty and would have insisted on going to trial. There is no dispute that the evidence establishing the petitioner's guilt as to the first degree murder of Deputy Bishop was overwhelming. Also, the petitioner has failed to establish that trial counsel's advice regarding entry of a guilty plea was unreasonable.

We are left to address counsel's advice regarding the decision to waive jury sentencing as to the punishment of first degree murder. In *People v. Montgomery,* 192 Ill.2d 642, 249 Ill.Dec. 587, 736 N.E.2d 1025 (Ill.2000), the Illinois Supreme Court addressed whether counsel's advice to a capital defendant to waive jury sentencing was deficient performance. In *Montgomery,* defense counsel advised the defendant to enter a guilty plea and waive jury sentencing in light of alleged assurances from the trial court that a sentence of death would not be imposed. *Montgomery,* 249 Ill.Dec. 587, 736 N.E.2d at 1033-34. The defendant entered guilty pleas to two (2)

murders and, following a bench trial for sentencing, the trial court imposed a death sentence. *Id.* at 1035. At the post-conviction evidentiary hearing, the trial judge and his court reporter denied making any assurances that a sentence less than death would be imposed upon defendant's entry of guilty pleas. *Id.* at 1035-36. The post-conviction court rejected counsel's allegations that the trial judge had made *ex parte* assurances regarding a sentence less than death. *Id.* at 1036. Regardless, the defendant stated that trial counsel had only informed him that this particular judge had never before sentenced a defendant to death in a bench proceeding, and that counsel therefore encouraged him to waive a jury for the sentencing hearing. *Id.* at 1037. This assertion by trial counsel was later proven untrue. *Id.* at 1039. Notwithstanding the mistaken beliefs and assertions of trial counsel, the Illinois supreme court found that trial counsel were not deficient in their advice to the defendant. *Id.; see also People v. Maxwell,* 173 Ill.2d 102, 219 Ill.Dec. 1, 670 N.E.2d 679 (Ill.1996) (determining that trial counsel's advice to waive jury for capital sentencing was not deficient). The Illinois Supreme Court acknowledged that counsel's belief that a judge was less likely than a jury to impose the death penalty is a legitimate ground on which to base jury waiver in a capital sentencing trial. *Montgomery,* 249 Ill.Dec. 587, 736 N.E.2d at 1038.

Similarly, in *Fields v. Gibson,* 277 F.3d 1203 (10th Cir.2002), the Tenth Circuit addressed whether counsel's advice to waive jury sentencing constituted deficient performance. Trial counsel believed that if the defendant accepted a blind plea that he would be sentenced to less than death. *Fields,* 277 F.3d at 1209. Her belief was based upon several conversations with the trial judge. *Id.* at 1209-10. Notwithstanding, there was no guarantee that the trial court would not impose a sentence of death. *Id.* at 1210. Counsel then persuaded defendant, with the assistance of several of his family members, to enter a guilty plea. *Id.* The trial court accepted the plea and after a bench sentencing hearing imposed a sentence of death. *Id.* Defendant later attempted to withdraw his plea, but his attempt was rejected by the trial court and the court's decision was upheld on appeal. *Id.* at 1211. The Tenth Circuit determined that the defendant's plea was voluntarily entered and that trial counsel's advice regarding the decision to waive jury sentencing did not constitute deficient performance. *Id.* at 1214-15. In finding counsel's advice not deficient, the court acknowledged that "[t]he fact that the desired result was not reached in this case does not render defense counsel ineffective." *Id.* at 1216 (citing *Fields v. State,* 923 P.2d 624, 635 (Okla.Crim.App.1996)).

***39** Lawyers are supposed to draw conclusions from all the evidence in a case and recommend what they think is in their clients' best interest. *Fields,* 277 F.3d at 1216. "The Supreme Court has recognized that because representation is an art and not a science, even the best criminal defense attorneys would not defend a particular client in the same way." *Id.* (quoting *Waters v. Thomas,* 46 F.3d 1506, 1522 (11th Cir.1995) (en banc)). The record indicates that trial counsel made no guarantee to the petitioner that the trial court would not impose a death sentence. The evidence against the petitioner was overwhelming, as was the evidence of the statutory aggravating factors. Moreover, it is clear from the colloquy at the guilty plea hearing that the petitioner was informed that the trial court could impose a sentence of life, life without parole, or death. Thus, the petitioner made a conscious decision between two (2) viable options. Without more, the petitioner has failed to prove that counsel's advice was completely unreasonable. He is not entitled to relief on this issue.

5. Trial counsel failed to adequately pursue a motion for change of venue.

Prior to trial, trial counsel filed a motion requesting a change of venue. At argument on the motion, trial counsel argued that:

> [D]ue to the extensive pretrial publicity; due to the nature of the case; the very fact that it's a death penalty case; due to the nature of Deputy Bishop ... being well-liked by everybody in this community.... We've attached copies of some newspaper articles in the Fayette County paper.... But the one headline that I think compels this Court to move this case from Fayette County is one attached, which is from the Wednesday, May 7, 1997 Edition, front page of the Fayette County Review, and the headlines show the photograph of Deputy Bishop. It shows a picture of a multitude of law enforcement vehicles, going ... to the funeral home.... And the headline says this: "County Mourns Loss of Deputy Bishop." ... I just don't feel like that Mr. Henderson can get a fair trial in Fayette County.

Mr. Mosier further related other media reports detailing the petitioner's history of escape attempts. The trial court denied the motion, reserving final ruling on the matter until the conclusion of the voir dire process. The trial court noted that, if at the conclusion of voir dire of the venire that it appeared that it would be difficult to get a jury in this case, the trial court would then move the case.

Again, counsel sought a change of venue and the trial court reserved final determination until it was shown that it would be impossible to impanel an impartial jury. The petitioner entered an informed and counseled guilty plea prior to the trial court's ruling on the motion to change venue. The petitioner has waived any claim regarding change of venue by virtue of his voluntary guilty plea. *See State v. McKinney,* 74 S.W.3d 291, 306 (Tenn.2002); *State v. House,* 44 S.W.3d 508, 513 (Tenn.2001); *See also Recor v. State,* 489 S.W.2d 64, 69 (Tenn.Crim.App.1972) (holding valid please of guilty waives issue of change of venue). The petitioner has failed to show that further efforts by counsel in seeking a change of venue would have created a situation where he would not have entered a guilty plea. Accordingly, the petitioner has failed to meet the standard for ineffective assistance of counsel in the guilty plea setting. Therefore, he is not entitled to relief as to this claim.

6. Trial counsel failed to inform themselves of developments in capital litigation.

***40** The petitioner next asserts that trial counsel were deficient by their failure to stay abreast of developments in capital representation. The petitioner argues that trial counsel's failures impaired their ability to work with experts properly and ensure that the experts were performing the necessary tasks. In support of his position, the petitioner asserts that both Mr. Mosier and Mr. Johnston admitted their deficiency regarding working with experts. The petitioner asserts that this deficiency resulted in the loss of vital mitigation evidence. As stated earlier, issues addressing the failure to present mitigation evidence will be addressed as such. Our review as to this claim is merely as to whether Mr. Mosier's and Mr. Johnston's failure to inform themselves of developments in capital litigation constituted deficient performance.

The record reflects that Mr. Mosier had previous experience in capital litigation. Additionally, his testimony established that he was familiar with the use of experts and that the experts in this matter were hand-selected by him. The petitioner has failed to make specific allegations referencing the developments in the area of capital litigation of which trial counsel was unaware. Rather, the petitioner relies upon alleged deficiencies in the area of mitigation proof. We refuse to adopt a *per se* finding of deficiency based upon an allegation of counsel's lack of knowledge regarding recent developments in the law, especially in light of the absence of any reference by the petitioner of what legal developments counsel was allegedly unaware. The petitioner is not entitled to relief as to this claim.

7. Trial counsel failed to develop and introduce mitigation evidence.

The petitioner asserts that trial counsel failed to adequately utilize the services of a mitigation specialist to prepare a social history and timeline relating to the petitioner's life. In support of his allegations, the petitioner relies upon the testimony of his expert, Dr. Frank Einstein, who testified that Ms. Fenyes, the mitigation specialist, spent less than 38.5 hours working on mitigation from the time of her appointment until June 30, 1998. Dr. Einstein calculated that Ms. Fenyes spent an additional 28.9 hours on the case from June 30, 1998, until July 6, 1998, the date of the petitioner's guilty plea. Dr. Einstein testified that Ms. Fenyes worked an additional 43.5 hours between the date of the guilty plea on July 6 and the sentencing hearing held on July 13.

The petitioner contends that he has established his assertion through the testimony of lay witnesses and the introduction of medical records. He argues that evidence existed that would have raised serious issues about the existence of a mental disease or defect and would have provided significant mitigation. Specifically, the petitioner asserts that the need for further psychiatric evaluation would have been triggered had the defense team secured information relating to the history of mental illness in his extended family members and the petitioner's behavior during the two (2) years prior to the murder of Deputy Bishop. In this regard, the petitioner relies upon the diagnosis of Dr. Kenner that the petitioner suffers from bipolar disorder 2.

***41** At the sentencing hearing, the defense team presented the testimony of four (4) witnesses. The petitioner testified that he was a twenty-four-year-old high school graduate and that he was the eldest of five (5) sons. Trial counsel introduced evidence of the petitioner's achievements in both elementary and high school, including fourteen (14) achievement awards from Central Elementary School during the period between 1985 and 1988 and two (2) awards related to the petitioner's participation in the Fayette County Athletic League. [1] The petitioner also testified to being very involved in extracurricular activities during high school, including the following: basketball team, 4-H Club president, student body

president, track and baseball. Miles Wilson, the principal of Fayette-Ware High School, further testified that the petitioner was an officer in the library club and a member of the Esquire club. He participated both as an athlete and a coach in the Fayette County Athletic League. The petitioner's talent as an artist was also explored, emphasizing that he had won a contest naming Sonic Restaurant's newspaper and drawing the cover for the paper and winning first place in an art contest with his drawing of the Fayette County Courthouse. The petitioner also testified that he drew the logo and designed the window for Somerville Electronics.

When testifying, the petitioner expressed his remorse and apologies to Deputy Bishop's family and to the Fayette County Sheriff's Department. He stated that, while incarcerated in Arkansas, he asked his mother to inquire as to obtaining him psychological help because "things that I was going through mentally wasn't normal." He stated that his mother contacted the sheriff but that nothing was done.

The petitioner's high school principal, Miles Wilson, stated that the petitioner was respectful to faculty members and that he had positive interaction with the other students, with the exception of two incidents. Mr. Wilson stated that the petitioner's mother was in denial that the petitioner could do anything wrong.

The petitioner's mother, Sally Johnson, testified that she was fifteen (15) years old when the petitioner was born. She did not marry the petitioner's father. She did not recall the petitioner having any problem with other students during high school, although she remembered one incident when the petitioner left the campus with his girlfriend. She also vaguely recalled the petitioner requesting psychological treatment. She could not recall what happened. Mrs. Johnson blamed the petitioner's girlfriend, Natonya Cobb, for his behavior.

Dr. Lynn Zager, a clinical psychologist, testified regarding her meetings and evaluations of the petitioner. She diagnosed the petitioner with a dissociative state, narcissitic traits and antisocial traits.

Trial counsel testified at the post-conviction hearing that they presented all of the mitigating evidence that they had collected. The petitioner now alleges that trial counsel was ineffective for failing to present a complete mitigation profile. His complaints include counsel's: (1) failure to interview extended family members to reveal a family history of mental illness; (2) failure to seek additional psychological evaluation to reveal a diagnosis of bipolar disorder; and (3) failure to complete investigation to sufficiently indicate marked change in behavior, including (a) a change in sleep patterns, (b) the fact that his victims were people that he knew, (c) exhibitions of depression, and (d) indication of religious ideation.

***42** 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, 93 L.Ed.2d 934 (1987); *see Eddings v. Oklahoma,* 455 U.S. 104, 113-15, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio,* 438 U.S. 586, 604-05, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion); *Zagorski v. State,* 983 S.W.2d 654, 657-58 (Tenn.1998); *Goad,* 938 S.W.2d at 369. The right that capital defendants have to present a vast array of personal information in mitigation at the sentencing phase, however, is constitutionally distinct from the question whether counsel's choice of what information to present to the jury was professionally reasonable.

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

To determine whether or not trial counsel was ineffective for failing to present mitigating evidence, the reviewing court must consider several factors. First, the reviewing court must analyze the nature and extent of the mitigating evidence that was available but not presented. *Goad,* 938 S.W.2d at 371 (citing *Deutscher v. Whitley,* 946 F.2d 1443 (9th Cir.1991); *Stephens v. Kemp,* 846 F.2d 642 (11th Cir.1988); *State v. Adkins,* 911 S.W.2d 334 (Tenn.Crim.App.1994); *Cooper v. State,* 847 S.W.2d 521, 532 (Tenn.Crim.App.1992)). Second, the court must determine whether substantially similar mitigating evidence was presented to the jury in either the guilt or penalty phase of the proceedings. *Id.* (citing *Atkins v. Singletary,* 965 F.2d 952 (11th Cir.1992), *cert. denied,* 515 U.S. 1165, 115 S.Ct. 2624, 132 L.Ed.2d 865 (1995); *Clozza v.*

Murray, 913 F.2d 1092 (4th Cir.1990), *cert. denied,* 499 U.S. 913, 111 S.Ct. 1123, 113 L.Ed.2d 231(1991); *Melson,* 722 S.W.2d at 421). Third, the court must consider whether there was such strong evidence of applicable aggravating 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), *cert. denied,* 502 U.S. 1112, 112 S.Ct. 1219, 117 L.Ed.2d 456 (1992)); *Elledge v. Dugger,* 823 F.2d 1439 (11th Cir.1987), *cert. denied,* 485 U.S. 1014, 108 S.Ct. 1487, 99 L.Ed.2d 715 (1988)).

It appears that the crux of the petitioner's complaint is the failure to introduce evidence regarding the alleged existence of a bipolar type 2 mental illness. The existence of such a mental illness would have been apparent, suggests the petitioner, had trial counsel discovered a family history of mental illness and evidence of the petitioner's erratic criminal behavior. Dr. Zager failed to diagnosis the petitioner with anything more severe than a personality disorder. The petitioner blames this diagnosis on trial counsel's failure to gather sufficient information. The petitioner ignores the fact that Dr. Zager's diagnosis remained the same even after reviewing the additional information. Moreover, the petitioner's own post-conviction witness, Dr. Auble, arrived at essentially the same diagnosis as Dr. Zager. While Dr. Kenner eventually diagnosed the petitioner as Bipolar Type 2, his diagnosis would have necessitated the introduction of evidence regarding the petitioner's escalating history of violent crime, which is a tactic with considerable risk. The petitioner's claim, at best, amounts to an assertion that counsel should have obtained an expert who would have diagnosed the petitioner as Bipolar Type 2. The Constitution does not require attorneys to "shop around" for more favorable expert testimony. *Poyner v. Murray,* 964 F.2d 1404, 1419 (4th Cir.1992). Additionally, the necessary introduction of the petitioner's violent criminal behavior could have undermined this mitigating factor and outweighed any beneficial mitigating impact of the mental illness evidence. This "undiscovered" mitigation evidence raised by the petitioner was correctly characterized by the post-conviction court as being a "double-edged sword."

***43** Given the strength of the proof of the aggravating circumstances relied upon by the State, the mitigation evidence that was presented at sentencing and the possible negative impact of the "undiscovered" mitigation evidence, we conclude that had this information been presented to the court there is little reason to believe the trial judge would impose a sentence other than death. The petitioner is not entitled to relief on this basis. Indeed, in this case, unlike the situation where a jury imposes a death sentence, we are not left to speculate to some degree as to the effect this evidence might have had on the sentencer. The sentencer in this case, the trial judge himself, found this evidence would not have altered the result of the sentencing hearing.

V. Appellate Counsel was Ineffective

Michael Robbins was appointed to represent the petitioner on direct appeal of his sentence. The petitioner implies that Mr. Robbins was not qualified to pursue a direct appeal because this was Mr. Robbins's first capital appeal. In support of his allegation, the petitioner refers to Mr. Robbins's failure to raise any issue other than proportionality. He states that Mr. Robbins failed to raise issues raised in pre-trial motions, specifically those challenging the constitutionality of the death penalty. He asserts that Mr. Robbins should have made the following challenges on direct appeal: (1) the indictment should be dismissed due to illegality and unconstitutionality of Tennessee Code Annotated sections 39-13-205 and 39-13-206; (2) the death penalty violates article I, section 19 of the Tennessee Constitution; (3) the State failed to declare publicly the standards which it applies in determining whether to seek the death penalty of any individual defendant; (4) the trial court erred in denying his motion for discovery of dispositions of all first degree murder prosecutions in the State of Tennessee; (5) the death penalty statute violates the Eighth and Fourteenth amendments of the United States Constitution; (6) the Tennessee death penalty statute impinges upon the petitioner's right to life; and (7) Tennessee's death penalty statute is unconstitutional in that it involves torture. The petitioner also complains that Mr. Robbins failed to competently argue the only issue raised on appeal, proportionality. Finally, the petitioner asserts that Mr. Robbins failed to follow through with "the business of the letter," relating to several attempts made by the petitioner to withdraw his guilty plea.

The same principles apply in determining the effectiveness of both trial and appellate counsel. *Campbell v. State,* 904 S.W.2d 594, 596 (Tenn.1995). Criminal appellate work constitutes approximately forty percent (40%) of Mr. Robbins' legal practice. He attended national habeas seminars focusing on capital cases. At the post-conviction hearing, Mr. Robbins asserted that he considered the proportionality issue the only viable issue for appellate purposes.

***44** A petitioner alleging ineffective assistance of appellate counsel must prove both that (1) appellate counsel acted objectively unreasonably in failing to raise a particular issue on appeal, and (2) absent counsel's deficient performance, there was a reasonable probability that defendant's appeal would have been successful before the state's highest court. *See e.g., Smith v. Robbins,* 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000); *Aparicio v. Artuz,* 269 F.3d 78, 95 (2nd Cir.2001); *Mayo v. Henderson,* 13 F.3d 528, 533-34 (2d Cir.1994). To show that counsel was deficient for failing to raise an issue on direct appeal, the reviewing court must determine the merits of the issue. *Carpenter v. State,* 126 S.W.3d 879, 887 (Tenn.2004) (citing *Kimmelman v. Morrison,* 477 U.S. 365, 375, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986)). Obviously, if an issue has no merit or is weak, then appellate counsel's performance will not be deficient if counsel fails to raise it. *Id.* Likewise, unless the omitted issue has some merit, the petitioner suffers no prejudice from appellate counsel's failure to raise the issue on appeal. *Id.* When an omitted issue is without merit, the petitioner cannot prevail on an ineffective assistance of counsel claim. *Carpenter,* 126 S.W.3d at 888 (citing *United States v. Dixon,* 1 F.3d 1080, 1083 (10th Cir.1993)). Additionally, ineffectiveness is very rarely found in cases where a defendant asserts that appellate counsel failed to raise an issue on direct appeal, primarily because the decision of what issues to raise is one of the most important strategic decisions to be made by appellate counsel.

Gray v. Greer, 800 F.2d 644, 646 (7th Cir.1986), established a test for determining whether counsel was deficient in *Strickland* terms for failing to raise particular claims on direct appeal, i.e, "significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective counsel be overcome." *Id.*

In *Carpenter v. State,* our supreme court refused to hold that the *Gray v. Greer* standard was the conclusive test of finding deficient performance. *Carpenter,* 126 S.W.3d at 888. Our supreme court noted that the relative strength of the omitted issue is only one among many factors to be considered. Indeed, the court noted the numerous factors relied upon the Sixth Circuit Court of Appeals in evaluating appellate counsel's failure to raise issues. [2] *Id.* The non-exhaustive list includes:

> 1) Were the omitted issues "significant and obvious"?
>
> 2) Was there arguably contrary authority on the omitted issues?
>
> 3) Were the omitted issues clearly stronger than those presented?
>
> 4) Were the omitted issues objected to at trial?
>
> 5) Were the trial court's rulings subject to deference on appeal?
>
> 6) Did appellate counsel testify in a collateral proceeding as to his appeal strategy and, if so, were the justifications reasonable?
>
> ***45** 7) What was appellate counsel's level of experience and expertise?
>
> 8) Did the petitioner and appellate counsel meet and go over possible issues?
>
> 9) Is there evidence that counsel reviewed all the facts?
>
> 10) Were the omitted issues dealt with in other assignments of error?
>
> 11) Was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt?

Carpenter, 126 S.W.3d at 888 (citing *Mapes v. Coyle,* 171 F.3d 408, 427-28 (6th Cir.1999)).

Again, the petitioner complains that appellate counsel failed to raise issues concerning the constitutionality of the death penalty, for example: (1) the death penalty is arbitrarily imposed; (2) the sentencer does not have unlimited discretion not to impose death; (3) the death penalty is not imposed fairly; (4) the death penalty statute impinges upon the petitioner's fundamental right to life; and (5) the death penalty statute is unconstitutional because it imposes torture. These are essentially the same arguments that we have already determined that the petitioner waived for failure to assert them on direct appeal. These issues have been repeatedly rejected by the appellate courts of this state on numerous occasions. *See e.g., State v. Odom,* 137 S.W.3d 572, 600 (Tenn.2004) (determining that the death penalty is not unconstitutional under international law); *State v. Holton,* 126 S.W.3d 845 (Tenn.2004) (holding that a sentence of death does not violate due process where the indictment fails to include language of the statutory aggravating circumstances that elevate the offense to capital murder); *State v. Hines,* 919 S.W.2d 573,

582 (Tenn.1995), *cert. denied,* 519 U.S. 847, 117 S.Ct. 133, 136 L.Ed.2d 82 (1996) (concluding that unlimited discretion is vested in the prosecutor and that the death penalty was not imposed in a discriminatory manner). Further, the petitioner asserts no argument and cites no new authority requiring reversal of this precedent and does not show how he was prejudiced by counsel's failure to raise these issues. Mr. Robbins testified that he did not raise these issues on appeal because the law as to the claims was well-settled. Mr. Robbins was experienced in appellate matters and his decision to omit these issues and focus upon what he considered the single meritorious issue was reasonable.

An appellate attorney is neither duty bound nor required to raise every possible issue on appeal. *Carpenter,* 126 S.W.3d at 887 (citing *King v. State,* 989 S.W.2d 319, 334 (Tenn.1999)); *Campbell v. State,* 903 S.W.2d 594, 596-97 (Tenn.1995). Mr. Robbins, an experienced appellate advocate, focused on the only issue he felt had merit. *See generally Cooper,* 849 S.W.2d at 757 (determining that it is standard practice for advocates to weed out weak arguments in order to focus on one central issue). An attorney's determination as to the viability of the issues should be given considerable deference. *Carpenter,* 126 S.W.3d at 887; *Campbell,* 903 S.W.3d at 597. Application of the *Carpenter* factors indicate that counsel's decision was not deficient. Accordingly, no prejudice resulted. The petitioner is not entitled to relief as to his claim that appellate counsel was ineffective.

***46** We proceed to address the petitioner's claim that appellate counsel was deficient for failing to "follow through with the business of the letter." In this allegation, the petitioner asserts that he filed various letters and pleadings with the trial court after the notice of appeal was filed. Appellate counsel, Mr. Robbins, believed that these pleadings amounted to an attempt to withdraw his guilty plea. Mr. Robbins filed a motion in this Court seeking remand to the trial court. This Court denied the motion and no review by the Tennessee Supreme Court was sought. Mr. Robbins stated that, upon further review, "the decision of the Court of Criminal Appeals was imminently sustainable because of the peculiar posture the record was in. And that is why I did not file a Rule 11."

No evidence regarding these subsequent pleadings was introduced at the post-conviction evidentiary hearing other than Mr. Robbins's testimony. This Court, however, is able to take judicial notice of its own records. Looking at this Court's records, it appears that the petitioner filed a pro se motion for remand on October 14, 1998. The substance of this motion reiterated the petitioner's dissatisfaction with counsel's advice and service. This motion was denied by this Court on November 3, 1998. On December 28, 1998, Mr. Robbins filed a motion to remand to the trial court for the purpose of developing a record regarding pleadings by the petitioner indicating that he wished to withdraw his guilty pleas. This Court denied the motion by order entered January 27, 1999. Given the procedural posture of the case at this point, we, as Mr. Robbins, conclude that further review would have been futile. Accordingly, we conclude that Mr. Robbins's decision not to seek further review of this Court's decision was reasonable. The petitioner is not entitled to relief as to this claim.

VI. Post-Conviction Court Erred by Excluding Testimony of Kelly Gleason

Kelly Gleason was called by post-conviction counsel as a witness. Ms. Gleason a former employee of the Capital Division of the Tennessee District Public Defender's Conference, was to testify as to the standards of practice expected of defense attorneys in capital cases. The post-conviction court refused to permit Ms. Gleason to testify. However, the court did grant the petitioner's request to submit a proffer of Ms. Gleason's testimony. That proffer was submitted in writing on May 7, 2003, in the form of a five-page memorandum of law regarding the need for the evidence, a thirty-three (33) page affidavit of Ms. Gleason, and one hundred-twenty-nine pages of attachments. By order of June 19, 2003, the trial court found that the proffer of evidence from Ms. Gleason would be of assistance and admitted it into evidence in the post-conviction proceedings.

We acknowledge that both parties have cited to cases from our sister jurisdictions, both federal and state, supporting their respective positions regarding the admissibility of a legal expert on capital case representation. Interestingly, both parties apparently overlook the legal standard for reviewing the admissibility of an expert's testimony.

***47** "The admissibility of expert testimony, the qualification of expert witnesses, and the relevancy and competency of expert testimony are matters which rest within the sound discretion of the trial court." *State v. Harris,* 839 S.W.2d 54, 69 (Tenn.1992). A witness who is qualified in a particular field may testify in the form of an opinion if the specialized knowledge of the witness will substantially assist the trier

of fact in understanding evidence or determining a fact at issue. Tenn. R. Evid. 702. A trial court's ruling will not be overturned on appeal absent a clear abuse of discretion in admitting or excluding the expert testimony. *State v. Stevens,* 78 S.W.3d 817, 832 (Tenn.2002). In the present case, the post-conviction judge stated that he had considerable experience in the area of capital cases and excluded the testimony of Ms. Gleason. The court, however, permitted a proffer by the petitioner. Subsequently, the post-conviction court entered an order, specifically finding that the proffer would be of assistance in the court's determination of the post-conviction claims. There is no indication that the post-conviction court was not qualified as a legal expert to render findings and conclusions of law without Ms. Gleason's testimony. Moreover, it appears that the post-conviction judge did consider the petitioner's comprehensive proffer regarding Ms. Gleason's proposed testimony. We conclude that the post-conviction court did not abuse its discretion in prohibiting Ms. Gleason's testimony. The petitioner is not entitled to relief as to this issue.

Conclusion

After a thorough review of the record and the law applicable to the issues raised herein, we find that the petitioner has failed to prove the allegations contained in his post-conviction petition. The judgment of the trial court is affirmed.

All Citations

Not Reported in S.W.3d, 2005 WL 1541855

Footnotes

1 These awards include the following:

May 1988	Outstanding Speaker
May 1988	Honorable Mention Math
May 1988	High Achievement Reading and Spelling
February 1988	Fayette County Spelling Bee
May 1987	Honor Roll History
May 1987	Academic Achievement
May 1987	Honorable Mention Math
May 1987	Highest Academic Average
May 1987	Outstanding Performance in Basketball
May 1986	Honor Roll
May 1986	Highest Academic Average in Spelling
May 1986	Highest Academic Average
May 1986	Honorable Mention Math
June 1985	Great Helper
June 1985	Honor

August 1990	First Place Coach
August 1991	Fayette County Athletic League Award

2 Our supreme court did acknowledge, however, that the Sixth Circuit's final factor addresses the ultimate issue under the first prong of *Strickland* and is therefore not helpful in deciding whether appellate counsel's performance was deficient. *Id.* at 888-89.

IN THE CIRCUIT COURT OF FAYETTE COUNTY, TENNESSEE

KENNATH HENDERSON	§	
	§	
Petitioner	§	
	§	
VS.	§	NO. 4465
	§	
STATE OF TENNESSEE	§	
	§	
Respondent	§	

ORDER

The Petitioner challenges his death sentence, alleging i effective assistance of counsel. The factual background of his convictio n for murder in the first deg ee and other offenses began when he was an inmate at the Fayette County jail. His girlfriend surre titi usly delivered a handgun to him while he was in jail. Later, the Petitioner complained of a too h p oblem and a dental appointment was arranged. Transporting the Petitioner to the local dentist w as Tommy Bishop, a sheriff's deputy. While seated in the dental chair, the Petitioner pulled the hand gun on the dentist and demanded his car key. The dentist grabbed at the gun, and a struggle ensue resulting in a shot. The deputy was in the waiting room. Hearing the commotion, he left his chair, only to encounter the Petitioner. The Petitioner shot Deputy Bishop and tried to kidnap the dentist nd his assistants. Before exiting the office, the Petitioner returned to the deputy who was lying on he floor. The Petitioner then fired a shot into the body of the deputy. Due to some quick think g by the dentist, he, along with his assistants, locked the Petitioner outside the building. Hav ng obtained the dentist's car keys, Petitioner stole his car and fled. Shortly thereafter, Petitioner was captured.

The Court appointed Mr. Mike Mosier of Madison C oun y, and Mr. Andrew Johnston of

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Fayette County, to represent the Petitioner. Various motions were filed including ex parte motions for investigative services, a mitigation and jury selection specialist and a clinical psychologist. All of these services were granted. After all the motions were heard, the case was eventually set for trial in July 1998. Just prior to trial, the attorneys requested a continuance based upon the request for more time for the mitigation expert to conclude her report. The motion was granted. However, later that same day, the Petitioner requested that he be allowed to enter a plea of guilty to first degree murder. Also, after an extensive hearing, the Petitioner waived his right to a jury trial regarding punishment. The punishment phase of the proceeding was conducted approximately one week later. After a long hearing, the court imposed the sentence of death.

In the Post-Conviction Petition, the basic allegations are that counsel was ineffective in the mitigation stages of the proceeding. Specifically, the proof offered was to the effect that trial counsel failed to make a proper mitigation investigation that would have revealed that the Petitioner was bipolar. This diagnosis, Petitioner argues, would have been a mitigating factor, which if considered by the Court, would have changed the result of the Court's ruling.

Certain issues need to be addressed before the Court's finding. First, this case occurred before Rule 13 of the Supreme Court became applicable. Nevertheless, Mr. Mosier had experience in capital cases, and Mr. Johnston had impressed the Court with his legal acumen, despite his lack of experience. Secondly, there is nothing in the record to suggest that the Petitioner did not voluntarily, knowingly and intelligently waive his right to a jury trial on the issue of punishment. The record indicates that he initially suggested to trial counsel that he plead guilty. Thirdly, there are very few factual issues of importance that are disputed. Lastly, the Court, having been the trier of fact during the punishment phase, is in a unique position to be able to hear any additional mitigating evidence and

weigh it against the evidence heard at trial. This is important in determining whether any additional mitigating evidence would have changed the Court's sentence.

After reviewing all the evidence at this hearing, the Court finds that Petitioner was not denied effective assistance of counsel. Counsel filed all the appropriate motions. Counsel was provided with expert services. Counsel allowed the investigative and mitigation expert to conduct their investigation and report to counsel their findings. It is true that trial counsel was not aware of all the history of mental illness in the Petitioner's family. Also true was that counsel was not completely aware of some of the violent events that the Petitioner engaged in shortly before this incident. It is true that counsel was aware from the expert clinical psychologist that Petitioner was diagnosed with a personality disorder, not otherwise specified, with narcissistic traits. However, their expert did not see any bipolar tendency, and counsel, under the circumstances, acted in a competent manner in presenting this psychological proof to the Court. It is true that counsel's mitigation expert did not make as an extensive mitigation investigation as Post-Conviction mitigation expert opined was necessary. However, two points need to be addressed. One, there was a mitigation investigation, and a review of the trial transcript revealed that various witnesses testified on Petitioner's behalf in an effort to produce mitigation. Secondly, the Court places little weight on the testimony of Petitioner's mitigation expert, especially when he opined that it would take two to three years to do a proper mitigation investigation. Lastly, as trial counsel stated, this was a case where finding mitigation was difficult, and as explained hereinafter, also a double-edged sword. Therefore, the Court concludes that counsel was not ineffective.

Further, the Court has already mentioned the unique position the Court stands in resolving this matter. The Court can now look to the additional mitigation proof offered at this hearing in

assessing whether the result would have been different. The additional mitigation proof can be summarized. The Petitioner was a normal student in grammar and high school. He was a talented basketball player and had a talent for art. About two years prior to this event, his behavior changed. He became violent. He viciously assaulted one girlfriend. He was convicted of some lesser felonies. Thereafter, he abducted the mother of his girlfriend on several occasions while masked. He also raped the mother. Petitioner's clinical psychologist opined that he had a personality disorder, but did not basically disagree with trial counsel's clinical psychologist, other than she administered more tests. Finally, Dr. Kenner diagnosed the Petitioner as bipolar. Significantly, Dr. Kenner opined that in order to fully explain the nature of Petitioner's bipolar diagnosis, the trier of fact would have to hear all the details of Petitioner's various assaults, abductions and rapes.

At trial, the statutory aggravating circumstances proven beyond a reasonable doubt by the State were simply overwhelming. The Court considered the mitigating testimony, especially the testimony regarding this personality disorder. This proffered new mitigating testimony regarding Dr. Kenner's bipolar diagnosis, only reinforces the Court's opinion that the aggravating circumstances outweighed, in fact overwhelmed, any mitigating evidence. Two additional points need to be made. The Court is assuming, for argument's purpose, that Dr. Kenner's diagnosis is correct. Had this testimony been offered at the trial, the State, of course, would have had an opportunity to rebut same. Then a question of weight would have to be assigned. Secondly, the evidence presented regarding the defendant's abduction of his girlfriend's mother, the rapes, the assaults, lead the Court to the conclusion that the Petitioner's acts were calculated, cold and deliberate. These are the same calculated and deliberate actions that led to the death of Tommy Bishop. Whether or not they were the result of a bipolar condition would not have changed the Court's decision to impose a sentence

of death.

Lastly, Appellate counsel was not ineffective given the history of the case. The only viable issue to appeal was pre proportionality.

WHEREFORE, THE COURT DISMISSES THIS PETITION.

ENTER this the 21st day of May 2003.

JON KERRY BLACKWOOD, Circuit Court Judge, Part I

CERTIFICATE OF SERVICE

I, Jimmie German, Clerk of the Circuit Court of Fayette County, Tennessee, do hereby certify that a true copy of this Order was served upon counsel for each of the parties by depositing in the United States Mail, postage prepaid.

This the 22nd day of May 2003.

JIMMIE GERMAN, Clerk

State v. Henderson

Supreme Court of Tennessee, Western Section, At Jackson

July 10, 2000, Decided

No. W1998-00342-SC-DDT-DD

Reporter
24 S.W.3d 307 *; 2000 Tenn. LEXIS 390 **

STATE OF TENNESSEE v. KENNATH ARTEZ HENDERSON

Subsequent History: [1]** Certiorari Denied October 10, 2000, Reported at: 2000 U.S. LEXIS 6754.

Writ of certiorari denied *Henderson v. Tennessee, 531 U.S. 934, 121 S. Ct. 320, 148 L. Ed. 2d 257, 2000 U.S. LEXIS 6754 (Oct. 10, 2000)*

Post-conviction relief denied at Henderson v. State, 2005 Tenn. Crim. App. LEXIS 667 (Tenn. Crim. App., June 28, 2005)

Appeal denied by Henderson v. State, 2005 Tenn. LEXIS 1101 (Tenn., Dec. 5, 2005)

Prior History: Appeal from the Circuit Court for Fayette County. Hon. Jon Kerry Blackwood, Judge. No. 4465.

State v. Henderson, 1999 Tenn. Crim. App. LEXIS 587 (Tenn. Crim. App., June 15, 1999)

Disposition: Judgment of the Court of Criminal Appeals Affirmed.

Core Terms

murder, death sentence, cases, aggravating circumstances, disproportionate, killing, circumstances, aggravated, sentence, shot, beyond a reasonable doubt, proportionality review, death penalty, mitigating circumstances, unconscious, remorse, fired, pool, similar case, dentist, factors, robbery, floor, proportionality, outweigh, pistol, sentencing hearing, lawful custody, circuit court, receptionist

Case Summary

Procedural Posture

Appellant challenged the affirmation by the Court of Criminal Appeals (Tennessee) of his death sentence for the murder of a police deputy in the course of appellant's attempted escape from a dentist office, on the grounds that it was excessive and disproportionate.

Overview

Appellant, serving time, planned to escape when taken by an officer to the dentist. For this, appellant used a gun smuggled into jail. When alone with the dentist and his assistant, appellant pulled out his gun. The dentist struggled with appellant and called for the officer in the other room to help. The officer, upon entering the room, was grazed by appellant's shot, hit his head, and fell down unconscious. Appellant left the room, returned with the receptionist in custody, took keys and money and the officer's gun, and shot the officer in the head. On the day of his trial for premeditated and felony murder, kidnapping, robbery, assault, and escape, appellant pled guilty to everything except felony murder. Appellant was convicted, waived a sentencing jury, and was sentenced to death which was affirmed. The court upheld the sentence upon Tenn. Code Ann. § 39-13-206(c)(1) comparative proportionality review. In several other cases involving officers, escape, helpless victims, and youthful murderers, death had been upheld. Tenn. Code Ann. § 39-13-204(i)(3), (6), (7), and (9) aggravating factors outweighed Tenn. Code Ann. § 39-13-204(j)(1), (2), (6), and (8) mitigating factors.

Outcome

Judgment was affirmed. Where in an attempted escape appellant killed an unconscious officer with premeditation after firing his gun near others, the aggravating factors outweighed the mitigating of his youth, remorse, and dissociative state, and his death sentence was upheld. In regard to comparative proportionality review, in several other cases involving officers, escape, helpless victims, and youthful murderers, death had been upheld.

LexisNexis® Headnotes

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

Criminal Law & Procedure > ... > Murder > Capital Murder > Elements

Criminal Law & Procedure > Sentencing > Appeals > General Overview

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Findings

HN1[] Capital Punishment, Aggravating Circumstances

Pursuant to Tenn. Code Ann. § 39-13-206(c)(1), the Tennessee Supreme Court reviews all capital cases to determine whether the evidence supports the trial court's finding of aggravating circumstances and whether these aggravating circumstances outweigh any mitigating circumstances beyond a reasonable doubt. In determining whether the evidence supports the application of an aggravating circumstance, the proper standard to consider is whether, after reviewing the evidence in the light most favorable to the state, a rational trier of fact could have found the existence of the aggravating circumstance beyond a reasonable doubt. Tenn. Code Ann. § 39-13-204(i)(3).

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

HN2[] Capital Punishment, Aggravating Circumstances

In the context of aggravating factors for sentencing, the desire to avoid arrest or prosecution need not be the sole motive, so long as it is one of the motives in the killing.

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

Governments > Courts > Judicial Precedent

Criminal Law & Procedure > Sentencing > Appeals > General Overview

Criminal Law & Procedure > Sentencing > Appeals > Capital Punishment

Criminal Law & Procedure > Sentencing > Appeals > Proportionality & Reasonableness Review

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

Criminal Law & Procedure > Sentencing > Capital Punishment > Mitigating Circumstances

Criminal Law & Procedure > Sentencing > Proportionality

HN3[] Capital Punishment, Aggravating Circumstances

Pursuant to Tenn. Code Ann. § 39-13-206(c)(1), the Tennessee Supreme Court conducts a comparative proportionality review of every death sentence for the purpose of determining whether the death penalty is unacceptable in a particular case because it is disproportionate to the punishment imposed on others convicted of the same crime. The court applies the precedent-seeking approach, in which it compares a particular case with other cases in which the defendants were convicted of the same or similar crimes. It conducts this comparison by examining the facts of the crimes, the characteristics of the defendants, and the aggravating and mitigating factors involved.

Criminal Law & Procedure > Appeals > General Overview

Criminal Law & Procedure > ... > Murder > First-Degree Murder > General Overview

Criminal Law & Procedure > ... > Murder > First-Degree Murder > Penalties

Criminal Law & Procedure > Sentencing > Appeals > General Overview

Criminal Law & Procedure > Sentencing > Appeals > Capital Punishment

Criminal Law & Procedure > Sentencing > Appeals > Proportionality & Reasonableness Review

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

Criminal Law & Procedure > Sentencing > Capital Punishment > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Proportionality

HN4[] Criminal Law & Procedure, Appeals

Comparative proportionality review of death sentences is not required by either the state or federal constitutions, and the review must be distinguished from traditional *U.S. Const. amend. VIII* proportionality analysis, which is the abstract evaluation of the appropriateness of a sentence for a particular crime. In conducting a comparative proportionality review, the Tennessee Supreme Court begins with the presumption that the sentence of death is proportionate to the crime of first degree murder. This purpose of the analysis is to identify arbitrary, or capricious sentences by determining whether the death penalty in a given case is disproportionate to the punishment imposed on others convicted of the same crime.

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

Criminal Law & Procedure > Sentencing > Appeals > General Overview

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

Criminal Law & Procedure > Sentencing > Proportionality

HN5[] Capital Punishment, Aggravating Circumstances

A death sentence will be considered disproportionate if the case, taken as a whole, is plainly lacking in circumstances consistent with those in similar cases in which the death penalty has previously been imposed. However, a sentence of death is not disproportionate merely because the circumstances of the offense are similar to those of another offense for which the defendant has received a life sentence. The Tennessee Supreme Court's inquiry, therefore, does not require a finding that a sentence less than death was never imposed in a case with similar characteristics. Instead, the court's duty is to assure that no aberrant death sentence is affirmed. Because the proportionality requirement on review is intended to prevent caprice in the decision to inflict the death penalty, the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice.

Criminal Law & Procedure > Sentencing > Capital Punishment > Aggravating Circumstances

Criminal Law & Procedure > Sentencing > Appeals > General Overview

Criminal Law & Procedure > Sentencing > Proportionality

HN6[] Capital Punishment, Aggravating Circumstances

Death sentence comparative proportionality review is not a rigid, objective test. The Tennessee Supreme Court does not employ a mathematical formula or scientific grid, nor is it bound to consider only those cases in which exactly the same aggravating circumstances have been found by the jury.

Criminal Law & Procedure > ... > Murder > First-Degree Murder > Penalties

Governments > Courts > Judicial Precedent

Criminal Law & Procedure > ... > Murder > First-Degree Murder > General Overview

Criminal Law & Procedure > Sentencing > Appeals > General Overview

Criminal Law & Procedure > Sentencing > Appeals > Capital Punishment

Criminal Law & Procedure > Sentencing > Appeals > Proportionality & Reasonableness Review

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

Criminal Law & Procedure > Sentencing > Proportionality

HN7 **First-Degree Murder, Penalties**

Because Tennessee Supreme Court comparative proportionality review for the death sentence is based on the precedent-seeking method, the court's first task is to identify the pool of similar cases, which includes all cases in which the defendant is convicted of first-degree murder and in which a capital sentencing hearing was actually conducted. After identifying a pool of similar cases, the court considers a multitude of variables, some of which are listed in Bland, in light of the experienced judgment and intuition of the members of the court. Selection of similar cases from the general pool is, of course, not an exact science, because no two cases are identical with respect to either circumstances or defendants.

Criminal Law & Procedure > Sentencing > Appeals > Capital Punishment

Criminal Law & Procedure > Sentencing > Appeals > General Overview

Criminal Law & Procedure > Sentencing > Appeals > Proportionality & Reasonableness Review

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

Criminal Law & Procedure > Sentencing > Proportionality

HN8 **Appeals, Capital Punishment**

In death sentence comparative proportionality reviews, with respect to the circumstances of the offense, the relevant factors considered by the Tennessee Supreme Court include, but are not limited to: (1) the means of death; (2) the manner of death, such as whether the death was violent or torturous; (3) the motivation for the killing; (4) the place of death; (5) the similarity of the victims' circumstances including age, physical and mental conditions, and the victims' treatment during the killing; (6) the absence or presence of premeditation; (7) the absence or presence of provocation; (8) the absence or presence of justification; and (9) the injury to and effects on non-decedent victims.

Criminal Law & Procedure > Sentencing > Appeals > Capital Punishment

Criminal Law & Procedure > Defenses > Insanity > General Overview

Criminal Law & Procedure > Defenses > Insanity > Insanity Defense

Criminal Law & Procedure > Sentencing > Appeals > General Overview

Criminal Law & Procedure > Sentencing > Appeals > Proportionality & Reasonableness Review

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

Criminal Law & Procedure > ... > Adjustments & Enhancements > Criminal History > General Overview

Criminal Law & Procedure > Sentencing > Proportionality

HN9 **Appeals, Capital Punishment**

In death sentence comparative proportionality reviews, with respect to comparing the characteristics of the

defendants, the following factors are relevant: (1) the defendant's prior criminal record or prior criminal activity; (2) the defendant's age, race, and gender; (3) the defendant's mental, emotional or physical condition; (4) the defendant's involvement or role in the murder; (5) the defendant's cooperation with authorities; (6) the defendant's remorse; (7) the defendant's knowledge of helplessness of victim(s); and (8) the defendant's capacity for rehabilitation. Of course, these factors are not exhaustive, and the Tennessee Supreme Court may consider other factors in comparing the characteristics of the defendant with other defendants in the pool of cases.

Criminal Law & Procedure > Sentencing > Appeals > Capital Punishment

Criminal Law & Procedure > Sentencing > Appeals > General Overview

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

Criminal Law & Procedure > Sentencing > Proportionality

HN10[] **Appeals, Capital Punishment**

In conducting death sentence proportionality review, the Tennessee Supreme Court has an obligation and a duty to examine all of the cases in the applicable pool irrespective of whether the issue of proportionality was thoroughly discussed in the reported opinion.

Criminal Law & Procedure > ... > Murder > Attempted Murder > Penalties

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Sentencing Issues

Criminal Law & Procedure > Sentencing > Appeals > General Overview

Criminal Law & Procedure > Sentencing > Appeals > Capital Punishment

Criminal Law & Procedure > Sentencing > Appeals > Proportionality & Reasonableness Review

Criminal Law & Procedure > Sentencing > Capital Punishment > General Overview

Criminal Law & Procedure > Sentencing > Proportionality

HN11[] **Attempted Murder, Penalties**

The task of the Tennessee Supreme Court in death sentence proportionality review is to review the circumstances of the present crime and defendant and, when comparing the circumstances with those present in prior cases, to seek to determine whether the present case, taken as a whole, plainly lacks circumstances found in similar cases in which the death penalty has been imposed. In so doing, the court's role in comparative proportionality review is to identify aberrant death sentences and to prevent the arbitrary application of the death penalty.

Counsel: C. Michael Robbins, Memphis, Tennessee; Mike Mosier, Jackson, Tennessee, for the appellant, Kennath Artez Henderson.

Paul G. Summers, Attorney General & Reporter; Michael E. Moore, Solicitor General; Tonya Miner, Assistant Attorney General, Nashville, Tennessee, for the appellee, State of Tennessee.

Judges: BARKER, J., delivered the opinion of the court, in which ANDERSON, **[**2]** C.J., and HOLDER, J., joined. BIRCH, J., filed a dissenting opinion. DROWOTA, J., not participating.

Opinion by: BARKER

Opinion

[*310] At the time of the events giving rise to this case, the appellant, Kennath Henderson, was incarcerated at the Fayette County Jail serving consecutive sentences for felony escape and aggravated burglary. On April 26, 1997, as the appellant was planning an escape from jail, he had a .380 semi-automatic pistol smuggled into the jail through his girlfriend. A couple of days later, the appellant requested dental work on a tooth that needed

to be pulled, and an appointment was made for May 2 with Dr. John Cima, a dentist practicing in Somerville. Dr. Cima had practiced dentistry in Somerville for more than thirty years, and he had often seen inmate patients. In fact, this was not the appellant's first visit to see Dr. Cima.

On May 2, 1997, Deputy Tommy Bishop, who was serving in his official capacity as a transport officer for the Fayette County Sheriff's office, took the appellant and another inmate, Ms. Deloice Guy, to Dr. Cima's Office in a marked police car. Upon their arrival at the dentist's office, Dr. Cima placed the appellant and Ms. Guy in separate treatment **[**3]** rooms, and each patient was numbed for tooth extraction. Deputy Bishop remained in the reception area and talked with the receptionist during this time.

When Dr. Cima and his assistant returned to the appellant's treating room to begin the tooth extraction, the appellant pulled out his .380 pistol. Dr. Cima immediately reached for the pistol, and he and the appellant struggled over the weapon. During this brief struggle, Dr. Cima called out for Deputy Bishop, and the deputy hurried back to the treatment room. Just as the deputy arrived at the door, the appellant regained control of the pistol and fired a shot at Deputy Bishop, which grazed him on the neck. Although not fatal, this shot caused the deputy to fall backwards, hit his head against the doorframe or the wall, and then fall to the floor face down, presumably unconscious.

The appellant then left the treating room and came back with the receptionist in his custody. The appellant reached down and took Deputy Bishop's pistol, and he took money, credit cards, and truck keys from Dr. Cima. The appellant then ordered Dr. Cima and the receptionist to accompany him out of the building, but just before he turned to leave the building, **[**4]** the appellant went back to the treatment room, leaned over Deputy Bishop, and shot him through the back of the head at point- blank range. The deputy had not moved since first being shot in the neck moments earlier and was still lying face-down on the floor by the door to the treatment room when the appellant fatally shot him.

Once outside of the office, the appellant was startled by another patient, and Dr. Cima and his receptionist were able to escape back into the office. [1] Once inside, **[*311]** Dr. Cima locked the door and called the police. The appellant, in the meantime, stole Dr. Cima's truck and drove away at a slow speed so as not to attract any attention to himself. When police officers began to follow him, the appellant sped away, and eventually drove off the road and into a ditch. The officers took the appellant into custody, and upon searching the truck, they found the murder weapon, Deputy Bishop's gun, and personal items taken from Dr. Cima's office.

[5]** On May 13, 1997, the appellant was indicted by a Fayette County Grand Jury in a ten-count indictment, which alleged one count of premeditated murder, three counts of felony murder, two counts of especially aggravated kidnaping, and one count of attempted especially aggravated kidnaping, aggravated robbery, aggravated assault, and felonious escape. After three continuances, the appellant pled guilty on the day of trial to all of the charges except for the three counts of felony murder.

On July 13, 1998, the circuit court held the sentencing hearing, and the appellant waived his right to have a jury empaneled for purposes of determining his sentence. Several witnesses testified for the State at the sentencing hearing, including Deloice Guy, the inmate taken with the appellant to the dentist by Deputy Bishop; Dr. John Cima; Donna Feathers, Dr. Cima's dental assistant; and Peggy Riles, Dr. Cima's receptionist. In addition, Dr. O.C. Smith, a forensic pathologist, testified as to his investigation of the crime scene and of his autopsy of Deputy Bishop. Dr. Smith stated that based on his examination of Deputy Bishop's wounds, along with witness testimony, it was likely that the first shot **[**6]** fired by the appellant hit the deputy in the neck, and caused the deputy to hit his head against the doorframe of the examination room. Dr. Smith opined that this blow to the deputy's head could have rendered him unconscious. Moreover, Dr. Smith testified that the second shot fired by the appellant entered at the back of the deputy's head and exited near the left eye. This second shot caused "significant and severe brain damage," and the blood from this wound seeped from the skull fractures into the deputy's sinuses, and ultimately, was breathed into his windpipe. Finally, Dr. Smith testified that the bullets used by the appellant could have "easily" penetrated the thin walls of the dentist's office.

In mitigation, the appellant testified on his own behalf. According to his testimony, he was 24 years old at the time of the offense. He was a high-school graduate and has four younger brothers. While in elementary school,

[1] The second inmate, Deloice Guy, apparently knew nothing of the appellant's plans to escape, and she hid in her treatment room during the episode.

the appellant received numerous academic awards and certificates, and he was heavily involved in extracurricular activities and sports while in high school. Although the appellant expressed sorrow and remorse over his actions, he admitted that "there's no reason" for **[**7]** the murder of Tommy Bishop. While he acknowledged that he extensively planned his escape from prison, including procuring the .380 pistol, his only excuse for the shooting was that he "wasn't thinking clearly that day." [2]

The appellant also testified that he had some "problems" in high school, and although he was never cited to the juvenile court, he stated that he felt like his problems were never addressed. He also testified that while in jail in 1996, he requested counseling because he "felt like [he] needed help psychologically." His mother testified, however, that she did not believe that the appellant needed any help or intervention of any kind during his high school years. In addition, the appellant's **[**8]** mother testified that though she remembered **[*312]** that the appellant requested help while in jail in 1996, she never pursued the matter because he "seemed to be doing fine when [she] talked to him."

Finally, Dr. Lynne Zager, a forensic psychologist, testified as to her findings and conclusions based on two interviews with the appellant, a personality test administered to the appellant, and other information supplied by the defense. From this pool of information, Dr. Zager concluded that the appellant was suffering from dissociative disorder at the time of the murder, and that the appellant possessed an unspecified personality disorder which exhibited some narcissistic and anti-social traits. She also testified that based upon her testing, she believed that the appellant's dissociative state began after the first shot was fired and lasted at least 24 hours following. While in this state, Dr. Zager stated that it was not uncommon for individuals to feel as though they are in a dream-like state and are not "an integral part of what the person is [really] doing." Although she refused to give an opinion as to whether the appellant was aware of his actions at the time of the murder, the appellant, **[**9]** in her opinion, "was [acting] under duress, and that his judgment was not adequate." In addition, while Dr. Zager considered him to be "impaired at the time," she testified that the appellant's condition at the time of the murder would not support a legal finding of insanity.

The State argued that four aggravating factors applied to warrant imposing the death sentence: (1) that the defendant created a great risk of death to two or more persons during the act of murder, *Tenn. Code Ann. § 39-13-204(i)(3)*; (2) that the murder was committed for the purpose of avoiding an arrest, *Tenn. Code Ann. § 39-13-204(i)(6)*; (3) that the murder was committed during the defendant's escape from lawful custody, *Tenn. Code Ann. § 39-13-204(i)(7)*; and (4) that the murder was committed against a law enforcement officer, who was engaged in the performance of official duties, *Tenn. Code Ann. § 39-13-204(i)(9)*.

The appellant argued that four statutory mitigating factors should be considered by the court: (1) the lack of significant criminal history by the defendant; *Tenn. Code Ann. § 39-13-204(j)(1)*; that the murder was committed while the defendant was under the influence of extreme mental or emotional **[**10]** disturbance, *Tenn. Code Ann. § 39-13-204(j)(2)*; (3) that the defendant acted under extreme duress; *Tenn. Code Ann. § 39-13-204(j)(6)*; and (4) that the murder was committed while the defendant's mental capacity, while not deficient to the point of raising a defense, was substantially impaired, *Tenn. Code Ann. § 39-13-204(j)(8)*. In addition, the defense argued for application of an additional non-statutory mitigating circumstance, *i.e.*, that the failure to recognize and treat the mental health disorders of the defendant allowed such to remain untreated by any form of intervention.

At the conclusion of the hearing, the circuit court found that all four of the aggravating circumstances were proven beyond a reasonable doubt by the State. Although the circuit court did not make a specific finding as to which mitigating circumstances were supported by the evidence, [3] **[**11]** the court found that the aggravating circumstances had been proven beyond a reasonable doubt to "outweigh the mitigating circumstances." The circuit court then imposed the sentence of death for the premeditated murder of Deputy Tommy Bishop. [4]

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[2] At one point during his attempted escape, the appellant also shot himself in the leg with his own gun resulting in a superficial flesh wound. In support of his assertion that he "wasn't thinking clearly," the appellant stated that he did not even realize that he shot himself in the thigh until the next day.

[3] The circuit court did not make any finding of mitigating circumstance on the record or list any such circumstances in the capital case report as required by Tennessee Supreme Court Rule 12.

[4] The circuit court also sentenced the appellant to 20 years for

[*313] On appeal to the Court of Criminal Appeals, the sole issue raised by the appellant was whether the sentence of death was excessive and disproportionate to the offense committed. In affirming the sentence imposed by the circuit court, the Court of Criminal Appeals stated that "our review of this case **[**12]** in conjunction with other similar cases convinces us that the death penalty in this case is not disproportionate to the penalty imposed in other similar cases." Pursuant to our statutory obligation under *Tennessee Code Annotated section 39-13-206(c)(1)* (1997), we conduct our own comparative proportionality review, to review whether the sentence of death was arbitrarily imposed, and to determine whether the evidence supports the trial court's findings with respect to the statutory aggravating circumstances. We also undertake to review whether the evidence supports a finding that the aggravating circumstances outweigh the mitigating circumstance beyond a reasonable doubt.

Although no other issues in this case have been presented by the appellant, either in his brief or in argument before this court, we have carefully examined the record and have determined that no other reversible error exists. Further, after reviewing the testimony and evidence presented at the sentencing hearing along with the applicable legal authorities, we agree with the Court of Criminal Appeals that the sentence of death in this case has not been arbitrarily imposed and that it is not disproportionate to the **[**13]** sentence imposed in similar cases. We also hold that the evidence supports the trial court's findings concerning the applicable aggravating circumstances and that these aggravating circumstances outweigh any mitigating circumstances beyond a reasonable doubt. Accordingly, we affirm the judgment of the Court of Criminal Appeals and the sentence imposed by the trial court.

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especially aggravated kidnaping, 20 years for a second count of especially aggravated kidnaping, 8 years for aggravated robbery, 8 years for attempted especially aggravated kidnaping, 6 years for aggravated assault, and 3 years for felony escape.

All of the prison terms, except the term imposed for felonious escape, were ordered to run concurrently with each other, but to run consecutively with the sentences then being currently served by the appellant. The prison term for felonious escape was ordered to run consecutively to all of the non-capital offenses. Accordingly, the effective sentence ordered by the court in this case is death and a prison term totaling 23 years, which is to run consecutively to the current prison sentence.

REVIEW OF AGGRAVATING AND MITIGATING CIRCUMSTANCES

As part of our statutory duty *HN1*[↑] pursuant to *Tennessee Code Annotated section 39-13-206(c)(1)*, we review all capital cases to determine whether the evidence supports the trial court's finding of aggravating circumstances and whether these aggravating circumstances outweigh any mitigating circumstances beyond a reasonable doubt. In determining whether the evidence supports the application of an aggravating circumstance, the proper standard to consider is whether, after reviewing the evidence in the light most favorable to the State, a rational trier of fact could have found the existence of the aggravating circumstance beyond a reasonable doubt. *State v. Carter, 988 S.W.2d 145, 150 (Tenn. 1999)*. After a careful review of the testimony and evidence **[**14]** presented at the sentencing hearing, we conclude that the evidence fully supports the findings of the trial court and that the aggravating circumstances outweigh any mitigating circumstances beyond a reasonable doubt.

Tennessee Code Annotated section 39-13-204(i)(3)

The record shows that the appellant's actions in firing the weapon caused a great risk of death to two or more persons during the act of murder. This factor "'contemplates either multiple murders or threats to several persons at or shortly prior to or shortly after an act of murder upon which the prosecution is based.'" *State v. Burns, 979 S.W.2d 276, 280 (Tenn. 1998)* (quoting *State v. Cone, 665 S.W.2d 87, 95 (Tenn. 1984))*. This factor "most often **[*314]** has been applied where a defendant fires multiple gunshots in the course of a robbery or other incident at which persons other than the victim are present." Id.

The record in this case reveals that the appellant threatened the dentist and dental assistant by pointing a loaded weapon at them, that the dentist and the appellant struggled over the loaded weapon, and that when the appellant fired the first shot at the victim, the receptionist **[**15]** was very close nearby. The State also introduced expert testimony that the bullets fired by the appellant could easily have penetrated the thin walls of the office and continued into adjoining rooms. We conclude that a rational trier of fact could have concluded that this aggravated circumstance was proven beyond a reasonable doubt.

Tennessee Code Annotated section 39-13-204(i)(6)

The record also demonstrates that the murder was committed to avoid arrest or prosecution. As our cases make clear, HN2[] the desire to avoid arrest or prosecution need not be the sole motive, so long as it is one of the motives in the killing. *State v. Carter, 714 S.W.2d 241, 250 (Tenn. 1986)*; see also *State v. Smith, 868 S.W.2d 561, 581 (Tenn. 1993)* (stating that prevention of arrest and prosecution need not be the "dominant" motive for the killing). The evidence in this case is that the appellant returned to the treatment room after looking for money throughout the office only to put a bullet into the head of an unconscious, non-resisting law-enforcement officer lying face-down on the floor. Viewed in a light most favorable to the State, we conclude that a rational **[**16]** trier of fact could have found the existence of this aggravating circumstance beyond a reasonable doubt.

Tennessee Code Annotated sections 39-13-204(i)(7), (9)

Last, the record also shows that the appellant committed the murder while in lawful custody and that the victim was a law-enforcement officer engaged in performing his official duties. In fact, the proof is uncontroverted that the appellant was then currently serving a prison term, and that he was transported to the dentist's office in a marked patrol car by a uniformed police officer in the course of his official duties. The proof is also uncontroverted that the appellant was personally acquainted with Tommy Bishop in Bishop's capacity as a law-enforcement officer and that the appellant knew that Tommy Bishop was acting in his official capacity on the morning of May 2, 1997. Viewed in a light most favorable to the State, we conclude that a rational trier of fact could have found the existence of these two aggravating circumstances beyond a reasonable doubt.

The trial court did not make any specific findings as to which, if any, mitigating circumstances argued by the appellant were proven to exist. For sake of this **[**17]** appeal, and in fairness to the appellant, we will assume that all five of the mitigating circumstances argued by the appellant were raised by the evidence and are entitled to some consideration. Nevertheless, we agree that the aggravating circumstances far outweigh all of the mitigating circumstances beyond a reasonable doubt.

COMPARATIVE PROPORTIONALITY REVIEW

HN3[] Pursuant to *Tennessee Code Annotated section 39-13-206(c)(1)*, this Court conducts a comparative proportionality review of every death sentence for the purpose of "determining whether the death penalty is unacceptable in a particular case because it is disproportionate to the punishment imposed on others convicted of the same crime." *State v. Hall, 8 S.W.3d 593, 604 (Tenn. 1999)*. This Court applies the precedent-seeking approach, in which we compare a particular case with other cases in which the defendants were convicted of the same or similar crimes. We conduct this comparison by examining the facts of the crimes, the characteristics of **[*315]** the defendants, and the aggravating and mitigating factors involved. See *State v. Bland, 958 S.W.2d 651, 664 (Tenn. 1997)*. Comparative review of **[**18]** capital cases "insures rationality and consistency in the imposition of the death penalty." See *id. at 665* (citing *State v. Barber, 753 S.W.2d 659, 665-66 (Tenn. 1988)*; *State v. Kandies, 342 N.C. 419, 467 S.E.2d 67, 86 (1996))*.

HN4[] Comparative proportionality review is not required by either the state or federal constitutions, and the review must be distinguished from "traditional Eighth Amendment proportionality analysis, which is the 'abstract evaluation of the appropriateness of a sentence for a particular crime.'" *Bland, 958 S.W.2d at 662* (quoting *Pulley v. Harris, 465 U.S. 37, 42-43, 79 L. Ed. 2d 29, 104 S. Ct. 871 (1984))*. In conducting a comparative proportionality review, we begin with the presumption that the sentence of death is proportionate to the crime of first degree murder. *State v. Hall, 958 S.W.2d 679, 699 (Tenn. 1997)*. This purpose of the analysis is to identify arbitrary, or capricious sentences by determining whether the death penalty in a given case is "'disproportionate to the punishment imposed on others convicted of the same crime.'" *Bland, 958 S.W.2d at 662* **[**19]** (quoting *Pulley v. Harris, 465 U.S. 37, 42-43, 79 L. Ed. 2d 29, 104 S. Ct. 871 (1984))*.

HN5[] A death sentence will be considered disproportionate if the case, taken as a whole, is "plainly lacking in circumstances consistent with those in similar cases in which the death penalty has previously been imposed." *Bland, 958 S.W.2d at 665*. However, a sentence of death is not disproportionate merely because the circumstances of the offense are similar to those of another offense for which the defendant has received a life sentence. *State v. Smith, 993 S.W.2d 6, 17 (Tenn. 1999)*; *State v. Blanton, 975 S.W.2d 269, 281 (Tenn. 1998)*; *Bland, 958 S.W.2d at 665* (citing *State v. Carter, 714 S.W.2d 241, 251 (Tenn. 1986))*. Our inquiry,

therefore, does not require a finding that a sentence "less than death was never imposed in a case with similar characteristics." *Blanton, 975 S.W.2d at 281*; see also *Bland, 958 S.W.2d at 665*. Instead, our duty "is to assure that no aberrant death sentence is affirmed." *Bland, 958 S.W.2d at 665*. Because "'the proportionality **[**20]** requirement on review is intended to prevent caprice in the decision to inflict the [death] penalty, the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice.'" *Hall, 958 S.W.2d at 699* (quoting *Gregg v. Georgia, 428 U.S. 153, 203, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976))* (alteration in original).

As we have previously explained in Bland, ***HN6***[] comparative proportionality review is not a rigid, objective test. See *958 S.W.2d at 668*; *State v. Cazes, 875 S.W.2d 253, 270 (Tenn. 1994)*. We do not employ a mathematical formula or scientific grid, "nor are we bound to consider only those cases in which exactly the same aggravating circumstances have been found by the jury." *State v. Cribbs, 967 S.W.2d 773, 790 (Tenn. 1998)* (citing *State v. Brimmer, 876 S.W.2d 75, 84 (Tenn. 1994))*.

HN7[] Because our comparative proportionality review is based on the precedent-seeking method, our first task is to identify the pool of similar cases, which **[**21]** includes all cases in which the defendant is convicted of first-degree murder and in which a capital sentencing hearing was actually conducted. See *Bland, 958 S.W.2d at 666*. After identifying a pool of similar cases, "we consider a multitude of variables, some of which were listed in Bland, in light of the experienced judgment and intuition of the members of this Court." See *Cribbs, 967 S.W.2d at 790*. Selection of similar cases from the general pool is, of course, not an exact science, because no two cases are identical with respect to either circumstances or defendants.

HN8[] With respect to the circumstances of the offense, the relevant factors considered **[*316]** by this Court include, but are not limited to: (1) the means of death; (2) the manner of death, such as whether the death was violent or torturous; (3) the motivation for the killing; (4) the place of death; (5) the similarity of the victims' circumstances including age, physical and mental conditions, and the victims' treatment during the killing; (6) the absence or presence of premeditation; (7) the absence or presence of provocation; (8) the absence or presence of justification; and (9) the injury **[**22]** to and effects on non-decedent victims.

HN9[] With respect to comparing the characteristics of the defendants, the following factors were listed in Bland as relevant: (1) the defendant's prior criminal record or prior criminal activity; (2) the defendant's age, race, and gender; (3) the defendant's mental, emotional or physical condition; (4) the defendant's involvement or role in the murder; (5) the defendant's cooperation with authorities; (6) the defendant's remorse; (7) the defendant's knowledge of helplessness of victim(s); (8) the defendant's capacity for rehabilitation. Of course, these factors are not exhaustive, and this Court may consider other factors in comparing the characteristics of the defendant with other defendants in the pool of cases.

Applying these factors, we note that the proof in this case reflects that the victim was senselessly executed by a gunshot wound to the back of his head. It is clear that one motivation for the killing was the facilitation of escape from lawful custody and the avoidance of arrest and prosecution. The victim was a uniformed police officer acting in his official capacity as a transportation officer. The record indicates the presence **[**23]** of premeditation as the appellant returned to the treatment room, after searching the dentist's office for money, to execute the police officer, and because the officer was unarmed and lying face-down on the floor while unconscious, there can be no doubt that the appellant acted totally without provocation or any conceivable justification. In addition, after the deputy was rendered unconscious, he could offer no impediment or further obstacle of any kind to the appellant's escape plan. During the course of the shooting, the appellant placed in danger the lives of at least four other people.

The appellant, a then 24-year-old African-American male, does have a history of criminal activity, including convictions for aggravated burglary, robbery, forgery, and was then currently serving a sentence for felony escape, assault, and contributing to the delinquency of a minor. Although the defense presented expert proof to establish that the appellant may have been in a dissociative state during the killing, the proof also shows that the appellant does not suffer from any major psychological or psychiatric illness. The appellant did display signs of remorse, but although the appellant's forensic **[**24]** psychologist found his remorse "genuinely sincere," the trial judge made a specific finding that he found the appellant's remorse to be insincere. The appellant, to the extent that it can be considered "cooperation," did plead guilty on the day of

trial and waived his right to a sentencing jury. Moreover, notwithstanding any other mitigating evidence presented by the defense at the sentencing hearing, the record does not demonstrate a strong likelihood or potential for rehabilitation.

In State v. Workman, 667 S.W.2d 44 (Tenn. 1984), a jury imposed, and we upheld, a sentence of death for a defendant who shot and killed a police officer following his robbery of a fast- food restaurant. The defendant, who had been apprehended by police officers almost immediately after the robbery, broke free from their lawful custody and fired his pistol at the officers in an attempt to escape. The defendant hit two of the officers and killed one. An examination of Workman reveals that all four of the aggravating circumstances present in that case are also present in this case, including the killing of a police officer, a killing made during his escape **[*317]** from lawful custody, and a **[**25]** killing made "for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another." Further, the jury found that the defendant's actions in Workman presented a substantial risk of death to two or more persons other than the victim.

In addition, the defendant in Workman, like the appellant in this case, claimed to remember only "'bits and pieces'" of the episode, although the Workman defendant related his memory loss to drug use rather than to a dissociative state. Also like the appellant in this case, the Workman defendant had prior convictions for assault and burglary, although Philip Workman had an additional conviction for selling drugs.

The appellant claims that State v. Workman should not be considered in the proportionality review because there was no significant discussion in that case of the proportionality issue. We disagree. ***HN10***[↑] In conducting proportionality review, we have an obligation and a duty to examine all of the cases in the applicable pool irrespective of whether the issue of proportionality was thoroughly discussed in the reported opinion. In fact, when reviewing the cases in which a life sentence **[**26]** was imposed after a hearing, one will not find a written opinion discussing proportionality, and yet, it would be absurd to argue that these cases should not be considered in weighing proportionality. Moreover, "because we do not find it necessary in every case to compare in writing, detail by detail, all the specific cases or circumstances which are considered in our proportionality review, it does *not* follow . . . that we have failed to perform an effective comparative proportionality review as outlined." State v. Cazes, 875 S.W.2d 253, 270 (Tenn. 1994) (emphasis in original).

Our review also reveals several other cases, though certainly not identical, that contain many circumstances that are similar to the appellant's crime and circumstances. In State v. Taylor, 771 S.W.2d 387 (Tenn. 1989), a 21-year-old defendant was sentenced to death after killing a prison guard while attempting to escape from prison. The record in the Taylor case reveals that the defendant suffered from a history of mental illness, had been incarcerated in a state facility for prisoners with psychiatric problems, and was taking several anti-psychotic drugs, although **[**27]** there was no evidence that the defendant took these drugs on the day of the murder. There was also expert testimony that the defendant committed the murder while in a psychotic episode, although many of the symptoms were also consistent with anti-social personality disorder, a disorder shared by the appellant in this case. A sentence of death was imposed by a jury and upheld by this Court.

In State v. Van Tran, 864 S.W.2d 465 (Tenn. 1993), the 19-year-old defendant killed two victims after previously shooting each and disabling them. In one case, the defendant shot the victim once, thereby disabling her, and then later returned after searching for valuables in the restaurant to shoot her again in the back of the head while she lay on the floor. Furthermore, the victim in Van Tran did nothing to provoke the attack, and even though she was still conscious, she did not provide any impediment to the defendant's course of action. The Van Tran defendant, unlike the appellant in this case, had no significant history of criminal activity. Nevertheless, a jury imposed the sentence of death, and this Court found the penalty not to be disproportionate.

In State v. Harris, 839 S.W.2d 54 (Tenn. 1992), **[**28]** the defendant received the death penalty for two murders, one of which involved a night security guard for a Gatlinburg hotel. The defendant clubbed the security guard unconscious, dragged him into a motel suite, and later fired a bullet between the guard's eyes while the guard was lying on the floor unconscious. The guard offered no provocation or obstacle to completion of the criminal transaction. This Court affirmed the sentence of death.

[*318] In State v. King, 694 S.W.2d 941 (Tenn. 1985), a 32-year-old defendant robbed a tavern while on probation for other offenses. In the course of the robbery, the defendant ordered the tavern owner and

three other persons to lie face-down on the floor, and after robbing the victims, the defendant put a bullet through the back of the head of the tavern owner. Again, the tavern owner offered no resistance or obstacle to the completion of the robbery. A jury sentenced the defendant to death, and that sentence was sustained on appeal by this Court. Like the appellant's case, the jury in King found the (i)(3) aggravator of great risk of death to two or more persons other than the victim.

In *State v. Dicks, 615 S.W.2d 126 (Tenn. 1981)*, **[**29]** a second-hand clothing store owner was knocked unconscious with a severe blow to the head and robbed by the defendant. At some point while the victim lay unconscious on the floor, the defendant slit his throat. The jury imposed the death penalty, which was affirmed by this Court.

The appellant relies heavily on the fact that he expressed remorse and "cooperated" with authorities. Ignoring the specific finding of the trial court that the expressions of remorse were insincere, we note that his remorse, even if true, does not render the sentence of death in this case disproportionate. For example, the defendant in Bland also expressed significant remorse. The Bland defendant, moreover, turned himself over to the Memphis Police Department and gave a detailed confession. Even despite the greater cooperative efforts by the defendant in Bland, this Court held that the imposition of the death penalty in that case was not disproportionate or arbitrarily applied. One may likewise look to Van Tran, wherein the defendant expressed remorse for his crime and gave greater cooperative efforts than are present in this case.

The appellant further argues that the death penalty is **[**30]** disproportionate in this case, in part, because he is a youthful offender. Although we are not willing to hold that a 24-year-old defendant is a "youthful" offender for mitigation purposes, our cases reveal that the punishment in this case is certainly not arbitrary or disproportionate because of the appellant's age. See *State v. Cauthern, 967 S.W.2d 726 (Tenn. 1998)* (upholding a death sentence for a 19-year-old defendant who murdered two victims while burglarizing their home); *State v. Bland, 958 S.W.2d 651 (Tenn. 1997)* (upholding a death sentence for a 19-year-old defendant who chased, shot, and killed the victim); *State v. Van Tran, 864 S.W.2d 465 (Tenn. 1993)* (upholding a death sentence for a 19-year-old defendant shot and killed a 74 year-old victim during a robbery); *State v. Taylor, 771 S.W.2d 387 (Tenn. 1989)* (upholding a death sentence for a 21-year-old defendant assaulted the victim with a knife and the victim died from internal bleeding). While many of these cases also applied the "heinous, atrocious or cruel" aggravator--an aggravator not found in this case--we held that the death sentence in each of these **[**31]** cases was neither arbitrary nor disproportionate, notwithstanding the age of the offenders.

Although the cases in the comparative pool are similar in many aspects to the present case, no case in the pool is exactly the same as the appellant's case. The appellant cites the application of the "heinous, atrocious or cruel" aggravator in many of these other cases as one major example of dissimilarity. While we acknowledge that proportionality review is not an exact science, our function in this regard is not to overturn a death sentence unless we can locate a case that stands on all fours with the case at the bar. Such a task, of course, is both impracticable and impossible because no two such cases exist. As we have stated on multiple occasions, "No two cases are alike, and no two defendants are alike." *Harris, 839 S.W.2d at 77*.

Instead, our ***HN11***[↑] task is to review the circumstances of the present crime and defendant and, when comparing these circumstances **[*319]** with those present in prior cases, we seek to determine whether the present case, taken as a whole, plainly lacks circumstances found in similar cases in which the death penalty has been imposed. See *Bland, 958 S.W.2d at 665*. **[**32]** In so doing, our role in comparative proportionality review is to identify aberrant death sentences and to prevent the arbitrary application of the death penalty.

In this case, we have tried to identify cases from the comparative pool in which the defendant committed a murder while attempting to escape from lawful custody or in which a law-enforcement officer was murdered while performing his or her official duties. We have also tried to identify cases in which the murdered victim was totally helpless, unconscious, or otherwise presented absolutely no impediment to the defendant's desired course of action. Based on our review of these several cases in which the death penalty was upheld, we are unable to say that the appellant's case, taken as a whole, is plainly lacking in circumstances that have previously justified death sentences. Accordingly, we hold that the death sentence imposed in this case was neither disproportionate nor arbitrarily applied.

CONCLUSION

In conclusion, we have carefully reviewed the record of the sentencing hearing in this case, the briefs and arguments of the parties, and the applicable legal authority. Based on this extensive review, we hold **[**33]** that the sentence of death in this case is not disproportionate or arbitrarily applied given the nature of the crime and the circumstances of the appellant. We further hold that the evidence presented establishes, in a light most favorable to the State, the presence of each aggravated circumstance beyond a reasonable doubt, and that the aggravated circumstances outweigh any mitigating circumstances beyond a reasonable doubt. The judgment of the Court of Criminal Appeals, which sustained the death sentence imposed by the Fayette County Circuit Court, is affirmed.

It appearing from the record that the appellant is indigent, costs of this appeal are assessed to the State of Tennessee.

Dissent by: BIRCH

Dissent

JUSTICE BIRCH, dissenting.

I am compelled to dissent from the opinion of my colleagues because of my view that under the circumstances here presented, the (i)(6) aggravating factor is fully absorbed by the (i)(9) aggravating factor. [1] Accordingly, only one of the two should affect the defendant's sentence.

[34]**

End of Document

[1] *Tenn. Code Ann. § 39-15-204* (Supp. 1999).

IN THE CIRCUIT COURT OF FAYETTE COUNTY, TENNESSEE

STATE OF TENNESSEE

VS. CRIMINAL ACTION NO. 4463

Kenneth A Henderson
Defendant

PLEA OF GUILTY

I, Kenneth A Henderson, the defendant in this cause voluntarily enter a plea of guilty to the offense of (see above), and understand that the District Attorney General will recommend a sentence of N/A. I further understand that this sentence is within Range —. I further understand that I will be classified as a — offender and that I must serve — % before I am eligible for release status, and that such release status is conditioned on my good behavior. I understand that this plea of guilty is a conviction of (see above) and is a waiver of my Constitutional rights of privilege against compulsory self incrimination right to a trial by jury, right to confront my accusers, and the right to exclude from the jury determining my punishment evidence of any prior convictions.

I.

I am charged with (see above) for which the mandatory minimum penalty provided by law is — and the maximum possible penalty provided by law is —.

II.

I understand that I have a right to plead not guilty or to persist in that plea if it has already been made and that I have the right to be tried by a jury and at that trial I have the right to the assistance of counsel, the right to confront and cross-examine witnesses against me, and the right not to be compelled to incriminate myself.

III.

I understand that if I plead guilty there will not be a further trial of any kind except to determine the sentence so that by pleading guilty I waive the right to a trial.

IV.

I understand that if I plead guilty, the Court or the State may ask me questions about the offense to which I have pleaded and if I answer these questions under oath, on the record, and in the presence of counsel, my answers may later be used against me in a prosecution for perjury or false statement, and further upon the sentencing hearing, evidence of any prior convictions may be presented to the Judge or jury for their consideration in determining punishment.

V.

I, therefore, voluntarily plead guilty to the offense of (see above). My plea of guilty is voluntary and not the result of force or threats or of promises apart from a plea agreement.

VI.

The defendant, appearing in person in this cause, and having been fully advised by the Court of the crime charged against him, the punishment which could be meted out if the defendant is found guilty and of his constitutional rights therein, hereby voluntarily pleads guilty of the offense of (see above).

The defendant also states to the Court that his attorney being present, Honorable Mike Mosier & Hooker & Johnson, has fully informed him of all his rights and that after a full explanation of these rights, the defendant informed his attorney that he wanted to voluntarily enter a plea of guilty, and to this decision of the defendant, said attorney agrees.

This the 6th day of July 19 98.

Kenneth A Henderson
DEFENDANT

APPROVED FOR ENTRY:

District Attorney General

Attorney for Defendant

Attorney for Defendant

CERTIFICATE OF JUDGE

I hereby certify that the above named defendant, being represented by Mike Mosier, Hooker & Johnson, a member in good standing of the Tennessee Bar, pleaded guilty to the offense of see above and did so after a full explanation of his rights were made to him in open Court.

This the 6th day of July 19 98.

JUDGE

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defendant against a law enforcement officer, and the defendant knew the victim was a law enforcement officer, engaged in the performance of his official duties.

The Court finds that the State has proven beyond a reasonable doubt that the statutory aggravating circumstance or circumstances, so listed above, outweigh the mitigating circumstances; therefore, the Court finds that the punishment for the defendant, **KENNATH ARTEZ HENDERSON**, shall be **DEATH.**

KENNATH ARTEZ HENDERSON, in accordance with the judgment of this Court, you're hereby remanded to the custody of the Department of Corrections; and pursuant to the judgment of this Court, on the 13th day of November, 1998, at the State Penitentiary, wherein the Death Chamber is located, the Warden shall thereby cause this order to be carried out and that your body shall be subjected to shock by sufficient current of electricity, or injection by lethal drug, until dead.

AND MAY GOD HAVE MERCY ON YOUR SOUL!

(Whereupon, Court was adjourned.)

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENNATH HENDERSON	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	**No. 12-5028**
	)	**DEATH PENALTY CASE**
CHARLES WAYNE CARPENTER, Warden,	)	
	)	
	)	
Respondent-Appellee	)	

APPELLANT'S MOTION TO EXPAND THE CERTIFICATE OF APPEALABILITY

Appellant Kennath Henderson, by and through counsel, respectfully moves this Court pursuant to the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, 28 U.S.C.§ 2253(c)(1), and Fed. R. App. P. 22(b), to expand the Certificate of Appealability (COA) granted by the District Court to include all claims raised in his amended habeas corpus petition.[1] Moreover, Mr. Henderson will show in detail why this Court should expand the certificate of appealability to include the following claims in particular:

(1) Amended Petition ¶ 8h: In violation of the Sixth, Eighth, and Fourteenth Amendments . . . Kennath Henderson's counsel were ineffective in preparation for trial and at the resulting guilty plea for the following . . .

[1] Mr. Henderson respectfully incorporates all briefing in the District Court on such issues in support of this application, including: (1) Amended Petition for Writ of Habeas Corpus (R. 16); (2) Response to Respondent's Motion for Summary Judgment (R. 68); (3) Second Response to Respondent's Motion for Summary Judgment (R. 77); (4) Motion for Evidentiary Hearing and Reply to Response (R. 87, 90); (5) Motion to Alter or Amend Judgment (R. 93); (6) Brief Regarding the Applicability Of *Martinez v. Ryan* to Kennath Henderson's Case (R.116); (7) Reply To Respondent's Brief Concerning Procedural Default and *Trevino v. Thaler* (R.121); (8) Petitioner's Brief Identifying His Substantial Claims To Which *Martinez v. Ryan* and *Trevino v. Thaler* Apply (R.129, 130, 131); and (9) Motion to Alter or Amend Judgment And To Expand Certificate of Appealability (R.136).

reasons which prejudiced Mr. Henderson: (h) Counsel failed in their duties to fully represent Mr. Henderson when they advised him to enter guilty pleas to the charges against him (R.16, Amended Petition, PageID# 91);

(2) Amended Petition ¶ 8k: In violation of the Sixth, Eighth, and Fourteenth Amendments . . . Kennath Henderson's counsel were ineffective in preparation for trial and at the resulting guilty plea for the following . . . reasons which prejudiced Mr. Henderson: (k) Counsel failed to use expert services effectively (Id., PageID# 92-93);

(3) Amended Petition ¶ 10: In violation of the Sixth, Eighth and Fourteenth Amendments, Kennath Henderson's counsel was ineffective on appeal (Id., PageID# 114-117); and,

(4) Amended Petition ¶ 20: In violation of the Sixth, Eighth, and Fourteenth Amendments, the grand jury was improperly constituted (Id., PageID# 131-132).

I. Standard Governing The Issuance Of A Certificate of Appealability

The United States Supreme Court articulated the standard for granting a certificate of appealability (COA) under the Antiterrorism Act of 1996 (AEDPA) in Miller-El v. Cockrell, 537 U.S. 322 (2003):

> Consistent with our prior precedent and the text of the habeas corpus statute, we reiterate that a prisoner seeking a COA need only demonstrate "a substantial showing of the denial of a constitutional right." *28 U.S.C. § 2253*(c)(2). A petitioner satisfies this standard by demonstrating that jurists of reason *could disagree* with the district court's resolution of his constitutional claims or that jurists *could conclude* the issues presented are adequate to deserve encouragement to proceed further.

Miller-El, 537 U.S. 322, 327 (emphasis added). This standard is identical to the pre-AEDPA standards for a certificate of probable cause to appeal, with the exception that a COA requires that the standard be met for each issue on which an appeal is sought. Lyons v. Ohio Adult Parole Authority, 105 F.3d 1063, 1073, *overruled on other grounds by* Lindh v. Murphy, 521 U.S. 320 (1997); Slack v. McDaniel, 529 U.S. 473, 483 (2000)("Except for substituting the word "constitutional" for the word "federal," § 2253 is a codification of the CPC standard announced in *Barefoot*. . . .").

To be entitled to a certificate, a petitioner must "make a 'substantial showing of the denial of [a] federal right.'" Barefoot v. Estelle, 463 U.S. 880, 893 (1983), *quoting* Stewart v. Beto, 454 F.2d 268, 270 n.2 (5th Cir.1971). According to the Supreme Court:

> In requiring a 'question of some substance,' or a 'substantial showing of the denial of [a] federal right,' obviously the *petitioner need not show that he should prevail on the merits*. He has already failed in that endeavor. Rather, *he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are 'adequate to deserve encouragement to proceed further*.'

Barefoot, 463 U.S. at 893 n.4 (emphasis added). A certificate is to be granted so long as the petitioner's claim "is not legally frivolous." Id., 463 U.S. at 894. Only when a court is "confident that petitioner's claim is squarely foreclosed by statute, rule, or authoritative court decision, or is lacking any factual basis in the record of the case," may a court dismiss the claim "as frivolous" and deny the certificate. Id. Put another way, a Court of Appeals may not withhold a COA because a petitioner does not show that he is entitled to relief. See Miller-El, 537 U.S. at 338. Rather, the COA showing asks only if other jurists could find the District Court's decision debatable, even if they might ultimately agree with that court. Id. As a result, any doubt about whether to grant a COA should be resolved in the petitioner's favor. See Sonnier v. Johnson, 161 F.3d 941, 944 (5th Cir.

1998). If one judge believes that the "issues are adequate to deserve encouragement" then, by definition, the issue is debatable among jurists of reason and a COA should issue.

Where a petitioner's claims are denied on procedural grounds, and the district court does not reach the merits of a claim, the petitioner should be granted a COA if he demonstrates both that: (1) reasonable jurists would find it debatable whether the district court was correct in its procedural ruling; and, (2) that reasonable jurists would find it debatable whether the petition states a valid claim of the denial of a constitutional right. Slack, 529 U.S. at 478.

Finally, "[i]n a capital case, the nature of the penalty is a proper consideration in determining whether to issue a certificate [of appealability]." Barefoot, *supra*, 463 U.S. at 893; *see also* Ramirez v. Dretke, 398 F.3d 691, 694 (5th Cir. 2005); Jennings v. Woodford, 290 F.3d 1006, 1010 (9th Cir. 2002); Hernandez v. Johnson, 213 F.3d 243, 248 (5th Cir.2000)(where a case involves the death penalty, "any doubts as to whether a COA should issue must be resolved in [the petitioner's] favor.").

II. A CERTIFICATE OF APPEALABILITY SHOULD ISSUE

A. Reasonable Jurists Could Differ As To Whether Mr. Henderson's Trial Counsel Failed In Their Duties To Fully Represent Mr. Henderson When They Advised Him To Plead Guilty To Capital Murder (Amended Petition ¶ 8h)[2]

Despite the failure to perform even a rudimentary mitigation investigation, trial counsel advised Kennath Henderson to plead guilty to capital murder, including to facts which necessarily proved the existence of two of the four aggravating circumstances the

[2] Amended Petition ¶8h: In violation of the Sixth, Eighth, and Fourteenth Amendments . . . Kennath Henderson's counsel were ineffective in preparation for trial and at the resulting guilty plea for the following . . . reasons which prejudiced Mr. Henderson: (h) Counsel failed in their duties to fully represent Mr. Henderson when they advised him to enter guilty pleas to the charges against him (R.16, Amended Petition, PageID# 91).

prosecution was to prove in order to sentence Mr. Henderson to death.[3] As counsel has admitted, his entire "strategy" in advising Mr. Henderson to plead guilty and waive juror sentencing was in hope that the trial court would sentence him to life by abandoning his judicial ethics and refusing to follow Tennessee's statutory sentencing scheme. See R.77, Exhibit 1, Declaration of Mike Mosier, PageID# 4316. In truth and in fact, when advising Mr. Henderson to plead guilty, counsel employed no "strategy" at all – the vain hope that a court will abandon its judicial ethics and refuse to follow the law is not, in fact, a strategy. Correll v. Ryan, 539 F.3d 938, 951 & n.4 (9th 2009)(a presumption that the judge would not follow the law is "speculation that is never appropriate").

Counsel's ineffectiveness vitiated the quality of their advice to Mr. Henderson to enter a guilty plea and waive juror sentencing. Indeed, trial counsel failed to provide effective representation to Mr. Henderson, because their advice was based on an irrational hope that the trial court would abandon his judicial ethics and refuse to apply the law, instead of conducting a thorough mitigating investigation. Because of counsel's failure to properly investigate obvious sources of potential mitigation, counsel had no mitigation case to present in Mr. Henderson's defense. Out of uninformed despair, counsel advised Mr. Henderson that his only hope to avoid capital punishment was to plead guilty and waive juror sentencing. Because this advice was antithetical to the laws of the State of Tennessee, counsel effectively abdicated his role as legal counsel, depriving Mr. Henderson of his right to counsel under the Sixth Amendment to the Constitution. Had counsel properly investigated and read the discovery provided by the State, counsel would not have advised Kennath Henderson to plead guilty, and in fact,

[3] The admission that Kennath Henderson shot and killed Deputy Tommy Bishop when Deputy Bishop transported Mr. Henderson from the jail to the dentist office on May 2, 1997 necessarily proved that (1) Mr. Henderson was in custody at the time of the murder and (2) that Deputy Bishop was a law enforcement officer.

Kennath Henderson would not have agreed to plead guilty. See R.77, Exhibit 1, Declaration of Mike Mosier; PageID# 4316.

The Supreme Court has determined that deficient performance by counsel is measured against an "objective standard of reasonableness;" Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984), and "under prevailing professional norms." Wiggins v. Smith, 539 U.S. 510, 521, 123 S.Ct. 2527, 2535 (2003). A defendant must demonstrate both deficient performance and prejudice – that there is a reasonable probability that but for counsel's error the defendant would not have made the decision of which he complains. Strickland, 466 U.S. at 668. In the case of a guilty plea, the accused must show that but for counsel's errors, there is a reasonable probability that he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 56, 106 S.Ct. 366 (1985).

Trial counsel's advice that Kennath Henderson should plead guilty and waive a jury trial out of a hope the trial court would not follow the law was clearly not advice "within the range of competence demanded of attorneys in criminal cases" as required by *Strickland*. See Strickland, 466 U.S. at 687 (*quoting* McMann v. Richardson, 397 U.S. 759, 770, 771, 90 S.Ct. 1441 (1970)). The advice given Mr. Henderson – to plead guilty and waive juror sentencing hoping that the trial court would not follow the law – is analogous to the affirmative misadvice the Supreme Court found to constitute deficient performance under *Strickland* and *Hill* in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010).

Padilla involved a criminal defendant who was induced to plead guilty based on his attorney's advice that the plea would not affect his immigration status. That advice was affirmatively wrong. In finding counsel's performance deficient under *Hill*, the

Supreme Court cited the ease with which counsel could have determined the actual, legally mandated consequences of Padilla's plea – that immigration law required that drug felons be deported. Just as Padilla's attorney would have learned that deportation was legally mandated by the immigration code had he read it; if trial counsel here had read the statute, he would have known that a death sentence is mandated when aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt. See T.C.A. § 39-13-204(g).

Counsel recognized that, in light of the paucity of mitigation proof the defense had to present, the court would not have discretion as to whether to impose the death penalty. See R.77, Exhibit 1, Declaration of Michael Mosier, PageID# 4316. Despite this knowledge, counsel advised Kennath Henderson to plead guilty and leave the sentencing to the trial court. Id. Counsel's advice to Mr. Henderson – necessarily predicated on some belief that there was a possibility that the trial court would not follow the law — was affirmatively unreasonable and misleading. Had Mr. Henderson been correctly and reasonably advised that under Tennessee law the trial court was actually required to sentence Mr. Henderson to death, he certainly would not have pleaded guilty. Thus, counsel's unreasonable and misleading advice had devastating consequences – not simply deportation, as in *Padilla*, but a death sentence for Mr. Henderson.

1. The CCA's Determination Of The Facts Was Unreasonable In Light Of The Record; The District Court's Decision To The Contrary Is Debatable Among Jurists Of Reason

a) The CCA's Determination Of The Facts Was Unreasonable

Finding that counsel's advice to Mr. Henderson that he should plead guilty and waive juror sentencing was not ineffective, the CCA unreasonably determined that "the petitioner made a conscious decision between two (2) viable options." Henderson v.

State, 2005 Tenn. Crim. App. LEXIS 667, at *113. This finding was patently unreasonable in light of counsel's failure to investigate or develop a mitigation theory – particularly where counsel admits that he knew at the time that "we did not have mitigation proof sufficient to legally outweigh the aggravating circumstances." See R.77, Exhibit 1, Declaration of Mike Mosier, PageID# 4316. In actuality, counsel's advice to Mr. Henderson was that he had no other viable option other than to plead guilty and have the trial court sentence him. That advice was based on nothing more than counsel's unfounded hope that the trial court would throw his duty to uphold the law to the winds. Id. Such advice, based on the dearth of any competent mitigation investigation, not only failed to insure that Kennath Henderson "made a conscious decision between two (2) viable options" as the CCA found, it, in fact, guaranteed that his choice was anything but.

The CCA's conclusion that Mr. Henderson "made a conscious decision between two (2) viable options" is an unreasonable determination of the facts in light of the record. See 28 U.S.C. § 2254(d)(2). As a result, Kennath Henderson is entitled to *de novo* review of his claim and to habeas corpus relief. The District Court's determination to the contrary is error.

b) The District Court's Decision Denying Relief Is "Debatable Among Jurists Of Reason" And A COA Should Issue

The District Court's determination that Mr. Henderson failed to present clear and convincing evidence that the CCA's adjudication of this claim was unreasonable is wrong and at the very least debatable. As Mr. Henderson has shown, counsel's advice was based on pure desperation, not legal theory or strategy. As lead counsel Mike Mosier has sworn, his "strategy was to put the case in front of Judge Blackwood and trust that he

would follow his conscience **rather than the law.**" See R.77, Exhibit 1, Declaration of Mike Mosier, PageID# 4316 (emphasis added).

Counsel's desperation was borne of inaction and ignorance. Because counsel did not have any capital defense training, counsel did not understand how to supervise a mitigation investigation. Because counsel did not supervise his mitigation investigator, he did not know she had failed to so much as ask anyone what her client's father's name was — much less interview that father or his relatives. Counsel also failed to read the discovery provided him by the State, thereby missing the information regarding Mr. Henderson's criminal history and progressive decompensation into the altered, manic state in which the instant offense was committed. Because of counsel's failures, counsel had nothing of any worth to present to the trial court on Mr. Henderson's behalf: "At the time I advised Mr. Henderson to plead guilty, we did not have mitigation proof sufficient to legally outweigh the aggravating circumstances" Id.

Counsel's advice, given in light of the complete void of a competent mitigation investigation, was not advice of counsel as contemplated by the Sixth Amendment, but was, rather, an abdication of the responsibility of counsel to provide effective representation. The District Court's decision to the contrary is debatable among jurists of reason and a COA should issue where other similarly situated petitioners have gotten habeas relief. See Dando v. Yukins, 461 F.3d 791, 799 (finding counsel's performance outside the range of competence for attorneys where her advice "was not an exercise in professional judgment because it reflected a misunderstanding of the law"); Mapes v. Stegall, 340 F.3d 433, 439 (6th Cir. 2003)(erroneous advice from counsel is outside the realm of "an objective standard of reasonableness" and constitutes deficient

performance); Magana v. Hofbauer, 263 F.3d 542, 550 (6th Cir. 2001)(same); Lyons v. Jackson, 299 F.3d 588 (6th Cir. 2002)(same).

2. The CCA Unreasonably Applied *Strickland* and *Hill*

In determining that Mr. Henderson was not entitled to post-conviction relief, the CCA's decision was also an unreasonable application of *Strickland* and *Hill*. Finding that Mr. Henderson had failed to demonstrate ineffective assistance of counsel, the CCA concluded:

> The record indicates that trial counsel made no guarantee to the petitioner that the trial court would not impose a death sentence. The evidence against the petitioner was overwhelming, as was the evidence of the statutory aggravating factors. Moreover, it is clear from the colloquy at the guilty plea hearing that the petitioner was informed that the trial court could impose a sentence of life, life without parole or death. Thus, the petitioner made a conscious decision between two (2) viable options. Without more, the petitioner has failed to prove that counsel's advice was completely unreasonable. He is not entitled to relief on this issue.

Henderson, at *113-114.

In determining that counsel's performance was not deficient under the first prong of the *Strickland* analysis, the CCA held that Mr. Henderson had failed to show that trial counsel's advice was "completely unreasonable," because proof of his guilt was overwhelming. Henderson, at *110. The CCA failed to contemplate that counsel's advice was predicated **entirely** on counsel's "trust" that the judge would "follow his conscience rather than the law," and that counsel's unreasonable advice deprived Mr. Henderson of actual, legal counsel.

The CCA unreasonably relied on Fields v. Gibson, 277 F.3d 1203 (10th Cir. 2002), which involved an attorney who believed that the trial court would not impose death, because of prior statements by the trial judge, and related those statements to her client. In assessing whether counsel in *Fields* was ineffective for her advice to enter a blind

plea, the question was not – as is the case with Mr. Henderson – whether counsel was ineffective for advising a client to take an action hoping for the court to refuse to follow the law, but whether counsel was ineffective for basing her advice on *ex parte* conversations with the judge. In ruling against Mr. Fields, the Tenth Circuit stated, "a lawyer is supposed to take all information she learns and use it to advise her client of his best course of action." Fields, 277 F.3d at 1217. Mr. Henderson's counsel failed to do exactly that: they failed to gather information to use in giving Mr. Henderson advice and were therefore left with only their inaccurate assessment and blind hope that the court would not follow the law.

Here, counsel's advice to plead and waive juror sentencing was based on two factors: 1) counsel's failure to conduct a thorough mitigation investigation and 2) counsel's personal belief that the trial court would decide the case based on something other than Tennessee law. See R.77, Exhibit 1, Declaration of Mike Mosier, PageID# 4316. That counsel advised Mr. Henderson to plead guilty and waive juror sentencing based on those two factors is, in fact, deficient performance. Counsel's advice, rooted in the inadequacies of his mitigation investigation, was ineffectiveness born of ineffectiveness. Williams, 529 U.S. at 395; Goodwin v. Johnson, 632 F.3d 301, 318 (6th Cir. 2011); Woodard v. Mitchell, 2010 U.S. App. LEXIS 24761, *24-25 (6th Cir. Dec. 2, 2010); Bigelow v. Haviland, 576 F.3d 284, 289 (6th Cir. 2009); Hawkins v. Coyle, 547 F.3d 540, 548 (6th Cir. 2008); Jells v. Mitchell, 538 F.3d 478, 491 (6th Cir. 2008); Eady v. Morgan, 515 F.3d 587, 597 (6th Cir. 2008). Counsel's advice to Mr. Henderson to plead guilty trusting that the court might not follow the law was not legal advice at all – it was stupidity.

Counsel advised Mr. Henderson that his only chance to avoid the death penalty was to plead and have the court sentence him when, in truth and in fact, Mr. Henderson's best chance to avoid the death penalty would have been to have a competent lawyer who actually investigated and presented the available and compelling mitigation evidence. Because counsel failed to perform a constitutionally adequate mitigation investigation, counsel's advice clearly constitutes deficient performance. The CCA's analysis of counsel's deficient advice without reference to counsel's failure to investigate and develop mitigation proof is an unreasonable application of *Strickland* and is contrary to *Hill*. The District Court's determination to the contrary (R. 91, Order, PageID# 4413-4414) is error and is debatable among jurists of reason. *Compare* Koon v. Cain, 277 Fed. Appx. 381, 388 (5th Cir. 2008)(capital defendant was prejudiced by ineffective assistance of counsel in the guilt stage of his trial where trial attorney failed to retain mental health expert until eve of trial which prohibited expert from developing complete psychological history and conducting thorough assessment of defendant); Daniels v. Woodford, 428 F.3d 1181 (9th Cir. 2005)(capital petitioner was prejudiced by ineffective assistance of counsel in the guilt stage of his trial where trial attorney did not investigate petitioner's background to discover history of mental illness); Jacobs v. Horn, 395 F.3d 92 (3rd Cir. 2005)(reversing denial of guilt phase ineffective assistance claim on finding that petitioner was prejudiced by trial counsel's failure to investigate social history and provide psychological expert with full details regarding the case); Jennings v. Woodford, 290 F.3d 1006 (9th Cir. 2002)(capital petitioner was prejudiced by ineffective assistance of counsel in the guilt stage of his trial where his attorney failed to investigate petitioner's social history, which would have revealed mental health issues that provided basis for meritorious state of mind defense).

3. The Outcome Determinative Test Used By The CCA Was Contrary To Supreme Court Precedent And The District Court's Determination To The Contrary Is Debatable

Contrary to the mandates of *Strickland* and *Hill*, the CCA applied an outcome determinative test to decide that Mr. Henderson was not entitled to relief. The CCA found that counsel were not ineffective because the evidence of Mr. Henderson's guilt was overwhelming, as were the aggravating factors. Henderson, at *113-114. Because the CCA's test would require Mr. Henderson to prove he would have prevailed had he gone to trial, it is contrary to clearly established federal law.

Under *Strickland*, a defendant complaining about the ineffectiveness of his counsel must demonstrate that 1) "the performance of counsel fell below an objective standard of reasonableness," Strickland, 466 U.S. at 687-688, and that 2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. In *Hill*, the Court clarified the *Strickland* standard within the context of a guilty plea: "in order to satisfy the 'prejudice' requirement [of *Strickland*], the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59.

Here, counsel was ineffective for advising Kennath Henderson to enter a guilty plea and waive juror sentencing. Accordingly, pursuant to *Hill*, Mr. Henderson must prove that, but for counsel's advice, he would not have pleaded guilty and waived juror sentencing. Mr. Henderson does not have to prove that he would have been acquitted, as the CCA held. That is to say, under *Hill*, the court's inquiry is not whether, absent the erroneous advice, the defendant would have prevailed, but whether he would have

waived his rights. Hill, 474 U.S. at 59; see also Magana, 263 F.3d 542; Turner v. State, 858 F.2d 1201 (6th Cir. 1988); Dickerson v. Meggett, 90 F.3d 87 (3rd Cir. 1996).

Hill requires a reviewing court to consider the weight of the evidence against the accused only as that evidence would have factored into the attorney's advice had the attorney performed effectively. The CCA failed to apply the clearly established law of *Hill* and *Strickland*, and instead merely stated that the evidence against Mr. Henderson was overwhelming without assessing how the trial counsel's failure to investigate or read discovery affected the advice counsel gave to their client.

Trial counsel would not have advised Mr. Henderson to plead guilty and waive juror sentencing if he had conducted an adequate mitigation investigation, including reading discovery. Accordingly, the question before the CCA was not whether Kennath Henderson would have won at trial, but rather whether, in accord with *Hill*, there is a reasonable probability that he would not have pleaded guilty absent counsel's unreasonable advice.

As a result, Mr. Henderson is entitled to a COA where the decision of the District Court, which affirms the state court's conflation of the Hill test for prejudice, is "debatable among jurists of reason." Where Hill has been improperly and unreasonably applied, and where the test for prejudice used by the state courts is incorrect, other petitioners have been granted a COA. See Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 1512 (2000)(state court applied the wrong standard for prejudice); Gray v. Branker, 529 F.3d 220, 235 (4th Cir. 2008)(state court unreasonably failed to apply test for prejudice established by the U.S. Supreme Court); West v. Bell, 550 F.3d 542, 553 (6th Cir. 2008)(same); Ferensic v. Birkett, 501 F.3d 469, 474 (6th Cir. 2007)(same); Richey v. Mitchell, 395 F.3d 660, 687 (6th Cir. 2005); Johnson v. Scott, 68 F.3d 106, 109

(5th Cir. 1995). As a result, the issue is "debatable among jurists of reason," and a COA should issue.

4. The CCA's Use Of A "Completely Unreasonable" Instead Of "Objectively Unreasonable" Standard Was Contrary To Strickland; The District Court's Denial of Relief Is Debatable Among Jurists Of Reason

a) The CCA's Decision Is Contrary To Supreme Court Precedent

Further, contrary to precedent, the CCA applied an erroneous standard in assessing the reasonableness of counsel's advice to Mr. Henderson. A state court decision is "contrary to" clearly established Supreme Court precedent when the state court "'appl[ies] a rule that contradicts the governing law set forth in [Supreme Court] cases,' or 'confronts a set of facts that are materially indistinguishable from a decision of' the Supreme Court and nevertheless arrive[s] at a different result." Magana, 263 F.3d 542, 546 (*quoting* Williams, 529 U.S. at 405-06, 120 S.Ct. 1495 (O'Connor, J., concurring)).

The standard by which ineffective assistance of counsel is judged is clearly established federal law. Starting with *McMann* in 1970 and reiterating it with *Strickland* in 1984, the Supreme Court has held that: "when a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an **objective** standard of reasonableness." Strickland, 466 U.S. at 687-688 (*citing* McMann, 397 U.S. at 771 (emphasis added). Despite the clear wording of *Strickland*, the CCA ruled that Mr. Henderson's claim failed, because "the petitioner has failed to prove that counsel's advice was **completely** unreasonable." See Henderson, at *113-114 (emphasis added).

When the state court fails, as here, to apply the appropriate legal standard, the federal courts are unconstrained by §2254 (d)(1) and may review a claim *de novo*. See Fulcher v. Motley, 444 F.3d 791 (6th Cir. 2006) (*citing* Romine v. Head, 253 F.3d 1349, 1365 (11th Cir. 2001)). A state court decision "will certainly be contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases." *Id.* at 799 (*quoting* Williams, 529 U.S. at 412-13); Gray v. Branker, 529 F.3d 220 (4th Cir. 2008) (habeas relief granted where state court "required certainty that the jury would have reached a different result" contrary to *Strickland*). In *Fulcher*, this Court provided an example of a state court applying an erroneous rule of law. The example given was of a state court requiring a defendant to prove the prejudice prong of a *Strickland* analysis by a preponderance of the evidence—a higher standard than the "reasonable probability" standard set forth by *Strickland*. Application of such a clearly erroneous standard is "contrary to" the rule of *Strickland*.

By denying Mr. Henderson relief based on his failure to demonstrate that counsel's advice was "completely" unreasonable, the CCA held Mr. Henderson to an erroneously high standard of proof that was contrary to clearly established law. "Complete" unreasonableness encompasses the "objective" unreasonableness contemplated by *Strickland*, but also encompasses "subjective" unreasonableness. It is this additional component, necessarily included in "complete" unreasonableness, which is contrary to the standard articulated by the Supreme Court. By setting forth a standard of "objective" unreasonableness, the Supreme Court necessarily limited the proof a convicted defendant must put forth. Rather than requiring a defendant to defeat all possible subjective rationales for counsel's advice, he must show only that it was

objectively unreasonable. The CCA applied the wrong standard to Mr. Henderson's claim contrary to the clear dictates of *Strickland*, and the District Court opinion denying relief is debatable among jurists. R. 91, Order, PageID# 4416-4417.

b) The District Court's Denial Of Relief Is Debatable

Citing two opinions from the Tenth Circuit, the District Court determined that the CCA's use of the "completely unreasonable" standard in the place of *Strickland's* "objectively unreasonable" standard is not contrary to clearly established federal law. R. 91, Order, PageID# 4416. Indeed numerous opinions from the Tenth Circuit utilize the "completely unreasonable" standard, and this Court has -- at least once -- cited such opinions with approval. See, e.g., Moore v. Mitchell, 708 F.3d 760, 786 (6th Cir.) cert. denied sub nom. Moore v. Robinson, 134 S. Ct. 693, 187 L. Ed. 2d 559 (2013) ("As a sister circuit has stated, in choosing to call a witness, '[f]or counsel's [decision] to rise to the level of constitutional ineffectiveness, the decision ... must have been completely unreasonable, not merely wrong, so that it bears no relationship to a possible defense strategy'" *citing* Hoxsie v. Kerby, 108 F.3d 1239, 1246 (10th Cir.1997)).

However, even within the Tenth Circuit, reasonable jurists disagree as to whether the standard for review of a trial counsel's strategy decision must be "completely" unreasonable or merely "objectively" so:

> Petitioner "must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* But "the mere incantation of 'strategy' does not insulate attorney behavior from review." *Fisher v. Gibson,* 282 F.3d 1283, 1296 (10th Cir.2002). We must consider whether that strategy was **objectively reasonable**. *See id.* at 1305; *Roe v. Flores-Ortega,* 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).[3]

Hooper v. Mullin, 314 F.3d 1162, 1169-70 (10th Cir. 2002)(emphasis added).

Further the Tenth Circuit's treatment of the "completely unreasonable" standard is cabined within its treatment of trial counsel strategy. That is to say, the Tenth Circuit determines whether counsel's actions were part of a "sound trial strategy" and only if that is so does the higher "completely unreasonable" standard apply. "An attorney who is shown to have made a conscious strategic choice will only be found constitutionally incompetent where the strategy pursued was "completely unreasonable" not merely wrong." Sallahdin v. Mullin, 380 F.3d 1242 (10th Cir. 2004) (citing Bullock v. Carver, 297 F.3d 1047 10th Cir. 2002). As the Tenth Circuit has articulated the two level inquiry:

> As will be discussed below, the overriding question under the first prong of *Strickland* is whether, under all the circumstances, counsel performed in an objectively unreasonable manner. Two presumptions inform our objective reasonableness inquiry. First, we always start the analysis that an attorney acted in an objectively reasonable manner and that an attorney's challenged conduct *might* have been part of a sound trial strategy. **Second, where it is shown that a particular decision was, *in fact,* an *adequately informed* strategic choice, the presumption that the attorney's decision was objectively reasonable becomes "virtually unchallengeable."**

Bullock v. Carver, 297 F.3d 1036 (10th. Cir 2002).

In this case, however, Mr. Henderson has shown that the decision by counsel to advise Mr. Henderson to plead guilty and waive jury sentencing was anything but "an adequately informed strategic choice." Id. Counsel failed to conduct even a rudimentary mitigation investigation, failing to even identify Mr. Henderson's father. Counsel had nothing to offer as mitigation to balance the aggravating circumstances which were necessarily proven by Mr. Henderson's plea; counsel just did not want to live through the humiliation of a trial. "As we established in *Strickland,* 'strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable

professional judgments support the limitations on investigation.' " Wiggins v. Smith, 539 U.S. 510, 528 (2003)(*citing* Strickland, 466 U.S. at 690-691). Mr. Henderson's counsels' failure to investigate was completely unreasonable, therefore their uninformed decisions, whether called strategy or not, flowing from that failure to investigate were equally unreasonable. Even under the Tenth Circuit's "completely unreasonable" strategy test, the CCA's opinion fails: because counsel failed to conduct a reasonable investigation, counsel's advice to waive a jury trial and jury sentencing by pleading to facts necessarily proving four aggravating circumstances cannot be considered "strategy" and the CCA therefore held Mr. Henderson to too high a standard. Counsel's assistance was objectively unreasonable and Mr. Henderson deserves relief.

Because jurists of reason, like those in the Tenth Circuit, can and do disagree concerning the appropriate degree of unreasonableness which a petitioner must show regarding his attorneys' assistance, Mr. Henderson is entitled to a COA.

B. Kennath Henderson's Counsel Were Ineffective At The Guilt Stage When They Failed To Use Expert Services Effectively And Reasonable Jurists Could Differ With The District Court's Determination To The Contrary (Amended Petition ¶ 8k)[4]

Kennath Henderson's counsel did not know about his neurological and psychiatric deficiencies and the impact those deficiencies had on his ability to conform his behavior at the time of the offense and to knowingly and intelligently waive his rights at trial. Counsel were not aware of the brain damage that Mr. Henderson suffered as a child. Counsel didn't know that Mr. Henderson had low brain volume which further limited his abilities. Counsel were not aware of the remarkable and telling changes in

[4] Amended Petition ¶8k: In violation of the Sixth, Eighth, and Fourteenth Amendments . . . Kennath Henderson's counsel were ineffective in preparation for trial and at the resulting guilty plea for the following . . . reasons which prejudiced Mr. Henderson: (k) Counsel failed to use expert services effectively (R.16, Amended Petition, PageID# 92-93.

Mr. Henderson's behavior and personality during late adolescence and into early adulthood. Counsel did not know that Mr. Henderson's behavior and personality change was caused by a severe mental illness, rapid-cycling (or mixed phase) bipolar disorder, for which he had a genetic predisposition and which prevented him from controlling his behavior and emotions. Counsel didn't know these things – and as a result, none of this critical information was relayed to Mr. Henderson's psychologist, Lynn Zager. R. 23-2, Addendum No. 7, TR PC, Vol.2 (Mike Mosier), PageID# 2254, 2572.

Without the critical social history, Dr. Zager would have been unable to arrive at an appropriate diagnosis for Mr. Henderson – though she wasn't even asked to do so before counsel advised Mr. Henderson to plead guilty. At counsel's request, Dr. Zager began her assessment of Mr. Henderson on November 4, 1997 by conducting a preliminary interview but not psychological testing. R. 77, Exhibit 3, Declaration of Dr. Zager, PageID# 4321. As Dr. Zager related, she did not speak with counsel after November 1997 until she received a phone call letting her know that Mr. Henderson had entered a guilty plea. Id. Having failed to perform the social history investigation, counsel also failed to have Dr. Zager complete her examination or conduct any psychological testing prior to Mr. Henderson's plea.

Counsels' performance was clearly deficient – they failed to investigate and obtain Mr. Henderson's life history and history of mental illness and to provide that information to Dr. Zager and failed to ask her to conduct even the most basic psychological testing. Because counsels' performance was unreasonable and did not meet the minimum standards in the profession, counsels' performance was deficient. And, because there is a reasonable probability that Kennath Henderson would not have

been sentenced to death but for counsels' errors, Kennath Henderson is entitled to habeas corpus relief. See Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527 (2003) (granting habeas relief where counsel failed to fully investigate and present mitigating evidence); Williams v. Taylor, 529 U.S. 420, 120 S.Ct. 1479 (2000)(same).

1. The District Court's Denial Of Mr. Henderson's Claim Is Not Supported By The State Court Record And Is Therefore Debatable Among Jurists Of Reason; A COA Should Issue

Having found Mr. Henderson's claim regarding the use of experts to be exhausted, the District Court dismissed this claim in its entirety based on the CCA's discussion of the Administrative Office of the Courts' failure to respond timely to trial counsel's request for funding for the mitigation specialist, Julie Fenyes. R. 72, Order, PageID# 4121. The District Court quoted the state court opinion at length and then summarized: "the AOC (not trial counsel) caused the delay in obtaining additional funding for the mitigation specialist despite counsel's repeated efforts." Id. at PageId# 4122 (citing Henderson, 2005 WL 1541855 at **33-34). Missing from the District Court's discussion of the claim is any analysis of the allegations that counsel was ineffective for failing to properly utilize the services of **Dr. Zager** prior to the plea. The District Court did not address that portion of Amended Petition ¶8k at all.[5]

As the District Court dismissed the claim based upon a state court's decision which did not address the claim relating to Dr. Zager, the District Court's determination is debatable. The District Court was correct that ¶8k is exhausted – the claim appears in the state post-conviction petition and was raised on appeal to the state appellate court.

[5] The District Court did not address the Zager portion of claim ¶8k except to the extent that it intended footnote 22 to address Zager. Footnote 22 states: "to the extent this claim includes an evaluation of the mitigation evidence that trial counsel and defense experts investigated and presented, the court will consider these allegations in connection with Henderson's ineffective assistance claims related to the penalty phase asserted in ¶9 of the Amended Petition." R.72, Order, PageID# 4120. The District Court granted a COA as to ¶9.

However, the CCA did not address trial counsel's ineffectiveness pre-plea in failing to provide Dr. Zager with an adequate social history or allowing her to complete her assessment. Because the state court failed to adjudicate Mr. Henderson's ineffective assistance of counsel claim as it related to counsel's failure to effectively use Dr. Zager pre-plea, Mr. Henderson's claim is not encumbered by any AEDPA deference to the state court. Johnson v. Williams, 133 S.Ct. 1088 (2013) ("If a federal claim is rejected as a result of sheer inadvertence, it has not been evaluated based on the intrinsic right and wrong of the matter."); Cone v. Bell, 556 U.S. 449 (U.S. 2009)(where the state court did not reach the merits of a claim, federal habeas review is not subject to the deferential standard under AEDPA and the claim is reviewed *de novo*); Rompilla v. Beard, 545 U.S. 374, 390 (*de novo* review where state courts did not reach *Strickland* prejudice prong); Wiggins v. Smith, 539 U.S. 510 (2003)(same). Mr. Henderson is therefore entitled to *de novo* review of this claim, and ultimately to relief.

As Mr. Henderson has shown, counsel's failure to provide Dr. Zager with an adequate social history prevented her from properly diagnosing Mr. Henderson. Counsel failed to identify or investigate Mr. Henderson's father, which prevented Dr. Zager from diagnosing Mr. Henderson's rapid-cycling bi-polar I disorder, which is genetically linked. Counsel failed to review the discovery material provided to them by the state which would have led to information necessary for proper diagnosis. Had counsel performed this most basic task, *simply reading the discovery provided to him by the State*, counsel would have known, as everyone in the Fayetteville courthouse – except counsel – knew, that Mr. Henderson was accused of crimes which raised very obvious red flags about his mental health. The facts of Mr. Henderson's prior crimes, had counsel been aware of them, would have provided crucial information to Dr. Zager,

allowing her to appropriately diagnose Mr. Henderson's mental illness. See R.77, Exhibit 3, Declaration of Dr. Zager, PageID# 4322. Mr. Henderson's behavior during those prior crimes was proof that he was suffering from both mania (recklessness, hypersexuality, altered thinking), and depression (suicidal ideation, distorted perception of reality), and their co-concurrence. Id. This information "would have opened the door for [Dr. Zager] to consider whether [Mr. Henderson] was suffering from serious, Axis I, mental illness." Id. Had she been provided this information prior to Mr. Henderson's plea, it is likely she would have reached the correct diagnosis – that Mr. Henderson suffers from a severe mental illness, rapid-cycling Bipolar I disorder. See R. 68, Exhibit 2, Report of Dr. George Woods, PageID# 4001; R.77, Exhibit 3, Declaration of Dr. Zager, PageID# 4323 ("the diagnosis of Dr. George Woods appears to be more accurate than the diagnosis I was able to provide in 1998"). Had Dr. Zager known that Mr. Henderson had a family history replete with mental illness, specifically rapid-cycling Bipolar I Disorder, and that Mr. Henderson's recent history included episodes of co-occurring severe depression and mania, her evaluation of Mr. Henderson would have addressed those issues and would have likely resulted in a diagnosis of rapid-cycling Bipolar I Disorder, just as Dr. Woods has found. Id., PageId# 4323 (finding Dr. Woods' diagnosis to be more accurate than her own). As Dr. Zager has stated, "I believe that Ms. Fenyes' failure to investigate in this case caused me to have inadequate information to assist in my diagnosis of Mr. Henderson's condition, resulting in a diagnosis that is no longer reliable." Id., PageID# 4322. Counsel's failure to provide any information to Dr. Zager pre-plea or to even permit her to finish her evaluation prior to advising Mr. Henderson to plead guilty prevented Dr. Zager from adequately assessing Mr. Henderson, which, in turn led counsel to ineffectively advise

Mr. Henderson that he had no choice but to plead guilty and hope that the trial judge did not follow the law.

A COA should issue as the issue raised by Mr. Henderson is "adequate to deserve encouragement to proceed further." Barefoot, *supra*, 463 U.S. at 893. The District Court erroneously relied on the state court's non-resolution of Mr. Henderson's claim to deny relief. Such a denial is clearly debatable under *Johnson* and *Cone*, supra, and under Miller-El, a COA must issue. Miller-El v. Cockrell, 537 U.S. 322 (2003).

C. Reasonable Jurists Differ As To Whether *Martinez v. Ryan* Applies To Claims Of Ineffective Assistance Of Appellate Counsel (Amended Petition ¶ 10)[6]

While *Martinez* by its terms applied to a claim of ineffective-assistance-of-trial-counsel, its equitable principles apply to Mr. Henderson's claim that appellate counsel was ineffective for failing to challenge all issues raised in Mr. Henderson's habeas petition. R.16, Amended Petition ¶ 10b(11), PageID# 117. The District Court's determination to the contrary is debatable. See Nguyen v. Curry, 736 F.3d 1287 (9th Cir. 2013)(holding that *Martinez* does apply to claims of ineffective assistance of appellate counsel). As a result, Mr. Henderson is entitled to a COA on this issue.

Under *Martinez*, to the extent that Henderson shows that post-conviction counsel was ineffective in failing to claim that direct appeal counsel was ineffective for failing to allege that Mr. Henderson received ineffective assistance of trial counsel, the ineffectiveness of post-conviction counsel provides Henderson "cause" for the default of his ineffective-assistance-of-appellate-counsel claim, which in turn provides "cause" for

[6] Amended Petition ¶10: In violation of the Sixth, Eighth and Fourteenth Amendments, Kennath Henderson's counsel was ineffective on appeal (R.16, Amended Petition, PageID# 114-117).

the default of his substantive challenges to ineffective assistance of trial counsel. See Promotor v. Pollard, 628 F.3d 878, 887 (7th Cir. 2010) (otherwise defaulted claim of ineffective assistance of counsel can still provide "cause" if petitioner can show "cause and prejudice" for the default of the ineffectiveness claim itself). Thus, the District Court's determination that *Martinez* does not apply to Mr. Henderson's claims of ineffective assistance of appellate counsel is debatable and a COA must issue as to Mr. Henderson's claims regarding appellate counsel's ineffectiveness that the District Court found to be defaulted, including Amended Petition ¶ 10b(4)[7](Appellate counsel failed to raise a challenge to the trial court's denial of a change of venue) and Amended Petition ¶ 10(b)(5)[8](Appellate counsel failed to raise a challenge to the trial court's denial of Mr. Henderson's motion to strike T.C.A. § 39-13-204(h) as unconstitutional and to allow the jury to know that if they are unable to reach a verdict in the sentencing phase that the judge will impose a sentence of life imprisonment).

D. Reasonable Jurists Could Debate The District Court's Ruling That Martinez v. Ryan, 566 U.S. 1 (2012) Does Not Apply To Post-Conviction Counsel's Failure To Litigate Trial Ineffectiveness Argued As Cause For Procedural Default Under Edwards v. Carpenter, 529 U.S. 446 (2000); Mr. Henderson Is Entitled To A COA Regarding The District Court's Procedural Ruling And As To The Substantive Claims As Well (Amended Petition ¶ 20

1. Reasonable Jurists Could Debate The District Court's Ruling That *Martinez* Does Not Apply To Post-Conviction Counsel's Failure To Litigate Trial Ineffectiveness Argued As Cause For Procedural Default Under *Edwards*

The District Court ruled that a number of Mr. Henderson's substantive constitutional claims are procedurally defaulted. Mr. Henderson has maintained, however, that the ineffective-assistance-of-trial-counsel provides "cause" for the default

[7] R.16, Amended Petition, PageID# 115-116.
[8] R.16, Amended Petition, PageID# 116.

of such substantive claims. Admittedly, however, such "ineffectiveness as cause" arguments were themselves never raised by post-conviction counsel and are otherwise defaulted and cannot be used to establish cause – unless Mr. Henderson has cause for the post-conviction default as well. Edwards v. Carpenter, 529 U.S. 446 (2000); Id. at 454-459 (Breyer, J., concurring). Mr. Henderson has asserted that he has cause for this post-conviction default, given the principles, theory, and holding of *Martinez*, which, he maintains, allowed the ineffectiveness of post-conviction counsel to establish cause for any failure to present in state court his "ineffective-assistance-as-cause" arguments.

The District Court disagreed, but when one examines *Martinez* in light of *Edwards*, and Justice Breyer's concurring opinion in *Edwards*, it is clear that Mr. Henderson's position on this matter is debatable among reasonable jurists, if not meritorious. It certainly deserves encouragement to proceed further. Thus, a COA should issue on the question whether, in light of *Martinez*, the ineffective assistance of Mr. Henderson's post-conviction counsel provides cause for the procedural default of his ineffective-assistance-of-counsel arguments which, in turn, provide cause for the default of his substantive constitutional claims for relief.

Ineffective assistance of trial counsel constitutes cause for the procedural default of federal claims (trial-IAC-cause, "TIAC-cause"). Murray v. Carrier, 477 U.S. 478 (1986). However, TIAC-cause must be exhausted in state courts. Edwards, *supra*. *Edwards* also anticipated that a federal habeas petitioner could show cause for the default of his TIAC-cause claim in state court: "To hold, as we do, that an ineffective-assistance-of-counsel claim asserted as cause for the procedural default of another claim can itself be procedurally defaulted is not to say that that procedural default may not

itself be excused *if the prisoner can satisfy the cause-and-prejudice standard with respect to that claim*." Edwards, 529 U.S. at 453 (emphasis added).

In *Martinez*, the Supreme Court then recognized that habeas petitioners must be afforded a mechanism to show cause for the default of TIAC-cause. In *Martinez*, the Supreme Court ruled that the equitable principles that are the foundation of the habeas power require an exception to the established rule that post-conviction counsel's errors do not constitute cause for procedural default. See Coleman v. Thompson, 501 U.S. 722 (1991). The Court observed the procedural reality that "if counsel's errors in an initial review collateral proceeding do not establish cause to excuse the procedural default [of an ineffective assistance of trial counsel claim] in a federal habeas proceeding, no court will review the prisoner's claims." Martinez, 566 U.S. at ___, 132 S.Ct. at 1316. For this reason, and because "the right to the effective assistance of counsel is a bedrock principle in our justice system [and] the right to counsel is the foundation of our adversary system" (Id. at 1317), the Court ruled that ineffective assistance of collateral-review counsel constitutes cause (post-conviction-IAC-cause, "PCIAC-cause") for the default of a substantial ineffective assistance of trial counsel claim when post-conviction proceedings provide the petitioner's initial opportunity to litigate his TIAC claims.

Mr. Henderson's first opportunity to litigate his TIAC-cause claims in connection with the trial error claims that his defense attorneys failed to preserve for review occurred in his initial-opportunity collateral-proceeding. See Sutton v. Carpenter, 745 F.3d 787 (6th Cir. 2014)(finding, under the rubric of Trevino v. Thaler, 570 U.S. ___, 133 S. Ct. 1911 (2013), that the first opportunity for persons convicted in Tennessee to litigate ineffective assistance of trial counsel claims is after direct appeal in collateral review). Thus, where Mr. Henderson's post-conviction counsel failed to litigate at the

first opportunity to do so trial counsel's failure to preserve substantial claims of trial error (TIAC-cause), that failure constitutes cause (PCIAC-cause) for the default of Mr. Henderson's TIAC-cause claims and the trial-error claims on which they are based.

The Supreme Court's decision in *Martinez* contemplates this scenario. The Court stated specifically in *Martinez* that one of trial counsel's vital roles is to "preserve[] claims to be considered . . . in federal habeas." Id., *citing* Edwards. Thus, trial counsel's failure to preserve a claim for habeas review may constitute ineffectiveness, as was the case when Mr. Henderson's defense counsel failed to preserve the substantive issues raised in his habeas petition. Logic dictates that the same failure by initial opportunity collateral review counsel – to preserve *cause* for the default of the claim that trial counsel waived – must likewise constitute ineffectiveness, and in turn, cause for a procedural default. There is no difference at all between a TIAC-cause claim and a substantive ineffective assistance claim that *Martinez* permits a federal court to hear. Both claims are premised upon trial counsel's deficient performance that prejudiced a defendant, and both can only be litigated in an initial-opportunity collateral-review proceeding, where such issues must be properly raised and presented by post-conviction counsel. Thus, the principles of equity and due process that *Martinez* protects necessarily extend equally to defaulted claims of ineffective assistance of trial counsel that are presented as stand-alone claims *or* as cause for the default of a separate constitutional claim.

In fact, in his concurring opinion in *Edwards*, Justice Breyer foresaw that when a petitioner establishes cause for a post-conviction procedural default of a TIAC-cause argument – as *Martinez* allows – the petitioner must then be heard on the merits of his underlying constitutional claim. That is precisely the situation for Mr. Henderson,

where *Martinez* provides a vehicle for showing cause for the post-conviction default of an ineffectiveness claim argued as cause for the default of an underlying constitutional claim. Joined by Justice Stevens, Justice Breyer explained that a habeas petitioner is entitled to review of a defaulted underlying claim upon making a two-tiered showing of cause, namely the ineffective assistance of trial counsel (which establishes cause for default of the underlying claim) along with cause for the post-conviction default of the assertion of ineffective assistance of trial counsel. He explained:

> Consider a prisoner who wants to assert a federal constitutional claim (call it FCC). Suppose the State asserts as a claimed "adequate and independent state ground" the prisoner's failure to raise the matter on his first state-court appeal. Suppose further that the prisoner replies by alleging that he had "cause" for not raising the matter on appeal (call it C). After *Carrier*, if that alleged "cause" (C) consists of the claim "my attorney was constitutionally ineffective," the prisoner must have exhausted C in the state courts first. And after today, if he did not follow state rules for presenting C to the state courts, he will have lost his basic claim, FCC, forever. . . . According to the opinion of the Court, he will not necessarily have lost FCC forever if he had "cause" for not having followed those state rules (i.e., the rules for determining the existence of "cause" for not having followed the state rules governing the basic claim, FCC) (call this "cause" C*). The prisoner could therefore still obtain relief if he could demonstrate the merits of C*, C, and FCC.

Edwards, 529 U.S. at 458 (Breyer, J., concurring). Thus, Justice Breyer's exposition on the effect of *Edwards* is that a federal habeas petitioner who makes a two-pronged showing of cause – PCIAC and TIAC – is entitled to merits review of a defaulted substantive constitutional claim. Justice Breyer's opinion confirms the debatability of the District Court's ruling.

This construct fits within the boundaries of this Court's decision in Hodges v. Colson, 727 F.3d 517 (6th Cir. 2013), that demarcated the boundaries of *Martinez*. In *Hodges*, the panel adhered strictly to the Supreme Court's statement in *Martinez* that "an attorney's negligence in a post-conviction proceeding does not establish cause, and

this remains true *except* as to initial review collateral proceedings for claims of ineffective assistance of trial counsel." Hodges, 727 F.3d at 531 (emphasis added in *Hodges*). The appellate court declined to apply the equitable *Martinez* exception to defaulted claims of ineffective assistance of appellate counsel. Id. Federal review of a defaulted TIAC-cause claim under the PCIAC-cause exception of *Martinez*, however, falls squarely within the ruling of *Hodges*.

Reasonable jurists could therefore disagree with the District Court's ruling that *Martinez* does not provide cause for procedural default of Mr. Henderson's claims. See Edwards, 529 U.S. at 453, 458; Lutz v. Valeska, No. 1:10cv950–TMH, 2014 WL 868870, *4 (M.D. Ala. March 5, 2014)(a federal habeas petitioner may show *Martinez* PCIAC cause for an *Edwards* TIAC default). See also Santana v. Cummins, No. 1:10cv493–TMH, 2014 WL 1491176 (M.D. Ala. Apr. 14, 2014). In light of the principles of *Martinez* and *Edwards*, this issue certainly deserves encouragement to proceed further, so that this Court may properly explicate the scope of *Martinez* under such circumstances. Accordingly, this Court should grant Mr. Henderson a certificate of appealability.

2. Mr. Henderson Is Entitled To Certificate Of Appealability On His Grand Jury Discrimination Claim (Amended Petition ¶ 20)[9], Because He Has Made A Substantive Showing Of The Denial Of A Constitutional Right And The District Court's Denial Was Debatable Among Jurists Of Reason

Mr. Henderson claimed in his amended petition that the grand jury that indicted him had been composed in a discriminatory manner, specifically by the exclusion of women and blacks from the role of grand jury foreperson, who is selected by the trial court as a thirteenth voting member of the grand jury Tenn. R. Crim. Pro. 6(g). R.16, Amended Petition ¶ 20, PageID# 131. The District Court denied the claim on the

[9] R.16, Amended Petition, PageID# 131-132.

grounds of procedural default (as discussed above). R.134, Order, PageID# 5021. In fact, Mr. Henderson exhausted this claim before the state courts, which refused to address the merits of the claim because it *is not recognized under state law* – not because he had failed to abide by state procedural rules that were an adequate and independent state ground. Because the substantive merits of Mr. Henderson's claim are also debatable among reasonable jurists, Mr. Henderson is entitled to a COA. See, Woodfox v. Cain, __ F.3d ___, 2014 U.S. App. Lexis 21955 (5th Cir. 2014)(habeas relief granted based upon discriminatory selection of Grand Jury foreperson).

a. Reasonable Jurists Could Debate Whether There Was An Available Process To Review Mr. Henderson's Claim And Exhaustion Of The Claim Before The State Courts Would Have Been Futile Because Tennessee Courts Refuse To Hear Claims Of Discrimination In The Selection Of Grand Jury Forepersons

In Tennessee, there is no state tribunal that will hear a claim for the violation of the protection that the Supreme Court recognized in Rose v. Mitchell, 443 U.S. 545 (1979), and Campbell v. Louisiana, 523 U.S. 392 (1998). The Tennessee Supreme Court rejected the applicability of *Rose* in State v. Bondurant, 4 S.W.3d 662 (Tenn. 1999), and no petitioner has been able to overcome the hurdle that decision presents raising a claim for the discriminatory appointment of a voting grand jury foreperson. The lower courts abide by the *Bondurant* decision and keep the courthouse doors closed to claims of discrimination in the selection of a grand jury foreperson.

During federal habeas proceedings, Mr. Henderson returned to state court to litigate this claim. Thus, it is exhausted for federal habeas purposes. See 28 U.S.C. § 2254(b)(1)(A). The state court denied his motion to reopen his post-conviction petition on the grounds that the right that Mr. Henderson claimed – to be indicted by a grand

jury whose voting foreperson was appointed in a non-discriminatory manner – is not recognized *at all* by Tennessee courts. It was not a matter of the right being available earlier and Mr. Henderson's failing to claim it. Cf. Tenn. Code Ann. § 40-30-117(a)(1)(requiring that motions to reopen post-conviction petitions allege a right that has been recognized since the time of trial). Thus, Mr. Henderson's claim was ruled non-meritorious under state law that contravenes a decision of the United States Supreme Court, not procedurally defaulted.

Reasonable jurists could debate whether Petitioner's claim is exhausted for purposes of federal habeas review. Under the supremacy clause of the United States Constitution, it is axiomatic that a state court may not refuse to hear a federal constitutional claim. U.S. Const., Art. VI. State courts are "charge[d] with a coordinate responsibility to enforce [federal] law according to their regular modes of procedure," Howlett By and Through Howlett v. Rose, 496 U.S. 356, 367 (1990), and "entrusted with providing a forum for the vindication of federal rights violated by state or local officials acting under color of state law." Haywood v. Drown, 129 S.C. 2108, 2114 (2009), *citing* Patsy v. Board of Regents of Fla., 457 U.S. 496, 506-507 (1982). See also Test v. Kant, 330 U.S. 386 (1947); Claflin v. Houseman, 93 U.S. 130, 136-137 (1876). This is the reason that habeas petitioners are required to first present their claims to state courts. 28 U.S.C. § 2254(B)(1)(A).

Nevertheless, the federal habeas statute provides an exception for circumstances where state courts refuse to enforce constitutional protections. Under 28 U.S.C. § 2254(b)(1)(B), federal habeas courts may hear claims in the first instance where "there is an absence of available state court corrective process" or "circumstances exist that render such process ineffective to protect the rights of the applicant." State court

process is "ineffective" where a state court refuses to hear a federal claim based on a state court ruling denying applicability of a constitutional protection to state court criminal processes. See Selsor v. Workman, 644 F.3d 984 (10th Cir. 2011)(hearing habeas petitioner's unexhausted claim where raising it in state court would have been "futile" based on state court rulings contradicting federal law); Pursell v. Horn, 187 F.Supp.2d 260, 290 (E.D.Penn. 2002)(hearing unexhausted claim because presenting it to the state court would have been futile where "the state's highest court had ruled unfavorably on a claim involving facts and issues materially identical to those undergirding a federal habeas petition and there was no plausible reason to believe that a reply would persuade the court to reverse its field."). Compare Lynce v. Mathis, 519 U.S. 433, 436 n. 4 (1997)(noting, antecedent to reviewing habeas claim, that exhaustion of claim in state court would have been futile because state high court had already reviewed and denied a similar claim).

Thus, reasonable jurists could debate whether Mr. Henderson's claim for discrimination in the appointment of the foreperson of the grand jury that indicted him is procedurally barred from review.

b. Reasonable Jurists Could Debate Whether The Foreperson Of The Grand Jury That Indicted Mr. Henderson Was Appointed As A Voting Member In A Discriminatory Manner That Violates Due Process

The foreman of the grand jury that indicted Mr. Henderson was chosen in accordance with Tenn.R.Crim.P. 6(g)(1992). This statute gives unfettered discretion to a judge in the selection of the grand jury "foreman." Under Rule 6: "The judge of the court authorized by law to charge the grand jury and to receive the report of that body shall appoint the foremen of the grand juries in the counties of their respective

jurisdictions." Moreover, Rule 6(g) gives the foreman significant duties, including the power to vote for issuance of an indictment:

> It shall be the duty of such foreman of grand juries to assist and cooperate with the district attorney in ferreting out crime, to the end that the laws may be faithfully enforced; and such foremen are directed out of term to advise the district attorney general with respect to law violations and to furnish him names of witnesses, whom the district attorney general may, if he deem proper, order summoned to go before the grand jury at the next term. In term time, the foreman or the district attorney general may order the issuance of subpoenas for witnesses to go before the grand jury. The foreman may vote with the grand jury and his vote shall count toward the twelve necessary for the return of an indictment.

Tenn.R.Crim.P. 6(g)(1992). See also Tenn.R.Crim.P. 6(g)(4)(2007)(describing powers of foreperson).

The use of Rule 6(g) has resulted in the systematic exclusion and under-representation of women and blacks as foreperson of Fayette County, Tennessee grand juries. In the last 107 years, neither a Black person nor a woman has ever been selected to serve as grand jury foreperson in Fayette County. See R. 130-1, Declaration of Janet Santana, PageID# 4800-4976; R.131-1, Affidavit of Ann Walker-King, PageID# 4978-4979. When Mr. Henderson's indictment was issued in 1997, Earl Dowdy, a White male, was the foreperson and had been appointed to his third term of service in 1996 under Tenn. R. Crim. P. 6(g).[10] Before that, every foreperson appointed in Fayette County was a White male.[11]

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[10] "The judge of the court authorized by law to charge – and receive the report of – the grand jury shall appoint the grand jury foreperson."

[11] From 1900 to 1924, a grand jury foreperson was appointed every four months – each foreperson appointed during this time was a White male. In 1925, W.G. Shelton, a White male, was appointed and served for a total of 4 years. In 1929, John S. Murphy, a White male, was appointed and served only one year as grand jury foreperson. In 1930, J.N. Clay, a White male, was appointed and served for a total of 16 years. In 1947, W.H. Wilkerson, another White male, was appointed and served for a total of 4 years. In 1951, two grand jury forepersons were appointed – both were White males. In 1952, J.N. Clay, a White male, was appointed and served 1 year as foreperson. In 1953, two grand jury forepersons were appointed – L.E. Gafford and

The issue of Mr. Henderson's grand jury discrimination claim, and the facts that he submitted in support thereof,[12] are adequate to deserve encouragement to proceed further. See Johnson v. Puckett, 929 F.2d 1067 (5th Cir. 1991)(granting relief for discrimination in the selection of grand jurors); Crandell v. Cain, 421 F.Supp.2d 928 (W.D.La. 2004). Compare Henley v. Bell, 487 F.3d 379, 385 (6th Cir. 2007)(finding, in contrast to *Bondurant*, that "the foreperson in Tennessee played an unusually important role because he was selected independently by the judge as a thirteenth member of the grand jury [and t]hus the selection of the foreperson affected the grand jury's composition.").

c. This Court Should Grant A COA On Mr. Henderson's Claim For Discrimination In The Selection Of The Jury That Indicted Him

Mr. Henderson has shown that jurists could debate: (1) the District Court's rejection of the application of Martinez as cause for the failure of post-conviction counsel to raise this claim in Mr. Henderson's post-conviction proceedings; (2) the District Court's dismissal of his claim as procedurally defaulted even though presentation of the claim was futile; and (3) the merits of Mr. Henderson's claim that the voting foreperson of the grand jury that indicted him was appointed in a discriminatory manner. For all these reasons, this Court should grant Mr. Henderson's

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David Givens, both White males. In 1954, David Givens, White male, was appointed again and served 1 year. In 1955, John W. McNeil, another White male, was appointed and served 1 year.

In the summer of 1955, J.T. Greer, a White male, was appointed to serve as grand jury foreperson. In the years that followed, Mr. Greer was appointed 13 additional and separate times, serving a total of 27 years. Between 1982 and 1990, C.E. "Junior" Pattat, a White male, was appointed 4 separate times and served a total of 8 years. Earl Dowdy, a White male, was appointed for the first time in 1990, was subsequently appointed 8 separate times. He has thus far served a total of 16 years, including the grand jury term in the instant case.

[12] See R.129, Petitioner's Brief Identifying His Substantial Claims, PageID# 4677-4681.

motion and give him a certificate of appealability on this claim. See Burns v. Colson, No. 11-5214 (granting a COA on similar grand jury foreperson claim).

CONCLUSION

For all of the reasons stated herein, this Court should GRANT Mr. Henderson's motion and EXPAND the Certificate of Appealability to include the claims discussed herein, and all claims raised in his petition for writ of habeas corpus.

Respectfully Submitted,

/s/ *Gretchen L. Swift*
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing is to be served via the electronic filing process upon Andrew Coulam, Assistant Attorney General, Office of the Attorney General, 425 5th Avenue North, Nashville, Tennessee 37243.

Date: December 15, 2014

/s/ *Gretchen L. Swift*